STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
The Honorable Michael G. Nettles, Circuit Court Judge

Case No. 2007-CP-22-476

ROBERT TROY TAYLOR,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

BRIEF OF RESPONDENT

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I. **Padilla v. Kentucky is not retroactive and therefore does not apply to Petitioner's post-conviction relief case; however, even if Padilla was retroactive, it is still not applicable to Petitioner's case because its holding is limited to cases involving deportation consequences. In this case, where Petitioner was advised of the direct consequences of his guilty plea and was not misadvised regarding any consequences, the post-conviction relief court properly denied relief.**

II. **The PCR court properly concluded that Petitioner was not entitled to relief based upon counsel's investigation of the CSC with a minor charge where counsel performed reasonably under the circumstances and where Petitioner's purported defenses were unconvincing and did not necessarily refute Petitioner's guilt.**

STATEMENT OF THE CASE

Petitioner was indicted in 2004 and 2005 in Georgetown County for two counts of lewd act upon a minor. (App. p. 77-83). He was later charged with criminal sexual conduct ("CSC") with a minor in the second degree. (App. p. 85-87). On April 20, 2006, Petitioner pled guilty before the Honorable Edward B. Cottingham. (App. p. 1-46). Petitioner waived grand jury presentment on the CSC with a minor charge. (See App. p. 84). Regarding each of the three charges, Judge Cottingham sentenced Petitioner to eight years, suspended upon the service of five years and three years of probation. (App. p. 45, lines 10-16). All sentences were to run concurrently. (See App. p. 77; p. 81; p. 84). No direct appeal was filed.

Petitioner filed an Application for post-conviction relief on April 3, 2007. (App. p. 47-71). The State made a Return on July 27, 2007. (App. p. 72-76). An evidentiary hearing was convened before the Honorable Michael G. Nettles on November 20-21, 2008. (App. p. 93-286). Thereafter, on January 27, 2009, Judge Nettles filed an Order of Dismissal With Prejudice. (App. p. 334-55). Petitioner filed a Rule 59(e), SCRCP, motion on February 9, 2009, and the State made a Response on February 18, 2009. (App. p. 357-64). Petitioner's Rule 59 Motion was denied in an order filed March 30, 2009. (App. p. 365). A timely notice of appeal was served and filed. A Petition for a Writ of Certiorari was served on March 22, 2010, and an Amended Petition for a Writ of Certiorari was served on June 8, 2010. The State made a Return on August 9, 2010. This Court granted certiorari on October 6, 2011.

ARGUMENT

I. **Padilla v. Kentucky is not retroactive and therefore does not apply to Petitioner's post-conviction relief case; however, even if Padilla was retroactive, it is still not applicable to Petitioner's case because its holding is limited to cases involving deportation consequences. In this case, where Petitioner was advised of the direct consequences of his guilty plea and was not misadvised regarding any consequences, the post-conviction relief court properly denied relief.**

A. *Padilla* should not be applied retroactively to cases on collateral review because it announced a new rule not falling into either of the *Teague v. Lane* exceptions.

Review of Padilla v. Kentucky

In Padilla v. Kentucky, 130 S. Ct. 1473 (2010), the United States Supreme Court held that criminal defense attorneys render deficient performance under Strickland v. Washington when they fail to advise noncitizen clients about the deportation consequences of a guilty plea. The United States Supreme Court 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, 130 S. Ct. 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. Before addressing Padilla's claims, the Court pointed out that numerous changes to immigration law "have dramatically raised the stakes of a noncitizen's criminal conviction," and discussed the rapidly diminishing parallel between the consequences of criminal convictions and deportation. Id. at 1478-80.

In addressing the defendant's claim that Kentucky was wrong in dismissing his claim of ineffective assistance of counsel because the claim related to the "collateral"

consequence of deportation, the Court stated that it had "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance'" under Strickland. Id. at 1481. However, the Court held that "whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation." Id. The Court also noted that "[t]he disagreement over how to apply the direct/collateral distinction has no bearing on the disposition of this case." Id. at 1481 n8. The Court stated that, "importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it 'most difficult' to divorce the penalty from the conviction in the deportation context." Id. (citation omitted). The Court continued:

> Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a Strickland claim *concerning the specific risk of deportation.* We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. Strickland applies to Padilla's claim.

Id. at 1482 (emphasis added). The Court then proceeded to analyze the defendant's claim under Strickland. Although not citing any case law, the Court held that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." Id. The Court found that it was an easy case in which to find a deficiency in counsel's performance because the "presumptively mandatory" deportation consequence of the defendant's plea could have been easily determined and because the advice counsel provided was in fact incorrect. Id. at 1483.

The Court concluded that whether or not the defendant was entitled to relief would depend upon his ability to satisfy the prejudice prong of Strickland. Id. at 1483-84.

The Court rejected the government's argument that only "affirmative misadvice" regarding deportation would give rise to an ineffective assistance of counsel claim, "although [this position] has support among the lower courts." Id. at 1484 (citations omitted). The Court stated that "in this context," there is no relevant difference between acts and omissions if the acts or omissions were outside of the range of professionally competent assistance. Id. In that vein, the Court found "[w]hen attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all." The Court found that "although we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas," it did not believe its opinion would open the floodgates to litigation regarding guilty pleas because "it is quite difficult for petitioners who have acknowledged their guilt to satisfy Strickland's prejudice prong." Id. at 1484-85. The Court concluded that "we now hold" that, in order for counsel to satisfy his responsibilities under this opinion, counsel must inform his client whether his plea carries a risk of deportation. Id. at 1486.

Justice Alito issued a concurring opinion which was joined by Chief Justice Roberts. In the concurrence, Justice Alito agreed with the judgment insofar as it concluded that counsel provides ineffective assistance if he "misleads a noncitizen client regarding the removal consequences of a conviction." Id. at 1487 (Alito, J., concurring). Justice Alito, however, believed that plea counsel should not be obligated to explain the exact consequences to a client, as most criminal defense attorneys are not well-versed in the complex area of immigration law. Id. at 1487-90.

Justice Alito pointed out that "[u]ntil today, the longstanding and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the *direct* consequences of a criminal conviction. Id. at 1487 (emphasis in original) (citations omitted). One of Justice Alito's citations indicated that "'virtually all jurisdictions'—including 'eleven federal circuits, more than thirty states, and the District of Columbia'—'hold that defense counsel need not discuss with their clients the collateral consequences of a conviction,' including deportation." Id. at 1487 (citing Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L.Rev. 697, 699 (2002)). Justice Alito pointed out that the majority opinion "does not cite a single case, from this or any other federal court, holding that criminal defense counsel's failure to provide advice concerning the removal consequences of a criminal conviction violates a defendant's Sixth Amendment right to counsel."[1] Id. at 1491. In fact, he stated, the majority opinion, while acknowledging that the lower federal courts are quite experienced with applying Strickland, "casually dismisses the longstanding and unanimous position of the lower federal courts with respect to the scope of criminal defense counsel's duty to advise on collateral consequences. Id. at 1491-92. In that vein, "the [majority's] view has been rejected by every Federal Court of Appeals to have considered the issue thus far." Id. at 1491. Thus, the majority's "dramatic expansion of the scope of criminal defense counsel's duties" under the Sixth Amendment "marks a major upheaval in Sixth Amendment law." Id. at 1491-92.

[1] Justice Alito also noted that the vast majority of lower courts considering ineffective assistance of counsel claims in the guilty plea context distinguish between attorneys who remain silent and attorneys who give affirmative misadvice. Id. at 1493.

Justice Alito asserted that the majority opinion attempted to justify its "dramatic departure from precedent" by pointing to the "views of various professional associations;" however, he explained, "ascertaining the level of professional competence required by the Sixth Amendment is ultimately a task for the courts." Id. at 1488 (citation omitted). Justice Alito stated that while it may be appropriate to consult standards promulgated by private bar groups, "we must recognize that such standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice." Id. Thus, contrary to the majority, Justice Alito concluded that prevailing professional norms did not support the majority's "new approach" and "the duty the Court today imposes on defense counsel." Id.

