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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Case No. 2015-002396

Ken Lucero

Petitioner,

v.

State of South Carolina,

Respondent.

APPENDIX

Eleanor Duffy Cleary
Bar # 7068
Cleary Law LLC
1116 Blanding Street, Suite 2B
Columbia, South Carolina 29201
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ellen@clearylawnllc.com
Attorney for Petitioner

David Spencer
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Senior Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
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Attorney for Respondent

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STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO DORCHESTER COUNTY
Court of Common Pleas

The Honorable DeAndrea G. Benjamin, Circuit Court Judge
Case No. 2011-CP-18-0778
Appellate Case No. 2012-213130

KEN LUCERO, ...RESPONDENT,

v.

STATE OF SOUTH CAROLINA, ... PETITIONER.

APPENDIX

ALAN WILSON
Attorney General

DAVID SPENCER
Assistant Deputy Attorney General
Bar No. 68571

P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

ELEANOR DUFFY CLEARY
Esquire

1720 Main Street
Suite 303
Columbia, SC 29201
(803) 376-0075

ATTORNEY FOR RESPONDENT

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South Carolina Court Administration
South Carolina Supreme Court
Columbia, South Carolina

ROSALYN FRIERSON
DIRECTOR

1015 SUMTER STREET,
SUITE 200
COLUMBIA, SOUTH
CAROLINA 29201
PHONE: (803) 734-1800
FAX: (803) 734-0269

May 5, 2011

Ms. Lauren Meara
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

In re: Ken Lucero v State of S. Carolina, 2002-GS-18-0689

Dear Ms. Meara:

This is in response to your letter dated April 25, 2011, requesting a transcript of proceedings heard on November 18, 2002. Our records reflect that Robin Keil was the court reporter assigned to record these proceedings. Ms. Keil is no longer employed by Court Administration.

This is to advise that in maintaining court reporter records, we adhere strictly to Rule 607, which requires that court reporter records be kept for five years. Therefore, the records to prepare a transcript before May 2006 are no longer available. I am sorry that I cannot assist you further.

Sincerely,



Desiree R. Allen
Court Reporter Manager

SC Attorney General
RECEIVED

MAY 11 2011

Referred to Meara

Answered _____

FORM 5

2011-CP-18-778

STATE OF SOUTH CAROLINA)

COUNTY OF DORCHESTER)

KEN LUCERO)

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 (legally 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 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 NONE
2. Name and location of Court which imposed sentence DORCHESTER COUNTY:
COURT OF GENERAL SESSIONS
3. Name(s) of co-defendant(s) (if any) NONE
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2002-GS-18-00689
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 11/18/2002 (2 YRS & \$5000 SUSP 3 YRS PROB 40 HRS PSE)

FILED - RECORDED
2011 APR 14 PM 1:25
CLERK OF COURT
DORCHESTER COUNTY

- (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) NO DIRECT APPEAL ISSUES
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Counsel failed to advise me of the immigration consequences of my guilty plea and my plea was not voluntary under Padilla v. Kentucky, 130 S.Ct 1473 (2010).

(b) _____

(c) _____

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

(a) I did not realize that I would be negatively affected with ICE because of this conviction.

(b) _____

(c) _____

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?

no

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) _____

(b) _____

(c) _____

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

6

- (a) your arraignment and plea? yes
- (b) your trial, if any? n/a
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? n/a
- (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. Marva Hardee-Thomas, 130 E. Richardson Ave, Summerville, SC 29483
 - ii. Eleanor Duffy Cleary, 1720 Main St, Suite 303, Columbia, SC 29201
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. plea
 - ii. preparation of PCR application
 - iii. _____

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

Vacation of conviction

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

no

STATE OF SOUTH CAROLINA)

County of DORCHESTER)

VERIFICATION

I, Ken Lucero, 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.

Ken Lucero

SWORN to and subscribed before me this 31st
day of March, 2011.

Karen D. Elliott (L.S.)
Notary Public

My Commission Expires: 3-13-2017

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

KEN LUCERO

Applicant,

v.

STATE OF SOUTH CAROLINA

Respondent.

IN THE COURT OF COMMON PLEAS

FILED - RECORDED
2011 APR 14 PM 1:2
CHERYL GRAHAM
CLERK OF COURT
DORCHESTER, SC

CERTIFICATE OF SERVICE

I certify that a true copy of the Application for Post-Conviction Relief in this case has been served on Mary S. Williams, Assistant Attorney General, SC Office of the Attorney General, PO Box 11549, Columbia, SC 29211, and The Honorable Cheryl L. Graham, Dorchester County Clerk of Court, 5200 E. Jim Bilton Blvd., St. George, SC 29477, this 31st day of March, 2011.

Karen Dumas Elliott

Karen Dumas Elliott
Paralegal to Eleanor Duffy Cleary

**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
31st day of March, 2011.


Notary Public

My Commission Expires: 3-13-2017



LAW OFFICE OF

ELEANOR DUFFY CLEARY

10
1720 MAIN STREET, SUITE 303
COLUMBIA, SC 29201
TELEPHONE: 803.376.0075
FAX: 866.724.1965
EMAIL: EDCLEARY@ATT.NET
WWW.ELEANORCLEARYLAW.COM

March 31, 2011

The Honorable Cheryl L. Graham
Dorchester County Clerk of Court
5200 E. Jim Bilton Blvd.
St. George, SC 29477

Re: Ken Lucero v. State of South Carolina

Dear Ms. Graham:

Please file the enclosed application for Post Conviction Relief on behalf of the above-mentioned petitioner. I have been retained to represent Ms. Lucero and I will be supplementing the application with additional information very shortly.

Please send me a clocked copy in the enclosed envelope.

Sincerely,

Eleanor D Cleary
Eleanor Duffy Cleary

cc: Ms. Ken Lucero

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

2011-CP-18-0778

Ken Lucero,

Applicant,

v.

RETURN AND MOTION TO
DISMISS

State of South Carolina,

Respondent.

In response to the post-conviction relief application filed April 14, 2011, the Respondent would show this Court:

I.

The Applicant was true bill indicted for Trafficking in Cocaine or Heroin, More Than 100 grams, Less Than 200 grams. Marva Hardee-Thomas, Esquire, represented him. On November 18, 2002, Applicant pled guilty to the lesser included offense of Possession of Heroin and was sentenced by the Honorable Diane S. Goodstein to two (2) years imprisonment plus three (3) years probation and a \$50,000 fine. Applicant did not appeal his conviction or sentence.

II.

In his current application, Applicant set forth the following grounds for relief:

- I. "Counsel failed to advise me of the immigration consequences of my guilty plea and my plea was not voluntary under Padilla v. Kentucky, 130, S.Ct. 1473 (2010)."
- a. I did not realize that I would be negatively affected with ICE because of this conviction.

For the purpose of this Return, the Respondent incorporates the Clerk of Court records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

The Respondent submits that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160. S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offense(s) he challenges in this Application on May 16, 2001. The Remittitur after the Applicant's unsuccessful appeal, on February 25, 2005. This Application was filed on July 27, 2010, which was more than four (4) years after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, the Respondent requests that this Court summarily

dismiss the application for post conviction relief for failure to file within the time mandated by the Post Conviction Procedure Act.

V.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VI.

WHEREFORE, Respondent moves to summarily dismiss the application because was filed after the statute of limitations had expired and contains allegations that are without merit.

Respectfully submitted,

ALAN WILSON
Attorney General

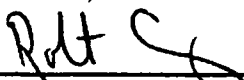
JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Assistant Deputy Attorney General

ROBERT D. CORNEY
Staff Attorney

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for the Respondents

Columbia, South Carolina

August 9, 20 11

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	
	)	
	)	2011-CP-18-0778
	)	
KEN LUCERO,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

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

Eleanor D. Cleary, Esquire
Law Office of Eleanor Duffy Cleary
1720 Main Street, Ste. 303
Columbia, SC 29201

DATED this 9th day of August, 2011


 Lauren Meara, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER
STATE VS.

KEN LUCERO

AKA:

Race: H Sex: F Age: 34

DOB: [REDACTED] SS#:

Address:

DL#

SID#:

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:

2002-GS-18-0689

A/W#: H173074

Date of Offense: 6-6-2002

S.C. Code §: 44-57-370(c)(2)(c)

CDR Code #: 0121810

☐ CASE RESTORED

SENTENCE

☒ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS

TO: POSSESSION OF HEROIN

in violation of § 44-53-370(a)(1) of the S.C. Code of Laws, bearing CDR Code # 011716

☒ NON-VIOLENT

☐ VIOLENT

☐ SERIOUS

☐ MOST SERIOUS

☐ 17-25-45

The charge is: ☐ As Indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☒ Recommendation by the State.

ATTEST:

B. H. Riley
Solicitor

Ken Lucero
Defendant

M. H. H. H. H.
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 2 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ 5000 provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for 3 months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ The Defendant is to be given credit for _____ days/months jail time.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS

Recipient: _____

*Fine:\$

§14-1-206 (Assessments 100%)\$

§14-1-211(A)(1) (Surcharge)\$

§14-1-211(A)(2) (Surcharge)\$

§56-5-2995 (DUI Assessment)\$

3% to County (if paid in installments)\$

TOTAL\$

PTUP

40 days/hours Public Service Employment

Obtain GED

Attend Voc Rehab. or Job Corps

May serve W/E beginning

Substance Abuse Counseling ☒

Random Drug/Alcohol Testing ☒

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning

\$ _____ paid to Public Defender Fund.

Other: Assessment for drug abuse & treatment as indicated to include inpatient. Tran
spn to New York.

PRESIDING JUDGE [Signature]

Judge Code: 11121

Sentence Date: 11-18-02

[Signature]
Clerk of Court Deputy Clerk

Court Reporter: Robin Keil

White - Clerk

Green - Corrections

17
Yellow - Probation

Pink - Defendant

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

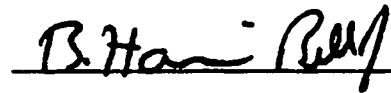
INDICTMENT
2002GS18-0689

At a Court of General Sessions, convened on November 18, 2002 the Grand Jurors
of Dorchester County present upon their oath:

TRAFFICKING IN COCAINE OR HEROIN >100GM <200GM

In that the defendant, Ken Lucero, did in Dorchester County on or about June 6, 2002,
knowingly sell, manufacture, cultivate, deliver, purchase, bring into this State, or
provide financial assistance or did otherwise aid, abet, attempt, or conspire to sell,
manufacture, cultivate, deliver, purchase, or bring into this State, or did knowingly
actually or constructively possess or attempt to become in actual or constructive
possession of more than one hundred but less than two hundred grams of cocaine, or
any mixtures thereof.

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



B. Harrison Bell Jr., SOLICITOR

WITNESSES

Trooper Russell Brown

ACE

ARREST WARRANT NUMBER

H173074

Arrested: Jun 07, 2002

ACTION OF GRAND JURY

Date ^{True B3} 11/14/02
Carol Kending

Foreperson of Grand Jury
Date: November 14th, 2002

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2002GS18-0689

The State of South Carolina

County of

DORCHESTER

COURT OF GENERAL SESSIONS

November 18th, 2002---

**THE STATE
vs.**

Ken Lucero

Indictment for

**TRAFFICKING IN COCAINE OR HEROIN
>100GM <200GM**

SC Code: 44-53-370(e)(2)C
CDR Code: 0280
Class: FEL-E

After being fully advised as to my legal rights, I
hereby waive presentment to the Grand Jury.

Defendant

I
hereby appear in my own proper person and
plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

FILED-RECORDED
2002 NOV 14 AM 11:59
CHERYL S. GRIFFIN
CLERK OF COURT
DORCHESTER COUNTY

ARREST WARRANT

H-173074

STATE OF SOUTH CAROLINA

☐ County/ ☐ Municipality of
 YORK

THE STATE

against

Address: [REDACTED]

Phone: [REDACTED] SSN: [REDACTED]

Sex: [REDACTED] Race: [REDACTED] Height: [REDACTED] Weight: [REDACTED]

DL State: [REDACTED] DL #: [REDACTED]

DOB: [REDACTED] Agency ORI#: [REDACTED]

Prosecuting Agency: [REDACTED]

Prosecuting Officer: [REDACTED]

Offense: [REDACTED]

Offense Code: [REDACTED]

Code/Ordinance Sec. [REDACTED]

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

 The accused
 is to be arrested and brought before me to be
 dealt with according to law.

Signature of Judge

(L.S.)

Date: [REDACTED]

RETURN

 A copy of this arrest warrant was delivered to
 defendant 6-7-02 / LUCAS, KEN
 on 6-7-02

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

STATE OF SOUTH CAROLINA

☐ County/ ☐ Municipality of

AFFIDAVIT

 Form Approved 2-1-7
 SC Attorney General
 July 26, 1990
 SCCA 518

 Personally appeared before me the affiant [REDACTED] who
 being duly sworn deposes and says that defendant [REDACTED]
 did within this county and state on [REDACTED] violate the criminal laws of the

 State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of [REDACTED])
 in the following particulars: [REDACTED]
DESCRIPTION OF OFFENSE: [REDACTED] **TRAFFICKING HEROIN**
 I further state that there is probable cause to believe that the defendant named above did commit
 the crime set forth and that probable cause is based on the following facts:

THAT ON 6-7-02 LOCATED IN 1.35 MILE MARKER ON HIGHWAY 171 IN THE COUNTY OF YORKSTON AND BELONGING TO [REDACTED] STOPPED FOR A ROUTINE TRAFFIC VIOLATION AND DURING THE SEARCH OF THE VEHICLE WAS FOUND 1 BAG OF [REDACTED] COINED OF A WHITE BROWN POWDER SUBSTANCE THAT WAS POSITIVE FOR HEROIN.

AND IT IS AGAINST THE PEACE AND GOOD GOVERNMENT OF SOUTH CAROLINA AND WILL BE DONE FULLY DISCHARGE.

 Sworn to and subscribed before me
 on 6/7/02
 Signature of Issuing Judge Raymond McMillen (L.S.)

Signature of Affiant

Affiant's Address 100 EXECUTIVE CENTER DRIVESuite A-1 COLUMBIA, SC 29210Affiant's Telephone 803-896-5528

STATE OF SOUTH CAROLINA

☐ County/ ☐ Municipality of

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

 It appearing from the above affidavit that there are reasonable grounds to believe that
 on 6-7-02 defendant LUKAS, KEN
 did violate the criminal laws of the State of South Carolina (or ordinance of

☐ County/ ☐ Municipality of [REDACTED] as set forth below:

DESCRIPTION OF OFFENSE:

 Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before
 me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the
 defendant at the time of its execution, or as soon thereafter as is practicable

 Signature of Issuing Judge Raymond McMillen (L.S.)

Judge's Address [REDACTED]

Judge's Telephone [REDACTED]

ORIGINAL

Issuing Court: ☐ Magistrate ☐ Municipal ☐ Circuit

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG) FIRST JUDICIAL CIRCUIT

2011-CP-180778

Ken Lucero,

Applicant,

v.

State of South Carolina,

Defendant.

)
)
)
)
) Transcript of Record

) EXCERPT OF RECORD
)
)
)

May 22, 2012
Orangeburg, South Carolina

B E F O R E:

The Honorable Deandrea G. Benjamin, Judge

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

Eleanor Duffy Cleary
Attorney for the Applicant

David Spencer, Esquire
Attorney for the State

Hilda M. Jordan, CVR-M
Circuit Court Reporter

Lucero v. State 5/22/12

2

I N D E XWITNESS/DESCRIPTIONPAGE NO.

EXCERPT OF PCR OF KEN LUCERO

TESTIMONY:

Ken Lucero direct.....

Ken Lucero cross.....

Ken Lucero redirect.....

Marva Hardee-Thomas ...direct.....

EXHIBITS:

State's Exhibit No. 1

Applicant's Exhibit No. 1

Applicant's Exhibit No. 2

Applicant's Exhibit No. 3

Applicant's Exhibit No. 4

Applicant's Exhibit No. 5

Applicant's Exhibit No. 6

Certificate of Court Reporter

Lucero v. State 5/22/12

3

1 (Applicant's Exhibit Numbers One through 6 were pre-marked
2 for identification only.)

3 MR. SPENCER: Your Honor, are you ready to go. I'm
4 going to call that case from yesterday.

5 THE COURT: Okay.

6 MR. SPENCER: Thank Your Honor. This next case is a
7 2011 case, CP-18-778. It's Ken Lucero verses South
8 Carolina. This is -- the applicant was indicted for
9 trafficking cocaine or heroin, I believe it was heroin, more
10 than 100 grams, less than 200 grams. She was represented by
11 Ms. Hardee-Thomas, who is here today. He pled guilty --
12 she, excuse me, she pled guilty on November 18, 2002, to
13 lesser included offense of possession of heroin and was
14 sentenced by Judge Goodstein to two years in prison plus
15 three years probation and a \$50,000 fine. There was no
16 appeal of the conviction or sentence.

17 Your Honor, we have a Motion to Dismiss. As the Return
18 indicates the conviction was in 2002. This is far beyond
19 the statute of limitations. It is the first PCR application
20 but it is far -- over 10 years past the statue of
21 limitations. We would also raise the additional grounds of
22 latches, and, Your Honor, in the package is the letter from
23 Court Administration in which we attempted in May of 2011 or
24 in April 2011, to obtain a transcript. Of course, as Your
25 Honor is probably well aware under Court Administration

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1 rules they destroy transcripts within five years and so this
2 transcript, according to our information has been destroyed
3 for quite some time. That obviously raises the complication
4 in trying to defend a 10 year old conviction and collateral
5 action. Ms. Hardee-Thomas is here today, but, of course,
6 this is just one of who knows how many drug cases she's
7 probably represented people on. So I think this is going to
8 impair our ability to defend this application.

9 So we're moving to dismiss on two grounds. The
10 application basically raised an issue of whether the plea
11 was free and voluntarily given because apparently Mr. Lucero
12 -- Ms. Lucero is at risk of being deported for her drug
13 charge. She is relying upon the somewhat recent case of
14 Padilla verses Kentucky, which is a US Supreme Court case
15 from 2010. The -- so far the majority of circuits that have
16 ruled on the issue have found that Padilla is not
17 retroactive and would not -- it's not something that can be
18 used for someone with an old conviction to avail themselves.
19 Further, as I understand, and Ms. Cleary had given me some
20 materials last night. As I understand this isn't a failure
21 to advise a case, this is an allegation that she was
22 mis-advised, and that's not a new rule. That's an old rule.
23 So I don't think that Padilla is anything that would be of
24 benefit to the applicant to avoid the statute of
25 limitations, and even so, we're clearly prejudiced at this

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1 point, and I will be raising latches, also. And that's the
2 state's Motion to Dismiss, Your Honor.

3 THE COURT: Yes, ma'am, any argument particularly
4 regarding the statute of limitations?

5 MS. CLEARY: May it please the Court.

6 THE COURT: Yes, ma'am.

7 MS. CLEARY: It's our position that Ms. Lucero's
8 application falls within the statute of limitations because
9 it was filed within one year of Padilla verses Kentucky
10 becoming final. Section 17-27-45 being specifically
11 provides that when Court decision who's binding -- when a
12 Court whose decisions are binding on our Courts imposes a
13 state -- a substantive standard not previously recognized or
14 right not in existence at the time of the state court trial,
15 then that's to be applied retroactively.

16 Our appellate court, the South Carolina Supreme Court,
17 the South Carolina Court of Appeals have not had an occasion
18 to address whether Padilla verses Kentucky should be applied
19 retroactively in state collateral proceedings. So in order
20 to determine if it should be applied retroactively we have
21 to look at the statute, the language of the statute and also
22 the case of Tally verses State at 640 SE 2d 878, 2007.
23 That's the only case that interprets that section of the
24 code.

25 The statute says, as I stated, it imposes -- it will

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1 apply retroactively if there's a substantive statute not
2 previously recognized. When Ms. Lucero pled guilty in 2002,
3 there was no requirement that she be advised of collateral
4 consequences such as whether she would be deported from this
5 country.

6 She is -- ICE has already issued a deportation order.
7 That is imminent, and that is based completely on this
8 conviction, this 2002, conviction.

9 There was some confusion as to whether she had been
10 mis-advised or given no advice, and her testimony today will
11 be that she was given no advice that certainly if she had
12 known that she would be exiled from this country that she
13 has lived in since 1993, that she would not have pled
14 guilty.

15 As far as the -- Mr. Spencer mentioned that the
16 circuits that had considered this had ruled that Padilla did
17 not apply retroactively. That is a separate issue. Those
18 cases are addressing whether Padilla applies to Federal
19 habeas review of state court decision, which is different,
20 uses a different analysis than the one that our statute
21 requires. If you look at Tally verses State and also
22 Danforth verses Minnesota, which is 128 Supreme Court 1029.
23 In that case the Teague Rule, the rule that states that if a
24 -- that if a case imposes a new rule then it's not applied
25 retroactively. Danforth recognizes that states can apply new

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1 rules however they want. The states can give more rights to
2 the people than the Federal government gives, and Danforth
3 makes that very clear. So Teague, and regardless of how
4 other Federal circuits have ruled on Teague is only helpful
5 on an analysis of looking at the case, but it's not
6 controlling on the South Carolina Supreme Court in deciding
7 whether it wants to apply Padilla retroactively.

8 If you look at Tally, the South Carolina Supreme Court
9 applied Alabama v. Shelton retroactively. That is not a
10 case that the Supreme Court, the United States Supreme Court
11 has applied retroactively, but our state Supreme Court, as
12 it has a right to do, found that because Shelton implicated
13 the right to counsel, it was so important it should be
14 applied retroactively. Similarly, the right to effective
15 counsel, the right to know that you're going to be deported
16 from the country should also be applied retroactively, as
17 was the case in Tally verses State.

18 And the other language in the statute is whether the
19 case is one that was intended to be applied retroactively,
20 and that language has not been interpreted, but if you look
21 at the language in Padilla, the Supreme Court, the United
22 States Supreme Court in Padilla indicates that it
23 anticipates that it intends for this rule to be applied
24 retroactively. The Court stated: It is unlikely the
25 decision would have a significant effect on those

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1 convictions already obtained as a result of plea bargains.

2 The Court noted that a large number of those -- a large
3 number of previously obtained guilty pleas would not be
4 challenged because it would often -- it would often be
5 unwise to lose the benefit of the bargain obtained from the
6 plea. So by discussing what happens from the retroactive
7 effect or what could possibly could happen that the Court
8 indicated that it had anticipated that there would be
9 retroactive -- retrospective application, but that it would
10 not cause that much problems. In addition it would not be
11 any sort of floodgate problems with the South Carolina
12 courts because it's our contention that applications under
13 Padilla would have had to have been filed within a year that
14 that decision became final, which was in May of 2012 --
15 2011. So the time for having challenged your conviction
16 under Padilla has passed, those PCR applications have to
17 have already been in the pipe. So no matter how you ruled,
18 this case would not bring on a floodgate if you were to rule
19 in Ms. Lucero's favor.

20 So therefore we believe that we have complied as in
21 Tally verses State, we have complied with Section 27-45(b)
22 because she filed it within one year, and that's all we have
23 on that issue.

24 THE COURT: All right. What about the latches issue?

25 MS. CLEARY: The sole issue in this case is whether she

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1 was advised of the consequences of pleading guilty, that it
2 would cause her to be deported.

3 I've -- I think the testimony will show that she was
4 not advised. That we do not need the transcript. I know
5 that as a matter of course, Courts do not advise on that
6 sort of thing in 2002, and that attorneys also did not. The
7 rule that we've all followed under State verses Williams was
8 that you do not have to advise of collateral consequences.
9 And -- I'm not exactly sure what Ms. Hardee-Thomas is going
10 to testify to, but I would be very surprised if she had
11 advised her about immigration rights.

12 So without the transcript, I think that we can still --
13 that this Court can still determine, if, in fact, she was
14 advised of the -- the -- that she was not advised that she
15 would be deported if she was convicted of a crime involving
16 controlled substance.

17 THE COURT: Yes, sir.

18 MR. SPENCER: Thank Your Honor.

19 I have two cases to bring up. One is Chaivez
20 C-h-a-i-v-e-z verses US, which is from the Seventh Circuit.
21 The other one is a District of South Carolina case, Dennis
22 verses US. Both find that Padilla is not retroactive.

23 I will advise you, and I can't remember -- I know, it's
24 a Third Circuit case that the US Supreme Court had granted
25 cert on so it will be reviewed at some point. It may not be

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1 -- be favorable and I question the likelihood on that just
2 given our case law and the US Supreme Court case law on
3 retroactive, but if it was to be successful the problem
4 would be in the time of this hearing, of course, but I would
5 bring up both Dennis and the Chaivez case particularly with
6 the District of South Carolina case. Let me give my
7 opposing counsel -- particularly with the District of South
8 Carolina case it cites a sort of table opinion or something
9 of that nature from the Fourth Circuit saying it's not
10 something that's going to be applied retroactively.

11 You know, looking -- and I was provided what purports
12 to be an affidavit from Ms. Lucero and it states that the
13 claim is that Ms. Hardee-Thomas told her that she wouldn't
14 be deported and if that's -- and that's what that affidavit
15 is, we disagree with that, but if that's the claim, then
16 Padilla goes out the window because the law has always been
17 that if you mis-advise a deportation status, ineffective
18 assistance of counsel. The old rule being that there's no
19 duty to give advice on the collateral consequence, but if
20 you undertake it you need to do it correctly.

21 That changes everything, and what I have before me is
22 what I would assume to be the truth or their contention to
23 be the truth, which is that their claim is ineffective
24 assistance is a mis-advice case, and that's all I have
25 before me.

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1 THE COURT: Let me ask you a quick question to make
2 sure. Your position is that if it is a mis-advice case then
3 Padilla has nothing to do with it, and that she should have
4 filed a mis-advice case in 2003 or whenever, following --
5 within a year?

6 MR. SPENCER: Exactly. Like every other PCR case
7 within a year. So Padilla wouldn't apply if it's a
8 mis-advice case, and, you know, this is what I've been
9 given, Your Honor, and I feel like I'm dealing with a moving
10 target here, quite frankly, and it's an affidavit that bears
11 the signature, and I would content that I be held to that,
12 Your Honor, and I would move to dismiss this case on statute
13 of limitations and the particulars of these conversations
14 we're trying to go back and reconstruct 10 years -- advice
15 from 10 years ago. Obviously, we're going to be prejudiced
16 in that.

17 THE COURT: Let me ask you this, though, you agree that
18 probably wouldn't be in the transcript, because during the
19 Court's colloquy, the -- normally there's no question and
20 definitely in 2003 --

21 MR. SPENCER: You know, I think some judges would have
22 and some judges wouldn't. I don't know enough to know what
23 Judge Goodstein might have done back in 2002, but I can tell
24 you reading a number of transcripts for this term, today,
25 this is the first time I've been in the First Circuit since

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1 probably around that time, Judge Goodstein does a very
2 thorough transcript and she is on the ball and it wouldn't
3 surprise me in the least if she said you realize there's a
4 possibility you could get deported, especially when she --
5 and presumably she had a -- Ms. Lucero had an interpreter
6 like she does today. So I think that would have been a red
7 flag to Judge Goodstein. So I think that's a pretty
8 speculative thing to suggest that it wouldn't be in the plea
9 transcript, quite frankly.

10 And, again, we'll never know, because at least -- I
11 will never know, and, you know, I doubt Ms. Hardee-Thomas
12 will recall that from 10 years ago. I haven't asked her
13 that question, but -- you know, that's the problems of
14 trying to defend a 10 year old conviction, and that's why
15 latches is entirely appropriate to this particular case, and
16 in regards to the Tally Rule, too, before I forget about
17 that, I think this is a definite situation where this
18 shouldn't be applied retroactively. The fact that even if
19 you were to try and apply the Tally Rule to this case, we
20 still have the latches defense, but the problem with Tally,
21 it is -- we are presented with the potential for opening the
22 floodgate. We do have a number of these kinds of cases out
23 there where somebody has come back and said they weren't
24 told something years ago.

25 Again, this isn't a pure no advice case because we

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1 already have evidence of the claim of mis-advice. We're
2 prepared to defend it, but I don't think we should defend it
3 because I think we are prejudiced by the quality of our
4 defense due to the passage of time. I would ask Your Honor
5 to dismiss this case on both grounds.

6 I appreciate Your Honor's time.

7 THE COURT: All right. Thank you.

8 MS. CLEARY: May I address that?

9 THE COURT: Yes.

10 MS. CLEARY: Regarding the affidavit, actually, what it
11 is, it's a Motion to Vacate her conviction that a friend of
12 her's helped her write after Padilla was passed, and it sort
13 of mirrors the language of Padilla, because in Padilla the
14 defendant was actually given mis-advice. He was told,
15 you've been in the country so long, nothing is going to
16 happen to you. So it sort of mirrored that. It's written
17 in English and that's not her native language, and she
18 signed it. It has not, to my knowledge been filed anywhere.
19 I actually to provided to Mr. Spencer just as an indication
20 showing that she had been trying to, you know, she had not
21 been completely sitting on her rights. I believe it's
22 something he could cross-examine her on, but I doubt
23 seriously -- I mean, I think we should go by, you know, how
24 credible you believe her testimony is as to whether you
25 think she got mis-advice or no advice.

1 I still think Padilla created a new rule in term of
2 immigration consequences and the Court even says in it, you
3 know, we recognize that we're breaking new ground in this,
4 by making this decision today. But it's her -- it's going
5 to be her testimony that it actually was not discussed. She
6 had very few discussions with her lawyer and that that issue
7 was not raised.

8 I hoped to be given an opportunity to argue it when I
9 argued prejudice, but I think that we can look at the fact
10 that if Judge Goodstein had said to her, you're going --
11 it's mandatory deportation if you have a controlled
12 substance, it's not discretionary, okay. So if Judge
13 Goodstein had said to her, you know you're going to be
14 deported, that she probably would have risked the two year
15 -- she was facing two years on this charge, not 20. So it's
16 not -- it would completely reasonable to say, never mind,
17 I'll risk the trial.

18 She has lived in this country, this is her home, she
19 has children here that are citizens of the United States.
20 She doesn't have a home in Ecuador. So if -- I think that
21 reasonable minds would agree that if she had been told that
22 she would be deported that she would not have said, oh,
23 that's fine. I mean, that's just ridiculous.

24 Also, in terms of the Federal cases that Mr. Spencer
25 handed up, now Chaivez, it's my understanding -- cert has

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1 been granted and it's supposed to be decided this fall.
2 They're already submitted their briefs on those issues, but
3 again, those cases, when that case is decided it will
4 determine whether on Federal habeas review a state court
5 conviction can be challenged, can be overturned
6 retroactively.

7 Danforth verses Minnesota makes it clear that a state
8 court can apply it retroactively regardless of what the
9 federal court decides. Very few cases are applied
10 retroactively on the federal level. That's a policy
11 decision that the federal government has made, but they make
12 clear in Danforth that that's not a policy decision that
13 they make for the state of South Carolina or any other
14 state.

15 In fact, if the rule were that it had to be applied
16 retroactively under federal law the statute that we have
17 allowing for this tolling of the statute of limitations when
18 a new rule come down would be rendered meaningless, because
19 essentially Teague says if it's a new rule it's not going to
20 be applied retroactively, but what our state statute
21 recognizes is if it's a new rule you have a year to file
22 your application and under Tally verses State it may be
23 applied retroactively, a new rule.

24 THE COURT: Okay.

25 MS. CLEARY: So I don't think that the federal cases

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1 are going to be relevant to whether our state Supreme Court
2 can apply Padilla retroactively. And, again, I would just
3 emphasize there could not be a floodgates argument because I
4 don't know how many petitions they've already had filed, but
5 I do not believe it's been a floodgate on my information,
6 and that those would have had to already have been filed by
7 May, 2011.

8 THE COURT: Well, All right. Well, as you all can
9 imagine -- because you've cited, at least -- between the two
10 of you several cases, and I need to have time to look at it.
11 So I'm going to take that under advisement, but we can go
12 ahead and for purposes of -- I'll take that issue under
13 advisement. If you all would like to brief that and send me
14 something I'll be glad to take a look at it, but we'll go
15 ahead and do the testimony today because everybody is here,
16 prepared to go forward with that. I'll be glad to hear
17 testimony at this time.

18 MR. SPENCER: Your Honor, is it my understanding you're
19 taking this under advisement -- I just want to make one very
20 quick point.

21 THE COURT: Yes, sir.

22 MR. SPENCER: Padilla was decided on March 31, 2010.
23 This application was filed April 14, 2011. So we're also
24 dealing with something -- in terms of something -- in terms
25 of the PCR statute, we're dealing with something that -- the

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1 same as a new rule would be 14 days past that statute of
2 limitations.

3 MS. CLEARY: I didn't know he was going to raise that,
4 but if he's going to raise that hyper-technical rule, I have
5 a print out from the United States Supreme Court where a
6 mandate was issued, just like a remittitur in state court,
7 was issued on May 3, 2010 on this case. So that's the date
8 it actually becomes final. The parties have an opportunity
9 to file petitions for re-hearing up until May 3. So just
10 like when we're applying state court decisions we're saying
11 a year, it's actually a year from when the remittitur is
12 sent down not a year from the date of the opinion. I
13 actually know all about the mailbox rule, but I actually did
14 mail it on March 31. They did not clock it in until April
15 14, and when I realized that I looked on this -- on the
16 United State Supreme Court website and saw that it actually
17 was not final until May 3.

18 So I believe we are within the statute of limitations
19 on that, and I would hope that this lady is not sent back to
20 Ecuador on such a hyper-technical issue.

21 THE COURT: So you filed it when, again?

22 MS. CLEARY: I actually mailed it, drove down to Cayce
23 and mailed it on March 31, and, you know, I have my
24 paralegal here who did the certificate of mailing, but I
25 didn't realize it wasn't clocked --

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1 THE COURT: Of 2012?

2 MS. CLEARY: But then -- of 2011.

3 THE COURT: Okay.

4 MS. CLEARY: I didn't realize it wasn't clocked in for
5 another two weeks for some reason.

6 THE COURT: And it was clocked in on April --

7 MS. CLEARY: 14, I think. So at the point that I
8 realized that --

9 THE COURT: Okay.

10 MS. CLEARY: -- I looked up the Supreme Court to see
11 when the case was final.

12 MR. SPENCER: And Your Honor, that implicates -- I want
13 to point out 17-27-45 the exact language is: Concerning a
14 standard or right. The standard or right is intended to be
15 applied retroactively. An application under this chapter
16 may be filed not later than one year after the date on which
17 the standard or right was determined to exist. It doesn't
18 mention anything about a final -- you know, final opinion
19 and sense of having a remittitur or the US Supreme Court
20 equivalent, and this Supreme Court opinion would have been
21 out on March 31, and that's when it would come into
22 existence, and that would be the birth date, Your Honor.

23 THE COURT: All right.

24 All right. You want to call your first witness?

25 MS. CLEARY: I'd like to call Ms. Ken Lucero.

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1 THE COURT: All right. And --

2 MS. CLEARY: Oh, I'm sorry.

3 THE COURT: -- the translator, get his name on the
4 record and also he needs to be placed under oath.

5 MR. AVILES: Wilmer --

6 (Whereupon, Wilmer Aviles,
7 translator for Ms. Lucero, was sworn to tell the truth.)

8 THE COURT: All right. Thank you, sir.

9 CLERK OF COURT: State your name for the record, please.

10 MR. AVILES: The interpreter is Wilmer Aviles.

11 MS. LUCERO: Ken Lucero.

12 (WHEREUPON, Ken Lucero was sworn to
13 tell the truth.)

14 THE COURT: Thank you.

15 (The following testimony of Ms. Lucero is by and through her
16 interpreter, Wilmer Aviles.)

17 KEN LUCERO - DIRECT EXAMINATION

18 BY MS. CLEARY:

19 Q Ms. Lucero, what is your date of birth?

20 A [REDACTED]

21 Q And where were you born?

22 A '68.

23 Q And where were you born?

24 A In Ecuador.

25 Q And when did you first come to the United States?

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1 A In 1993.

2 Q. Okay. And how old were you then?

3 A. 25 years of age.

4 Q. Okay. You were married?

5 A When I arrived in this country, no. I was about to get
6 married.

7 Q Okay. And who did you marry?

8 A Luis Alberto Lucero.

9 Q And he was a United States citizen?

10 A Yes.

11 Q And he was a Marine?

12 A Yes.

13 Q Okay, and when did you become a permanent resident
14 alien?

15 A. In 2000.

16 Q. And do you have children?

17 A. Yes.

18 Q. And what are their names and ages?

19 A My young girl, who is [REDACTED] is 15 years of
20 age, and Santiago Lucero, who is 21.

21 Q And your daughter is here today?

22 A Yes.

23 Q And are they citizens of the United States?

24 A Yes.

25 Q And you live in New York City?

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1 A. Yes.

2 Q. The Bronx?

3 A. Yes.

4 Q. And you speak English?

5 A. No.

6 Q. Do you speak some English?

7 A. Very little.

8 Q. Sort of like my Spanish?

9 A. Yes.

10 Q. And in New York City is it necessary to speak English
11 in order to accomplish your daily task, like to work or to
12 shop in your community; is it necessary?

13 A. No.

14 Q. And where do you work now?

15 A. I work with a cleaning company.

16 Q. And do you pay taxes?

17 A. Yes.

18 Q. Okay. Going back to 2002, what happened in South
19 Carolina on June 6, 2002?

20 A. I was on my way from New York to Orlando on I-95, and I
21 was stopped by a policeman on the highway.

22 Q. You were going to Orlando?

23 A. Yes.

24 Q. Okay. Whose car was it that you were in?

25 A. It was a rental.

1 Q. And who was in the car with you?

2 A. My daughter.

3 Q Okay, and how old was she?

4 A She was small I don't remember. In 2002, she was
5 small.

6 Q Okay.

7 A I don't remember her age.

8 Q And where was your husband?

9 A At that time, he was deployed in the war in
10 Afghanistan.

11 Q. Okay. When the officer pulled you over what did he
12 pull you over for; do you know what he pulled you over for?

13 A Well, he did speak to me, but I did not understand what
14 he was saying.

15 Q Okay. And he asked you to get outside of the car?

16 A He did tell me that, but I did not understand. So
17 through signs he told me to get out.

18 MR. SPENCER: Your Honor, I don't mind some background
19 information being brought out, that's fine. I want to make
20 sure the only thing we're doing on today is questioning
21 advice on deportation. I'd object to anything else, because
22 anything else could have been brought with the one-year time
23 frame.

