20-7152
NO.:_____

IN THE

SUPREME COURT OF THE UNITED STATES

Brian Hook - Petitioner;

v.

State of Indiana - Respondent;

PETITION FOR WRIT OF CERTIORARI

Attorney for Petitioner:

Brian Hook #211604
Appellant / *Pro se*
Pendleton Correctional Facility
4490 W. Reformatory Road
Pendleton, Indiana. 46064-9001

Petitioner / *pro se*

QUESTIONS PRESENTED

1. Whether the Indiana Courts erred denying Petitioner was deprived of effective assistance of counsel in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution when counsel and the Court misadvised/misled him concerning this conviction being used to support the criminal habitual offender in the future under *I.C.* 35-50-2-8 rendering Petitioner's guilty plea illusory and thus not entered into knowingly, intelligently, and voluntarily and defense counsel's ineffectiveness during sentencing?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix ____ to the petition and is-

☐ reported at _____; or,

☐ has been designated for publication but is not yet reporter; or,

☐ is unpublished.

The opinion of the United States district court appears at Appendix ____ to the petition and is-

☐ reported at _____; or,

☐ has been designated for publication but is not yet reporter; or,

☐ is unpublished.

☒ **For cases from state courts:**

The opinion of the highest state court to review the merits appears at **Appendix A** to the petition and is-

☐ reported at _____; or,

☐ has been designated for publication but is not yet reporter; or,

☒ is unpublished.

The opinion of the Indiana Court of Appeals appears at **Appendix B** to the petition and is-

☐ reported at _____; or,

☐ has been designated for publication but is not yet reporter; or,

☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States court of appeals decided my case was _____.
A copy of that decision appears at Appendix ____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States court of appeals on the following date: _____ ____, 20__, and a copy of the order denying rehearing appears at Appendix ____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ ____, 20__, on _____ ____, 20__, in Application No. __, and a copy of the order granting said extension appears at Appendix ____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

☒ **For cases from state courts:**

The date on which the highest state court decided my case was _____ ___, 20__.
A copy of that decision appears at **Appendix A.**

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied on the following date: _____ ____, 20__, and a copy of the order denying rehearing appears at Appendix ____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ ____, 20__, on _____ ____, 20__, in Application No. __, and a copy of the order granting said extension appears at Appendix ____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment 14

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. The State of Indiana filed Information in this case charging Petitioner under Cause No.: 89D03-1112-FD-00518. Under Cause No.: 89D03-1112-FD-00518 Petitioner entered into a (Combined Guilty Plea) for: Probation Violation from case Number 10-FD-121 for OWI; OWI under Cause number FD-516 and OWI under Cause number FD528.

2. On March 13, 2012 a sentencing hearing was held and Petitioner was sentenced to Probation Violation from case Number 10-FD-121, 630 days; Cause number FD-516, 9 months; and Cause number FD528, 12 months.

3. Petitioner filed no appeal.

4. Petitioner was charged under Cause No.: 89C01-1312-FA-34 for Burglary, Class B felony and the Habitual Offender. On February 26, 2015 Petitioner was sentenced to Burglary, Class B felony, Habitual Offender Twenty (20) years enhance by twenty (20) years using the conviction from this present case under Cause No.: 89D03-1112-FD-00518 to support the habitual offender enhancement and Battery, Class A Misdemeanor, One (1) years. Total executed sentence of Forty-one (41) years.

5. Petitioner filed a petition for post-conviction relief wherein he alleged:

> **(a)** Whether the Petitioner was deprived of effective assistance of counsel in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article One, Sections Twelve and Thirteen of the Indiana Constitution when counsel and the Court misadvised/misled him concerning this conviction being used to support the criminal habitual offender in the future under I.C. 35-50-2-8 rendering Petitioner's guilty plea illusory and thus not entered into knowingly, intelligently, and voluntarily and defense counsel's ineffectiveness during sentencing?

6. Petitioner had Post-Conviction Relief evidentiary hearing on September 13, 2019. Petitioner subpoenaed the following witnesses: Kaarin Lueck, 301 East Main Street, Richmond, IN 47374.

7. The Court Ordered the parties shall submit proposed finding of facts and conclusions of law on October 13, 2019.

8. Petitioner filed a Motion for Post-Conviction Court to Take Judicial Notice Of Own Records and To Order The Clerk To Have The Record From Direct Appeal Sent To The Post-Conviction Court As Evidence In These Proceedings herein to prove his claims. The Court granted this motion.