Justice Scalia issued a dissenting opinion in which Justice Thomas joined. Justice Scalia rejected the idea that the Sixth Amendment required plea counsel to provide accurate advice concerning the potential removal consequences of a guilty plea, because "[t]he Sixth Amendment guarantees the accused a lawyer 'for his defense' against a 'criminal prosecutio[n]'—not for sound advice about the collateral consequences of conviction." Id. at 1494 (Scalia, J., dissenting). In fact, Justice Scalia stated he did not believe the Sixth Amendment required counsel to provide *any* advice about collateral consequences not pertaining to the actual criminal prosecution. Id. at 1495-96 (emphasis added). Justice Scalia asserted that, assuming the Sixth Amendment includes the right to "effective assistance" of counsel, he rejected the "significant further extension" that the majority, and, to a lesser extent the concurrence, would create. Id. at 1495. He stated that, "[w]e have until today at least" limited the Sixth Amendment's reach to criminal prosecutions, rather than defending the accused "in relation to other objectives that may

be important [to him]." Id. In that vein, the Supreme Court had not previously "required advice of counsel regarding consequences collateral to prosecution." Id. In fact, "[this Court] ha[s] never held, as the logic of the [majority] opinion assumes, that once counsel is appointed all professional responsibilities of counsel—even those extending beyond defense against the prosecution—become constitutional commands." Id. (citation omitted).

Justice Scalia continued: "There is no basis in text or in principle to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the criminal prosecution at hand—to wit, the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction. Such matters fall within 'the range of competence demanded of attorneys in criminal cases.'" Id. Thus, "[b]ecause the subject of the misadvice here was not the prosecution for which [the defendant] was entitled to effective assistance of counsel, the Sixth Amendment has no application." Id. In that vein, "[a]dding to counsel's duties an obligation to advise about a conviction's collateral consequences has no logical stopping-point."[2] Id. at 1496. Justice Scalia concluded by pointing out that legislation which could have remedied the problems caused by the changing relationship between immigration consequences and criminal convictions has been precluded by "today's sledge hammer." Id. at 1497.

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[2] Justice Scalia also noted that an awareness of the *direct* consequences suffices for ensuring the validity of a guilty plea under the Due Process Clause, and that the Court has previously held that the colloquy between the district court and a defendant required under Rule 11(b) of the Federal Rules of Criminal Procedure – which does not mention *collateral* consequences – generally satisfies the due process requirements for a valid plea. Id.

Federal and State Court Decisions

Three of the four circuits in the United States Courts of Appeal that have approached the question of whether Padilla is retroactive have found that Padilla is a new rule that should not be applied retroactively to cases on collateral review.[3] The first of these opinions was issued by the Fourth Circuit. See U.S. v. Hernandez-Monreal, 404 Fed. Appx. 714, at *1 n1 (4th Cir. 2010) (unpublished opinion) (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. See Chaidez v. U.S.,[4] 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."); U.S. 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). Notably, the Sixth Circuit avoided the issue by concluding that regardless of whether Padilla applied retroactively, the defendant failed to show prejudice. See Pilla v. U.S., 668 F.3d 368, 373 (6th Cir. 2012).

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[3] In an opinion issued on June 29, 2011, the Third Circuit Court of Appeals found Padilla to be retroactive. See U.S. v. Orocio, 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).

[4] On April 30, 2012, the United States Supreme Court granted certiorari to review the Seventh Circuit's opinion in Chaidez v. U.S. See United States Supreme Court Docket No. 11-820. However, Respondent submits that this Court need not hold Petitioner's case in abeyance pending the outcome of Chaidez because regardless of whether or not Padilla applies retroactively, it does not apply to Petitioner's case since Petitioner's case does not involve the consequence of deportation. See *infra*, p. 25-27.

In addition, numerous United States District Courts have indicated that Padilla is a new rule not to be applied retroactively. The District Court of South Carolina, for example, held Padilla "broke new ground and is not retroactively applicable." Dennis v. U.S., 787 F.Supp.2d 425, 430 (D.S.C. 2011). Other United States District Court cases reaching similar conclusions include, but are not limited to: Maxwell v. U.S., 2011 WL 5870041, at *2 (D. Md. Nov. 21, 2011); U.S. v. Garcia, 2011 WL 5024628, at *3 (M.D. Fla. Oct. 21, 2011); Emojevwe v. U.S., 2011 WL 5118800, at *3 (M.D. Ala. Sep. 29, 2011); U.S. v. Chapa, 2011 WL 2730910, at *5-8 (N.D. Ga. July 12, 2011); Mathur v. U.S., 2011 WL 2036701, at *3 (E.D. N.C. May 24, 2011); U.S. v. Laguna, 2011 WL 1357538, at *6 (N.D. Ill. Apr. 11, 2011); Doan v. U.S., 760 F. Supp.2d 602, 605-06 (E.D. Va. 2011); U.S. v. Macedo, 2010 WL 5174342, at *1 (N.D. Fla. Dec. 15, 2010); U.S. v. Bacchus, 2010 WL 5571730, at *1 (D. R.I. Dec. 8, 2010); U.S. v. Perez, 2010 WL 4643033 (D.Neb. Nov. 9, 2010); Ufele v. U.S., __ F.Supp.2d __, 2011 WL 5830608 (D.D.C. 2011); Mendoza v. U.S., 774 F.Supp.2d 791 (E.D.Va. 2011); U.S. v. Gilbert, 2010 WL 4134286 (D.N.J. Oct. 19, 2010); Sarria v. U.S., __ F.Supp.2d __, 2011 WL 4949724 (S.D.Fla. Oct. 18, 2011); Llanes v. U.S., 2011 WL 2473233 (M.D.Fla. June 22, 2011); Rackley v. Keith, 2011 WL 7452156 (W.D.Okla. Nov. 9, 2011); U.S. v. Abraham, 2011 WL 3882290 (D.Neb. Sept. 1, 2011); U.S. v. Martinez, --- F.Supp.2d ----, 2012 WL 220244 (D.Mass. Jan. 20, 2012); U.S. v. Agoro, 2011 WL 6029888, at *7 (D.R.I. Nov. 16, 2011), *accepted and adopted*, 2011 WL 6034478 (D.R.I. Dec. 05, 2011); U.S. v. Cervantes–Martinez, 2011 WL 4434861, at *6 (S.D.Cal. Sept. 23, 2011); Ellis v. U.S., 806 F.Supp.2d 538 (E.D.N.Y., 2011); Obomighie v. U.S., 2011 WL 2938218 (D.Md.

July 18, 2011); U.S. v. Haddad, 2010 WL 2884645 (E.D.Mich. July 20, 2010); Escobar-Pacheco v. U.S., 2011 WL 1750762 (E.D.N.C. May 6, 2011).

Numerous state courts have also concluded that Padilla created a new rule that is not to be applied retroactively. Such cases include, but are not limited to: 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); Guevara v. State, 2012 WL 938984 (Tenn.Crim.App. 2012); Gomez v. State, 2011 WL 1797305 (Tenn.Crim.App. 2011); Diotis v. State, 2011 WL 5829580 (Tenn.Crim.App. 2011); Oung v. State, 2011 WL 6382546 (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 (N.Y.Sup. 2012) (unpublished table decision); 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).