24 MS. CLEARY: Your Honor, one of the things that I have
25 to prove is that if she had known of the consequences she

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1 would not have pled guilty, so I have to establish some
2 underlying facts about the charge to see whether it would've
3 been reasonable to have challenged. So that's what I was
4 trying to do.

5 THE COURT: All right. Well I'm going to overrule the
6 objection but --

7 MS. CLEARY: Speed it up.

8 THE COURT: Yes.

9 MS. CLEARY: Yes, ma'am.

10 THE COURT: We don't want to retry it today.

11 MS. CLEARY: Can I lead her some to speed it up?

12 THE COURT: If you can do it and they don't object.

13 BY MS. CLEARY:

14 Q And you had a valid driver's license?

15 A Yes.

16 Q And you had rental car papers?

17 A Yes.

18 Q Okay. And did he ask you if he could search the car?

19 A I really don't know because he made me signs to get out
20 of the car, but never told him yes or no to anything.

21 Q Okay, and he, at some point, showed you heroin that he
22 said he found in there?

23 A Yes.

24 Q And did you know heroin was in there?

25 A No.

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1 Q Where in the car did he find it?

2 A At the back of the car, in the trunk.

3 Q. Had you ever seen heroin before?

4 A No.

5 Q Have you ever used heroin?

6 A No.

7 Q Okay. Have you ever knowingly carried drugs for
8 another person?

9 A No.

10 Q Okay. So you were taken to jail, and you stayed there
11 until you were able to be bailed out in a couple of weeks;
12 is that correct?

13 A Yes, correct.

14 Q And when did you first meet your appointed lawyer?

15 A. When I had my first court date.

16 Q Your first appearance, and that was Ms. Marva
17 Hardee-Thomas?

18 A Yes.

19 Q And did she speak Spanish?

20 A No.

21 Q How did you communicate with her?

22 A She had an interpreter that she provided.

23 Q How many times did you meet with her?

24 A Three times, because it was at the third time that I
25 received, well, you know, a judgment.

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1 Q Okay. And what did she advise you to do?

2 A Well, the last time she had told me, look, they're
3 giving you an offer. It's two years or three years of
4 probation and she recommended that I take the probation. I
5 agreed because I wanted to be with my children.

6 Q Okay. Did she talk to you about whether you would be
7 deported if you pled guilty?

8 A No.

9 Q. Okay. When did you first find out you were deportable
10 even though you were a legal alien?

11 A. It was when I visited Ecuador and on my way back to the
12 US I approached the counter and INS put all my papers in a
13 folder, told me to follow them to a room. That's when I
14 found out about this.

15 Q. Okay, and when did you receive notice to appear before
16 the immigration board?

17 A. In 2010, I believe.

18 Q. Ms. Lucero, do you --

19 MS. CLEARY: May I approach the witness?

20 THE COURT: Yes, ma'am.

21 BY MS. CLEARY:

22 Q Ms. Lucero, I'm going to show you what's been
23 previously marked for identification as Exhibit No. 2. Do
24 you recognize that?

25 A Yes.

1 Q. And you received -- did you receive that in the mail?

2 A. Yes.

3 Q And that was sent to you?

4 A. Yes.

5 Q And that's from the --

6 MS. CLEARY: Sorry. Beg the Court's indulgence.

7 BY MS. CLEARY:

8 Q -- and where was this notice to appear sent from?

9 A I don't understand.

10 Q I'm sorry.

11 A From what I understand, immigration sent that paper to
12 me.

13 Q Okay.

14 MS. CLEARY: Your Honor, I'd like to ask to be allowed
15 to admit this as Applicant's Exhibit -- well, it's pre-
16 marked as two, but it would actually be one. It is a Notice
17 from the Department of Justice, Immigration and
18 Naturalization. Just explaining to her why she's got to
19 have a hearing.

20 THE COURT: Any objection?

21 MR. SPENCER: I have no objection, Your Honor.

22 THE COURT: All right. That will be --

23 COURT REPORTER: That will be Applicant's No. 2.

24 Applicant's No. 1 is marked for ID, not entered.

25 Applicant's No. 2 was ID yesterday, and it's entered today.

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1 (Applicant's Exhibit No. 2, Justice
2 Department documents, was marked and entered.)

3 MS. CLEARY: Oh, all right.

4 Can I get that back?

5 COURT REPORTER: Sure.

6 BY MS. CLEARY:

7 Q And can you tell us -- can you just tell us what this
8 -- and in this notice, did the Department of Immigration and
9 Naturalization Service, as it was called back then, did it
10 state that the reason that you were going to be deported was
11 because you had been convicted of the crime of possession of
12 heroin in South Carolina?

13 A Yes.

14 Q Have you ever been convicted of any other crimes?

15 A No.

16 Q Okay. On September 18, 2010 you signed a pro se motion
17 to vacate your conviction. Who wrote that for you?

18 A A friend of mine.

19 Q. Okay, and at some point you were advised that you
20 needed to get a lawyer to help you and not a lay person; is
21 that correct?

22 A Yes. Yes, that is true.

23 Q Okay, and you found me in March, 2012; is that correct
24 -- sorry, 2011? Yes, 2011; is that correct?

25 A Yes.

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1 Q And I'm going to show you what's been previously marked
2 as Applicant's Exhibit 5 for identification; and what is
3 this?

4 A I have my own immigration lawyer, and so this is just
5 paperwork that I brought for you to represent me in this
6 case.

7 Q And your immigration lawyer is Lloyd Monjack; is that
8 correct?

9 A Yes.

10 Q Okay. And he filed this on your behalf?

11 A Yes.

12 MS. CLEARY: I'd like to move to admit Respondents's
13 Brief on Appeal submitted to the immigration board on her
14 behalf by her immigration lawyer.

15 THE COURT: Any objection?

16 MR. SPENCER: I have no objection, but I think I do have
17 an objection relevance. I think she's established she's in
18 the process of being deported, however, I think as to
19 whether they would continue it or not is not really
20 something that is relevant to this action, which is dealing
21 purely with the voluntariness of the plea.

22 MS. CLEARY: It's not vital to our case, but it does
23 provide background on the immigration law that I think would
24 be helpful to the Court. It certainly was helpful to me.

25 THE COURT: I'll overrule the objection. So it will be

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1 entered over the objection. What's the number?

2 COURT REPORTER: Five.

3 (Applicant's Exhibit No. 5,
4 Respondent's Brief on Appeal, was marked and entered.)

5 MS. CLEARY: What number is that?

6 COURT REPORTER: Five.

7 MS. CLEARY: Okay. Thank you, Your Honor.

8 BY MS. CLEARY:

9 Q Okay. Ms. Lucero, and you have since received notice
10 from the Executive Office for Immigration and Review of the
11 Board of Immigration Appeals that your appeals have been
12 denied, and you are going to be removed because of the
13 heroin conviction; is that correct?

14 A Yes.

15 Q Okay, and do you recognize this, what I'm showing you,
16 Applicant's No. 6 for ID; do you recognize that?

17 A Yes.

18 MS. CLEARY: I'd like to introduce this -- a letter
19 denying her appeal and stating the reason from the Executive
20 Office for Immigration review.

21 MR. SPENCER: Same objection, Your Honor.

22 THE COURT: All right.

23 MR. SPENCER: Relevance.

24 THE COURT: All right. That will be overruled.

25 (Applicant's Exhibit No. 6, letter,

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1 was marked and entered.)

2 BY MS. CLEARY:

3 Q It's your understanding that INS -- or ICE now has the
4 authority to come pick you up at any time for this
5 conviction?

6 A Yes.

7 Q And if the conviction is vacated, then you will not be
8 deported?

9 A Correct, yes.

10 Q Okay. If you're -- okay, why do you want to stay in
11 the United States, just very briefly?

12 A Because this is my home. This is where my children are.
13 I've lived here half my life. I don't want to go back to my
14 country. I don't want to be separated from my family.

15 Q Okay. Now, this is very important, if you had known
16 that you would be removed from the United States if you pled
17 guilty to possession of heroin would you have pled guilty?

18 A No.

19 Q What would you have done?

20 A I would have fought to prove that I wasn't guilty.

21 Q Thank you. Mr. Spencer is going to ask you some
22 questions now.

23 THE COURT: Yes, sir.

24 MR. SPENCER: Thank Your Honor.

25 KEN LUCERO - CROSS-EXAMINATION

1 BY MR. SPENCER:

2 Q Just kind of wanted to briefly recap. My understanding
3 is you first came to the United States from Ecuador in 1993?

4 A Yes.

5 Q. Okay. And then you received permanent resident status
6 in 2000?

7 A. Yes.

8 Q. Okay. And then in 2008, you were returning from
9 Ecuador and that's when you found out that you might be
10 deportable for the heroin charge?

11 A Yes.

12 Q. I understand. Okay, and were you visiting in Ecuador?

13 A Yes.

14 Q. And how long were you in Ecuador for that trip?

15 A For two weeks.

16 Q. Okay. Between 2002 when you pled guilty and 2008 when
17 you came back and found out you were potentially deportable,
18 had you visited Ecuador?

19 A Yes.

20 Q What was the longest length of time you are visiting?

21 A The last time that I went was the longest period that I
22 stayed. And I stayed for two to three weeks, and it was
23 because my father was very ill. I've never stayed for a
24 long period of time.

25 Q Okay. You were discussing the police stop and you were

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1 stopped on your way from Orlando to New York -- and what was
2 the date that you were stopped?

3 A It was in -- well, let me see, it was around August --
4 it was June of 2002.

5 Q Okay.

6 A Of 2002. Yes.

7 Q Between June of 2002 and the time you pled guilty in
8 November 2002, were you released on bail?

9 A Under a bond.

10 Q Okay. And how soon -- when were you released on bond?

11 A Immediately after I had the last court date. I didn't
12 understand your question.

13 Q Were you released -- were you in jail until your guilty
14 plea?

15 A It was only days, just days that I was in.

16 Q Okay, between the time that you were released from jail
17 and the time you pled guilty, did you return to New York
18 City?

19 A Yes. I traveled to New York and I stayed in New York,
20 and I would come each month when I would have to present
21 myself here.

22 Q Okay. I wanted to ask you about the day of your guilty
23 plea. Did you have an interpreter for your guilty plea
24 hearing?

25 A Yes.

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1 Q And do you remember the Judge, Judge Goodstein?

2 A Yes. I remember her.

3 Q And she asked a lot of questions, didn't she?

4 A Yes.

5 Q And you answered them to the best of your ability; is
6 that correct?

7 A Yes.

8 Q. Do you remember all the questions that she asked?

9 A Not precisely.

10 Q. Do you remember whether or not she told you that you
11 could potentially be deportable?

12 A. The day of the court hearing nothing was said about
13 anything regarding deportation. I don't remember that.

14 Q. That was 10 years ago; right?

15 A Yes.

16 Q. And you certainly couldn't remember every question
17 Judge Goodstein asked you, could you?

18 A There wasn't a lot of question that I was asked at that
19 moment. It was either two or three questions about this
20 case.

21 Q Do you remember if you were asked about your right to a
22 jury trial?

23 A No. No. It was my first time. I never knew anything
24 about these proceedings.

25 Q That's not what I was asking. What I was asking was

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1 did Judge -- do you remember if Judge Goodstein told you you
2 had a right to a jury trial?

3 A Well, the trial we were at at that moment, right?

4 Q Would you remember, say, if Judge Goodstein told you
5 how much time you were potentially facing for that charge?

6 A All I remember that she told me that I had two options;
7 either the two years of jail or the probation.

8 Q Do you recall that the solicitor would've given the
9 statement of facts behind the case?

10 A. Not exactly.

11 Q Because it was ten years ago, right?

12 A. Yes.

13 Q. And it's difficult to remember something that happened
14 10 years ago, isn't it?

15 A Yes.

16 MR. SPENCER: Beg the Court's indulgence.

17 BY MR. SPENCER:

18 Q I'm going to hand up this document. It's entitled,
19 Defendant's Motion to Vacate Convictions. You said you had
20 a friend assist you in drafting that?

21 A Yes.

22 Q Was this friend conversant in Spanish?

23 A. Yes.

24 Q When you prepared this with your friend, did your
25 friend tell you in Spanish what the document said?

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1 A Yes. Yes, he did explain to me about Padilla and said
2 that he would fill out the form and send it.

3 Q Did you -- did your friend actually read you everything
4 that was in that document before you signed it?

5 A He did explain it to me. He explained it to me. Yes.

6 Q And you signed that document?

7 A Yes.

8 Q And certainly, I'm sure, you would have made sure what
9 was in that document before you signed it, wouldn't you?

10 A Yes.

11 MR. SPENCER: I would move to admit this exhibit as
12 State's one.

13 MS. CLEARY: No objection.

14 THE COURT: All right.

15 (State's Exhibit No. 1, Defendant's
16 Motion to Vacate Conviction.)

17 BY MR. SPENCER:

18 Q Now, prior to the traffic stop occurring you were
19 living in New York; is that correct?

20 A I'm sorry. What was your question, again?

21 Q Were you -- have you been residing in New York since
22 1993?

23 A Yes.

24 Q And you mentioned in the community you live most
25 everyone speaks Spanish?

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1 A Yes.

2 Q And are there a number of people other than yourself in
3 your community who are also resident aliens?

4 A Yes.

5 Q And certainly before the traffic stop ever occurred
6 you're aware that somebody could be deported for a criminal
7 conviction, didn't you?

8 A No.

9 Q Your testimony is that you didn't realize that somebody
10 could be deported for a criminal conviction?

11 A No. No, because I don't know anything about laws. No.

12 Q What did you have to do to be allowed to be a resident
13 alien in the United States?

14 A Well, I married my boyfriend, and I submitted the
15 papers to become a resident because I was married to my
16 husband who is a citizen and was working here.

17 Q You submitted some papers to whom?

18 A My husband was the one that filled out the paper work
19 petitioning me for a residency.

20 Q Did you sign the paper work?

21 A Yes.

22 Q And, of course, when you signed the paper work you had
23 your husband explain to you what was in the paper work did
24 you not?

25 A Well, really we went to an attorney who specializes in

1 those types of cases. We paid the attorney to submit the
2 paper work.

3 Q Somebody who understood immigration law?

4 A Yes, I would imagine so. Yes.

5 Q At what point prior to your guilty plea did you go see
6 an immigration lawyer in New York to find out whether a
7 conviction for this charge would result in you being
8 deported?

9 A The moment immigration told me about my case I
10 immediately went to look for an attorney with the press
11 company.

12 Q That wasn't my question. My question was prior to your
13 guilty plea in November of 2002, when did you go see an
14 immigration lawyer while you were up in New York?

15 A I never knew that. I never inquired about that.

16 Q Because your testimony here today is you didn't realize
17 you could potentially be deported for a criminal offense

18 A. Yes.

19 MR. SPENCER: Beg the Court's indulgence.

20 I only have one more thing.

21 BY MR. SPENCER:

22 Q I want you to look at the second page of State's
23 Exhibit No. 2, and if you could read the date on that form?

24 A April 16, 2008.

25 Q The one that is right here.

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1 A Okay. January 5, 2010.

2 Q Thank you.

3 MR. SPENCER: I have no further questions.

4 COURT REPORTER: Is that an applicant's exhibit? It
5 is, and not state's. I will change the sticker.

6 MR. SPENCER: Thank you.

7 (State's Exhibit No. 1, January 5,
8 2010, form, was marked and entered.)

9 KEN LUCERO - REDIRECT EXAMINATION

10 BY MS. CLEARY:

11 Q Referring back to State's Exhibit No. 1, the document
12 that your friend filed for you, did he read each word to you
13 in this?

14 A No.

15 Q Did he --

16 A I trusted in him.

17 Q Okay. One of the things that he wrote was: Mr.
18 Hardee-Thomas, trial counsel, advised him that because he
19 had been in the US so long a conviction on this offense will
20 not effect my immigration status.

21 First of all, do you know your lawyer was a female?

22 A No.

23 Q Okay. Let me rephrase it.

24 A I don't understand.

25 Q When your friend wrote this, he referred to your lawyer

1 as Mr. Hardee-Thomas. If you had known that he had used a
2 masculine way to refer to your female lawyer, you would have
3 told him to correct that?

4 A To correct it, yes.

5 Q And it also says that Mr. Hardee-Thomas advised him,
6 referring to you. Would you have told him to correct that?

7 A Yes, of course.

8 Q And then it says, he, referring to you, had been in the
9 US for so long a conviction of this offense will not effect
10 my immigration status. Did you know that he had put that in
11 this application?

12 A No.

13 Q Okay. So you did not understand each word on this
14 application when you signed it?

15 A No. Just -- no.

16 Q And it's your testimony here today that you did not
17 discuss the immigration consequences at all with Ms. Thomas
18 or anyone else, Ms. Hardee-Thomas?

19 A Yes. Correct.

20 Q And Mr. Spencer was asking you about the process to
21 become a resident alien you had interviews with an
22 immigration agent to become a resident, did you have to go
23 in there with your husband?

24 A Yes.

25 Q At any time, did the immigration officer say to you if

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1 you are convicted of a controlled substance crime you will
2 be deported?

3 A No.

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

5 THE COURT: Anything else?

6 MR. SPENCER: No further questions.

7 THE COURT: All right. Ma'am, you may step down.

8 MS. CLEARY: That's all our witnesses.

9 THE COURT: All right.

10 Yes, sir, please call any witness you may need.

11 MR. SPENCER: Yes, Your Honor. I would call Ms.

12 Hardee-Thomas to the stand.

13 THE CLERK: Could you state your name for the record,
14 please.

15 MS. HARDEE-THOMAS: Marva Ann Hardee-Thomas.

16 (WHEREUPON, Marva Hardee-Thomas was
17 sworn to tell the truth.)

18 THE CLERK: Thank you. Please be seated.

19 MARVA HARDEE-THOMAS - DIRECT EXAMINATION

20 BY MR. SPENCER:

21 Q Ms. Thomas, my first question is going to be, I know
22 it's been a long time. Do you remember Ms. Lucero?

23 A Yes, I do remember Ms. Lucero.

24 Q And, of course, at the time you were representing Ms.
25 Lucero you were a public defender for Dorchester County?

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1 A That's correct.

2 Q Public Defender's Office. How long had you been doing
3 that?

4 A Started September -- 15 or 17, 1995 until, I think it
5 was 2008. I think it was February 2008.

6 Q So you would have been a public defender for about
7 seven years at the time of the plea?

8 A Yes.

9 Q And at the time of the plea had you done a number of
10 guilty pleas in front of Judge Goodstein?

11 A Trials and guilty pleas, correct.

12 Q And you're experienced with Judge Goodstein as a plea
13 judge, was she thorough in her colloquy with a pleading
14 defendant?

15 A Very.

16 Q And would she have asked a multitude of questions?

17 A She would have.

18 Q And do you recollect whether or not Ms. Lucero had an
19 interpreter at the time of the plea?

20 A I don't remember, but if she's the same way that she is
21 now, yes, she would have.

22 Q And by that you mean if she didn't -- if she wasn't
23 sufficiently fluent in English she would have had an
24 interpreter appointed?

25 A That is correct.

1 Q Now, I wanted to ask you about the day of the guilty
2 plea. How well do you remember the guilty plea hearings?

3 A I couldn't tell you how many people came before her or
4 after her. I couldn't tell you if it was in the morning or
5 the afternoon. I would need more information -- my docket
6 to remind me, but when I got the packet I knew that it was a
7 female and it wasn't a male. That Ken Lucero was a female.
8 That's what I remember.

9 Q Certainly it would be a lot easier to refresh your
10 recollection if we had a guilty plea transcript; is that
11 correct?

12 A Something. Something that would help.

13 Q And certainly it would be a lot easier to remember this
14 within a year of a guilty plea then it is to remember today?

15 A Several years afterwards, correct.

16 Q Do you recall what your practice would have been at the
17 time of the guilty plea in terms of giving any advice as to
18 the potential for deportation, an alien facing criminal
19 charges?

20 A Advise them of their rights, first and foremost. What
21 the charges are, what they're facing, what is likely to
22 happen.

23 Q And the state's evidence?

24 A What they're facing, the charges.

25 Q Would you have given them any advice as to whether or

1 not they would be deported?

2 A It could likely happen.

3 Q So you would have advised the client that it would
4 likely happen that they would be deported?

5 A Any convictions they would likely, they could likely be
6 deported.

7 Q Do you have any recollection, in this case, you gave
8 Ms. Lucero any advice on the likelihood on deportation?

9 A I have no information on that, what I advised her of.

10 Q Do you -- I'm sorry.

11 A As a public defender, when we're appointed to cases, we
12 go see our clients. We go tell them what they're facing.
13 If the information from the solicitor's office, if they
14 would like us to share, we share that information. With
15 people who don't necessarily understand the English language
16 we get interpreters, whether or not they're Russian, whether
17 or not they're, you know, whatever language, but as far as
18 the charges, we'd tell them what they're facing and talk
19 about the whole aspect in regards to if they're likely to
20 get, you know, deported for their particular charges.

21 Q Right. And so that would have been your practice to
22 advise her that it was likely that she'd get deported?

23 A From the conviction.

24 Q From a conviction. Thank you. Do you recall giving
25 her that advice in this case?

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1 A I have no information to tell me whether or not that
2 was done or not. Nothing, the file.

3 Q Again, your recollection would have been clearer 10
4 years ago than it is today; is that correct?

5 A Yes.

6 Q Would you have given her advise that she wasn't going
7 to be deported?

8 A I would have to have more information to say if it was
9 in the negative. More information in a case -- give me
10 something to have said something like that.

11 Q You're not an immigration lawyer, right?

12 A I am not.

13 Q And would you have given such advice without consulting
14 an immigration lawyer?

15 A Or consulting someone in reference to something going
16 on with her case, an expert or something.

17 Q And you're not aware of anything in this particular
18 case that would have prompted you to give that kind of
19 advice?

20 A Nothing that stands out, no.

21 Q Would you have said nothing about the deportation?

22 A I think something like that would come up, someone who
23 is from not -- something like that would have come up.

24 Q So is it fair to say at minimum you would have said
25 there is a possibility of deportation?

1 A Yes.

2 Q Would you remember one way or the other whether Judge
3 Goodstein would have said anything about deportation during
4 the guilty plea hearing?

5 A I know she's thorough, but I wouldn't be able to recall
6 what she would have said on that particular day on a guilty
7 plea.

8 Q And that's largely in part because it's 10 years ago;
9 is that correct?

10 A Unless there was something to spark me to have the
11 paper work and write something like that down. So --

12 Q Thank you very much. I have no further questions.

13 THE COURT: Please answer any questions that Ms. Clary
14 has.

15 MARVA HARDEE-THOMAS - CROSS EXAMINATION

16 BY MS. CLARY:

17 Q Ms. Hardee-Thomas, is it your testimony that in 2002,
18 you advised your client that they likely could be deported
19 if they were resident aliens, that they likely could be
20 deported if they were convicted of a crime?

21 A I would likely have advised clients of the possibility
22 of something like that occurring.

23 Q Okay. So that was your normal process in 2002, was to
24 advise clients that even resident -- even legal aliens can
25 be deported for convictions?

1 A That would be my practice.

2 Q Okay.

3 A My thing is, I don't know at that point if I wrote down
4 if she was legally here or not legally here, however, I knew
5 that there was an interpretation problem.

6 Q Okay.

7 A And that's how something like that would --

8 Q And why were there distinctions between whether she's
9 legal or illegal, what difference would that make?

10 A Well, my thing is to give the client the advice to know
11 that possibly something may happen outside of this
12 particular hearing.

13 Q So there's no reason to think that you would have
14 deviated from that practice with Ms. Lucero?

15 A Nothing that I can think of.

16 Q Okay. So you testified that it would be fair to say
17 you would have told her there was a possibility of
18 deportation; is that correct?

19 A That something may happen in another court.

20 Q So it's your testimony that you probably told her that
21 she would be deported, but she wanted to go ahead and plead
22 guilty anyway; is that your testimony?

23 A No, that's not my testimony.

24 Q Okay.

25 A I'm basically saying I would probably have advised my

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1 client of another court hearing in regards to deportation,
2 but to plead guilty or not guilty would be up to them.

3 Q Okay. When's the last time that you've done a plea in
4 front of Judge Goodstein; in the last four years, five
5 years?

6 A I haven't practiced since 2008.

7 Q Okay. But you've never heard Judge Goodstein advise
8 someone who is pleading guilty before her, say, anything
9 about immigration consequences; is that it, have you ever
10 heard that to be part of her regular plea colloquy?

11 A Judge Goodstein is very thorough --

12 Q I understand that. Have you ever heard her advise
13 about immigration consequences?

14 A Based on the circumstances --

15 Q Have you ever heard her in any plea at all say anything
16 about immigration consequences to someone who is pleading
17 guilty before her?

18 A (No response.)

19 Q Have you ever?

20 A I'm trying to recollect at this point. I just know
21 she's very thorough. I can't tell you whether or not she
22 would say something about deportation --

23 Q Okay. Well, you don't have a memory of her having of
24 her ever discussing immigration consequences?

25 A Deportation.

1 Q Okay. Were you aware that general law commands removal
2 for any controlled substances conviction except for very
3 small amounts of marijuana?

4 A No.

5 Q Okay. So you're not aware of that that's been the
6 federal law since 1996?

7 A I didn't --

8 Q Okay.

9 A -- have any information in regards to that unless it
10 comes up in a particular case.

11 Q Okay. So when you tell your clients that they're going
12 to be deported or may be deported, if they plead guilty, do
13 they usually go ahead and plead guilty anyway?

14 A Well, in a particular circumstances if someone is not
15 legally here --

16 Q That's not -- I'm sorry. I'm talking about legally,
17 legal resident, green card holder.

18 A Okay. In this situation I don't know what I would have
19 put down in her file, that she was legally here or illegally
20 here, but based upon the fact that she has a language
21 barrier and there is a crime that's been committed and that
22 she's interested in pleaing to that crime, that's the
23 likelihood of me advising that person just in case. I don't
24 know if I would the ability in checking whether or not
25 they're legal or not legal, but that would come up in that

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1 scenario.

2 Q All right. You didn't consider challenging the stop or
3 the consent to search or anything related to the traffic
4 stop in this case?

5 A If I had the file, I could tell you --

6 MR. SPENCER: Objection.

7 Q That's fine. I just wanted to know the basis --

8 A -- what I would have done.

9 THE COURT: Hold on. There's an objection.

10 MR. SPENCER: I just have an objection to relevance,
11 strictly on the deportation.

12 THE COURT: Okay. Sustained.

13 BY MS. CLARY:

14 Q Okay. But you do remember Ms. Lucero, but you don't
15 remember the details; is that right?

16 A I remember her because when I first got the file it
17 said Ken. I said, I don't remember a Ken. I remember this
18 person being a female. I didn't have a transport to support
19 that, but when I got to Court I said, yeah, I remember. I
20 just remember the Ken and seeing her. It just didn't match,
21 which is something that sparks with regard to facts.

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

23 MR. SPENCER: Briefly, Your Honor.

24 MARVA HARDEE-THOMAS - REDIRECT EXAMINATION

25 BY MR. SPENCER:

1 Q How many Ecuadorian defendants have you had during the
2 course of your practice?

3 A I can say several. I can say less than five.

4 Q So that would be an unusual thing and that would help
5 you remember who she is?

6 A Yes.

7 Q In terms of facts in the case, it's very difficult to
8 remember the facts in the case from 10 years ago?

9 A It is, but this client was able to get out and come
10 back before the court. That's something I didn't remember.

11 Q Well, let me ask you this, people usually plead guilty
12 to evade a more severe sentence; isn't that true?

13 A Can you repeat that question?

14 Q The reason you plead guilty is to avoid a potentially
15 harsher sentence?

16 A That's possible but -- that's possible. I don't know
17 why people plead guilty, it could be their choice, but
18 that's possible.

19 Q And given the choice of a lengthy sentence verses a
20 possibility of deportation some people might choose to take
21 the risk of deportation over having to serve a lengthy
22 prison sentence; isn't that true?

23 A That could be a possibility.

24 Q Thank you. I have no further questions.

25 THE COURT: All right. Thank you.

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1 Anything else?

2 MS. CLARY: No.

3 THE COURT: All right, ma'am, you may step down.

4 MARVA HARDEE-THOMAS: Thank you.

5 THE COURT: Yes, sir.

6 MR. SPENCER: Your Honor, that would be the State's
7 case, however, I would like a brief opportunity -- first I
8 would like to renew my statute of limitation, my latches
9 motion. Particularly latches because we've heard evidence
10 that supports my motion in which we have difficulties, not
11 only a missing transcript, Ms. Hardee-Thomas doing the best
12 she can with trying to remember something from 10 years ago.
13 You know, this will go to credibility, as well, but I think
14 Ms. Lucero had difficulties remembering the circumstances of
15 her guilty plea. At one point she agrees with me that Judge
16 Goodstein asked a lot of questions and then she seems to say
17 there were only two or three questions.

18 Clearly I think everybody involved is trying to
19 remember something from 10 years ago, and I think it's
20 impaired our defense of this case. I contend they haven't
21 met their burden, but has impaired our case none the less.

22 I would renew my statute motion, I would renew my
23 latches motion because she was aware in January of 2010 that
24 the fact that the government, the US government was going to
25 attempt to deport her and this application was coming. I

1 think i said April of 2011, so that's when the facts was
2 discovered that referred -- If I may argue, also, the
3 merits. I don't think they've met their burden. We have
4 some very inconsistent troubling testimony from Ms. Lucero.

5 There's the affidavit, well, she signed the affidavit.
6 The person that prepared it speaks Spanish and could tell
7 her what was in the affidavit. I think there were some
8 inconsistencies as to whether or not she was advised of the
9 potential for deportation. I don't think it's very credible
10 to say that when she's living in the community that
11 individuals like herself that she wouldn't be aware of a
12 potential for deportation for a criminal conviction and, on
13 the other hand, I think Ms. Hardee-Thomas, doing the best
14 that she can with her recollection, said that her practice
15 was to tell if there was a possibility of deportation, and I
16 don't think Padilla requires in most cases anything more
17 than that.

18 I don't think there is a concrete answer and I don't
19 think it needs to be given and I think the possibility of
20 deportation is enough to warrant her to do what she did when
21 she is a resident alien, which is to seek out an immigration
22 lawyer. I really question that she was not aware at the
23 time of the guilty plea, not only from Ms. Hardee-Thomas but
24 from her own knowledge from her own community that this was
25 a potential -- given that, you know, given the testimony

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1 that we've heard, I'd ask you to deny the application.

2 Of course, I would reserve all my arguments, the
3 statute of limitations, latches and the fact that Padilla is
4 not retroactive and the fact that the statute --in defense
5 of the statute -- deal with -- basically there isn't a PCR
6 statute -- I can't get past the one year on that even -- I'd
7 ask that you deny the application.

8 THE COURT: Yes, ma'am.

9 MS. CLARY: May I please the Court.

10 I think one of the arguments that Mr. Spencer has added
11 now is that when she -- that she should have filed the
12 application within a year of learning that she could be
13 deported when she came back from Ecuador. If she had filed
14 her application at that point, it would have been summarily
15 denied because Padilla verses Kentucky had not been decided,
16 yet. She would have had no grounds to file a PCR
17 application.

18 So I certainly don't think it should be dismissed on
19 that grounds. It was -- the decision in Padilla verses
20 Kentucky that gave her a grounds to attack this guilty plea,
21 so that right did not arise until May of 2010.

22 I think -- all right, Mr. Spencer characterizes her
23 testimony today on the stand was not conflicting. There may
24 have been some conflict with this affidavit, but it was
25 obvious that this was written by somebody else, that she did

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1 not go through and make sure that everything was right.
2 She's referred to as a man, Ms. Hardee-Thomas is referred to
3 as a man. And then it take -- the language of Padilla.
4 Padilla was misinformed about the consequences of
5 immigration. So I do not think that she -- that that should
6 not be considered to be her testimony.

7 Also, to my knowledge, that document has not been filed
8 anywhere. It was not formally adopted by her, and her
9 testimony was consistent that she did not know about the
10 immigration consequences, and it's entirely believable
11 because Padilla states that attorneys have a duty to be
12 aware that the federal law specifically commands removal for
13 all control substance convictions except for the most
14 trivial of marijuana possession offenses. So Padilla puts
15 this rather large burden on attorneys that they have to be
16 aware that removal is commanded in these cases and it has
17 been for narcotics offenses for many, many years. At least
18 since 1996.

19 I went though that law in my supplemental memorandum
20 that I hope that you will consider. I won't go through all
21 that, again, but it's obvious -- It's credible that Ms.
22 Lucero would have -- it's obvious that she would not have
23 agreed that, yeah, I don't mind leaving the country that
24 I've lived in for, at that point, almost 10 years, where my
25 child has been born and then, this is my home. No, it's not

1 credible that she would say, yeah, I'll plead to it,
2 especially based on the fact that she said it wasn't hers.

3 It's just not believable that in 2002, when we have a
4 lot less immigrants here and also there was not -- certainly
5 Padilla hadn't been decided. It's not credible that Ms.
6 Thomas would have advised her, and she clearly, based on her
7 testimony, that legal -- the law relating to immigration.
8 Many, many people do not understand that legal immigrants
9 can be deported.

10 Now, Mr. Spencer speculated, not based on any
11 testimony, but speculated that she should know that because
12 she should have been aware because the immigration folks
13 tell you that.

14 Well, if he's allowed to speculate on that without any
15 evidence then I would like you to consider my husband is a
16 resident alien and I am well aware of what immigration
17 advises you and they do not tell you that.

18 Her testimony was that she had never been told that by
19 immigration and I don't think, you know, that his statement
20 that she should have known that just because of some
21 assumption that immigration tells you that, that's just not
22 supported by the testimony, and without testimony that's
23 shouldn't be considered.

24 I think that there's no testimony that Judge Goodstein
25 has ever advised clients about immigration consequences and

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1 that I believe you could take judicial notice of what the
2 traditional plea colloquy is for circuit court judges in
3 South Carolina. Certainly in 2002, it did not include any
4 advice about deportation, but, again, I'd like to emphasize
5 she would have fought these charges. Apparently, it was
6 based on mere presence, alone.

7 She would have fought these charges if she had known
8 she was going to be exiled, never allowed to return to the
9 United States and separated from her child, who is a United
10 States citizen. She would not have pled guilty to this
11 charge.

12 I would -- unless you have anything more specific that
13 you would like me to argue about I'd like to rely on the
14 briefs that we submitted.

15 THE COURT: All right.

16 MS. CLARY: And the law in Padilla. I think you
17 understand it.

18 THE COURT: Yeah, and if you all will supplement
19 anything that will be fine. As I stated earlier, I want to
20 take it under advisement and --

21 MR. SPENCER: Really quickly, I want to put one more
22 thing on the record, which is -- because Ms. Clary said it
23 was commanded under Title 8 -- that would be 8 USC at 1227
24 that talks about classes of deportable aliens. It says, any
25 alien admitted to the US shall upon order of the Attorney

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1 General, so it's up to the Attorney General, be removed if
2 the alien is within one or more of the following class or
3 classes. It's seen most directly applicable as far as
4 controlled substances and it merely says someone violating -
5 and I'm paraphrasing this, somebody violating the substance,
6 the control substance law is deportable. Specific language.
7 So I disagree that is commanded. Seems like it's something
8 that's a matter of discretion, at least, at the executive
9 level. And, of course, it took six years -- eight years
10 before any one even made any attempt to try and deport Ms.
11 Lucero.

12 MS. CLARY: May I just say real briefly that the
13 commanded language comes from the Court decision in Padilla
14 verses Kentucky, and that was a quote that I was saying that
15 they say that this had been commanded. When a federal
16 statute tells you -- says the Attorney General shall do
17 something that is a commandment. That is not discretionary,
18 but that's all federal interpretation of the law, but I
19 don't necessarily think that it would preclude recovery for
20 her whether it's mandatory or not. The way that it's been
21 interpreted is that it is mandatory that there is no
22 discretion, that that is a controlled substance.

23 THE COURT: All right.

24 MS. CLARY: One more thing. I'm sorry. Mr. Spencer and
25 I have talked about this, and I believe he's in agreement

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1 that if you could just write an order just stating that --
2 or we write an order just stating that you're taking this
3 under advisement, her immigration lawyer believes that would
4 hold off her deportation. Once she's deported he can't get
5 her back.

6 THE COURT: All right. You can forward me an order.
7 Just copy Mr. Spencer.

8 MS. CLARY: Thank you.

9 THE COURT: All right. Thank you.

10 (This proceeding was concluded.)
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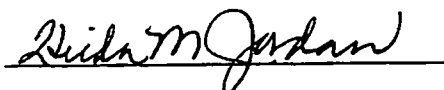
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C-E-R-T-I-F-I-C-A-T-E

I, THE UNDERSIGNED HILDA M. JORDAN, CVR-M, OFFICIAL COURT REPORTER FOR THE FIRST JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE PLEA IN THE CAPTIONED CAUSE, IN THE COURT OF COMMON PLEAS FOR ORANGEBURG COUNTY, SOUTH CAROLINA, ON THE 22ND DAY OF MAY, 2012.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.



Hilda M. Jordan, CVR-M

October 15, 2012

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

FORM 4

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP1800778
2012 MAY 30 PM 4:23

Ken Lucero

South Carolina State of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Eleanor Duffy Cleary

Attorney for: ☒ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☒ See attached order; (formal order to follow)☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

DeAndrea Benjamin
Circuit Court Judge

2161
Judge Code

5/30/2012
Date

For Clerk of Court Office Use Only

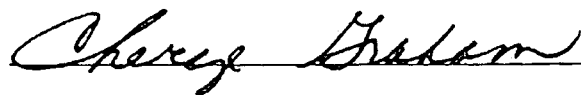
This judgment was entered on 5-30-2012, and a copy mailed first class or placed in the appropriate attorney's box on 5-30-2012, to attorneys of record or to parties (when appearing pro se) as follows:

Eleanor Duffy Cleary Attorney at Law 1720 Main Street,
Suite 303 Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

David A. Spencer S.C. Attorney General's Ofc. P.O. Box
11549 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)



Cheryl Graham - Clerk of Court

Court Reporter

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

IN THE FAMILY COURT
FIRST JUDICIAL CIRCUIT

2012 MAY 30 PM 4:22

KEN LUCERO

Plaintiff,

vs.

