

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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 ORIGINAL

Certiorari to Spartanburg County  
Honorable Frank R. Addy, Circuit Court Judge

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OCT 16 2017

S.C. SUPREME COURT

ALEXANDER RUIZ,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2016-002557

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RETURN TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1.

Does the record support the PCR court's finding that probation revocation counsel rendered ineffective assistance when counsel indisputably misadvised Respondent about the sentence he faced under the Youthful Offender Act upon the revocation of his probation and unwittingly requested the probation revocation judge impose a sentence that would trigger a mandatory minimum three year sentence required to be served day for day as opposed to a sentence pursuant to the ninety day shock incarceration program, and where Respondent was clearly prejudiced because counsel's deficient performance resulted in a substantially greater term of imprisonment than he would have received if counsel had been familiar with the law as interpreted by the Department of Corrections and requested the court impose the suspended shock sentence?

2.

Does the record support the PCR court's finding that Respondent was entitled to relief based on an unjust and fundamentally unfair sentence which violated the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section III of the South Carolina Constitution since the sentence imposed, as interpreted by the Department of Corrections, required Respondent to arbitrarily serve a mandatory minimum three year sentence day for day for nonviolent second degree burglary pursuant to the Youthful Offender Act as opposed to the six to ten month sentence usually imposed under the Act?

## STATEMENT OF THE CASE

A Spartanburg County Grand Jury indicted Respondent on December 6, 2012 for two counts of nonviolent second degree burglary. App. 57; App. 64-65. On December 13, 2012, he pled guilty before the Honorable J. Mark Hayes. Assistant Solicitor Hunter Blouin represented the state, and James Cheek represented Respondent. App. 58. Based on the state's recommendation, Judge Hayes sentenced Respondent pursuant to the Youthful Offender Act (YOA) to an indeterminate sentence not to exceed five years, including the shock incarceration program outlined in S.C. Code Ann. § 24-13-1330. App. 58; App. 67. Judge Hayes suspended this sentence upon the service of ninety seven days imprisonment and three years probation. App. 58; App. 67.

Respondent was served with a probation citation on September 11, 2014 for allegedly violating the terms and conditions of his probation. App. 61-63; App. 69-71. On March 6, 2015, Respondent appeared before the Honorable J. Derham Cole for a hearing to address the citation. App. 1. An unidentified probation agent represented the state, and M. Claire Hall represented Respondent. App. 1. At the beginning of the hearing, Hall told Judge Cole that Respondent admitted he failed to comply with the terms and conditions of his probation. App. 3, ll. 13-14.

As far as what sentence should be imposed, Hall stated, "So we [Hall and Respondent] have discussed the difference between him getting a shock incarceration versus a regular activation [of the suspended YOA sentence], and I think he wanted me to ask for the regular with the understanding that he would get some better services once he is placed back on supervision." App. 3, l. 24 – 4, l. 3. The probation agent, who seemed to be surprised by the request, responded, "If that's what he's asking for, I mean, obviously we agree to impose the 'Y' and not

impose shock. I don't believe, if that's what we are doing, I need to say any more." App. 4, ll. 4-7.

Judge Cole merely stated, "I find he has wilfully failed to comply. Revoke it." App. 4, ll. 8-9. Pursuant to Hall's request, Judge Cole activated Respondent's suspended indeterminate sentence not to exceed five years pursuant to the Youthful Offender Act, but not the shock incarceration program originally ordered by Judge Hayes. App. 60; App. 68.

When Respondent entered the Department of Corrections, he learned he must serve a mandatory minimum three year sentence day for day before he would be eligible for parole. This sentence conflicted with what he was advised by his probation revocation counsel concerning the amount of time he would be required to serve before he was eligible for parole. App. 26, ll. 14-24. More specifically, counsel had advised him that he would be eligible for parole within ten months. App. 26, ll. 14-24.

On September 9, 2015, Respondent filed an application for post-conviction relief (PCR) alleging that he was misadvised by counsel. App. 6-12. The state filed a return and partial motion to dismiss dated April 1, 2016. App. 13- 19. An evidentiary hearing was convened on November 7, 2016 before the Honorable Frank R. Addy, Jr. App. 20. Assistant Attorney General Alicia A. Olive represented the state, and Susannah C. Ross represented Respondent. App. 20.

