

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Edgar W. Dickerson, Circuit Court Judge

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Appellate Case No. 2020-001036

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Hamzed H. Saadeh,.....Respondent,

v.

State of South Carolina,.....Petitioner.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## INTRODUCTION

This case is from Charleston County post-conviction relief court, arising from convictions in the City of North Charleston Municipal Court. From June 2, 2014 until December 14, 2018, it appears that there were numerous wrongful convictions throughout the State of South Carolina for simple possession of marijuana, because unbeknownst to the majority of the State bar and the majority of the State judiciary, the legislatures changed the definition of marijuana under S.C. Code Ann. § 46-55-10 instead of through S.C. Code Ann. § 46-53-110. Also unknown, the State Law Enforcement Division (*hereinafter* SLED) testing requirements were no longer able to differentiate between lawful hemp and unlawful marijuana violating Rule 6, SCRPC. (A. p. 9). The change in the law created an essential element that since June 2, 2014 has been the crux that makes green leafy plant-like material that contained THC legal or illegal. *See* Respondent's Petition for Post-Conviction Relief (A. pp. 1-6 ¶¶ 1-35).

The records in Saadeh's cases reflect that the disposing court, in light of the new evidence brought forward by the SLED announcement, did not apply the proper law to the Applicant's cases. The State did not have the evidence to support that the possession of the green leafy plant-like material was a crime. The records do not reflect that a plea colloquy corrected this default or that a crime was even committed. To assert that a Defendant can plead guilty to acts that do not amount to a crime without specifically waiving knowledge of the element is an absurdity. For example, a Defendant pleading guilty to trespassing without ever being presented with a notice not to enter the premises and being wholly unaware that they needed to have notice not to enter, should not suffice. A person cannot implicitly waive a key element of a crime, particularly the element that alters the acts from lawful to unlawful. The records in Applicant's cases reflect that this is in fact what happened. The Petitioner's arguments suggest that Defendants should be allowed to plead

guilty even if the State has not presented proof beyond a reasonable doubt that a crime was committed, despite the protections of the United States Constitution.

## COUNTER-STATEMENT OF ISSUES FOR WHICH THE STATE SEEKS

1. The post-conviction relief court properly granted relief to Hamzeh Saadeh, the Respondent, based on the newly discovered evidence. The post-conviction relief court applied the proper standard for newly discovered evidence following a guilty plea. Hamzeh Saadeh presented evidence to substantiate his claim for relief, the State did not raise any arguments, and the post-conviction relief court granted the relief after careful consideration of the application. The interests of justice in this case does require the vacating of his guilty pleas.

## COUNTER-STATEMENT OF THE CASE

On May 6, 2017, Hamzeh Saadeh was arrested and charged with Simple Possession of Marijuana on ticket number 67492HA. On August 8, 2017, Saadeh was represented by North Charleston Public Defender, Bob Haley. Based on the known and accepted as evidence at that time, Saadeh pled guilty to a reduced charge of Possession of Drug Paraphernalia and was sentenced to a fine. At no time was the Respondent aware that testing of the green leafy plant-like material (*hereinafter*, GPM) was not sufficient to comport with the applicable law under which he was originally charged. At no time did the State present evidence that the GPM was in fact unlawful marijuana and not lawful cannabis. At no time did Saadeh know that a required element of the original crime charged was that the GPM contained more than .3% THC dry weight basis. *See* S.C. Code Ann. § 46-55-10. On the court date, Saadeh was seventeen (17) years old and a citizen of Jordan, here in the United States as a lawful permanent resident

On October 5, 2017, Saadeh was given a courtesy summons for Simple Possession of Marijuana on ticket number 4102P0160776. On October 23, 2017, Saadeh received deferred prosecution until January 23, 2018. Saadeh was not represented by counsel. Saadeh did not successfully complete the terms of the deferral of the prosecution and the case was referred to the court for a court date of February 21, 2018 at 1pm. Saadeh received the summons and appeared in court at 1pm wherein he pled guilty and was sentenced to a fine. At no time was the Respondent aware that testing of the GPM was not sufficient to comport with the applicable law under which he pled guilty. At no time did the State present evidence that the GPM was in fact unlawful marijuana and not lawful cannabis, therefore, not giving a factual basis for the plea. At no time did the Court advise Saadeh of his Faretta warnings. On the court date, Saadeh was eighteen (18) years old and a citizen of Jordan, here in the United States as a lawful permanent resident.

