STATE OF SOUTH CAROLINA

IN THE SUPREME COURT



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Appeal from Anderson County
The Honorable R. Scott Sprouse, Circuit Court Judge

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Appellate Case No. 2018-000095

Jerome J. Noone,

Petitioner,

v.

State of South Carolina,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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ATTORNEYS FOR RESPONDENT

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## RESPONDENT'S QUESTIONS PRESENTED

I. Did the PCR court correctly find Petitioner was not prejudiced by any advice either Thomason or Oppermann gave regarding the consequences to Petitioner's driving privileges for pleading guilty to driving under the influence where, prior to entering his plea, Petitioner received notice from the South Carolina Department of Motor Vehicles (DMV) that a subsequent conviction for driving under the influence would result in Petitioner being deemed a Habitual Traffic Offender and his license would be suspended for a period of five years?

II. Can Petitioner establish a constitutional violation sufficient to support a grant of post-conviction relief when he was not entitled to state-appointed counsel where his conviction did not result in actual imprisonment or the possibility of imprisonment?

## STATEMENT OF THE CASE

In May 2016, the Anderson County Grand Jury indicted Petitioner for a DUI – second offense, which occurred on September 24, 2015. Scott Thomason, Esquire (Thomason), and Joseph Oppermann, Esquire, represented Applicant.[1] Assistant Solicitor Stephanie Looper, Esquire, prosecuted the case. On February 2, 2017, Petitioner pleaded guilty in Anderson Summary Court to DUI – first offense before the Honorable Ronald W. Whitman.[2] Judge Whitman sentenced Petitioner to pay a fine of four-hundred dollars plus court costs and fees in a total amount of one-thousand ninety-two dollars. Petitioner did not appeal his conviction or sentence.

Petitioner filed an application for post-conviction relief (PCR) on May 17, 2017, raising a single claim of ineffective assistance of counsel alleging plea counsel affirmatively misadvised Petitioner as the consequences of a conviction to his driving privileges. Respondent made its return on July 21, 2017. An evidentiary hearing into the matter was convened on October 6, 2017, at the Anderson County Courthouse before the Honorable R. Scott Sprouse. E. Charles Grose, Jr., Esquire, represented Petitioner. Lindsey McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Petitioner argued his guilty plea was not freely and voluntarily entered because his counsel gave erroneous advice regarding the status of Petitioner's driving privileges upon conviction.

Petitioner testified on his own behalf at the hearing. Joseph Oppermann, Esquire (Oppermann) also testified. The PCR court also had before it a copy of the records of the Anderson County Clerk of Court, the application, and the State's Return. The PCR court found

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[1] Mr. Thomason was originally appointed to Petitioner's case, but he passed away during the course of the representation. Mr. Oppermann represented Petitioner at the guilty plea.

[2] Because this case was heard in Summary Court, there is no transcript of the proceeding.

Petitioner received effective assistance of counsel, and the plea was entered into freely and voluntarily and dismissed Petitioner's application by Order filed November 27, 2017.

Petitioner filed a Petition for a Writ of Certiorari to this Court, along with an Appendix, on July 13, 2018. This Return to the Petition for a Writ of Certiorari follows.

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., 300 S.C. at 117-18, 386 S.E.2d at 625. When there has been a guilty plea, the applicant must prove counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

## ARGUMENT

Petitioner asserts his counsel rendered ineffective assistance such that his plea was not knowingly and voluntarily entered. Specifically, Petitioner contends his counsel was ineffective because counsel gave him incorrect advice as to the status of his driving privileges upon entering the plea. PWC p. 3. However, because Petitioner was not prejudiced by any deficient advice he received, and because, in any event, Petitioner was not even entitled to state-appointed counsel, certiorari should be denied.

### I. The PCR court correctly found Petitioner was not prejudiced by any advice either Thomason or Oppermann gave regarding the consequences to Petitioner's driving privileges for pleading guilty to driving under the influence where, prior to entering his plea, Petitioner received notice from the South Carolina Department of Motor Vehicles (DMV) that a subsequent conviction for driving under the influence would result in Petitioner being deemed a Habitual Traffic Offender and his license would be suspended for a period of five years.

An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. Roscoe, 345 S.C. at 20, 546 S.E.2d at 419. An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill, 474 U.S. at 56. Further, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Dalton v. State, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969)).

At the evidentiary hearing, Petitioner testified his main concern in resolving this case was maintaining his driving privileges, and if he had known this conviction would result in the long-

term loss of his license, he would have proceeded to trial. App. p. 48. The PCR court, however, found this testimony not credible because the DMV sent Petitioner a letter, between the date of his arrest and the date of his plea, specifically informing him a conviction for driving under the influence would result in the suspension of his driving privileges for five years as a Habitual Offender. App. pp. 81-82. On April 29, 2016, the DMV mailed Petitioner a letter informing him he had accumulated two major violations of the Habitual Offender law, and stating a subsequent major violation would result in his classification as a Habitual Offender, with his driving privileges "suspended for a period of five years." App. p. 81. This letter was mailed to Petitioner at his home address, which Petitioner verified was correct at the evidentiary hearing, while Petitioner's DUI charge was pending. App. pp. 49-50, 81. Moreover, the letter specifically states driving under the influence is a major violation. App. p. 81.