At the beginning of the hearing, PCR counsel told the court that Respondent is serving a four year sentence day for day based on the way the Department of Corrections interpreted the sentence imposed after his probation was revoked by Judge Cole. App. 23, l. 18 – 24, l. 12. Again, Judge Cole imposed Respondent's suspended indeterminate sentence not to exceed five years pursuant to the Youthful Offender Act based on the request by probation revocation

counsel rather than the suspended shock sentence. App. 60. PCR counsel emphasized that this sentence was significantly longer than the usual six to twelve month sentence one usually serves before being granted parole when sentenced pursuant to the Youthful Offender Act. App. 23, l. 18 – 24, l. 12. Counsel argued that the sentence was unjust and violated due process, and that probation revocation counsel was ineffective for misadvising Respondent about the sentence he faced and for failing to ensure Respondent received the sentence the parties intended. App. 25, ll. 1-8.

Respondent, whose testimony the PCR court found credible, testified that his understanding, based on the advice of his probation revocation counsel, was that he was going to serve six to ten months after his probation was revoked and his suspended YOA sentence was activated.<sup>1</sup> App. 26, ll. 14-19; App. 28, l. 25 – 29, l. 6; 50. He was never warned that he would be required to serve a mandatory minimum three year active sentence day for day. App. 27, ll. 1-3. Respondent said counsel told him that he would be “better off” if he served the “regular” YOA sentence as opposed to completing the ninety day shock incarceration program. App. 27, ll. 7-18. Because counsel was an attorney, Respondent “went with what she said” and agreed to request the probation revocation judge impose the suspended YOA sentence instead of the shock incarceration program. App. 29, ll. 17-22.

Claire Hall, Respondent’s probation revocation counsel, had no independent recollection of the discussions she had with Respondent before his hearing or the advice she gave him. App. 32, l. 21 – 33, l. 4. She could only speculate about what advice she may have given. App. 32, l.

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<sup>1</sup> To complicate matters, Respondent’s original plea counsel likewise advised him that if he violated the terms and conditions of his probation and his suspended YOA sentence was activated, he would be required to serve ten months imprisonment before being granted parole. Plea counsel also failed to advise him that he would be required to serve a mandatory minimum three year sentence pursuant to the Act. App. 30, ll. 8-18.

21 – 33, l. 4. Hall testified that if the judge found Respondent wilfully violated the terms and conditions of his probation, the only options the judge had were to impose the suspended indeterminate sentence not to exceed five years under the Youthful Offender Act or the suspended shock incarceration program. App. 32, ll. 10-18; App. 34, ll. 10-17. Because she had not practiced criminal law for some time, Hall could not remember any details of the Youthful Offender Act or how sentences pursuant to the Act were calculated. App. 35, ll. 8-23. However, she admitted that “if someone were to put that to me 90 days versus three years *I can’t imagine why I’d ask for three years,*” demonstrating that she did not understand the implications of requesting the probation revocation judge impose the suspended indeterminate YOA sentence instead of the suspended shock incarceration program. App. 35, l. 18 – 36, l. 8 (emphasis added).

At the conclusion of the testimony, PCR counsel asserted that Respondent, due to the inaccurate advice of probation revocation counsel, “had no understanding that he was turning down a request for Shock 90 days and would end up with this, you know, three-year harsh sentence that he did receive on a burglary second non-violent.” App. 37, 22-25. She also argued that the sentence Respondent received, the mandatory minimum three year sentence required to be served day for day, was unfair and a violation of due process. She stressed that adults sentenced for the same offense, nonviolent second degree burglary, “end up doing well less time than he’s now doing as a youth for the same crime.” App. 37, l. 25 – 38, l. 18.

