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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO THE COURT OF APPEALS
Appeal from Richland
The Honorable James R. Barber, Circuit Court Judge

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Opinion No. 2016-UP-132 (S.C. Ct. App. filed March 9, 2016)

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Appellate Case No. 2016-001534

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WILLIS WEARY, PETITIONER-RESPONDENT,

v.

STATE OF SOUTH CAROLINA, RESPONDENT-PETITIONER.

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# SUPPLEMENTAL APPENDIX

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**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Willis Weary, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2011-201588

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**ON WRIT OF CERTIORARI**

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Appeal From Richland County
G. Thomas Cooper, Jr., Trial Judge
James R. Barber, III, Post-Conviction Relief Judge

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Unpublished Opinion No. 2016-UP-132
Heard February 2, 2015 – Filed March 9, 2016

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**REVERSED**

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Attorney General Alan McCrory Wilson and Assistant Attorney Megan E. Harrigan, both of Columbia, for Petitioner.

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Respondent.

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**PER CURIAM:** The State of South Carolina (the State) appeals the post-conviction relief court's (PCR court) order granting Willis Weary's application for post-conviction relief and remanding his case for sentencing on second-degree burglary. The State argues the PCR court erred in determining that Weary's trial counsel provided ineffective assistance by failing to investigate and properly challenge—at the directed verdict stage in a trial for first-degree burglary—two prior burglary convictions, which elevated Weary's charge to first-degree burglary. The State further argues Weary's sentence was appropriately enhanced based on his three prior burglary convictions. We reverse.

## I. Deficient Performance

On April 19, 2006, the Richland County grand jury indicted Weary for first-degree burglary, alleging the August 20, 2005 burglary occurred "in the nighttime." The indictment was subsequently amended on January 25, 2007, to include the additional allegation that Weary had "a prior record of two or more convictions for burglary." Following a jury trial, Weary was convicted of first-degree burglary and sentenced to eighteen years of imprisonment. The PCR court subsequently granted Weary's application for post-conviction relief and remanded for resentencing on the charge of second-degree burglary. At issue is whether the PCR court erred in finding that trial counsel was ineffective for failing to investigate Weary's prior burglary convictions.

In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). "A decision 'not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.'" *Simpson v. Moore*, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006) (quoting *Strickland*, 466 U.S. at 691).

Here, Weary testified that he never discussed his prior burglary convictions with trial counsel. Likewise, trial counsel did not recall discussing the prior convictions with Weary and did not have any notes reflecting such a discussion. Despite the

fact that the indictments and records related to the prior burglaries were available to trial counsel before Weary's trial on the 2005 burglary charge, trial counsel could not confirm that he pulled or reviewed the documents and admitted that he did not have a copy of them in his file. Trial counsel testified that he should have investigated Weary's prior convictions. He did not recall conducting any legal research regarding the prior convictions, did not have any legal research in his file, and did not cite any specific case law or statutes at trial. Therefore, we find no error in the decision of the PCR court finding that trial counsel failed to render reasonably effective assistance under prevailing professional norms. This finding does not conclude our analysis, however, because we must determine if Weary suffered any prejudice and to do that, analyze his prior convictions.

## II. Prior Burglary Convictions

The State argues the PCR court erred in finding Weary's two prior burglary convictions do not satisfy the requirements for a subsequent first-degree burglary conviction based on the "two or more prior convictions" element.

A person is guilty of first-degree burglary "if the person enters a dwelling without consent and with intent to commit a crime in the dwelling and . . . the burglary is committed by a person with a *prior record of two or more convictions for burglary* or housebreaking or a combination of both; or the entering or remaining occurs *in the nighttime*." S.C. Code Ann. § 16-11-311(A)(2)-(3) (2003) (emphasis added). Our supreme court has explained that section 16-11-311 "allows the State to punish Defendant's recidivism by using his previous convictions to elevate actions that would normally constitute a burglary, second degree charge to a charge of burglary, first degree." *State v. Washington*, 338 S.C. 392, 396, 526 S.E.2d 709, 711 (2000). In seeking an enhanced punishment under this section, "the State is punishing Defendant to a greater extent for the current offense due to his repetitive illegal actions." *Id.* at 397, 526 S.E.2d at 711. "Considering this interpretation of section 16-11-311(A)(2), it is clear that the legislative policy behind the enactment of this section is to provide 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because it is a repetitive one.'" *State v. Zulfer*, 345 S.C. 258, 263, 547 S.E.2d 885, 887 (Ct. App. 2001) (quoting *Washington*, 338 S.C. at 396, 526 S.E.2d at 711).

