

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY  
COURT OF COMMON PLEAS

The Honorable Deadra L. Jefferson, Circuit Court Judge

Case No. 2010-CP-10-3800

Opinion No. 2016-UP-015 (S.C. Ct. App. filed Jan. 13, 2016)  
Appellate Case No. 2016-001456

Onrae Williams,..... Petitioner,

v.

State of South Carolina, ..... Respondent.

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**REPLY BRIEF OF ONRAE WILLIAMS**

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## ARGUMENT IN REPLY

**The PCR court erred because its orders are 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 when the State was seeking LWOP.**

The State's argument that trial counsel's representation of Mr. Williams fell within prevailing professional norms and that Mr. Williams suffered no prejudice because of curative comments by the trial court is based on (1) distinguishable secondary and non-binding authority that is inconsistent with South Carolina law, (2) an overly narrow reading of the relevant transcripts, and (3) speculation about the trial judge's exchanges with the lawyers at trial. A fair reading of South Carolina law and other persuasive appellate authority, as well as the overwhelming evidence in the record establish that Mr. Williams was prejudiced by trial counsel's ineffectiveness in failing to ensure that Mr. Williams was sufficiently advised and sufficiently understood that "LWOP" meant "mandatory LWOP."

**(1) The State relies on distinguishable secondary and non-binding authority.** Citing a section of the ABA Standards of Criminal Justice, *Pleas of Guilty*, which South Carolina has not adopted, and a readily distinguishable seventeen-year-old Maryland case, the State attempts to raise a distinction in the law that South Carolina courts have not recognized: duty to communicate and explain a plea offer versus duty "to ensure Petitioner fully understands the import of every piece of information Counsel conveyed to him." Such a distinction, however, is at odds with South Carolina law.

South Carolina Rule of Professional Conduct 1.4(b) specifically provides that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation" (emphasis added). Comments 5 and 6 to the Rule require that the client have "sufficient information to participate intelligently in decisions" and that "ordinarily, the information to be provided is that appropriate for a client who is a

comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14.” Rule 1.14 describes counsel’s responsibilities when interacting with clients with diminished capacity. These Rules ensure that clients are sufficiently advised and sufficiently understand the legal issues at stake to allow clients to effectively participate in the representation. See S. C. Rule of Prof’l Conduct 1.4 cmt. 1.<sup>1</sup>

The idea that counsel’s advice to a defendant is inextricably linked to the defendant’s understanding of the advice is implicit in South Carolina case law. See, e.g., *Berry v. State*, 381 S.C. 630, 636, 675 S.E.2d 425, 427 (2009) (finding ineffective assistance of counsel because counsel did not inform the defendant about a legal issue that could have impacted a guilty plea, finding that “the issue before us, is that such decisions [about pleas] must be made knowingly and voluntarily . . .”) (emphasis added); *Roscoe v. State*, 345 S.C. 16, 20 n.6, 546 S.E.2d 417, 419 n.6 (2001) (when addressing the voluntariness of a plea that was entered upon advice of counsel, noting that a defendant must have a “full understanding of charges of the consequences of a plea and the charges against him”) (emphasis added); *Jackson v. State*, 342 S.C. 95, 97-98, 535 S.E.2d 926, 927 (2000) (granting PCR when the defendant testified that he would not have pleaded the function equivalent of a guilty plea had he known that the charge was a felony and citing *Alexander v. State*, 303 S.C. 539, 402 S.E.2d 484 (1991), for the proposition that PCR was appropriate when trial counsel erroneously advised the petitioner about his potential sentence); *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (noting that before the court can accept a guilty plea, “the defendant must be advised of the constitutional rights he or she is

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<sup>1</sup> Indeed, for a defendant to be competent to stand trial, he must have “a rational as well as factual understanding of the proceedings against him,” including “the potential penalty he faced and his options in pleading.” *State v. Reed*, 332 S.C. 35, 39, 40, 503 S.E.2d 747, 749 (1998).