The assistant attorney general argued the probation revocation judge had discretion to revoke Respondent’s probation and impose the suspended indeterminate sentence not to exceed five years pursuant to the Act. Consequently, she concluded that counsel was not ineffective because “regardless of what advice she [probation revocation counsel] gave to him

[Respondent], it's the judge's decision whether or not to revoke probation." App. 38, l. 20 – 39, l. 16. The assistant attorney general also argued there was no due process violation because the "sentence for burglary second non-violent under YOA is what it is. You had to serve a minimum of 36 months and - - -" App. 39, ll. 17-20.

The PCR judge then interrupted counsel. He asserted:

And that was - - let's go ahead and address that. Not to interrupt you, but there's this weird thing that has happened with burglary second degree, whether it's violent or non-violent, under the Youthful Offender Act. My understanding was pretty much that **SCDC treated it as a three year day-for-day if you were to activate a YOA sentence for burglary second degree, regardless of the violent nature of it.** And that's from they changed the law, I think, in 2010 when they rewrote a lot of the criminal code. **But if you actually look at the law it indicates that that three-year sentence is only supposed to apply for someone who I think is 21 or less, 17 to 21, for burglary second conviction.**

**In this case this gentleman [Respondent] was 22 at the time of his conviction, which means that that three-year mandatory section should not even come into play. As a practical matter, though, I realized SCDC treats that as a three year regardless of whether you're 17 or 25. I may be mistaken in that regard.**

Recently when I revoked - - when I've been faced with this kind of situation my understanding is that SCDC will still allow an individual to be screened for Shock. And this has happened kind of at the last year, but **they'll still allow someone to be screened for Shock even though it's a burglary second degree conviction if the Court specifically makes allowance or specifically orders that.** I have no idea where that's coming from in terms of the law, but that's, as a practical matter, the way [S]CDC treats it.

Ms. Hall [probation revocation counsel] didn't specifically recall this probation hearing. That's not at all surprising because these hearings often take place very, very quickly. **But if she was under the impression that it would be better to turn away or turn down or argue against Shock in favor of the regular "Y" involving, you know, 13 months, 10 to 13 months in SCDC as opposed to a three year day-for-day, I mean, [PCR] counsel's right this is kind of clear.**

This is about as clear as mud because you've got SCDC reading the law one way. The law specifically saying, okay, he's got to be younger than 21 at the time of the conviction. He [Respondent] was 22 at the time of his conviction, so that section shouldn't even come into play here. And then **at the time of the**

**violation this [probation revocation] counsel saying well we prefer not to have Shock because she's under the impression that it would be a regular YOA where he would be out in 13 months because according to the explicit definitions in 24-19-10 he's 22 at the time of conviction so she doesn't have to worry about the three year day-for-day even though under my experience SCDC did treat it as a three year day-for-day . . . if you're 17 to 25.**

Correct my thinking on any of that, any of you, but it's just messy. I understand your [the assistant attorney general's] position, he's clearly in violation [of his probation]. There's no doubt he was going to prison, but **I could see where Ms. Hall [probation revocation counsel], if she was privy to how SCDC treated this, I could see where she would perhaps suggest, hey look, maybe Shock is a better option for you because you're looking at three to four months instead of three years day-for-day.**

App. 39, l. 21 – 42, l. 18 (emphasis added).

To conclude her argument, the assistant attorney general asserted again that there was no due process violation because the probation revocation judge had the discretion to revoke Respondent's probation and impose the suspended sentence pursuant to the Act. As to ineffective assistance of counsel, she argued Respondent could not prove prejudice because "there's no way to know from the record and the testimony today whether the judge would have ordered Shock incarceration if it had been requested." App. 43, ll. 5-19.

PCR counsel countered that the prejudice Respondent suffered as a result of probation revocation counsel's ineffectiveness was the length in the sentence he received. She asserted that Respondent believed he was requesting a sentence where he would serve approximately ten months and instead he received a mandatory minimum three year sentence required to be served day for day before he was eligible for parole. App. 44, ll. 2-9.

The PCR judge ultimately granted Respondent relief at the conclusion of the hearing. He found:

**[A]t the very least I think that Ms. Hall [probation revocation counsel] had the obligation to have an understanding of how SCDC would treat this. And even though SCDC is treating this, in my opinion, incorrectly because in this**

case the applicant [Respondent] was 22 at the time of the plea, he should under the law be entitled to a regular “Y” with a 10 to 13 month sentence, as opposed to the three year day-for-day.