Teague v. Lane Analysis

Whether Padilla applies retroactively or not depends upon the results of an analysis pursuant to Teague v. Lane, 489 U.S. 288 (1989). When the Supreme Court announces a rule, the rule's effect on a defendant's conviction depends upon whether the rule is "new" or "old" and whether the defendant's case is pending on direct or collateral review. See Teague, 489 U.S. at 301-310. The rationale underlying Teague's "new rule"

analysis is that the "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." Teague, 489 U.S. at 309. A "new" rule will generally apply only to criminal cases pending on direct review, while an "old" rule will apply to cases on both direct and collateral review. Whorton v. Bockting, 549 U.S. 406, 416 (2007) (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987)). A rule is "new" within the meaning of Teague if it "breaks new ground or imposes a new obligation on the States or the Federal Government," or was not dictated by precedent existing when the defendant's conviction became final. Teague, 489 U.S. at 301; Graham v. Collins, 506 U.S. 461, 467 (1993). In contrast, a rule is "old" if a "court considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule the defendant seeks was required by the Constitution." O'Dell v. Netherland, 521 U.S. 151, 156 (1997) (citation omitted).

When making a determination whether an announced rule is "new" or "old," a court must consider "whether reasonable jurists could have differed" on whether the rule was compelled or dictated by existing precedent. Beard v. Banks, 542 U.S. 406, 414 (2004). Thus, the "new rule" principle "validates reasonable, good-faith interpretations of existing precedents" even if those good-faith interpretations are later changed or overruled. U.S. v. Price, 400 F.3d 844, 847 (10th Cir.2005) (quoting Graham, 506 U.S. at 467). If reasonable jurists at the time of the conviction could have differed as to whether the rule was compelled or dictated by existing precedent, the rule must be considered "new." See Beard v. Banks, 542 U.S. at 414. Further, the fact that the United States Supreme Court indicates that its current decision is "within the logical compass" of an

earlier decision, or even "controlled by" a prior decision, is not conclusive for purposes of deciding whether the decision is a new rule pursuant to Teague. Butler v. McKellar, 494 U.S. 407, 415 (1990). It is clear that a decision announces a new rule if it expressly overrules a prior decision; however, it is more difficult to determine whether a decision announces a new rule when it extends the reasoning of prior cases. Graham, 506 U.S. at 467 (citation omitted).

Lack of unanimity on the United States Supreme Court in deciding a case supports a conclusion that the case announced a new rule. See Beard v. Banks, 542 U.S. at 414-15. In addition, if the lower courts were split on the issue, this suggests that the outcome of the case was susceptible to debate amongst reasonable jurists and, therefore, that the case announced a new rule. See Butler v. McKellar, 494 U.S. at 415; O'Dell v. Netherland, 521 U.S. at 166 n3.

If a court determines that a case has announced a new rule of constitutional law and therefore would not ordinarily be applied retroactively, the court must then consider whether the new rule fits into either of two narrow exceptions set forth in Teague. The first exception that would allow a new rule to be applied retroactively is "if it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Teague at 311 (internal quotation and citation omitted). This exception has subsequently been defined as referring to a "substantive" rather than a procedural new rule. See Beard v. Banks, 542 U.S. at 411 n.2; see also Whorton v. Bockting, 549 U.S. at 416. A substantive rule is one that alters the range of conduct or the class of persons that the law punishes. Schriro v. Summerlin, 542 U.S.

348, 353 (2004). Conversely, a procedural rule "regulate[s] only the manner of determining the defendant's culpability." Id.

The second exception that would allow a new rule to be applied retroactively is "if it requires the observance of those procedures that are implicit in the concept of ordered liberty." Teague at 311 (internal quotation and citation omitted). The Teague Court explained this second exception was to be reserved for "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding. Id. at 311. To determine whether a new rule is a "watershed" rule, it must (1) "be necessary to prevent an impermissibly large risk of an inaccurate conviction" and (2) "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." Whorton, 549 U.S. at 418 (internal quotations and citations omitted).

This Court Should not Apply Padilla Retroactively

Padilla Set Forth A New Rule

This Court should follow the sound reasoning of the Fourth, Tenth, and Seventh Circuits, and that of the other courts list above, and conclude that Padilla should not be retroactively applied to cases on collateral review. First, the Padilla opinion set forth a new rule because it broke new ground and was not dictated by existing precedent. As noted by Justice Alito in the Padilla concurrence, before the issuance of the Padilla decision, most state and federal courts had considered the failure to advise a client of potential collateral consequences of a conviction to be outside the realm of the Sixth Amendment. See Padilla, 130 S.Ct. at 1481 n9; see also id. at 1487 (citing Gabriel J. Chin & Richard W. Holmes, Jr., Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 CORNELL L. REV. 697, 699 (2002) (prior to Padilla, "eleven federal

circuits, more than thirty states, and the District of Columbia have held that lawyers need not explain collateral consequences [under the Sixth Amendment]."); see also Llanes v. U.S., 2011 WL 2473233 at *2 (M.D.Fla. June 22, 2011) ("Based on the near uniformity of law that *Padilla* abrogated, a court 'would [not] have felt compelled by existing precedent' to conclude that trial counsel renders ineffective assistance by not advising a client about the risks of deportation.") (citation omitted); Marroquin v. U.S., 2011 WL 488985 (S.D.Tex. Feb. 4, 2011) ("The Supreme Court's conclusion [in Padilla] is opposite the holding of several state courts and every federal circuit court to have addressed the issue.") (citing U.S. v. Del Rosario, 902 F.2d 55 (D.C.Cir.1990); U.S. v. Gonzalez, 202 F.3d 20 (1st Cir.2000); U.S. v. Santelises, 509 F.2d 703 (2d Cir.1975); U.S. v. Romero-Vilca, 850 F.2d 177 (3d Cir.1998); U.S. v. Yearwood, 863 F.2d 6 (4th Cir.1988); Santos-Sanchez v. U.S., 548 F.3d 327 (5th Cir.2008); El-Nobami v. U.S., 287 F.3d 417 (6th Cir.2002); Santos v. Kolb, 880 F.2d 941 (7th Cir.1989); U.S. v. Fry, 322 F.3d 1198 (9th Cir.2003); Broomes v. Ashcroft, 358 F.3d 1251 (10th Cir.2004); U.S. v. Campbell, 778 F.2d 764 (11th Cir.1985); Oyekoya v. State, 558 So.2d 990 (Ala.Crim.App.1989); State v. Rosas, 183 Ariz. 421, 904 P.2d 1245 (Ariz.Ct.App.1995); State v. Montalban, 810 So.2d 1106 (La.2002); Commonwealth v. Frometa, 520 Pa. 552, 555 A.2d 92 (Pa.1989)). Thus, prior to Padilla, the vast majority of the lower courts clearly believed the holding of Padilla was not dictated or compelled by precedent.

A split in the lower court decisions supports that the rule of the case was subject to debate and was thus not dictated by precedent. Here, as discussed above, there was not merely a "split" but an *overwhelming majority* of cases in the lower federal and state courts reaching precisely the opposite conclusion as did Padilla. Importantly, even the

Padilla majority opinion acknowledged that Kentucky was "far from alone" in its contrary holding and that numerous lower courts had previously held that the Sixth Amendment did not apply to counsel's advice regarding deportation consequences. Padilla at 1481.

In addition, the lack of unanimity on the Padilla Court - as illustrated by the strong concurring and dissenting opinions - supports that the outcome of the case was susceptible to debate amongst "reasonable jurists" and was therefore not compelled by preexisting precedent. See Padilla, 130 S.Ct. at 1491 (Alito, J., concurring) ("[T]he majority does not cite a single case, from this or any other federal court, holding that criminal defense counsel's failure to provide advice concerning the removal consequences of a criminal conviction violates a defendant's Sixth Amendment right to counsel."); see also id. at 1488 (Alito, J., concurring) (noting the majority's "dramatic departure from precedent"); id. at 1491 ("[T]he Court's view has been rejected by every Federal Court of Appeals to have considered the issue thus far."); id. at 1492 ("The majority seeks to downplay its dramatic expansion of the scope of criminal defense counsel's duties under the Sixth Amendment."); id. at 1491, 1492 (referring to the majority's holding as "a major upheaval in Sixth Amendment law," and a "dramatic expansion of the scope of criminal defense counsel's duties under the Sixth Amendment"); id. at 1487 ("Until today, longstanding and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the *direct* consequences of a criminal conviction.). The dissent expressed a similar view that the majority's extension of the Court's Sixth Amendment jurisprudence had no "basis in text or in principle," and clearly did not view Padilla as dictated by precedent. Id. at 1495 (Scalia, J., dissenting). The

fact that the members of the High Court expressed such an "array of views" indicates that Padilla was not dictated by precedent. O'Dell v. Netherland, 521 U.S. at 159.

