THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

The Honorable Deadra L. Jefferson, Circuit Court Judge

Case No. 2010-CP-10-3800

Onrae Williams, #284437,..... Petitioner,

v.

State of South Carolina, ... Respondent.

PETITION FOR A WRIT OF CERTIORARI

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Certification of Counsel

The undersigned hereby certifies that Petitioner Onrae Williams filed a petition for rehearing with the Court of Appeals and the Court of Appeals ruled on the petition with finality on June 10, 2016.

Questions Presented for Review

I. Did the Court of Appeals err in affirming the denial of post-conviction relief for ineffective assistance of counsel where this Court's previous opinions found ineffective assistance of trial counsel for failure to research, notify the client, notify the State and/or object to an enhanced sentence where there was legal uncertainty as to whether the sentence could be enhanced?

II. Did the Court of Appeals err in affirming the denial of post-conviction relief for ineffective assistance of counsel where the PCR court's orders are inconsistent with the record showing that trial counsel failed to ensure Petitioner understood the consequences of rejecting a plea bargain and proceeding to trial when the State was seeking mandatory life in prison without parole?

Statement of the Case

Pursuant to Rules 242 and 243 of the South Carolina Appellate Court Rules, Petitioner Onrae Williams ("Mr. Williams") hereby petitions this Court to grant a writ of certiorari to review the Court of Appeals' opinion in *Onrae Williams v. State of South Carolina*, Unpublished Op. No. 2016-UP-015 (S.C. Ct. App. filed Jan. 13, 2016) (App. p 590). For the reasons set forth below, this petition should be granted, the decision of the

Court of Appeals should be reversed, and Mr. Williams should be granted post conviction relief.

On January 17, 2007, Mr. Williams was convicted of selling about $15 worth of crack cocaine to an informant within one-half mile of a high school. He was sentenced to Life Without Parole ("LWOP"). This LWOP sentence was based on two prior offenses: (1) a guilty plea under South Carolina's Youthful Offender's Act for distribution of approximately $5-10 worth of crack cocaine within the proximity of a school, and (2) a guilty plea for possession of cocaine with intent to distribute within close proximity of a school. The offense of conviction, as well as Petitioner's two prior convictions, used to impose his current system, were based on the proximity to Burke High School, which was 50 yards from where Mr. Williams lived, and all were based on sales to adults.

Mr. Williams' trial counsel was ineffective because he neither researched nor raised whether a prior youthful-offender conviction or a conviction actually incurred while a minor could be used to enhance a sentence to life without parole. Counsel's failures resulted in the State of South Carolina ("the State") pursuing, and Mr. Williams receiving, an LWOP sentence. Further, trial counsel failed to ensure that his learning-disabled client understood that a conviction when the State was seeking "LWOP" meant mandatory LWOP.

The PCR court erred in ruling that trial counsel was effective and that Mr. Williams suffered no prejudice. The Court of Appeals erred in affirming the PCR court while overlooking issues raised on appeal, overlooking numerous decisions of this Court, and misapprehending the import of non-binding cases that are distinguishable from Mr. Williams' case in several significant respects.

A. Procedural History

In May 2005, Mr. Williams was indicted for distribution of crack cocaine (2005-GS-10-3592) and distribution of crack cocaine within proximity of a school (2005-GS-10-3593). On January 17, 2007, a jury found Mr. Williams guilty as indicted. He was sentenced to LWOP. After exhausting the direct appeal process, Mr. Williams applied for post-conviction relief ("PCR"), and amended his application to state that his trial counsel was ineffective for failing to research, inform him and the State, and object to the State's notice of its intent to seek LWOP. At the PCR hearing, new evidence was presented that trial counsel failed to adequately inform Mr. Williams that he faced mandatory LWOP if he rejected a plea offer and proceeded to trial.

The PCR court dismissed Mr. Williams' amended application on August 4, 2011, and his motion to alter or amend on September 2, 2011. Mr. Williams timely petitioned this Court for a writ of certiorari on December 23, 2011. This Court transferred the case to the Court of Appeals. The Court of Appeals granted the petition on May 22, 2014, and the appeal was fully briefed. Although the appeal was scheduled for oral argument, due to the severe flooding in Columbia in October 2015, the Court of Appeals elected to forgo rescheduling oral arguments and decided the case on the record and briefs. On January 13, 2016, the Court of Appeals affirmed the PCR court in an unpublished opinion. Mr. Williams' petition for rehearing and rehearing en banc was denied on June 10, 2016.