**I do feel like this is touching on something that’s affecting fundamental fairness basic due process.** Procedurally, how I put my finger on that, I really have no idea, but **I know unfair when I see it, and this isn’t fair** and that’s what it boils down to. He was under the impression, and apparently everyone was under the impression, that YOA was, or YOA Shock, was something that they would be entitled to. My understanding is SCDC will or at least in the last year, or so since the time of this plea or about the time of this plea, SCDC will allow for a Youthful Offender Act Shock sentence to be imposed for burglary second degree non-violent. And clearly under the law that’s right because he was 22 at the time of the conviction.

So I’m granting him relief and I’ll grant him a new probation hearing in this matter at a future point in time.

App. 46, ll. 1-25.

On November 22, 2016, about two weeks after the PCR hearing, the PCR judge issued a Form 4 order again stating he was granting Respondent relief. App. 50-51. In the order, the judge found Respondent’s testimony “credible on the question of what his options were concerning not being advised of the three (3) year sentence for a YOA Burglary 2<sup>nd</sup> revocation.” App. 50. The judge further found the transcript of the probation revocation hearing supported Respondent’s testimony or “version of events.” App. 50.

The judge also noted that, pursuant to S.C. Code Ann. § 24-19-10(d)(iv), Respondent should not be serving a mandatory minimum three year sentence because he was twenty two years old at the time of his conviction for nonviolent second degree burglary. App. 50. The judge found probation revocation counsel should have clarified this fact for the record at the time of Respondent’s revocation hearing. App. 50.

The judge ordered PCR counsel to prepare a formal order reflecting the judge’s oral findings at the conclusion of the evidentiary hearing and the written findings contained in the

Form 4 order. App. 50. In the order granting post-conviction relief, the PCR judge found probation revocation counsel was ineffective. He asserted counsel “was under an obligation to understand the law and how SCDC was interpreting the sentence for YOA revocations with burglary second charges.” App. 53. He further found counsel “should have been aware of the dangers of revoking a suspended YOA on a [second degree] burglary charge and made the sentencing judge aware of the outcome of a revocation.” App. 53. The PCR judge concluded counsel “was obligated to correctly advise her client [Respondent] of the sentence he faced. Ms. Hall [probation revocation counsel] did not ask for the shock incarceration [program] that would be likely for a revocation of a suspended shock sentence, and instead unwittingly requested a sentence that would trigger the three to four year mandatory sentence. Then she misadvised her client on the sentence he would receive.” App. 53-54. The judge found counsel’s deficient performance prejudiced Respondent because it resulted in a substantially greater term of imprisonment than he would have received if counsel understood the law and how it was interpreted by the Department of Corrections. App. 54.

The PCR judge also found Respondent’s sentence was “unjust and fundamentally unfair in violation of the Due Process Clause of the V and XIV Amendments of the United States Constitution and Article I, Section III of the South Carolina Constitution.” App. 54. The judge stated:

Under the plain meaning of the YOA statute, Mr. Ruiz [Respondent] would not fall under Sec. 24-19-10(d)(iv) and was legally sentenced as a youthful offender under Sec. 24-19-10(d)(ii) being over seventeen and under twenty-five at the time of his plea to a non-violent, class D offense carrying under fifteen years. SCDC’s interpretation of Sec. 24-19-10 giving Mr. Ruiz a mandatory three to four year, day for day sentence, for burglary second, non-violent, is fundamentally unfair and arbitrary. A penal statute must be strictly construed against the State and in favor of the defendant. State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). Such interpretation would require Mr. Ruiz receive the normal sentence for a YOA revocation. Furthermore, the 2016 amendment allowing non-

violent burglary second degree under the YOA Sec. 24-19-10(d)(iii) & (iv) suggests an effort on the part of the legislature to correct an unintended result. Given that statutory construction should ascertain and give effect to the intent of the legislature, this again supports that Mr. Ruiz was the recipient of an unintended sentence and should receive the normal sentence for a YOA revocation. See Bryant v. State, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009).