"[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). "Padilla extended the Sixth Amendment right to effective counsel and applied it to an aspect of a plea bargain previously untouched by Strickland." U.S. v. Hong, 671 F.3d at 1156. Thus, 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, because the Court had never decided the issue one way or the other, it was completely free to rule either way. This in no way implies that the Court's ultimate decision was one dictated by precedent; instead, the Court was simply *not prohibited* by its own precedent.

Interestingly, although the United States Supreme Court had never explicitly decided a Strickland claim based upon whether a consequence was direct or collateral, it appears the lower courts did derive the direct/collateral dichotomy by following United States Supreme Court precedent. In Brady v. U.S., 397 U.S. 742, 747 (1970), the United States Supreme Court specifically stated that a guilty plea is voluntary if the defendant is "fully aware of the **direct** consequences of the plea." (emphasis added). The Supreme Court subsequently held that where "a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea

depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" Hill v. Lockhart, 474 U.S. 52, 56 (1985) (citation omitted).

The lower courts - including South Carolina - quite reasonably extrapolated from these holdings that counsel performs effectively under Strickland by advising a client as to the direct consequences of a guilty plea. See Chaidez at 691; see also Randall v. State, 356 S.C. 639, 641, 591 S.E.2d 608, 609 (2004); Cuthrell v. Director, Paxtuent Institution, 475 F.2d 1364, 1366 (4th Cir. 1973); Appleby v. Warden, Northern Regional Jail and Correctional Facility, 595 F.3d 532, 538 n5 (4th Cir. 2010); Wilson v. McGinnis, 413 F.3d 196, 199 (2d Cir.2005); Steele v. Murphy, 365 F.3d 14, 17 (1st Cir.2004); U.S. v. Littlejohn, 224 F.3d 960, 965 (9th Cir.2000); King v. Dutton, 17 F.3d 151, 152 (6th Cir.1994); U.S. v. Salmon, 944 F.2d 1106, 1130 (3d Cir.1991); George v. Black, 732 F.2d 108, 110 (8th Cir.1984); U.S. v. Sambro, 454 F.2d 918, 922 (D.C.Cir.1971) (en banc) ("We presume that the Supreme Court meant what it said when it used the word 'direct'; by doing so, it excluded collateral consequences.")). Thereafter, until Padilla, the lower federal and state courts almost unanimously adhered to the direct versus collateral dichotomy and routinely classified immigration consequences as collateral. The departure from that longstanding legal distinction, and the application of Strickland to immigration consequences of a guilty plea, was an unexpected extension of Strickland into previously uncharted waters. Thus, "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." U.S. v. Hong, 671 F.3d at 1156 (emphasis in original). "Padilla marked a dramatic shift when it applied Strickland to collateral civil consequences of a conviction—a line courts had never crossed before." Id. at 1155.

Notably, although it did not generally reject the direct/collateral dichotomy, the Padilla Court appeared to place the consequence of deportation – because of its "unique" nature - in its own special category somewhere outside the traditional direct/collateral dichotomy and determined that the Sixth Amendment could apply to this category. See Padilla at 1478; p. 1480-82; see Ufele v. U.S., __ F.Supp.2d __, 2011 WL 5830608 at *3-4 (D.D.C. 2011). In other words, the Padilla court essentially concluded that "immigration consequences are divorced from the traditional distinction between direct and collateral consequences." Ufele v. U.S. at *5. This novel analysis is surely new, and no reasonable jurist could have anticipated such a ruling. Id. In addition, the "specific contours of the *Padilla* holding further indicate that it is a new rule." Chaidez at 693. Under the rule set forth in Padilla, the scope of an attorney's duty to provide immigration-related advice varies depending on the degree of specialization needed to provide such advice accurately. This "nuanced, new analysis cannot . . . be characterized as having been dictated by precedent." Id.

Petitioner argues that the Padilla Court's comment that they were not concerned about "opening the floodgates" indicates that the Court intended that the case applied retroactively. However, the Court's "floodgates" comment is ambiguous, especially when juxtaposed with the Court's subsequent statement that it realized it must be "especially careful about recognizing *new grounds* for attacking the validity of guilty pleas." Padilla at 1485 (emphasis added). Further, the Court could have been referring to opening the floodgates to *future* claims, i.e., prospective defendants who plead guilty in the future and then seek to challenge their convictions under the auspices of Padilla. The Court's ambiguous reference to the word "floodgates" should not be seized upon as a

conclusive indication that the Supreme Court believed that Padilla would be fully retroactive, especially when the Court was in fact silent on the subject of retroactivity.

Petitioner also points out the Court's observation that "[i]t seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains" and argues that this comment suggests that the Court contemplated its holding would be applied retroactively to cases on collateral review. However, the Court could have, just as easily, been referring to convictions already obtained but still pending on direct appeal.[5] Petitioner further argues that the Court's references to Hill v. Lockhart, 474 U.S. 52 (1985), which involved a challenge to a guilty plea and was applied retroactively, indicates that Padilla's holding should also be applied retroactively. To the contrary, Respondent submits that the Court was merely recognizing that "past decisions enumerating the contours of Strickland have not led to a surfeit of collateral attacks on guilty pleas." U.S. v. Hong, 671 F.3d at 1159. In other words, the Court was simply stating that it believed that Padilla – because it involved a challenge to a guilty plea as did Hill v. Lockhart – would have a similar lack of significant effect on the finality of guilty pleas. See Padilla at 1484-85; Hong at 1159.

In fact, that the Court realized its holding was new is supported by the majority's recognition that although Padilla's claim "follow[ed] from" its decision applying Strickland to advice regarding guilty pleas in Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), Hill does not control the question before us." Padilla at 1485. The majority's characterization of Hill as not controlling suggests that it did not understand the rule set forth in Padilla to be "dictated by precedent." See Chaidez at 690.

[5] Some jurisdictions allow claims of ineffective assistance of counsel to be raised on direct appeal. See, e.g., U.S. v. Tatum, 943 F.2d 370 (4th Cir. 1991).

Certainly, the Court never stated its holding was compelled by precedent, although it easily could have; moreover, it did not cite any case law for its ultimate holding.

Additionally, the majority indicated its holding was new when it extensively reviewed the history of immigration law and suggested that the recent and drastic changes to that law, and the resulting impact upon noncitizen defendants and their families, called for a change in the law regarding defense counsel's advice on immigration consequences. See Padilla at 1478-80; see also Dennis v. U.S., 787 F.Supp.2d 425, 429-30 (D.S.C. 2011) ("[T]he Court was mindful of the automatic nature deportation has taken in recent years with respect to certain criminal convictions, and it thus derived a rule fit for these circumstances."). The majority opinion further indicated the Court was endorsing a new rule when it noted that the Court had to be especially careful about recognizing "new grounds" for attacking guilty pleas, see id. at 1485, and when it stated "we now hold" that counsel must inform a client whether his plea carries a risk of deportation. See Padilla at 1488.

In any event, regardless of whether or not the Supreme Court subjectively believed it was announcing new law, the issue to be decided is whether, objectively, the Court *did* change the law. The ambiguous dicta in the Court's opinion - which creative legal scholars could interpret in various and sundry ways - surely does not justify a departure from a proper analysis under the Teague v. Lane framework, which exists to "promote the finality of convictions by shielding them from collateral attacks mounted on new procedural rules of constitutional law." Hong at 1159.