B. Facts Giving Rise To Mr. Williams' Life Without Parole Sentence

1. 2007 Conviction (2005-GS-10-3592 and 2005-GS-10-3593)

During Mr. Williams' January 2007 trial, Charleston County Police officers testified that on August 10, 2004, officers equipped a confidential informant with hidden audio and video, gave the informant official funds from the narcotics account, and patted him down to ensure that he did not have any drugs with him. (App. p. 227:1-11, 232:24 to 233:2.) Under visual police surveillance, the confidential informant approached Mr. Williams near the corner of President and Line Streets in Charleston, which is thirty yards from where Mr. Williams lived with his grandmother and happens to be less than one-half mile from Burke High School. (App. p. 227:13 to 228:7, 229:4-10; 409:3-5.) The confidential informant testified that Mr. Williams handed him drugs in exchange for $50. (App. p. 257:9-25.) The confidential informant returned to the police officers, holding what appeared to be drugs, which lab tests later confirmed to be 0.3 grams of crack cocaine. (App. p. 233:3-5, 250:22 to 251:2, 258:3-8, 288:5-12, 321:16-22; 409:10-12; 414:23 to 415:4.) On January 17, 2007, a jury found Mr. Williams guilty as indicted. (App. p. 371:19 to 372:14.)

Before the trial, the State served notice of its intention to seek LWOP pursuant to S.C. Code Ann. § 17-25-45 because distribution of crack cocaine within proximity of a school constituted what the State claimed was Mr. Williams' third "serious offense." At sentencing, the Court asked Mr. Williams' trial counsel whether Mr. Williams objected to the prior convictions for possession with intent to distribute cocaine in proximity of a school (2003-GS-10-0171 and 1999-GS-10-7722) as triggering the recidivism statute.

(App. p. 380:17 to 381:11.) Trial counsel's response was: "No, sir, I don't have any argument on that." (App. p. 381:10-13.) The Court proceeded to sentence Mr. Williams to LWOP. (App. p. 383:15 to 384:2.)

2. 2003 Plea (2003-GS-10-0171)

The LWOP sentence was based on two prior offenses. The first was Mr. Williams' 2003 plea to distribution of crack cocaine within proximity of a school. The affidavit giving rise to the indictment provides that on October 14, 2002, Mr. Williams sold 0.2 grams of crack cocaine (between $5 and $10 worth of drugs) to a confidential informant. (*See* App. p. 408:13-15.) The transaction occurred in the area of Norman and Alway Streets (within fifty yards of Mr. Williams' grandmother's house, where he lived, and within one-half mile of Burke High School). At age twenty, Mr. Williams pleaded guilty under the Youthful Offender Act, S.C. Code § 24-19-10, *et seq.*

3. 2000 Plea (1999-GS-10-7722)

The second offense was Mr. Williams' 2000 plea to possession of cocaine with intent to distribute within close proximity of a school. The affidavit giving rise to the indictment provides that on October 5, 1999, the police department received complaints of narcotic activity at the corner of Norman and Bogard Streets (within fifty yards of Mr. Williams' grandmother's house and within one-half mile of Burke High School). At approximately 6:45 p.m., two officers arrived to investigate the complaint, and saw two people on a bike, one of whom was Mr. Williams. The affidavit notes that when Mr. Williams saw the officers, he ran and placed a baggie of cocaine in a hole in a brick wall. Mr. Williams was caught, and the field test confirmed that the bag contained cocaine. At age seventeen, Mr. Williams pleaded guilty.

C. Facts Giving Rise To Ineffective Assistance of Counsel Claims

1. Failure To Research and Advise Client

Mr. Williams' trial counsel did not research whether Mr. Williams' 1999 or 2002 offenses qualified to enhance the maximum statutory sentence of ten years for Mr. Williams' 2004 offense under S.C. Code section 44-53-445(D)(1) to LWOP. Counsel did not inform Mr. Williams or the State that legal uncertainty existed as to whether these prior offenses could be used to enhance his sentence to LWOP. Counsel did not object to the State's notice of intent to seek LWOP. (*See* App. p. 423:5-16.) Moreover, at sentencing, the Court asked Mr. Williams' trial counsel whether Mr. Williams objected to the prior convictions for possession with intent to distribute cocaine in proximity of a school (2003-GS-10-0171 and 1999-GS-10-7722) as triggering the recidivism statute. (App. p. 380:17 to 381:11.) Trial counsel's response was: "No, sir, I don't have any argument on that." (App. p. 381:10-13; *see also* App. p. 423:14 to 424:1.)

2. Failure To Inform Client Before Trial of *Mandatory* LWOP

Before the trial, the State offered Mr. Williams several plea deals, including three years, five years, and ten years, all of which Mr. Williams rejected. (App. p. 443:9-17.) At his PCR hearing, Mr. Williams testified that although he learned that the State could seek, and later did seek, LWOP, he believed that the judge had discretion to sentence him to anything from no time to LWOP, and that his trial counsel never explained to him that LWOP meant mandatory LWOP. (App. p. 409:15-25.)

Mr. Williams had no reason to believe that LWOP meant mandatory LWOP. The arrest involved only 0.3 grams (approximately $15 worth) of drugs. The State's notice of intention to seek LWOP did not mention the mandatory nature of the sentence.

