

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC SUPREME COURT

Appeal from Charleston County
The Honorable Deadra Jefferson, Circuit Court Judge

Appellate Case No. 2016- 001456

ONRAE WILLIAMS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
QUESTION PRESENTED	1
STATEMENT OF THE CASE.....	2
ARGUMENT.....	3
CONCLUSION.....	13

TABLE OF AUTHORITIES

Cases:

<u>Butler v. State</u> , 286 S.C. 441, 334 S.E.2d 813 (1985).	4
<u>Cherry v. State</u> , 300 S.C. 115, 386 S.E.2d 624 (1989).	4
<u>Simuel v. State</u> , 390 S.C. 267, 701 S.E.2d 738 (2010).	12
<u>State v. Ellis</u> , 345 S.C. 175, 547 S.E.2d 490 (2001).	8
<u>State v. England</u> , 271 S.C. 129, 245 S.E.2d 608 (1978).	8
<u>State v. Standard</u> 351 S.C. 199, 569 S.E.2d 325 (2002).	6, 7, 8, 10
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).	4, 5
<u>United States v. Brown</u> , 324 F. App'x 231, 233 (4th Cir. 2009).	9
<u>United States v. Crumblin</u> , 441 F. App'x 180, 183 (4th Cir. 2011), <u>cert. denied</u> , 132 S. Ct. 1037 (2012).	9
<u>Wolfe v. State</u> , 326 S.C. 158, 485 S.E.2d 369 (1997).	5

Other Authorities:

S.C. Code Ann. § 17-19-10, et al. (1976).	5
S.C. Code Ann. §17-25-45 (1976).	5, 6, 7
S.C. Code Ann. § 63-19-20, et al. (1976).	8

QUESTION PRESENTED

- I. Whether the Court of Appeals properly affirmed the lower court's ruling that counsel was not ineffective for failing to challenge the Petitioner's sentence enhancement based on a prior conviction for which the Petitioner received a Youthful Offender Act sentence when use of the conviction for enhancement was proper and counsel had no basis to challenge the enhancement?

- II. Whether the Court of Appeals properly affirmed the lower court's ruling that counsel properly explained to the Petitioner that life without parole (LWOP) was the only possible sentence the Petitioner could receive if convicted at trial when counsel and the trial court both advised the Applicant of the mandatory nature of the life without parole sentence he would receive if convicted at trial?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. The Petitioner was indicted at the May 2005 term of the Charleston County Grand Jury for distribution of crack cocaine- 3rd offense (2005-GS-10-3592) and distribution of crack cocaine within proximity of a school (2005-GS-10-3592). Jason King, Esquire, represented the Petitioner. The Petitioner proceeded to trial on January 16-17, 2007, after which a jury found him guilty as indicted. The Honorable R. Markley Dennis, Jr. sentenced the Petitioner to confinement for life without parole (LWOP) for each offense.

A timely Notice of Appeal was filed on the Petitioner's behalf on January 25, 2007 and an appeal was perfected. Mark Peper, Esquire, represented the Petitioner on appeal. After full briefing by both sides, the South Carolina Court of Appeals affirmed the Petitioner's convictions and sentences. State v. Williams, Opinion No. 4447 (S.C. Ct. App. October 22, 2008). The Petitioner's Petition for Rehearing was denied on December 19, 2008. The Petitioner's Petition for Writ of Certiorari to the South Carolina Supreme Court was denied by Order dated October 21, 2009. The Remittitur was issued on October 26, 2009.