In sum, despite the fact that the holding in Padilla was an extension of Strickland, its rule is still "new" under Teague because Padilla was not in any way foreordained by

previous federal and state law; therefore, a reasonable jurist considering the issue prior to issuance of Padilla would not have concluded that existing precedent compelled or dictated the Padilla's holding. Consequently, Padilla created a new constitutional rule of criminal procedure which must not be applied retroactively unless it fits within one of the two Teague exceptions.

Padilla Does Not Fit Within Either of the *Teague* Exceptions

The first Teague exception analyzes whether the new law is "substantive" in nature rather than procedural. The Padilla rule is clearly not substantive because it does not alter the range of conduct or class of persons that the law punishes and merely regulates only the manner in which defendants decide to plead guilty. See Schriro v. Summerlin, 542 U.S. 348, 353 (2004). Second, the Padilla rule does not represent a watershed rule of criminal procedure. The rule is not necessary to "prevent an impermissibly large risk of an inaccurate conviction." Whorton, 549 U.S. at 418. The rule relates only to potential deportation consequences and not to a defendant's guilt or innocence. In addition, inasmuch as the Padilla rule applies only to guilty pleas, it is "simply not germane to concerns about risks of inaccurate convictions or fundamental procedural fairness." See U.S. v. Hong, 671 F.3d at 1158.

Further, the Padilla rule does not serve to "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." Whorton, 549 U.S. at 418. The United States Supreme Court has held a new rule must be in the same category as the rule announced in Gideon v. Wainwright, 372 U.S. 335 (1963) (finding for the first time that, under the Sixth Amendment, indigent defendants have a right to appointed counsel in state court prosecutions), in order to be considered a "bedrock procedural element" and

that "less sweeping and fundamental rules do not qualify." Whorton at 421 (internal quotation and citation omitted). Although the Padilla rule established a new requirement for counsel to comply with, it did not establish a right for defendants akin to the right established in Gideon. Accordingly, neither of the Teague exceptions apply to justify the retroactive application of the new rule announced in Padilla. See U.S. v. Abraham, 2011 WL 3882290 at *2 (D.Neb. Sept. 1, 2011) ("The weight of authority appears to favor nonretroactivity.").

B. *Padilla v. Kentucky* Cannot Properly be Extended Beyond Cases Involving Deportation Consequences

In addition to arguing that Padilla v. Kentucky should be applied retroactively, Petitioner also argues that Padilla should apply beyond the scope of immigration consequences. Respondent submits that the holding in Padilla is strictly limited to cases involving deportation consequences and should not be extended except by the United States Supreme Court. As discussed in detail above, the Padilla Court held that, because "virtually mandatory" deportation pursuant to federal immigration law is such a unique consequence, it is not appropriately classified as either direct or collateral. See Padilla at 1478; p. 1481-82. The Padilla court repeatedly emphasized the unique nature of the consequence of deportation, and the opinion suggests that a bright-line rule is appropriate in cases involving deportation only because the law of deportation has its roots in a comprehensive federal statutory scheme, applicable nationwide, since recent and drastic changes to that law called for a change regarding defense counsel's duty to provide advice on immigration consequences. See id. at 1477-80; p. 1480 ("as a matter of federal law," deportation is an "integral part" of a non-citizen's penalty); p. 1482-83.); see also U.S. v. Bakilana, 2010 WL 4007608 (E.D.Va., Oct. 12, 2010) ("However,

Padilla does not require that defendants be informed of all other collateral consequences of pleading guilty. Indeed, language in the opinion suggests that immigration consequences, because they are so "drastic," are *sui generis*.") (emphasis in original) (citing Padilla at 1478 & 1480).

Further, the Padilla Court did not hold that Strickland could conceivably apply to *all* consequences – direct and collateral - of a conviction, nor did it state that the Strickland test is applicable to all *material* consequences of a conviction. In that vein, the Court did not abrogate the proposition that the Sixth Amendment is not applicable to collateral consequences of a conviction; instead, the Court simply overruled the notion that deportation is, in fact, a collateral consequence. Critically, the Padilla Court expressly declined to overrule the plethora of lower federal and state court decisions using the direct/collateral dichotomy for consequences other than deportation. See Padilla at 1481-82. Given the care with which the Padilla Court limited its decision to the deportation context, this Court should decline to extend it to the collateral consequence in this case.

In summary, Respondent submits that Padilla carved out an exception to the direct/collateral consequence dichotomy *only* for the unique consequence of deportation.[6] See Padilla at 1481-87. Since the United States Supreme Court declined to reject it, the direct/collateral dichotomy remains viable for consequences other than deportation unless and until the High Court explicitly decides to extend Padilla's reach to other consequences not so "unique" as deportation. See People v. Hughes, 953 N.E.2d 1017, 1026 (Ill.App. 2 Dist. 2011) ("We are bound to follow the United States

[6] Respondent also believes that the Padilla Court's rejection of the "affirmative misadvice" standard is similarly limited to cases involving deportation consequences. See Padilla at 1484; see *supra*, p.12.

Supreme Court's interpretation of the Constitution of the United States. But we are not bound to extend the decisions of the Court to arenas which it did not purport to address, which indeed it specifically disavowed addressing, in order to find unconstitutional a law of this state. This is especially true where, as here, to do so would require us to overrule settled law in this state.") (citations omitted). Many lower federal and state courts agree with the conclusion that Padilla is strictly limited to cases involving deportation. See Ex Parte Moussazadeh, __ S.W.3d __, 2012 WL 468518 (Tex.Crim.App. 2012); Rackley v. Keith, 2011 WL 7452156 (W.D.Okla. Nov. 9, 2011); Myers v. Warden, Warren Correctional Inst., 2011 WL 7039933 (S.D.Ohio, Aug. 9, 2011); U.S. v. Nelson, 2011 WL 883999 (S.D.Ohio, Jan. 5, 2011); Thomas v. U.S., 2011 WL 1457917 (D.Md., Apr. 15, 2011); Pelaya v. Cate, 2011 WL 976771 (C.D.Cal., Jan. 18, 2011); U.S. v. Bakilana, 2010 WL 4007608 (E.D.Va., Oct. 12, 2010); People v. Hughes, 953 N.E.2d 1017, 1026 (Ill.App. 2 Dist. 2011); State v. Romos, 787 N.W.2d 480 (Table), 2010 WL 2598630 (Iowa App. 2010); State v. Rasheed, 340 S.W.3d 280, 284 (Mo.App. E.D. 2011); Nicolaison v. State, 2012 WL 539266 (Minn.App. 2012) (unpublished opinion); Brown v. Goodwin, 2010 WL 1930574 (D.N.J., 2010) (unpublished opinion). This Court should following the reasoning of the above cases and conclude that Padilla is not applicable to Petitioner's case because Petitioner's case does not involve the unique consequence of deportation.[7]

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[7] Padilla is also factually distinguishable from Petitioner's case because Padilla dealt with a consequence caused by *that particular plea and conviction.* Padilla at 1477-78. As will be discussed *infra*, the purported "consequence" in Petitioner's case – the imposition of a life without parole sentence – resulted from a *subsequent* and *separate* conviction in another county. See State v. Jones, 344 S.C. 48, 59, 543 S.E.2d 541, 546 (2001) (pointing out that the two-strikes law does not operate as a punishment for the *predicate* offense; instead it is a "stiffened penalty" for the *subsequent* offense) (emphasis added); see also King v. Dutton, 17 F.3d 151, 154 (6th Cir. 1994) ("Because only the Grainger County conviction is under review here, any lack of knowledge of the maximum penalty on the Knox County charge in the Knox County proceedings (if such there was) is irrelevant to the case at hand."). Since the complained-of