9. Petitioner Motion for Continuance to file his Finding of Facts and Conclusions of Law granted setting the new date of November 13, 2019 for the Finding of Facts and Conclusions of Law to be file.

10. On January 14, 2020 the Post-Conviction Court denied Post-Conviction Relief and Appellant now appeals.

REASONS FOR GRANTING THE WRIT

The Indiana Courts erred in denying Petitioner was deprived of effective assistance of counsel in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution when counsel and the Court misadvised/misled him concerning this conviction being used to support the criminal habitual offender in the future under I.C. 35-50-2-8 rendering Petitioner's guilty plea illusory and thus not entered into knowingly, intelligently, and voluntarily and defense counsel's ineffectiveness during sentencing.

In *Lafler v. Cooper*, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012), our United States Supreme Court recently stated:

> Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process. *Frye*, ante, at 8; see also *Padilla v. Kentucky*, 559 U.S. ---,---(2010)(slip op., at 16); *Hill*, supra, at 57. During the plea negotiations defendants are "entitled to the effective assistance of competent counsel." *McMann v, Richardson,* 397 U.S. 759, 771 (1970). In *Hill*, the Court held "the two-part *Strickland v. Washington* tests applies to challenges to guilty pleas based on ineffective assistance of counsel." 474 U.S., at 58. The performance prong of Strickland requires a defendant to show "'that counsel's representation fell below an objective standard of reasonableness.'" 474 U.S. 57 (quoting Strickland, 466 U.S., at 688).

Petitioner's defense counsel's performance was deficient by falling below an objective standard of reasonableness based on professional norms and counsel's performance prejudiced the defendant so much that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington,* 466 U.S. 668, 687-88 (1984).

First, Petitioner's defense counsel, Kaarin Lueck, did not advise him by pleading guilty the conviction could be used to support a future criminal habitual offender charge under I.C. 35-50-2-8 in further proceedings nor did she bring to the Court's attention it did not make this

advisement after warning Petitioner that it qualified for a future habitual traffic offender (Guilty Plea Tr. 9, L. 24 to tr. 10, L. 5) and habitual substance abuse offender. (Guilty Plea Tr. 9, L. 19-22). Although *I.C.* 35-35-1-2(3) mandates that the judge must only inform the defendant a "of the maximum possible sentence and minimum sentence for the crime charged and any possible increased sentence by reason of the fact of a prior conviction or convictions, and any possibility of the imposition of consecutive sentences" which the Court did, however, the judge in this case then went outside of the statute adding a warning about the "traffic offender" and "substance abuse offender" habitual(s) but did not warn of the criminal habitual under I.C. 35-50-2-8 misleading Petitioner this conviction would not qualify for it in the future. In its denial of Petitioner's request for Post-Conviction Relief, the Court stated, "The Court is required to comply with I.C. 35-35-1-2 before accepting a guilty plea. This Court in this matter complied with all the requirements of the statute before accepting Petitioner's guilty plea and admission to the probation violation." (Order, p. 2, ¶ 2). The Indiana Court of Appeals also stated the judge followed I.C. 35-35-1-2 and was not required to warn about the habitual possibility. The Court of Appeals did not address the judge went outside of I.C. 35-35-1-2 misleading Hook. Appellant agrees the Court did comply with the statute **but** then added to it giving additional warnings about the "traffic offender" and "substance abuse offender" habitual(s) but did not warn of the criminal habitual under I.C. 35-50-2-8 misleading Hook this conviction would not qualify for it in the future.

During the September 13, 2019 evidentiary hearing, Ms. Lueck testified when asked:

> Q. When the judge informed me this guilty plea and sentence can be used for future habitual traffic offender and habitual substance abuser, but failed to inform me about the criminal habitual, wasn't it your job to bring this to the Court's attention to inform me?

A. The transcript shows both habitual offender, habitual substance offender and habitual traffic violator.

Q. As an attorney, if not informed about the criminal habitual, after being the habitual traffic and habitual substance abuser, would it be misleading – would it be misleading (indiscernible).