The trial court only asked counsel for the State: "Did you offer something other than life without parole?" (App. p. 175:24-25.) After counsel for the State responded "yes," the Trial Court said, "That being the case, you've made your choice. If he's going to be burned, he'll be burned. No question about that." (App. p. 176:1-5.) Nothing in the trial court's statements informed Mr. Williams that LWOP was, under the circumstances, mandatory.

After a brief recess, the Court and Mr. Williams' trial counsel had the following exchange:

> Mr. King: Judge, I think Numbers 13 and 14, I would prefer the Court's standard charge on those [voir dire] issues.
>
> The Court: We will address those. You can object but I am going to discuss those aspects of it. Once they come into the room, the deal is gone. The only sentence is LWOP. He has made his decision. Do you understand?
>
> Mr. King: Yes, Your Honor.

(App. p. 179:5-14.) None of these comments from counsel or the Trial Court were directed to Mr. Williams. And the Trial Court never asked Mr. Williams if he understood that by rejecting the State's plea offer and proceeding to trial, he faced mandatory LWOP, not a number of possible sentences up to LWOP.

Mr. Williams' trial counsel testified during the PCR hearing that he does not know whether he informed Mr. Williams that LWOP meant mandatory LWOP. Counsel stated, "I knew then the case **was possible** life without parole, and I advised him to take the deal because the risk was very high, but -- so I don't remember specifically what we discussed about that parole. I did **imply** that it was **up to** life, so if I advised him, it would have been that this -- if they served notice on him that he **could** get life without

parole." (App. p. 425:12-21 (emphasis added).) Trial counsel later testified that although he discussed LWOP with Mr. Williams, "I can't remember that issue coming up with him ever asking, you know, is it up to life or is it mandatory life? I don't remember discussing that specific issue . . . ." (App. p. 427:14-17.)

Even though trial counsel did "imply" that it "was possible" that Mr. Williams "could" receive "up to" LWOP, Mr. Williams has a learning disability (which his trial counsel admitted that he did not know) (*see* App. p. 421:21-23), and he did not understand the significance of the distinction between LWOP and mandatory LWOP. In fact, Mr. Williams testified that he thought that "[t]he judge could give me anything from zero, no time, to life without parole." (App. p. 409:18-25; 421:21-23.)

Significantly, after Mr. Williams was convicted, the trial judge likewise suggested that Williams did not understand that he would be sentenced to mandatory LWOP: "[Y]ou're correct, mine is without any discretion, but clearly this case, the facts observed, and the fact of recent convictions, -- there was a gentleman this morning that entered a plea to avoid. I think that he finally perceived the gravity of the situation; *unfortunately some don't, and Mr. Williams falls into that.*" (*Id.* at 382:15-22) (emphasis added).

Mr. Williams' appellate counsel also explained:

> It became extremely apparent to me in the first 20 minutes that I went and saw Onrae up at Leiber that he had no idea that if he was convicted the only choice the Court had was to sentence him to life without parole. . . . It's very apparent he did not understand. It was not explained to him thoroughly that if he is to be found guilty, there is no sentencing, there is no mitigation on what your sentence is going to be. Your sentence is going to be life without parole. It's very clear to me he did not understand that. . . . We had to go over things three or four times, and when I met him, I still do not think he had understood the gravity of what LWOP meant, even after the court expressly told him, See you later. You are not going home.

(App. p. 413:18-23; 414:7-15, 18-22.) Indeed, appellate counsel explained that the fact that Mr. Williams rejected a plea offer for ten years (and, in fact, Mr. Williams also rejected offers of three years and five years) reinforced the fact that Mr. Williams did not know that he would receive LWOP for selling 0.3 grams of drugs. (App. p. 413:24 to 414:6 ("Nobody [turns down a plea offer of 10 years] if you know that if you get convicted, you are going to jail for the rest of your life and you are going to die in jail.").)

ARGUMENT

I. The Court of Appeals erred in affirming the denial of post-conviction relief for ineffective assistance of counsel where this Court's previous opinions have found ineffective assistance of trial counsel for failure to research, notify the client, notify the State and/or object to an enhanced sentence where there was legal uncertainty as to whether the sentence could be enhanced.

South Carolina law is unclear as to whether Mr. Williams' 2003 plea under the Youthful Offender Act is an eligible conviction under South Carolina's recidivism statute to enhance a maximum ten-year sentence to LWOP. Mr. Williams' trial counsel's failure to investigate this issue, raise it with Mr. Williams, raise it with the State, and object to the notice of intent to seek LWOP—regardless of the ultimate resolution of the legal uncertainty—constitutes ineffective assistance of counsel under this Court's precedent. The Court of Appeals, in affirming the PCR court's denial of post conviction relief, erred in overlooking this issue on appeal.

The entirety of the Court of Appeals' order on this issue is as follows:

> As to whether trial counsel was ineffective for failing to properly research and subsequently object to an enhanced mandatory LWOP sentence: *State v. Morgan*, 352 S.C. 359, 366-67, 574 S.E.2d 203, 206-07 (Ct. App. 2002) ("If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation and the court has no right to look for or impose another meaning."); S.C.