On February 7, 2018, Saadeh was arrested and charged with Simple Possession of Marijuana on ticket number 69584HA. On February 21, 2018 at 8.30am, Saadeh did not appear in court at 8.30am and was found guilty in his absence, no Rule to Show Cause was issued. Saadeh was sentenced in his absence to a fine. At no time did the State present evidence that the GPM was in fact unlawful marijuana and not lawful cannabis, therefore, not giving a factual basis for him to be found guilty in his absence. On the court date, Saadeh was eighteen (18) years old and a citizen of Jordan, here in the United States as a lawful permanent resident.

On June 5, 2019, Saadeh filed an initial application for post-conviction relief in the court of disposition, the City of North Charleston Municipal Court. On June 7, 2019, the Chief Municipal Judge advised there would be no further action taken on the tickets, he would not hold a PCR hearing, and advised to file for post-conviction relief with the circuit court. On June 12, 2019, Saadeh filed his application for post-conviction relief with the circuit court.

Saadeh claims his convictions and sentences were unconstitutional for the following reasons: 1. At no time did the State provide evidence to the court that the alleged marijuana contained THC greater than .3% dry weight basis; 2. At no time was Saadeh informed that an element the State needed to prove was that the alleged marijuana had to contain THC greater than .3% dry weight basis; 3. At no time was the State able to analyze the marijuana for a percentage of THC dry weight basis; 4. Saadeh was not given Faretta Warnings prior to pleading. A hearing on the matter was held in Charleston County on January 23, 2020. (A. pp. 154-155 ¶¶ 1-4). No testimony was taken at the hearing and no evidence concerning the marijuana in Saadeh's case was admitted outside of the affidavits already contained in the Court's record. Plaintiff's Exhibit #1, a summarized timeline, was entered into evidence. (Supp. A. pp. 1-3). The State did not present any arguments against Saadeh's post-conviction relief request and was congratulated by the Court,

**“... And, Mr. Limbaugh, let me congratulate you. It’s always nice to see a prosecutor remembering that there needs to be justice.”** (Judge Dickson, A. p. 132 lines 5-7) (*Emphasis added*). The PCR court granted relief based on the arguments presented by Saadeh. The Order Granting Relief was filed on April 17, 2020. (A. pp. 134-140). Petitioner filed a Motion to Reconsider on May 1, 2020, more than ten (10) days after the Order was filed. (A. pp. 141-146). Later that same day, Petitioner filed an Amended Motion to Reconsider. (A. pp. 147-152). On May 8, 2020, Saadeh served a Response to Respondent’s Amended Motion to Reconsider, Alter, or Amend Pursuant to Rule 59(e), SCRCP. (Supp. A. pp. 4-9). The PCR Court issued its Order Denying Motion to Reconsider on July 20, 2020 along with an Amended Order Granting Application for Post-Conviction Relief. (A. pp. 161-162).

## ARGUMENTS

### **I. The State did not preserve any objections or arguments in the PCR court and it cannot raise them now, therefore the State's petition for writ of certiorari is moot.**

Certiorari is not warranted to review the post-conviction relief court's grant of relief to Saadeh based on newly discovered evidence. The PCR Court properly reviewed the basis for the claim. The State did not offer any evidence rebutting Saadeh's arguments or request the relief not to be granted. The State did not preserve any objections or arguments in the PCR court and so it cannot raise them now. The Amended Motion to Reconsider filed by the State submitted new arguments against the relief application not previously raised or preserved in the PCR Court. Under Rules of procedure of South Carolina and as detailed in *Whaley v. CSX Transp., Inc.* it is not proper to raise the arguments in a petition for writ of certiorari, not having preserved them below. "[T]o preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court." *Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 609 S.E.2d 286, 299 (2005),

In trial, issues may have been **raised** but not explicitly ruled upon. In such circumstances a motion must be brought under Rules 52(b) and 59(e), SCRCP, asking the court to rule upon the issue. Otherwise the issue is not preserved for appeal. **When a trial court does not explicitly rule on an argument raised**, an appellant makes no Rule 59(e) motion to obtain a ruling, the appellate court may not address the issue. *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (*Emphasis added*).