For the purpose of sentencing, "the court shall treat as one offense any number of offenses which have been committed at times *so closely connected in point of time that they may be considered as one offense*, notwithstanding under the law they constitute separate and distinct offenses." S.C. Code Ann. § 17-25-50 (2014)

(emphasis added). *See, e.g.*, S.C. Code Ann. § 56-1-1020 (2006) (explaining that multiple traffic offenses committed within a one-day period "shall be treated for the purposes of this article as one offense"); *State v. Woody*, 359 S.C. 1, 3–4, 596 S.E.2d 907, 908 (2004) (rejecting the State's position that defendant's two prior armed robberies, which arose from a single incident at the same time and at the same location, did not constitute one offense); *State v. Boyd*, 288 S.C. 206, 209–10, 341 S.E.2d 144, 146 (Ct. App. 1986) ("[W]e hold that where a defendant has been convicted on two or more counts for the violation of the Controlled Substance Act arising out of simultaneous acts committed in the course of a single incident, the convictions will be considered as only one for the purpose of sentencing under a subsequent conviction for a violation of the Controlled Substance Act."). *But see Bryant v. State*, 384 S.C. 525, 533–34, 683 S.E.2d 280, 284–85 (2009) (explaining that when a defendant commits three separate armed robberies on different days, at different locations, and the robberies involved different victims, the "armed robberies may not, as a matter of law, be considered 'one offense'"); *Koon v. State*, 372 S.C. 531, 534, 643 S.E.2d 680, 682 (2007) (concluding that "the March 28th burglary of a different building, in a different location, which occurred two weeks later [than the March 13th and 14th burglaries], clearly constitutes a separate burglary").

Here, Weary's two prior second-degree burglaries took place within ten to fifteen minutes of one another on November 24, 2000, as part of a single crime spree. Further, the residences where the burglaries took place are close in proximity. Despite the fact that the November 24, 2000 burglaries involved different victims, we find the PCR court's determination that Weary provided sufficient evidence that the burglaries occurred within a single crime spree and were so closely connected in point of time that they may be considered as one offense is supported by the evidence.

Although the State only introduced evidence of two prior burglary convictions at trial, the record reflects that Weary has three prior burglary convictions. Even if trial counsel had argued that the two prior burglaries presented were too close in time to be considered two separate offenses, the first-degree burglary charge would still have gone to the jury because the State would have simply introduced its evidence of Weary's third prior burglary, which was not closely related in time to the other priors and would clearly have qualified as an additional burglary offense. Therefore, we reverse the PCR court's finding that Weary's two prior burglary convictions did not satisfy the requirements for a subsequent first-degree burglary conviction based on the "two or more prior convictions" element.

## III. Prejudice

The State further argues that even if the PCR court did not err in determining trial counsel was ineffective for failing to investigate Weary's prior burglary convictions, Weary cannot show any resulting prejudice. We agree.

To show prejudice, a PCR applicant must establish that the deficient performance prejudiced the applicant to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A 'reasonable probability' is less than a preponderance of the evidence but still 'probability sufficient to undermine confidence in the outcome.'" *Weik v. State*, 409 S.C. 214, 233, 761 S.E.2d 757, 767 (2014) (quoting *Strickland*, 466 U.S. at 693–94). "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (quoting *Strickland*, 466 U.S. at 693).