The Petitioner filed an application for post-conviction relief on May 11, 2010 and amended the application on May 16, 2011. The Respondent made its Return on August 18, 2010 which was filed on August 20, 2010. An evidentiary hearing into the matter was convened on May 24, 2011 at the Charleston County Courthouse. The Petitioner was present at the hearing and represented by Elizabeth Scott Moise, Esquire, and Matthew E. Brown, Esquire. Matthew Friedman, Esquire, of the South Carolina Office of the Attorney General represented the Respondent. Testifying at the hearing were the Petitioner, trial counsel- Jason King, and

appellate counsel- Mark Peper. By Order dated August 1, 2011, the Honorable Deadra L. Jefferson denied and dismissed the Petitioner's application with prejudice. The Petitioner subsequently filed a Motion to Alter and Amend and the Respondent filed a Return to the motion. By Order dated August 31, 2011, the Court of Appeals denied the Petitioner's Motion to Alter and Amend. The Petitioner filed a timely Notice of Appeal. The Court of Appeals granted Petition for Writ of Certiorari by Order dated May 22, 2014. On January 13, 2016, the Court of Appeals affirmed the lower court's findings. Petitioner filed a Motion for Rehearing, which was denied on June 10, 2016. Petitioner filed a Petitioner for a Writ of Certiorari to this Court on July 16, 2016. This Return to the Petition for a Writ of Certiorari follows.

ARGUMENT

The Petitioner asserts that the post-conviction relief court erred by finding trial counsel did not provide ineffective assistance of counsel. The Respondent submits probative evidence exists to support the post-conviction relief court's findings. The lower court's ruling should be affirmed.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. 5

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

I. The Court of Appeals properly affirmed the lower court's finding that counsel was not ineffective for failing to challenge the use of the Petitioner's prior conviction to enhance the Petitioner's sentence to life without parole when the Petitioner's prior 2003 conviction for which he received a youthful offender sentence was properly used for enhancement purposes.

The Petitioner claims the Court of Appeals erred by affirming the lower court's finding that trial counsel was not ineffective for failing to challenge the use of the Petitioner's 2003 drug conviction to enhance a sentence to life without parole pursuant to S.C. Code Ann. §17-25-45 (1976). The Petitioner argues there is an ambiguity in the law and trial counsel should have argued the Petitioner's 2003 drug conviction sentence should not have been used for enhancement purposes since the Petitioner received a sentence under the Youthful Offender Act (YOA)¹. The Respondent submits there is no ambiguity in South Carolina law and a conviction for which a defendant received a youthful offender sentence can be used to enhance a sentence pursuant to S.C. Code Ann. § 17-25-45.

On January 16-17, 2007, the Petitioner proceeded to trial for distribution of crack cocaine- 3rd offense (2005-GS-10-3592) and distribution of crack cocaine within proximity of a school (2005-GS-10-3593). The Petitioner was found guilty as indicted by a jury. During the Petitioner's sentencing proceeding, the State proffered two certified convictions in support of its

¹ S.C. Code Ann. § 17-19-10, et al. (1976).

intention to seek life without parole pursuant to S.C. Code Ann. § 17-25-45(B)². The State relied on two prior convictions for possession with intent to distribute cocaine in proximity of a school (1999-GS-10-7722 and 2003-GS-10-0171) to show the Petitioner had two prior serious offenses. (App. 380-381). For the 1999 distribution of cocaine in proximity of a school conviction, the Petitioner received a five year sentence. (App. 486). For the 2003 distribution of cocaine in proximity of a school conviction, the Petitioner received a Youthful Offender Act sentence not to exceed one to six years. (App. 463). Trial counsel made no challenge to the prior convictions being serious offenses, but objected to the sentence of life without parole on a drug offense as constituting cruel and unusual punishment. (App. 382). Because the Petitioner's conviction for distribution of crack cocaine within proximity of a school constituted a third serious offense pursuant to S.C. Code Ann. § 17-25-45(C)(2), the Court sentenced the Petitioner to life without parole. (App. 384).

The Respondent submits trial counsel was not ineffective for failing to challenge the use of the Petitioner's 2003 drug conviction for sentence enhancement purposes. The fact that the Petitioner received a sentence under the Youthful Offender Act for his 2003 drug conviction does not preclude the use of this conviction to enhance a sentence to life without parole. Counsel cannot be found ineffective for his performance because he had no basis to challenge the use of the Petitioner's 2003 drug conviction and the Petitioner was properly sentenced to life without parole.

