

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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SC SUPREME COURT

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Certiorari to Spartanburg County

Roger L. Couch, Circuit Court Judge  
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CURTIS WILKIE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001234  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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ISSUE PRESENTED

Trial counsel erred in advising petitioner that it was possible for him to receive a suspended sentence on his attempted burglary conviction.

## STATEMENT

Petitioner Curtis Wilkie pled guilty to armed robbery and attempted first degree burglary during the April 2011 term of the Spartanburg County General Sessions Court before Judge J. Mark Hayes II. Petitioner was sentenced to imprisonment for a period of two twenty-five-year terms. Robert Hall represented petitioner at the plea proceeding and Assistant Solicitor Derrick Bulsa appeared on behalf of the state. App. 1 – 23. Petitioner appealed, but the appeal was dismissed per Rule 203(d)(1)(B)(iv), SCACR, because there were no appealable issues in the case.

On April 12, 2013, petitioner filed a PCR application with the Spartanburg County Office of the Clerk of Court. App. 25 – 32. The respondent filed a return dated February 20, 2013, requesting that a PCR hearing be held in response to petitioner's PCR action. App. 33 – 37.

A PCR hearing was held on September 16, 2014, at the Spartanburg County Courthouse before Judge Roger L. Couch. App. 39 – 103. Petitioner was present at the hearing and represented by J. Brandt Rucker, and Assistant Attorney General Suzanne White appeared on behalf of the state. On April 23, 2015, Judge Couch issued an Order of Dismissal in the case. App. 116 – 124.

Petitioner appealed Judge Couch's Order of Dismissal. This petition follows.

## ARGUMENT

Trial counsel erred in advising petitioner that it was possible for him to receive a suspended sentence on his attempted burglary conviction.

During the plea proceeding, the solicitor advised the plea judge of the facts in the case. Around midnight on September 9, 2010, petitioner kicked in the living room door of Dorothy Howard's home, but fled when the alarm and surveillance systems were activated. Earlier around 10:30 pm on September 9, 2010, three men holding guns and wearing masks barged in on a cookout held by Danna Lewis and took Lewis' purse, which contained a wallet, credit cards, and a cell phone. Petitioner, Eddie Pilcher, and Jonathan Goss were arrested after Pilcher's girlfriend contacted police about the incidents. App. 14, l. 6 – p. 16, l. 5.

Prior to sentencing, defense counsel made the following remarks and requests regarding a suspended sentence option on the attempted burglary charge:

What I have suggested for him and would ask the Court to consider a sentence – I think a lot – there's folks on the burglary, first, agree that that can be a split sentence or suspended sentence, is give him a mandatory minimum fine on the armed robbery, give him a consecutive sentence on the burglary, attempted burglary suspended to probation. App. 20, lines 18 – p. 21, l. 1.

Your Honor, we're asking you to be merciful for him and give him a sentence on the robbery, concurrent with what he's doing for the Greenville charge followed by a consecutive sentence that suspended to probation. App. 21, lines 8 – 15.

And on his behalf we ask that you consider that, a minimum ten year sentence on the armed robbery, concurrent with the sentence he has from Greenville and then hang the time over his head consecutive, suspended to probation on the burglary. App. 21, lines 21-25.

During the PCR hearing, petitioner testified that he pled guilty because trial counsel advised him of the likelihood that he would receive a suspended sentence and probation on his attempted

burglary conviction. App. 74, l. 4 – 9; App. 75, l. 2 – 6; App. 75, l. 17 – 22. Petitioner testified that he later learned that counsel gave him incorrect sentencing advice on the burglary charge because “based upon the facts of the State versus Jacobs, any charge that carries a life sentence or a death penalty may not be suspended.” App. 76, l. 13 – p. 77, l. 3; App. 78, lines 14 – 17; App. 80, lines 14 – 21.

Petitioner summarized his position as follows:

Q. Tony, you heard the testimony of Mr. Hall.  
Was that your understanding -- was your understanding at the time -- when you entered the plea that you were gonna have a suspended sentence?