Here, the record reflects that Weary had three prior burglary convictions, two of which could not be considered as "so closely connected in point of time that they may be considered as one offense." Therefore, we reverse the finding of the PCR court that but for trial counsel's deficiency, a different outcome would have resulted at trial.[1]

Accordingly, the decision of the PCR court is

**REVERSED.**

**SHORT, LOCKEMY, and MCDONALD, JJ., concur.**

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[1] Because we reverse on the *Strickland* prejudice element, we decline to address the question of whether the PCR court's remedy of remanding for sentencing on second-degree burglary, as opposed to granting a new trial on first-degree burglary, was proper. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding the appellate court need not address remaining issues when disposition of a prior issue is dispositive).

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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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WILLIS WEARY,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2011-201588

---

Appeal from Richland County
G. Thomas Cooper, Jr., Trial Judge
James R. Barber, III, Post-Conviction Relief Judge

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Opinion No. 2016-UP-132

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PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, counsel for Willis Weary petitions the Court for rehearing. Counsel respectfully submits that this Court misapprehended the standard of review in post conviction relief cases. The evidence from the PCR hearing supports the PCR judge's findings of prejudicial deficient performance. Under the any evidence standard of review, this Court should affirm the finding of the PCR judge. Additionally, counsel respectfully submits that in finding that "[e]ven if trial counsel had argued that the two prior burglaries presented were too close in time to be considered two separate offenses, the first –degree burglary charge would still have gone to the

jury because the State would have simply introduced its evidence of Weary's third prior burglary, which was not closely related in time to the others and would clearly have qualified as an additional burglary offense," this Court overlooked the fact, as found by the PCR judge in the order of dismissal, that first, it is speculative to assume what the State might have done or been able to do in regard to a third burglary conviction and second, at the time the directed verdict motion was made the State had already rested its case and would not have been allowed to present evidence of a third burglary conviction. The State failed to meet its burden of proof in regard to prior convictions for enhancement pursuant to the burglary first statute, S.C. Code §16-11-311(A)(2). The case should have been submitted to the jury as a burglary second degree.

On January 25, 2007, three days prior to trial, the State amended the indictment to include as an element of burglary first degree the allegation that Petitioner had two or more prior convictions for burglary. (App. p. 6, lines 16-24; pp. 482-483). At trial the State introduced two sentencing sheets for two prior convictions for burglary second degree, indictments #2001-GS-40-9127 and #2001-GS-40-9128. The State then rested their case. (App. p. 281, lines 17-p.282, lines 1-3). Counsel for petitioner moved for a directed verdict on burglary first degree arguing that the State failed to present sufficient evidence of burglary first degree. Specifically, trial counsel argued that the case should be sent to the jury as a burglary second because the State did not disprove that the two prior convictions, the element required for burglary first degree, were "so closely linked as to basically constitute one offense." (App. p. 283, lines 2-14). Trial counsel argued, ". . . [M]y understanding of the law, in order to use the enhancement, the two offenses cannot be so closely linked as to basically constitute the same offense. I don't think that there is anything on these pieces of paper that indicates that these two cases aren't so linked." (App. p. 283, lines 9-14).

Trial counsel argued that the State failed to present evidence that the prior burglaries were months apart. The trial judge noted that the defense failed to present evidence that the burglaries took place on the same day to which trial counsel responded, "They have the burden of proof in this case." (App. p. 286, lines 23 – p. 287, lines 1-4). The trial judge denied the directed verdict motion.

Trial counsel erred in believing that the State was required to disprove that the prior convictions were closely related. Once the State presents evidence of prior convictions, the burden falls back to the defense to prove, as a matter of law, that the offenses were committed at times so closely connected in point of time that may be considered as one offense under S.C. Code §17-25-50. See generally Scott v. State, 334 S.C. 248, 513 S.E.2d 100 (1999). Trial counsel was deficient in failing to have been more familiar with the prior convictions so that he could have effectively argued that the prior convictions should be treated as one offense.