> Code Ann. § 17-25-45(A)(2)(a) (2014) ("Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a most serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has . . . two or more prior convictions for . . . a serious offense . . . ."); S.C. Code Ann. § 17-25-45(C)(2)(b) (Supp. 2015) (stating felony convictions for possession with intent to distribute cocaine within the proximity of a school and distribution of cocaine within the proximity of a school are each classified as a "serious offense"); S.C. Code Ann. § 17-25-45(C)(3) (2014) ("'Conviction' means any conviction, *guilty plea*, or plea of nolo contendere." (emphasis added)); *see also* S.C. Code Ann. § 63-19-20(1) (2010) ("'Child' or 'juvenile' means a person less than seventeen years of age."); *United States v. Crumblin*, 441 F. App'x 180, 183-84 (4th Cir. 2011) (holding defendant's felony conviction at the age of seventeen for purposes of his career offender status was not a juvenile conviction, despite defendant's youthful offender sentence, because he was neither a child as defined by section 63-19-20 nor did the family court have exclusive jurisdiction over defendant as required for sentencing as a juvenile).

(App. p. 590.)

The Court of Appeals appears to have reached a conclusion that Mr. Williams was eligible for an enhanced sentence under South Carolina law, and thus, the court seems to imply, if Mr. Williams' sentence was properly enhanced, then there could be no ineffective assistance of counsel.[1] (App. p. 590.) The key issue on appeal, however, was

[1] The Court of Appeals seems to rely on *United States v. Crumblin*, 441 F. App'x 180 (4th Cir. 2011), as the linchpin for the string citation that appears to suggest that a youthful offender conviction may be used to enhance a sentence under South Carolina's recidivism statute. But the Fourth Circuit did not reference any of this Court's precedent that Mr. Williams identified to the Court of Appeals; the issue of whether legal uncertainty existed was not before the Fourth Circuit; the Fourth Circuit's finding that the defendant's conviction as a seventeen year old amounted to an adult conviction is contrary to this Court's precedent in *Gay v. Ariail*, 381 S.C. 341, 673 S.E.2d 418 (2009) (rejecting the State's argument that a sixteen year old had an adult conviction, finding instead that he was convicted as a "youthful offender"); *Crumblin* concerned a federal criminal statute, not South Carolina's recidivism statute; and *Crumblin* was decided more than four years after Mr. Williams was convicted in January 2007.

not whether Mr. Williams' sentence could be enhanced, but rather whether legal uncertainty existed on the enhancement issue.

The Court of Appeals addressed none of this Court's precedent that Mr. Williams identified in his appellate briefing. This precedent demonstrates the existence of legal uncertainty as to whether a sentence as a "Youthful Offender" amounts to an adult conviction. In *Berry v. State*, 381 S.C. 630, 675 S.E.2d 425 (2009), this Court found that counsel was ineffective for failing to consider, inform his client, and object to whether the petitioner's prior conviction for possession of drug paraphernalia could be used to enhance his sentence for manufacturing methamphetamine. At the time of the petitioner's guilty plea, South Carolina courts had not clearly addressed whether the State could use the prior conviction to enhance the petitioner's sentence. This Court found that such uncertainty "may well provide a defendant a catalyst in plea negotiations with the State." *Id.* at 633-35, 675 S.E.2d at 426-27. That is, even where legal issues are not clearly defined, trial counsel has a duty to research, inform the client, and raise the legal ambiguity on the client's behalf, because the ambiguity itself could impact plea negotiations and sentencing.

As in *Berry*, whether the State may use Mr. Williams' prior convictions to enhance his sentence to LWOP is not clear. South Carolina's recidivism statute, S.C. Code § 17-25-45, allows for sentences of LWOP only when the offender has the requisite number eligible adult convictions. *See State v. Ellis*, 345 S.C. 175, 345 S.E.2d 490 (2001) (finding that a prior juvenile conviction does not apply toward the recidivism statute). One of Mr. Williams' prior convictions that the State used to enhance Mr. Williams' sentence to LWOP was a "youthful offender" conviction, not an adult

conviction. And this Court has long held that "a person between the ages of seventeen and twenty-five is, by definition, a youthful offender," *Creel v. State*, 262 S.C. 558, 564, 206 S.E.2d 825, 828 (1974) (per curiam), and has explicitly found that convictions of "youthful offenders" are not adult convictions. *Gay v. Ariail*, 381 S.C. 341, 673 S.E.2d 418 (2009) (finding that a twenty-two year old "was convicted as a 'youthful offender,'" and rejecting the State's argument that the defendant was convicted as an adult; this further bolster's Mr. Williams' interpretation of the law).