STATE OF SOUTH CAROLINA

Defendant.

MOTION AND ORDER INFORMATION
FORM AND COVERSHEET

Docket No. 2011-CP-18-0778

Plaintiff's Attorney:

Eleanor Duffy Cleary, Bar No. 7068

Address:

1720 Main St., Suite 303

Phone: 803-376-0075 Fax 1-866-724-1965

E-mail: edcleary@att.net Other: _____

Defendant's Attorney:

_____, Bar No. _____

Address:

Phone: _____ Fax: _____

E-mail: _____ Other: _____

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

SECTION I: Hearing Information

Nature of Motion: _____

Estimated Time Needed: _____

Court Reporter Needed: ☐ YES/☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached☒ Form Motion/Order

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

Signature of Attorney for ☒ Plaintiff/☐ Defendant

May 25, 2012

Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT: \$ _____☒ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support☐ Domestic Abuse or Abuse and Neglect☐ Indigent Status ☐ State Agency v. Indigent Party☐ Sexually Violent Predator Act ☒ Post-Conviction Relief☐ Motion for Stay in Bankruptcy☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.☐ Other: _____

JUDGE CODE _____ Date: _____

Judge Signature: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

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

Custodial Parent (if applicable): _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	
	)	
Ken Lucero,	)	
	)	
Applicant,	)	
	)	
v.	)	ORDER
	)	
State of South Carolina,	)	2011-CP-18-0778
	)	
Respondent.	)	
_____	)	

2012 MAY 30 PM 4:23
 CLERK OF COURT

This matter comes before this Court pursuant to an application for post-conviction relief filed April 14, 2011. Applicant moved to vacate her November 3, 2003 conviction for possession of heroin, as was proscribed by Section § 44-53-370 (d)(1) (2002).

Applicant, represented by Eleanor Duffy Cleary, Esquire, alleged that her guilty plea should be vacated under *Padilla v. Kentucky*, 130 S.Ct. 1473, 176 L.Ed. 2d 284 (2010), because she was not advised that a conviction for this offense would cause her to be deported pursuant to 8 USC § 1227(a)(2)(B)(i). Respondent, represented by David Spencer, Assistant Deputy Attorney General, argued that the case should be dismissed for failure to comply with the statute of limitations under S.C. Code Ann. § 17-27-45 (Supp. 2011) and that Applicant failed to meet her burden of proof on the merits.

This Court held a hearing on the issues raised on May 22, 2012 at the Orangeburg County court house. This Court has retained jurisdiction in order to

consider the arguments and evidence presented and intends to issue an Order within the next thirty days.

AND IT IS SO ORDERED this 25 day of May, 2012.



DEANDREA G. BENJAMIN
Circuit Court Judge

Orangeburg, South Carolina.
May 25, 2012

STATE OF SOUTH CAROLINA	)	
COUNTY OF DORCHESTER	)	IN THE COURT OF COMMON PLEAS
	)	
KEN LUCERO	)	
Applicant,	)	
	)	
v.	)	
	)	
STATE OF SOUTH CAROLINA	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I certify that a true copy of the Order in this case has been served on David Spencer, Assistant Attorney General, SC Office of the Attorney General, PO Box 11549, Columbia, SC 29211, this 25th day of May, 2012.


 Karen Dumas Elliott
 Paralegal to Eleanor Duffy Cleary

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	
	)	
Ken Lucero,	)	
	)	
Applicant,	)	BRIEF IN SUPPORT
	)	OF GRANTING
v.	)	POST-CONVICTION RELIEF
	)	
State of South Carolina,	)	2011-CP-18-0778
	)	
Respondent.	)	
	)	

STATEMENT OF THE FACTS

On May 22, 2012, this Court held a hearing on Applicant Ken Lorena Lucero's application for post-conviction relief in Orangeburg, South Carolina. Lucero and plea counsel, Marva Hardee-Thomas, testified at the hearing. The Court took the matter under advisement and requested briefs from both parties.

Lucero pled guilty in November 2002 to possession of heroin. That offense was proscribed by S.C. Code Ann. § 44-53-370 (d)(1) (2002), which read, in pertinent part:

d) A person who violates subsection (c) with respect to:
 (1) a controlled substance classified in Schedule I (b) and
 (c) which is a narcotic drug or lysergic acid diethylamide
 (LSD) and in Schedule II which is a narcotic drug is guilty
 of a misdemeanor and, upon conviction, must be
 imprisoned not more than two years or fined not more
 than five thousand dollars, or both. ...

She was sentenced to two years in prison (suspended with three years of probation) in Dorchester County Court of General Sessions. Lucero seeks a

vacation of her conviction pursuant to *Padilla v. Kentucky*, 130 S.Ct. 1473, 176 L.Ed. 2d 284 (2010). 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.

Lucero, 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 citizens by birth. She works as a cleaning attendant in New York.

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 immigration law.

Under federal law, an alien who is convicted of a crime for which a sentence of one year or longer may be imposed is deportable. 8 U.S.C.A. § 1227 (a)(2)(A)(i)(II). Furthermore, federal immigration law has long provided that a conviction for controlled substance violations is deportable. 8 USC § 1227(a)(2)(B)(i).

If a noncitizen has committed a removable offense after 1996, removal is "practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses. *See* 8 U.S.C. § 1229b. Subject to limited exceptions, this discretionary relief is not available for an offense related to

trafficking in a controlled substance. *See* § 1101(a)(43)(B); § 1228. *Padilla, supra*, at 1480.

Lucero 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.

At the time of her plea, she had lived in the United States for almost ten years and was married to a United States Marine. He was deployed when she was arrested. Her arrest arose from a traffic stop on Interstate 95 in Dorchester County. She testified she did not understand the officer and did not give him permission to search the car she had rented in Orlando, Florida. Her two year old daughter was in the car with her. She showed the officer her rental car receipt and her valid driver's license.

According to her testimony, the officer showed her the heroin he found in the rear part of the car. She had never seen heroin before. According to the arrest warrant, a SC highway patrolman stopped her for unspecified "routine traffic violation" and after searching the vehicle for an unspecified reason, he found the heroin. She was charged with trafficking between 100 and 200 grams, as proscribed by S.C. Code Ann. § 44-53-370 (e) (2) (c) (2002). The offense carried a mandatory term of imprisonment of not less than twenty-five years nor more than forty years.

Lucero testified that she had never used heroin and had never sold any drugs. To her knowledge, her friends in Orlando did not sell drugs and she was unaware the drugs were in the rental car.

She testified she pled guilty upon the advice of her appointed counsel, Ms. Thomas. She testified that Thomas told her she would get probation if she pled to possession of heroin and would not lose her children. On November 18, 2002, Judge Goodstein did impose a sentence of two years, suspended upon three years of probation. Lucero successfully completed probation early on August 5, 2004.

Lucero introduced letters and orders from the U.S. Department of Justice, Immigration and Naturalization Service, and the Board of Immigration Review showing that she was being deported solely because she was convicted of possession of heroin in South Carolina.

In September 2010, a non-lawyer friend of hers wrote in English a motion to vacate her conviction, which she signed but did not read. The petition mirrors the language of *Padilla*, stating "he told (sic) because I had been in the U.S. for so long, a conviction of this offense will not affect my immigration status." In *Padilla*, the Court wrote that "Padilla claims that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he 'did not have to worry about immigration status since he had been in the country so long.'" *Padilla, supra*, at 1478. Lucero testified at the hearing that she did not know the exact contents of the unfiled motion and that she was not given any information about immigration consequences by Ms. Thomas.

In February 2011, an immigration judge ordered Lucero removed to Ecuador. Her lawyer in New York, Lloyd Munjack, filed an appeal to the Board of Immigration Appeals. On March 22, 2012, the Board denied her appeal because her PCR was still pending and notified her that she would be removed.

In March of 2011, Lucero met with undersigned counsel, who filed the PCR application by placing it in the United States mail on March 31, 2011. The Dorchester Clerk of Court's office did not mark it as filed until April 14, 2011.

Lucero testified that she would never have pled guilty if she had known she would be deported because the United States is her home and the home of her two children, who are American citizens. She testified she would have fought the charges because the heroin was not hers.

Ms. Thomas, a former attorney, who was appointed to represent Lucero, testified at the hearing. She recalled her name but did not remember details of the case because of the amount of time that had passed. She testified that she might have told her clients that they faced deportation. She was unable to testify as to the immigration consequences of a legal alien pleading guilty to a controlled substance offense and was unable to distinguish between immigration consequences for illegal immigrants and legal resident aliens. She did not remember if Judge Goodstein advised Lucero she would be deported if she pled guilty to a controlled substance violation but stated that she was thorough with her pleas. Lucero asked this Court to take judicial notice of the fact that the standard plea colloquy did not contain any questions about immigration consequences in 2002.

I. Applicant's post-conviction relief application complies with the statute of limitations and the right to effective assistance of counsel with regard to advice about deportation should be applied to her claim.

Lucero complied with South Carolina Code of Laws section 17-27-45 by filing her application within one year of the United States Supreme Court's decision in *Padilla v. Kentucky, supra*, becoming final on May 3, 2010 because *Padilla* imposed upon a state proceeding a substantive standard not previously recognized or a right not in existence at the time of her guilty plea, which is intended to be applied retroactively under South Carolina law.

As noted above, Lucero's application was clocked in as filed in the Dorchester Clerk of Court's office on April 14, 2011; two weeks after Lucero's counsel mailed the application. *Padilla* was decided on March 31, 2010, but the mandate was issued on May 3, 2010.¹ According to Rule 45.2 of the United States Supreme Court, "[i]n a case on review from a state court, the mandate issues 25 days after entry of the judgment, unless the Court or a Justice shortens or extends the time, or unless the parties stipulate that it issue sooner. The filing of a petition for rehearing stays the mandate until disposition of the petition, unless the Court orders otherwise. If the petition is denied, the mandate issues forthwith." This is analogous to the state court's issuing of the remittitur under Rule 221, SCACR. Under S.C. Code Ann. §17-27-45 (A), "[a]n application for relief filed pursuant to this chapter must be filed within one year after the entry of judgment of conviction or within one year after the sending of the remittitur to the lower court from an

¹ See <http://www.supremecourt.gov/search.aspx?filename=/docketfiles/08-651.htm>.

appeal of the filing of the final decision upon an appeal, whichever is later." As in state court, a decision of the Supreme Court is not binding until the petition for rehearing expires. Therefore, a petition filed within one year of the Supreme Court's mandate complies with the statute of limitation in S.C. Code Ann. § 17-27-45 (B).

In any case, it would be inequitable to punish Lucero so harshly for an error, if any, made by her counsel, who, in good faith, believed the application was timely filed.

Lucero's application falls within an exception to the one-year statute of limitations.

South Carolina Code Section 17-27-45(B) provides:

[w]hen a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

S.C. Code Ann. § 17-27-45(B) (Supp. 2010).

Only one appellate case has addressed this subsection. In *Talley v. State*, 371 S.C. 535, 543-44, 640 S.E.2d 878, 882 (2007), the South Carolina Supreme Court determined that *Alabama v. Shelton*, 535 U.S. 654, 122 S. Ct. 1764 (2002), applied retroactively on collateral review and that S.C. Code Ann. § 17-27-45 (B)

provided the applicable statute of limitations. In *Shelton*, the United States Supreme Court held the constitutional right to counsel extends to a defendant who receives a sentence that may result in incarceration. The *Talley* Court reasoned that *Shelton* extended a new rule for the purposes of collateral review because it pronounced a rule that was not in existence when the petitioner was convicted. Similarly, this Court should hold that *Padilla v. Kentucky* extended the *Strickland v. Washington* rule to cases where the applicant was not made aware of immigration consequences.

In *Talley*, decided in 2007, the South Carolina Supreme Court stated “[i]n determining whether Respondent was deprived of his federal constitutional right to counsel, we are required to follow the United States Supreme Court’s decisions on retroactivity,” citing *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989). *Talley*, 371 S.C. at 541, 640 S.E.2d at 880. Essentially, *Teague* held that a case that announces a “new rule” – when it breaks new ground or imposes a new obligation on the States or the Fe

deral Government. “To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant’s conviction became final.” *Teague, supra* at 301, 109 S.Ct. 1060. New rules are not to be applied to convictions that have already been finalized unless narrow exceptions apply.

The year after *Talley*, the United States Supreme Court clarified that the *Teague* rule does not prevent the states from applying “new rules” to cases finalized

before the new rule was issued. *Danforth v. Minnesota*, 128 S.Ct. 1029 (2008). In that case concerning state review of a Minnesota conviction, the Court stated that neither “*Teague* (or any of the other cases relied upon by respondent and the Minnesota Supreme Court) speak to the entirely separate question whether States can provide remedies for violations of these rights in their own post conviction proceedings.” *Danforth*, 552 U.S. at 275, 128 S. Ct. at 1038.

The Supreme Court in *Danforth* could not make it any clearer that the *Teague* rule “was intended to limit the authority of federal courts to overturn state convictions—not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions.” *Danforth*, 552 U.S. at 280-81, 128 S. Ct. at 1041 (emphasis added).

Therefore, reference to *Teague* by the State is not controlling on the issue of whether this Court should apply *Padilla* retroactively to Lucero's state conviction in this state post-conviction relief action.²

Even in *Talley*, decided before *Danforth*, the South Carolina Supreme Court used *Teague's* analysis but then applied it more broadly than the United States Supreme Court ever has. The *Talley* Court held that the “new rule” in *Shelton* came within *Teague's* “watershed” exception “because the right to counsel undeniably implicates the fundamental fairness and accuracy of the proceeding.” 371 S.C. at 544, 640 S.E.2d at 882.

² The United States Supreme Court has granted certiorari and is set to decide if *Padilla* applies retroactively to cases on federal habeas review. See *Chaidez v. United States*, 655 F.3d 864 (7th Cir. 2011), in which certiorari was granted on April 30, 2012 to resolve a conflict among federal circuits. <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-820.htm>

In contrast, the United States Supreme Court has “yet to find a new rule that falls under this [watershed] exception. In providing guidance as to what might do so, the Court has repeatedly, and only, referred to the right-to-counsel rule of *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799.” *Beard v. Banks*, 542 U.S. 406, 407, 124 S. Ct. 2504, 2507, 159 L. Ed. 2d 494 (2004).

Therefore, contrary to the State’s assertions, *Teague* is not controlling in this case. Instead, this Court must determine if the holding in *Padilla* imposed “a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively.” S.C. Code Ann. § 17-27-45 (B) (Supp. 2011). The State asserts that the Supreme Court held for the first time in *Padilla* that criminal defense attorneys render deficient performance when they fail to advise noncitizen clients about deportation consequences. Lucero agrees that *Padilla* provided the “new” right to effective assistance of counsel regarding advice about immigration consequences. That is precisely why section 17-27-45 (B) puts Lucero’s application within the statute of limitations.

In fact, if the state courts were required to apply *Teague*, section 17-27-45 (B) would be rendered meaningless. Under our state 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.” It would be illogical

that our law would allow the filing of a late application after a “new rule” only to then proclaim it cannot apply a “new rule” retroactively under *Teague*.

Padilla imposed a substantive standard not previously recognized in 2002 under South Carolina precedent when Lucero pled guilty. Causing much upheaval, the Court held that effective counsel must inform clients who are legal aliens of the severe immigration consequences of convictions for almost any drug offense, which have been in effect since at least 1996. *Padilla* implicates the right to effective counsel, which arises from *Gideon*, and effective counsel implicates the fundamental fairness and accuracy of the proceeding. It is fundamentally unfair when a person pleads to an offense without knowledge of the severe consequences.

This Court should also find that *Padilla* was also “intended to be applied retroactively.” S.C. Code Ann. §17-27-45(b). The language of *Padilla* signals that it was intended to be applied retroactively. The Court noted that it was unlikely that its decision would open a floodgate of attacks on guilty pleas. *Padilla*, 130 S. Ct. at 1485. The Court stated that it was “unlikely the decision would have a significant effect on those convictions already obtained as a result of plea bargains” because a large number of previously obtained guilty pleas would not be challenged because it is often unwise to lose the benefit of the bargain obtained from a plea. *Id.* at 1485. This discussion of the effect of the decision on convictions obtained prior to the issuance of the decision would be rendered meaningless if the Court intended the decision to only apply prospectively.

As Justice Alito noted in his dissent in *Padilla*, the majority's decision dramatically expanded the scope of criminal defense counsel's duties by holding that omissions of advice about collateral consequences, such as deportation, can constitute ineffective assistance of counsel. 130 S. Ct. at 1492-1493. South Carolina courts have followed the previous rule that counsel does not have to advise his client about collateral consequences and that only affirmative erroneous advice can render a plea involuntary. See e.g. *State v. Williams*, 378 S.C. 511, 662 S.E.2d 615 (Ct. App. 2008); *Hinson v. State*, 297 S.C. 456, 377 S.E.2d 338 (1989); *Griffin v. Martin*, 278 S.C. 620, 300 S.E.2d 482 (1983).

Other state courts have addressed the issue of whether *Padilla* should apply to state collateral review. These states have interpreted the issue in the context of their own rules of collateral review. Nonetheless, the arguments may be considered as persuasive.

The Supreme Court of Massachusetts voluntarily applied a *Teague* analysis and concluded that *Padilla* is to be applied retroactively on collateral review of guilty pleas obtained after the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. No. 104-208, 110 Stat. 3009-546 (eff. April 1, 1997). The Court reasoned that *Padilla* recognized after that law was enacted, "if a noncitizen has committed a removable offense . . . his removal is practically inevitable." *Com. v. Clarke*, 460 Mass. 30, 41, 949 N.E.2d 892, 902 (2011). Pennsylvania has also applied *Padilla* to convictions finalized after the

effective date of the 1996 changes to the immigration laws. *Denisyuk v. State*, 422 Md. 462, 482 (2011).

The Massachusetts, Texas, and Pennsylvania Courts held that *Padilla* applied retroactively because it did not impose a "new rule" as defined by *Teague* but instead it imposed *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984) on immigration consequences that became obvious after enactment of the law cited above. *Ex parte De Los Reyes*, 350 S.W.3d 723, 731-32 (Tex. App. 2011).

Padilla imposed existing precedent in a novel context – that is, the fact of inevitable deportation must be conveyed to noncitizen defendants when the consequences are clear, as they were after 1997. In other words, *Padilla* imposed "a substantive standard not previously recognized or a right not in existence at the time of the state court trial," as required by S. C. Code Ann. § 17-27-45 (B). To demonstrate, if Lucero had raised this issue in a post-conviction relief application within one year after her conviction in 2002, it would have been denied pursuant to South Carolina's rule that counsel does not have to advise clients about "collateral consequences." *Hinson, supra; Griffin, supra*.

In conclusion, Lucero's application complies with the statute of limitations and the right to effective assistance of counsel with regard to advice about deportation should be applied to her claim.

II. Plea counsel was ineffective for failing to advise applicant that if she pled guilty to possession of heroin, deportation would be near certain, and applicant was prejudiced by counsel's ineffectiveness.

In *Padilla*, the Supreme Court noted that when Padilla pled guilty to transportation of marijuana in a Kentucky state court, the law providing for deportation after such a conviction was "succinct, clear, and explicit in defining the removal consequences for Padilla's conviction." *Id.* at 1483. The Court held that Padilla's counsel "could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses." *Id.*

As noted above, Lucero pled guilty in November 2002 to possession of heroin under S.C. Code Ann. § 44-53-370 (d)(1) (2002). When Lucero pled guilty in 2002 to a controlled substance offense carrying two years in prison, there was a succinct, clear, and explicit federal statute providing for her deportation. For a resident alien who pleads guilty to a controlled substance offense, deportation is "presumptively mandatory." *Padilla*, *supra*, at 1480.

Lucero is deportable under the same statute Padilla was. However, her plea counsel did not advise Lucero that she would her removal would be presumptively mandatory after such a plea.

The Supreme Court refused to limit its holding to cases where counsel gives affirmative misadvice, stating "there is no relevant difference between an act of omission and an act of commission in this context." *Padilla*, 130 S.Ct. at 1484.

As in *Padilla*, Lucero has satisfied the first prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 674 (1984). Under *Strickland*, the Court first determines whether counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The Supreme Court explained in *Padilla* that "preserving the client's right to remain in the United States may be more important to the client than any jail sentence." *Padilla*, 130 S.Ct. at 1483.

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." *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *Kolle v. State*, 386 S.C. 578, 589, 690 S.E.2d 73 (2010).

Plea counsel clearly did not understand immigration law when she testified at the PCR hearing. Therefore, it is certain that she did not tell Lucero that deportation was inevitable, as required by *Padilla*. Even if she told her there may be immigration consequences, that would not be sufficient under *Padilla*. The Court made clear that given the near certainty that *Padilla* would be deported, the admonishment that the plea "may" result in deportation was not sufficient to alleviate the prejudice arising from counsel's failure to advise Appellant of the plea's immigration consequences. The Court stated:

When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice ALITO), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear,

as it was in this case, the duty to give correct advice is equally clear.

Padilla, supra, at 1483.

Lucero testified credibly at the hearing that she was never advised of any immigration consequences. In light of the fact that there were very few non-citizens in South Carolina in 2002, her testimony is convincing. This Court may take judicial notice of the readily verifiable fact that less than 1.3 percent of Dorchester County residents were non-citizens in 2000 and that number had only increased to 1.9 in 2010.³

At the hearing, Applicant demonstrated that there is a reasonable probability that, but for counsel's errors, she would not have pled guilty, but would have insisted on going to trial. *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

If Lucero had been advised of the harsh consequences of her plea, she could have insisted on a trial or asked her counsel to pursue alternative punishment. Lucero testified that she would have fought the charges. Even though she was facing a lengthy jail sentence if convicted, the prospect of deportation is more severe than jail, as the *Padilla* court made so clear. Clearly, Lucero would have wanted to avoid deportation from the United States where, at the time of her plea, she had lived for almost ten years, and which was the only home her US citizen children had ever known. Deportation would separate her from her children, who are not

³ U.S. Census Bureau, Fact Finder, Place of Birth by Citizenship Status, Dorchester County, South Carolina.

Ecuadorian citizens, and as she testified, keeping her children was her main concern, as it is with nearly all mothers.

In addition, the warrant shows that there were grounds to fight the charges. There is no evidence that the officer had probable cause to search the car for drugs pursuant to a routine traffic violation. Even under the rule in 2002 in *New York v. Belton*, 453 U.S. 454 (1981), an officer must first arrest the person before searching the vehicle. A routine traffic violation does not lead to an arrest. Furthermore, any consent to search should have been challenged as invalid because of her inability to understand English.

III. The doctrine of laches should not preclude relief for the Applicant.

At the hearing, the State raised the defense of laches. Laches is “neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party.” *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002), citing *Hallums v. Hallums*, 296 S.C. 195, 198-199, 371 S.E.2d 525, 527 (1988).

While it is true that memories have faded since 2002, as noted above it is clear that Thomas did not tell Lucero that her deportation would be inevitable if she pled guilty to a controlled substance violation. Therefore, the prejudice to the state is not outweighed to the extremely severe consequences Lucero will face if her conviction is not vacated.

The transcript has been destroyed. However, this Court may take judicial notice of the fact that plea judges do not discuss immigration consequences in their plea colloquy and it is a near certainty that in 2002 even the most thorough of judges like Judge Goodstein would not have told Lucero to expect to be deported.

Lucero sought relief as soon as practical. The federal government did not commence deportation proceedings until 2010. *Padilla* did not provide its glimmer of hope of relief until the Spring of 2010. Lucero lives in New York and had to gather the time and resources to retain South Carolina counsel willing to attack her conviction, which she did in March of 2011.

In addition, retroactive application of the rule in *Padilla* would not be far-reaching and adverse to the administration of justice. Under the statute of limitations, applications filed after May 3, 2011 would be time-barred.

In conclusion, South Carolina courts may, and have, extended the protections of due process, and its concept of fundamental fairness, beyond what is required by the United States Supreme Court. *See e.g. Talley, supra.* This is one of those situations where South Carolina's concept of justice demands that Lucero be given the opportunity to face such serious consequences with the *effective* assistance of counsel.

CONCLUSION

Based on the foregoing, Applicant requests that this Court grant post-conviction relief and vacate for conviction for possession of heroin.

Respectfully submitted,

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Attorney for Applicant

Columbia, South Carolina
June 7, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	
	)	
Ken Lucero,	)	
	)	
Petitioner,	)	
	)	
v.	)	CERTIFICATE OF SERVICE
	)	
State of South Carolina,	)	2011-CP-18-0778
	)	
Respondent.	)	
_____	)	

I, Karen Dumas Elliott, paralegal for the undersigned counsel, certifies that I served the Brief in Support of Granting Post-Conviction Relief in the above captioned case on David Spencer, Assistant Attorney General, by mailing a copy by US Mail to PO Box 11549, Columbia, SC 29211, with the return address clearly indicated on the envelope and proper postage attached on said envelope on the 7th day of June 2012.

Karen D. Elliott
 Karen Dumas Elliott
 Paralegal to Eleanor Duffy Cleary

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. NO. 2011-CP-18-0778
COUNTY OF DORCHESTER	)	
	)	
Ken Lucero,	)	
	)	
Applicant,	)	RESPONDENT'S BRIEF
	)	
VS.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

This matter is before this Court by way of an application for post-conviction relief (PCR). A hearing into the matter was convened at the Orangeburg County Courthouse on May 22, 2012. This Court heard arguments from Respondent on its motion to dismiss the application as being untimely filed under the statute of limitations and that the application should be dismissed under the doctrine of laches. The motions were taken under advisement. Additionally, this Court conducted an evidentiary hearing concerning whether plea counsel was ineffective for failing to advise Applicant that Applicant would be deported as a result of her guilty plea conviction for possession of heroin. At the hearing, this Court requested briefing from the parties concerning whether Padilla v. Kentucky, 130 S.Ct. 1473 (2010) should be applied retroactively. Respondent now presents the following in support of its motion to dismiss on the statute of limitations:

In Padilla v. Kentucky, 130 S. Ct. 1473 (2010), the United States Supreme Court held, for the first time, that criminal defense attorneys render deficient performance under Strickland v. Washington, 467 U.S. 1267, 704 S.Ct. 3562 (1984) when they fail to advise noncitizen clients about deportation consequences of a guilty plea. The United States Supreme Court, therefore, reversed the

Kentucky Supreme Court, which had concluded that the Sixth Amendment does not protect a defendant from erroneous advice about deportation because it is merely a collateral consequence of a guilty plea. Padilla at 1478. However, in reversing Kentucky's decision, the Supreme Court noted that "[t]he Kentucky high court is far from alone in th[e] view" that the failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel. Id. at 1481.

In determining whether a decision of the United States Supreme Court should be applied retroactively, first it must be determined if the decision amounts to a new rule as defined by Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Padilla represents a new rule due to its application of Strickland for the first time to whether plea counsel was deficient to advise a defendant of the collateral consequence of deportation from a guilty plea conviction. Dennis v. United States, 787 F.Supp.2d 425, 430 (D.S.C. 2011) (finding Padilla was a new rule because it rejected the direct versus collateral consequences distinction utilized by many lower courts, a result not dictated by existing precedent when the Padilla court found for the first time that failing to advise a client of obvious deportation consequences falls below accepted professional norms).

Where a United States Supreme Court decision announces a new rule, the decision will not be applied retroactively to claims of ineffective assistance of counsel unless the new rule either places certain types of primary, private individual conduct beyond the government's ability to proscribe as criminal conduct or if the new rule requires observance of procedures implicit to the concept of ordered liberty that amounts to a "watershed rule of criminal procedure." Talley v. State, 371 S.C. 535, 543, 640 S.E.2d 878, 882 (2007). The first exception does not apply as Padilla does not involve a new rule concerning which type of conduct the government may proscribe. As found

in decisions listed below, the second exception does not apply either as the rule announced in Padilla is not a watershed rule of criminal procedure.

Three of the four circuits in the United States Courts of Appeal that have addressed the question of whether Padilla is retroactive have found that Padilla is a new rule and therefore should not be applied retroactively to cases on collateral review.¹ The first of these opinions was issued by the United States Court of Appeals for the Fourth Circuit. See United States v. Hernandez-Monreal, 404 Fed. Appx. 714, at *1 (4th Cir. 2010) (noting that “nothing in the Padilla decision indicates that it is retroactively applicable to cases on collateral review.”). Following suit, the Seventh and Tenth Circuits also concluded that Padilla was not retroactive. Chaidez v. United States,² 655 F.3d 684, 694 (7th Cir. 2011) (the fact that “numerous courts failed to anticipate the holding in Padilla,” and because of the “narrow definition of what constitutes an old rule,” “tips the scales in favor of finding that Padilla announced a new rule.”); United States v. Hong, 671 F.3d 1147, 1156 (10th Cir. 2011) (“Padilla is a new rule of constitutional law not because of what it applies – *Strickland* – but because of where it applies – collateral immigration consequences of a plea bargain.”) (emphasis in original). The Sixth Circuit Court of Appeals declined determining whether Padilla applied retroactively, finding the defendant failed to show prejudice. See Pilla v. United States, 668 F.3d 368, 373 (6th Cir. 2012).

¹ In an opinion issued on June 29, 2011, the Third Circuit Court of Appeals found Padilla to be retroactive. See United States v. Orojio, 645 F.3d 630 (3rd Cir. 2011). However, in an opinion issued about two months later, on September 1, 2011, the same circuit pointed out that the possibility Padilla is not to be applied retroactively is “far from remote,” and that “there is no judicial consensus on the issue and many lower courts have come to a contrary conclusion.” Diop v. ICE/Homeland Sec., 656 F.3d 221, 228 (3rd Cir. 2011).

² On April 30, 2012, the United States Supreme Court granted certiorari to review the Seventh Circuit’s opinion in Chaidez v. United States. See United States Supreme Court Docket No. 11-820.

Importantly, the District Court of South Carolina has held Padilla “broke new ground and is not retroactively applicable.” Dennis v. United States, 787 F.Supp.2d 425, 430 (D.S.C. 2011).

In addition, numerous United States District Courts that have addressed this issue have indicated that Padilla is a new rule not to be applied retroactively. Other United States District Court cases reaching similar conclusions include, but are not limited to, Maxwell v. United States, 2011 WL 5870041, at *2 (D. Md. Nov. 21, 2011); United States v. Garcia, 2011 WL 5024628, at *3 (M.D. Fla. Oct. 21, 2011); Emojewwe v. United States, 2011 WL 5118800, at *3 (M.D. Ala. Sep. 29, 2011); United States v. Chapa, 800 F.Supp.2d 1216 (N.D. Ga. July 12, 2011); Mathur v. United States, 2011 WL 2036701, at *3 (E.D. N.C. May 24, 2011); United States v. Laguna, 2011 WL 1357538, at *6 (N.D. Ill. Apr. 11, 2011); Doan v. United States, 760 F. Supp.2d 602, 605-06 (E.D. Va. 2011); United States v. Macedo, 2010 WL 5174342, at *1 (N.D. Fla. Dec. 15, 2010); United States v. Bacchus, 2010 WL 5571730, at *1 (D. R.I. Dec. 8, 2010); United States v. Perez, 2010 WL 4643033 (D.Neb. Nov. 9, 2010); Ufele v. United States, 825 F.Supp.2d 193 (D.D.C. 2011); Mendoza v. United States, 774 F.Supp.2d 791 (E.D.Va. 2011); United States v. Gilbert, 2010 WL 4134286 (D.N.J. Oct. 19, 2010); Sarria v. United States, ___ F.Supp.2d ___, 2011 WL 4949724 (S.D.Fla. Oct. 18, 2011); Llanes v. United States, 2011 WL 2473233 (M.D.Fla. June 22, 2011); Rackley v. Keith, 2011 WL 7452156 (W.D.Okla. Nov. 9, 2011); United States v. Abraham, 2011 WL 3882290 (D.Neb. Sept. 1, 2011); United States v. Martinez, --- F.Supp.2d ----, 2012 WL 220244 (D.Mass. Jan. 20, 2012); United States v. Cervantes-Martinez, 2011 WL 4434861, at *6 (S.D.Cal. Sept. 23, 2011); Ellis v. United States, 806 F.Supp.2d 538 (E.D.N.Y., 2011); Obomighie v. United States, 2011 WL 2938218 (D.Md. July 18, 2011); United States v. Haddad, 2010 WL 2884645 (E.D.Mich. July 20, 2010); Escobar-Pacheco v. United States, 2011 WL 1750762 (E.D.N.C. May 6, 2011).

A number of state courts have also concluded Padilla created a new rule that is not to be applied retroactively. State v. Alshaif, __ S.E.2d __, 2012 WL 540740 (N.C.App. 2012); Hernandez v. State, 61 So.3d 1144 (Fla.App. 3 Dist., 2011); Barrios-Cruz v. State, 63 So.3d 868 (Fla.App. 2 Dist., 2011); Gomez v. State, 2011 WL 1797305 (Tenn.Crim.App. 2011); State v. Poblete, 227 Ariz. 537, 260 P.3d 1102 (Ariz.App. Div. 2, 2011); State v. Gaitan, 209 N.J. 339, 37 A.3d 1089 (2012); People v. Kabre, 29 Misc.3d 307, 905 N.Y.S.2d 887 (N.Y. 2010); People v. Gomez, __ N.W.2d __, 2012 WL 468248 (Mich.App. 2012); Perez v. State, 807 N.W.2d 157, 2011 WL 3925682 (Iowa App., 2011) (unpublished table decision); People v. Ramirez, 35 Misc.3d 1208(A), 2012 WL 1193762 (Table) (N.Y.Sup. 2012); People v. Lorente, 34 Misc.3d 1225(A), 2012 WL 470456 (N.Y.Sup. 2012) (unpublished table decision); State v. Barrios, 2010 WL 5071177 (N.J.Super.A.D. Dec. 14, 2010) (unpublished opinion).

Padilla should not be applied retroactively because its holding, while a new rule, is not a watershed rule. See Talley v. State, 371 S.C. 535, 640 S.E.2d 878 (2007). “[A]lthough the Supreme Court did not overturn any precedent it had established, it did, for the first time, expand the Sixth Amendment right to counsel to cover the immigration implications of a criminal conviction by rejecting several lower courts’ method of evaluating the issue.” Dennis v. U.S., 787 F.Supp.2d 425, 429 (D.S.C. 2011). While the Supreme Court had never previously *foreclosed* the application of Strickland to collateral consequences of a conviction, it also had never *applied* Strickland to them. In other words, the Court was indicating that because it had never ruled on the issue one way or the other, it was completely free to go either way. Accordingly, neither of the Teague exceptions apply to justify the retroactive application of the new rule announced in Padilla.

In an attempt to avoid the weight of case law finding Padilla is not retroactive, Applicant attempts to argue that regardless of whether Padilla would be found retroactive under Teague, this Court should apply Padilla retroactively based on Talley and S.C. Code § 17-27-45(B). In Talley, the South Carolina Supreme Court reviewed the issue of whether Alabama v. Shelton, 535 U.S. 654 (2002) (finding the constitutional right to counsel extends to a defendant who receives a suspended sentence with the potential to result in actual deprivation of the defendant's liberty) should be applied retroactively for collateral review of a conviction. The Supreme Court concluded Shelton was a watershed rule of criminal procedure under the Teague analysis and therefore the PCR court correctly applied section 17-27-45(B) as the applicable statute of limitations to find the application was timely filed because it was filed within one year of the decision in Shelton. Talley, 371 S.C. at 544, 640 S.E.2d at 882.

Applicant argues that Talley provides this Court with a vehicle to apply Padilla retroactively even if it is not a watershed rule pursuant to Teague analysis. However, in beginning its analysis under Teague, the Talley court noted: "In determining whether Respondent was deprived of his federal constitutional right to counsel, we are required to follow the United States Supreme Court's decisions on retroactivity." Talley, 371 S.C. at 541, 640 S.E.2d at 880. Accordingly, the Talley court found section 17-27-45(B) applicable only after determining Shelton announced a new watershed rule of criminal procedure. Talley is inapplicable to the instant case because as discussed above, Padilla did not announce a new watershed rule of criminal procedure and should not be applied retroactively.

Further, even if Padilla was to be retroactively applied under 17-27-45(B), the application was not timely because Padilla was decided and announced on March 31, 2010 and the instant application was filed on April 14, 2011.

Additionally, Respondent would reassert all previous arguments raised by Respondent at the hearing in support of dismissal and denial of the application, including but not limited to the grounds of laches and the basis that Applicant has not met her burden of proving counsel was ineffective.

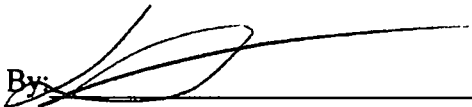
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By: 
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June 6, 2012

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	
	)	
	)	2011-CP-18-0778
	)	
KEN LUCERO,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

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

Eleanor Duffy Cleary, Esquire
Law Office of Eleanor Duffy Cleary
1720 Main Street, Ste. 303
Columbia, SC 29201

DATED this 6th day of June, 2012.

Lauren Meara
 Lauren Meara, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	
	)	
Ken Lucero,	)	
	)	
Applicant,	)	SUPPLEMENTAL MEMORANDUM
	)	IN SUPPORT OF POST-CONVICTION
v.	)	RELIEF APPLICATION
	)	
State of South Carolina,	)	2011-CP-18-0778
	)	
Respondent.	)	
	)	

STATEMENT OF THE FACTS

Applicant Ken Lorena Lucero, 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 minor children who are citizens by birth. She works as a cleaning attendant in New York.