In the order granting relief the PCR judge wrote, "In summation, this Court finds that trial counsel was deficient in failing to investigate the Applicant's prior burglaries and research whether they should be considered a single incident. Trial counsel's deficiency resulted in the Applicant's charge being submitted to the jury as a First Degree Burglary. If not for trial counsel's deficiency a different outcome would have resulted." (App. p. 480). This Court correctly found that trial counsel provided ineffective assistance of counsel writing, "Therefore, we find no error in the decision of the PCR court finding that trial counsel failed to render reasonably effective assistance of counsel under prevailing professional norms." This Court correctly found that the two prior convictions relied upon by the State should have been treated as one offense pursuant to S.C. Code §17-25-50. "Despite the fact that the November 24, 2000 burglaries involved different victims, we find the PCR court's determination that Weary provided sufficient evidence that the burglaries occurred within a

single crime spree and were so closely connected in point of time that they may be considered as one offense is supported by the evidence."

Although this Court found deficient performance on the part of trial counsel for not investigating and presenting evidence that the two prior burglary convictions relied upon by the State were so closely connected that they should be treated as one offense, this Court found no prejudice. This Court wrote:

> Although the State only introduced evidence of two prior burglary convictions at trial, the record reflects that Weary has three prior burglary convictions. Even if trial counsel had argued that the two prior burglaries presented were too close in time to be considered two separate offenses, the first-degree burglary charge would still have gone to the jury because the State would have simply introduced its evidence of Weary's third prior burglary, which was not closely related in time to the other priors and would clearly have qualified as an additional burglary offense. Therefore, we reverse the PCR court's finding that Weary's two prior burglary convictions did not satisfy the requirements for a subsequent first-degree burglary conviction based on the "two or more prior convictions" element.

Counsel respectfully submits that in finding no prejudice resulting from the deficient performance of trial counsel this Court misapprehended the any evidence standard of review.

In McHam v. State, 404 S.C. 465, 472-73, 746 S.E.2d 41, 45 (2013), the South Carolina Supreme Court wrote:

> On certiorari in PCR cases, the Court applies an "any evidence" standard of review. Terry v. State, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). "This Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them," and it "will reverse the PCR judge's decision when it is controlled by an error of law." Suber v. State, 371 S.C. 554, 558–59, 640 S.E.2d 884, 886 (2007). This Court gives great deference to the PCR judge's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005).

The PCR judge's findings are supported by the evidence and are not controlled by an error of law. The PCR judge found "that trial counsel was deficient in failing to investigate the Applicant's prior burglaries and research whether they should be considered a single incident. Trial counsel's deficiency resulted in Applicant's charge being submitted to the jury as a First

Degree Burglary. If not for trial counsel's deficiency a different outcome would have resulted." (App. p. 480). In regard to the third burglary conviction relied upon by this Court in finding no prejudice, the PCR judge wrote, "The Respondent further argued that it was reasonable to speculate that had trial counsel provided the appropriate factual information regarding the prior convictions, then the State would have introduced the third burglary conviction into evidence. This speculative argument fails because the State had already rested its case." (App. p. 479). Respectfully, this Court failed to give any deference to the PCR judge's findings of fact and conclusions of law and instead substituted its own findings in regard to the third burglary conviction, speculating as to what the State might have done.

At trial the State relied solely on two prior burglary convictions, indictments #2001-GS-40-9127 and #2001-GS-40-9128 for the burglary first degree enhancement. While the State mentioned a third burglary conviction at sentencing (App. p. 365, line 20 – p. 366, lines 1-20), and an Order revoking probation for a burglary offense listing indictment #2001-GS-40-9125 is included in the Appendix, (App. p. 492), for whatever reason the State did not rely on this third burglary conviction at trial. The indictment and sentencing sheet for this third burglary conviction were not introduced at trial or at the PCR hearing and were not included in the Appendix. The third burglary conviction was never presented to the jury. The third burglary conviction was never argued to the judge as an enhancement. The prior conviction is an element of burglary first degree pursuant to S.C. Code §16-11-311(A)(2). State v. Hamilton, 327 S.C. 440, 486 S.E.2d 512 (Ct. App. 1997). The State failed to prove this element of burglary first degree.