² S.C. Code Ann. § 17-25-45 outlines what is commonly referred to as the two-strikes/three-strikes law. Under the "three-strikes law" a person can be sentenced to life without parole after being convicted of **three serious offenses**. Under the "two-strikes law" a person can be sentenced to life without parole after being convicted of **two most serious offenses**. For purposes of this statute, a "conviction means any conviction, guilty plea, or plea of nolo contendere. S.C. Code § 17-25-45(C)(3) (1976) (emphasis added). To "distribute, sell, manufacture, or possess with intent to distribute controlled substances within the proximity of a school" is defined as a serious offense. S.C. Code § 17-25-45(C)(2)(b) (1976).

The South Carolina Supreme Court in State v. Standard explicitly held that a conviction for which a person receives a Youthful Offender Act sentence is a conviction for purposes of sentencing under S.C. Code Ann. § 17-25-45(C)(3). 351 S.C. 199, 569 S.E.2d 325 (2002). In Standard, the defendant committed an armed robbery two months prior to his 16th birthday. Standard was waived up to general sessions court where he pled guilty to armed robbery at age 17 and was sentenced to a youthful offender sentence not to exceed six years. Standard subsequently was convicted of first degree burglary and grand larceny. Based upon his prior “most serious” armed robbery conviction, the trial court sentenced Standard to life without parole for burglary under the “two-strikes law”. Id. at 201, 569 S.E.2d at 327.

In Standard, the Court held the defendant “was tried and adjudicated as an adult, such that his guilty plea to armed robbery in general sessions court [for which the Petitioner received a youthful offender sentence] is a “conviction” for purposes of sentencing under S.C. Code Ann. § 17-25-45(C)(3).” Id. at 203, 569 S.E.2d at 328. S.C. Code Ann. § 17-25-45(C)(3) defines conviction for purposes of the two-strikes/three-strikes statute as “any conviction, guilty plea, or plea of nolo contendere.” It is clear from Standard, that an adult conviction for which a defendant received a youthful offender sentence is a conviction that can be used to enhance a sentence to life without the possibility of parole pursuant to S.C. Code Ann. § 17-25-45.

The Petitioner’s case is analogous to Standard. Like in Standard, the Petitioner pled guilty as an adult³ to an offense in general sessions court, was tried and adjudicated as an adult, and received a youthful offender sentence. (App. 463). Also, like in Standard, the Petitioner’s prior conviction for which he received a youthful offender sentence was properly used by the Court to enhance the Petitioner’s sentence for a subsequent conviction to life without parole.

³ The record reflects on the Petitioner’s sentencing sheet, the Petitioner was 20 years old in 2003 when he pled guilty to distribution of cocaine within proximity of a school. (App. 463).

Based on the Court's finding in Standard, trial counsel had no basis to challenge the use of the Petitioner's prior 2003 drug conviction for sentencing enhancement.

The Petitioner claims that his case should be distinguished from Standard because Standard involved sentence enhancement under the two-strike law for most serious offenses and his case involved sentence enhancement under the three-strike law for serious offenses. The Respondent submits this distinction does not affect the applicability of the Court's clear holding in Standard to the Petitioner's case. The two-strike and three-strike laws are enumerated in the same statute- S.C. Code Ann. § 17-25-45 and are both governed by the same definition of "conviction" cited by the Court in Standard. The Petitioner's argument is without merit.

The Petitioner also claims that a conviction in which a defendant receives a sentence pursuant to the Youthful Offender Act is not an adult conviction. The Respondent submits the Petitioner's 2003 conviction for distribution of cocaine within proximity of a school was an adult conviction despite the Petitioner receiving a youthful offender sentence.