C. Counsel did not Render Deficient Performance in this Case

An attorney's performance is reasonable under Strickland v. Washington if he informs his guilty plea client regarding all direct consequences of a plea and does not misadvise him regarding any consequences. See Griffin v. Martin, 278 S.C. 620, 621-22, 300 S.E.2d 482, 483 (1983); Brown v. State, 306 S.C. 381, 382-83, 412 S.E.2d 399, 400-401 (1991); Smith v. State, 329 S.C. 280, 284, 494 S.E.2d 626, 628 (1997); Knox v. State, 340 S.C. 81, 86, 530 S.E.2d 887, 889 (2000), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); Meyer v. Branker, 506 F.3d 358, 367-68 (4th Cir. 2007). "Direct" consequences are consequences having a "definite, immediate and largely automatic effect" on the range of the defendant's punishment for that offense. Williams v. State, 378 S.C. 511, 515, 662 S.E.2d 615, 617 (Ct. App. 2008) (*quoting* Cuthrell v. Director, Patuxent Institution, 475 F.2d 1364 (4th Cir. 1973)); State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975) (citation omitted); Page v. State, 364 S.C. 632, 637, 615 S.E.2d 740, 742 (2005). Conversely, "where the consequence is contingent upon action taken by an individual or individuals other then the sentencing court - such as another governmental agency or the defendant himself - the consequence is generally 'collateral.'" U.S. v. Littlejohn, 224 F.3d 960, 965 (9th Cir.2000) (citation omitted); see also Brown v. State, 306 S.C. 381, 383, 412 S.E.2d 399, 400-401 (1991).

It is well-settled that a guilty plea is not rendered involuntary because the defendant was not informed of the collateral consequences of his conviction. See, e.g., Smith v. State, 329 S.C. at 285-86, 494 S.E.2d at 629. In that vein, an attorney does not render deficient performance when he fails to inform a defendant regarding collateral

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consequence did not flow from the conviction being challenged, as did the deportation consequence in Padilla, Padilla is factually distinguishable and cannot serve as a basis for relief in Petitioner's case.

consequences of a guilty plea. See, e.g., Smith v. State, 329 S.C. at 284, 494 S.E.2d at 628. There are several consequences of convictions that have been declared collateral by South Carolina courts. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citation omitted) (parole eligibility is collateral); Smith v. State, 329 S.C. at 284, 494 S.E.2d at 628 (a crime's designation as "violent" is collateral); Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004) (85% service requirement is collateral); Jackson v. State, 349 S.C. 62, 562 S.E.2d 475 (2002) (community supervision is collateral) Page v. State, 364 S.C. at 637, 615 S.E.2d at 742 (sexually violent predator civil commitment is collateral).

No South Carolina cases have specifically found that the application of the two-strikes law is a collateral consequence of a guilty plea. However, other courts have indicated that a conviction's enhancing effect on a future sentence is merely a collateral consequence. See Wright v. U.S., 624 F.2d 557, 561 (5th Cir. 1980) ("a plea's possible enhancing effect on a subsequent sentence is merely a collateral consequence of the conviction; it is not the type of consequence about which a defendant must be advised before the defendant enters the plea"); Appleby v. Warden, Northern Regional Jail and Correctional Facility, 595 F.3d 532, 541 (4th Cir. 2010) (guilty plea upheld even though the defendant was not informed that the State could institute a recidivist proceeding and have him sentenced to life without parole for the same crime to which he pled guilty); U.S. v. Brownlie, 915 F.2d 527, 528 (9th Cir. 1990) (the possibility that a defendant will be convicted of another offense in the future and will receive an enhanced sentence based upon the instant conviction is not a direct consequence of a guilty plea); U.S. v. Edwards, 911 F.2d 1031, 1035 (5th Cir. 1990) (uncounseled defendant who pled guilty to

receive a "time-served" sentence in state court needed not be advised that her plea could be used to enhance her sentence in a pending federal case; such consequence was merely collateral); U.S. v. Lambros, 544 F.2d 962, 966 (8th Cir. 1976) (the possibility of enhanced punishment for a subsequent similar conviction is not a direct consequence of a guilty plea); U.S. v. Salmon, 944 F.2d 1106, 1130 (3rd Cir. 1991) (the effect of a conviction on sentencing for a later offense under "career offender" law is a collateral consequence of which a defendant need not be advised; defendant need not be advised of even "foreseeable" collateral consequences in order for his plea to be voluntary under the constitution; defendant need only be advised of the direct consequences); McCarthy v. U.S., 320 F.3d 1230, 1234 (11th Cir. 2003) (the fact that defendant's guilty plea could have sentencing consequences in a subsequent federal prosecution were clearly collateral, and neither the court nor McCarthy's counsel were constitutionally required to make him aware of them); Fee v. U.S., 207 F.Supp. 674 (1962) (defendant's guilty plea, which was later used to enhance the sentence on a subsequent conviction, was not involuntary where he was not informed that the plea could be used to enhance the subsequent sentence under a "third offender" provision; the court had a right to assume the defendant would be not guilty of a subsequent offense); People v Pierre, 80 A.D.3d 441, 913 N.Y.S.2d 655 (2011) ("[g]enerally, an enhanced sentence resulting from a subsequent conviction is a collateral consequence of a guilty plea"); Ball v. U.S., 470 U.S. 856, 865 (1985) (referring to an increased sentence for a future offense under a recidivist statute as a collateral consequence); King v. Dutton, 17 F.3d 151 (6th Cir. 1994) (the defendant's guilty plea to murder was not involuntary where he was not informed that the plea could be used as an "aggravating circumstance" to elevate the sentence to death in a then-

pending murder charge from another county); compare U.S. v. Nelson, 2011 WL 883999 at *3 (S.D.Ohio, Jan. 5, 2011) (an enhanced penalty on a future offense is neither a direct nor a collateral consequence of the convictions at issue; the penalty the defendant faces on any future conviction will be the direct consequence of the relevant characteristics he displays at that time and of the law in effect at that time).

Notably, Petitioner agrees that the two-strikes law is generally a collateral consequence. (See Brief of Petitioner, p. 19). However, he contends that an exception should be made because of the unique facts of his case. He argues that, in his case, the application of the two-strikes law to elevate his subsequent conviction in Williamsburg was a "direct" consequence of his guilty plea in Georgetown. (Brief of Petitioner, p. 18-19). The Sixth Circuit rejected a similar argument in King v. Dutton, 17 F.3d 151, 154-55 (6th Cir. 1994). The defendant in King v. Dutton asserted that the use of a guilty plea to murder from one county to elevate the penalty for a subsequent murder conviction in another county to the death penalty was a direct result of the guilty plea. King, 17 F.3d at 154. He argued that, considering that the second murder charge was already pending at the time the defendant entered his guilty plea, and taking into account the extreme harshness of the death penalty, he should have been informed of this purportedly "direct" consequence. Id. The King court rejected this argument, pointing out that, because there were several conditions precedent that had to be fulfilled before the second sentence could be enhanced, the enhancement was merely a collateral consequence. Id.

This Court should, for similar reasons, reject Petitioner's argument. The application of the two-strikes law to Petitioner's subsequent conviction in Williamsburg cannot be considered a "direct" consequence of Petitioner's plea in Georgetown. The

subsequent imposition of an LWOP sentence in Williamsburg, which occurred approximately one year and three months after the Georgetown guilty plea, was not a certainty at the time of the plea. (See App. p. 335). See Williams v. State, 378 S.C. at 515, 662 S.E.2d at 617. It was not an "immediate" or "largely automatic" result of the Georgetown plea. Id. Petitioner's subsequent receipt of an LWOP sentence required application of legal principles entirely extraneous to the criminal statutes involved in the Georgetown guilty plea. Appleby v. Warden, Northern Regional Jail and Correctional Facility, 595 F.3d at 540. Further, the future imposition of an LWOP sentence was entirely contingent upon events occurring after Petitioner's guilty plea, and upon actions taken by individuals other than the plea court. See U.S. v. Littlejohn, 224 F.3d at 965.