In State v. Benton, 338 S.C. 151, 155, 526 S.E.2d 228, 230 (2000), the South Carolina Supreme Court wrote, "In State v. Hamilton, supra, the Court of Appeals held because two prior burglary and/or housebreaking convictions are an element of first degree burglary under § 16–

11–311(A)(2), the defendant cannot require the State to stipulate to the prior convictions in lieu of informing the jury about the prior convictions. This holding does not dilute the State's burden of proof in violation of due process. The State is still required to prove all the elements of first degree burglary beyond a reasonable doubt." The State failed to meet its burden of proof in regard to prior convictions for enhancement pursuant to the burglary first statute, S.C. Code §16-11-311(A)(2). See In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368, 375 (1970)(" [t]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

Respectively, this Court overlooked the fact that if counsel had properly argued during the motion for a directed verdict that the two offenses relied upon by the State should be treated as one offense, the State could **not** have simply introduced evidence of Weary's third prior burglary conviction because the State had rested. The two prior convictions are an element of burglary first degree. As an element of burglary first degree, the State is required to prove the prior convictions beyond a reasonable doubt. The State failed to prove beyond a reasonable doubt that Petitioner had two prior convictions for burglary. As correctly found by this Court, the two prior convictions relied upon by the State should have been treated as one offense pursuant to S.C. Code §17-25-50. "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). On appeal from the denial of a directed verdict, appellate courts must view the evidence and reasonable inferences in the light most favorable to the State. Id. If there is either any direct evidence or any substantial circumstantial evidence reasonably tending to prove the defendant's guilt, appellate courts must find that the trial judge properly submitted the case to the jury. State v. Cherry, 361

S.C. 588, 593–94, 606 S.E.2d 475, 478 (2004). Prior to the State resting and Petitioner moving for directed verdict of acquittal, the State failed to produce any evidence that Petitioner had two prior convictions for burglary. A properly argued directed verdict motion would have resulted in the case being submitted to the jury as a burglary second degree.

Based on the above arguments, Petitioner seeks rehearing and submits that this court should affirm of the PCR judge's finding of prejudicial deficient performance of trial counsel and remand for re-sentencing for burglary second degree.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

This 15th day of March, 2016.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Richland County
James R. Barber, III, Circuit Court Judge

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WILLIS WEARY,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2011-201588

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Megan E. Harrigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 15th day of March, 2016.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 15th day
of March, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

STATE OF SOUTH CAROLINA
In the Court of Appeals

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ON WRIT OF CERTIORARI
Appeal from Richland County

G. Thomas Cooper, Jr., Trial Judge
James R. Barber, III, Post-Conviction Relief Judge
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WILLIS WEARY,

Respondent,

vs.

STATE OF SOUTH CAROLINA,

Petitioner.

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Unpublished Opinion No. 2016-UP-132
Heard February 2, 2015 – Filed November March 9, 2016

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**THE STATE'S PETITION FOR REHEARING**

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On March 9, 2016, this Court reversed the post-conviction relief court's grant of relief to Respondent Willis Weary in an unpublished opinion. Willis Weary v. State, Op. No. 2016-UP-132 (Ct. App. filed March 9, 2016). In reaching this result, this Court held the post-conviction relief court erred in granting Weary resentencing for the lesser-included offense of second-degree burglary because Weary failed to show the necessary prejudice required for relief. This Court specifically found although the post-conviction relief court correctly found trial counsel deficient for failing to investigate Weary's prior burglary convictions, it erred in finding Weary was prejudiced by his counsel's deficient performance. This Court found although the post-conviction relief court's finding that Weary's two prior burglary convictions were so closely

connected as to constitute one offense was supported by the evidence, the post-conviction relief court erred in failing to consider Weary's third prior burglary conviction not closely related to the other two convictions. This Court determined Weary therefore did not suffer the requisite prejudice needed for relief because had trial counsel investigated the two prior burglaries and argued they should be considered one offense, the State would have introduced the third prior burglary conviction. This Court "reverse[d] the PCR court's finding that Weary's two prior burglary convictions did not satisfy the requirements for a subsequent first-degree burglary conviction based on the 'two or more prior convictions' element." Weary v. State, Op. No. 2016-UP-132. Pursuant to Rule 221(a), SCACR, Petitioner, the State of South Carolina, respectfully submits this Court misapprehended or overlooked several critical points—particularly in respect to the determination Weary's two prior second degree burglary offenses should be considered one offense—and petitions this Court for rehearing as a result.