Juvenile adjudications may not be used to enhance a sentence under the recidivist statute. State v. Ellis, 345 S.C. 175, 179, 547 S.E.2d 490, 492 (2001).⁴ However, a juvenile adjudication is different from a sentence as a youthful offender. In South Carolina, a juvenile is a "person less than seventeen years of age." S.C. Code Ann. § 63-19-20(1). A juvenile is also subject to the exclusive jurisdiction of the family court. State v. England, 271 S.C. 129, 130, 245 S.E.2d 608, 609 (1978).

⁴ The Respondent notes that the Supreme Court explicitly distinguished its holding in Ellis from its holding in State v. Standard. The Court stated in Standard, "[r]ecently, in State v. Ellis (citation omitted), we held a juvenile adjudication is not a conviction, guilty plea, or plea of nolo contendere, such that it may not be used to invoke the mandatory LWOP provisions of the recidivist statute. Unlike Ellis, however, Standard here was tried and adjudicated as an adult, such that his guilty plea to armed robbery in general sessions court is a conviction for purposes of sentencing under S.C. Code Ann, § 17-2-45(C)." Standard, 351 S.C. at 203, 569 S.E.2d at 328.

Although South Carolina courts have not had an opportunity to address whether a youthful offender sentence is a “juvenile conviction,” federal courts have held that sentences under South Carolina’s Youthful Offender Act (“YOA”) are not “juvenile convictions.” See United States v. Crumblin, 441 F. App’x 180, 183 (4th Cir. 2011), cert. denied, 132 S. Ct. 1037 (2012) (“Crumblin’s 1994 conviction was not a juvenile conviction, despite his YOA sentence...”); United States v. Brown, 324 F. App’x 231, 233 (4th Cir. 2009) (“We agree that the convictions under the state Youthful Offender Act were properly considered in designating Brown a career offender.”).

The Court in Crumblin specifically held that YOA sentences are not juvenile convictions because the family court has exclusive jurisdiction over juvenile offenses. Crumblin, 441 F. App’x at 183. Because the YOA is a sentencing option for individuals up to twenty-four (24) years old, an individual can be sentenced under the YOA and not be a juvenile. Id. The opinion in Crumblin is especially instructive because the District of Columbia, like South Carolina, also gives the Superior Court Family Division exclusive jurisdiction over juveniles. Logan, 483 A.2d at 667. Also, individuals who are not juveniles may be sentenced under both the federal youth corrections act and the YOA. Compare 18 U.S.C. 5006(e) (defining “youth offender” as individual under 22) and S.C. Code Ann. § 24-19-10(d) (defining “youthful offender as various individuals under 25).

The Respondent submits the Petitioner’s 2003 conviction for distribution of cocaine within proximity of a school was not a juvenile conviction and was properly used for sentencing enhancement. The Petitioner, who was 20 years old at the time, was not a juvenile when he pled guilty to the 2003 drug offense in general sessions court. The Petitioner’s 2003 drug offense was also not adjudicated in family court. The Respondent submits there is probative evidence to

support the lower court's finding that the Petitioner failed to carry his burden of proving counsel was ineffective for failing to challenge the use of the Petitioner 2003 drug conviction to enhance a sentence on the basis that the 2003 conviction in which the Petitioner received a youthful offender sentence could not be used for enhancement purposes. The Respondent submits the Court's finding in State v. Standard clearly shows the use of the Petitioner's 2003 conviction to enhance a sentence to life without parole pursuant to S.C. Code Ann. § 17-25-45 was proper. The Respondent submits further the Petitioner was not prejudiced by counsel's failure to advance a challenge based on his 2003 conviction since a challenge on the basis asserted by the Petitioner would likely have been futile. This Court should affirm the lower court's denial of post-conviction relief.

II. The Court of Appeals properly affirmed the lower court's finding that trial counsel properly advised and explained to the Applicant that life without the possibility of parole was the Petitioner's only possible sentence if convicted at trial when counsel provided credible testimony that he never indicated to the Petitioner that the LWOP sentence would be anything but mandatory and the Petitioner never indicated to the trial court that he was not aware the LWOP sentence was mandatory.