The most obvious contingency was, of course, Petitioner's subsequent conviction in Williamsburg for a "most serious" charge. See Weinstein v. U.S., 325 F.Supp. 597, 600 (1971) (it is proper to "assume that the defendant will not be guilty of a subsequent offense") (citation omitted); Coffin v. United States, 156 U.S. 432, 453 (1895) (the presumption of innocence in favor of the accused is axiomatic and elementary). In addition, contingencies occurring well before the trial/conviction stage could have also precluded the imposition of an LWOP sentence in Williamsburg. For instance, the Williamsburg prosecutor could have elected to dismiss the charges in their entirety or to prosecute only less serious offenses. The Williamsburg prosecutor could have (and did in this case) decided to offer a plea bargain to a lesser-included offense which would not have subjected Petitioner to life without parole, and Petitioner could have accepted such a plea bargain. (See App. p. 110, lines 3-19; p. 269-70; p. 333). Alternatively, the legislature could have altered or repealed the LWOP statute such that it was not

applicable to Petitioner.[8] The existence of all of these future contingencies necessarily rendered the imposition of an LWOP sentence for a subsequent, future conviction, at best, a collateral consequence of Petitioner's Georgetown guilty plea. See cases cited *supra* at p. 34-35; compare U.S. v. Nelson, 2011 WL 883999 at *3 (S.D.Ohio, Jan. 5, 2011) (an enhanced penalty on a future offense is *neither a direct nor a collateral consequence* of the convictions at issue; the penalty the defendant faces on any future conviction will be the direct consequence of the relevant characteristics he displays at that time and of the law in effect at that time) (emphasis added). The fact that this consequence is collateral is also supported by the fact that it had no effect whatsoever upon the "range of punishment" Petitioner faced on the Georgetown charges to which he pled. Williams, 378 S.C. at 515, 662 S.E.2d at 617.

Accordingly, notwithstanding the regret expressed by Petitioner's former counsel that he did not advise Petitioner regarding this collateral consequence, counsel did not render *objectively* unreasonable performance by failing to do so. (See App. p. 191, line 19 – p. 192. line 12). See Foye v. State, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999) (the court may properly disregard opinions of trial counsel going to the ultimate issues in a PCR case). Counsel's performance did not fall below reasonable professional norms where he advised Petitioner regarding all direct consequences of his Georgetown plea and where he did not provide any erroneous advice regarding consequences of the plea. (See App. p. 164, lines 16-18). See, e.g., Smith v. State, 329 S.C. at 284-86, 494 S.E.2d at 629-30; compare Appleby v. Warden, Northern Regional Jail and Correctional Facility, 595 F.3d at 540 (guilty plea upheld even though the defendant was not informed that the

[8] Notably, as Petitioner points out in footnote 3 on page 17 of his Brief, the legislature did in fact later amend the LWOP statute to make its application at the discretion of the solicitor. See S.C. Code § 17-25-45 (G) (as amended effective June 2, 2010).

State could institute a recidivist proceeding and have him sentenced to life without parole for the same crime to which he pled guilty). Respondent submits that, considering the law cited above – which, as discussed previously, was not abrogated by Padilla - the PCR court properly concluded that the application of the two-strikes law is merely a collateral consequence of Petitioner's guilty plea and that counsel was not ineffective for failing to advise Petitioner regarding this consequence. Therefore, the PCR judge's denial of relief on this ground should be upheld.

D. Petitioner Failed to Credibly Establish Prejudice

Further, even if counsel's performance had been deficient, the PCR court's denial of relief should still be upheld where the court concluded that Petitioner failed to credibly prove prejudice. (See App. p. 345-46). See Griffin v. Martin, 278 S.C. 620, 621-22, 300 S.E.2d 482, 483 (1983) (where the evidence at the PCR hearing reflected that the defendant pled guilty based upon factors other than counsel's erroneous advice, the PCR judge's conclusion that the defendant failed to prove prejudice was supported by the evidence). After making thorough findings regarding Petitioner's lack of credibility, the PCR judge concluded that Petitioner failed to prove that had he known of the two-strikes law, he would not have pled guilty. (See App. p. 340; p. 345; p. 353-54). Petitioner now argues that the Court's prejudice analysis was pervasive with incorrect findings that Petitioner's decision to proceed to trial in Williamsburg served as evidence that he would not have been deterred from pleading guilty in Georgetown even had he been informed of the two-strikes law. (See Brief of Petitioner, p. 21-22). Respondent submits that the thrust of the PCR judge's reasoning in this regard was that, because Petitioner believed he would be exonerated in the future on the Williamsburg CSC charge, he failed to

credibly prove that the application of the LWOP statute to a conviction in Williamsburg - as a distant future contingency - would have changed his mind about pleading guilty in Georgetown in order to receive the immediate benefit of a favorable sentence on those charges. (See App. p. 14-20; p. 40-45; p. 103-104; p. 115, lines 5-10; p. 126, lines 22-24; p. 175, line 23 – p. 176, line 2; p. 187, lines 5-8; p. 240, line 10 – p. 241, line 11; p. 252, lines 15-21; p. 345).

Further, the PCR judge also found that Petitioner's decision to plead in Georgetown was based on a variety of other factors and considerations, including overwhelming evidence on the two lewd act charges and a very damaging tape recording that could have been used against him at trial; avoiding the embarrassment of three separate public trials; the favorable concurrent sentences; avoiding the possibility of receiving significantly more time if he were convicted at trial; and confessing his guilt and taking responsibility for his actions. (See Respondent's Exhibit # 1 - CD - 2003 Telephone Conversation - on file with this Court; see App. p. 144-47; p. 256-60; p. 352; p. 353-54). The PCR judge's finding that Petitioner failed to credibly prove prejudice is also supported by the fact that Petitioner failed to actually testify to any specific and convincing reasons why knowledge of the LWOP statute would have changed his mind about pleading guilty in Georgetown. (See App. p. 230-54; p. 345).

Petitioner also contends that the PCR court placed an undue amount of emphasis on the fact that defense counsel would have been able to secure a favorable plea bargain in Williamsburg that would have allowed Petitioner to avoid LWOP. (See Brief of Petitioner, p. 23). Respondent submits that, contrary to Petitioner's argument, the "prejudice" finding discussed above was clearly separate and distinct from the court's

additional findings regarding Petitioner's ability to avoid LWOP by pleading guilty to lewd act in Williamsburg. (See App. p. 345 & p. 346-47). Therefore, disregarding the PCR court's findings about Petitioner's rejection of the plea bargain in Williamsburg (see App. p. 346-47), the court's ultimate finding that Petitioner failed to credibly prove prejudice is nevertheless supported by the evidence. (See App. p. 345). See Robinson v. State, 387 S.C. 568, 574, 693 S.E.2d 402, 405 (2010) (the findings of the PCR court must be upheld if they are supported by "any evidence").

Accordingly, because Petitioner failed to convince the PCR judge that he would have proceeded to trial had he known about the two-strikes law, the denial of relief on this ground should be upheld. See Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 n6 (2001) (noting that even if a defendant proves that he was not fully advised of the consequences of a plea, he must also prove that he was in fact prejudiced thereby); Foye v. State, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999), Solomon v. State, 313 S.C. 526, 529, 443 S.E.2d 540, 542 (1994), & Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (all holding that great deference must be afforded the PCR court's findings and conclusions, especially where matters of credibility are involved, since the appellate court lacks the opportunity to directly observe the witnesses during their testimony); Robinson v. State, 387 S.C. at 574, 693 S.E.2d at 405 (the findings of the PCR court must be upheld if they are supported by "any evidence").