App. 54. Therefore, the judge granted Respondent relief. App. 54-55.

The state filed a notice of appeal. On May 31, 2017, the state filed its petition for writ of certiorari. This return follows.

## ARGUMENT

1.

The record supports the PCR court's finding that probation revocation counsel rendered ineffective assistance when counsel indisputably misadvised Respondent about the sentence he faced under the Youthful Offender Act upon the revocation of his probation and unwittingly requested the probation revocation judge impose a sentence that would trigger a mandatory minimum three year sentence required to be served day for day as opposed to a sentence pursuant to the ninety day shock incarceration program, and where Respondent was clearly prejudiced because counsel's deficient performance resulted in a substantially greater term of imprisonment than he would have received if counsel had been familiar with the law as interpreted by the Department of Corrections and requested the court impose the suspended shock sentence.

There is ample evidence in the record to support the PCR court's finding that probation revocation counsel rendered ineffective assistance when counsel indisputably misadvised Respondent about the sentence he faced under the Youthful Offender Act upon the revocation of his probation and unwittingly requested the probation revocation judge impose a sentence that would trigger a mandatory minimum three year sentence required to be served day for day as opposed to a sentence pursuant to the ninety day shock incarceration program. Counsel should have been aware of the dangers of revoking a suspended sentence pursuant to the Act for a nonviolent second degree burglary conviction. She was obligated to understand the law and how the Department of Corrections interpreted the law.

Respondent was clearly prejudiced because counsel's deficient performance resulted in a substantially greater term of imprisonment than he would have received if counsel had been

familiar with the law as interpreted by the Department of Corrections and requested the court impose the suspended shock incarceration program as opposed to the suspended indeterminate sentence under the Act. There is a reasonable probability that the probation revocation judge would have accepted the request by counsel particularly where the shock incarceration program was a part of Respondent's original suspended sentence.

A probationer does not have a Sixth Amendment right to counsel. Turner v. State, 384 S.C. 451, 454, 682 S.E.2d 792, 793 (2009). "Rather, the right to counsel may arise pursuant to the Due Process Clause under the Fifth and Fourteenth Amendments." Id. (citing Gagnon v. Scarpelli, 411 U.S. 778 (1973)). "In South Carolina, however, all persons charged with probation violations have a right to counsel and must be informed of this right pursuant to court rules and case law." Id. (citing Barlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986)). Moreover, Rule 602(a), SCACR, requires the appointment of counsel for indigent persons charged with the violation of a probationary sentence. See Barlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986). "[B]ecause a probationer has a right to counsel, albeit not a Sixth Amendment right, the same analysis for ineffectiveness that applies in other PCR proceedings involving claims against counsel should, by analogy, apply in PCR proceedings involving claims against probation counsel." Turner, 384 S.C. at 455, 682 S.E.2d at 794.

In order to show ineffective assistance of counsel as a ground for relief, an applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. An applicant must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

At the time of Respondent’s guilty plea and subsequent probation revocation, S.C. Code Ann. § 24-90-10(d) read in pertinent part:

“Youthful offender” means an offender who is:

(ii) *seventeen but less than twenty-five years of age at the time of conviction for an offense that is not a violent crime, as defined in Section 16-1-60, and that is a misdemeanor, a Class D, Class E, or Class F felony, or a felony which provides for a maximum term of imprisonment of fifteen years or less;*

(iv) *seventeen but less than twenty-one years of age at the time of conviction for burglary in the second degree (Section 16-11-312). The offender must receive and serve a minimum sentence of at least three years, no part of which may be suspended, and the person is not eligible for conditional release until the person has served the three-year minimum sentence.”*

For whatever reason, the Department of Corrections does not interpret the first sentence of § 24-90-10(d)(iv) to be a limitation on the applicability of the three year mandatory minimum sentence on youthful offenders between the age of twenty-two and twenty-five at the time of conviction. The Department ignores the plain language of the statute and this Court’s precedent on statutory interpretation. See Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) (“Under the plain meaning rule, it is not the court’s place to change the meaning of a clear and unambiguous statute. Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has

no right to impose another meaning. What the legislature says in the text of a statute is considered the best evidence of the legislative intent or will . . . [C]ourts are bound to give effect to the expressed intent of the legislature.”) (internal citations and quotation marks omitted).