She returned to the United States after a visit to Ecuador on April 16, 2008. On or about January 10, 2010, she received a notice to appear before the Immigration Board, charged with removability under immigration law. Under federal law, an alien who is convicted of a crime for which a sentence of one year or longer may be imposed is deportable. 8 U.S.C.A. § 1227 (a)(2)(A)(i)(II). On November 18, 2002, Lucero pled guilty to possession of heroin and was sentenced to two years in prison (suspended with three years of probation) in Dorchester County Court of General Sessions.

On March 31, 2010, the United States Supreme Court ruled in *Padilla v. Kentucky*, 130 S.Ct. 1473, 176 L.Ed. 2d 284 (2010). In that case, the United States Supreme Court held that counsel must advise a criminal client regarding the risk of deportation.

ARGUMENTS

I. PLEA COUNSEL WAS INEFFECTIVE FOR FAILING TO ADVISE APPLICANT THAT IF SHE PLED GUILTY TO POSSESSION OF HEROIN, SHE WOULD BE SUBJECT TO DEPORTATION.

As noted above, Lucero pled guilty in November 2002 to possession of heroin. That offense was proscribed by S.C. Code Ann. § 44-53-370 (d)(1) (2002), which read, in pertinent part:

d) A person who violates subsection (c) with respect to:
 (1) a controlled substance classified in Schedule I (b) and (c) which is a narcotic drug or lysergic acid diethylamide (LSD) and in Schedule II which is a narcotic drug is guilty of a misdemeanor and, upon conviction, must be imprisoned not more than two years or fined not more than five thousand dollars, or both. ...

Since 1996, a conviction for a crime “for which a sentence of one year or longer may be imposed,” has been cause for deportation. Pub. L. 104-132, Sec. 435 (a) (1996). Furthermore, federal immigration law has long provided that a conviction for controlled substance violations is deportable. 8 USC § 1227(a)(2)(B)(i). Therefore, when Lucero pled guilty in 2002 to a controlled substance offense carrying two years in prison, there was a succinct, clear, and explicit statute providing for her deportation for two different reasons.

In *Padilla*, the Supreme Court noted that when Padilla pled guilty to transportation of marijuana in a Kentucky state court, the law providing for deportation after such a conviction was “succinct, clear, and explicit in defining the removal consequences for Padilla’s conviction.” 130 S.Ct. at 1483, 176 L.Ed. 2d at

295. The Court held that Padilla's counsel "could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses." *Id.*

Similarly, the subsections of the same statute that allows Lucero to be deported for conviction of a crime carrying more than one year in prison was equally accessible to Lucero's counsel. In addition, she is deportable under the same statute Padilla was. However, her plea counsel did not advise Lucero that she would be subject to removal if she were convicted.

The Supreme Court refused to limit its holding to cases where counsel gives affirmative misadvice, stating "there is no relevant difference between an act of omission and an act of commission in this context." *Padilla*, 130 S.Ct. at 1484.

As in *Padilla*, Lucero has satisfied the first prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 674 (1984). Under *Strickland*, the Court first determines whether counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688. The Supreme Court explained in *Padilla* that "preserving the client's right to remain in the United States may be more important to the client than any jail sentence." *Padilla*, 130 S.Ct. at 1483. For the reasons stated above, Lucero's plea counsel was ineffective for failing to advise her she would be subject to deportation if she pled guilty to possession of heroin.

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.” *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *Kolle v. State*, 386 S.C. 578, 589, 690 S.E.2d 73 (2010).

At the hearing, Applicant will show that there is a reasonable probability that, but for counsel's errors, she would not have pled guilty, but would have insisted on going to trial. *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

If Lucero had been advised of the harsh consequences of her plea, she could have insisted on a trial or asked her counsel to pursue alternative punishment. In *Padilla*, the Supreme Court stated that “counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation.” *Padilla*, 130 S.Ct. at 1486. In this case, it appears that such alternatives were not investigated, even though deportation is a “particularly severe penalty.” *Padilla*, 130 S.Ct. at 1481. Clearly, Lucero would have wanted to avoid deportation from the United States where, at the time of her plea, she had lived for almost ten years, and where she had given birth to her two children.

II. APPLICANT'S PETITION FOR POST-CONVICTION RELIEF COMPLIES WITH THE STATUTE OF LIMITATIONS BECAUSE THE SUPREME COURT'S DECISION IN *PADILLA V. KENTUCKY* IS A WATERSHED RULE OF CRIMINAL PROCEEDING THAT APPLIES RETROACTIVELY TO APPLICANT.

Applicant filed and served her application not later than one year after the United States Supreme Court issued the mandate in the case of *Padilla v. Kentucky* on May 3, 2010.

South Carolina Code Section 17-27-45(B) provides:

[w]hen a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

S.C. Code Ann. § 17-27-45(B) (Supp. 2010).

In *Talley v. State*, 371 S.C. 535, 543-44, 640 S.E.2d 878, 882 (2007), the South Carolina Supreme Court determined that *Alabama v. Shelton*, 535 U.S. 654, 122 S. Ct. 1764 (2002), applied retroactively on collateral review and that S.C. Code Ann. § 17-27-45 (B) provided the applicable statute of limitations. In *Shelton*, the United States Supreme Court held the constitutional right to counsel extends to a defendant who receives a sentence that may result in incarceration. The Court reasoned that *Shelton* extended a new rule for the purposes of collateral review

because it pronounced a rule that was not in existence when the petitioner was convicted. Similarly, this Court should hold that *Padilla v. Kentucky* extended the *Strickland v. Washington* rule to cases where the applicant was not made aware of immigration consequences.

The Court noted that new rules are applied retroactively on collateral review “unless the new rule falls within one of two exceptions to the general rule.” *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989). The second exception is applicable here and applies when the rule “requires the observance of those procedures that ... are implicit in the concept of ordered liberty.” *Id.* at 311, 109 S.Ct. at 1076, 103 L.Ed.2d at 356 (internal quotations omitted). The second exception is “reserved for watershed rules of criminal procedure” that implicate the fundamental fairness and accuracy of the proceeding. *Id.* The Court in *Talley* concluded that the new rule “announced by *Shelton* was a watershed rule of criminal proceeding because the right to counsel undeniably implicates the fundamental fairness and accuracy of the proceeding.” 371 S.C. at 544, 640 S.E.2d at 882.

In so deciding, the South Carolina Supreme Court noted that the United States Supreme Court “has applied each extension of the constitutional right to counsel retroactively to collateral proceedings.” *Id.* The Court’s decision in *Padilla* is similarly a watershed rule of criminal proceeding because it involves the right to effective assistance of counsel and therefore implicates the fundamental fairness of Applicant’s guilty plea. *Talley v. State*, 371 S.C. 535, 543-44, 640 S.E.2d 878, 882

(2007). The right to effective counsel on a matter with such drastic consequences is also fundamental to the fairness and accuracy of petitioner's guilty plea.

As Justice Alito noted in his dissent in *Padilla*, the majority's decision dramatically expanded the scope of criminal defense counsel's duties by holding that omissions of advice about collateral consequences, such as deportation, can constitute ineffective assistance of counsel. 130 S. Ct. at 1492-1493.

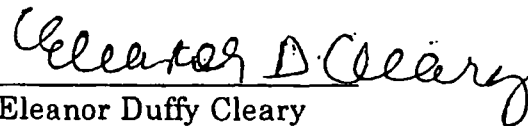
South Carolina courts have followed the previous rule that counsel does not have to advise his client about collateral consequences and that only affirmative erroneous advice can render a plea involuntary. See e.g. *State v. Williams*, 378 S.C. 511, 662 S.E.2d 615 (Ct. App. 2008); *Hinson v. State*, 297 S.C. 456, 377 S.E.2d 338 (1989); *Griffin v. Martin*, 278 S.C. 620, 300 S.E.2d 482 (1983).

Additional evidence of the intention of the United States Supreme Court to apply *Padilla* retroactively is found in the text of the opinion. The Court noted that it was unlikely that its decision would open a floodgate of attacks on guilty pleas. *Padilla*, 130 S. Ct. at 1485. The Court stated that it was "unlikely the decision would have a significant effect on those convictions already obtained as a result of plea bargains." The Court noted that a large number of previously obtained guilty pleas would not be challenged because it is often unwise to lose the benefit of the bargain obtained from a plea. *Id.* at 1485. This discussion of the effect of the decision on convictions obtained prior to the issuance of the decision would be rendered meaningless if the Court intended the decision to only apply prospectively.

CONCLUSION

Based on the foregoing, Applicant submits that she is entitled to a hearing on the issue of whether her guilty plea was rendered involuntary under *Padilla v. Kentucky* because her counsel did not advise her that her conviction would result in her deportation to Ecuador.

Respectfully submitted,



Eleanor Duffy Cleary
1720 Main St., Suite 303
Columbia, SC 29201
(803) 376-0075

Attorney for Applicant

Columbia, South Carolina
August 24, 2011

STATE OF SOUTH CAROLINA	)	
COUNTY OF DORCHESTER	)	IN THE COURT OF COMMON PLEAS
	)	
KEN LUCERO	)	
Applicant,	)	
	)	
v.	)	
	)	
STATE OF SOUTH CAROLINA	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I certify that a true copy of the Supplemental Memorandum in Support of Post-Conviction Relief in this case has been served on Robert D. Corney, Staff Attorney, SC Office of the Attorney General, PO Box 11549, Columbia, SC 29211, and The Honorable Cheryl L. Graham, Dorchester County Clerk of Court, 5200 E. Jim Bilton Blvd., St. George, SC 29477, this 24th day of August, 2011.

Karen Dumas Elliott
 Karen Dumas Elliott
 Paralegal to Eleanor Duffy Cleary

FORM 4

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

JUDGMENT IN A CIVIL CASE
FILED - RECORD CASE NUMBER 2011CP1800778

2012 JUL 31 PM 4:44

Ken Lucero

CHERYL
CLERK
DORCHESTER

South Carolina State of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: David A. Spencer S.C. Attorney General's Ofc.
P.O. Box 11549 Columbia, SC 29211

Attorney for: ☐ Plaintiff ☒ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☒ See attached order; (formal order to follow)

☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk:

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

DeAndrea Benjamin
Circuit Court Judge

2161
Judge Code

7/31/2012
Date

For Clerk of Court Office Use Only

This judgment was entered on 7-31-2012, and a copy mailed first class or placed in the appropriate attorney's box on 7-31-2012, to attorneys of record or to parties (when appearing pro se) as follows:

Eleanor Duffy Cleary Attorney at Law 1720 Main Street,
Suite 303 Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

David A. Spencer S.C. Attorney General's Ofc. P.O. Box
11549 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Cheryl Graham
Cheryl Graham - Clerk of Court

Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Ken Lucero,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER
GRANTING
POST-CONVICTION RELIEF

2011-CP-18-0778

FILED - RECORD
2012 JUL 31 PM 4:46
CLERK OF COURT
DORCHESTER COUNTY

Hearing Date: May 22, 2012
Judge: The Honorable DeAndrea Gist Benjamin, Circuit Court Judge
Appearances: Eleanor Duffy Cleary for Applicant
Assistant Deputy Attorney General David Spencer for Respondent
Court Reporter: Hilda M. Jordan, P.O. Box 435, Lexington, SC 29071

I. STATEMENT OF THE CASE

This is a Post Conviction Relief (PCR) matter filed by Ken Lorena Lucero (Applicant), who is not incarcerated at this time. She 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, Applicant 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. On April 14, 2012, Applicant 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). 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.

Based on the pleadings, the court records, the evidence and arguments presented at the hearing on May 22, 2012, as well as the post-hearing briefs submitted by both parties, this Court finds that Applicant is entitled to post-conviction relief and her conviction for possession of heroin is hereby vacated.

II. EVIDENCE PRESENTED

Applicant, 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.

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.

Applicant 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.

At the time of her plea, she had lived in the United States for almost ten years and was married to a United States Marine. He was deployed when she was arrested. Her arrest arose from a traffic stop on Interstate 95 in Dorchester

County. She testified she did not understand the officer and did not give him permission to search the car she had rented in Orlando, Florida. Her two year old daughter was in the car with her. She showed the officer her rental car receipt and her valid driver's license.

According to her testimony, the officer showed her the heroin he found in the rear part of the car. She testified that she had never seen heroin before. According to the arrest warrant, a South Carolina highway patrolman stopped her for unspecified "routine traffic violation" and after searching the vehicle for an unspecified reason, he found the heroin. She was charged with trafficking between 100 and 200 grams, as proscribed by S.C. Code Ann. § 44-53-370 (e) (2) (c) (2002). The offense carried a mandatory term of imprisonment of not less than twenty-five years nor more than forty years.

Applicant testified that she had never used heroin and had never sold any drugs. To her knowledge, her friends in Orlando did not sell drugs and she was unaware the drugs were in the rental car.

She testified she pled guilty upon the advice of her appointed counsel, Hardee-Thomas. She testified that Hardee-Thomas told her she would get probation if she pled to possession of heroin and, therefore, would not lose her children. Applicant testified at the hearing that she was not given any information about immigration consequences by Hardee-Thomas.

On November 18, 2002, the Honorable Diane Schafer Goodstein, Circuit Court Judge, did impose a sentence of two years, suspended upon three years of probation. Applicant successfully completed probation early on August 5, 2004.

Applicant introduced letters and orders from the U.S. Department of Justice, Immigration and Naturalization Service, and the Board of Immigration Review showing that she was being deported solely because she was convicted of possession of heroin in South Carolina.

In February 2011, an immigration judge ordered Applicant removed to Ecuador. Her lawyer in New York, Lloyd Munjack, filed an appeal to the Board of Immigration Appeals. On March 22, 2012, the Board denied her appeal because her PCR was still pending and notified her that she would be removed.

In March of 2011, Applicant met with her current counsel, who filed the PCR application by placing it in the United States mail on March 31, 2011. The Dorchester Clerk of Court's office did not mark it as filed until April 14, 2011.

Applicant testified that she would never have pled guilty if she had known she would be deported because the United States is her home and the home of her two children, who are American citizens. She testified she would have fought the charges because the heroin was not hers.

Hardee-Thomaa, a former attorney, who was appointed to represent Applicant, testified at the hearing. She recalled her name but did not remember details of the case because of the amount of time that had passed. She testified that she might have told her clients that they faced deportation. She was unable to

testify as to the immigration consequences of a legal alien pleading guilty to a controlled substance offense and was unable to distinguish between immigration consequences for illegal immigrants and legal resident aliens. She did not remember if Judge Goodstein advised Applicant she would be deported if she pled guilty to a controlled substance violation but stated that she was thorough with her pleas. Applicant asked this Court to take judicial notice of the fact that the standard plea colloquy did not contain any questions about immigration consequences in 2002.

III. LEGAL ANALYSIS AND FACTUAL FINDINGS

A. Statute of Limitations under Section 17-27-45 (B)

Even though Applicant filed her application eight years after her conviction, this Court finds that Applicant's claim falls within an exception to the one-year statute of limitations.

South Carolina Code Section 17-27-45 (B) provides:

[w]hen a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

S.C. Code Ann. § 17-27-45(B) (Supp. 2010).

This Court finds that prior to *Padilla, supra*, South Carolina followed the rule that counsel does not have to advise her client about collateral consequences and that only affirmative erroneous advice renders a plea involuntary.

As a matter of South Carolina state law, *Padilla* imposes a substantive standard not previously recognized or a right not in existence at the time of Applicant's trial, namely the right to effective counsel regarding advice about immigration consequences, and that it was intended to be applied retroactively.

Only one appellate case has addressed the application of Section 17-27-45 (B). In *Talley v. State*, 371 S.C. 535, 543-44, 640 S.E.2d 878, 882 (2007), the South Carolina Supreme Court determined that *Alabama v. Shelton*, 535 U.S. 654, 122 S.Ct. 1764 (2002), applied retroactively on collateral review and that S.C. Code Ann. § 17-27-45 (B) provided the applicable statute of limitations. In *Shelton*, the United States Supreme Court held the constitutional right to counsel extends to a defendant who receives a sentence that may result in incarceration. The *Talley* Court reasoned that *Shelton* extended a new rule for the purposes of collateral review because it pronounced a rule that was not in existence when the petitioner was convicted. Similarly, this Court finds that *Padilla* extended a new rule to cases where the applicant was not made aware of immigration consequences.

In *Talley*, decided in 2007, the South Carolina Supreme Court stated "[i]n determining whether Respondent was deprived of his federal constitutional right to counsel, we are required to follow the United States Supreme Court's decisions on retroactivity," citing *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989). *Talley*,

371 S.C. at 541, 640 S.E.2d at 880. Essentially, *Teague* held that a case that announces a "new rule" – when it breaks new ground or imposes a new obligation on the States or the Federal Government. "To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301, 109 S.Ct. 1060. Under *Teague*, new rules are not to be applied to convictions that have already been finalized unless narrow exceptions apply.

The year after *Talley*, the United States Supreme Court clarified that the *Teague* rule does not prevent the states from applying "new rules" to cases finalized before the new rule was issued. *Danforth v. Minnesota*, 552 U.S. 264, 128 S.Ct. 1029 (2008). In that case concerning state review of a Minnesota conviction, the Court stated that neither "*Teague* (or any of the other cases relied upon by respondent and the Minnesota Supreme Court) speak to the entirely separate question whether States can provide remedies for violations of these rights in their own post conviction proceedings." *Danforth*, 552 U.S. at 275, 128 S. Ct. at 1038.

The Supreme Court in *Danforth* could not make it any clearer that the *Teague* rule "was intended to limit the authority of federal courts to overturn state convictions—not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions." *Danforth*, 552 U.S. at 280-81, 128 S. Ct. at 1041 (emphasis added).

Therefore, *Teague* is not controlling on the issue of whether this Court should apply *Padilla* retroactively to Applicant's state conviction in this state post-conviction relief action.¹

Even in *Talley*, decided before *Danforth*, the South Carolina Supreme Court used *Teague*'s analysis but then applied it more broadly than the United States Supreme Court ever has. The *Talley* Court held that the "new rule" in *Shelton* came within *Teague*'s "watershed" exception "because the right to counsel undeniably implicates the fundamental fairness and accuracy of the proceeding." *Talley*, 371 S.C. at 544, 640 S.E.2d at 882.

In contrast, the United States Supreme Court has "yet to find a new rule that falls under this [watershed] exception. In providing guidance as to what might do so, the Court has repeatedly, and only, referred to the right-to-counsel rule of *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799." *Beard v. Banks*, 542 U.S. 406, 407, 124 S. Ct. 2504, 2507, 159 L. Ed. 2d 494 (2004).

Therefore, contrary to the State's assertions, *Teague* is not controlling in this case. Instead, this Court must determine if the holding in *Padilla* imposed "a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively." S.C. Code Ann. § 17-27-45 (B) (Supp. 2011). The State asserts that the Supreme Court held for the first time in *Padilla* that criminal defense attorneys

¹ The United States Supreme Court has granted certiorari and is set to decide if *Padilla* applies retroactively to cases on federal habeas review. See *Chaidez v. United States*, 655 F.3d 864 (7th Cir. 2011), in which certiorari was granted on April 30, 2012 to resolve a conflict among federal circuits. <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-820.htm>

render deficient performance when they fail to advise noncitizen clients about deportation consequences. This Court agrees that *Padilla* provided the "new" right to effective assistance of counsel regarding advice about immigration consequences. That is precisely why section 17-27-45 (B) puts Applicant's claim within the statute of limitations.

In fact, if the state courts were required to apply *Teague*, then Section 17-27-45 (B) would be rendered meaningless. Under our State 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." It would be illogical that our law would allow the filing of a late application after a "new rule" only to then proclaim it cannot apply a "new rule" retroactively because of *Teague*.

Padilla imposed a substantive standard not previously recognized in 2002 under South Carolina precedent when Applicant pled guilty. Causing much upheaval, the Court held that effective counsel must inform clients who are legal aliens of the severe immigration consequences of convictions for almost any drug offense, which have been in effect since at least 1996. *Padilla* implicates the right to effective counsel, which arises from *Gideon*, and effective counsel implicates the fundamental fairness and accuracy of the proceeding. It is fundamentally unfair when a person pleads to an offense without knowledge of the severe consequences.

This Court finds that *Padilla* was also "intended to be applied retroactively." S.C. Code Ann. §17-27-45 (B). The language of *Padilla* signals that it was intended to be applied retroactively. Significantly, the Court implicitly recognized *Padilla* would be applied retroactively when it noted that it was unlikely that its decision would open a floodgate of attacks on guilty pleas. *Padilla*, 130 S. Ct. at 1485. The Court stated that it was "unlikely the decision would have a significant effect on those convictions already obtained as a result of plea bargains" because a large number of previously obtained guilty pleas would not be challenged because it is often unwise to lose the benefit of the bargain obtained from a plea. *Id.* at 1485. This discussion of the effect of the decision on convictions obtained prior to the issuance of the decision would be rendered meaningless if the Court intended the decision to only apply prospectively.

As Justice Alito noted in his dissent in *Padilla*, the majority's decision dramatically expanded the scope of criminal defense counsel's duties by holding that omissions of advice about collateral consequences, such as deportation, can constitute ineffective assistance of counsel. *Id.* at 1492-1493. South Carolina courts have followed the previous rule that counsel does not have to advise his client about collateral consequences and that only affirmative erroneous advice can render a plea involuntary. See e.g. *State v. Williams*, 378 S.C. 511, 662 S.E.2d 615 (Ct. App. 2008); *Hinson v. State*, 297 S.C. 456, 377 S.E.2d 338 (1989); *Griffin v. Martin*, 278 S.C. 620, 300 S.E.2d 482 (1983).

Other state courts have addressed the issue of whether *Padilla* should apply to state collateral review. These states have interpreted the issue in the context of their own rules of collateral review. Nonetheless, the arguments are persuasive.

The Supreme Court of Massachusetts voluntarily applied a *Teague* analysis and concluded that *Padilla* is to be applied retroactively on collateral review of guilty pleas obtained after the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. No. 104-208, 110 Stat. 3009-546 (eff. April 1, 1997). The Court reasoned that *Padilla* recognized after that law was enacted, "if a noncitizen has committed a removable offense . . . his removal is practically inevitable." *Com. v. Clarke*, 460 Mass. 30, 41, 949 N.E.2d 892, 902 (2011). Pennsylvania has also applied *Padilla* to convictions finalized after the effective date of the 1996 changes to the immigration laws. *Denisyuk v. State*, 422 Md. 462, 482 (2011).

The Massachusetts, Texas, and Pennsylvania Courts held that *Padilla* applied retroactively because it did not impose a "new rule" as defined by *Teague* but instead it imposed *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), on immigration consequences that became obvious after enactment of the law cited above. *Ex parte De Los Reyes*, 350 S.W.3d 723, 731-32 (Tex. App. 2011).

Padilla imposed existing precedent in a novel context – that is, the fact of inevitable deportation must be conveyed to noncitizen defendants when the consequences are clear, as they were after 1997. In other words, *Padilla* imposed "a substantive standard not previously recognized or a right not in existence at the

time of the state court trial," as required by S. C. Code Ann. § 17-27-45 (B). To demonstrate, if Applicant had raised this issue in a post conviction relief application within one year after her conviction in 2002, it would have been denied pursuant to South Carolina's rule that counsel does not have to advise clients about "collateral consequences." *Hinson, supra; Griffin, supra.*

In addition, retroactive application of the rule in *Padilla* would not be far-reaching and adverse to the administration of justice. Under the statute of limitations, applications filed after May 3, 2011 would be time-barred.

In summary, South Carolina courts may, and have, extended the protections of due process, and its concept of fundamental fairness, beyond what is required by the United States Supreme Court. *See e.g. Talley, supra.* This is one of those situations where South Carolina's concept of justice demands that Applicant be given the opportunity to face such serious consequences with the *effective* assistance of counsel.

Finally, this Court finds that Applicant's petition for PCR was filed within one year of the United States Supreme Court's mandate in the *Padilla* case being issued and that statute of limitations does not bar Applicant's PCR application since a decision of the Supreme Court is not binding until the petition for rehearing expires.

As noted above, the application was clocked in as filed in the Dorchester Clerk of Court's office on April 14, 2011; two weeks after Applicant's counsel mailed the application. *Padilla* was decided on March 31, 2010, but the mandate was

issued on May 3, 2010.² According to Rule 45.2 of the United States Supreme Court:

[i]n a case on review from a state court, the mandate issues 25 days after entry of the judgment, unless the Court or a Justice shortens or extends the time, or unless the parties stipulate that it issue sooner. The filing of a petition for rehearing stays the mandate until disposition of the petition, unless the Court orders otherwise. If the petition is denied, the mandate issues forthwith.

This is analogous to the state court's issuing of the remittitur under Rule 221, SCACR. Under S.C. Code Ann. §17-27-45 (A), "[a]n application for relief filed pursuant to this chapter must be filed within one year after the entry of judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal of the filing of the final decision upon an appeal, whichever is later." As in state court, a decision of the Supreme Court is not binding until the petition for rehearing expires. Therefore, because Applicant filed her petition within one year of the Supreme Court's mandate, it complies with the statute of limitation in S.C. Code Ann. § 17-27-45 (B).

In conclusion, under South Carolina law, *Padilla's* pronouncements concerning the right to effective assistance of counsel with regard to advice about deportation applies to Applicant's claim.

² See <http://www.supremecourt.gov/search.aspx?filename=/docketfiles/08-661.htm>.
Page 13 of 20

B. The Merits of the Application for Post-Conviction Relief
 1. Ineffective Assistance of Counsel

Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 674 (1984), the Court first determines whether counsel's representation "fell below an objective standard of reasonableness." This Court finds Applicant's plea counsel was ineffective for failing to advise her she would be subject to deportation if she pled guilty to possession of heroin.

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." *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *Kolle v. State*, 386 S.C. 578, 589, 690 S.E.2d 73 (2010).

The Supreme Court explained in *Padilla* that "preserving the client's right to remain in the United States may be more important to the client than any jail sentence." *Padilla*, 130 S.Ct. at 1483. The Supreme Court noted that when Padilla pled guilty to transportation of marijuana in a Kentucky state court, the law providing for deportation after such a conviction was "succinct, clear, and explicit in defining the removal consequences for Padilla's conviction." *Id.* at 1483. The Court held that Padilla's counsel "could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses." *Id.*

As noted above, Applicant pled guilty in November 2002 to possession of heroin under S.C. Code Ann. § 44-53-370 (d) (1) (2002). When Applicant pled guilty in 2002 to a controlled substance offense carrying two years in prison, there was a succinct, clear, and explicit federal statute providing for her deportation. For a resident alien who pleads guilty to a controlled substance offense, deportation is "presumptively mandatory." *Padilla*, 130 S.Ct. at 1480.

Under federal law, an alien who is convicted of a crime for which a sentence of one year or longer may be imposed is deportable. 8 U.S.C.A. § 1227 (a)(2)(A)(i)(II). Furthermore, federal immigration law has long provided that a conviction for controlled substance violations is deportable. 8 USC § 1227(a)(2)(B)(i).

If a noncitizen has committed a removable offense after 1996, removal is "practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses. See 8 U.S.C. § 1229b. Subject to limited exceptions, this discretionary relief is not available for an offense related to a controlled substance. See § 1101(a)(43)(B); § 1228. *Padilla*, 130 S.Ct. at 1480.

Applicant is deportable under the same statute *Padilla* was. However, this Court finds that Applicant's plea counsel did not advise her that she would her removal would be presumptively mandatory after such a plea.

As in *Padilla*, Applicant has satisfied the first prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 674 (1984). Under *Strickland*,

the Court first determines whether counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Plea counsel's testimony at the PCR hearing showed that she did not understand immigration law. Therefore, this Court finds that she did not tell Applicant that deportation was inevitable, as required by *Padilla*. Even if she told her there may be immigration consequences, such information would not be sufficient under *Padilla*. The United States Supreme Court made clear that given the near certainty that Padilla would be deported, the admonishment that the plea "may" result in deportation was not sufficient to alleviate the prejudice arising from counsel's failure to advise Appellant of the plea's immigration consequences. The Court stated:

When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice ALITO), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Padilla, 130 S.Ct. at 1483.

Applicant testified credibly at the hearing that she was never advised of any immigration consequences. In light of the fact that there were very few non-citizens in South Carolina in 2002, her testimony is convincing. This Court takes judicial notice of the readily verifiable fact that less than 1.3 percent of Dorchester County residents were non-citizens in 2000 and that number had only increased to 1.9 in 2010.³

³ U.S. Census Bureau, Fact Finder, Place of Birth by Citizenship Status, Dorchester County, South Carolina.

In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing is considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. *Stalk v. State*, 375 S.C. 289, 298-99, 652 S.E.2d 402, 406-07 (Ct. App. 2007) aff'd as modified, 383 S.C. 559, 681 S.E.2d 592 (2009); *Wolfe v. State*, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997). In this case, the transcripts no longer exist; however, this Court takes judicial notice of the fact that in 2002 circuit court judges in this State did not advise defendants that deportation was practically inevitable after a conviction for a drug related offense.

2. Prejudice

The applicant is required to show that there is a reasonable probability that, but for counsel's errors, she would not have pled guilty, but would have insisted on going to trial. *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009), *Thompson v. State*, 340 S.C. 112, 117, 531 S.E.2d 294, 297 (2000).

This Court finds that Applicant demonstrated that there is a reasonable probability that, but for counsel's errors, she would not have pled guilty, but would have insisted on going to trial.

This Court finds that Applicant had meritorious defenses to the charges against her. If Applicant had been advised of the harsh consequences of her plea, she could have insisted on a trial or asked her counsel to pursue alternative punishment. Applicant testified that she would have fought the charges. Even though she was facing a lengthy jail sentence if convicted, the prospect of

deportation is more severe than jail, as the *Padilla* court made so clear. Clearly, Applicant would have wanted to avoid deportation from the United States where, at the time of her plea, she had lived for almost ten years, and which was the only home her American children had ever known. Deportation would separate her from her children, who are not Ecuadorian citizens, and as she testified, keeping her children was justifiably her main concern.

In addition, the warrant shows that there were grounds to fight the charges. There is no evidence that the officer had probable cause to search the car for drugs pursuant to a routine traffic violation. Even under the rule in 2002 in *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860 (1981), an officer must first arrest the person before searching the vehicle. A routine traffic violation does not lead to an arrest. Furthermore, any consent to search could have been challenged as invalid because of her inability to understand English.

C. Laches

This Court finds that the doctrine of laches does not bar Applicant's claim given the facts of this case since the severe consequences of Applicant being deported outweigh any prejudice caused to the state by trying this case.

At the hearing, the State raised the defense of laches. Laches is "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to

the other party." *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002), citing *Hallums v. Hallums*, 296 S.C. 195, 198-199, 371 S.E.2d 525, 527 (1988).

While it is true that memories have faded since 2002, as noted above it is clear that Hardee-Thomas did not tell Applicant that her deportation would be inevitable if she pled guilty to a controlled substance violation. Therefore, the prejudice to the state is not outweighed to the extremely severe consequences Applicant will face if her conviction is not vacated.

The transcript has been destroyed. However, this Court takes judicial notice of the fact that plea judges do not discuss immigration consequences in their plea colloquy and it is a near certainty that in 2002 even the most thorough of judges -- like Judge Goodstein -- would not have told Applicant to expect to be deported.

Applicant sought relief as soon as practical. The federal government did not commence deportation proceedings until 2010. *Padilla* did not provide its glimmer of hope of relief until the Spring of 2010. Applicant lives in New York and had to gather the time and resources to retain South Carolina counsel willing to attack her conviction, which she did in March of 2011.

IV. CONCLUSION

This Court finds by a preponderance of evidence that the applicant has met her burden of proof in demonstrating that her plea lawyer was ineffective for failing to advise her that deportation was nearly inevitable if she pled guilty to a drug-related offense, under *Padilla v. Kentucky*, *supra*, and that there is a reasonable

probability that if Applicant had been so advised she would not have pleaded guilty but would have insisted on going to trial.

This Court further finds that, as a matter of South Carolina law, *Padilla* imposed a substantive standard not previously recognized or a right not in existence at the time of Applicant's trial, and that it was intended to be applied retroactively, pursuant to Section 17-27-45 (B) of the South Carolina Code of Laws.

This Court further finds that the action is not barred by the doctrine of laches.

Therefore, Applicant's conviction for possession of heroin under indictment number 2002-GS-18-0689 is hereby vacated.

AND IT IS SO ORDERED.



The Honorable DeAndrea Gist Benjamin
Circuit Court Judge

Columbia, South Carolina

7-25, 2012



State of South Carolina
The Circuit Court of the Fifth Judicial Circuit

DeAndrea Gist Benjamin
 Judge

Post Office Box 192
 1701 Main Street, Room 215
 Columbia, SC 29202
 Phone: (803) 576-1770
 Fax: (803) 576-1772
 dbenjamin@sccourts.org

July 26, 2012

The Honorable Cheryl L. Graham
 Dorchester County Clerk of Court
 5200 E Jim Bilton Blvd
 St. George, SC 29477-8020

FILED - RECORDED
 JUL 30 PM 3:16
 CHERYL L. GRAHAM
 CLERK OF COURT
 DORCHESTER COUNTY

Dear Ms. Graham,

Please find enclosed a copy of a signed order by Judge Benjamin, *Granting Post-Conviction Relief* case number 2011CP180778.

Please file this order with your office and return clocked copies to our office in the enclosed envelope.

If you have any questions, comments, or concerns please contact our office as soon as possible.

With Warmest Regards,

Jerrell Kirk-James

Jerrell Kirk-James
 Administrative Assistant for
 The Honorable DeAndrea Gist Benjamin
 Richland County Judicial Center
 1701 Main Street, Suite 215
 Columbia, SC 29201
 Phone: 803-576-1746
 Fax: 803-576-1777
www.sccourts.org
dbenjamin@sccourts.org

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. NO. 2011-CP-18-0778
COUNTY OF DORCHESTER	)	
	)	
Ken Lucero,	)	
	)	
Applicant,	)	STATE'S NOTICE OF MOTION
	)	AND MOTION TO ALTER
VS.	)	OR AMEND JUDGMENT PURSUANT
	)	TO RULE 59(E), SCRPC
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

Respondent now moves pursuant to Rule 59(E) and Rule 60, SCRPC, and all other applicable rules to alter or amend the judgement.

This matter is before this Court by way of an application for post-conviction relief (PCR). A hearing into the matter was convened at the Orangeburg County Courthouse on May 22, 2012. Following the hearing, this Court issued an order granting post-conviction relief by order dated July 25, 2012, which was filed with the Clerk of Court on July 31, 2012. The Clerk's cover sheet indicates that the order was mailed to both parties on July 31, 2012. However, undersigned counsel did not receive notice of the order until undersigned counsel inquired of the status of the order with opposing counsel on August 22, 2012. Opposing counsel sent the order by e-mail attachment the same day. Review of the applicable legal assistants' mail logs fails to indicate that the order was received by the Office of the Attorney General prior to August 22.

In making this motion, Respondent reserves and incorporates all previous arguments and authority presented to this Court and contends that the application should have been denied on the

basis of the statute of limitations, the defense of laches, and the failure of Applicant to meet her burden of proof. Respondent would reassert all arguments, including, but not limited to arguments concerning the retroactive application of Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

The Respondent would submit that the judgment should be altered or amended based on the following:

(1) The order declares the conviction to be “vacated”. (Respondent objected to the order on this basis by e-mail dated July 2, 2012). Respondent submits that the proper relief where a plea is found involuntary is that the conviction and sentence is reversed and remanded. Respondent State reserves the right to prosecute Applicant for the original trafficking offense under indictment 2002-GS-18-689. Accordingly, the order should be altered or amended to correct the erroneous language.

(2) Respondent objects to the following language on page 17 of the order: “In this case, the transcript no longer exists: however, this Court takes judicial notice of the fact that in 2002 circuit court judges in this State did not advise defendants that deportation was practically inevitable after a conviction for a drug related offense.” Respondent also objects to the following language on page 19 of the order: “However, this Court takes judicial notice of the fact that plea judges do not discuss immigration consequences in their plea colloquy and it is a near certainty that in 2002 even the most thorough of judges – like Judge Goodstein – would not have told Applicant to expect to be deported.”

In both instances, the judicial notice pursuant to Rule 201, SCRE is inappropriate. Under Rule 201(b), SCRE, a judicially noticed fact: “must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably

questioned.” In the instant case, it is quite feasible that Judge Goodstein would have addressed the deportation issue with Applicant. Applicant required the services of an interpreter, and would have had an interpreter at the guilty plea. This alone would have suggested to Judge Goodstein of the likelihood that Applicant was an alien and Judge Goodstein, always a thorough and conscientious plea judge, more than likely, but at least possibly, would have addressed the affect of the plea on immigration status. Accordingly, the language concerning judicial notice of plea court practices should be stricken from the order.

For the foregoing reasons, Respondent would request that the order be altered or amended.

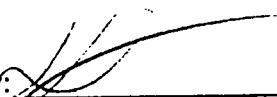
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

DAVID SPENCER
Assistant Deputy Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3727

August 24, 2012

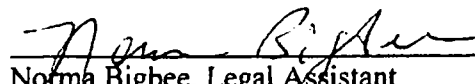
STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	
	)	
	)	2011-CP-18-0778
	)	
KEN LUCERO	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Notice of Motion And Motion to Alter Or Amend Judgment Pursuant To Rule 59(e), SCRCF** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Eleanor Duffy Cleary, Esquire
1720 Main St., Ste., 303
Columbia, SC 292021-2850

Judge DeAndrea G. Benjamin
P.O. Box 192
Columbia, SC 29202

DATED this 24th day of August, 2012.


 Norma Bigbee, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	
	)	
Ken Lucero,	)	
	)	
Applicant,	)	REPLY TO STATE'S NOTICE OF
	)	MOTION AND MOTION TO ALTER
v.	)	OR AMEND JUDGMENT PURSUANT
	)	TO RULE 59(E), SCRCF
State of South Carolina,	)	
	)	2011-CP-18-0778
Respondent.	)	
_____	)	

(e). Applicant responds to Respondent's motion to amend judgment pursuant to Rule 59

Regarding the issue of the proper term for the remedy, I believe that "vacate" is the proper relief. A vacation of a conviction does not mean the State cannot retry the defendant. In Chief Justice Toal's dissent in Yates v. Aiken, 301 S.C. 214, 223 (1989), which was a habeas (and thus post-conviction) case, she stated "I would, therefore, grant the petition for habeas corpus and vacate Yates' conviction, subject to the right of the State to retry Yates within a reasonable amount of time."

