STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Orangeburg County

Honorable Paul M. Burch, Circuit Court Judge

BRANDON WILSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2024-000751

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Was the guilty plea rendered involuntary by the fact that Petitioner was not advised that possession of weapon during the commission of a violent crime carried a mandatory five-year sentence?

STATEMENT

On March 27, 2019[1], the Orangeburg County Grand Jury indicted Petitioner, Brandon Dwight Wilson, for assault and battery of a high and aggravated nature [ABHAN] and possession of a firearm during the commission of a violent crime, indictments #2018-GS-38-0825, 0826. (App. pp. 179-182). On January 24, 2022, Petitioner appeared before the Honorable Maite Murphy for pre-trial hearings. Belinda M. Davis-Branch and Thomas R. Sims represented Petitioner. Catherine M. Hunter and W. Phillip Giese prosecuted the case. At the conclusion of pre-trial hearings Petitioner elected to plead guilty to the indicted offenses and waive presentment and plead guilty to an unrelated assault and battery second degree charge, indictment #2021-GS-38-1249. (App., pp. 157-177; pp. 183-184). The State recommended a cap of six (6) years on all charges. Judge Murphy sentenced Petitioner to ten (10) years provided upon the service of five (5) years the balance is suspended with three (3) years of probation for the ABHAN charge, five (5) years concurrent for the weapon charge and three (3) years concurrent for the assault and battery second degree. (App. pp. 185-190).

Plea counsel timely filed the notice of intent to appeal on January 31, 2022, but failed to file the proof of service until February 9, 2022. The Court of Appeals dismissed the appeal on February 17, 2022, because the notice of intent to appeal was not timely served. (App. p. 199). On May 16, 2022, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 191-201). An amended application was filed on August 29, 2022[2]. The State filed a return on October 19, 2022. On February 7, 2024, an evidentiary hearing was held before the Honorable Paul M. Burch. Arthur Aiken represented Petitioner at the PCR hearing. Bryan T. Hall represented the State. In a written order signed March 27, 2024, Judge Burch denied relief and

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[1] The indictment lists the April 1, 2019, term but has a 2018 indictment number.
[2] The amended application incorrectly lists the year as August 29, 2021.

dismissed the application. A timely notice of intent to appeal was served on May 6, 2024. This petition for writ of certiorari follows.

ARGUMENT

The guilty plea was rendered involuntary by the fact that Petitioner was not advised that possession of weapon during the commission of a violent crime carried a mandatory five-year sentence.

Following pre-trial hearings, Petitioner elected to plead guilty to the indicted charges of ABHAN and possession of a firearm during the commission of a violent crime and waive presentment and plead guilty to an unrelated assault and battery second degree charge for a recommended six-year cap. (App. pp. 157-177). During the plea the judge asked counsel, "And have you explain [sic] to your client the charges contained in the indictments, the possible punishment and his constitutional rights?" (App. p. 158, lines 19-22). Counsel replied, "Yes, ma'am, I have." (App. p. 158, line 23). Specifically, in regard to the weapon charge, the judge asked Petitioner, "In the possession of a firearm or knife during the commission of a violent crime that carries up to five years; do you understand that?" (App. p. 161, lines 20-23). Petitioner responded, "Yes, ma'am." (App. p. 161, line 24). The plea judge also asked Petitioner, "Although the State's recommending that you receive a cap of up to six year, you understand I don't have to do that you could get the maximum possible punishment on each of these charges; do you understand that?" (App. p. 162, lines 4-8). Petitioner answered, "Yes, ma'am." (App. p. 162, line 9).

The plea judge incorrectly advised Petitioner that the weapon charge carried **up to** five years. The weapon charge carried a mandatory five-year sentence. S.C. Code Ann. § 16-23-490 provides:

> (A)If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime. This five-year sentence does not apply in cases

> where the death penalty or a life sentence without parole is imposed for the violent crime.
>
> (B) Service of the five-year sentence is mandatory unless a longer mandatory minimum term of imprisonment is provided by law for the violent crime. The court may impose this mandatory five-year sentence to run consecutively or concurrently.
>
> (C) Except as provided in this subsection, the person sentenced under this section is not eligible during this five-year period for parole, work release, or extended work release. The five years may not be suspended and the person may not complete his term of imprisonment in less than five years pursuant to good-time credits or work credits, but may earn credits during this period. The person is eligible for work release, if the person is sentenced for voluntary manslaughter (Section 16-3-50), kidnapping (Section 16-3-910), carjacking (Section 16-3-1075), burglary in the second degree (Section 16-11-312(B)), armed robbery (Section 16-11-330(A)), or attempted armed robbery (Section 16-11-330(B)), the crime did not involve any criminal sexual conduct or an additional violent crime as defined in Section 16-1-60, and the person is within three years of release from imprisonment.