Under the plain meaning of § 24-90-10(d)(iv), the mandatory minimum three year sentence did not apply to Respondent, who was twenty-two years old at the time of his conviction. See App. 58; App. 67. Respondent should have been classified as a youthful offender pursuant to § 24-90-10(d)(ii) because he was between the age of seventeen and twenty-five at the time of his conviction for nonviolent second degree burglary, which is not a violent crime as defined in § 16-1-60, and is a Class D felony with a maximum term of imprisonment of ten years. See S.C. Code Ann. § 16-11-312(A) & (C)(1).

In its effort to support the Department of Corrections’ blatantly incorrect interpretation of § 24-90-10(d)(iv), the state likewise ignores the rules of statutory interpretation. In its petition, the state asserted, “Because the Youthful Offender Act allows participation for offenders up to the age of 25, with its goal being to afford young offenders certain opportunities not available to offenders over the age of 25 in an effort to rehabilitate youthful offenders, it is illogical to construe the legislature’s intent was to mandate a *longer* sentence for offenders age 17-21 than those 22-25 for second degree burglary. Petition at 12 (emphasis in original).

Again, the plain meaning of § 24-90-10(d)(iv) was unambiguous. What the legislature says in the text of a statute is considered the best evidence of the legislative intent or will. See Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Because the statute’s language was plain and unambiguous, the Department of Corrections had no right to impose another meaning. Under the plain meaning of § 24-90-10(d)(iv), the mandatory minimum three year sentence did not apply to Respondent, who was twenty-two years old at the time of his

conviction. See App. 58; App. 67. Respondent should have been classified as a youthful offender pursuant to § 24-90-10(d)(ii).

Despite the fact that the Department of Corrections' interpretation of § 24-90-10(d)(iv) was incorrect, it was well known that the Department required all youthful offenders between the ages of seventeen and twenty-five who were convicted of second degree burglary, whether violent or nonviolent, to serve a mandatory minimum sentence of three years day for day before being eligible for parole, as opposed to the six to twelve months other offenders under the Act were required to serve. Probation revocation counsel was obligated to be familiar with the law and how the Department was interpreting the law as it applied to Respondent. She should have been aware of the dangers of revoking a suspended indeterminate sentence under the Act for a second degree burglary conviction and made the probation revocation judge aware of the outcome of a revocation. Counsel also had an obligation to correctly advise Respondent of the sentence he faced and the consequences of a probation revocation.

Because of counsel's failure to be familiar with the law and the Department's interpretation of that law, counsel unknowingly requested the probation revocation judge impose a sentence that would trigger a mandatory minimum sentence of three years required to be served day for day. Respondent was clearly prejudiced because counsel's deficient performance resulted in a substantially greater term of imprisonment than he would have received if counsel had been familiar with the law as interpreted by the Department of Corrections and requested the court impose the suspended shock incarceration program as opposed to the suspended indeterminate sentence under the Act. Moreover, there is a reasonable probability that the probation revocation judge would have accepted the request by counsel to impose the shock incarceration program, particularly if counsel had informed the judge how the Department was

interpreting § 24-90-10(d)(iv), and where the shock incarceration program was a part of Respondent's original suspended sentence imposed by the plea judge.

Unlike the state argued in its petition, Respondent was eligible for the shock incarceration program. See Petition at 11-12. S.C. Code Ann. § 24-13-1310(1) states in pertinent part:

“Eligible inmate” means a person committed to the South Carolina Department of Corrections: (a) who has not reached the age of thirty years at the time of admission to the department; (b) who is eligible for release on parole in two years or less; (c) who has not been convicted of a violent crime as defined in Section 16-1-60 or a “no parole offense” as defined in Section 24-13-100; (d) who has not been incarcerated previously in a state correctional facility or has not served a sentence previously in a shock incarceration program; (e) who physically is able to participate in the program.