II. **The PCR court properly concluded that Petitioner was not entitled to relief based upon counsel's investigation of the CSC with a minor charge where counsel performed reasonably under the circumstances and where Petitioner's purported defenses were unconvincing and did not necessarily refute Petitioner's guilt.**

The discovery materials provided by the solicitor prior to the guilty plea designated a two-month span of time (June and July of 1999) during which the CSC could have occurred. (See App. p. 13-15; p. 87; p. 116, lines 20-25). Unsurprisingly, due to the passage of approximately six years from the date of the assault to the report date, the victim had been unable to pinpoint a specific date for the assault, although he was certain that it occurred during the summertime. (See App. p. 87; p. 116-23; p. 349-50). At the guilty plea, the solicitor presented the court with a proposed indictment indicating the assault occurred "on or about" August 5-7, 1999. (App. 15, lines 1-12; p. 85-86). This indictment was never true-billed since Petitioner elected to waive grand jury presentment. (App. p. 5, line 22 – p. 6, line 1). Therefore, the victim never specifically confirmed the dates listed in the proposed indictment and was apparently never able to confirm any date in particular. (See App. p. 24, lines 8-23; p. 85-87). There is no evidence in the record conclusively establishing why the solicitor included those particular dates in the proposed indictment. (See App. p. 5-15; p. 85-87; p. 120-23; p. 195-96; p. 199, lines 19-25; p. 349-50).

At the PCR hearing, Petitioner asserted that since the time of his plea, he had discovered an alibi for the dates listed on the proposed indictment. (See App. p. 202-213; p. 223-29; p. 238, lines 5-15). He also asserted that the victim's claim regarding use of the church showers could have been impeached with evidence that those showers had been inoperable since the spring of 1999. (App. p. 200, line 17 –p. 202, line 7; p. 214,

lines 7-20). Petitioner claimed that if counsel had investigated these matters, he would have proceeded to trial and asserted these defenses. (See App. p. 302).

The PCR judge rejected Petitioner's allegations, concluding that Petitioner failed to prove ineffective assistance with respect to counsel's investigation of the Georgetown CSC charge. (See App. p. 347-54). First, counsel's performance was not deficient where he was not given a reason to further investigate the CSC charge or the dates listed in the proposed indictment. (See App. p. 347-51). In discussions regarding pleading guilty, counsel emphasized to Petitioner the duty to tell the absolute truth at the plea proceeding. (App. p. 123, lines 19-20; p. 124, lines 5-7; p. 161, lines 3-12; p. 186, lines 22-25; p. 354). Petitioner – the only person other than the victim who knew whether or not he was truly guilty – was in the best position to decide whether the date change would impact his decision to plead guilty. (See App. p. 5-15; p. 199, line 14 – p. 200, line 10; p. 348-49). If he believed there was a potential defense based upon the date, it was incumbent upon him to speak up and tell counsel that the dates made a difference. (See App. 348-49; p. 351). However, Petitioner mentioned nothing about wanting more time and nothing about potential defenses. (See App. p. 160-64). Importantly, Petitioner also never mentioned to counsel any problem with the church showers, even though this defense was **not** affected by the date change in the proposed indictment. (App. p. 127, lines 16-19; p. 147, lines 11-18; p. 201, lines 19-21; p. 350-51).

Instead, Petitioner decided to plead guilty, and he told the plea judge on three separate occasions that he was, in fact, guilty of the offenses to which he was pleading. (App. p. 17, lines 9-10; p. 17, line 23; p. 19, lines 2-9). As mentioned above, his admissions of guilt are particularly significant considering that counsel specifically told

Petitioner he was required to tell the truth at the plea. (App. p. 123, lines 19-20; p. 124, lines 5-7; p. 161, lines 3-12; p. 186, lines 22-25; p. 354). See Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) ("A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed.") (citation omitted). Petitioner also told the court in no uncertain terms that he was completely satisfied with counsel's services. (See App. p. 19, line 24 – p. 20, line 12; p. 351). Accordingly, considering that counsel had already conducted an independent investigation prior to the plea (which uncovered only information that was harmful to Petitioner), he was not required to further investigate after receiving the proposed new dates, where (1) Petitioner did not express to counsel that the dates made a difference to him, and (2) counsel was justified in believing that Petitioner was telling the truth about being guilty of assaulting the victim. (See App. p. 19, lines 2-5; p. 124, lines 5-7; p. 123-27; p. 149-55; p. 161, lines 3-12; p. 177, line 13 – p. 179, line 10; p. 183, lines 18-19). See Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006) (counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgments).

Even if counsel had been given reason to further investigate, the denial of relief should nevertheless be upheld where Petitioner failed to convince the PCR court that his alleged defenses were credible or sufficient. See Roscoe v. State, 345 S.C. 16, 21, 546 S.E.2d 417, 420. As the PCR judge pointed out, Petitioner's purported "alibi" did not, in fact, make it physically impossible for him to have committed the CSC, considering that the victim had always been unable to pinpoint a specific date for the assault and

considering that the proposed indictment listed the dates as "*on or about*" August 5-7, 1999. (App. p. 86-87; p. 118-127; p. 162, lines 6-17; p. 348-50). See Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (pointing out that a purported alibi which leaves it possible for the accused to be guilty of the crime is no alibi at all) (citation omitted). In light of the passage of time since the offense; the victim's young age at the time of the offense; the fact that the victim had never been able to specify a particular date for the offense; and the fact that no dates were ever confirmed before a grand jury, the PCR court did not believe that the victim would have in fact testified that the assault occurred specifically on August 5, 6, or 7. (See App. p. 348-50). Therefore, Petitioner's alleged alibi, which was *strictly limited* to the dates of August 5-7, 1999, was insufficient and unconvincing. (See App. p. 202-203; p. 348-51). His potential defense regarding the inoperability of the church showers was similarly insufficient and unconvincing, where the information was at best merely impeaching of the victim and where Petitioner did not come up with this defense until after his guilty plea *even though he would have known about it all along.* (See App. p. 127, lines 16-19; p. 147, lines 11-18; p. 201, lines 19-21; p. 348-51). Furthermore, the inoperability of the showers could have easily been turned around to favor the victim's version of events since it established an obvious reason for Petitioner to let the victim shower at his house.[9]

In sum, where Petitioner did not give counsel reason to investigate the matters he raised at the PCR hearing, counsel's performance was not deficient. Further, Petitioner

[9] Considering the passage of several years from the date of the CSC to the time of reporting, it would not be surprising if the young victim blended together several childhood memories involving church beach trips. (See App. p. 178, lines 18-25). Compare State v. Kirton, 381 S.C. 7, 18-19, 671 S.E.2d 107, 112 (Ct. App. 2008) (expert witness discussing the nature of childhood memories of sexual assaults). Nevertheless, a jury could have still concluded that the critical aspects of the victim's account pertaining to the actual sodomy - the aspects the victim would undoubtedly never forget - were in fact true.

failed to prove prejudice where his purported defenses were unconvincing and would not necessarily have conclusively refuted his guilt. Accordingly, where Petitioner failed to meet his burden of proof, the PCR court's denial of relief should be upheld. See Robinson v. State, 387 S.C. at 574, 693 S.E.2d at 405 (the findings of the PCR court must be upheld if they are supported by "any evidence").

CONCLUSION

For the reasons discussed above, Respondent submits that this Court should affirm the PCR court's denial of relief.

Respectfully submitted,

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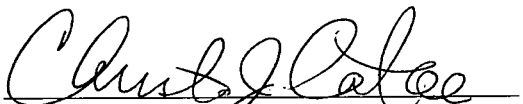

ATTORNEYS FOR RESPONDENT

May 22, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
The Honorable Michael G. Nettles, Circuit Court Judge

Case No. 2007-CP-22-476

ROBERT TROY TAYLOR, # 315084 PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Brief of Respondent** in the above-referenced case has been served upon the person(s) listed below, by U.S. mail, this **22nd** day of **May, 2012**:

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SWORN to before me this 22nd day of May, 2012.

Notary Public for South Carolina.
My Commission Expires: 7/18/2017