The Petitioner claims the Court of Appeals erred in affirming the lower court's finding that counsel was ineffective for failing to inform him of the mandatory nature of the life without the possibility of parole sentence he would face if he went to trial. The Respondent submits the Petitioner failed to carry his burden of proving he was unaware he would receive a mandatory life without parole sentence if convicted at trial. At the evidentiary hearing, counsel provided credible testimony that he had no problems communicating with the Petitioner and that he advised the Petitioner that if he was served notice and convicted of a third strike he could get life without parole. (App. 425-425). Counsel testified further that when explaining life without parole to the Petitioner he "wouldn't have implied in any way that it was not a mandatory life without parole" sentence. (App. 427). The lower court found trial counsel's testimony to be

credible. (App. 6). See Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999) (Great deference is given to the PCR court's findings on matters of credibility, as the reviewing court lacks the opportunity to observe witnesses).

The Respondents submits counsel's credible testimony regarding his advice to the Petitioner about the life without parole sentence he was facing is sufficient to support the lower court's finding that the Petitioner failed to carry his burden of proving counsel did not properly advise him of the mandatory nature of the life without parole sentence. However, the trial court also made repeated comments throughout the Petitioner's trial about the mandatory nature of the life without parole sentence the Petitioner was facing. The Respondent submits any alleged deficiency by counsel was cured by the Court's comments during the Petitioner's trial. The following exchanges took place during the Petitioner's trial:

The Court: Thank you sir. You all made that call. Did you offer something other than life without parole?

Solicitor: Yes, sire we did.

The Court: That being the case, you've made your choice. If he is going to be burned he'll be burned. No questioned about that. Okay. Thank you very much. (App. 175-176).

Trial Counsel: Judge, I think Numbers 13 and 14, I would prefer the Court's standard charge on those 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's made his decision.** Do you understand?

Trial Counsel: Yes your honor. (App. 179) (emphasis added).

The Court: The reviewing Court—you'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. (App. 382) (emphasis added).

The Respondent submits the trial court's comments before the start of the Petitioner's trial and during the Petitioner's sentencing proceeding clearly show the Petitioner was made

aware of the mandatory nature of the life without parole sentence he was facing if convicted. The Respondent also submits the Petitioner never indicated to the Court during the course of his trial that that he was not aware the life without parole sentence he was facing would be mandatory. The Petitioner spoke during his sentencing proceeding and never indicated he did not know LWOP was mandatory. (App. 383).

Lastly, the Petitioner's testimony at his post-conviction relief hearing is the sole evidence presented by the Petitioner in support of his claim that counsel did not advise him of the mandatory nature of the life sentence he was facing if he were convicted at trial. This Court should not consider the Petitioner's testimony dispositive of this issue since the lower court found the Petitioner's testimony at the post-conviction relief hearing was not credible. In the Order of Dismissal, the lower court found "the Applicant's testimony is not credible while also finding that trial counsel's testimony is credible." (App. 6). This Court should give great deference to the PCR judge's findings where matters of credibility are involved. Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). The Respondent submits the Petitioner has failed to carry his burden of proving counsel was ineffective for failing to advise the Petitioner of the mandatory nature of the life without parole sentence he was facing if convicted at trial. This Court should affirm the Court of Appeals affirmation of the lower court's denial of post-conviction relief.

CONCLUSION

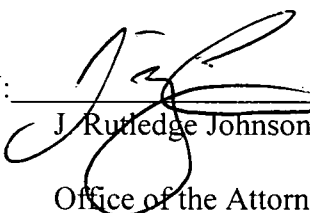
For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the Court of Appeals and PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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Certiorari to Charleston County
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ONRAE WILLIAMS,

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**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

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This 17th day of August, 2016


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