Respondent met all the requirements outlined in § 24-13-1310(1) and was therefore eligible for the shock incarceration program. He was under the age of thirty, he was eligible for release on parole within two years since he was a youthful offender pursuant to § 24-90-10(d)(ii) as asserted above, he was not convicted of a violent crime or a no parole offense, and he had never been incarcerated in the Department of Corrections before as this was his first admission to the Department.

Consequently, there is ample evidence in the record to support the PCR court's finding that probation revocation counsel was ineffective and that Respondent was prejudiced by counsel's deficient performance. Counsel not only misunderstood the law and the interpretation of that law by the Department of Corrections, but she also misadvised Respondent as to the sentence he faced upon the revocation of his probation and unknowingly requested the probation revocation judge impose a mandatory minimum three year sentence rather than the ninety day shock incarceration program. Respondent was clearly prejudiced since counsel's deficient performance resulted in a substantially greater term of imprisonment than Respondent would have received if counsel had been familiar with the law as interpreted by the Department of

Corrections and requested the court impose the suspended shock sentence as opposed to the suspended indeterminate sentence under the Act.

Respectfully, this Court should deny the petition for writ of certiorari.

2.

The record supports the PCR court's finding that Respondent was entitled to relief based on an unjust and fundamentally unfair sentence which violated the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section III of the South Carolina Constitution since the sentence imposed, as interpreted by the Department of Corrections, required Respondent to arbitrarily serve a mandatory minimum three year sentence day for day for nonviolent second degree burglary pursuant to the Youthful Offender Act as opposed to the six to ten month sentence usually imposed under the Act.

There was ample evidence to support the PCR court's finding that Respondent was entitled to relief based on an unjust and fundamentally unfair sentence which violated the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section III of the South Carolina Constitution since the sentence imposed, as interpreted by the Department of Corrections, required Respondent to arbitrarily serve a mandatory minimum three year sentence day for day before being eligible for parole for nonviolent second degree burglary pursuant to the Youthful Offender Act as opposed to the six to ten month sentence usually imposed under the Act. The Department's interpretation of S.C. Code Ann. § 24-90-10(d), which resulted in Respondent serving a substantially greater term of imprisonment than he would have served under the plain language of the statute, is fundamentally unfair and arbitrary.

On December 13, 2012, Respondent pled guilty to two counts of nonviolent second degree burglary. Based on a recommendation from the state, the plea judge sentenced Respondent pursuant to the Youthful Offender Act to an indeterminate sentence not to exceed five years, including the shock incarceration program outlined in S.C. Code Ann. § 24-13-1330.

App. 58; App. 67. However, the plea judge suspended this sentence upon the service of ninety seven days imprisonment and three years probation. App. 58; App. 67.

On March 6, 2015, after a hearing, Respondent was found to be in violation of his probation. Based on a request from his counsel, the probation revocation judge activated Respondent's suspended indeterminate sentence not to exceed five years pursuant to the Act, but not the shock incarceration program originally ordered by the plea judge. App. 76-77.

Based on its incorrect interpretation of S.C. Code Ann. § 24-90-10(d), which defied the plain language of the statute, the Department of Corrections arbitrarily required Respondent to serve a mandatory minimum three year sentence day for day before being eligible for parole.

At the time of Respondent's guilty plea and subsequent probation revocation, § 24-90-10(d) read in pertinent part:

“Youthful offender” means an offender who is:

(ii) *seventeen but less than twenty-five years of age at the time of conviction for an offense that is not a violent crime, as defined in Section 16-1-60, and that is a misdemeanor, a Class D, Class E, or Class F felony, or a felony which provides for a maximum term of imprisonment of fifteen years or less;*

(iv) *seventeen but less than twenty-one years of age at the time of conviction for burglary in the second degree (Section 16-11-312). The offender must receive and serve a minimum sentence of at least three years, no part of which may be suspended, and the person is not eligible for conditional release until the person has served the three-year minimum sentence.”*

For whatever reason, the Department of Corrections does not interpret the first sentence of § 24-90-10(d)(iv) to be a limitation on the applicability of the three year mandatory minimum sentence on youthful offenders between the age of twenty-two and twenty-five at the time of conviction. The Department ignores the plain language of the statute and this Court's precedent on statutory interpretation. See Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) (“Under the plain meaning rule, it is not the court's place to change the meaning of a clear and

unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. What the legislature says in the text of a statute is considered the best evidence of the legislative intent or will . . . [C]ourts are bound to give effect to the expressed intent of the legislature.” (internal citations and quotation marks omitted).