A conviction is only "reversed and remanded" by a superior court reviewing a lower court on direct appeal. The appellate court also remands the case with instructions for the lower court to take some action consistent with its opinion. Since this is collateral review, "vacation" is the correct term. The effect is to nullify the conviction but the arrest warrant, bond, and indictment remain in place.

It is not necessary to include language about retrial because it is manifest that the State can retry it when double jeopardy does not apply. However, if this Court deems it appropriate to change the wording, Applicant suggests this language:

"Therefore, Applicant's conviction for possession of heroin under indictment number 2002-GS-18-0689 is hereby vacated, subject to the right of the State to retry Applicant within a reasonable amount of time."

In regards to the judicial notice issue, Applicant submits that it is common knowledge that in 2002 no judge ever said anything about immigration consequences during a plea and judges certainly did not say "deportation was practically inevitable after a conviction for a drug related offense" as required by Padilla. If they had, many fewer aliens would have pled guilty. It is also readily verifiable, but also common knowledge, that South Carolina did not have a

significant immigrant population before 2002 and immigration consequences were simply not an issue.

Furthermore, the judges would not have had a reason to ask if the defendant understood his deportation was practically inevitable because the provision allowing deportation of legal aliens for older crimes was not vigorously enforced until recently. According to ICE's website, once ICE started using old convictions to deport legal aliens, the number of deportations for "criminal aliens" jumped from 71,686 in 2002 to 216,698 in 2011.

Applicant submits that this finding is appropriate for judicial notice. However, if this Court agrees with Respondent, Applicant would respectfully request this Court re-open the record to allow for the submission of affidavits and/or depositions to support these contentions that Applicant asserts are common knowledge.

Respectfully submitted,



ELEANOR DUFFY CLEARY

Attorney at Law

1720 Main Street, Suite 303

Columbia, South Carolina 29201

Phone: (803) 376-0075

ATTORNEY FOR THE APPLICANT

Columbia, South Carolina.
August 29, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	
	)	
Ken Lucero,	)	
	)	
Applicant,	)	
	)	
v.	)	CERTIFICATE OF SERVICE
	)	
State of South Carolina,	)	2011-CP-18-0778
	)	
Respondent.	)	
_____	)	

I, Karen Dumas Elliott, paralegal for the undersigned counsel, certifies that I served the Reply to State's Motion to Alter or Amend Judgment Pursuant to Rule 59(E), SCRCP 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 to said envelope on the 29th day of August 2012, to the following:

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

The Honorable DeAndrea G. Benjamin
PO Box 192
Columbia, SC 29202

Karen D. Elliott
Karen Dumas Elliott

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. NO. 2011-CP-18-0778
COUNTY OF DORCHESTER	)	
	)	
Ken Lucero,	)	
	)	
Applicant,	)	STATE'S RETURN
	)	TO APPLICANT'S RESPONSE
	)	TO STATE'S RULE 59(E) MOTION
VS.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

Respondent would reply to Applicant's Reply to State's Rule 59, SCRCF motion as follows:

- (1) The State would agree to the suggested language clarifying that the State remains able to retry the charges, except that the State would object to the language: "within a reasonable amount of time." The language is unnecessary, as to the extent available, Applicant would be able to seek remedies pursuant to the right to speedy trial, in the unlikely event it should become necessary.
- (2) Respondent would renew objection to the language of the order making judicial notice of facts that are in dispute. Further, based on Applicant's reply, advice to a defendant in 2002 that deportation is inevitable would not be accurate, as at the time, such convictions did not necessarily result in deportation. On the second page, Applicant explains: "... judges would not have had a reason to ask if the defendant understood his deportation was practically inevitable because the provision allowing deportation of legal aliens for older crimes was not vigorously enforced until recently." Note that Applicant did not receive notice of deportation until approximately eight years after her conviction. Therefore, the grant of PCR relief should be reversed. At a minimum, the language regarding judicial notice should be removed from the order.

Respondent reserves and incorporates all previous arguments and authority presented to this Court and contends that the application should have been denied on the basis of the statute of limitations, the defense of laches, and the failure of Applicant to meet her burden of proof. Respondent would reassert all arguments, including, but not limited to arguments concerning the retroactive application of Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

For the foregoing reasons, Respondent would request that the order be altered or amended. Further, Respondent would request that the order granting relief be reversed.

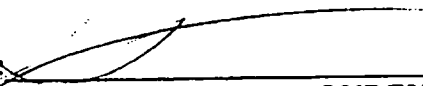
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

DAVID SPENCER
Assistant Deputy Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3727

September 4, 2012

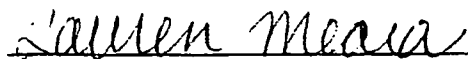
STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	
	)	
	)	2011-CP-18-0778
	)	
KEN LUCERO,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA.	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **State's Return to Applicant's Response to State's Rule 59(e) Motion** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

The Honorable DeAndrea G. Benjamin
Presiding Judge
Post Office Box 192
Columbia, SC 29202

Eleanor Duffy Cleary, Esquire
Law Office of Eleanor Duffy Cleary
1720 Main Street, Ste. 303
Columbia, SC 29201

DATED this 4th day of September, 2012.


 Lauren Meara, Legal Assistant
 For Respondent

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP1800778

RECORDED
2012 OCT -2 AM 10:42 ✓

Ken Lucero

South Carolina State of

CLERK OF COURT
DORCHESTER COUNTY

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☒ See attached order; (formal order to follow)

☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk:

Judgment In Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

DeAndrea Benjamin
Circuit Court Judge

2161
Judge Code

9-19-12
Date

For Clerk of Court Office Use Only

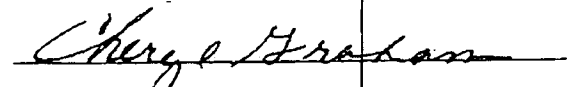
This judgment was entered on 10-2-2012, and a copy mailed first class or placed in the appropriate attorney's box on 10-2-2012, to attorneys of record or to parties (when appearing pro se) as follows:

Eleanor Duffy Cleary 1720 Main St Ste 303 Columbia, SC
292012850

David A. Spencer PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)


Cheryl Graham - Clerk of Court

Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

Ken Lucero,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT
2012 OCT -2 AM 10:42

CLERK OF COURT
DORCHESTER COUNTY

MODIFICATION OF
ORDER

2011-CP-18-0778

2012 SEP 20 AM 11:14
C.C.P. & G.S.
HARRIS

This matter comes before the court on the State's Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRCF. The court, having considering the affidavits in support of and in opposition to the motion, and being fully advised in the matter finds the order requires modification in the following respect:

IT IS ORDERED that Applicant's conviction for possession of heroin under indictment number 2002-GS-18-0689 is hereby vacated, subject to the right of the State to retry Applicant.


The Honorable DeAndrea Gist Benjamin
Circuit Court Judge

Columbia, South Carolina
September 19, 2012

STATE OF SOUTH CAROLINA

AFFIDAVIT

County of Dorchester

Personally appeared before me, Jonathan Morris, who first being duly sworn, deposes and says that Ken Lucero did within this county and State on the 5th day of August, 2004, satisfactorily complete a period of supervision as stated below:

EARLY TERMINATION OF PROBATION PURSUANT TO SECTION 24-23-130

"Upon the satisfactory fulfillment of the conditions of probation, the court, with the recommendation of the agent in charge of the responsible county probation office, may terminate the probationer or supervised prisoner from supervision."

The Affiant states that there is probable cause to believe the defendant named above has completed successfully and that such probable cause is based on the following facts:

That the above named defendant has reported as instructed and has followed advice and instructions of supervising agent; that he/she has committed no violations of supervision or of the law; that he/she has fulfilled his/her financial obligations to the court; that he/she has successfully completed the conditions of supervision to this date; and that the Agent in Charge has recommended that the above named defendant be released from supervision.

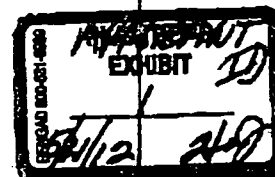
Sworn to and subscribed

before me this 5th day of
August, 2004

[Signature]
Signature of Notary Public

My Commission Expires: 9/25/12

[Signature]
Affiant



160

**PROBATION CITATION
EARLY TERMINATION**

Indictment Number: 2002-GS-18-0689

No. C-18-04-101

SOUTH CAROLINA		COUNTY: Dorchester	
V. Ken Lucero		SCDC #	SID # 1457068
TO: Ken Lucero			
YOU ARE HEREBY NOTIFIED to appear in the above named case at the time, date and place specified below.			
Place TBA		Courtroom TBA	
		Date and Time TBA	
YOU ARE HEREBY NOTIFIED that your case will be presented to the Court for the purpose stated below.			
Early Termination of Probation Pursuant to Section 24-23-130			
"Upon the satisfactory fulfillment of the conditions of probation, the court, with the recommendation of the agent in charge of the responsible county probation office, may terminate the probationer or supervised prisoner from supervision."			
YOU ARE HEREBY NOTIFIED that you have the rights listed below.			
List of Rights: You have the right at the hearing to question any person who appears as a witness against you and to have witnesses appear in your behalf. You may present evidence on your behalf. You may have an attorney represent you. If you cannot afford an attorney, an attorney will be appointed for you. You must advise the agent or the court in writing of your desire for an attorney. It is your responsibility to make arrangements for your witnesses and your attorney to appear at the hearing.			
IF YOU FAIL TO APPEAR AT THE TIME, DATE AND PLACE SHOWN ABOVE, THE HEARING WILL BE HELD IN YOUR ABSENCE AND YOU MAY BE INCARCERATED.			
Summerville, South Carolina		Probation and Parole Agent	
Date 8/5/04		Agent # 332	
A copy of the citation was served by the undersigned and given to the individual named therein at the time, date, and place indicated below.			
Place Summerville		Date and Time 8/5/04 11:34	
		Serving Officer's Signature	
Sworn to and subscribed before me this <u>5th</u> day of <u>August</u> , <u>2004</u>			
Signature of Notary Public		My Commission Expires <u>9/23/12</u>	

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U. S. Department of Justice
Immigration and Naturalization Service

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act

File No: A047 686 914

Case No: NYC1012002324

FIN #: 1074058760

In the Matter of:

Respondent: Ken Lorena LUCERO AKA: LUCERO, KEN

currently residing at:

BROOK NEW YORK 10467

(Number, street, city state and ZIP code)

(Area code and phone number)

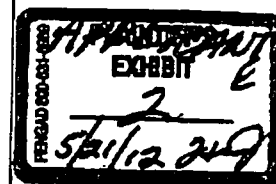
- ☒ 1. You are an arriving alien.
☐ 2. You are an alien present in the United States who has not been admitted or paroled.
☐ 3. You have been admitted to the United States, but are deportable for the reasons stated below.

The Service alleges that you:

See Continuation Page Made a Part Hereof

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

See Continuation Page Made a Part Hereof



- ☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.
☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8 CFR 208.30(f)(2) ☐ 8 CFR 235.3(b)(5)(iv).

YOU ARE ORDERED to appear before an Immigration Judge of the United States Department of Justice at:
26 Federal Plaza 12 Floor Room 1237 New York NEW YORK US 10278

(Complete Address of Immigration Court, including Room Number, if any)

on April 6, 2010 at 09:00 a.m. to show why you should not be removed from the United States based on the
 (Date) (Time)
 charge(s) set forth above.

BELGER, GREGORY
 CBPO (ENFORCEMENT)

(Signature and Title of Issuing Officer)

Date: January 9, 2010

Jamaica, NY

(City and State)

See reverse for important information

Alien's Name Ken Lorena LUCERO	File Number Case No: NYC1012002324 A047 686 914	Date January 5, 2010
--	---	-------------------------

The Service alleges that you:

- 1) You are not a citizen or national of the United States;
- 2) You are a native of ECUADOR and a citizen of ECUADOR;
- 3) You applied for admission to enter the United States at or near Jamaica, New York on or about April 16, 2008;
- 4) You applied for admission as a returning Lawful Permanent Resident;
- 5) You were convicted of the crime of Possession of Heroin in violation of Section 44-53-370(d)(1) of the South Carolina Code of Laws, pursuant to a judgment entered on or about November 18, 2002 by the Court of General Sessions, County of Dorchester, State of South Carolina under case number 2002-GS-18-0689.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act, as amended, in that you are an alien who has been convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802)).

Signature  BELGER, GREGORY	Title CBPO (ENFORCEMENT)
---	-----------------------------

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NOTICE OF HEARING IN REMOVAL PROCEEDINGS
IMMIGRATION COURT
26 FEDERAL PLZ 12TH FL., RM1237
NEW YORK, NY 10278

RE: LUCERO, KEN LORENA
FILE: A047-686-914

DATE: 4-6-10

TO:

LUCERO, KEN LORENA
[REDACTED]
BRONX, NY 10467

Please take notice that the above captioned case has been scheduled for a Master/~~Individual~~ hearing before the Immigration Court on 21 Sept. at 10:00 AM 2010

26 FEDERAL PLZ 12TH FL., RM1237
NEW YORK, NY 10278

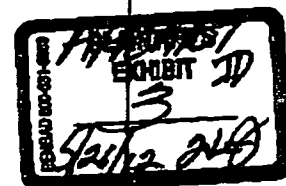
You may be represented in these proceedings, at no expense to the Government, by an attorney or other individual who is authorized and qualified to represent persons before an Immigration Court. Your hearing date has not been scheduled earlier than 10 days from the date of service of the Notice to Appear in order to permit you the opportunity to obtain an attorney or representative. If you wish to be represented, your attorney or representative must appear with you at the hearing prepared to proceed. You can request an earlier hearing in writing.

Failure to appear at your hearing except for exceptional circumstances may result in one or more of the following actions:

- 1) You may be taken into custody by the Department of Homeland Security and held for further action.
- 2) Your hearing may be held in your absence under section 240(b)(5) of the Immigration and Nationality Act. An order of removal will be entered against you if the Department of Homeland Security established by clear, unequivocal and convincing evidence that a) you or your attorney has been provided this notice and b) you are removable.

IF YOUR ADDRESS IS NOT LISTED ON THE NOTICE TO APPEAR, OR IF IT IS NOT CORRECT, WITHIN FIVE DAYS OF THIS NOTICE YOU MUST PROVIDE TO THE IMMIGRATION COURT NEW YORK, NY THE ATTACHED FORM EOIR-33 WITH YOUR ADDRESS AND/OR TELEPHONE NUMBER AT WHICH YOU CAN BE CONTACTED REGARDING THESE PROCEEDINGS. EVERYTIME YOU CHANGE YOUR ADDRESS AND/OR TELEPHONE NUMBER, YOU MUST INFORM THE COURT OF YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER WITHIN 5 DAYS OF THE CHANGE ON THE ATTACHED FORM EOIR-33. ADDITIONAL FORMS EOIR-33 CAN BE OBTAINED FROM THE COURT WHERE YOU ARE SCHEDULED TO APPEAR. IN THE EVENT YOU ARE UNABLE TO OBTAIN A FORM EOIR-33, YOU MAY PROVIDE THE COURT IN WRITING WITH YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER BUT YOU MUST CLEARLY MARK THE ENVELOPE "CHANGE OF ADDRESS." CORRESPONDENCE FROM THE COURT, INCLUDING HEARING NOTICES, WILL BE SENT TO THE MOST RECENT ADDRESS YOU HAVE PROVIDED, AND WILL BE CONSIDERED SUFFICIENT NOTICE TO YOU AND THESE PROCEEDINGS CAN GO FORWARD IN YOUR ABSENCE.

A List of Free Legal Service Providers has been given to you. For information regarding the status of your case, call toll free 1-800-898-7180 OR 703-305-1662.



Alien Number: 047-686-914

Alien Name: LUCERO, KEN LORENA

LIMITATIONS ON DISCRETIONARY RELIEF FOR FAILURE TO APPEAR

- (✓) 1. You have been scheduled for a removal hearing, at the time and place set forth on the attached sheet. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for a period of ten (10) years after the date of entry of the final order of removal.
- () 2. You have been scheduled for an asylum hearing, at the time and place set forth on the attached notice. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. Below) for a period of ten (10) years from the date of your scheduled hearing.
- () 3. You have been granted voluntary departure from the United States pursuant to section 240B of the Immigration and Nationality Act, and remaining in the United States beyond the authorized date will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. Below) for ten (10) years from the date of the scheduled departure. Your Voluntary departure bond, if any, will also be breached. Additionally, if you fail to voluntarily depart the United States within the time period specified, you shall be subject to a civil penalty of not less than \$1000 and not more than \$5000.
 **the term "exceptional circumstances" refers to circumstances such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances.

A. THE FORMS OF RELIEF FROM REMOVAL FOR WHICH YOU WILL BECOME INELIGIBLE ARE:

- 1) Voluntary departure as provided for in section 240B of the Immigration and Nationality Act;
- 2) Cancellation of removal as provided for in section 240A of the Immigration and Nationality Act; and
- 3) Adjustment of status or change of status as provided for in Section 245, 248 or 249 of the Immigration and Nationality Act.

This written notice was provided to the alien in English. Oral notice of the contents of this notice must be given to the alien in his/her native language, or in a language he/she understands by the Immigration Judge.

Date: Apr 6, 2010

Immigration Judge: AN Mack or Court Clerk: _____

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)

TO: ☒ ALIEN ☐ ALIEN c/o Custodial Officer ☐ ALIEN's ATTORNEY ☐ OtherDATE: 4-6-10 BY: COURT STAFFAttachments: ☐ EOIR-33 ☐ EOIR-28 ☐ Legal Services List ☐ Other

N6

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE GENERAL COURT OF JUSTICE

Ken LUCERO

Vs.

INDICTMNT/ CASE # 2002-OS-18-0689

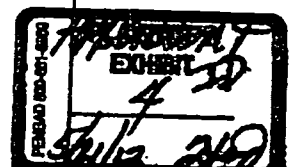
STATE OF SOUTH CAROLINA

DEFENDANT'S MOTION TO VACATE CONVICTION/S/

Pursuant to under the Uniform Post-Conviction Procedure Act (§ 17-27-10 et seq and Rule 71.1 SCRPC), the defendant now moves to vacate his *guilty plea/admission to sufficient facts* in the above-entitled matter on the ground that such *plea/admission* was obtained in violation of due process under the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina Declaration of Rights, and that it appears that justice may not have been done.

In support, and as more fully set forth in the affidavit and memorandum filed herewith, the defendant states that:

1. The defendant was denied effective assistance of counsel by his trial counsel's affirmative misadvice regarding the immigration consequences that could result from his *guilty plea/admission*. Padilla v. Kentucky, No. 08-651, 2010 U.S. LEXIS 2928 at *19 (March 31, 2010), citing Strickland v. Washington, 466 U.S. 668 (1984); see also Kolle v. State, ___ S.E.2d ___, 2010 WL 522799 (2010)
2. Defendant's plea was not made knowingly and voluntarily. Boykin v. Alabama, 395 U.S. 238, 242-244 (1969); and
3. Justice may not have been done and such conviction/s/ should be vacated in the



interest of justice under Rule 71.1 SCRCP

Dated: September 18, 2010

Respectfully Submitted,



Ken Lucero, (Pro-se)

[REDACTED]
Bronx, New York 10467]
[REDACTED]

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE GENERAL COURT OF JUSTICE

Ken LUCERO

§

INDICTMNT/ CASE # 2002-OS-18-0689

§ Vs.

STATE OF SOUTH CAROLINA

AFFIDAVIT OF DEFENDANT IN SUPPORT OF
MOTION TO VACATE CONVICTION/S/

I, Ken Lucero, hereby swear and state as follows:

1. My name is Ken Lucero. I am the defendant in the South Carolina Indictment No. 2002-OS-18-0689.

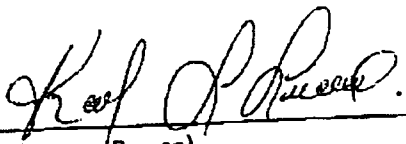
2. On 11/18/2002, I *pled guilty* to the charges in the above-entitled matter, and I was sentenced to three (3) years of Probation and \$5,000.00 fine.

3. I was represented in this matter by Hardee Thomas, Esq. Prior to *pleading guilty*, he told because *I had been in the U.S. for so long, a conviction on this offense will not affect my immigration status" and "as long as am not incarcerated, a conviction on the offense will not have adverse immigration consequences* I never would have *pled guilty/admitted sufficient facts* to the charge[s] and agreed to this disposition if I had known that it would affect my immigration status.

4. I has been in this country since 1992. I have work, I have pay my taxes. I have all my family here, I have no prior arrest nor conviction. This was my first encounter with the judicial system.

5. Am currently in a removal proceeding, charge with been inadmissible due to the outcome of the guilty Plea for the crime of possession of Heroin in violation of section 44-53-370 (d)(1) of the South Carolina Code law.

I declare under the penalties of perjury that the foregoing is true and correct.
Executed on September 18, 2010.



Ken Lucero (Pro-se)

██████████
Bronx, New York 10467
██████████

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE GENERAL COURT OF JUSTICE

Ken LUCERO

Vs.

INDICTMNT/ CASE # 2002-OS-18-0689

STATE OF SOUTH CAROLINA

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO VACATE CONVICTION[S]

This memorandum is submitted in support of the Defendant's Motion to Vacate Conviction[s] in the above-entitled matter. The defendant requests this Court to vacate the conviction[s] in this matter as they were imposed in violation of the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina's Declaration of Rights.

On June 6, 2002 while traveling to Florida and driving through The Carolinas, I was stop By the South Carolina Police for a traffic violation. The officer, didn't not speak Spanish and I didn't understand English. He searched the rental car I was driving. He claimed that I gave permission for the search but I was not aware that he was doing something against my constitutional rights. During my arrest and criminal proceeding I was represented by Hardee Thomas who never told me that my constitutional's right were violated.

Hardee Thomas, esq, gave me the wrong advices regarding the immigration consequence. I have been in this country more than twenty years, I have a family, I had worked and pay my taxes. However, when I told him about these he just told me that I would not need this because I would have no problem with immigration. That the reason he advices me to enter a guilty plea.

On November 18, 2002 I was sentence to probation and on August 5, 2004 pursuant to Section 24-23-130 the probation was terminated. However, even though it was a great thing to complete probation early. That didn't help me when I was coming from a trip from my home

country. Because I was stop and detained due to my only conviction. Now am in a removal proceeding in the New York immigration Court. See attached documents referrer here as Exhibit A.

FACTUAL AND PROCEDURAL BACKGROUND

The defendant was charged with Possession of Heroin in violation of Section 44-53-370 (d)(1) in the above-entitled matter. Prior to *pleading guilty*, Mr. Hardee Thomas's trial counsel advised him that : *"because he had been in the U.S. for so long, a conviction on this offense will not affect my immigration status" and "as long as he is not incarcerated, a conviction on the offense will not have adverse immigration consequences."*

Pursuant to trial counsel's *misadvise* about immigration consequences caused by the conviction[s] in this matter, I *pled guilty* and received probation. . The defendant is now *in removal proceedings, inadmissible, ineligible for naturalization, subject to an immigration detainer*, as a result of the disposition in this matter.

ARGUMENT

A.

Ineffective Assistant of counsel

The defendant was denied effective assistance of counsel by his trial counsel's *affirmative misadvised* regarding the immigration consequences that could result from his *guilty plea* in this matter. Effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution. *Padilla v. Kentucky*, No. 08-651, 2010 U.S. LEXIS 2928 at *19 (March 31, 2010), citing *Strickland v. Washington*, 466 U.S. 668 (1984); see also *Kolle v. State*, ___ S.E.2d ___, 2010 WL 522799 (2010) - Evidence was sufficient to support post-conviction relief judge's determination that plea counsel was ineffective in advising defendant to plead guilty to trafficking in cocaine; there was evidence plea counsel was deficient in failing to procure pertinent discovery materials, there was a reasonable probability that credibility attack would have influenced the trial judge's decision regarding the existence of exigent circumstances and affected the outcome of the suppression motion, and, if plea counsel truly believed the suppression issue was meritorious, he could have advised defendant to proceed to trial and, if convicted, challenge the denial of the suppression motion on direct appeal. Also, plea counsel was ineffective in advising defendant to reject state's initial plea offer and plead guilty to trafficking cocaine without a

negotiated sentence, where counsel advised defendant that state's initial plea offer of 10 years suspended on the service of five years, with three years' probation, was not a "good deal" even though defendant faced a seven to 25 year sentence, and counsel misinformed defendant that plea offer would remain open until after hearing on defendant's motion to suppress, at which time state withdrew the plea offer.

Furthermore, constitutional due process under the Fourteenth Amendment and article 12 of the Declaration of Rights requires that the defendant's conviction be vacated and a new trial be granted because his plea was not made knowingly and voluntarily; *Boykin v. Alabama*, 395 U.S. 238, 242-244 (1969). Finally, this Court has power to vacate, setting aside, or correcting a sentence under the Uniform Post-Conviction Procedure Act (§ 17-27-10 et seq. and Rule 71.1 SCRPC).

Padilla, 2010 U.S. LEXIS at *19, citing *Strickland*, 466 U.S. at 688. The Court in *Padilla* found that such a standard includes advice on immigration consequences, and that, "[f]or at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea." *Id.* at *29. *Padilla* held that the extent of required advice will depend on the legal clarity of the immigration consequences stemming from the offense in question. If the immigration consequences are "succinct, clear and explicit," defense counsel is likewise required to provide specific, substantive advice regarding those consequences. *Id.* at *22. If the law is "not succinct and straightforward" regarding the immigration consequences of a particular offense, defense counsel must provide her client with a general advisement that the offense may have adverse immigration consequences. *Id.* at *23. An attorney's inadequate understanding of the law does not render the law "not succinct and straightforward"; to the contrary, "ignorance of the law will not excuse." *Shevlin-Carpenter Co. v. Minnesota*.

If the defendant demonstrates that his attorney's representation fell below an objective standard of reasonableness, then he must show that his counsel's errors, 218 U.S. 57, 68 (1910).

materially prejudiced him and that, "but for counsel's unprofessional errors, the result of the proceeding would have been different."

The Supreme Court held in *Padilla* that defense counsel is required to advise a defendant of the immigration consequences of a guilty plea. *Id.* at *22-23. "[C]hanges to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of

accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, 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.*

Pursuant to *Padilla*, any advice that defense counsel provides to a defendant regarding the immigration consequences of a guilty plea must be correct. The Court stated that “there is no relevant difference ‘between an act of commission and an act of omission’ in this context.”

Padilla, 2010 U.S. LEXIS at *25. “[U]nreasonable and incorrect information concerning the risk of removal can give rise to an ineffectiveness claim.” *Id.* at *56-57 (Alito, J., concurring). See also *U.S. v. Khalaf*, 116 F. Supp. 2d 210 (D. Mass. 1999) (ineffective assistance of counsel where counsel provided affirmative misadvice about immigration consequences of guilty plea). In the present case, counsel advised the defendant *because he had been in the U.S. for so long, a conviction on this offense will not affect my immigration status* and *“as long as he is not incarcerated, a conviction on the offense will not have adverse immigration consequences* Thus, counsel’s incorrect advice fell below an objective standard of reasonableness.

Defendant herein, has been prejudiced by trial counsel’s *affirmative misadvice*. Because there is a reasonable probability that, but for trial counsel’s errors, The Defendant would not have *pleaded guilty* to the offenses in the above-entitled matter.

Consequently, Defendant herein was prejudiced by trial counsel’s *misadvice*, and she should be granted a new trial or as an alternative sentence to a violation that not a crime.

B.

Absence of a Knowing and Voluntary Plea

Because Defendant herein did not understand the consequences of her *guilty plea*, she did not enter into it knowingly and voluntarily. As the SJC has held, “[j]ustice is not done, and a new trial is therefore warranted, where a defendant pleads guilty without an understanding of the proceedings.” citing *Boykin v. Alabama*, 395 U.S. at 242-244. Thus, the plea must be set aside under Rule 71.1 SCRPC). Because it was not offered knowingly and voluntarily.

In the case at bar, trial counsel’s incorrect advice about immigration consequences detracted from the knowing and voluntary nature of the defendant herein *guilty plea*. Affirmatively misadvising the defendant that *pleading guilty* to Possession of Heroin in violation of Section 44-53-370 (d)(1) would not have adverse immigration consequences considerably diminished his

understanding of the proceedings and the meaning of his *guilty plea/admission*. Consequently, Defendant was unable to make a knowing and voluntary *plea/admission*.

C.

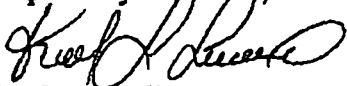
Interest of justice

The defendant *pled guilty* in the above matter based on the misleading advice of her counsel about the immigration consequences that would flow from such *plea*. Had he known that this offense subjected her to removal proceeding she would have *chosen to go to trial asked her attorney to negotiate a plea to a lesser included offense, negotiated for a lesser sentence/etc.*. This Court should vacate the conviction[s] in this matter in the interest of justice under the Uniform Post-Conviction Procedure Act (§ 17-27-10 et seq. and Rule 71.1 SCRPC).

CONCLUSION

Based upon the foregoing points and authorities, the defendant respectfully requests this Honorable Court to vacate the convictions in this matter due to violations of her federal and state constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution and since the defendant successfully completed the terms of the probation, the court should order an expungemen as provided by S.C. Code Ann. §44-53-450(b).

Respectfully submitted,



Ken Lucero, (Pro-se)

[REDACTED]
Bronx, New York 10467]
[REDACTED]

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:

COUNTY OF DARLINGTON
STATE VS.

KEN LUCERO

CERTIFIED COPY

2002-GS-18-0689

A/W#: 4173074

AKA: 2008 MAY 13 PM 2:56

Date of Offense: 6-6-2002

Race: H Sex: F Age: 34

S.C. Code §: 44-57-370(c)(2)(c)

DOB: [REDACTED] SS#: [REDACTED]

CDR Code #: 0121810

Address: [REDACTED]

☐ CASE RESTORED

DL# SID#

SENTENCE
☒ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS

TO: POSSESSION OF HEROIN

in violation of § 44-53-370(a)(1) of the S.C. Code of Laws, bearing CDR Code # 0111716

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

The charge is: ☐ As Indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☒ Recommendation by the State.

ATTEST:

B. H. [Signature]
Solicitor

Ken Lucero
Defendant

Margaret [Signature]
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections, ☐ County Detention Center, for a determinate term of 2 days/months/years or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of \$ 3000 provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for 3 months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ The Defendant is to be given credit for days/months jail time.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ plus 20% fee: \$

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

§14-1-206 (Assessments 100%)

§14-1-211(A)(1) (Surcharge) 100.00

§14-1-211(A)(2) (Surcharge)

§56-5-2995 (DUI Assessment)

3% to County (If paid in installments) 3.00

TOTAL 103.00

[Signature]
Clerk of Court Deputy Clerk

PTUP

40 days/hours Public Service Employment

Obtain GED

Attend Voc Rehab. or Job Corps

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning

\$ paid to Public Defender Fund.

Other: ASSESSMENT for drug abuse & treatment as indicated to include inpatient Tra
SPR to New York

PRESIDING JUDGE [Signature]

Judge Code: 11121

Sentence Date: 11-14-02

Lloyd Munjack
Bretz & Coven, Esqs.
305 Broadway Suite 100
New York, NY 10007
(212) 267-2555

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

-----X

In the matter of

LUCERO, Ken Lorena

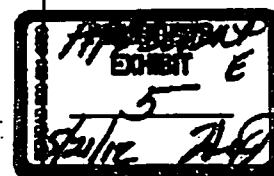
File No.: A 047-686-914

Respondent,

In Removal Proceedings

-----X

RESPONDENT'S BRIEF ON APPEAL



UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

_____X
In the matter of

LUCERO, Ken Lorena

File No.: A 047-686-914

Respondent,

In Removal Proceedings
_____X

RESPONDENT'S BRIEF ON APPEAL

ISSUE PRESENTED

Whether the immigration judge should have permitted Mrs. Lucero additional time for her to receive a decision on her motion to vacate her South Carolina conviction for criminal possession of heroin by guilty plea pursuant to section 44-53-370(d)(1) on November 18, 2002, pursuant to a motion filed by her based on Padilla vs. Kentucky, 559 U.S. ____, 130 S. Ct. 1473 (2010).

PRELIMINARY STATEMENT

Respondent Mrs. Ken Lorena Lucero respectfully appeals from the decision of the Immigration Judge ("IJ") denying a continuance and ordering removal. The IJ erred in denying Mrs. Lucero a continuance because she can demonstrate good cause for the continuance; namely, Mrs. Lucero is seeking to vacate her conviction on the merits pursuant to Padilla vs. Kentucky. If successful, Mrs. Lucero will be eligible for relief from removal under INA § 240A(a),

Cancellation of Removal. The Board of Immigration Appeals ("Board") should therefore vacate the IJ's removal order, and remand the case to the IJ so that Mrs. Lucero may continue seeking relief from her conviction and thus seek relief from removal.

STATEMENT OF FACTS

Respondent Ken Lorena Lucero is a 43 year old, divorced female, born on March 5, 1968, and is a native and citizen of Ecuador. She has two minor children who are United States citizens by birth. Mrs. Lucero first came to live in the United States in or about 1993, and subsequently became a lawful permanent resident on November 23, 2000. She has been working as a cleaning attendant in the United States.

On or about April 16, 2008, after a visit to her native country, Ecuador, Mrs. Lucero returned to the United States as a returning Lawful Permanent Resident at JFK Airport in New York City. On or about January 5, 2010, a Notice to Appear was issued charging Mrs. Lucero with Removability pursuant to INA section 212(a)(2)(A)(i)(II) - as an arriving alien who has been convicted of controlled substance violation based on her conviction by guilty plea for criminal possession of heroin under section 44-53-370(d)(1) of the South Carolina Code of Laws on or about November 18, 2002. Mrs. Lucero had received a sentence of two years suspended sentence and three years probation for that conviction.

At the first Master Calendar Hearing before the Immigration Judge on April 6, 2010, the case was set over to September 22, 2010 for pleadings. At the rescheduled Master Calendar Hearing on September 22, 2010, counsel for Respondent admitted allegations 1 through 5 on the Notice to Appear but denied allegation 5 (the conviction). The Immigration Judge found

sufficient evidence entered into the record and sustained allegation 5 as well as the charge of Removal. At that time counsel for Respondent indicated to the Court that Mrs. Lucero was in the process of filing a motion to vacate her South Carolina conviction based on ineffective assistance of counsel and Padilla vs. Kentucky, i.e. that essentially she was not advised of the severe immigration consequences by her criminal defense attorney when she was advised to plead guilty to criminal possession of heroin with a sentence of three years probation. The Immigration Judge rescheduled the hearing for February 15, 2011 to address this issue and any other requests for relief.

At the hearing on February 15, 2011, counsel for Respondent once again indicated to the Court that Respondent was pursuing post conviction relief from her South Carolina conviction in accordance with Padilla vs. Kentucky, and requested a continuance to allow the South Carolina Court to reach a decision on that motion, since if it were granted, Respondent would be eligible for LPR Cancellation of Removal pursuant to INA section 240A(a). The Immigration Judge denied the request for a continuance and ordered Respondent removed to Ecuador based on the charge on the Notice to Appear. It should be noted that while Respondent had originally prepared her post conviction relief to the South Carolina Court pro se, she subsequently hired a South Carolina criminal attorney to represent her in the matter, and counsel has indeed filed an Application for Post-Conviction Relief with the South Carolina Court. See Exhibit A. Respondent now takes this appeal from the Decision of the Immigration Judge.

DISCUSSION

I. THE IJ ERRED IN DENYING A CONTINUANCE BECAUSE MRS. LUCERO DEMONSTRATED GOOD CAUSE.

An IJ may grant a motion for continuance for good cause shown. 8 C.F.R. § 1003.29. An IJ has the discretion to depart from the letter of the local court rules in certain circumstances where fairness demands an excuse. See Dedji v. Mukasey, 525 F.3d 187 (2d Cir. 2008) (internal citations omitted). In Dedji, the U.S. Court of Appeals for the Second Circuit held that the respondent demonstrated good cause for failing to meet a filing deadline, because the alien's attorney had received the documents from the alien in a timely manner, but the attorney failed to submit the documents to the court due to a staffing shortage. Id. at 192. Additionally, the alien demonstrated the possibility of substantial prejudice was sufficient to grant the petition for review and remand to the Board. Id. at 193. Reviewing the record for abuse of discretion, the Second Circuit remanded the case to the IJ because a departure from the local rules was within the IJ's discretion and the evidence presented warranted consideration to prevent prejudice. Id. at 192.

Additionally, in Rajah v. Mukasey, 544 F.3d 449 (2d Cir. 2008), the Second Circuit granted a petition for review of a removal order and denial of a motion for continuance where the alien's labor certification was pending for an extensive amount of time. The Second Circuit found there was good cause for allowing a continuance since the delay was in no way attributable to inaction by the alien. The Second Circuit stated, "it is imperative that the agency connect the notion of 'sufficient time' with the practicalities of the labor certification and the immigration process as well as the intentions of Congress (1) in creating the labor certification and adjustment

of status provisions...and (2) in extending the sunset clause for filing for labor certification." Id. at 456. Even though the alien had been granted five continuances spanning the course of over eighteen months, the Second Circuit found that the circumstances warranted: (1) vacating the Board's decision affirming the IJ's denial of a motion for continuance; and (2) remanding the case for further review.

