

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO SPARTANBURG COUNTY  
Court of Common Pleas

**RECEIVED**

JUN 20 2016

The Honorable Roger L. Couch, Circuit Court Judge

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**SC SUPREME COURT**

Appellate Case No. 2015-001234

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Curtis Wilkie, #345673, .....Petitioner,

v.

State of South Carolina, .....Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**ISSUE PRESENTED**

- I. Is there any probative evidence in the record to support the PCR judge's finding that counsel was not ineffective in advising Petitioner that his sentence for attempted first degree burglary could be suspended, where counsel's advice was reasonable; and Petitioner failed to meet his burden to show prejudice?

## STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Petitioner was indicted at the March 2011 term of the Spartanburg County Grand Jury for one count of armed robbery (11-GS-42-1842) and one count of attempted first degree burglary (11-GS-42-1841). He was represented by Robert Hall, Esquire. On April 15, 2011, Petitioner pled guilty as indicted. He was sentenced by the Honorable J. Mark Hayes, II to confinement for concurrent periods of twenty five (25) years for each charge. Judge Hayes also ruled that these sentences are to run concurrently with an eight (8) year sentence imposed by Greenville County for a separate conviction.

A timely notice of appeal was filed on Petitioner's behalf, but the South Carolina Court of Appeals dismissed the appeal on June 22, 2011. The Remittitur was returned on July 8, 2011.

Petitioner subsequently filed an application for post-conviction relief on April 12, 2012. He was represented by J. Brandt Rucker, Esquire. Respondent was represented by Suzanne H. White, Esquire, of the South Carolina Attorney General's Office. An evidentiary hearing was convened on September 16, 2014, at the Spartanburg County Courthouse, with the Honorable Roger L. Couch presiding. In a written order dated and filed April 23, 2015, Judge Couch denied and dismissed the application with prejudice. This appeal follows.

### STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

## ARGUMENT

- I. **There is probative evidence in the record to support the PCR judge's finding that counsel was not ineffective in advising Petitioner that his sentence for attempted first degree burglary could be suspended, where counsel's advice was reasonable; and Petitioner failed to meet his burden to show prejudice.**

Respondent submits there is substantial probative evidence in the record to support the PCR judge's finding that counsel was not ineffective for advising Petitioner he was eligible for a suspended sentence on his guilty plea to attempted first degree burglary. Judicial scrutiny of counsel's performance must be highly deferential. Strickland at 689, 104 S.Ct. at 2065. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Id. Counsel is not required to be clairvoyant and anticipate changes in the law. Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992) (finding counsel not ineffective for failing to use a defense that would not receive acceptance until several years after the trial).

In this case, Petitioner failed to meet his burden to show deficiency because there is substantial evidence that counsel had a good faith, reasonable basis on which to believe a sentence for attempted burglary could be suspended. At the time of Petitioner's guilty plea, the Supreme Court had not yet decided Jacobs<sup>1</sup> – a published opinion, which for the first time held that a sentence for first degree burglary could not be suspended. According to credible evidence in the record, when counsel told Petitioner his sentence could be suspended, not only was his interpretation of the applicable law widespread, but the practice itself was common. Counsel credibly testified that before Jacobs, “[w]e were all under the impression . . . that [a sentence for

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<sup>1</sup> State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011) (finding that a trial court has no authority to suspend the sentence for first degree burglary).

attempted burglary]<sup>2</sup> could be suspended **and it routinely was in many cases.**” App. p. 85, l. 8-11 (emphasis added).<sup>3</sup> Even in Jacobs the Supreme Court acknowledged defense counsel’s opinion that “state courts have routinely suspended sentences for first degree burglary, and the State has never appealed those sentences.” 393 S.C. at 586, 713 S.E.2d at 622. The fact that the Supreme Court later settled the issue differently is not relevant to the deficiency analysis. See Robinson, supra. Petitioner’s reliance on his understanding of the statutory scheme was reasonable. Accordingly, there is probative evidence in the record to support the PCR judge’s finding that Petitioner failed to show counsel’s performance was deficient.

There is also probative evidence in the record to support the PCR judge’s finding with respect to prejudice. In order to show prejudice with respect to guilty plea counsel, Petitioner was required to show a reasonable probability that, but for counsel’s alleged errors, he would not have pled guilty but would have instead insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). The PCR judge determined that Petitioner’s testimony was, as a whole, not credible. App. p. 123. The PCR judge also concluded that while Petitioner appeared to be concerned with having received a lengthier sentence than he originally hoped for, he never indicated that he would have proceeded to trial but for counsel’s alleged deficiencies. App. p. 123. There is therefore probative evidence in the record support the PCR judge’s findings that Petitioner failed to meet his burden to prove prejudice. This Petition for Writ of Certiorari should therefore be denied.

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<sup>2</sup> While Petitioner pled guilty to attempted first degree burglary, “[a] person who commits the common law offense of attempt, upon conviction, must be punished as for the principal offense.” S.C. Code § 16-1-80 (2016).

<sup>3</sup> It is also inferable from the record that both the presiding judge and the solicitor believed the sentence could be suspended. Counsel said that the presiding judge was “a very intelligent man who will put things like that on the record,” and “[i]f somebody asked for something he can’t do, he said I can’t do it.” App. p. 95, l. 17-19.

**CONCLUSION**

For the reasons stated above, this Court should affirm the PCR court's ruling and deny the requested petition for writ of certiorari.

Respectfully submitted,  
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By:   
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ATTORNEYS FOR RESPONDENT

June 20, 2016

STATE OF SOUTH CAROLINA  
In The Supreme Court

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Certiorari to Spartanburg County  
Court of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge

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CURTIS A. WILKIE,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of Return to Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Wanda H. Carter, Esquire**  
**SC Commission of Indigent Defense**  
**Appellate Defense**  
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This 20<sup>th</sup> day of June, 2016.



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ASHLEY HAWORTH  
LEGAL ASSISTANT