Plea counsel failed to correct the judge's incorrect statement to Petitioner that the weapon charge carried **up to** five years.

In the amended application for PCR Petitioner alleges that, "Trial counsel did not tell Wilson [Petitioner] the possible penalties for his offenses." (App. p. 203). At the start of the PCR hearing the State told the judge, "Mr. Wilson alleges that he would not have pled guilty if he had known that the possession of a firearm during the commission of a violent crime carried a mandatory sentence of five years." (App. p. 223, lines 22-25). During the PCR hearing Petitioner testified, "Then I got to my first charge April 2022 and went to see classification. They said I had two mandatory sentences, a mandatory 85, a mandatory day-for-day, five-year sentence. If I would have known that, I would continued on the trial. I would never have taken it." (App. p. 229, lines 13-17). PCR counsel asked Petitioner, "So if you had known that not only – not only was the – the firearms charge a mandatory sentence, it was a day-for-day sentence?" (App. p. 229, lines 18-20). Petitioner responded that he would not have pled guilty

if he had known the sentence for the weapon charge was a mandatory day-for-day sentence. (App. p. 229, line 21 – p. 230, lines 1-2).

On re-direct examination the following took place between PCR counsel and Petitioner:

> Q: When the judge said possession of a firearm during the commission of a violent crime carried up to five years, did you understand that to mean zero to five?
>
> A: Yeah, that's what I thought. That's what I thought, sir.
>
> Q: Instead of mandatory, which means every time you get five?
>
> A: No, I didn't. She never said that.
>
> Q: And what the judge said didn't address the somewhat unusual nature of the day-for-day sentence, did it?
>
> A: I never heard it. Never heard that.

(App. p. 241, lines 12-21).

In the order of dismissal the PCR judge wrote, "this Court finds **credible** Counsel's testimony that she explained to Applicant the charges he was facing and the possible penalties for each charge." (App. p. 269)(emphasis in original). While plea counsel testified that she explained the possible penalties (App. p. 250, lines 6-8), she did not testify that she explained that the weapon charge carried a mandatory five years. The PCR judge additionally wrote in the order of dismissal, "The plea judge explained to Applicant that he was pleading guilty to possession of a weapon during the commission of a violent crime, which carries five (5) years." (App. p. 269). The PCR judge erred. The plea judge explained to Applicant that he was pleading guilty to possession of a weapon during the commission of a violent crime, which carries **up to** five (5) years, not five years mandatory. (App. p. 161, lines 20-23). The PCR judge erred in refusing to grant relief. Petitioner met his burden of proving that plea counsel was deficient in failing to advise that the weapon charge carried a mandatory five-year sentence. The

plea judge's incorrect advice that the weapon charge carried **up to** five years did not correct the deficiency. Plea counsel's failure to correct the plea judge's erroneous advice supports the deficiency. Petitioner was prejudiced by the deficient performance. Petitioner testified that and there is a reasonable probability that, but for counsel's deficient performance, Petitioner would not have pled guilty and instead would have continued with trial.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "To find a guilty plea

is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

In Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999), the South Carolina Supreme Court wrote:

> Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently by defendants. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The United States Supreme Court has held that before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he or she is waiving. Id. Specifically, a defendant must be aware of the privilege against self incrimination, the right to a jury trial, and the right to confront one's accusers. This Court considered the requirements of a voluntary and knowing guilty plea in State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980) and Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). 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. Id.

In Dalton v. State, 376 S.C. 130, 138–39, 654 S.E.2d 870, 874 (Ct. App. 2007), the South Carolina Court of Appeals wrote:

> "[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing." Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984). "When determining issues relating to guilty pleas, this Court will consider the entire record, including the transcript of the guilty pleas and the evidence presented at the PCR hearing." Roddy, 339 S.C. at 33, 528 S.E.2d at 420. In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the

information conveyed at the plea hearing. Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997).

The guilty pleas were rendered involuntary by plea counsel's failure to advise Petitioner that the weapon charge carried a mandatory five-year sentence. The error was not cured during the guilty plea hearing because the plea judge erroneously told Petitioner that the weapon charge carried **up to** five years. Petitioner was prejudiced by the error.

In Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018), the South Carolina Supreme Court wrote:

> In order to establish prejudice when challenging a guilty plea, a defendant must prove "there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have gone to trial." Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991). As the United States Supreme Court stated in Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), "[I]n order to satisfy the 'prejudice' requirement, the defendant must show there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial."

There is a reasonable probability that, but for counsel's error, Petitioner would not have pled guilty and would have insisted on going to trial. The PCR judge erred in refusing to grant relief. Petitioner is entitled to post-conviction relief.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

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ATTORNEY FOR PETITIONER

This 11th day of February, 2025.