waiving. Specifically, a defendant must be aware of . . . the maximum and any mandatory minimum penalty,” and for guilty pleas, the record “should indicate the defendant was fully aware of the consequences of his guilty plea.” (emphasis added)); *State v. Hazel*, 275 S.C. 392, 394, 271 S.E.2d 602, 603 (1980) (finding ineffective assistance of counsel when trial counsel advised the client that the judge might exercise discretion in passing sentence, noting “[i]t is elementary that in order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of his plea” (emphasis added)). As South Carolina law makes clear, separating counsel’s advice from a defendant’s understanding is unworkable. Whether a defendant sufficiently understands informs whether a defendant was sufficiently advised; likewise, whether a defendant was sufficiently advised informs whether a defendant sufficiently understands.

This link between advice and understanding was specifically recognized in the very recent decision of the United States Supreme Court in *Lee v. United States*, No. 16-327, 2017 WL 2694701 (U.S. June 23, 2017), in which the Court emphasized that the “decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea.” *Id.* at \*8. There, the attorney incorrectly advised Lee that he would not be subject to deportation—an issue of paramount importance to Lee—if he pleaded guilty. The Court noted that the attorney’s incorrect advice “affected Lee’s understanding of the consequences of pleading guilty,” thus leading Lee to an incorrect assessment of his options in light of his overriding interest in not being deported. *Id.* at \*7.

In *Kratsas v. United States*, 102 F. Supp. 2d 320 (D. Md. 2000), which the State relies on almost exclusively, the rule of law announced is different than what Mr. Williams requests of this Court. In *Kratsas*, the court considered whether the defendant understood that “LWOP”

meant “mandatory LWOP.” In that case—unlike Mr. Williams’ case, in which he was convicted for selling 0.3 grams of cocaine—the *Kratsas* defendant was the manager of a ring of dealers who supplied drugs to distributors and converted crack from wholesale to retail quantities and had distributed more than five kilograms of crack over a six-month period (with 18 kilograms directly attributable to the defendant) and was then convicted of drug trafficking and money laundering, his third drug conviction. See *United States v. Kratsas*, 45 F.3d 63, 64, 67 (4th Cir. 1995) (affirming sentence on other grounds without addressing the issue of whether a defendant must understand the mandatory nature of life without parole).

The *Kratsas* district court found that “there is no duty for an attorney to insure that his client understands all that he is told.” 102 F. Supp. 2d at 325. To support the assertion, the court cited only a Fourth Circuit case, *Jones v. Murray*, 947 F.2d 1106 (4th Cir. 1991), which does not discuss the issue at all, as the *Kratsas* court later acknowledged. *Id.* (noting, “[t]here is nothing in *Jones*, or any other cases cited by the petitioner, to suggest that a client, who was properly advised but misunderstood such advice, received ineffective assistance of counsel”). Thus, the District of Maryland appears to have announced a new rule of law, one unsupported by South Carolina law, and one that goes well beyond what Mr. Williams requests here. Mr. Williams does not suggest that counsel be required to ensure that “a client understands all that he is told.” Rather, Mr. Williams is asking the Court to recognize that effective assistance of counsel requires counsel to ensure that clients are sufficiently advised and sufficiently understand the legal issues at stake to allow clients to effectively participate in the representation, which is

wholly consistent with South Carolina's Rules of Professional Conduct and South Carolina precedent discussed above.<sup>2</sup>