To raise an issue, "[i]t is a litigant's duty to bring to the court's attention any perceived error, and the failure to do so amounts to a waiver of the alleged error." *McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 381, 597 S.E.2d 181, 186 (Ct. App. 2004). In *Burgess v. State*, the Court found that an issue was unpreserved where the issue was addressed to the court by a litigant but the opposing party advanced no arguments on the issue to the circuit court. *Burgess v. State*,

402 S.C. 92, 95, 738 S.E.2d 264, 265 (Ct. App. 2013). To preserve the issue in a PCR action, after raising the issue, allowing argument, and allowing the judge to rule upon the issue, a Rule 59(e) [SCRCP] motion is then filed. These issues in the State's Rule 59(e) [SCRCP] motion were not raised prior to the filing of the motion and therefore the issues raised in this writ have not been preserved. *Hilton v. McCall*, No. 1:2012cv01540-Document 26 (D.S.C. 2013), *Bailey v. Bazzle*, 628 F.Supp.2d 651 (D.S.C. 2008), *Love v. State*, 428 S.C. 231, 834 S.E.2d 196 (S.C. 2019), *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (S.C. 2019).

**II. Certiorari is not warranted to review this case and the PCR court's grant of relief to Saadeh based on newly discovered evidence should not be reversed. The PCR Court properly reviewed the evidence when issuing its Amended Order.**

The Uniform Post-Conviction Relief Act states a person may institute a post-conviction relief action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the Respondent or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(G).

When a PCR applicant seeks relief on the basis of newly discovered evidence following a guilty plea, relief is appropriate only where the applicant presents evidence showing that (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the "interest of justice" requires the applicant's guilty plea to be vacated. *In other words, a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions. In so holding, we caution that it will be the rare case indeed where the interests of justice will require that a knowing and*

voluntary guilty plea be vacated through post-conviction relief on the basis of newly discovered evidence, for an unconditional guilty plea involving an admission of guilt and a waiver of trial and all defenses will generally preclude any subsequent challenge to factual guilt.

*Jamison v. State*, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014) (*Emphasis added*).

The record does not contain any factual basis that a crime was committed. SLED's announcement of the inability of its at-the-time test to differentiate between unlawful marijuana and lawful cannabis is not sheer speculation but is a matter of whether a crime was even committed. Whether or not the test was performed is irrelevant, as it could not have told the difference of whether a crime was being committed, according to SLED's own announcement. (A. p. 9). SLED's announcement was the evidence that there was an additional element needed in the prosecution of possession of marijuana. (A. p. 9). That element needed since June 2, 2014, was that the GPM needed to contain more than .3% THC dry weight basis for the crime of possession of marijuana to be committed. Courts, prosecutors, and defense attorneys had relied on Rule 6 for the "proper testing" of marijuana. That "proper testing" was determined by SLED to not be reliable for State law purposes since the inception of the State Industrial Hemp Program, June 2, 2014.

The municipal court judge did not require a factual basis for accepting the guilty plea. Not to mention, there is no evidence in the record supporting that either plea was a knowing plea. Certain elements of certain crimes are essential elements that make an act unlawful. For example, having a can of beer in the driver's cupholder is not unlawful. However, if that can of beer is open, it is unlawful. Therefore, the can being open is a critical element of the crime of open container in a motor vehicle. The can's "openness" would need to be addressed for a factual basis for a court to accept a plea of guilty for that crime. In a similar fashion, possessing a quantity of GPM is not unlawful. However, if it contains more than .3% THC per dry weight basis, it is. Therefore, the GPM containing more than .3% THC is a critical element of the crime of possession of marijuana.

The GPM's THC level (not presence) would need to be addressed for a factual basis for a court to accept a plea of guilty for the crime of possession of marijuana. The announcement by SLED and the testing is not sheer speculation. It evidences a critical element that is needed for the act to be unlawful since June 2, 2014. It is an application of law. The PCR Court properly understood this.