Here, the IJ erred in denying Mrs. Lucero's request for a continuance and ordering her removed to Ecuador, because the opportunity to make an attack on her conviction constitutes good cause. Mrs. Lucero should have the opportunity to attack her conviction on constitutional or procedural defects that, if successful, could result in the conviction being vacated and thus render her eligible for relief from removal under former INA § 240(A). Respondent has already filed a motion to vacate her conviction pursuant to South Carolina law and Padilla vs. Kentucky, which if granted, would render her eligible for cancellation of removal (i.e. with this conviction, Respondent is ineligible for LPR COR due to the stop-time rule for accrual of seven years presence after admission and possibly because the South Carolina statute which she pleaded guilty to could be considered an aggravated felony barring LPR COR relief as well).. Pursuant to Matter of Pickering, 23 I. & N. Dec. 621 (BIA 2003), a conviction vacated on grounds solely related to rehabilitation or immigration hardships is not eliminated for immigration purposes, a conviction vacated on the merits due to constitutional, procedural, or other substantive defects will be eliminated for immigration purposes. Id. at 624. Should Mrs. Lucero's conviction be vacated on the merits, she will be eligible for relief.

In Rajah, the alien had not yet secured an approved labor certification; similarly, Mrs. Lucero has not secured a vacatur of her conviction. However, unlike the alien in Rajah, Mrs.

Lucero's entire Immigration Proceedings lasted just over ten months, whereas in Rajah the applicant was given five continuances over the course of eighteen months to pursue possible avenues of relief. Further, in Rajah, the Second Circuit found that even this was not sufficient, because shortly following the denial of the next motion by the respondent, the labor certification was approved and the Second Circuit ordered a remand in light of the approved certification. In light of the gravity of the immigration consequences of Mrs. Lucero's Criminal Possession plea - namely, ineligibility for relief from Removal from the United States - the IJ should have granted additional time because the possibility of vacating a removable conviction constitutes good cause under these circumstances.

Finally, in a recent Second Circuit case, Freire v. Holder (Docket No. 09-0329-ag, decided May 27, 2011), the Second Circuit Appeals Court held that it was abuse of discretion for the BIA not to allow a continuance for an arriving alien in deportation proceedings so that CIS could adjudicate his adjustment of status application, without clearly enunciating its reasons for doing so and considering the factors in Matter of Hashmi, 24 I&N Dec. 785 (BIA 2009). Rejecting the BIA's argument that "(W)e acknowledge that the denial of a motion to reopen or a request for a continuance to await adjudication of an application before the USCIS or some other agency may result in a loss of relief. However, we cannot find it within our authority to grant relief based on an application over which we ultimately have no jurisdiction. To do so would leave us open to the whims and time lines of other agencies which might or might not communicate the outcome of a particular application to us." And that "the BIA did not 'find it judicious to grant a continuance or reopening to await a decision over which it has no control', the Second Circuit remanded the case to the BIA to consider whether a continuance should have

been granted. Mrs. Lucero's case should be treated by the Board in similar fashion.

CONCLUSION

Based on the foregoing, the Board should vacate the IJ's removal order, and remand the case to the IJ so that Mrs. Lucero has the opportunity to seek relief from her South Carolina Criminal Possession conviction and thus relief from removal pursuant to INA section 240A(a).

Dated: June 2, 2011
New York, New York

Respectfully submitted,

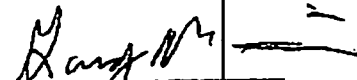
BRETZ & COVEN, LLP

By:



Lloyd Munjack

CERTIFICATION: The undersigned certifies that a copy of the foregoing brief was served on Office of the District Counsel/NYC, 26 Federal Plaza, Room 1130, New York, NY 10278, by on June 2, 2011.


Gerardy McIsaac



U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

LUCERO, KEN LORENA
[REDACTED]
BRONX, NY 10467-0000

DHS/ICE Office of Chief Counsel - NYC
28 Federal Plaza, Room 1130
New York, NY 10278

Name: LUCERO, KEN LORENA

A047-686-914

Date of this notice: 3/22/2012

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

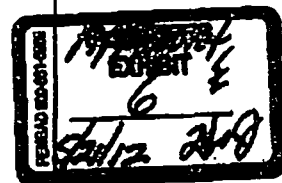
Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Pauley, Roger



Lucero

Exhibit A

**U.S. Department of Justice
Executive Office for Immigration Review**

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A047 686 914 - New York, NY

Date:

In re: KEN LORENA LUCERO a.k.a. Ken Lucero

MAR 22 2012

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lloyd Munjack, Esquire

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)] -
Controlled substance violation

APPLICATION: Continuance

The respondent appeals from an Immigration Judge's February 15, 2011, decision denying her request for a continuance and ordering her removed from the United States. The appeal will be dismissed.

The respondent is a native and citizen of Ecuador and a lawful permanent resident of the United States. On November 18, 2002, the respondent was convicted, upon a guilty plea, of possession of heroin in violation of section 44-53-370(d)(1) of the South Carolina Code of Laws. The Immigration Judge determined that this conviction renders the respondent removable under section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), as an alien convicted of a controlled substance violation.

On appeal, the respondent does not dispute that she was convicted of a controlled substance violation. Instead, she contends that she received ineffective assistance of counsel in her state criminal proceedings because her lawyer did not advise her of the adverse immigration consequences that might result from pleading guilty. Accordingly, she applied for post-conviction relief in state court based on *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). She requested a continuance of her removal proceedings pending the state court's decision.¹

We agree with the Immigration Judge that the respondent did not demonstrate good cause for a continuance. 8 C.F.R. §§ 1003.29, 1240.6 (2011). A pending collateral attack upon a state conviction does not affect its finality for immigration purposes unless and until the conviction is overturned. *Matter of Madrigal*, 21 I&N Dec. 323, 327 (BIA 1996); see also *Jimenez-Guzman v. Holder*, 642 F.3d 1294, 1297 (10th Cir. 2011) (holding that an Immigration Judge did not abuse his discretion by denying a continuance during the pendency of a motion for post-conviction relief);

¹ We express no opinion as to the merits of the respondent's application before the state court.

A047 686 914

Paredes v. Att'y Gen. of the U.S., 528 F.3d 196, 198-99 (3d Cir. 2008) (holding that a pending post-conviction motion does not negate the finality of a conviction for immigration purposes). Although more than 1 year has elapsed since the Immigration Judge issued his decision, the respondent's conviction evidently remains undisturbed, as she has yet to indicate that she received a vacatur. Therefore, her conviction is valid for the purpose of these removal proceedings. The respondent's reliance on *Freire v. Holder*, 647 F.3d 67 (2d Cir. 2011) (*per curiam*); *Rafah v. Mukasey*, 544 F.3d 449 (2d Cir. 2008); and *Dedji v. Mukasey*, 525 F.3d 187 (2d Cir. 2008), is misplaced because none of those cases involved a continuance request pending a speculative collateral attack on a conviction. While an alien may establish good cause to continue proceedings where administrative delays unattributable to her arise, she does not demonstrate good cause simply by filing an application for post-conviction relief during the pendency of removal proceedings. Absent compelling circumstances not present here, an Immigration Judge presented with a facially valid removal charge need not adjourn removal proceedings pending the outcome of collateral criminal proceedings.

In conclusion, the Immigration Judge properly denied the respondent's request for a continuance and ordered her removed from the United States. Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.


FOR THE BOARD

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE GENERAL COURT OF JUSTICE

Ken LUCERO

INDICTMNT/ CASE # 2002-OS-18-0689

Vs.

STATE OF SOUTH CAROLINA

DEFENDANT'S MOTION TO VACATE CONVICTION/S/

Pursuant to under the Uniform Post-Conviction Procedure Act (§ 17-27-10 et seq. and Rule 71.1 SCRCP), the defendant now moves to vacate his *guilty plea/admission to sufficient facts* in the above-entitled matter on the ground that such *plea/admission* was obtained in violation of due process under the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina Declaration of Rights, and that it appears that justice may not have been done.

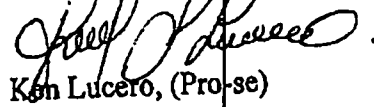
In support, and as more fully set forth in the affidavit and memorandum filed herewith, the defendant states that:

1. The defendant was denied effective assistance of counsel by his trial counsel's affirmative misadvice regarding the immigration consequences that could result from his *guilty plea/admission*. Padilla v. Kentucky, No. 08-651, 2010 U.S. LEXIS 2928 at *19 (March 31, 2010), citing Strickland v. Washington, 466 U.S. 668 (1984); see also Kolle v. State, ___ S.E.2d ___, 2010 WL 522799 (2010)
2. Defendant's plea was not made knowingly and voluntarily. Boykin v. Alabama, 395 U.S. 238, 242-244 (1969); and
3. Justice may not have been done and such conviction/s/ should be vacated in the

interest of justice under Rule 71.1 SCRCP

Dated: September 18, 2010

Respectfully Submitted,


Ken Lucero, (Pro-se)


Bronx, New York 10467]

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE GENERAL COURT OF JUSTICE

Ken LUCERO

Vs.

INDICTMNT/ CASE # 2002-OS-18-0689

STATE OF SOUTH CAROLINA

AFFIDAVIT OF DEFENDANT IN SUPPORT OF
MOTION TO VACATE CONVICTION/S/

I, Ken Lucero, hereby swear and state as follows:

1. My name is Ken Lucero. I am the defendant in the South Carolina Indictment No. 2002-OS-18-0689.

2. On 11/18/2002, I *pled guilty* to the charges in the above-entitled matter, and I was sentenced to three (3) years of Probation and \$5,000.00 fine.

3. I was represented in this matter by Hardee Thomas, Esq. Prior to *pleading guilty*, he told *because I had been in the U.S. for so long, a conviction on this offense will not affect my immigration status* and *"as long as am not incarcerated, a conviction on the offense will not have adverse immigration consequences* I never would have *pled guilty/admitted sufficient facts to the charge[s]* and agreed to this disposition if I had known that it would affect my immigration status.

4. I has been in this country since 1992. I have work, I have pay my taxes. I have all my family here, I have no prior arrest nor conviction. This was my first encounter with the judicial system.

5. Am currently in a removal proceeding, charge with been inadmissible due to the outcome of the guilty Plea for the crime of possession of Heroin in violation of section 44-53-370 (d)(1) of the South Carolina Code law.

I declare under the penalties of perjury that the foregoing is true and correct.
Executed on September 18, 2010.



Ken Lucero (Pro-se)

██████████
Bronx, New York 10467
██████████

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE GENERAL COURT OF JUSTICE

Ken LUCERO

INDICTMNT/ CASE # 2002-OS-18-0689
Vs.

STATE OF SOUTH CAROLINA

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO VACATE CONVICTION[S]

This memorandum is submitted in support of the Defendant's Motion to Vacate Conviction[s] in the above-entitled matter. The defendant requests this Court to vacate the conviction[s] in this matter as they were imposed in violation of the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina's Declaration of Rights.

On June 6, 2002 while traveling to Florida and driving through The Carolinas, I was stop By the South Carolina Police for a traffic violation. The officer, didn't not speak Spanish and I didn't understand English. He searched the rental car I was driving. He claimed that I gave permission for the search but I was not aware that he was doing something against my constitutional rights. During my arrest and criminal proceeding I was represented by Hardee Thomas who never told me that my constitutional's right were violated.

Hardee Thomas, esq, gave me the wrong advices regarding the immigration consequence. I have been in this country more than twenty years, I have a family, I had worked and pay my taxes. However, when I told him about these he just told me that I would not need this because I would have no problem with immigration. That the reason he advices me to enter a guilty plea.

On November 18, 2002 I was sentence to probation and on August 5, 2004 pursuant to Section 24-23-130 the probation was terminated. However, even though it was a great thing to complete probation early. That didn't help me when I was coming from a trip from my home

country. Because I was stop and detained due to my only conviction. Now am in a removal proceeding in the New York immigration Court. See attached documents referrer here as Exhibit A.

FACTUAL AND PROCEDURAL BACKGROUND

The defendant was charged with Possession of Heroin in violation of Section 44-53-370 (d)(1) in the above-entitled matter. Prior to *pleading guilty*, Mr. Hardee Thomas's trial counsel advised him that : *"because he had been in the U.S. for so long, a conviction on this offense will not affect my immigration status" and "as long as he is not incarcerated, a conviction on the offense will not have adverse immigration consequences."*

Pursuant to trial counsel's *misadvise* about immigration consequences caused by the conviction[s] in this matter, I *pled guilty* and received probation. . The defendant is now *in removal proceedings, inadmissible, ineligible for naturalization, subject to an immigration detainer*, as a result of the disposition in this matter.

ARGUMENT

A.

Ineffective Assistant of counsel

The defendant was denied effective assistance of counsel by his trial counsel's *affirmative misadvised* regarding the immigration consequences that could result from his *guilty plea* in this matter. Effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution. *Padilla v. Kentucky*, No. 08-651, 2010 U.S. LEXIS 2928 at *19 (March 31, 2010), citing *Strickland v. Washington*, 466 U.S. 668 (1984); see also *Kolle v. State*, ___ S.E.2d ___, 2010 WL 522799 (2010) - Evidence was sufficient to support post-conviction relief judge's determination that plea counsel was ineffective in advising defendant to plead guilty to trafficking in cocaine; there was evidence plea counsel was deficient in failing to procure pertinent discovery materials, there was a reasonable probability that credibility attack would have influenced the trial judge's decision regarding the existence of exigent circumstances and affected the outcome of the suppression motion, and, if plea counsel truly believed the suppression issue was meritorious, he could have advised defendant to proceed to trial and, if convicted, challenge the denial of the

suppression motion on direct appeal. Also, plea counsel was ineffective in advising defendant to reject state's initial plea offer and plead guilty to trafficking cocaine without a

negotiated sentence, where counsel advised defendant that state's initial plea offer of 10 years suspended on the service of five years, with three years' probation, was not a "good deal" even though defendant faced a seven to 25 year sentence, and counsel misinformed defendant that plea offer would remain open until after hearing on defendant's motion to suppress, at which time state withdrew the plea offer.

Furthermore, constitutional due process under the Fourteenth Amendment and article 12 of the Declaration of Rights requires that the defendant's conviction be vacated and a new trial be granted because his plea was not made knowingly and voluntarily; *Boykin v. Alabama*, 395 U.S. 238, 242-244 (1969). Finally, this Court has power to vacate, setting aside, or correcting a sentence under the Uniform Post-Conviction Procedure Act (§ 17-27-10 et seq. and Rule 71.1 SCRPC).

Padilla, 2010 U.S. LEXIS at *19, citing *Strickland*, 466 U.S. at 688. The Court in *Padilla* found that such a standard includes advice on immigration consequences, and that, "[f]or at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea." *Id.* at *29. *Padilla* held that the extent of required advice will depend on the legal clarity of the immigration consequences stemming from the offense in question. If the immigration consequences are "succinct, clear and explicit," defense counsel is likewise required to provide specific, substantive advice regarding those consequences. *Id.* at *22. If the law is "not succinct and straightforward" regarding the immigration consequences of a particular offense, defense counsel must provide her client with a general advisement that the offense may have adverse immigration consequences. *Id.* at *23. An attorney's inadequate understanding of the law does not render the law "not succinct and straightforward"; to the contrary, "ignorance of the law will not excuse." *Shevlin-Carpenter Co. v. Minnesota*.

If the defendant demonstrates that his attorney's representation fell below an objective standard of reasonableness, then he must show that his counsel's errors, 218 U.S. 57, 68 (1910).

materially prejudiced him and that, "but for counsel's unprofessional errors, the result of the proceeding would have been different."

The Supreme Court held in *Padilla* that defense counsel is required to advise a defendant of the immigration consequences of a guilty plea. *Id.* at *22-23. "[C]hanges to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of

accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, 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

Pursuant to Padilla, any advice that defense counsel provides to a defendant regarding the immigration consequences of a guilty plea must be correct. The Court stated that “there is no relevant difference ‘between an act of commission and an act of omission’ in this context.”

Padilla, 2010 U.S. LEXIS at *25. “[U]nreasonable and incorrect information concerning the risk of removal can give rise to an ineffectiveness claim.” Id. at *56-57 (Alito, J., concurring). See also U.S. v. Khalaf, 116 F. Supp. 2d 210 (D. Mass. 1999) (ineffective assistance of counsel where counsel provided affirmative misadvised about immigration consequences of guilty plea). In the present case, counsel advised the defendant *because he had been in the U.S. for so long, a conviction on this offense will not affect my immigration status* and *“as long as he is not incarcerated, a conviction on the offense will not have adverse immigration consequences* Thus, counsel’s incorrect advice fell below an objective standard of reasonableness.

Defendant herein, has been prejudiced by trial counsel’s *affirmative misadvised*. Because there is a reasonable probability that, but for trial counsel’s errors, The Defendant would not have *pleaded guilty* to the offenses in the above-entitled matter.

Consequently, Defendant herein was prejudiced by trial counsel’s *misadvice*, and she should be granted a new trial or as an alternative sentence to a violation that not a crime.

B.

Absence of a Knowing and Voluntary Plea

Because Defendant herein did not understand the consequences of her *guilty plea*, she did not enter into it knowingly and voluntarily. As the SJC has held, “[j]ustice is not done, and a new trial is therefore warranted, where a defendant pleads guilty without an understanding of the proceedings.” citing Boykin v. Alabama, 395 U.S. at 242-244. Thus, the plea must be set aside under Rule 71.1 SCRPC). Because it was not offered knowingly and voluntarily.

In the case at bar, trial counsel’s incorrect advice about immigration consequences detracted from the knowing and voluntary nature of the defendant herein *guilty plea*. Affirmatively misadvising the defendant that *pleading guilty* to Possession of Heroin in violation of Section 44-53-370 (d)(1) would not have adverse immigration consequences considerably diminished his

understanding of the proceedings and the meaning of his *guilty plea/admission*. Consequently, Defendant was unable to make a knowing and voluntary *plea/admission*.

C.

Interest of justice

The defendant *pled guilty* in the above matter based on the misleading advice of her counsel about the immigration consequences that would flow from such *plea*. Had he known that this offense subjected her to removal proceeding she would have *chosen to go to trial asked her attorney to negotiate a plea to a lesser included offense, negotiated for a lesser sentence/etc.].* This Court should vacate the conviction[s] in this matter in the interest of justice under the Uniform Post-Conviction Procedure Act (§ 17-27-10 et seq. and Rule 71.1 SCRCP).

CONCLUSION

Based upon the foregoing points and authorities, the defendant respectfully requests this Honorable Court to vacate the convictions in this matter due to violations of her federal and state constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution and since the defendant successfully completed the terms of the probation, the court should order an expungemen as provided by S.C. Code Ann. §44-53-450(b).

Respectfully submitted,



Ken Lucero, (Pro-se)

[REDACTED]
Bronx, New York 10467]
[REDACTED]

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:

COUNTY OF DARCHESTER
STATE VS.

2002-GS-18-0689
A/W#: 14173074

KEN LUCERO CERTIFIED COPY

AKA: 2008 MAY 13 PM 2:55

Date of Offense: 6-6-2002

Race: H Sex: F Age: 34

S.C. Code §: 44-57-370(e)(2)(c)

DOB: [REDACTED] SS#: [REDACTED]

CDR Code #: 0121810

Address: [REDACTED]

☐ CASE RESTORED

DL# SID#

SENTENCE
☒ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS

TO: POSSESSION OF HEROIN

in violation of § 44-53-370(d)(1) of the S.C. Code of Laws, bearing CDR Code # 0111716

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

The charge is: ☐ As Indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☒ Recommendation by the State.

ATTEST:

B. H. [Signature]
Solicitor

Ken Lucero
Defendant

[Signature]
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections, ☐ County Detention Center, for a determinate term of 2 days/months/years or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of \$ 5000, provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for 3 months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ The Defendant is to be given credit for days/months jail time.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: \$ plus 20% fee: \$
Payment Terms:
☐ set by SCDPPPS

Recipient:
*Fine: \$
§14-1-206 (Assessments 100%) \$
§14-1-211(A)(1) (Surcharge) \$ 100.00
§14-1-211(A)(2) (Surcharge) \$
§56-5-2995 (DUI Assessment) \$
3% to County (if paid in installments) \$ 3.00
TOTAL \$ 103.00

PTUP
40 days/hours Public Service Employment
Obtain GED
Attend Voc Rehab. or Job Corps
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol Testing
Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ beginning
\$ paid to Public Defender Fund.
Other: ASSESSMENT for drug
abuse & treatment as indicated
to include inpatient. Tra
spe to New York
PRESIDING JUDGE [Signature]
Judge Code: 11121
Sentence Date: 11-18-02

[Signature]
Clerk of Court/Deputy Clerk
[Signature]
197

Case # 2011-CP-18-0778

**STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG**

EXHIBITS

Plaintiff(s) KEN LUCERO
vs.
Defendant(s) _____

APPLICANTS PLAINTIFF'S EXHIBITS	STATE'S DEFENDANT'S EXHIBITS	COURT'S EXHIBITS
1 Affidavit ID	1 Indictment ^{KEN} LUCERO	1
✓ E ² NOTICE to APPEAR ID ✓	2	2
3 NOTICE of HEARING ID	3	3
4 Motion to vacate ID	4	4
✓ E ⁵ Respondants Brief ID	5	5
✓ E ⁶ NOTICE ID	6	6
7	7	7
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Court Reporter Shirley M. OVR-M

Date 5/22/12

Clerk of Court Shirley M. OVR-M

Date 5/22/2012

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ISSUE PRESENTED

The PCR court erred in finding that the holding of Padilla v. Kentucky, 130 S. Ct. 1473 (2010), applied retroactively, and in denying the State's motion to dismiss the PCR application on the grounds of statute of limitations and laches.

STATEMENT OF THE CASE

Respondent Lucero was indicted for trafficking heroin, but was allowed to plead guilty to possession of heroin before the Honorable Diane Shafer Goodstein on November 18, 2002 and received a sentence of two years imprisonment suspended upon three years probation. Respondent did not file an appeal of her conviction and sentence. App. pp. 15-18.

Respondent filed an application for post-conviction relief (PCR) on April 14, 2011. A hearing was convened at the Orangeburg County Courthouse on May 22, 2012 before the Honorable DeAndrea Gist Benjamin. Respondent was present and represented by Eleanor Duffy Cleary. The State moved to dismiss the application as beyond the statute of limitations and as being barred under the doctrine of laches. Then the PCR court heard testimony from Respondent and her plea counsel. The matter was taken under advisement and both parties submitted briefs to the PCR court. The PCR court then denied the State's motions to dismiss and granted relief by order dated July 25, 2012. However, the order was not received by the State until August 22, 2012. App. pp. 123-146.

The State filed a motion pursuant to Rule 59, SCRPC on August 24, 2012. The PCR court then issued a modified order on September 19, 2012. The State appealed the grant of relief and this petition follows.

ARGUMENT

The PCR court erred in finding that the holding of Padilla v. Kentucky, 130 S. Ct. 1473 (2010), applied retroactively, and in denying the State's motion to dismiss the PCR application on the grounds of statute of limitations and laches.

The PCR court erred in denying the State's motion to dismiss the PCR application on the grounds of statute of limitations, erroneously finding that Padilla v. Kentucky, 130 S. Ct. 1473 (2010) should be applied retroactively.¹ As determined by the Fourth, Fifth, Seventh, and Tenth Circuit Court of Appeals, Padilla should not be applied retroactively.

In Padilla, the United States Supreme Court held, for the first time, that criminal defense attorneys render deficient performance under Strickland v. Washington, 467 U.S. 1267, 704 S.Ct. 3562 (1984) when they fail to advise noncitizen clients about deportation consequences of a guilty plea. The United States Supreme Court, therefore, reversed the Kentucky Supreme Court, which had concluded that the Sixth Amendment does not protect a defendant from erroneous advice about deportation because it is merely a collateral consequence of a guilty plea. Padilla at 1478. However, in reversing Kentucky's decision, the Supreme Court noted that "[t]he Kentucky high court is far from alone in th[e] view" that the failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel. Id. at 1481.

In determining whether a decision of the United States Supreme Court should be applied retroactively, first it must be determined if the decision amounts to a new rule as

¹ Since the question as to whether Padilla is retroactive is a question of law, the issue should be reviewed de novo. Neely v. Thomasson, 365 S.C. 345, 618 S.E.2d 884 (2005) (questions of law may be decided with no deference to the trial court).

defined by Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Padilla represents a new rule due to its application of Strickland for the first time to whether plea counsel was deficient to advise a defendant of the collateral consequence of deportation from a guilty plea conviction. Dennis v. United States, 787 F.Supp.2d 425, 430 (D.S.C. 2011) (finding Padilla was a new rule because it rejected the direct versus collateral consequences distinction utilized by many lower courts, a result not dictated by existing precedent when the Padilla court found for the first time that failing to advise a client of obvious deportation consequences falls below accepted professional norms).

Where the United States Supreme Court decision announces a new rule, the decision will not be applied retroactively to claims of ineffective assistance of counsel unless the new rule either places certain types of primary, private individual conduct beyond the government's ability to proscribe as criminal conduct or if the new rule requires observance of procedures implicit to the concept of ordered liberty that amounts to a "watershed rule of criminal procedure." Talley v. State, 371 S.C. 535, 543, 640 S.E.2d 878, 882 (2007). The first exception does not apply as Padilla does not involve a new rule concerning which type of conduct the government may proscribe. As found in decisions listed below, the second exception does not apply either as the rule announced in Padilla is not a watershed rule of criminal procedure.

Four out of five circuits in the United States Courts of Appeal that have addressed the question of whether Padilla is retroactive have found that Padilla is a new rule and therefore should not be applied retroactively to cases on collateral review.² The first of these

² In an opinion issued on June 29, 2011, the Third Circuit Court of Appeals found Padilla to be retroactive. See United States v. Orocio, 645 F.3d 630 (3rd Cir. 2011). However, in an opinion issued about two months

opinions was issued by the United States Court of Appeals for the Fourth Circuit. See United States v. Hernandez-Monreal, 404 Fed. Appx. 714, at *1 (4th Cir. 2010) (noting that “nothing in the Padilla decision indicates that it is retroactively applicable to cases on collateral review.”). Following suit, the Seventh and Tenth Circuits also concluded that Padilla was not retroactive. Chaidez v. United States,³ 655 F.3d 684, 694 (7th Cir. 2011) (the fact that “numerous courts failed to anticipate the holding in Padilla,” and because of the “narrow definition of what constitutes an old rule,” “tips the scales in favor of finding that Padilla announced a new rule.”); United States v. Hong, 671 F.3d 1147, 1156 (10th Cir. 2011) (“Padilla is a new rule of constitutional law not because of what it applies – *Strickland* – but because of where it applies – collateral immigration consequences of a plea bargain.” (emphasis in original)). The Sixth Circuit Court of Appeals declined determining whether Padilla applied retroactively, finding the defendant failed to show prejudice. See Pilla v. United States, 668 F.3d 368, 373 (6th Cir. 2012). Lastly, the Fifth Circuit joined the Seventh and Tenth in finding that Padilla should not be applied retroactively. United States v. Amer, 681 F.3d 211 (5th Cir. 2012) (“We look forward to likely resolution of this question by the Supreme Court, however, in the interim, we join the Seventh and Tenth Circuits in holding that Padilla announced a ‘new’ rule within the meaning of Teague.”).

later, on September 1, 2011, the same circuit pointed out that the possibility Padilla is not to be applied retroactively is “far from remote,” and that “there is no judicial consensus on the issue and many lower courts have come to a contrary conclusion.” Diop v. ICE/Homeland Sec., 656 F.3d 221, 228 (3rd Cir. 2011).

³ On April 30, 2012, the United States Supreme Court granted certiorari to review the Seventh Circuit’s opinion in Chaidez v. United States. See United States Supreme Court Docket No. 11-820.

Importantly, the District Court of South Carolina has held Padilla “broke new ground and is not retroactively applicable.” Dennis v. United States, 787 F.Supp.2d 425, 430 (D.S.C. 2011).

Padilla should not be applied retroactively because its holding, while a new rule, is not a watershed rule. See Talley v. State, 371 S.C. 535, 640 S.E.2d 878 (2007). “[A]lthough the Supreme Court did not overturn any precedent it had established, it did, for the first time, expand the Sixth Amendment right to counsel to cover the immigration implications of a criminal conviction by rejecting several lower courts' method of evaluating the issue.” Dennis v. U.S., 787 F.Supp.2d 425, 429 (D.S.C. 2011). While the United States Supreme Court had never previously *foreclosed* the application of Strickland to collateral consequences of a conviction, it also had never *applied* Strickland to them. In other words, the Court was indicating that because it had never ruled on the issue one way or the other, it was completely free to go either way. Accordingly, neither of the Teague exceptions apply to justify the retroactive application of the new rule announced in Padilla.

Further, the PCR court erroneously found it should apply Padilla retroactively based on an erroneous interpretation of Talley and S.C. Code § 17-27-45(B). In Talley, the South Carolina Supreme Court reviewed the issue of whether Alabama v. Shelton, 535 U.S. 654 (2002) (finding the constitutional right to counsel extends to a defendant who receives a suspended sentence with the potential to result in actual deprivation of the defendant's liberty) should be applied retroactively for collateral review of a conviction. The Supreme Court concluded Shelton was a watershed rule of criminal procedure under the Teague analysis and therefore the PCR court correctly applied section 17-27-45(B) as the applicable

statute of limitations to find the application was timely filed because it was filed within one year of the decision in Shelton. Talley, 371 S.C. at 544. 640 S.E.2d at 882.

In beginning its analysis under Teague, the Talley court noted: "In determining whether Respondent was deprived of his federal constitutional right to counsel, we are required to follow the United States Supreme Court's decisions on retroactivity." Talley, 371 S.C. at 541, 640 S.E.2d at 880. Accordingly, the Talley court found section 17-27-45(B) applicable only after determining Shelton announced a new watershed rule of criminal procedure. Talley is inapplicable to the instant case because as discussed above, Padilla did not announce a new watershed rule of criminal procedure and should not be applied retroactively.

Under section 17-27-45(B) :

(B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this state holds that the Constitution of the United States or the constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, **and if the standard or right is intended to be applied retroactively**, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

(Emphasis added).

In the instant case, the new rule was created by the United States Supreme Court, and under the plain language of the statute, subsection (B) is implicated only if the United States Supreme Court intended the right to be applied retroactively, since the United States Supreme Court was the issuing court for the new rule. Accordingly, regardless of the

opinion in Danforth v. Minnesota, 552 U.S. 264, 128 S.Ct. 1029 (2008) (finding that states may provide their own remedies for new rules that are not applied retroactively pursuant to Teague), Teague analysis is necessary due to state statutory law, which requires a determination of whether the issuing court intends the right to be applied retroactively.

Further, even if Padilla was to be retroactively applied under 17-27-45(B), the application was not timely because Padilla was decided and announced on March 31, 2010 and the instant application was filed on April 14, 2011. Under the plain language of section 17-27-45(B), an applicant has one year to file the claim from when “the standard or right was determined to exist”. Under the plain language of the statute, the standard or right of Padilla was determined to exist when the opinion was issued on March 31, and not a later date when that court’s mandate was issued.

Additionally, the PCR court erred in denying the State’s motion to dismiss the application on the basis of laches. In the instant case, the transcript had been destroyed⁴ and although trial counsel was able to articulate her general practice, she was unable to recall specifics of this case. Tr. pp. 59-63. Further, even Respondent found recalling the colloquy with the trial court difficult. Tr. pp. 50-53. Accordingly, the PCR court should have granted

⁴ See App. pp. 21-22; p. 143. The PCR court also improperly took judicial notice that plea courts did not routinely advise defendants of the possibility of deportation. App. p. 143. Such a fact was disputed and judicial notice was improper. Under Rule 201(b), SCRE, a judicially noticed fact: “must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.” In the instant case, it is quite feasible that the plea court, especially when noticing the use of an interpreter, would have addressed the deportation issue with Applicant.

the State's motion to dismiss on the grounds of laches, given the obvious prejudice arising from the delay in Respondent bringing her claim.

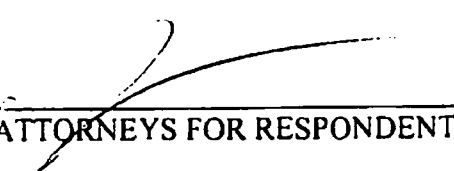
CONCLUSION

For the above stated reasons, the petition should be granted and the PCR court's order granting post-conviction should be reversed. If this Court sees fit to grant this petition for writ of certiorari, respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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BY: 

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Columbia, South Carolina
January 17, 2013

STATE OF SOUTH CAROLINA
SUPREME COURT

Certiorari to Dorchester County
The Honorable DeAndrea G. Benjamin, Circuit Court Judge
Case No. 2011-CP-18-0778
Appellate Case No. 2012-213130

KEN LUCERO,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

PROOF OF SERVICE

I, Lauren Meara, certify that I have served the within **Petition for Writ of Certiorari and Appendix** on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Eleanor Duffy Cleary, Esquire
Law Office of Eleanor Duffy Cleary
1720 Main Street, Ste. 303
Columbia, SC 29201

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

This 17th day of January, 2013.

Lauren Meara
LAUREN MEARA
Legal Assistant

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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County

DeAndrea G. Benjamin, Circuit Court Judge

Case No. 2011-CP-18-0778

KEN LUCERO,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR RESPONDENT

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QUESTION PRESENTED

Whether the Post Conviction Relief court properly held that the United States Supreme Court's decision in *Padilla v. Kentucky*, 130 S.Ct 1473, 559 U.S. 356 (2010), applies to Respondent's 2002 guilty plea, that the application was submitted within one year of the date *Padilla* became final, and that the action was not barred by the doctrine of laches?

STATEMENT OF THE CASE

The State has appealed the grant of Post Conviction Relief (PCR) to Ken Lorena Lucero (Respondent) by the Honorable DeAndrea G. Benjamin, filed July 31, 2012 and modified October 22, 2012.

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. 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). 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.

EVIDENCE PRESENTED

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.

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.

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.

At the time of her plea, she had lived in the United States for almost ten years and was married to a United States Marine. He was deployed overseas when she was arrested. Her arrest arose from a traffic stop on Interstate 95 in Dorchester County. She testified she did not understand the officer and did not give him permission to search the car she had rented in Orlando, Florida. Her two-year-old daughter was in the car with her. She showed the officer her rental car receipt and her valid driver's license.

According to her testimony, the officer showed her the heroin he found in the rear part of the car. She testified that she had never seen heroin before. According to the arrest warrant, a South Carolina highway patrolman stopped her for unspecified "routine traffic violation" and after searching the vehicle for an unspecified reason, he found the heroin. She was charged with trafficking between 100 and 200 grams, as proscribed by S.C. Code Ann. § 44-53-370 (e) (2) (c) (2002). The offense carried a mandatory term of imprisonment of not less than twenty-five years, nor more than forty years.

Respondent testified that she had never used heroin and had never sold any drugs. To her knowledge, her friends in Orlando did not sell drugs and she was unaware the drugs were in the rental car.

She testified she pled guilty upon the advice of her appointed counsel, Hardee-Thomas. She testified that Hardee-Thomas told her she would get probation if she pled to possession of

heroin and, therefore, would not lose her children. Respondent testified at the hearing that she was not given any information about immigration consequences by Hardee-Thomas.

On November 18, 2002, the Honorable Diane Schafer Goodstein, Circuit Court Judge, did impose a sentence of two years, suspended upon three years of probation. Respondent successfully completed probation early on August 5, 2004.

Respondent introduced letters and orders from the U.S. Department of Justice, Immigration and Naturalization Service, and the Board of Immigration Review showing that she was being deported solely because she was convicted of possession of heroin in South Carolina.

In February 2011, an immigration judge ordered Respondent removed to Ecuador. Her lawyer in New York, Lloyd Munjack, filed an appeal to the Board of Immigration Appeals. On March 22, 2012, the Board denied her appeal because her PCR was still pending and notified her that she would be removed.

In March of 2011, Respondent met with her current counsel, who filed the PCR application by placing it in the United States mail on March 31, 2011. The Dorchester Clerk of Court's office did not mark it as filed until April 14, 2011.

Respondent testified that she would never have pled guilty if she had known she would be deported because the United States is her home and the home of her two children, who are American citizens. She testified she would have fought the charges because the heroin was not hers.

Hardee-Thomas, a former attorney, who was appointed to represent Respondent, testified at the hearing. She recalled her name but did not remember details of the case because of the amount of time that had passed. She testified that she might have told her clients that they faced deportation. She was unable to testify as to the immigration consequences of a legal alien

pleading guilty to a controlled substance offense and was unable to distinguish between immigration consequences for illegal immigrants and legal resident aliens. She did not remember if Judge Goodstein advised Respondent she would be deported if she pled guilty to a controlled substance violation but stated that she was thorough with her pleas. Respondent asked the PCR Court to take judicial notice of the fact that the standard plea colloquy did not contain any questions about immigration consequences in 2002.

ARGUMENT

The Post Conviction Relief court properly held that the United States Supreme Court's decision in *Padilla v. Kentucky*, 130 S.Ct 1473, 559 U.S. 356 (2010), applies to Respondent's 2002 guilty plea, that the application was submitted within one year of the date *Padilla* became final, and that the action was not barred by the doctrine of laches.

A. Burden of Proof

The burden is on the Applicant (Respondent) in a PCR proceeding to prove the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). On certiorari in a PCR action, this Court applies an "any evidence" standard of review. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Accordingly, the Court should affirm if any evidence of probative value in the record exists to support the finding of the PCR court. *Id.* at 119, 386 S.E.2d at 626. The decision of the PCR judge may be reversed when it is controlled by an error of law. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). This Court is entitled to decide a novel question of law without any particular deference to the lower court. *Page v. State*, 364 S.C. 632, 615 S.E.2d 740 (2005).

B. Statute of Limitations under Section 17-27-45 (B)

Even though Respondent filed her application eight years after her conviction, the PCR Court properly found that Respondent's claim falls within an exception to the one-year statute of limitations.

South Carolina Code Section 17-27-45 (B) provides:

[w]hen a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

S.C. Code Ann. § 17-27-45(B) (Supp. 2010).

