

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

[PETITIONER]

*

vs.

*

Case no. XXXXX

State of Maryland

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**EMERGENCY PETITION FOR A WRIT OF ERROR *CORAM NOBIS* AND
REQUEST FOR EXPEDITED HEARING**

Petitioner, by his attorney, respectfully submits this Petition for writ of error *coram nobis* pursuant to *Skok v. State*, 361 Md. 52 and Maryland Rules 15-201 to 15-207.

PROCEDURAL HISTORY

On September 4, 2009, Petitioner entered a guilty plea to two counts of possession with intent to distribute pursuant to a binding plea. He was sentenced to 364 days, all suspended and one year parole and probation.

On or around May 25, 2011 Petitioner filed a *pro se* petition for *coram nobis* relief alleging procedural errors and requesting that the guilty plea in the above-captioned case to two counts of possession of a controlled substance with intent to distribute be vacated. On August 15, 2011, the [JUDGE] signed an order denying relief without a hearing based on the non-retroactive application of *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

COLLATERAL CONSEQUENCES

Petitioner was subject to a U.S. Immigration and Customs Enforcement (ICE) detainer at the time of the plea. He had been misadvised by his counsel, Mr. Defense Counsel, regarding the immigration consequences of the plea and is currently subject to

deportation proceedings. (Exhibit 1: Notice to Appear). He is in ICE custody and housed at the Worcester County Detention facility.

ALLEGATIONS OF ERROR

I.

Ineffective Assistance of Counsel: Counsel's representation fell below an objective standard of reasonableness.

Pursuant to the Supreme Court's recent holding in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), Petitioner's defense attorney, Mr. Defense Attorney, was ineffective in providing proper assistance of counsel. In *Padilla*, the defendant pleaded guilty to a crime that, unbeknownst to him, subjected him to deportation proceedings. This is true also of Petitioner who is in the process of removal proceedings as ordered by ICE. The defense attorney for Mr. Padilla neglected to properly advise him of potential immigration consequences. Likewise, Mr. Defense Attorney gave improper advice to Petitioner.

The transcript of the guilty plea and sentencing reflects the erroneous understanding that this was an immigration-structured plea, *i.e.*, a plea that would provide some measure of protection against deportation.

The Court: *"It seems pretty clear that this is an immigration structured plea, am I right?"*

(Exhibit 2: Transcript, at 5).

Wisely, [JUDGE] ensured that Petitioner understood there were no "guarantees" and that this plea could lead to deportation. The transcript reflects Petitioner's complete misunderstanding of what the immigration consequences, in fact, were. It was Mr. Defense Counsel's duty to 1) ascertain exactly what the consequences were and 2) inform

his client. Neither took place. Instead Petitioner went forward on the guilty plea with the understanding that 364 days was not considered an aggravated felony for immigration purposes. (Exhibit 2: Transcript, at 14)

The court in *Padilla* used the word ‘quintessential’ to describe the importance of advice regarding deportation consequences. *Padilla*, 130 S. Ct. at 1484. To Petitioner, who came to the United States at the age of eleven and has resided with his U.S. citizen mother as a legal permanent resident, the possibility of deportation as a consequence to his guilty plea would have compelled him to pursue every possible plea negotiation to mitigate the severity of deportation, and to consider the possibility of an acquittal before deciding to waive his right to a trial. According to *Padilla*, the Supreme Court held that the Sixth Amendment requires defense counsel to provide affirmative, competent advice to a non-citizen defendant regarding the immigration consequences of a guilty plea, and, absent this advice a non-citizen may claim ineffective assistance of counsel. *Id.* at 1483. Recently, the Court of Appeals held that the *Padilla* standard applies retroactively to all pleas entered after the effective date of the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. *Denisyuk v. State*, 422 Md. 462 (2011).

II.

The plea was not entered knowingly and voluntarily

Maryland Rule 4-242 permits a court to accept a guilty plea only after it determines upon an examination of the defendant on the record that 1) the defendant is pleading voluntarily and with understanding of the nature of the charge and the consequences of the plea and 2) there is a factual basis for the plea.

Petitioner was not advised on the record of the nature of the counts to which he pleaded guilty. In *Priet v. State*, 289 Md. 257, 288 (1981), the Court of Appeals provides its interpretation of Maryland Rule 4-242 and the extent of the requirement that a defendant should have an “understanding of the nature of the charge”:

[Maryland Rule 4-242] does not require that the precise legal elements comprising the offense be communicated to the defendant as a prerequisite to the valid acceptance of his guilty plea. Rather, by its express terms, the rule mandates that a guilty plea not be accepted unless it is determined by the court, after questioning of the defendant on the record, that the accused understands the “nature” of the charge. This, of course, is an essential requirement of the rule and must be applied in a practical and realistic manner. It simply contemplated that the court will explain to the accused, in understandable terms the nature of the offense to afford him a basic understanding of its essential substance rather than of the specific legal components of the offense to which the plea is tendered. The nature of some crimes is readily understandable from the crime itself.

The court went on to say that it is necessary to consider several factors in order to make a proper determination in each individual case such as the complexity of the charge, the personal characteristics of the accused, and the factual basis for the plea. According to Maryland Pattern Jury Instructions, distribution requires selling, exchanging, transferring possession, or the giving away of the substance. None of this was explained to Petitioner “on the record” as the rule requires. Additionally, Mr. Defense Counsel did not represent to the court that any of the elements were explained to Petitioner “in understandable terms” at their meetings prior to the plea. The Court of Appeals designated this aspect of guilty pleas as “an essential requirement of the rule.” In Petitioner’s case, the absence of this requirement renders the plea invalid.

III.

Court Error and/or Ineffective Assistance of Counsel: Failure to advise of post-trial rights

Throughout the plea and sentencing transcripts, [JUDGE] provides the advice of rights as required by Maryland Rule 4-242, but does not provide advice regarding Petitioner's post trial rights. (Exhibit 2: Transcript). Petitioner asserts that no discussions took place off the record between attorney and client regarding any of these rights. Considering the devastating consequences, the duty to explain these rights was crucial. Had he known of his right to an application for leave to appeal he would have requested his counsel file the appeal.

RELIEF SOUGHT

WHEREFORE, Petitioner requests:

- 1) An order vacating Petitioner's guilty plea, or
- 2) Such other relief this Court deems appropriate.

[SIGNATURES]