Therefore, because (1) the recidivism statute only applies to adult convictions, *Ellis*, *supra*, and (2) Mr. Williams received a youthful-offender conviction in 2003, not an adult conviction, *Creel*, *supra*; *Gay*, *supra*, legal uncertainty existed as to whether Mr. Williams' 2003 conviction could be used to enhance his sentence under the recidivism statute. Counsel's failure to research and raise this legal uncertainty constitutes ineffective assistance of counsel. *Berry*, *supra*. The Court of Appeals did not address this argument.

Mr. Williams' prior offenses played a central role in plea negotiations and sentencing. He was charged with violating South Carolina Code section 44-53-445, which carries a maximum prison sentence of ten years. S.C. Code § 44-53-445(D)(1) ("A person who violates the provisions of this section . . . must be fined not more than ten thousand dollars, or imprisoned not more than ten years, or both."). The State used Mr. Williams' prior convictions as a basis for invoking the enhanced sentencing of South Carolina Code section 17-25-45 to seek LWOP.

Armed with the research that Mr. Williams' 2003 youthful-offender conviction may not apply towards enhancing a sentence, "there is a reasonable probability that, but

for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (quoting *Strickland*, 446 U.S. at 688)). Plea negotiations would have been different because there was legal uncertainty as to whether Mr. Williams was eligible for an LWOP sentence, the solicitor likely would not have pursued a life sentence, and/or the trial court likely would not have applied the prior youthful-offender conviction toward the recidivism statute. Each of these issues establishes that Mr. Williams was prejudiced in receiving an LWOP sentence and in being deprived of "a catalyst in plea negotiations with the State." *Berry*, 381 S.C. at 635, 675 S.E.2d at 427; *see Robinson v. State*, 380 S.C. 201, 206, 669 S.E.2d 588, 590 (2008) (finding in a drug case that trial counsel's failure to challenge the defendant's prior convictions in enhancing the sentence amounted to ineffective assistance of counsel) (citing *United States v. Tucker*, 404 U.S. 443 (1972) (finding that the defendant should be resentenced when the trial judge improperly considered the defendant's prior convictions in determining the sentence)); *State v. Rich*, 269 S.C. 701, 239 S.E.2d 731 (1977) (same); *see also Stevens v. State*, 365 S.C. 209, 617 S.E.2d 366 (2005) (reversing PCR court's ruling and finding that the petitioner's plea attorney was ineffective for not researching whether the petitioner was properly charged with eighteen counts of receiving stolen goods); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833, 836 (1999) (finding that counsel's failure to raise an argument relevant to sentencing that was available pursuant to South Carolina case law constitutes deficient performance under the prevailing professional norms).

Trial counsel's failure to research and raise this legal uncertainty regarding sentencing enhancement is particularly problematic because the error resulted in an

LWOP sentence for Mr. Williams, which is a facially unjust result considering the small amount of drugs at issue in all three of Mr. Williams' offenses combined. *See Strickland v. Washington*, 446 U.S. 668, 686 (1984) (stating that whether counsel was ineffective should be measured against whether the trial produced a just result). Mr. Williams was sentenced to LWOP for selling 0.3 grams of crack cocaine (approximately $15 dollars worth of drugs) when he was twenty-one years old, and his prior offenses included selling 0.2 grams crack cocaine ($5 to $10 dollars worth of drugs) as a minor at seventeen years of age, and possession of cocaine. These crimes were all committed within blocks of Mr. Williams' grandmother's house where he lived, which happened to be in close proximity to a Charleston high school, thereby implicating "serious" offenses under South Carolina's recidivism statute.

Indeed, the injustice of Mr. Williams' sentence is highlighted by its contrast to the Supreme Court's decision in *Harmelin v. Michigan*, 501 U.S. 957 (1991), which the Court of Appeals discussed in affirming Mr. Williams' LWOP sentence. *See State v. Williams*, 380 S.C. 336, 348, 669 S.E.2d 640, 646 (Ct. App. 2008). In *Harmelin*, a defendant was sentenced to LWOP for possessing drugs, but the amount of drugs at issue was 672 grams of pure cocaine, which had a yield of between 32,500 and 65,000 doses, and was worth potentially many hundreds of thousands of dollars. The Supreme Court considered possession of such a large amount of drugs as "a grave harm to society," and the Court considered the large quantity of drugs at issue to be a key factor in its decision to affirm the sentence. *Harmelin*, 501 U.S. at 1002.

Contrast the danger to society in *Harmelin* with the single dose of 0.3 grams of cocaine involved in Mr. Williams' case and the 0.2 grams of cocaine at issue in one of his

prior offenses. Although Mr. Williams' offense warrants punishment, LWOP for selling 0.3 grams of drugs is far afield of facts and policy considerations of the Supreme Court's *Harmelin* decision and this Court's precedent for affirming an LWOP sentence. *See State v. Standard*, 351 S.C. 199, 569 S.E.2d 325 (2002) (affirming LWOP sentence for a defendant whose offenses included the violent crimes of armed robbery and vandalizing a home, including killing a cat and beating a dog so severely that it had to be put to sleep; and citing like cases across the country involving LWOP for violent crimes). Nothing in any of Mr. Williams' convictions suggests that he poses a grave harm to society that would warrant an LWOP sentence, as in either *Harmelin* where an extremely large quantity of drugs was at issue or in *Standard* when the defendant had committed violent and heinous crimes. Therefore, the injustice of Mr. Williams' resulting sentence should weigh heavily in considering the ineffectiveness of his counsel in failing to research and raise the legal uncertainty in the law with Mr. Williams, the State, and the trial court. As such, this Court should issue a writ and review the Court of Appeals' decision in this matter.