Under the plain meaning of § 24-90-10(d)(iv), the mandatory minimum three year sentence did not apply to Respondent, who was twenty-two years old at the time of his conviction. See App. 58; App. 67. Respondent should have been classified as a youthful offender pursuant to § 24-90-10(d)(ii) because he was between the ages of seventeen and twenty-five at the time of his conviction for nonviolent second degree burglary, which is not a violent crime as defined in § 16-1-60, and is a Class D felony with a maximum term of imprisonment of ten years. See S.C. Code Ann. § 16-11-312(A) & (C)(1). Under this classification, Respondent would have been required to serve approximately ten months before being eligible for parole.

In its effort to support the Department of Corrections' blatantly incorrect interpretation of § 24-90-10(d)(iv), the state likewise ignores the rules of statutory interpretation. In its petition, the state asserted, “Because the Youthful Offender Act allows participation for offenders up to the age of 25, with its goal being to afford young offenders certain opportunities not available to offenders over the age of 25 in an effort to rehabilitate youthful offenders, it is illogical to construe the legislature's intent was to mandate a *longer* sentence for offenders age 17-21 than those 22-25 for second degree burglary. Petition at 12 (emphasis in original).

Again, the plain meaning of § 24-90-10(d)(iv) was unambiguous. What the legislature states in the text of a statute is considered the best evidence of the legislative intent or will. See Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Because the statute's language was

plain and unambiguous, the Department of Corrections had no right to impose another meaning. Under the plain meaning of § 24-90-10(d)(iv), the mandatory minimum three year sentence did not apply to Respondent, who was twenty-two years old at the time of his conviction. See App. 58; App. 67. Additionally, “[p]enal statutes are to be construed strictly against the State and in favor of the defendant.” State v. Thomas, 372 S.C. 466, 468-469, 642 S.E.2d 724, 725 (2007) (citing State v. Muldrow, 348 S.C. 264, 559 S.E.2d 847 (2002)).

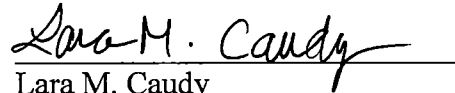
The sentence as interpreted by the Department of Corrections was unfair and arbitrary because it treated Respondent differently than youthful offenders as defined in § 24-90-10(d)(ii) despite the fact that he pled guilty to a nonviolent, Class D felony offense that had a maximum term of imprisonment of ten years. See S.C. Code Ann. § 16-11-312(A) & (C)(1).

Therefore, this is ample evidence to support the PCR court’s finding that Respondent’s sentence, as interpreted by the Department of Corrections, is fundamentally unfair and arbitrary in violation of the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section III of the South Carolina Constitution. Respectfully, this Court should deny the petition for writ of certiorari.

**CONCLUSION**

Respondent respectfully requests this Court deny the petition for writ of certiorari.

Respectfully submitted,



Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of October, 2017.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

Appeal from Spartanburg County

Honorable Frank R. Addy, Circuit Court Judge

ALEXANDER RUIZ,

RESPONDENT

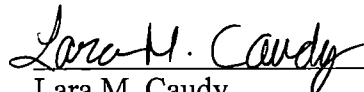
V.

STATE OF SOUTH CAROLINA,

PETITIONER

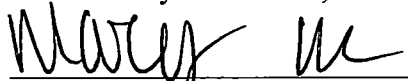
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari in the above referenced case has been served upon Valerie Garcia Giovanoli, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Return to Petition for Writ of Certiorari has been served upon Alexander Xavier Ruiz, #363295, at Turbeville Correctional Institution, P.O. Box 252, Turbeville, SC 29162, this 16th day of October, 2017.

  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me  
this 16th day of October, 2017.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: May 12, 2027.