

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Darlington County

Thomas A. Russo, Circuit Court Judge

**RECEIVED**

FEB 01 2013

**SC Court of Appeals**

THE STATE, \_\_\_\_\_

RESPONDENT,

V.

MIGUEL HERRERA,

APPELLANT

Appellate Case No. 2012-213538

\_\_\_\_\_  
ANDERS BRIEF OF APPELLANT

BREEN RICHARD STEVENS  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS ..... 1

TABLE OF AUTHORITIES..... 2

STATEMENT OF ISSUE ON APPEAL ..... 3

STATEMENT OF THE CASE ..... 4

ARGUMENT

**The plea court reversibly erred by failing to include  
deportation as part of the court’s colloquy regarding the  
possible penalty associated with Appellant’s guilty plea to the  
charge of CSCM 2nd. ....5**

CONCLUSION ..... 7

PETITION TO BE RELIEVED AS COUNSEL ..... 8

TABLE OF AUTHORITIES

**Cases**

Anderson v. State, 342 S.C. 54, 535 S.E.2d 649 (2000) ..... 6

Berry v. State, 381 S.C. 630, 675 S.E.2d 425 (2009)..... 5

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969) ..... 5, 6

Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463 (1970) ..... 5

Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985)..... 5

Moore v. State, 399 S.C. 641, 732 S.E.2d 871 (2012) ..... 5

Padilla v. Kentucky, \_\_\_ U.S. \_\_\_, 130 S.Ct. 1473, 176 L.E.2d 284 (2010)..... 6

Rollison v. State, 346 S.C. 506, 552 S.E.2d 290 (2001) ..... 6

State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)..... 6

STATEMENT OF ISSUE ON APPEAL

Whether the plea court reversibly erred by failing to include deportation as part of the court's colloquy regarding the possible penalty associated with Appellant's guilty plea to the charge of CSCM 2nd?

## STATEMENT OF THE CASE

Appellant Miguel Herrera was indicted by the Darlington County grand jury on November 29, 2012, for second degree criminal sexual conduct with a minor (CSCM 2nd). R. 3, lines 5-9; R. 31—R. 32. His case proceeded to a guilty plea hearing before the Honorable Thomas A. Russo on December 3, 2012. Richard Jones (Counsel) represented Appellant, while Patti McKenzie represented the State. R. 1.

The plea court accepted Appellant's guilty plea to CSC 2nd with no sentence recommendation from the State, and imposed a sentence of twelve years. R. 4, lines 17-20; R. 14, lines 23-25; R. 19, line 13—R. 20, line 4; R. 26, lines 15-19; R. 33. Counsel filed and served Notice of Appeal on December 7, 2012. R. 30.

This appeal follows.

## ARGUMENT

**The plea court reversibly erred by failing to include deportation as part of the court's colloquy regarding the possible penalty associated with Appellant's guilty plea to the charge of CSCM 2nd.**

Appellant asserts the trial court reversibly erred by accepting his guilty plea where the court failed to include deportation as a possible punishment in its colloquy with Appellant. Thus, Appellant's guilty plea was not knowingly, intelligently, and voluntarily made because no on-the-record understanding was made by Appellant that CSCM 2nd carries deportation as a consequence to his guilty plea. Accordingly, Appellant respectfully requests reversal of his conviction, and remand for a new trial.

"Guilty pleas are no more foolproof than full trials to the court or jury. Accordingly, we take great precautions against unsound results." Brady v. United States, 397 U.S. 742, 758, 90 S.Ct. 1463, 1474 (1970). The difference "between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea." Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009); see also Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969) (holding Due Process requires guilty pleas to be entered voluntarily, knowingly, and intelligently). "The longstanding test for determining the validity of a 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, 369 (1985) (internal quotations omitted). Additionally, "[t]he validity of a defendant's waiver does not turn on his communication with counsel, but rather on the presence of a record supporting the validity of that waiver." Moore v. State, 399 S.C. 641, 648, 732 S.E.2d 871, 874 (2012).