II. The Court of Appeals erred in affirming the denial of post-conviction relief for ineffective assistance of counsel where the Court of Common Pleas Orders are inconsistent with the record showing that trial counsel failed to ensure that the petitioner understood the consequences of rejecting a plea bargain and proceeding to trial where the State was seeking mandatory life in prison without parole.

This Court's decisions and the guiding principle of PCR that trials should produce a just result strongly suggests that the failure of trial counsel to ensure that a defendant understands the severity of his or her sentence constitutes ineffective assistance of counsel. Other appellate courts that have addressed this issue in a PCR context have

found ineffective assistance of counsel. The Court of Appeals, in affirming the PCR court's denial of post conviction relief, erred in overlooking this issue on appeal.

The entirety of the Court of Appeals' order on this issue is as follows:

> As to whether trial counsel failed to ensure Williams understood the consequences of rejecting his plea bargain and proceeding to trial when the State was seeking mandatory LWOP: *Walker v. State*, 407 S.C. 400, 404-05, 756 S.E.2d 144, 146 (2014) (stating to prevail on an ineffective assistance of counsel claim, a PCR applicant must demonstrate (1) "counsel was deficient" and (2) "the deficiency resulted in prejudice" (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984))); *id.* at 405, 756 S.E.2d at 146 (acknowledging an appellate court's great deference to a PCR court's findings on matters of credibility); *Lafler v. Cooper*, 132 S. Ct. 1376, 1385 (2012) (requiring an applicant alleging he rejected a plea offer because of counsel's deficient advice to establish prejudice by showing "there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed" (emphasis omitted)); *Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000) (establishing the burden of proving entitlement to PCR is upon the PCR applicant).

(App. p. 590.)[2]

The Court of Appeals' citation to cases does not address the issue on appeal regarding whether the PCR court's findings were inconsistent with the record showing that trial counsel failed to ensure that Mr. Williams understood the consequences of rejecting a plea bargain and proceeding to trial. Nor does the Court of Appeals address

[2] To the extent that the Court suggests that the test announced in *Lafler* precludes post-conviction relief for Mr. Williams, the Appellant submits that the Court misapprehends the import of *Lafler*. First, *Lafler* was decided ten months after Mr. Williams' PCR hearing, so the rule that the Supreme Court announced has no bearing on Mr. Williams' case at this time. Second, even if the test announced in *Lafler* applied to Mr. Williams' PCR application, the record establishes that Mr. Williams met his burden of proof.

this Court's precedent and other appellate precedent that Mr. Williams identified in his briefing, supporting his argument that failing to ensure that a defendant understands the severity of his or her sentence should constitute ineffective assistance of counsel.

As this Court has noted in the context of plea negotiations, "[w]e believe the Sixth Amendment guarantee of effective assistance of counsel requires that counsel accurately inform a defendant, to the extent possible, of the qualifying nature of a prior offense for enhancement purposes." *Berry v. State*, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009); *Judge v. State*, 321 S.C. 554, 560, 471 S.E.2d 146, 149 (1996), *overruled on other grounds by Jackson v. State*, 342 S.C. 95, 535 S.E.2d 926 (2000) (finding that the right to effective assistance of counsel applies during the plea negotiation process, even where the plea is rejected). Thus, ensuring that the defendant understands the maximum and minimum penalties at stake in considering and rejecting a plea, and proceeding to trial is akin to the defendant understanding the penalties at stake when entering a voluntary guilty plea.

In *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999), this Court found that PCR was appropriate were the defendant entered a guilty plea, did not understand that the plea carried a mandatory minimum sentence, and the defendant's counsel "had little recollection of the exact nature of the matters discussed during the meetings with the Defendant." *See State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980) (finding that the defendant's plea was involuntary because she was never informed of the mandatory minimum sentence, and court suggested that the he "could" impose a "maximum" sentence of life imprisonment; "thus the plea [was] entered in ignorance of its direct consequence . . . ."). Considering that "plea agreements allow our overly

burdened criminal courts to function," *Berry v. State*, 381 S.C. 630, 675 S.E.2d 425 (2009), the same rationale for effective assistance of counsel should apply for ensuring that in rejecting a plea, the defendant understands that the risk of proceeding to trial carries a mandatory minimum sentence.[3]