A. If it was true it would be misleading, but you were advised of the habitual consequences.
(PCR Tr. 6, L. 10-20)

During Cross-examination of Ms. Lueck by the Prosecutor Ms. Fantetti in an attempt to prove the Guilty Plea Hearing transcript prove Hook was advised of the criminal habitual the following occurred:

Q: And then Magistrate Lueck, you also talked about the Judge did advise Mr. Hook of the habitual.

MS. FANTETTI: May I approach the Witness?
THE COURT: Yes.

Q. I'm going to show you – this is the transcript from that sentencing hearing. Could you read me up to here. The highlighted –

A. So you want me to start here?

Q. – part. Yes, please.

THE COURT: Which page are you referring to?

THE WITNESS: I'm on page nine (9), starting at line nine (9).

THE COURT: Page nine (9), line nine (9)?

THE WITNESS: Yep.

THE COURT: Okay.

Q. "The Court: Do you understand by pleading guilty, Brian, on the criminal cases, you are creating a permanent adult felony record for yourself?" "The Defendant: Yes." "The Court: Do you understand that this record can be counted against you in the future, causing you to receive a worst sentence than you would receive if you did not have

these convictions in your record?" "The Defendant: Yes, Sir." "The Court: Because these are substance offenses, Brian, they can very specifically be counted against you in the future to trat you as a habitual substance offender, Sir. Do you understand that?" "The Defendant: Yes, Sir." Do you want me to stop there?

Q. Is that how you remember that hearing?

A. Yes.

Q. And again, that's telling Mr. Hook that he could be treated –
A. As a habitual offender, as well as a habitual substance offender.
(PCR Tr. 12, L. 1 – PCR Tr. 13, L. 1)

The above quoting of transcript from the guilty plea hearing does not reflect as the prosecutor and defense counsel twisted it to reflect that Mr. Hook could be treated as a habitual offender and, as well as a substance offender. When the Court stated "be counted against you as a habitual substance offender," the prosecutor cannot then separate this term into two (2) parts: 1) Habitual offender and 2) habitual substance offender. Nowhere in this transcript did the Judge state, 1) Habitual Offender, 2) Habitual substance Offender and 3) Habitual Traffic offender. When the Judge stated the following it was not concerning the habitual offender, but the possibility of an enhanced advisory sentence for having a prior criminal history as an aggravator under I.C. 35-35-1-2(3): "The Court: Do you understand that this record can be counted against you in the future, causing you to receive a worst sentence than you would receive if you did not have these convictions in your record?" "The Defendant: Yes, Sir." The Petitioner understood this advisement to mean a future sentence could be raised from the advisor for example a Level 3 felony of advisory nine (9) years to a maximum of sixteen (16) years. The transcript clearly does not reflect Hook was advised of the criminal habitual offender as the prosecutor and Ms. Lueck attempted to prove it did.

Further, during the September 13, 2019 evidentiary hearing, Ms. Lueck testified when asked if she informed Hook about the criminal habitual that "I have notes from our first interview that indicates you were advised of the habitual possibilities, and that's in the case file" (PCR Tr. 8, L. 15-16). During cross-examination the prosecutor discussed with Ms. Lueck her case file mentioning the advisement of the habitual as follows:

> Q. Okay. And you mentioned you do have notes from your first meeting with Mr. Hook?
> A. Correct.
>
> Q. Okay. And there is and indication in that – on paper, that you talked about the habitual?
>
> A. Correct. ...whether they're habitual eligible.
> (PCR Tr. 10, L. 14-16, 21-22)

When the prosecutor moved to enter this form into evidence Hook objected stating, "I object – Your Honor, this is very vague. It just says habitual definitions and it has a Y next to it" **(PCR Tr. 11, L. 16-17)**. This form does not specify what about the habitual was explained to Hook and he maintains it was not the criminal habitual. This sheet was vague and did not reflect which habitual definitions were covered and their consequences if this guilty plea was accepted; nor did this form explain if Ms. Leuck corrected the misinformation the judge had concerning the habitual offender. Petitioner is now suffering present penal consequences of a twenty (20) years habitual enhancement due to this prior conviction being used to support the criminal habitual offender in Cause No. 89C01-1312-FA-000034, the sentence he is now serving.