Mr. Williams' argument is also consistent with other appellate decisions that addressed advice and understanding concerning the issue of discretionary versus mandatory LWOP in the PCR context. *See Johnson v. State*, 712 S.E.2d 811, 813 (Ga. 2011) (finding ineffective assistance of counsel for failing to inform the defendant of the mandatory nature of LWOP because "If the accused's choice on the question of a guilty plea is to be an informed one, he must act with full awareness of his alternatives . . . . Therefore, without knowledge of the alternative of a mandatory life sentence if convicted at trial and without knowledge . . . Johnson could not make an informed decision about whether to accept or reject the State's plea offer and thus he has fulfilled his burden of showing that his counsel's representation fell below an objective standard of reasonableness." (citations and quotations omitted)); *Villegas v. Yearwood*, 131 Fed. App'x 93, 94-95 (9th Cir. 2005) (discussing ineffective assistance of counsel in terms of the defendant's not knowing "that life without the possibility of parole would be mandatorily imposed if the jury convicted him," the "decision to go to trial while ignorant of the consequences," and the defendant's testimony that he "did not know that he was facing a mandatory life without parole sentence").

**(2) The State's narrow reading of the relevant transcripts is incomplete and out of context.** In arguing that Mr. Williams was informed that "LWOP" meant "mandatory LWOP," the State relies on a narrow reading of the relevant transcripts. The State argues that trial counsel advised Mr. Williams "if he was served notice of the State's intent to seek life without parole and

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<sup>2</sup> The Court should note that contrary to the State's suggestion that Mr. Williams does not have a learning disability (Resp. Br. at 7), his appellate counsel testified that he knew that Mr. Williams has a learning disability (App. at 414:13-22) and the PCR Court referenced the learning disability in the Order of Dismissal. (App. at 4.)

was subsequently convicted of a third strike, Petitioner could get life without parole.” Resp. Br. at 7 (citing App. at 425.). Trial counsel’s actual testimony, however, was that “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. at 425:12-21 (emphasis added).) Thus, when considering the full response to the question posed, trial counsel did not make explicit to Mr. Williams that “LWOP” meant “mandatory LWOP.”

The State also argues that counsel testified that he “‘would have explained on the third strike you get life without parole’ and ‘wouldn’t have implied in any way that it was not a mandatory life without parole’ sentence.” Resp. Br. at 7 (quoting App. at 417). The full testimony, however, shows that trial counsel was speculating and that he did not remember whether the conversation actually occurred:

Q. Mr. King, I think you mentioned that you weren’t sure one way or the other whether you explained that life without parole meant mandatory; is that correct?

A. I don’t specifically remember exactly what we discussed, but I wouldn’t have implied in any way that it was not a mandatory life without parole. If I would have explained it, I would have explained on the third strike you get life without parole, and but [sic] 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, but I have my notes because I discussed life without parole with him.

Q. Is there anything in your notes that discusses that life without parole meant mandatory life without parole?

A. Not in my notes, no.

(App. at 427:7-22.)<sup>3</sup>

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<sup>3</sup> The State notes that the PCR court found trial counsel’s testimony to be credible while also finding Mr. Williams’ testimony was not credible. The PCR court’s credibility determinations, while entitled to great deference under South Carolina law, also find little support in the factual

Finally, the State argues that the full context of trial counsel's testimony discussed on Appendix pages 425 and 427 concerned discussions that he had with Mr. Williams "in May 2006, months prior to the LWOP notice actually being served by the State, and Counsel was accounting for the possibility of acquittal at trial." Resp. Br. at 7 n.2. (citing App. at 425, 473). The record, however, does not mention anything about the possibility of acquittal at trial, and the October 2006 LWOP notice says nothing about the mandatory nature of the sentence. (App. at 473.) Thus, any suggestion that the LWOP notice may have cured any ineffective assistance of counsel is unpersuasive.

The State's narrow reading of the transcripts also ignores the corroborative testimony and evidence:

- Mr. Williams' 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. at 413:19-23, 414:7.)
- Mr. Williams' testimony that he thought that "[t]he judge could give me anything from zero, no time, to life without parole." (App. at 409:18-25; 421:21-23.)
- Mr. Williams' actions during plea negotiations where, in the face of mandatory LWOP, he rejected a three-year deal, five-year deal, and a ten-year deal. (App. at 443:9-17.)<sup>4</sup>

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record and overlooks numerous issues of fact that did not concern issues of credibility, as discussed at length in Mr. Williams' Petition for Rehearing and Rehearing En Banc. (App. at 598-602.)