A. Yes, sir.

Q. All right. Why did you believe that to be true?

A. Because that's what me and counsel talked about from the beginning which led me to sign a plea....[b]ut the advice I received of counsel was errant advice and if counsel had not supplied me with this errant advice I would not have pled guilty and would have insisted upon going to trial. App. 97, l. 18 – 25; App. 98, lines 2-6.

Trial counsel testified at the plea proceeding and admitted that he believed that “burglary first...could be suspended,” and in effect advised petitioner of this. App. 85, l. 5 – 10. Counsel elaborated as follows:

Q. My client pled guilty to attempted burglary and you briefly mentioned that there was a change in the law about the probation implications or sentencing implications of burglary pleas.  
What was that change in the law?

A. There was a -- somebody asked for a suspended sentence and the judge didn't do it. They appealed it -- as I'm trying to draw it out. It's been in the past couple of years and said that you cannot suspend burglary first. It's a mandatory minimum 15 years.

Q. Okay. Do you know if that -- at that time did you know if that affected attempted burglary or not?

A. I'm not clear if that was -- when that case came down, but I assumed that attempted burglary could be suspended. I don't know that -- I know that, in our discussions with my -- my discussions with Mr. Balsa, the issue that it couldn't be suspended never came up. Mr. Balsa assumed it could and the judge never said I can't do that anymore. You know, that's not something I can suspend. App. 94, l. 23 -- p. 95, l. 16.

In the Order of Dismissal issued in the case, the PCR judge ruled that trial counsel did not perform ineffectively at the plea proceeding because petitioner did not "show that there [was] a reasonable probability that but for counsel's alleged error, he would not have pled guilty and insisted on going to trial. App. 122 -- 123. Hill v. Lockhart, 474 U.S. 52, 1985).

Trial counsel erred in advising petitioner that he could receive a suspended sentence on his attempted burglary conviction because in State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011), the Court held that a sentence for first degree burglary could not be suspended. The Jacobs ruling was premised on a 1976 statute found at S.C. Code Ann. § 24-21-410,<sup>1</sup> which was cited in Jacobs, that made it plain and clear that a judge could suspend a sentence for a conviction except "for a crime punishable by death or life imprisonment." Therefore, since the offense of first degree burglary carries a maximum sentence of life imprisonment, then per 24-21-410, no suspended sentence could have been issued to petitioner on his attempted burglary conviction. Although Jacobs was decided two months after petitioner's plea proceeding, the applicable statute existed long before Jacobs was handed down.

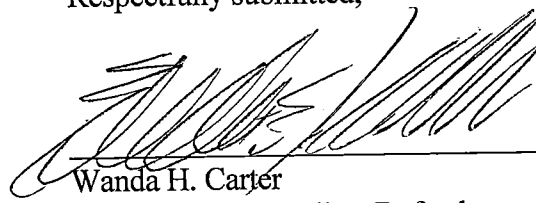
In order for a defendant to plead guilty he must have a full understanding of the consequences of his plea. Simpson v. State, 317 SC 506, 455 S.E. 2d 175 (1195); Pittman v. State, 337 S.C. 597, 524 S.E. 2d 623 (1999); Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989); State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980). Counsel's failure to adequately explain sentencing

consequences in this case violated petitioner's Sixth Amendment right to effective assistance of counsel during a plea proceeding. See Hill v. Lockhart, 484 U.S. 52 (1985). Hence, petitioner's attempted first degree burglary plea was not given voluntarily.

CONCLUSION

Based on the foregoing argument, petitioner requests that the Court grant the petition and allow full briefing on the issue.

Respectfully submitted,



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of February, 2016.

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<sup>1</sup> The history of S.C. Code Ann § 24-21-410 follows: 1962 Code § 55-591; 1952 Code § 55-591, 1942 Code § 1036-1; 1942 (42) 1456; 1996 Act. No. 34 §01; 2010 Act No. 151.

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Alicia Olive, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Curtis Antonio Wilkie #345673, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 3rd day of February, 2016.



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Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 3rd day  
of February, 2016.



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(L.S.)

Notary Public for South Carolina  
My Commission Expires: October 30, 2022.