In *White v. State*, (Ind. 1986), 497 N.E.2d 893, 906, it states, "Defendants who can prove that they were actually misled by **the judge, the prosecutor, or defense counsel** about the choices before them will present colorable claims for relief. Petitioner has proven above **he was misled by the judge** concerning the possible future criminal habitual charge and defense counsel

failed to correct it. It is not in the transcript he was advised as improperly testified to by Ms. Lueck. To decide a claim that a plea was not made voluntarily and intelligently, a court must review all the evidence before the court which heard his post-conviction petition, including the transcript of the petitioner's original sentencing, and any plea agreements, plea hearing transcripts or other exhibits which are a part of the record." *White v. State* at 905 (Ind. 1986).

Petitioner clearly understood he could face a future habitual traffic offender carrying a suspension of license and habitual substance abuse offender facing to an additional fixed term of at least three (3) years but not more than eight (8) years imprisonment. Petitioner has proven he was not properly advised and had he known was also facing the Criminal Habitual Offender facing an additional ten (10) to thirty (30) years, he would not have chose to plead guilty. The judge was not required to explain the possible habitual enhancements, however, when he did address them and failed to cover them all he misled this Petitioner that he concerning facing the criminal habitual and he did end up receiving an additional twenty (20) years in a later sentence as a result (sentence he is now serving). Nothing from the September 13, 2019 evidentiary hearing proves Petitioner was proper advised by the judge or his attorney and therefore his guilty plea must be vacated.

Second, Petitioner's defense counsel, Kaarin Lueck, did not effectively argue sentencing in this plea agreement after the judge stated concerning the two new charges:

> There are circumstances where I am allowed to suspend all or part of a felony sentence. There are other circumstances where I may reduce a Class D Felony to a Class C Misdemeanor, for which the maximum jail sentences is a year, the maximum fine is $5,000.00, the Countermeasure Fee and driver's license suspension are unchanged if it's reduced to a misdemeanor. (Guilty Plea Tr. 5, L. 1-7).

The judge further stated:

> On the probation revocation case there are three (3) options, Brian. I could extend your probation, I could change the rules under which you are supervised, and I can also order you to serve some or all of the originally suspended sentence in prison. In your case that would be six hundred and forty (640) days. (Guilty Plea Tr. 5, L. 9-14).

Later in arguing sentencing to the judge defense counsel did request for probation to be re-instated on the probation violation case, however, in arguing the two new criminal charges defense counsel failed to request or argue for reducing the D felonies to Class A misdemeanors due to the mitigating circumstances in this case. The judge had stated this option to reduce (Guilty Plea Tr. 5, L. 1-7) yet he was not encouraged to do it; defense counsel ineffectively argued for the minimum for Class D felonies instead. During the September 13, 2019 evidentiary hearing Ms. Leuck did not have an answer that explained a strategy for not arguing for the minimum except she didn't believe Hook was eligible for a misdemeanor but when asked, Q. "Isn't failing to argue for the best possible sentence ineffective representation? A. If that was true." **(PCR Tr. 7, L. 18-20).** In *Lafler, supra,* it further states, "Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in Strickland prejudice because 'any amount of [additional] jail time has Sixth Amendment significance." Quoting *Glover v. United States*, 531U.S. 198, 203 (2001).

In affirming this appeal, the Indiana Court of Appeals stated "Hook's argument fails because he has not demonstrated that he would, in fact, have been eligible for this sentencing option." (App. Opinion, p. 12 [15]). Appellant would point out again it was the sentencing judge who stated Hook was eligible as follows:

> There are circumstances where I am allowed to suspend all or part of a felony sentence. There are other circumstances where I may reduce a Class D Felony to a Class C Misdemeanor, for which the

> maximum jail sentences is a year, the maximum fine is $5,000.00, the Countermeasure Fee and driver's license suspension are unchanged if it's reduced to a misdemeanor. (Guilty Plea Tr. 5, L. 1-7).

The Court of Appeals was erred and Petitioner's defense counsel's performance was deficient by falling below an objective standard of reasonableness based on professional norms and counsel's performance prejudiced the defendant so much that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington,* 466 U.S. 668, 687-88 (1984). Effective and zealous representation in arguing sentencing would have created a different outcome.

CONCLUSION

The petition for a writ of certiorari should be granted. The Indiana Courts has departed from clearly established United States Supreme Court precedent concerning Petitioner being deprived of effective assistance of counsel in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Petitioner's guilty plea must be vacated and this case remanded for further proceedings and for any and all other just relief this Court deems necessary.

Executed on: October 14, 2020,

Respectfully submitted,

Brian Hook
Petitioner / *pro se*