To follow the State's arguments, even applying the *Jamison* standard, Saadeh's claims are valid. Saadeh's claims meet the first part of the test, in that the evidence was discovered since the plea, and that the evidence is of such weight or quality as to warrant vacating the plea in the "interest of justice." Saadeh's newly discovered evidence is not just the new testing procedures SLED has enumerated concerning marijuana, but the fact that previous testing could not differentiate lawful cannabis from unlawful marijuana. Even if Saadeh's pleas were to be found as knowing pleas, the arguments presented by Saadeh did not need to prove him innocent under an application of *Jamison* as the State infers. The testing is not sheer speculation but was needed to lay a factual basis that the GPM was unlawful and therefore a crime was being committed. It was needed to lay a factual basis for the plea to be accepted. The test for a valid guilty plea established by *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) is whether the record establishes that a guilty plea was voluntarily and understandingly made. Generally, "the [court] must be certain that the defendant understands the charge and the consequences of the plea and that **the record indicates a factual basis for the plea.**" (*Emphasis added*).

The State seems to overlook the point that the PCR Court understood ... without the testing there may not have been a crime committed. Saadeh was not introducing the new tests as new evidence but the fact that without the tests, there was no way to differentiate, since June 2, 2014, whether GPM was lawful cannabis or unlawful marijuana. SLED's own announcement is the evidence of this legal fact to establish elements that someone is guilty of the crime of possession

of marijuana instead of simply lawfully possessing lawful cannabis. The impact on Saadeh's case of the testing is tremendous as it is an element of the crime to which he pled guilty and an element of the crime that was the basis for why he accepted a plea offer, although this element was never laid as a factual basis for his plea. The State's now lack of understanding of this element needed for prosecution, or at minimum a knowing waiver or stipulation from Saadeh at the time of plea regarding a critical element of the crime, is troublesome.

Saadeh met his burden in proving he was prejudiced as a result of the improper testing procedures at the time of his convictions because testing for more than .3% THC was necessary to prove an element of the crime for which he was convicted. If he had known of the element needed, he would have required testing before making a decision to plead guilty to any charges. (A. 34-35). He did not know whether he possessed unlawful marijuana or lawful cannabis, only that he did have a small amount of GPM. (A. 34-35). It is the State's burden to prove a crime occurred. In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). "The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Rule 71.1(e), SCRPC. As noted above, the PCR Court found that Saadeh met his burden to prove his allegations and any resulting prejudice.

Saadeh faced deportation because of the wrongful convictions. He was detained by immigration for months while the US Department of Homeland Security mounted a case against him, based on the wrongful convictions, to strip his lawful permanent residency status from him. He would have been forced from his family and returned to Jordan, a country he does not know. The fact that there was no factual basis to establish a crime had even been committed is a matter of

law, not of testing. The testing is what evidences that a crime had occurred. It is a matter of law, not of testing.

The records in Saadeh's cases reflect that the disposing court did not apply the proper law to the Saadeh's cases. The records do not indicate that the State had the evidence to support that the possession of the green leafy plant-like material was a crime. The records do not reflect that a plea colloquy corrected this default or that a crime was even committed. To assert that a Defendant can plead guilty to acts that do not amount to a crime without specifically waiving knowledge of the element is an absurdity. For example, a Defendant pleading guilty to trespassing without ever being presented with a notice not to enter the premises and being wholly unaware that they needed to have notice not to enter, should not suffice. A person cannot implicitly waive a key element of a crime, particularly the element that alters the acts from lawful to unlawful. The records in Applicant's cases reflect that this is in fact what happened. The respondent's arguments suggest that Defendants should be allowed to plead guilty even if the State has not presented proof beyond a reasonable doubt that a crime was committed.

Prejudice was not raised and therefore not preserved in the lower court. It was not at issue at the hearing. The State had the opportunity to review the Order as it was proposed and did not raise any issues regarding the content. There was evidence presented by Saadeh of prejudice. (A. pp. 34-35). The Conclusion of the post-conviction court clearly finds that ... "1) would change the result if new trials were granted;". (A. p. 159). *Fishburne v. State*, 427 S.C. 505, 517, 832 S.E.2d 584, 590 (2019).