There is little doubt that *Padilla* imposed upon South Carolina's courts a standard "not previously recognized or a right not in existence at the time" Respondent pled guilty in 2002. As discussed *infra*, in *Chaidez v. United States*, 133 S. Ct. 1103 (2013), the United States Supreme Court stated that in deciding *Padilla*, "we answered a question about the Sixth Amendment's reach that we had left open, in a way that altered the law of most jurisdictions." Prior to *Padilla*, *supra*, South Carolina, like most jurisdictions, followed the rule that counsel does not have to advise her client about collateral consequences and that only affirmative erroneous advice renders a plea involuntary. *Brown v. State*, 306 S.C. 381, 382-83, 412 S.E.2d 399, 400 (1991); *Williams v. State*, 662 S.E.2d 615, 378 S.C. 511 (Ct. App. 2008).

Turning to South Carolina law on the application of Section 17-27-45 (B), this Court held in *Talley v. State*, 371 S.C. 535, 543-44, 640 S.E.2d 878, 882 (2007), that *Alabama v. Shelton*, 535 U.S. 654, 122 S. Ct. 1764 (2002), applied retroactively on collateral review and therefore

S.C. Code Ann. § 17-27-45 (B) provided the applicable statute of limitations. In *Shelton*, the United States Supreme Court held the constitutional right to counsel extends to a defendant who receives a sentence that may result in incarceration. The *Talley* Court reasoned that *Shelton* extended a new rule for the purposes of collateral review because it pronounced a rule that was not in existence when the petitioner was convicted. Similarly, *Padilla* extended a new rule to cases where the Respondent was not made aware of immigration consequences.

In *Talley*, decided in 2007, the South Carolina Supreme Court stated “[i]n determining whether Applicant was deprived of his federal constitutional right to counsel, we are required to follow the United States Supreme Court’s decisions on retroactivity,” citing *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989). *Talley*, 371 S.C. at 541, 640 S.E.2d at 880. Essentially, *Teague* held that a case that announces a “new rule” – when it breaks new ground or imposes a new obligation on the States or the Federal Government. “To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant’s conviction became final.” *Teague*, 489 U.S. at 301, 109 S.Ct. 1060. Under *Teague*, new rules are not to be applied to convictions that have already been finalized unless narrow exceptions apply.

The year following *Talley*, the United States Supreme Court clarified that the *Teague* rule does not prevent the states from applying “new rules” to cases finalized before the new rule was issued. *Danforth v. Minnesota*, 552 U.S. 264, 128 S.Ct. 1029 (2008). In that case, concerning state review of a Minnesota conviction, the Court stated that neither “*Teague* (or any of the other cases relied upon by respondent and the Minnesota Supreme Court) speak to the entirely separate question whether States can provide remedies for violations of these rights in their own post conviction proceedings.” *Danforth*, 552 U.S. at 275, 128 S. Ct. at 1038.

The Supreme Court in *Danforth* could not make it any clearer that the *Teague* rule “was intended to limit the authority of federal courts to overturn state convictions—not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions.” *Danforth*, 552 U.S. at 280-81, 128 S. Ct. at 1041 (emphasis added).

Therefore, *Teague* and the recently decided case of *Chaidez, supra*, is not controlling on the issue of whether this Court should apply *Padilla* retroactively to Respondent's state conviction in this state post-conviction relief action. *Chaidez*, in which the United States Supreme Court found that *Padilla* would not apply to a federal conviction, held that *Padilla* created a “new rule” and thus, would not be applied retroactively under *Teague*.

Even in *Talley*, decided before *Danforth*, the South Carolina Supreme Court used *Teague's* analysis but then applied it more broadly than the United States Supreme Court ever has. The *Talley* Court held that the “new rule” in *Shelton* came within *Teague's* “watershed” exception “because the right to counsel undeniably implicates the fundamental fairness and accuracy of the proceeding.” *Talley*, 371 S.C. at 544, 640 S.E.2d at 882. By doing so, this Court has already departed from the strict rule of *Teague* and applied retroactivity in a broader manner.

In contrast, the United States Supreme Court has “yet to find a new rule that falls under this [watershed] exception. In providing guidance as to what might do so, the Court has repeatedly, and only, referred to the right-to-counsel rule of *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799.” *Beard v. Banks*, 542 U.S. 406, 407, 124 S. Ct. 2504, 2507, 159 L. Ed. 2d 494 (2004).

Therefore, contrary to the State's assertions, *Teague* is not controlling in this case. Instead, this Court must determine if the holding in *Padilla* imposed “a substantive standard not

previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively.” S.C. Code Ann. § 17-27-45 (B) (Supp. 2011). *Padilla* provided the “new” right to effective assistance of counsel regarding advice about immigration consequences. That is precisely why section 17-27-45 (B) puts Respondent’s claim within the statute of limitations.

In fact, if the South Carolina courts were required to apply *Teague* exactly as the United States Supreme Court does, then Section 17-27-45 (B) would be rendered meaningless. Under our State 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.” It would be illogical that our law would allow the filing of a late application after a “new rule” only to then proclaim it cannot apply a “new rule” retroactively because of *Teague*.

Padilla held that effective counsel must inform clients who are legal aliens of the severe immigration consequences of convictions for almost any drug offense, which have been in effect since at least 1997. Therefore, *Padilla* implicates the right to effective counsel, which arises from *Gideon*, and effective counsel implicates the fundamental fairness and accuracy of the proceeding. It is fundamentally unfair when a person pleads to an offense without knowledge of the severe consequences.

Therefore, the issue is “if the standard or right is intended to be applied retroactively.” Respondent asserts and the PCR Court agreed that that is a determination for the South Carolina courts, and not a federal issue. The State reads into the statute that it is the United States Supreme Court that must have “intended [the standard] to be applied retroactively.” Again, that

interpretation is in conflict with *Talley v. State*, in which this Court found *Shelton* should apply retroactively, whereas the United States Supreme Court has not held such.

The state's interest in preventing a floodgate of PCR applications by immigrants who did not know they would be banished to a usually ghastly existence if they pled guilty could be furthered by limiting applicability of *Padilla* on collateral review of guilty pleas obtained after the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. No. 104–208, 110 Stat. 3009–546 (eff. April 1, 1997), the date on which removal became practically inevitable for all but the most minor offenses.

This Court could apply the balancing test used by Alaska which looks at the: (1) the purpose to be served by the new standards; (2) the extent of the reliance by law enforcement authorities on the old standards; and (3) the effect on the administration of justice of a retroactive application of the new standards. *State v. Smart*, 202 P.3d 1130 (Alaska 2009). Considering the relatively low number of resident aliens in South Carolina, the fact that the one year statute of limitations after *Padilla* has already expired, and the important purpose served by the Supreme Court's decision in *Padilla*, the decision should be applied retroactively to those who filed within one year of *Padilla*'s becoming final.

In summary, South Carolina courts may, and have, extended the protections of due process, and its concept of fundamental fairness, beyond what is required by the United States Supreme Court. *See e.g. Talley, supra*. As the PCR Court correctly noted, “[t]his is one of those situations where South Carolina’s concept of justice demands that Respondent be given the opportunity to face such serious consequences with the *effective* assistance of counsel.” App. p. 136..

Finally, this Court should not reverse the PCR Court's finding that Respondent's petition for PCR was filed within one year of the United States Supreme Court's mandate in the *Padilla* case being issued and that statute of limitations does not bar Respondent's PCR application since a decision of the Supreme Court is not binding until the petition for rehearing expires.

As noted above, the application was clocked in as filed in the Dorchester Clerk of Court's office on April 14, 2011; two weeks after Respondent's counsel mailed the application. *Padilla* was decided on March 31, 2010, but the mandate was issued on May 3, 2010.¹ According to Rule 45.2 of the United States Supreme Court:

[i]n a case on review from a state court, the mandate issues 25 days after entry of the judgment, unless the Court or a Justice shortens or extends the time, or unless the parties stipulate that it issue sooner. The filing of a petition for rehearing stays the mandate until disposition of the petition, unless the Court orders otherwise. If the petition is denied, the mandate issues forthwith.

This is analogous to the state court's issuing of the remittitur under Rule 221, SCACR. Under S.C. Code Ann. §17-27-45 (A), "[a]n application for relief filed pursuant to this chapter must be filed within one year after the entry of judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal of the filing of the final decision upon an appeal, whichever is later." As in state court, a decision of the Supreme Court is not binding until the petition for rehearing expires. Therefore, because Respondent filed her petition within one year of the Supreme Court's mandate, it complies with the statute of limitation in S.C. Code Ann. § 17-27-45 (B).

¹ See <http://www.supremecourt.gov/search.aspx?filename=/docketfiles/08-651.htm>.

In conclusion, under South Carolina law, *Padilla's* pronouncements concerning the right to effective assistance of counsel with regard to advice about deportation applies to Respondent's claim.

C. The Merits of the Application for Post-Conviction Relief
1. Ineffective Assistance of Counsel

Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 674 (1984), the Court first determines whether counsel's representation "fell below an objective standard of reasonableness." Respondent's plea counsel was ineffective for failing to advise her she would be subject to deportation if she pled guilty to possession of heroin.

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." *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *Kolle v. State*, 386 S.C. 578, 589, 690 S.E.2d 73 (2010).

The Supreme Court explained in *Padilla* that "preserving the client's right to remain in the United States may be more important to the client than any jail sentence." *Padilla*, 130 S.Ct. at 1483. The Supreme Court noted that when Padilla pled guilty to transportation of marijuana in a Kentucky state court, the law providing for deportation after such a conviction was "succinct, clear, and explicit in defining the removal consequences for Padilla's conviction." *Id.* at 1483. The Court held that Padilla's counsel "could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses." *Id.*

As noted above, Respondent pled guilty in November 2002 to possession of heroin under S.C. Code Ann. § 44-53-370 (d) (1) (2002). When Respondent pled guilty in 2002 to a controlled substance offense carrying two years in prison, there was a succinct, clear, and explicit federal statute providing for her deportation. For a resident alien who pleads guilty to a

controlled substance offense, deportation is “presumptively mandatory.” *Padilla*, 130 S.Ct. at 1480.

Under federal law, an alien who is convicted of a crime for which a sentence of one year or longer may be imposed is deportable. 8 U.S.C.A. § 1227 (a)(2)(A)(i)(II). Furthermore, federal immigration law has long provided that a conviction for controlled substance violations is deportable. 8 USC § 1227(a)(2)(B)(i).

If a noncitizen has committed a removable offense after 1996, removal is “practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses. *See* 8 U.S.C. § 1229b. Subject to limited exceptions, this discretionary relief is not available for an offense related to a controlled substance. *See* § 1101(a)(43)(B); § 1228. *Padilla*, 130 S.Ct. at 1480.

Respondent is deportable under the same statute *Padilla* was. Based on its review of the demeanor of the witnesses, the PCR Court found that Respondent’s plea counsel did not advise her that her removal would be presumptively mandatory after such a plea.

As in *Padilla*, Respondent has satisfied the first prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 674 (1984). Under *Strickland*, the Court first determines whether counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. The PCR Court found that plea counsel’s testimony at the PCR hearing showed that she did not understand immigration law, providing a basis for its finding that she did not tell Respondent that deportation was inevitable, as required by *Padilla*. Even if she told her there may be immigration consequences, such information would not be sufficient under *Padilla*. The United States Supreme Court made clear that given the near certainty that *Padilla* would be deported, the

admonishment that the plea “may” result in deportation was not sufficient to alleviate the prejudice arising from counsel's failure to advise Appellant of the plea's immigration consequences. The Court stated:

When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice ALITO), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Padilla, 130 S.Ct. at 1483.

Respondent testified credibly at the hearing that she was never advised of any immigration consequences. In light of the fact that there were very few non-citizens in South Carolina in 2002, her testimony is convincing. The PCR Court properly took judicial notice of the readily verifiable fact that less than 1.3 percent of Dorchester County residents were non-citizens in 2000 and that number had only increased to 1.9 in 2010.²

In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing is considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. *Stalk v. State*, 375 S.C. 289, 298-99, 652 S.E.2d 402, 406-07 (Ct. App. 2007) *aff'd as modified*, 383 S.C. 559, 681 S.E.2d 592 (2009); *Wolfe v. State*, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997). In this case, the transcripts no longer exist; however, the PCR Court properly took judicial notice of the fact that in 2002 circuit court judges in this State did not advise defendants that deportation was practically inevitable after a conviction for a drug related offense. Judicial notice is proper for “matters of common and general knowledge.” *Moss v. Aetna Life Ins. Co.*, 267 S.C. 370, 377,

² U.S. Census Bureau, Fact Finder, Place of Birth by Citizenship Status, Dorchester County, South Carolina.

228 S.E.2d 108, 112 (1976). It is disingenuous to assert that this is not common knowledge among criminal lawyers and judges and a review of every plea before *Padilla*, if practical, would surely show this.

2. Prejudice

The Respondent is required to show that there is a reasonable probability that, but for counsel's errors, she would not have pled guilty, but would have insisted on going to trial. *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009), *Thompson v. State*, 340 S.C. 112, 117, 531 S.E.2d 294, 297 (2000).

The PCR Court found, after observing the witnesses, that Respondent demonstrated that there is a reasonable probability that, but for counsel's errors, she would not have pled guilty, but would have insisted on going to trial.

Respondent had meritorious defenses to the charges against her. If Respondent had been advised of the harsh consequences of her plea, she could have insisted on a trial or asked her counsel to pursue alternative punishment. Respondent testified that she would have fought the charges. Even though she was facing a lengthy jail sentence if convicted, the prospect of deportation is more severe than jail, as the *Padilla* court made so clear. Clearly, Respondent would have wanted to avoid deportation from the United States where, at the time of her plea, she had lived for almost ten years, and which was the only home her American children had ever known. Deportation would separate her from her children, who are not Ecuadorian citizens, and as she testified, keeping her children was justifiably her main concern.

In addition, the warrant shows that there were grounds to fight the charges. There is no evidence that the officer had probable cause to search the car for drugs pursuant to a routine

traffic violation. Even under the rule in 2002 in *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860 (1981), an officer must first arrest the person before searching the vehicle. A routine traffic violation does not lead to an arrest. Furthermore, any consent to search could have been challenged as invalid because of her inability to understand English.

D. Laches

The PCR Court's finding that the doctrine of laches does not bar Respondent's claim is supported by the evidence. The severe consequences of Respondent being deported outweigh any prejudice caused to the state by trying this case.

At the hearing, the State raised the defense of laches. Laches is:

neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party.

Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002), citing *Hallums v. Hallums*, 296 S.C. 195, 198-199, 371 S.E.2d 525, 527 (1988).

While it is true that memories have faded since 2002, as noted above it is clear that Hardee-Thomas did not tell Respondent that her deportation would be inevitable if she pled guilty to a controlled substance violation. The arrest warrant shows the officer's actions during the traffic stop. Therefore, the prejudice to the state is not outweighed by the extremely severe consequences Respondent will face if her conviction is not vacated.

The transcript has been destroyed. However, as stated above, the PCR court correctly took judicial notice of the fact that plea judges did not discuss immigration consequences in their

plea colloquy and it is a near certainty that in 2002 even the most thorough of judges --like Judge Goodstein -- would not have told Respondent to expect to be deported.

Respondent sought relief as soon as practical. The federal government did not commence deportation proceedings until 2010. *Padilla* did not provide its glimmer of hope of relief until the spring of 2010. Respondent lives in New York and had to gather the time and resources to retain South Carolina counsel willing to attack her conviction, which she did in March of 2011.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court deny the State's petition for certiorari.

Respectfully submitted,

Eleanor D. Cleary

Eleanor Duffy Cleary
Attorney at Law

ATTORNEY FOR RESPONDENT.

This 22nd day of April, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County

DeAndrea G. Benjamin, Circuit Court Judge

Case No. 2011-CP-18-0778

KEN LUCERO,

RESPONDENT,

V.

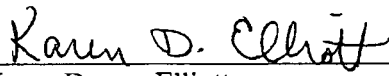
STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

I, Karen Dumas Elliott, paralegal for the undersigned counsel, certifies that I served the Return to Petition for Writ of Certiorari in the above captioned case by mailing a copy by U.S. Mail with the return address clearly indicated on the envelope and proper postage attached to said envelope on the 22nd day of March, 2013, on the State of South Carolina to the following address:

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


Karen Dumas Elliott



ALAN WILSON
ATTORNEY GENERAL

May 8, 2013

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29201
Via hand delivery

Re: Ken Lucero v. State

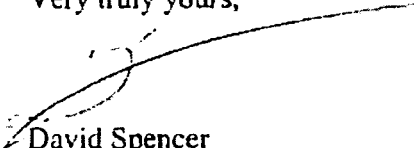
Dear Mr. Shearouse:

This case is before this Court by way of the State's petition for writ of certiorari challenging the PCR court's grant of relief. The Respondent made her return to the petition for writ of certiorari on April 22, 2013. The State moved for and was granted an extension until May 13, 2013 to reply. Upon closer review of this matter, the State does not feel any additional points need to be presented by way of a reply to the return to petition for writ of certiorari. However, pursuant to Rule 208(b)(7), SCACR, I would refer to the following case as additional authority:

Chaidez v. United States, 133 S.Ct. 1103 (2013) (finding that Padilla v. Kentucky, 559 U.S. 356 (2010) announced a new rule but not considering whether it constituted a watershed rule).

With kind regards, I am

Very truly yours,


David Spencer
Assistant Deputy Attorney General

cc:  Eleanor Duffy Cleary, Esquire

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

**Certiorari to Dorchester County
The Honorable Deandrea G. Benjamin, Circuit Court Judge**

Ken Lucero,

Respondent,

vs.

State of South Carolina,

Petitioner.

BRIEF OF PETITIONER

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ISSUE PRESENTED

The PCR court erred in finding that the holding of Padilla v. Kentucky, 130 S. Ct. 1473 (2010) applied retroactively and erred in denying the State's motion to dismiss the PCR application on the grounds of statute of limitations and laches.

STATEMENT OF THE CASE

Respondent Lucero was indicted for trafficking heroin, but allowed to plead guilty to possession of heroin before the Honorable Diane Shafer Goodstein on November 18, 2002. Lucero received a sentence of two years' imprisonment suspended upon three years' probation. Respondent did not file an appeal of her conviction and sentence. App. pp. 15-18.

Respondent filed an application for post-conviction relief (PCR) on April 14, 2011. A hearing was convened at the Orangeburg County Courthouse on May 22, 2012, before the Honorable DeAndrea Gist Benjamin. Respondent was present and represented by Eleanor Duffy Cleary, Esquire. The State moved to dismiss the application as beyond the statute of limitations and as being barred under the doctrine of laches. Then the PCR court heard testimony from Respondent and her plea counsel. The matter was taken under advisement and both parties submitted briefs to the PCR court. The PCR court then denied the State's motions to dismiss and granted relief by order dated July 25, 2012. However, the order was not received by the State until August 22, 2012. App. pp. 123-146.

The State filed a motion pursuant to Rule 59, SCRCP on August 24, 2012. The PCR court then issued a modified order on September 19, 2012. The State appealed the grant of relief. After the instant case was transferred from the Supreme Court to this Court, this Court granted the State's petition for writ of certiorari. This brief follows.

ARGUMENT

The PCR court erred in finding that the holding in Padilla v. Kentucky, 130 S. Ct. 1473 (2010) applied retroactively and erred in denying the State's motion to dismiss the PCR application on the grounds of statute of limitations and laches.

The PCR court erred in denying the State's motion to dismiss the PCR application on the grounds of statute of limitations, erroneously finding that Padilla v. Kentucky, 130 S. Ct. 1473 (2010) should be applied retroactively.¹

Since the State filed its petition, the United States Supreme Court issued its opinion in Chaidez v. United States, 133 S.Ct. 1103 (2013), which held that Padilla announced a new rule in rejecting application of Padilla retroactively to Chaidez. Relying on Chaidez, the South Carolina Supreme Court subsequently held in Hamm v. State, 403 S.C. 461, 744 S.E.2d 503 (2013) that Padilla does not apply retroactively.

Lucero contends Padilla should be retroactive because the new rule constitutes a watershed rule – a question not expressly determined by Chaidez or Hamm. See Chaidez, at 1107 n.3 (noting Chaidez did not argue Padilla announced a watershed rule of criminal procedure). In Padilla, the United States Supreme Court held, for the first time, that criminal defense attorneys render deficient performance under Strickland v. Washington, 466 U.S. 668 (1984) when they fail to advise noncitizen clients about deportation consequences of a guilty plea. The United States Supreme Court, therefore, reversed the Kentucky Supreme Court, which had concluded that the Sixth Amendment does not

¹ Since the question as to whether Padilla is retroactive is a question of law, the issue should be reviewed de novo. Neely v. Thomasson, 365 S.C. 345, 618 S.E.2d 884 (2005) (questions of law may be decided with no deference to the trial court).

protect a defendant from erroneous advice about deportation because it is merely a collateral consequence of a guilty plea. Padilla at 1478. However, in reversing Kentucky's decision, the Supreme Court noted that "[t]he Kentucky high court is far from alone in th[e] view" that the failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel. Id. at 1481.

In determining whether a decision of the United States Supreme Court should be applied retroactively, first it must be determined if the decision amounts to a new rule as defined by Teague v. Lane, 489 U.S. 288 (1989). Chaidez answered the question both parties to this case already agreed upon – Padilla announced a new rule. Chaidez, at 1108-09 (noting Padilla determined deportation was not "categorically removed" from the scope of Sixth Amendment right to counsel merely because deportation was a collateral consequence of a conviction; and this decision contradicted the almost unanimous view of lower courts that the Sixth Amendment categorically does not apply to collateral consequences such as deportation).

New rules from a United States Supreme Court opinion will generally not be applied retroactively, but Lucero relies on the extremely rare exception for when a new rule amounts to a watershed rule of criminal procedure. Where the United States Supreme Court decision announces a new rule, the decision will not be applied retroactively to claims of ineffective assistance of counsel unless the new rule places certain types of primary, private individual conduct beyond the government's ability to proscribe as criminal conduct, or the new rule requires observance of procedures implicit to the concept of ordered liberty that amounts to a "watershed rule of criminal procedure." Talley v. State, 371 S.C. 535, 543, 640 S.E.2d 878, 882 (2007). The first exception does not apply as

Padilla does not involve a new rule concerning which type of conduct the government may proscribe. As found in decisions listed below, the second exception does not apply either as the rule announced in Padilla is not a watershed rule of criminal procedure.

Several months prior to the Chaidez opinion, the Fourth Circuit Court of Appeals reviewed and determined that the new rule in Padilla is not a watershed rule. United States v. Mathur, 685 F.3d 396 (4th Cir. 2012). The Fourth Circuit noted a new procedural rule will apply retroactively “if it is implicit in the concept of ordered liberty and if, without the procedure, the likelihood of an accurate conviction is seriously diminished.” Id. at 399 (citing Teague, at 311) (internal quotation marks omitted). Mathur noted “[t]his exception is extremely narrow . . . as it is reserved only for watershed rules implicating fundamental fairness.” Id. (citations and internal quotation marks omitted). “Since Teague, the [United States] Supreme Court has reviewed numerous claims that new rights fall within this exception, and it has rejected every single one of them.” Id. Mathur noted that the only case in which it was suggested retroactive application of a new rule as a watershed rule was Gideon v. Wainwright, 372 U.S. 335 (1963), which found the Sixth Amendment right to counsel applies to the states. Id.; see Whorton v. Bockting, 549 U.S. 406, 417 (2007) (“We have observed that it is unlikely that any [watershed rules] have yet to emerge” (citation and internal quotation marks omitted)).

In Whorton, the United States Supreme Court noted: “In order to qualify as watershed, a new rule must meet two requirements. First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction. . . . Second, the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.” Id. at 418 (citation and internal quotation marks omitted). The Fourth

Circuit, applying Whorton, noted that a criminal defendant's awareness of deportation consequences when entering a guilty plea "does not cast doubt on the verity of the defendant's admission of guilt or the propriety of the sentence imposed pursuant to the plea agreement." Mathur, at 400. Thus, Mathur found Padilla was not a watershed rule.

Further, the Mathur Court noted it had not been directed to any cases suggesting that Padilla was a new rule that should be applied retroactively: "The cases decided under Padilla to date have held *either* that Padilla did not recognize a new right *or* that Padilla did recognize a new right but the right was *not* retroactively applicable to cases on collateral review." Mathur, at 400 (emphasis in the original). Padilla should not be applied retroactively because its holding, while a new rule, is not a watershed rule.

Further, the PCR court erroneously found it should apply Padilla retroactively based on an erroneous interpretation of Talley v. State, 371 S.C. 535, 640 S.E.2d 878 (2007) and S.C. Code § 17-27-45(B). In Talley, the South Carolina Supreme Court reviewed the issue of whether Alabama v. Shelton, 535 U.S. 654 (2002) (finding the constitutional right to counsel extends to a defendant who receives a suspended sentence with the potential to result in actual deprivation of the defendant's liberty) should be applied retroactively for collateral review of a conviction. The Supreme Court concluded, without the benefit of United States Supreme Court precedent, that Shelton was a watershed rule of criminal procedure under the Teague analysis and therefore, the PCR court correctly applied section 17-27-45(B) as the applicable statute of limitations to find the application was timely filed because it was filed within one year of the decision in Shelton. Talley, 371 S.C. at 544, 640 S.E.2d at 882.

In beginning its analysis under Teague, the Talley court noted: “In determining whether Respondent was deprived of his federal constitutional right to counsel, **we are required** to follow the United States Supreme Court’s decisions on retroactivity.” Talley, 371 S.C. at 541, 640 S.E.2d at 880 (emphasis added). Accordingly, the Talley court found section 17-27-45(B) applicable only after determining Shelton announced a new watershed rule of criminal procedure. Talley is inapplicable to the instant case because as discussed above, Padilla did not announce a new watershed rule of criminal procedure and should not be applied retroactively.

Under section 17-27-45(B) :

(B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, **and if the standard or right is intended to be applied retroactively**, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

(Emphasis added).

In the instant case, the new rule was created by the United States Supreme Court, and under the plain language of the statute, subsection (B) is implicated only **if the United States Supreme Court** intended the right to be applied retroactively, since the United States Supreme Court was the issuing court for the new rule. Accordingly, regardless of the opinion in Danforth v. Minnesota, 552 U.S. 264 (2008) (finding that states may provide their own remedies for new rules that are not applied retroactively pursuant to Teague), Teague analysis is necessary due to state statutory law, which requires a determination of

whether the **issuing court** intends the right to be applied retroactively. See Seckinger v. The Vessel, Excalibur, 326 S.C. 382, 483 S.E.2d 775 (Ct. App. 1997) (Statutory language should be given its plain and ordinary meaning unless something else in the statute requires an alternative meaning).

Further, even if Padilla was to be retroactively applied under section 17-27-45(B), the application was not timely because Padilla was decided and announced on March 31, 2010, and the instant application was filed on April 14, 2011. Under the plain language of section 17-27-45(B), an applicant has one year to file the claim from when “the standard or right was determined to exist.” Under the plain language of the statute, the standard or right of Padilla was determined to exist when the opinion was issued on March 31, and not a later date when that court’s mandate was issued.

Additionally, the PCR court erred in denying the State’s motion to dismiss the application on the basis of laches. In the instant case, the transcript had been destroyed² and although trial counsel was able to articulate her general practice, she was unable to recall specifics of this case. Tr. pp. 59-63. Further, even Respondent found recalling the colloquy with the trial court difficult. Tr. pp. 50-53. Accordingly, the PCR court should have granted the State’s motion to dismiss on the grounds of laches, given the obvious prejudice arising from the delay in Respondent bringing her claim.

² See App. pp. 21-22; p. 143. The PCR court also improperly took judicial notice that plea courts did not routinely advise defendants of the possibility of deportation. App. p. 143. Such a fact was disputed and judicial notice was improper. Under Rule 201(b), SCRE, a judicially noticed fact: “must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.” In the instant case, it is quite feasible that the plea court, especially when noticing the use of an interpreter, would have addressed the deportation issue with Applicant.

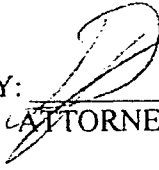
CONCLUSION

For the above stated reasons, the PCR court's order granting post-conviction relief should be reversed.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General
Bar # 68571

BY: 

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Office of the Attorney General
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Columbia, South Carolina 29211

September 23, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Dorchester County

Honorable Deandrea G. Benjamin, Circuit Court Judge

Ken Lucero

Respondent.

vs.

State of South Carolina,

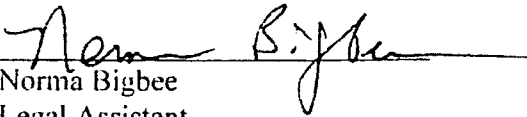
Petitioner.

PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Brief of Petitioner on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Eleanor Duffy Cleary, Esquire, 1720 Main St., Suite 303, Columbia, SC, 29201.

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

This 23rd day of September, 2014.


Norma Bigbee
Legal Assistant

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Dorchester County

DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2012-213130

KEN LUCERO,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER.

BRIEF OF RESPONDENT

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ATTORNEY FOR RESPONDENT

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ISSUE PRESENTED

The Post-Conviction Relief court properly held that the United States Supreme Court's decision in *Padilla v. Kentucky*, 130 S.Ct. 1473, 559 U.S. 356 (2010), applies to Respondent's 2002 guilty plea, that the application was submitted within one year of the date *Padilla* became final, and that the action was not barred by the doctrine of laches.

STATEMENT OF THE CASE

After the South Carolina Supreme Court transferred this post-conviction relief appeal to this Court, the State's petition for writ of certiorari was granted. The State timely filed its Brief of Petitioner on September 23, 2014, and Ken Lorena Lucero (Respondent) now submits her Brief of Respondent, asking this Court to affirm the grant of Post-Conviction Relief (PCR) by the Honorable DeAndrea G. Benjamin, filed July 31, 2012 and modified October 22, 2012.

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. 195. 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. 2. 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. 125-144.

EVIDENCE PRESENTED

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. 43-44.

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. 43.

At the time of her plea, she had lived in the United States for almost ten years and was married to a United States Marine. He was deployed overseas when she was arrested. App. pp. 38-40. Her arrest arose from a traffic stop on Interstate 95 in Dorchester County. App. p. 41. She testified she did not understand the officer and did not give him permission to search the car she had rented in Orlando, Florida. Her two-year-old daughter was in the car with her. She showed the officer her rental car receipt and her valid driver's license. App. pp. 39-42.

According to her testimony, the officer showed her the heroin he found in the rear part of the car. She testified that she had never seen heroin before. App. pp. 41-42.

According to the arrest warrant, a South Carolina highway patrolman stopped her for unspecified "routine traffic violation" and after searching the vehicle for an unspecified reason, he found the heroin. She was charged with trafficking between 100 and 200 grams, as proscribed by S.C. Code Ann. § 44-53-370 (e) (2) (c) (2002). App. p. 18. The offense carried a mandatory term of imprisonment of not less than twenty-five years, nor more than forty years.

Respondent testified that she had never used heroin and had never sold any drugs. To her knowledge, her friends in Orlando did not sell drugs and she was unaware the drugs were in the rental car. App. pp. 41-42.

She testified she pled guilty upon the advice of her appointed counsel, Hardee-Thomas. She testified that Hardee-Thomas told her she would get probation if she pled to possession of heroin and, therefore, would not lose her children. Respondent testified at the hearing that she was not given any information about immigration consequences by Hardee-Thomas. App. p. 43.

On November 18, 2002, the Honorable Diane Schafer Goodstein, Circuit Court Judge, did impose a sentence of two years, suspended upon three years of probation. Respondent successfully completed probation early on August 5, 2004. App. p. 15.

Respondent introduced letters and orders from the U.S. Department of Justice, Immigration and Naturalization Service, and the Board of Immigration Review showing that she was being deported solely because she was convicted of possession of heroin in South Carolina. App. pp. 161-164.

In February 2011, an immigration judge ordered Respondent removed to Ecuador. Her lawyer in New York, Lloyd Munjack, filed an appeal to the Board of Immigration Appeals. App. pp. 175-182. On March 22, 2012, the Board denied her appeal because her PCR was still pending and notified her that she would be removed. App. p. 183.

In March of 2011, Respondent met with her current counsel, who filed the PCR application by placing it in the United States mail on March 31, 2011. The Dorchester Clerk of Court's office did not mark it as filed until April 14, 2011.

Respondent testified that she would never have pled guilty if she had known she would be deported because the United States is her home and the home of her two children, who are American citizens. She testified she would have fought the charges because the heroin was not hers. App. p. 48.

Hardee-Thomas, a former attorney, who was appointed to represent Respondent, testified at the hearing. She recalled Respondent's name but did not remember details of the case because of the amount of time that had passed. App. p. 60. She testified that she might have told her clients that they faced deportation. App. pp. 61-62. She was unable to testify as to the immigration consequences of a legal alien pleading guilty to a controlled substance offense and was unable to distinguish between immigration consequences for illegal immigrants and legal resident aliens. App. pp. 66-67. She did not remember if Judge Goodstein advised Respondent she would be deported if she pled guilty to a controlled substance violation but stated that she was thorough with her pleas. App. pp. 63-65. Respondent asked the PCR Court to take judicial notice of the fact that

the standard plea colloquy did not contain any questions about immigration consequences in 2002. App. pp. 73-74.

ARGUMENT

The Post-Conviction Relief court properly held that the United States Supreme Court's decision in *Padilla v. Kentucky*, 130 S.Ct 1473, 559 U.S. 356 (2010), applies to Respondent's 2002 guilty plea, that the application was submitted within one year of the date *Padilla* became final, and that the action was not barred by the doctrine of laches.

A. Burden of Proof

The burden is on the Applicant (Respondent) in a PCR proceeding to prove the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). This Court applies an "any evidence" standard of review. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Accordingly, the Court should affirm if any evidence of probative value in the record exists to support the PCR court's findings of fact. *Id.* at 119, 386 S.E.2d at 626. The only factual issue raised by the State in its brief relates to the doctrine of laches.

The other issues raised by the State in its brief are the question of retroactivity and the statute of limitations, which are a questions of law. The decision of the PCR judge may be reversed when it is controlled by an error of law. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). This Court is entitled to decide a novel question of law without any particular deference to the lower court. *Page v. State*, 364 S.C. 632, 615 S.E.2d 740 (2005).

B. Statute of Limitations under Section 17-27-45 (B) and Retroactive Application

Even though Respondent filed her application eight years after her conviction, the PCR Court properly found that Respondent's claim falls within an exception to the one-year statute of limitations.

South Carolina Code Section 17-27-45 (B) provides:

[w]hen a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

S.C. Code Ann. § 17-27-45(B) (Supp. 2010) (emphasis added).

There is little doubt that *Padilla* imposed upon South Carolina's courts a standard "not previously recognized or a right not in existence at the time" Respondent pled guilty in 2002. As discussed *infra*, in *Chaidez v. United States*, 133 S. Ct. 1103 (2013), the United States Supreme Court stated that in deciding *Padilla*, "we answered a question about the Sixth Amendment's reach that we had left open, in a way that altered the law of most jurisdictions." Prior to *Padilla*, *supra*, South Carolina, like most jurisdictions, followed the rule that counsel does not have to advise her client about collateral consequences and that only affirmative erroneous advice renders a plea involuntary. *Brown v. State*, 306 S.C. 381, 382-83, 412 S.E.2d 399, 400 (1991); *Williams v. State*, 662 S.E.2d 615, 378 S.C. 511 (Ct. App. 2008).

Turning to South Carolina law on the application of Section 17-27-45 (B), this Court held in *Talley v. State*, 371 S.C. 535, 543-44, 640 S.E.2d 878, 882 (2007), that

Alabama v. Shelton, 535 U.S. 654, 122 S. Ct. 1764 (2002), applied retroactively on collateral review and therefore S.C. Code Ann. § 17-27-45 (B) provided the applicable statute of limitations. In *Shelton*, the United States Supreme Court held the constitutional right to counsel extends to a defendant who receives a sentence that may result in incarceration. The *Talley* Court reasoned that *Shelton* extended a new rule for the purposes of collateral review because it pronounced a rule that was not in existence when the petitioner was convicted. Similarly, *Padilla* extended a new rule to cases where the Respondent was not made aware of immigration consequences.

In *Talley*, decided in 2007, the South Carolina Supreme Court stated “[i]n determining whether Applicant was deprived of his federal constitutional right to counsel, we are required to follow the United States Supreme Court's decisions on retroactivity,” citing *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989). *Talley*, 371 S.C. at 541, 640 S.E.2d at 880. Essentially, *Teague* held that a case that announces a “new rule” – when it breaks new ground or imposes a new obligation on the States or the Federal Government. “To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.” *Teague*, 489 U.S. at 301, 109 S.Ct. 1060. Under *Teague*, new rules are not to be applied to convictions that have already been finalized unless narrow exceptions apply.

The year following *Talley*, the United States Supreme Court clarified that the *Teague* rule does not prevent the states from applying “new rules” to cases finalized before the new rule was issued. *Danforth v. Minnesota*, 552 U.S. 264, 128 S.Ct. 1029 (2008). In that case, concerning state review of a Minnesota conviction, the Court stated

that neither “*Teague* (or any of the other cases relied upon by respondent and the Minnesota Supreme Court) speak to the entirely separate question whether States can provide remedies for violations of these rights in their own post conviction proceedings.” *Danforth*, 552 U.S. at 275, 128 S. Ct. at 1038.

The Supreme Court in *Danforth* could not make it any clearer that the *Teague* rule “was intended to limit the authority of federal courts to overturn state convictions—not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions.” *Danforth*, 552 U.S. at 280-81, 128 S. Ct. at 1041 (emphasis added). The Supreme Court concluded that *Teague* does not “limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed ‘nonretroactive’ under *Teague*.” *Danforth, supra* at 282, 128 S.Ct. 1029.

Therefore, *Teague* and the recently decided case of *Chaidez, supra*, is not controlling on the issue of whether this Court should apply *Padilla* retroactively to Respondent’s state conviction in this state post-conviction relief action. *Chaidez*, in which the United States Supreme Court found that *Padilla* would not apply retroactively to a federal conviction, held that *Padilla* created a “new rule” and thus, would not be applied retroactively under *Teague*. Contrary to the State's assertion, this Court, in determining whether a South Carolina conviction should be vacated, is not bound by the retroactivity determination in *Chaidez*.