<sup>4</sup> See *Lee v. United States*, No. 16-327, 2017 WL 2694701, at \*10 (U.S. June 23, 2017) (when a defendant faced deportation after pleading guilty because of deficient advice of counsel, finding that Strickland's prejudice prong is met because the defendant's thought process for proceeding

- The State’s Notice of Intent to Seek LWOP that did not say that LWOP was a mandatory sentence. (App. at 473.)

Although the State claims that the District of Maryland in *Kratsas* “addressed a strikingly similar factual scenario and denied post-conviction relief” (Resp. Br. at 6), the *Kratsas* court found that counsel was effective because he “unequivocally testified that he advised Kratsas of a mandatory life sentence, [and] that he reviewed the statute that permits such a mandatory sentence . . . .” *Id.* at 323-24. Here, no such unequivocal testimony exists. No one – not trial counsel and not the trial court – ever stated simply and explicitly to Mr. Williams “If you go to trial and are convicted, which is almost certain, you will spend the rest of your life in jail with no possibility of ever getting out.” Rather, every statement in the record is hedged as if a mandatory life sentence was only “possible” or that a sentence might be “up to” that level, not that it must, unequivocally, be for life. The overwhelming weight of the evidence in this case is that Mr. Williams’ trial counsel did not sufficiently advise him so that he sufficiently understood that “LWOP” meant “mandatory LWOP.”

**(3) The State speculates about the trial judge’s exchanges with the lawyers at trial.**

The State argues that any ineffectiveness of trial counsel was cured by “[t]he trial court’s comments before the start of Petitioner’s trial and during Petitioner’s sentencing proceeding [which] clearly show Petitioner was made aware of the mandatory nature of the LWOP sentence.” (Resp. Br. at 9.) The State, however, cites only three very brief exchanges between the Court and the lawyers, each of which lasted seconds (and the last of which was made after Mr. Williams was convicted). None of the trial court’s comments were directed to Mr. Williams, and to conclude that seconds-long comments made during the course of an entire trial

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to trial was not “irrational” even though the defendant “almost certainly” would have been found guilty at trial and deported).

documented in a 235-page trial transcript proves that Mr. Williams heard and understood that “LWOP” meant “mandatory LWOP” is impermissibly speculative. *See Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (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). Nowhere in the course of the proceedings did the trial court every simply and unequivocally state to Mr. Williams “If you are convicted, I must sentence you to prison for the remainder of your life.”

Even assuming that Mr. Williams was listening in the moments when the trial court made these comments, nothing suggests that he understood the trial court’s comments (for example, the judge’s cryptic comment, “[i]f he’s going to be burned he’ll be burned.”). Indeed, the last of the three comments that the State quotes, which the trial court made after Mr. Williams was convicted, and therefore too late to cure the ineffective assistance of counsel, suggests that the trial court believed that Mr. 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.” (App. 382:15-22) (emphasis added).

Mr. Williams is thirty-four years old and has already been in jail for more than ten years for a non-violent crime where the maximum sentence is ten years. Keeping him in jail for the rest of his life as a recidivist for three non-violent crimes based on his trial counsel’s equivocal testimony, ignoring all of the corroborative evidence, and speculation that Mr. Williams was listening to and understood a couple of stray comments by the trial court is counter to the overwhelming weight of the evidence that he was not sufficiently advised and did not understand

that “LWOP” meant “mandatory LWOP” and the guiding principle of PCR that trials should produce a just result. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

**CONCLUSION**

For the above-stated reasons, and as further detailed in the opening brief, this Court should find that trial counsel was ineffective, that Mr. Williams was prejudiced as a result, and that the Court of Appeals erred in denying PCR.

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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):

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