Requiring counsel to inform defendants of the mandatory nature of their potential sentence is also consistent with similar decisions in other jurisdictions. In *Johnson v. State*, 712 S.E.2d 811 (Ga. 2011), the Georgia Supreme Court reversed the dismissal of a PCR application on grounds of ineffective assistance of counsel where the trial counsel failed to advise the petitioner that if he rejected the State's plea offer, he would face a

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[3] Requiring counsel to inform defendants of the mandatory nature of their potential sentence is also consistent with South Carolina's Rule of Professional Conduct 1.4(b), which defines "prevailing professional norms," *Strickland v. Washington*, 466 U.S. 668, 688 (1984), and which provides that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Moreover, the Comments to Rule 1.4 provide that "when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement." As applied to plea negotiations, the Rules of Professional Conduct require counsel to ensure that the defendant understands the potential sentence at stake in deciding to proceed to trial. *See Jackson*, 342 S.C. at 97, 535 S.E.2d at 927 (finding ineffective assistance of counsel where the defendant accepted a plea, and later testified at the PCR hearing that he did not understand the import of the offense to which he pled, and would not have accepted the plea if he had); *Alexander v. State*, 303 S.C. 539, 402 S.E.2d 484 (1991) (finding ineffective assistance of counsel where petitioner testified that accepted a plea because he misunderstood the amount of time that he could have received upon conviction at trial); *State v. Armstrong*, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975) (stating that the defendant must be apprised of the direct consequences, which are the direct and immediate results, of a guilty plea). *See also State v. Reed*, 332 S.C. 35, 39, 40, 503 S.E.2d 747, 749 (1998) (noting that for a criminal defendant to be competent to stand trial, the defendant must have "a rational as well as factual understanding of the proceedings against him," and finding a defendant competent to stand trial when a physician concluded that the defendant "had a factual knowledge of the charges against him, the potential penalty he faced and his options in pleading.") (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)) (emphasis added). Thus, because Mr. Williams did not have a correct understanding of the sentence that he faced when proceeding to trial, he was not competent to stand trial.

mandatory sentence of LWOP. The Court found that without knowledge of a mandatory LWOP sentence, the petitioner "could not make an informed decision about whether to accept or reject a State's plea offer [and thus the petitioner] has fulfilled his burden of showing that his counsel's representation fell below an objective standard of reasonableness." *Id.* at 813 (quotation omitted).

Similarly, in *Villegas v. Yearwood*, 131 Fed. App'x 93 (9th Cir. 2005), the Ninth Circuit Court of Appeals reversed the district court's denial of a claim of ineffective assistance of counsel where the petitioner's trial counsel failed to advise that proceeding to trial would implicate a mandatory sentence of LWOP. The court found that counsel's failure to inform the petitioner about the "crucial distinction" between a possible sentence of LWOP and a mandatory sentence of LWOP amounted to ineffective assistance of counsel because there was a reasonable probability that the petitioner would have accepted the prosecution's offer of 15 years to life if he had been properly informed of the consequences of proceeding to trial. *Id.* at 95.

Having established that the "prevailing professional norms" require that counsel to inform defendants of the mandatory nature of their potential sentence, the evidence presented at the PCR hearing establishes that trial counsel failed to inform Mr. Williams that the State could seek, and later did seek, mandatory LWOP. As such, trial counsel was ineffective.

Mr. Williams' actions during plea negotiations, and his testimony during the PCR hearing reflects that he did not understand that LWOP meant mandatory LWOP. Mr. Williams—who suffered from a learning disability, although trial counsel was unaware of that fact even though it was in Petitioner's records—was arrested for selling only 0.3

grams of drugs worth approximately $15 and testified that he thought that "[t]he judge could give me anything from zero, no time, to life without parole." (App. p. 409:18-25; 421:21-23.) His actions during plea negotiations bear out this stated belief because he rejected a three-year deal, five-year deal, and a ten-year deal. (App. p. 443:9-17.) And nowhere on the State's notice of intent to seek LWOP did it say that LWOP was a mandatory sentence.

Moreover, trial counsel testified during the PCR hearing that he did not know whether he informed Mr. Williams that LWOP meant mandatory LWOP. Counsel stated, "I knew then the case **was possible** life without parole, and I advised him to take the deal because the risk was very high, but -- so I don't remember specifically what we discussed about that parole. I did **imply** that it was **up to** life, so if I advised him, it would have been that this -- if they served notice on him that he **could** get life without parole." (App. p. 425:12-21 (emphasis added).) Trial counsel later testified that although he discussed the LWOP with Mr. Williams, "I can't remember that issue coming up with him ever asking, you know, is it up to life or is it mandatory life? I don't remember discussing that specific issue . . . ." (App. p. 427:14-17.)

After Mr. Williams was convicted, the trial judge suggested that Williams did not understand that he would be sentenced to mandatory LWOP: "[Y]ou're correct, mine is without any discretion, but clearly this case, the facts observed, and the fact of recent convictions, -- there was a gentleman this morning that entered a plea to avoid. I think that he finally perceived the gravity of the situation; *unfortunately some don't, and Mr. Williams falls into that.*" (*Id.* at 382:15-22) (emphasis added).