**Error in Finding Two Prior Burglary Convictions Constituted One Offense**

In seeking rehearing, the State respectfully submits this Court overlooked its argument regarding the post-conviction relief court's error as a matter of law in determining Weary's two prior burglary convictions from November 24, 2000, should be considered one offense when used to satisfy the elements of first-degree burglary pursuant to S.C. Code Ann. § 16-11-311(A)(2). In reversing, this Court found the post-conviction relief court erred in "finding that Weary's two prior burglary convictions did not satisfy the requirements for a subsequent first-degree burglary conviction based on the 'two or more prior convictions' element." However, in reaching this result, this Court relied exclusively on the use of a third prior burglary conviction not closely related in time to the other two prior convictions.[1] Regarding the State's argument

[1] The State agrees with the Court's ultimate determination that Weary suffered no prejudice from trial counsel's failure to investigate Weary's prior burglary convictions because the third, wholly unrelated burglary conviction

that Weary's two prior burglary convictions satisfied the requirements for a subsequent first-degree burglary conviction pursuant to S.C. Code Ann. § 16-11-311(A)(2) regardless of temporal connection, this Court found "despite the fact that the November 24, 2000 burglaries involved different victims . . . the PCR court's determination that Weary provided sufficient evidence that burglaries occurred within a single crime spree and were so closely connected in point of time that they may be considered as one offense is supported by the evidence." The State respectfully submits this Court overlooked the post-conviction relief court's error of law in determining the two prior burglary offenses did not satisfy the requisite elements for a subsequent burglary pursuant to S.C. Code Ann. § 16-11-311(A)(2).

The issue before this Court (and previously before the post-conviction relief court) is the meaning of "two or more convictions" under our first-degree burglary statute, S.C. Code Ann. § 16-11-311(A)(2). The State respectfully submits this Court and the post-conviction relief court improperly interpreted "two or more convictions" and erroneously applied the recidivist offender statute (S.C. Code Ann. § 17-25-50) to its meaning, an error of law that warrants reversal from this Court.

The basic rule of statutory construction is that a court must ascertain and give effect to the legislature's intention as expressed in the statute. State v. Zulfer, 345 S.C. 258, 262, 547 S.E.2d 885, 887 (Ct. App. 2001) (citing State v. Ramsy, 311 S.C. 555, 430 S.E.2d 511 (1993)). In construing a statute, a court cannot read into the statue something not within the manifest intention of the legislature as gathered from the statue itself. Id. If a statute is plain and

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could, and would, have been used by the State to satisfy the elements of S.C. Code Ann. § 16-11-311(A)(2). However, the State respectfully submits this Court overlooked its argument as to the post-conviction relief court's error of law in finding Weary's two prior burglary convictions could not be used to satisfy S.C. Code Ann. § 16-11-311(A)(2) because they were temporally connected and constituted a crime spree.

unambiguous and conveys a clear and definite meaning, there is no occasion of employing rules of statutory interpretation and the court has no right to look for or impose another meaning. Id.

Pursuant to S.C. Code Ann. § 16-11-311(A)(2), "A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both." Under Section 16-11-311(A)(2), "two or more convictions" is plain and unambiguous, requiring two or more judicial findings of guilt for prior burglaries or housebreakings, or a combination thereof. This Court has explained that S.C. Code Ann. § 16-11-311(A)(2) "allows the State to punish Defendant's recidivism by using his previous convictions to elevate actions that would normally constitute a charge to a charge of burglary, first degree." State v. Washington, 338 S.C. 392, 396, 526 S.E.2d 709, 711 (2000). The State is required to prove all elements of first-degree burglary beyond a reasonable doubt, and therefore, the jury must be informed of a defendant's prior convictions for burglary or housebreaking because it is an element of the offense. State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (Ct. App. 2002). In Simmons, the Court of Appeals held:

> "[T]o ensure that the defendant is not convicted on an improper basis while allowing the State to prove the elements of first degree burglary, the trial court should limit the evidence to the prior burglary and/or housebreaking convictions. Detailed, particular information about the prior burglaries and/or housebreaking convictions should not be admitted. In addition, the trial court should, on request, instruct the jury that the information should only be considered for the limited purpose of proving one of the elements of first degree burglary.