Petitioner testified he did not discuss this letter or the possibility of being deemed a Habitual Offender with Thomason or Oppermann because he did not receive it. App. pp. 49-50. However, Petitioner acknowledged receiving another DMV letter, dated February 10, 2017, informing him he had in fact been classified as a Habitual Offender and his license suspended. App. pp. 49-50. The letters were both mailed to the same address. App. pp. 81, 83. Additionally, the February 10, 2017 DMV letter contained instructions for Petitioner to appeal the DMV's decision, but Petitioner did not do so. App. pp. 66, 83.

Therefore, Petitioner was not prejudiced by any deficient advice because he was affirmatively informed in writing – after the date of his arrest but before his plea – his license would be suspended for five years upon conviction for any major traffic offense, including driving under the influence. Additionally, Petitioner's testimony he would have proceeded to

trial was not credible because of the overwhelming evidence against him.[3] Accordingly, certiorari should be denied as to this issue.

**II. In any event, Petitioner was not entitled to counsel because his conviction did not result in actual imprisonment. Therefore, Petitioner cannot establish a constitutional violation regardless of whether Thomason and/or Oppermann rendered ineffective assistance.**

Respondent raises this argument as an additional sustaining ground. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("Under the present rules, a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.").

The constitutional right to counsel attaches only when a defendant receives a sentence that ends up in the actual deprivation of a person's liberty or has the potential for such result. Talley v. State, 371 S.C. 535, 640 S.E.2d 878 (2007) (citing Alabama v. Shelton. 535 U.S. 654, 658 (2002)). In Talley, this Court held the PCR court had incorrectly granted relief as to a conviction for which Tally received an immediately suspended prison sentence plus a fine. As this Court explained, "the constitutional right to counsel does not apply when a prison term is an authorized punishment but not actually imposed." Id. at 542, 640 S.E.2d at 881.

In Argersinger v. Hamlin, the United States Supreme Court held "absent a knowing and

[3] Petitioner acknowledged the existence of a videotape of his encounter with the arresting officer, on which Petitioner can be heard telling the officer he "had too much to drink" and should not have been driving. App. pp. 59-60, 62-64. Additionally, the PCR court correctly found Petitioner's refusal to submit to a blood-alcohol breath test would have resulted in an adverse inference against him at trial. S.C. Code Ann. § 56-5-2950(B)(1). Although Respondent concedes the analysis in the Order of Dismissal, finding no prejudice because Petitioner was likely to lose at trial anyway, is inappropriate post-Frierson, the fact that overwhelming evidence against Petitioner exists makes less credible his assertion he would have proceeded to trial. 423 S.C. 257, 815 S.E.2d 433 (2018) (finding overwhelming evidence analysis of prejudice prong does not apply to convictions obtained via a guilty plea).

intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." 407 U.S. 25, 37 (1972). The United States Supreme Court later clarified actual imprisonment, *not just the possibility of imprisonment*, is the demarcation line, and the right to state-appointed counsel is not triggered unless the defendant is actually sentenced to a term of imprisonment. Scott v. Illinois, 440 U.S. 367, 373-374 (1979) (emphasis added). Later, the United States Supreme Court extended the right to state-appointed counsel for indigent defendants who receive a sentence that "*may* end up in the actual deprivation of a person's liberty." Alabama v. Shelton, 535 U.S. 654, 658 (2002) (emphasis added).

Here, Petitioner pleaded guilty and received a fine of four-hundred dollars plus court costs and fees in a total amount of one-thousand ninety-two dollars. App. p. 1. Petitioner was therefore not entitled to state-appointed counsel because his sentence did not result in actual imprisonment, and because there was no suspended term of imprisonment or imposition of probation, "there [was] absolutely no possibility [Petitioner] [would] ever be incarcerated for the underlying conviction. As such . . . [Petitioner] has not received a sentence that "may 'end up in the actual deprivation of a person's liberty.'" Talley, 371 S.C. at 545, 640 S.E.2d at 883. Therefore, even if Thomason and/or Oppermann rendered ineffective assistance, Petitioner has not established a violation of a constitutional right, and certiorari must be denied.

## CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR court's denial of relief. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

November 16, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT



Appeal from Anderson County
The Honorable R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2018-000095

JEROME NOONE,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

**CERTIFICATE OF SERVICE**

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

E. Charles Grose, Jr., Esquire
Grose Law Firm
404 Main Street
Greenwood, South Carolina 29646

This 15th day of November, 2018

Camille Henry
CAMILLE HENRY
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL



November 16, 2018

The Honorable Daniel E. Shearouse
Clerk – South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

***Re:*** **Jerome Noone v. State of South Carolina**
**Appellate Case No. 2018-000095**
**Lower Court Case No. 2017-CP-04-01012**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Lindsey McCallister
Assistant Attorney General
SC Bar #79054

LAM/ch

cc: E. Charles Grose, Jr., Esquire