“In addition to the requirements of Boykin, a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived.” Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000) (emphasis in original) (citing State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)); see also Rollison v. State, 346 S.C. 506, 511, 552 S.E.2d 290 (2001). Further, as the United States Supreme Court recently explained, “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.” Padilla v. Kentucky, \_\_\_ U.S. \_\_\_, 130 S.Ct. 1473, 1480, 176 L.E.2d 284 (2010) (emphasis added). Therefore, “[w]e have long recognized that deportation is a particularly severe penalty.” Id. \_\_\_ U.S. \_\_\_, 130 S.Ct. at 1481.

In the present case, the plea court conducted an on the record colloquy with Appellant regarding his constitutional rights; however, the court’s discussion with Appellant regarding the nature and consequences did not include any dialog whatsoever about deportation as a consequence of Appellant’s guilty plea to CSCM 2nd. R. 5, line 19—R. 6, line 8; R. 6, lines 20-25; R. 18, lines 3-23.<sup>1</sup> Accordingly, Appellant’s waiver was not knowingly, intelligently, or voluntarily made, as the record of the plea court’s colloquy indicates Appellant—who was an illegal immigrant for twelve years—was not correctly apprised by the court of an integral part of the penalty to Appellant. R. 21, lines 6-8.

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<sup>1</sup> Although Counsel’s presentation of mitigating evidence to the plea court during the sentencing phase of the hearing indicated Counsel previously spoke to Appellant about deportation, the only on-the-record discussion between the plea court and Appellant regarding the matter of the nature of the offense and penalties stemming from Appellant’s guilty plea to CSCM 2nd was nonetheless devoid of deportation. R. 21, lines 6-23; R. 24, lines 12-18.

CONCLUSION

For the foregoing reasons, Appellant Miguel Herrera respectfully requests reversal of his conviction, and remand for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Breen Richard Stevens", with a long horizontal flourish extending to the right.

Breen Richard Stevens  
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of February, 2013.

STATE OF SOUTH CAROLINA

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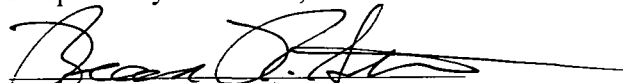
\_\_\_\_\_  
PETITION TO BE RELIEVED AS COUNSEL  
\_\_\_\_\_

Counsel for Miguel Herrera states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Thomas A. Russo, which was held on December 3, 2012, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Miguel Herrera.

Respectfully submitted,



Breen Richard Stevens  
Appellate Defender

ATTORNEY FOR APPELLANT

This 1<sup>st</sup> day of February, 2013.

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Thomas A. Russo, Circuit Court Judge

THE STATE,

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Appellate Case No. 2012-213538

**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment;
- (2) Guilty plea transcript, pp. 1-28;
- (3) Notice of Appeal and Proof of Service;
- (4) Sentence sheet.

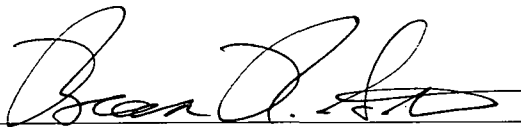
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SC COURT OF APPEALS

I certify that this designation contains no matter which is irrelevant to this appeal.

February 1st, 2013.

  
Breen Richard Stevens  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

Attorney for Appellant

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RESPONDENT,

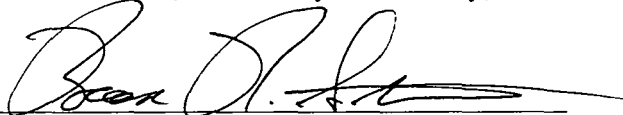
V.

MIGUEL HERRERA,  
APPELLANT

Appellate Case No. 2012-213538

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter, as well as the Record on Appeal, in the above referenced case has been served upon Salley W. Elliott, Esquire, at P.O. Box 50666, Columbia, SC; and on Mr. Miguel Herrera, #353438 at Kirkland Correctional Institution, this 1st day of February, 2013.



Breen Richard Stevens  
Appellate Defender

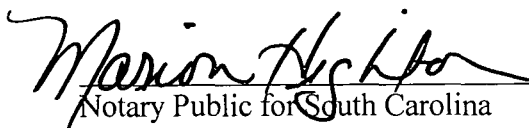
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 1st day of February, 2013.

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SC Court of Appeals

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 30, 2022