Id. at 357, 864 (internal citations omitted). The requirement for two or more prior convictions for burglary or housebreaking is an element of the offense pursuant to Section 16-11-311(A)(2). See State v. Benton, 338 S.C. 151, 526 S.E.2d 228(2000) (holding prior burglary convictions are

elements of charged burglary in the first-degree offense, not merely a sentencing consideration for the court to consider); State v. Hamilton, 327 S.C. 440, 486 S.E.2d 512 (Ct. App. 1998) (same). There is no such requirement that the two prior offenses not be closely connected in time.

In the present case, the post-conviction relief court disregarded the plain and ordinary meaning of "two or more prior convictions" and improperly superimposed the requirements of S.C. Code Ann. § 17-25-50 that the two or more offense be not so closely connected in time as to be considered one offense. This improper application of Section 17-25-50 to the plain and ordinary reading of our first-degree burglary statute constitutes an error of law requiring reversal of the post-conviction relief court.

Through the enactment of S.C. Code Ann. § 17-25-50, the South Carolina General Assembly instructed:

> **In determining the number of offenses for the purpose of imposition of sentence**, the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses.

(emphasis added). Notably, under the plain language of the statute, this section's applicability is limited solely to situations where it is necessary for the sentencing judge to determine the number of offenses for sentencing purposes, which is required under S.C. Code Ann. § 17-25-45, our recidivist offender statute. Accordingly, contrary to the post-conviction relief court's finding, Section 17-25-50 applies only in limited situations where it is necessary for a sentencing judge to make such a determination and in no way inhibits a sentencing judge's broad discretion in imposing sentences for individual offenses and in determining whether separate sentences should be served concurrently or consecutively. See State v. Legare, 333 S.C. 275, 282-283, 509 S.E.2d

472, 476 (1998) (recognizing S.C. Code Ann. § 17-25-50 "is a recidivist statute" and finding a sentencing judge can properly impose concurrent or consecutive sentences for each count for which a defendant is convicted).

A review of Section 17-25-50 clearly shows the post-conviction relief court's application of it to the present case was an error of law. Section 17-25-50 explicitly states that it is exclusively applicable for the purpose of imposition of a sentence. Under the plain language of this statute, this section's applicability is limited solely to situations where it is necessary for the sentencing judge to determine the number of offenses for sentencing purposes as required under Section 17-25-45, our recidivist offender statute. Therefore, it logically follows that Section 17-25-50 is only applicable in the limited situations where it is necessary for a sentencing judge to make such a determination, not for the jury's use when determining whether the requisite number of offenses has been proven to establish an element of first-degree burglary pursuant to Section 16-11-311(A)(2).

Despite this clear purpose stated in the statutory language, the post-conviction relief court improperly applied Section 17-25-50 to an element of the first-degree burglary statute. It is clear that "two or more convictions" is an element of the charged offense under Section 16-11-311(A)(2) through opinions such as Hamilton and Benton from both this Court and our Supreme Court. Accordingly, it is the jury's role to determine if the number of prior convictions meets the two or more threshold as set forth in Section 16-11-311(A)(2). The jury is not responsible for sentencing a defendant and therefore, applying Section 17-25-50—a statute explicitly intended for use exclusively during sentencing under the recidivist offender statute—to an element of the offense for jury consideration is an error of law requiring reversal.