The testing, or failure of the testing program at the time, is evidence that the State did not present proof beyond a reasonable doubt that a crime even occurred. It was that testing that was needed to establish criminality. To assert that the Applicant could have requested it at the time

would have 1) required the Applicant to be aware of the elements of the crime; and 2) would have shifted the burden from the State to the Defendant in the original proceedings. This burden shifting is unconstitutional.

The Respondent in this case has no issue with the case law presented by the State regarding guilty pleas. However, the State itself cites to a case directly on point: “A plea of guilty is an admission or a confession of guilt, and [is] as conclusive as a verdict of a jury; **it admits all material fact averments of the accusation**, leaving no issue for the jury, except in those instances where the extent of the punishment is to be imposed or found by the jury.” *State v. Fuller*, 254 S.C. 260, 266, 174 S.E.2d 774, 777 (1970) (*Citations omitted, emphasis added*). The fact averments of the accusation were never presented by the prosecution or in a colloquy by the Court because they could not have been due to the unreliable and improper testing that existed at the time; therefore, Saadeh did not knowingly confess to guilt of simple possession of marijuana.

The arguments to support Saadeh’s relief concerning ticket number 67492HA, are the same as already stated herein. He took a reduced plea, unknowing of the elements of the original crime with which he was charged. The results of the testing procedures of SLED at the time are relevant to the charge to which Saadeh ultimately plead. Although it may seem to the State that the testing procedures of SLED are irrelevant to the State’s case where Saadeh plead to a charge not relating to industrial hemp or marijuana; however, if Saadeh was not committing a crime to start with then pleading to anything is a wrongful conviction.

The Petitioner’s footnote regarding *Faretta* warnings is an illusion. The complication between immigration consequences, legal counsel, and courts has been decided in *Taylor v. State*, 422 S.C. 222, 810 S.E.2d 862 (2018). Respondent does not disagree with the cases cited by the Petitioner; however, those cases can be distinguished from the Respondent’s cases because Saadeh

is not a citizen of the United States and *Taylor* was decided after the cases cited by the Petitioner. A conviction for more than one offense of simple possession of marijuana less than 30 grams has severe “bright line” consequences of deportation for non-citizens. The record does not reflect that the court ever took this into consideration in Respondent’s cases, although he is incorrectly marked as Hispanic in court paperwork, conveniently redacted now (Applicant is from Jordan). In *Taylor*, the Supreme Court of South Carolina looked to the plea colloquy for any rehabilitation of an ineffective assistance of counsel claim and found the plea court’s colloquy to be insufficient in light of the “bright line” immigration consequences of the charge to which Taylor was pleading guilty. Although *Taylor* can be factually distinguished between the different Applicants’ claims, the Supreme Court of South Carolina holds “bright line” immigration consequences as serious in nature and that Defendants must be made aware of them. Therefore, the application of *Taylor* to Saadeh’s cases yields that although Saadeh was not necessarily entitled to *Faretta* warnings because there was no deprivation of his liberty under criminal law (only a fine imposed and no jail term), there was deprivation and continuing potential of deprivation of Respondent’s liberty under immigration law<sup>1</sup>.

The record supports that the newly discovered evidence presented by Saadeh would have dramatically changed the result of the proceedings and his decision to plead guilty in all of the cases, thus Saadeh met his burden concerning his charges as supported by the Order granting his post-conviction relief. Therefore, this Court should deny Certiorari and uphold Saadeh’s relief.

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<sup>1</sup> Respondent was detained by U.S. Immigration and Customs Enforcement for three months and went through immigration proceedings to have his legal permanent resident (green card) status removed. Respondent’s immigration attorney was successful in stopping it this time, but if anything further, he could be detained again and due to the convictions at issue in this PCR, could be subject to deportation proceedings again and unable to use the same form of immigration relief he used the first time because it is only available one time.

CONCLUSION

For the foregoing reasons, this Court should not grant this Petition for a Writ of Certiorari. Should this Court grant the petition, Petitioner seeks permission to more fully brief the issues herein.

Respectfully submitted.

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