Even in *Talley*, decided before *Danforth*, the South Carolina Supreme Court used *Teague*’s analysis but then applied it more broadly than the United States Supreme Court

ever has. The *Talley* Court held that the “new rule” in *Shelton* came within *Teague*’s “watershed” exception “because the right to counsel undeniably implicates the fundamental fairness and accuracy of the proceeding.” *Talley*, 371 S.C. at 544, 640 S.E.2d at 882. By doing so, this Court has already departed from the strict rule of *Teague* and applied retroactivity in a broader manner.

In fact, the United States Supreme Court, in contrast to the South Carolina Supreme Court, has “yet to find a new rule that falls under this [watershed] exception. In providing guidance as to what might do so, the Court has repeatedly, and only, referred to the right-to-counsel rule of *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799.” *Beard v. Banks*, 542 U.S. 406, 407, 124 S. Ct. 2504, 2507, 159 L. Ed. 2d 494 (2004). As the State noted in its brief, the United States Supreme Court has stated “that it is unlikely that any [watershed rules] have yet to emerge.” Brief of Petitioner at 4. This Court, however, has the power, and in fact, already has, applied the watershed standard more broadly.

Therefore, instead of blindly following *Teague* and *Choidez*, this Court must determine if the holding in *Padilla* imposed “a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively.” S.C. Code Ann. § 17-27-45 (B) (Supp. 2010). *Padilla* provided the “new” right to effective assistance of counsel regarding advice about immigration consequences. That is precisely why section 17-27-45 (B) puts Respondent’s claim within the statute of limitations.

In fact, if the South Carolina courts were required to apply *Teague* exactly as the United States Supreme Court does, then Section 17-27-45 (B) would be rendered meaningless. Under our State 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.” It would be illogical that our law would allow the filing of a late application after a “new rule” only to then proclaim it cannot apply a “new rule” retroactively because of *Teague*.

Padilla held that effective counsel must inform clients who are legal aliens of the severe immigration consequences of convictions for almost any drug offense, which have been in effect since at least 1997. Therefore, *Padilla* implicates the right to effective counsel, which arises from *Gideon*, and effective counsel implicates the fundamental fairness and accuracy of the proceeding. It is fundamentally unfair when a person pleads to an offense without knowledge of the severe consequences.

The remaining issue is “if the standard or right is intended to be applied retroactively.” Respondent asserts and the PCR Court agreed that this issue is a determination for the South Carolina courts, and not a federal issue. The State reads into the statute that it is the United States Supreme Court that must have “intended [the standard] to be applied retroactively.” Again, that interpretation is in conflict with *Talley v. State*, in which this Court found *Shelton* should apply retroactively, whereas the United States Supreme Court has not held such.

The State asserts in its brief that the South Carolina Supreme Court held in *Hamm v. State*, 403 S.C. 461, 744 S.E.2d 503 (2013), that "*Padilla* does not apply retroactively." Brief of Petitioner at 2. However, the issue of the State's power to provide broader retroactivity was not before the *Hamm* Court. In that case, the Court dismissed the claim because Hamm had not exhausted all other remedies but then stated that "were we even to reach Hamm's *Padilla* claim, he is not entitled to relief" because commitment does not automatically flow from conviction for a sex offense and "*Padilla* does not apply retroactively." 403 S.C. at 465, 744 S.E.2d at 504-505. As this was essentially *dicta*, this issue is still undecided in South Carolina.

This Court could choose to apply the balancing test used by Alaska which looks at the: (1) the purpose to be served by the new standards; (2) the extent of the reliance by law enforcement authorities on the old standards; and (3) the effect on the administration of justice of a retroactive application of the new standards. *State v. Smart*, 202 P.3d 1130 (Alaska 2009). Considering the relatively low number of resident aliens in South Carolina, the fact that the one-year statute of limitations after *Padilla* has already expired, and the important purpose served by the Supreme Court's decision in *Padilla*, the decision should be applied retroactively to those who filed within one year of *Padilla*'s becoming final.

The state's interest in preventing a floodgate of PCR applications by immigrants who did not know they would be banished to a usually ghastly existence if they pled guilty could be advanced by limiting applicability of *Padilla* on collateral review of guilty pleas obtained after the enactment of the Illegal Immigration Reform and

Immigrant Responsibility Act of 1996, Pub.L. No. 104-208, 110 Stat. 3009-546 (eff. April 1, 1997), the date on which removal became practically inevitable for all but the most minor offenses.

In summary, South Carolina courts may, and have, extended the protections of due process, and its concept of fundamental fairness, beyond what is required by the United States Supreme Court. *See e.g. Tailey, supra.* As the PCR Court correctly noted, “[t]his is one of those situations where South Carolina’s concept of justice demands that Respondent be given the opportunity to face such serious consequences with the *effective* assistance of counsel.” App. p. 136.

C. Filing Deadline

Additionally, this Court should not reverse the PCR Court’s decision that Respondent’s petition for PCR was filed within one year of the United States Supreme Court’s mandate in the *Padilla* case being issued and that statute of limitations does not bar Respondent’s PCR application since a decision of the Supreme Court is not binding until the petition for rehearing expires.

As noted above, the application was clocked in as filed in the Dorchester Clerk of Court’s office on April 14, 2011; two weeks after Respondent’s counsel mailed the application. *Padilla* was decided on March 31, 2010, but the mandate was issued on May 3, 2010.¹ According to Rule 45.2 of the United States Supreme Court:

[i]n a case on review from a state court, the mandate issues 25 days after entry of the judgment, unless the Court or a Justice shortens or extends the time, or unless the parties stipulate that it issue sooner. The filing of a petition for rehearing stays the mandate until disposition of the petition,

¹ See <http://www.supremecourt.gov/senrch.aspx?filename=/docketfiles/08-651.htm>.

unless the Court orders otherwise. If the petition is denied, the mandate issues forthwith.

This is analogous to the state court's issuing of the remittitur under Rule 221, SCACR. Under S.C. Code Ann. §17-27-45 (A), "[a]n application for relief filed pursuant to this chapter must be filed within one year after the entry of judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal of the filing of the final decision upon an appeal, whichever is later." As in state court, a decision of the Supreme Court is not binding until the petition for rehearing expires. Therefore, because Respondent filed her petition within one year of the Supreme Court's mandate, it complies with the statute of limitation in S.C. Code Ann. § 17-27-45 (B).

D. Laches

The PCR Court's finding that the doctrine of laches does not bar Respondent's claim is supported by the evidence. The severe consequences of Respondent being deported outweigh any prejudice imposed upon the State by trying this case.

At the hearing, the State raised the defense of laches. Laches is:

neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party.

Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002), citing *Hallums v. Hallums*, 296 S.C. 195, 198-199, 371 S.E.2d 525, 527 (1988).

While it is true that memories have faded since 2002, it is clear that plea counsel did not tell Respondent that her deportation would be inevitable if she pled guilty to a controlled substance violation. The arrest warrant shows the officer's actions during the traffic stop. Therefore, the prejudice to the state is not outweighed by the extremely severe consequences Respondent will face if her conviction is not vacated.

The transcript has been destroyed. However, the PCR court correctly took judicial notice of the fact that plea judges did not discuss immigration consequences in their plea colloquy and it is a near certainty that in 2002 even the most thorough of judges --like Judge Goodstein -- would not have told Respondent to expect to be deported.

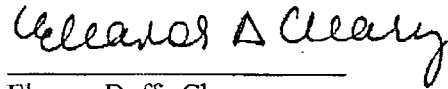
Respondent sought relief as soon as practical. The federal government did not commence deportation proceedings until 2010. *Padilla* did not provide its glimmer of hope of relief until the spring of 2010. Respondent lives in New York and had to gather the time and resources to retain South Carolina counsel willing to attack her conviction, which she did in March of 2011.

In summary, the PCR court did not commit an error of law in ruling that Respondent complied with the statute of limitations, did not violate the doctrine of laches, and that the vitally important rights imposed by *Padilla* should be applied to grant Respondent relief.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court dismiss the writ of certiorari, or affirm the PCR court's decision.

Respectfully submitted,



Eleanor Duffy Cleary
Attorney at Law

ATTORNEY FOR RESPONDENT.

This 23rd day of October, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Dorchester County

DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2012-213130

KEN LUCERO,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

I, Karen Dumas Elliott, paralegal for the undersigned counsel, certifies that I served a copy of the Brief of Respondent in the above captioned case by mailing a copy by U.S. Mail with the return address clearly indicated on the envelope and proper postage attached to said envelope on this 23rd day of October, 2014, on the State of South Carolina to the following address:

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


Karen Dumas Elliott

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Ken Lucero, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2012-213130

ON WRIT OF CERTIORARI

Appeal From Dorchester County
Diane Schafer Goodstein, Plea Court Judge
DeAndrea G. Benjamin, Post-Conviction Relief Court
Judge

Opinion No. 5352
Heard June 2, 2015 – Filed September 9, 2015

REVERSED

Attorney General Alan McCrory Wilson and Assistant
Deputy Attorney General David A. Spencer, both of
Columbia, for Petitioner.

Eleanor Duffy Cleary, of Cleary Law LLC, of Columbia,
for Respondent.

KONDUROS, J.: In this post-conviction relief (PCR) action, the State argues the PCR court erred in finding *Padilla v. Kentucky*, 559 U.S. 356 (2010), applied retroactively and granting Ken Lucero's application for PCR. The State also contends the PCR court erred in denying its motion to dismiss on the basis that the application was barred by the statute of limitations and laches. We reverse.

FACTS

Lucero was born in Ecuador, moved to the United States in 1993, and became a "permanent resident alien" in 2000. On June 6, 2002, she was traveling in a rental car from New York City, where she lived, to Orlando, Florida, when police executed a traffic stop in Dorchester County, South Carolina. According to Lucero, because she did not speak English, she was unsure why police stopped her. Police searched her vehicle and found heroin in the trunk, but she asserted she had never seen heroin or transported it for other people.

The State indicted Lucero for trafficking heroin in an amount more than one hundred grams but less than two hundred grams. In November 2002, she pled guilty to the lesser included offense of possession of heroin, and the plea court sentenced her to two years' imprisonment suspended on three years' probation.¹ Lucero did not file a direct appeal. In February 2011, an immigration judge ordered Lucero removed to Ecuador due to her conviction.

On April 14, 2011, Lucero filed an application for PCR alleging ineffective assistance of counsel based on *Padilla* because plea counsel failed to inform her of the possibility of deportation due to her conviction. At the PCR hearing, Lucero testified she met with plea counsel on three occasions and plea counsel never informed her of the possibility of deportation. She testified she would not have pled guilty if she knew she could be deported.

The State argued Lucero's application was barred by the statute of limitations because she pled guilty in 2002, never filed a direct appeal, and filed her PCR application in 2011, in excess of the one-year statute of limitations for PCR. The State claimed *Padilla* was not retroactive; therefore, her application was "far beyond the [one-year] statute of limitations." Alternatively, the State argued even if *Padilla* was retroactive, Lucero's application was still barred by the statute of

¹ The appendix does not contain a transcript of the guilty plea hearing because court administration maintains court reporter records for only five years.

limitations because she waited more than one year from the day the Supreme Court issued *Padilla*. The State also claimed the doctrine of laches barred Lucero's application.

The PCR court found Lucero was entitled to PCR and vacated her conviction. Initially, the PCR court determined Lucero's application fell within the one-year statute of limitations provided under section 17-27-45(B) of the South Carolina Code (2014) because *Padilla* was "'intended to be applied retroactively.'" Further, the PCR court ruled the one-year statute of limitations contained in section 17-27-45(B) begins from the day the Supreme Court issues its "mandate" because "[t]his is analogous to the state court's issuing of the remittitur under Rule 221, SCACR." The PCR court explained because the Supreme Court issued its mandate for *Padilla* on May 3, 2010, Lucero's application, filed on April 14, 2011, was within one year of *Padilla* becoming final. Finally, the PCR court found the doctrine of laches did not bar Lucero's application because "the severe consequences of [Lucero] being deported outweigh any prejudice caused to the [S]tate by trying this case."

The State filed a petition for writ of certiorari from the grant of Lucero's application for PCR. This court granted the petition.

STANDARD OF REVIEW

On review, we will uphold a PCR court's findings if any evidence of probative value supports them. *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). "This [c]ourt will reverse the PCR [court]'s decision when it is controlled by an error of law." *Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007). We "give[] great deference to the PCR court's findings of fact and conclusions of law." *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006).

LAW/ANALYSIS

The State argues the PCR court erred by finding *Padilla* applied retroactively. Specifically, the State claims the ruling in *Padilla* was a "new rule" under *Teague*² because it applied the ineffective assistance of counsel analysis from *Strickland*³

² *Teague v. Lane*, 489 U.S. 288 (1989).

³ *Strickland v. Washington*, 466 U.S. 668 (1984).

for the first time to decide whether plea counsel's failure to inform a defendant about deportation consequences constituted ineffective assistance. According to the State, because *Padilla* was a "new rule," it does not apply retroactively and the PCR court should have dismissed Lucero's application as barred by the statute of limitations. The State further asserts *Padilla*'s ruling was not a watershed rule of criminal procedure. We agree.

"In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief." *Lomax v. State*, 379 S.C. 93, 100, 665 S.E.2d 164, 167 (2008). "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components." *Strickland*, 466 U.S. at 687. "The defendant must first demonstrate that counsel was deficient and then must also show the deficiency resulted in prejudice." *Walker v. State*, 407 S.C. 400, 404-05, 756 S.E.2d 144, 146 (2014). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Morris v. State*, 371 S.C. 278, 282, 639 S.E.2d 53, 55 (2006). "The two-part test adopted in *Strickland* also applies to challenges to guilty pleas based on ineffective assistance of counsel." *Holden v. State*, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (internal quotation marks omitted).

"To satisfy the first prong, a defendant must show counsel's performance fell below an objective standard of reasonableness." *Walker*, 407 S.C. at 405, 756 S.E.2d at 146 (internal quotation marks omitted). "To prove prejudice, an applicant must show there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different." *Id.* (internal quotation marks omitted). To prove prejudice in the context of a guilty plea, an applicant must show that but for counsel's errors, there is a reasonable probability the applicant would not have pled guilty and would have insisted on going to trial. *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

In *Padilla*, 559 U.S. at 360, the Supreme Court addressed whether plea counsel must inform his or her client of the risk of deportation associated with a potential guilty plea. The Supreme Court explained:

It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the mercies of incompetent counsel. To satisfy this responsibility, we now hold that counsel must inform

her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

Id. at 374 (citation and internal quotation marks omitted). Further, to be effective, counsel must inform a defendant whether his or her plea carries a risk of deportation because it is a critical factor when deciding whether to plead guilty or proceed to trial. *Hamm v. State*, 403 S.C. 461, 463 n.1, 744 S.E.2d 503, 504 n.1 (2013).

The Supreme Court has found the retroactivity of federal criminal procedure decisions "turn[s] on whether they are novel," i.e., whether they constitute a "new rule." *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013). When the Supreme Court announces a "'new rule,' a person whose conviction is already final may not benefit from the decision in a habeas or similar proceeding." *Id.* "Only when [the Supreme Court] appl[ies] a settled rule may a person avail herself of the decision on collateral review." *Id.* "A case announces a new rule . . . when it breaks new ground or imposes a new obligation on the government" or "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* (brackets omitted) (internal quotation marks omitted). A case does not announce a new rule when it is "merely an application of the principle that governed a prior decision to a different set of facts." *Id.* (internal quotation marks omitted). In *Chaidez*,⁴ the Supreme Court found *Padilla* announced a "new rule" because its "holding that the failure to advise about a non-criminal consequence could violate the Sixth Amendment would not have been . . . 'apparent to all reasonable jurists' prior to [*Padilla*]." *Id.* at 1111. Accordingly, the Supreme Court found *Padilla* did not apply retroactively and "defendants whose convictions became final prior to *Padilla* therefore cannot benefit from its holding." *Id.* at 1107, 1113.

Our supreme court has acknowledged the Supreme Court's decision in *Chaidez*. See *Hamm*, 403 S.C. at 465 n.4, 744 S.E.2d at 505 n.4 ("[T]he [Supreme Court] held *Padilla* announced a new rule; therefore, the Court concluded it does not apply retroactively."). Additionally, the *Hamm* court found a PCR applicant

⁴ The Supreme Court decided *Chaidez* on February 20, 2013, after the PCR court issued its order on July 31, 2012.

"failed to file a PCR application raising any issue related to *Padilla* within one year of that decision, issued March 31, 2010, as required by section 17-27-45 of the South Carolina Code." *Id.* at 464, 744 S.E.2d at 504 (citing S.C. Code Ann. § 17-27-45(B) (2014)).

Despite its decisions addressing and applying retroactivity of "new" constitutional criminal procedure rules, the Supreme Court has also decided individual states are free to provide constitutional protections in excess of the minimum required by the Constitution. *See Danforth v. Minnesota*, 552 U.S. 264, 288 (2008). Specifically, the Supreme Court concluded "the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law. Federal law simply sets certain minimum requirements that States must meet but may exceed in providing appropriate relief." *Id.* (internal quotation marks omitted).^{5,6} In *Aiken v. Byars*, our supreme court noted it "ha[d] not addressed whether it should employ a more expansive analysis for determining retroactivity after *Danforth* . . . , which held that state courts can use a broader test than

⁵ In *Talley v. State*, decided prior to *Danforth*, our supreme court found "[i]n determining whether Respondent was deprived of his federal constitutional right to counsel, we are *required* to follow the . . . Supreme Court's decisions on retroactivity." 371 S.C. 535, 541, 640 S.E.2d 878, 880 (2007) (emphasis added) (citing *Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 178 (1990) (plurality opinion)). However, in *Danforth*, the Supreme Court discussed *American Trucking* and concluded that decision did not require states to follow the Supreme Court's decisions on retroactivity. 552 U.S. at 284-88.

⁶ Some states have taken advantage of the authority provided by the Supreme Court in *Danforth*. *See State v. Smart*, 202 P.3d 1130, 1136 (Alaska 2009) (citing *Danforth* and indicating a state test for determining whether a new decision was retroactive was appropriate "so long as the state test is at least as comprehensive as the federal test"); *Commonwealth v. Sylvain*, 995 N.E.2d 760, 762 (Mass. 2013) ("We conclude, as a matter of Massachusetts law and consistent with our authority as provided in *Danforth* . . . that the Sixth Amendment right enunciated in *Padilla* was not a 'new' rule and, consequently, defendants whose [s]tate law convictions were final . . . may attack their convictions collaterally on *Padilla* grounds."); *People v. Maxson*, 759 N.W.2d 817, 821-22 (Mich. 2008) ("The conclusion that [a case] is not retroactive under federal law does not end our analysis, however. A state may accord broader effect to a new rule of criminal procedure than federal retroactivity jurisprudence accords." (citing *Danforth*, 552 U.S. at 282-88)).

Teague." 410 S.C. 534, 539 n.4, 765 S.E.2d 572, 575 n.4 (2014) (citing *Danforth*, 552 U.S. at 282 (holding *Teague* "does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague*")). The supreme court found "it unnecessary to [determine whether to use a broader test in that case] because [the new rule] is clearly retroactive under *Teague*." *Id.*

Since the supreme court's ruling in *Chaidez* that *Padilla* is not retroactive, states have split over whether to apply *Padilla* retroactively in their state. However, states all seem to rely on the determination of whether *Padilla* created a new right in their state. The states that have found *Padilla* applies retroactively point to their state's prior case law, statutes, rules, or expected attorney practices requiring attorneys to advise their clients of deportation consequences when pleading guilty. *See, e.g., Sylvain*, 995 N.E.2d at 770-71 ("We conclude that *Padilla* did not announce a 'new' rule for the purposes of our retroactivity test under *Bray*. . . . *Padilla* did not announce a 'new' rule for the simple reason that it applied a general standard—designed to change according to the evolution of existing professional norms—to a specific factual situation. We also are not persuaded that Massachusetts precedent at the time *Padilla* was decided would have dictated an outcome contrary to that in *Padilla*. Indeed, long before *Padilla* was decided, it was customary for practitioners in Massachusetts to warn their clients of the possible deportation consequences of pleading guilty." (citation omitted)); *Ramirez v. State*, 333 P.3d 240, 243 (N.M. 2014) ("We decline to follow *Chaidez* . . . because since 1990, the New Mexico Supreme Court rules and forms have required an attorney to certify having engaged the client in detail in a guilty plea colloquy that included immigration consequences. Because the requirements that Form 9-406 imposes are not new in New Mexico, our holding in *Paredes* imposing requirements that were effective in 1990 applies retroactively to 1990, the adoption date of the Form 9-406 amendment that required a defendant to understand the possible immigration consequences of a plea conviction.").

The states that have not applied *Padilla* retroactively have found *Padilla* recognizes a new right, one that was not previously recognized in their state. *See Miller v. State*, 77 A.3d 1030, 1044-45 (Md. 2013) ("The issue before us in the instant case, thus, becomes whether Miller's claims of involuntariness or ineffective assistance of counsel resulting from his failure to be advised of the adverse immigration consequences of his plea had independent state bases in Maryland in 1999. When queried on this point at oral argument, Miller's counsel could not identify any such state bases for affording Miller relief, because there are

none. . . . By 1999, moreover, even after we adopted Rule 4-242(e), which mandated a trial court inform a defendant of the possibility of adverse immigration consequences, we further articulated that the failure to so advise a defendant did not itself mandate that the plea be declared invalid. The Rules Commentary acknowledged that the new Rule 4-242(e) did not overrule *Daley v. State*, in which the Court of Special Appeals held that the failure to advise of adverse immigration consequences did not render a guilty plea involuntary because possible deportation is merely collateral to his guilty plea, because it arises from a separate civil proceeding and, under immigration law at that time, deportation was not definite nor largely automatic." (citations and internal quotation marks omitted)); *People v. Baret*, 16 N.E.3d 1216, 1230-31 (N.Y. 2014) ("In 1995 we held in *Ford* that defense counsel were not under a duty to warn defendants of the possible deportation consequences before entering a guilty plea; and, stated another way, that the failure of counsel to warn defendant of the possibility of deportation [did not] constitute ineffective assistance of counsel. Thus, *Padilla* flatly contradicted and supplanted *Ford*'s holding as to whether defense attorneys were obligated to advise their noncitizen clients about the immigration consequences of a guilty plea. We agree with Justice Kagan that '[i]f [this] does not count as break[ing] new ground or impos[ing] a new obligation, we are hard pressed to know what would.' Thus, *Padilla* created a new rule of federal constitutional criminal procedure in New York which, consistent with *Teague* and *Eastman*, does not apply retroactively in CPL 440.10 proceedings." (alterations by court) (citations and internal quotation marks omitted)); *State v. Alshaif*, 724 S.E.2d 597, 603 (N.C. Ct. App. 2012) ("Persuaded by the reasoning of *Chang Hong*, we conclude that *Padilla* announced a new rule. Prior to *Padilla*, neither our state courts nor federal courts had interpreted *Strickland* as requiring counsel to advise a client of the immigration consequences of a guilty plea. We are aware that *Strickland* is a fact-specific test, and must naturally evolve over time as practical norms and underlying legal consequences change. However, we find that *Padilla* was an application of *Strickland* that would have been unreasonable to expect attorneys to have foreseen—especially those attorneys unfamiliar with immigration law. We therefore hold that *Padilla* announced a new rule." (citations omitted)); *State v. Garcia*, 834 N.W.2d 821, 823-26 (S.D. 2013) ("This Court, however, has previously deemed the *Teague* rule to be unduly narrow as to what issues it will consider on collateral review. We opined that [w]hile the substance of what is to be applied is a federal constitutional matter, the decision on what criteria to use to determine prospective or retroactive application is a nonconstitutional state decision. Accordingly, we use the following criteria to determine whether a particular decision should be given [retroactive] effect [in South Dakota]: (1) The

purpose of the decision, (2) reliance on the prior rule of law, and (3) the effect upon the administration of justice. Thus, while the trial court relied on the *Teague* factors in its analysis of the *Padilla* decision, we adhere to the *Cowell* precedent in analyzing whether *Padilla* applies retroactively. . . . At the time of Garcia's guilty plea in 2004, this Court had not yet addressed whether the failure to advise a defendant of the risk of deportation amounted to ineffective assistance of counsel. In our 2005 decision in *Nikolaev v. Weber*, we held that the overwhelming majority of courts to have addressed the question have held that deportation is a collateral consequence of the criminal process, and hence that, nothing else appearing, the failure to advise the defendant of the possibility of deportation does not amount to ineffective assistance of counsel. Subsequently, we denied Nikolaev relief on the same basis. Accordingly, the rule of law pronounced in *Nikolaev* in 2005 was exactly the opposite of the rule announced in *Padilla* in 2010. . . . In weighing the three *Cowell* criteria together, we will not apply the United States Supreme Court's decision in *Padilla* retroactively to cases that were decided prior to *Padilla*." (all alterations by court except last two) (citations and internal quotation marks omitted)); *see also Thiersaint v. Comm'r of Corr.*, 111 A.3d 829, 848 (Conn. 2015) ("Thus, by describing the holding in *Padilla* as an extension of *Strickland*, which was not a new rule, the court in *Sylvain* ignored the fact that the question of whether attorneys are *constitutionally required* to advise noncitizen criminal defendants of the deportation consequences of a guilty plea had never been addressed before *Padilla*. The court in *Sylvain* also ignored the fact that the ruling in *Padilla* was grounded in a legal analysis of the direct and indirect consequences of a plea, and that the court in *Padilla* had examined prevailing professional norms under the performance prong of *Strickland* only *after* resolving the threshold constitutional question of whether the rule applied in that case. We thus dismiss the reasoning in *Sylvain* because it fails to recognize that the rule announced in *Padilla* was new, and not merely an extension of the rule articulated in *Strickland*." (footnote and citation omitted)).

Generally, new procedural rules should [not be] applied retroactively to cases on collateral review, unless the new rule falls within one of two exceptions to the general rule. The first exception is when the rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." The second exception is when the rule "requires the observance of those procedures that . . . are implicit in the concept of ordered liberty." The second exception is

"reserved for watershed rules of criminal procedure"
which implicate the fundamental fairness and accuracy of
the proceeding.

Talley v. State, 371 S.C. 535, 543, 640 S.E.2d 878, 882 (2007) (second alteration
by court) (quoting *Teague*, 489 U.S. at 305, 310-11).

Lucero argues that although *Padilla* created a new rule, South Carolina should
apply it retroactively because it is a watershed rule of criminal procedure, which
implicates the fundamental fairness and accuracy of the proceeding. We find it is
not a watershed rule.

The Idaho Court of Appeals has noted, "We are aware of no court that has found
that *Padilla* applies retroactively under *Teague*'s watershed exception." *Gutierrez-
Medina v. State*, 333 P.3d 849, 853 (Idaho Ct. App. 2014). "The Tenth Circuit
Court of Appeals addressed the question in *United States v. Chang Hong*, 671 F.3d
1147 (10th Cir. 2011), after determining (pre-*Chaidez*) that *Padilla* established a
new rule of criminal procedure." *Id.* (footnote omitted). "The [*Chang Hong*] court
first noted the Supreme Court has not hesitated to hold that less sweeping and
fundamental rules than *Gideon* do not fall within *Teague*'s second exception." *Id.*
The *Chang Hong* court determined *Padilla* did not announce a watershed rule of
criminal procedure:

Simply put, *Padilla* is not *Gideon*. *Padilla* does not
concern the fairness and accuracy of a criminal
proceeding, but instead relates to the deportation
consequences of a defendant's guilty plea. The rule does
not affect the determination of a defendant's guilt and
only governs what advice defense counsel must render
when his noncitizen client contemplates a plea bargain.
Padilla would only be at issue in cases where the
defendant admits guilt and pleads guilty. In such
situations, because the defendant's guilt is established
through his own admission—with all the strictures of a
Rule 11 plea colloquy—*Padilla* is simply not germane to
concerns about risks of inaccurate convictions or
fundamental procedural fairness.

Chang Hong, 671 F.3d at 1158.

The Minnesota Supreme Court has also found *Padilla* did not create a watershed rule. *Campos v. State*, 816 N.W.2d 480, 498 (Minn. 2012).

Requiring counsel to inform his noncitizen client of the immigration consequences of a guilty plea does not decrease the risk of an inaccurate conviction. *Padilla* is only implicated "in cases where the defendant admits guilt and pleads guilty." *Chang Hong*, 671 F.3d at 1158. In such cases, "because the defendant's guilt is established through his own admission . . . *Padilla* is simply not germane to concerns about risks of inaccurate convictions or fundamental procedural fairness." *Id.* Moreover, *Padilla*'s holding, unlike the expansive rule in *Gideon* establishing a right to counsel in all felony cases, affects only a small subset of defendants, indicating that the rule does not have a fundamental and profound impact on criminal proceedings generally.

Campos, 816 N.W.2d at 498-99 (alteration by court) (citing *United States v. Mandanici*, 205 F.3d 519, 528 (2d. Cir. 2000) (explaining that a watershed rule must institute "a sweeping change that applies to a large swathe of cases rather than a narrow right that applies only to a limited class of cases" (internal quotation marks omitted)); *Ellis v. United States*, 806 F. Supp. 2d 538, 549 (E.D.N.Y. 2011) (concluding that the rule announced in *Padilla* was not a watershed rule because "the rule has nothing to do with the accuracy of a defendant's conviction," applied "a relatively narrow holding," and "only applies to a limited class of defendants—noncitizen defendants who face charges that carry with them immigration consequences"))).

In *Gutierrez-Medina*, 333 P.3d at 857, the appellant contended "because Idaho has a broader statutory right to counsel than is imposed by the federal Constitution, a lower threshold for finding *Padilla* is a watershed rule should be applicable in this case." The court found the appellant was "correct that in some instances, Idaho's statutory right to counsel is more expansive than the federal right to counsel." *Id.* "It does not automatically follow, however, that this distinction supports a finding that *Padilla* announced a watershed rule. As we noted above, despite our Supreme Court's adoption of a modified approach to *Teague*, the fundamental questions inherent in that analysis are still applicable." *Id.* "It still stands that in order to be

considered a watershed rule, a procedural rule must be one without which the likelihood of an accurate conviction is *seriously* diminished." *Id.* The court found the appellant made "no argument that without the *Padilla* rule, the likelihood of accurate convictions was seriously diminished." *Id.* The court "agree[d] with the numerous jurisdictions . . . that have explicitly concluded that *Padilla* is simply not germane to concerns about risks of inaccurate convictions given that it does not affect the determination of a defendant's guilt." *Id.* (internal quotation marks omitted).

The PCR court erred by ruling *Padilla* was retroactive in South Carolina. *See Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) ("This [c]ourt will reverse the PCR [court]'s decision when it is controlled by an error of law."). The Supreme Court determined *Padilla* was not retroactive for a collateral attack on a conviction in a federal proceeding. *Chaidez*, 133 S. Ct. at 1113. However, the Supreme Court also explicitly ruled a remedy in state court for a violation of the Federal Constitution is primarily a question of state law so long as the state law remedy meets the "minimum requirements" of the Federal Constitution. *Danforth*, 552 U.S. at 288. Because of the Supreme Court's decision in *Danforth*, our supreme court's ruling in *Talley*, 371 S.C. at 541, 640 S.E.2d at 880, that "we are required to follow the . . . Supreme Court's decisions on retroactivity" is no longer accurate. As such, our state is not required to follow the Supreme Court's holding in *Chaidez*. Therefore, we must determine whether *Padilla* will be retroactive for purposes of collateral attacks in state PCR proceedings.⁷

We found no South Carolina case, statute, or rule requiring an attorney to advise a client of the deportation consequences that could arise from his or her guilty plea. Accordingly, *Padilla* created a new rule in South Carolina. *Padilla* did not provide for a right to counsel in a situation in which one had not previously been entitled to it. It simply added a new type of advice counsel should give. *Padilla* does not raise any concern about risks of inaccurate convictions or fundamental procedural fairness because a defendant has admitted guilt. *See Talley*, 371 S.C. at 544, 640

⁷ In *Hamm*, 403 S.C. at 465, 465 n.4, 744 S.E.2d at 505, 505 n.4, the court noted *Padilla* was not retroactive due to the Supreme Court's decision in *Chaidez*. However, our supreme court's explanation of *Chaidez* was in dicta and did not discuss or make any findings with regard to whether *Padilla* was retroactive under state law and section 17-27-45(B) and made no mention of the Supreme Court's ruling in *Danforth*. *Id.* Thus, our supreme court's decision in *Hamm* did not clearly determine whether *Padilla* is retroactive under state law.

S.E.2d at 882 (finding a new rule was "a watershed rule of criminal proceeding because the right to counsel undeniably implicates the fundamental fairness and accuracy of the proceeding"). Therefore, this rule is not a watershed rule.

Further, Lucero contends section 17-27-45(B) would be pointless if a new rule did not apply retroactively. However, she overlooks the part of the subsection that states "a substantive standard not previously recognized or a right not in existence at the time of the state court trial, *and if the standard or right is intended to be applied retroactively.*" The section clearly indicates the new rule must be intended to apply retroactively. For the reasons discussed above, the rule announced in *Padilla* should not apply retroactively in South Carolina. Therefore, the PCR court erred as a matter of law in finding *Padilla* applied retroactively in South Carolina.⁸ Accordingly, the PCR's court granting of Lucero's PCR application is

REVERSED.

THOMAS and GEATHERS, JJ., concur.

⁸ The State also claims the PCR court erred by denying its motion to dismiss because Lucero's application was barred by the statute of limitations even if *Padilla* is retroactive because Lucero filed her application in excess of one year following the Supreme Court's release of the *Padilla* opinion because the one year time limit begins on the date the opinion is issued, not the date of its mandate. Additionally, it asserts the PCR court erred in denying its motion to dismiss based on the doctrine of laches. Based on our determination *Padilla* does not apply retroactively, we need not decide these issues. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
SEP 23 2015
SC Court of Appeals

Ken Lucero

RESPONDENT,

V.

State of South Carolina

PETITIONER

Appeal from Dorchester County

Dianne Schafer Goodstein, Plea Court Judge
DeAndrea G. Benjamin, Post-Conviction Relief Court Judge

Opinion No. 5352

PETITION FOR REHEARING

Respondent Ken Lucero respectfully petitions for rehearing in this case pursuant to Rule 221 (a) and Rule 243 (l). On September 9, 2015, this Court reversed and remanded the decision for the post-conviction relief court to grant Lucero a new trial.

Respondent submits that this Court may overlooked or misapprehended the following issues.

This Court held that the rule in *Padilla v. Kentucky*, 559 U.S. 356 (2010), did not apply retroactively under South Carolina law. In its decision, the Court correctly recognized that South Carolina is not required to follow the Supreme Court's holding in *Chaidez v. United States*, 113

S.Ct. 1103 (2013), in which the United States Supreme Court held that *Padilla* was not retroactive for a collateral attack in a federal proceeding.

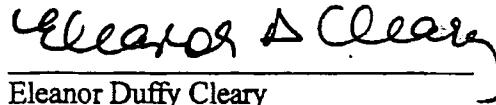
This Court held that *Padilla* created a new rule and, as such, does not apply retroactively because the rule does not fall under one of the exceptions listed in *Talley v. State*, 371 S.C.535, 543, 640 S.E.2d 878, 882 (2007). To wit, this Court found that *Padilla* is not a "watershed rule[] of criminal procedure" which "implicate[s] the fundamental fairness and accuracy of the proceeding."

This Court incorrectly stated that *Padilla* "simply added a new type of advice counsel should give" and "does not raise any concern about risks of inaccurate convictions or fundamental procedural fairness because a defendant has admitted guilt."

The failure to advise Lucero that she would most certainly be deported – sent away from a country she has called home for a number of years and away from her children born in the United States – and to a country where she has no home – raises sharp and obvious concerns about whether the conviction was accurate. The Court failed to acknowledge that the PCR court, which had a chance to determine the credibility of the witnesses – found that Lucero pleaded guilty despite obvious weaknesses in the State's case and her purported innocence. She testified she was advised this was the only way to retrieve her young daughter (who was in the car with her when she was stopped for speeding and arrested for drugs seized from a rental car trunk). There can be no faith in the guilty plea of a foreigner under that sort of duress who pleads without understanding of the consequences but only in response to her maternal instincts. The constitution does not guarantee the appointment of a warm body next to the defendant at a plea. It guarantees "effective assistance of counsel." In this case, under South Carolina law, the second exception is met because there was no fundamental fairness in the proceedings.

Based on the foregoing, Respondent respectfully requests a rehearing.

Respectfully submitted,



Eleanor Duffy Cleary
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Attorney for Respondent

This 23rd day of September, 2015.

RECEIVED

SEP 23 2015

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Ken Lucero

RESPONDENT,

V.

State of South Carolina

PETITIONER

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Petitioner's Counsel of Record Deputy Attorney General David Spencer on the 24th day of September, 2015 by placing the petition in a properly stamped envelope in the United States Mail addressed to: Deputy Attorney General David Spencer PO Box 11549, Columbia, SC 29211.

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SWORN TO BEFORE ME this 24 day
of September, 2015

Kathleen D Thomas (L.S.)
Notary Public for South Carolina

My Commission Expires: 10/01/2018

The South Carolina Court of Appeals

Ken Lucero, Respondent,

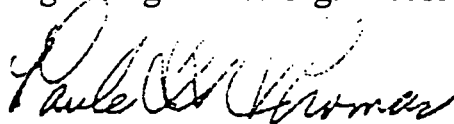
v.

State of South Carolina, Petitioner.

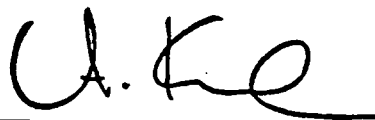
Appellate Case No. 2012-213130

ORDER

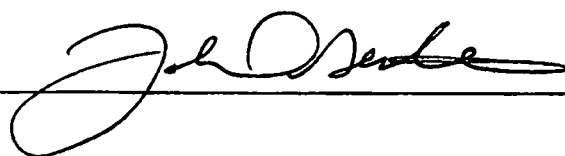
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

David A. Spencer, Esquire

Eleanor Duffy Cleary, Esquire

Alan McCrory Wilson, Esquire

FILED

October 23, 2015