Finally, appellate counsel testified at the PCR hearing that it was "extremely apparent" that Mr. Williams "had no idea that if he was convicted the only choice the Court had was to sentence him to life without parole. . . . It's very apparent he did not understand." (App. p. 413:19-23, 414:7.) His appellate counsel was shocked that Mr. Williams rejected a plea offer for ten years, let alone the offers for three years and five years. (App. p. 413:24 to 414:6.)

The PCR Court erred in several respects in failing to find ineffective assistance of counsel when presented with the foregoing evidence, and the Court of Appeals erred in failing to address any of these points:

- The PCR Court erred in completely discounting Mr. Williams' testimony that he thought that "[t]he judge could give me anything from zero, no time, to life without parole," (*Id.* at 409:18-25; 421:21-23), particularly when considering the actions of Mr. Williams in rejecting a plea deal of three years where mandatory LWOP was at stake. Without any explanation, the PCR Court found, "I do not find the Applicant credible. I think he has a hindsight recollection of what actually happened during the course of these proceedings . . . ." (*Id.* at 443:2-4.)
- The PCR Court erred in completely discounting sworn testimony from a member of the South Carolina Bar who is in good standing. The PCR Court found, "Appellate counsel, Mark Peper, Esquire's, [sic] testimony was based on hindsight which was founded on his relationship with the Applicant." (*Id.* at 4.)

- The PCR Court erred in finding that trial counsel "explained to [Mr. Williams] that LWOP was his only possible sentence if convicted." (*Id.* at 7.) Such a finding is unsupported by trial counsel's testimony, discussed *supra*.
- The PCR Court erred in finding that "the trial court explained to Applicant that the plea offer expires when the jury comes in and then LWOP is the only possible sentence if convicted." (*Id.* at 8.) Rather, the trial court's lone mention that "the only sentence is LWOP" was directed to counsel, not to Mr. Williams.
- The PCR Court erred in finding that Mr. Williams knew the mandatory nature of LWOP based on "standard colloquy for the plea judge to advise a defendant if a charge is a strike offense and the potential consequences of future strikes." (*Id.* at 8.) In fact, the PCR Court admitted that this was an "extrapolati[on]" because the court "[didn't] know who he pled before" and did not have the transcripts at issue. (App. p. 447:12-14.)

Accordingly, the evidence demonstrates that trial counsel did not inform Mr. Williams of the mandatory nature of LWOP, and therefore counsel provided ineffective assistance.

The fact that Mr. Williams did not understand that LWOP meant <u>mandatory</u> LWOP prevented him from making an informed plea decision and prevented him from understanding the risks of rejecting plea offers and proceeding to trial. Accordingly, had counsel properly informed Mr. Williams of the risk of mandatory LWOP, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different" because Mr. Williams would have accepted a three-year, five-year, or ten-year plea offer instead of proceeding to trial where he was sentenced to LWOP. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (quoting *Strickland*, 446 U.S. at 688)).

Mr. Williams' case is akin to *Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999) and *State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980), in that Mr. Williams did not understand that the charges against him carried a mandatory minimum sentence, and Mr. Williams' trial counsel testified that he has no specific recollection of informing Mr. Williams that LWOP meant mandatory LWOP, just that he did "imply" that Mr. Williams "could" receive "up to" LWOP. Thus—as in *Johnson v. State*, 712 S.E.2d 811 (Ga. 2011) and *Villegas v. Yearwood*, 131 Fed. Appx. 93 (9th Cir. 2005)—trial counsel was ineffective for failing to stress the "crucial distinction" between possible LWOP and mandatory LWOP and thereby prejudicing and preventing Mr. Williams from making an informed decision about whether to accept any of the State's plea offers of three years, five years, or ten years. Nor did the trial court cure the inadequacies of counsel by mentioning LWOP because Mr. Williams was never asked whether he understood that proceeding to trial would result in a mandatory sentence of LWOP if convicted, and all discussion of LWOP was in passing between the court and counsel. (App. p. 175:24-25; 176:1-5; 179:5-14); *see Pittman*, 337 S.C. at 599, 524 S.E.2d at 625 (finding that the discussion of the mandatory minimum sentence that was mentioned in passing could not cure the inadequacy of failing to inform the defendant of the mandatory minimum sentence). As such, this Court should issue a writ and review the Court of Appeals' decision in this matter.

CONCLUSION

For these reasons, and particularly considering the unjust result of Mr. Williams' trial, this Court should issue a writ and review the Court of Appeals' decision in this matter.

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson, Circuit Court Judge

Case No. 2010-CP-10-3800
Appellate Case No. 2011-201112

Onrae Williams, #284437, ... Petitioner,

v.

State of South Carolina, ... Respondent.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Petitioner Onrae Williams, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Petition for a Writ of Certiorari

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July 11, 2016