Additionally, Section 16-11-311(A)(2) does not place any limitations on the prior convictions to be used to meet the requisite two convictions. In State v. Zulfer, this Court rejected the appellant's argument that the legislature intended to limit the prior burglary convictions to only those occurring in South Carolina. 345 S.C. 258,262, 547 S.E.2d 885, 887 (Ct. App. 2001). This Court held that "[t]o restrict the predicate offenses for a first-degree burglary charge . . . would give the statute a meaning that the legislature clearly did not intend." Id. at 262, 547 S.E.2d at 887. See also State v. Donahue, 400 S.C. 604, 607, 735 S.E.2d 547, 549 (Ct. App. 2012) (holding "nothing in the language of subsection 16–11–313(B) limits a circuit court to considering only South Carolina offenses"). This Court further held that "[t]o shift the focus to the fact that a defendant's prior offenses may have occurred in different jurisdictions would thwart the objective of requiring heightened accountability from repeat offenders for their subsequent crimes. Id., at 263-64, 547 S.E.2d at 887-88. It is clear that the legislative intent of Section 16-11-311(A)(2) is heightened accountability from repeat offenders, and therefore, only logically conclusion is that Section 17-25-50 is not applicable.

Similarly, adopting Weary and the post-conviction relief court's interpretation of "two or more convictions" would reach an absurd result not intended by the legislature that would greatly expand the efficacy of Section 17-25-50 beyond its intended applicability.[2] By precluding the possibility of punishment for more than one offense committed in a series of separate crimes, Weary's proposed statutory construction would effectively incentivize the commission of

[2] Notably, Section 17-25-50 was not applied in the manner Weary asks this Court to apply it in any of the cases he has relied upon on appeal, which all involved the imposition of a sentence under the recidivist offender statute. See Bryant v. State, 384 S.C. 525, 533, 683 S.E.2d 280, 284 (2009) (finding multiple armed robberies committed over the course of three days did not constitute a single offense under Section 17-25-50 for purposes of sentencing under the recidivist offender statute); Koon v. State, 372 S.C. 531, 534, 643 S.E.2d 680, 682 (2007) (finding crimes committed two weeks apart constituted separate offenses under Section 17-25-50 for purposes of sentencing under the recidivist offender statute); State v. Woody, 359 S.C. 1, 4, 596 S.E.2d 907, 908 (2004) (finding two offenses committed at the same time constituted one offense under Section 17-25-50 for purposes of sentencing under the recidivist offender statute).

multiple offenses in close succession because the offender could avoid punishment for all but a single offense in his chain of crimes. This proposed result is entirely inconsistent with the purpose for which Section 17-25-50 was enacted, was clearly not intended by our General Assembly, and would serve no legitimate goal or purpose related to sentencing. See Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 845 (2002) ("[A] court must reject a statute's interpretation leading to absurd results not intended by the Legislature."). Therefore, the statutory interpretation Section 17-25-50 adopted by the post-conviction relief court must be rejected.

## Conclusion

Based on the foregoing reasons coupled with the arguments raised in the Brief of Petitioner and raised during the oral argument before this Court, the State respectfully requests this Court reconsider its decision, rehear the matter, and reverse the decision of the lower court denying Weary relief.

Respectfully submitted,

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March 24, 2016

STATE OF SOUTH CAROLINA
In the Court of Appeals

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ON WRIT OF CERTIORARI
Appeal from Richland County

G. Thomas Cooper, Jr., Trial Judge
James R. Barber, III, Post-Conviction Relief Judge
Appellate Case No. 2011-201588

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WILLIS WEARY,

Respondent,

vs.

STATE OF SOUTH CAROLINA,

Petitioner.

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Unpublished Opinion No. 2016-UP-132
Heard February 2, 2015 – Filed November March 9, 2016

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**PROOF OF SERVICE**

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I, Megan Harrigan Jameson, certify that I have served the within Petitioner's Petition for Rehearing on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Appellate Defender
S.C. Comm. on Indigent Defense – Div. of Appellant Defense
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I further certify that all parties required by Rule to be served have been served.

This 24th day of March, 2016.

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# The South Carolina Court of Appeals

Willis Weary, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2011-201588

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ORDER

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After careful consideration of the petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied.

Paul G. Short, Jr. J.

James E. Lucas J.

Stephen P. McDonald J.

Columbia, South Carolina

cc:
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