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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CHEROKEE COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2017-000758

John B. Bonner,.....Respondent,

v.

State of South Carolina,.....Petitioner.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. **Does the record contain any probative evidence to support the PCR court's finding Counsel was ineffective for failing to object to or request reconsideration of Bonner's sixty year individual sentence or seventy year aggregate sentence where Counsel is not required to be clairvoyant to potential changes in the law and Bonner was not prejudiced because there is no reasonable probability that absent Counsel's alleged errors, the outcome of his appeal would have been different?**

II. **Did the PCR court commit an error of law in finding Counsel ineffective on the basis that Bonner's sixty year individual sentence and seventy year aggregate sentence amounted to a *de facto* life sentence in violation of Graham v. Florida?**

STATEMENT OF THE CASE

Procedural History

Trial

Bonner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Cherokee County. Bonner was indicted at the July 2009 term of the Cherokee County Grand Jury for first degree burglary (2009-GS-11-0824), kidnapping (2009-GS-11-0827), armed robbery (2009-GS-11-0828), assault and battery of a high and aggravated nature ("ABHAN") (2009-GS-11-0829), second degree burglary (2009-GS-11-0826) and grand larceny, greater than $5,000 (2009-GS-11-0825). E. Joshua Schultz, Esquire, represented Bonner. Solicitor Barry Barnette and Assistant Solicitor Prina Tailor represented the State. On November 17, 2009, Bonner proceeded to trial before the Honorable J. Derham Cole and a jury. The jury found Bonner guilty as indicted. Judge Cole initially sentenced Bonner to imprisonment for a term of life without parole ("LWOP") for first degree burglary. Additionally, Judge Cole sentenced Bonner to imprisonment for a term of 30 years each for kidnapping and armed robbery, 15 years for second degree burglary, ten years for ABHAN, and five years for grand larceny.

Direct Appeal

Bonner filed a timely notice of appeal. Tristan M. Shaffer, Esquire, represented Bonner on appeal. The South Carolina Court of Appeals vacated Bonner's LWOP sentence for burglary and remanded the matter for new sentencing on the first degree burglary charge, pursuant to Graham v. Florida, 560 U.S. 48 (2010). State v. Bonner, 400 S.C. 561, 735 S.E.2d 525 (Ct. App. 2012). The remittitur was returned January 17, 2013.

Resentencing and Appeal

On January 22, 2013, Bonner appeared before Judge Cole for resentencing. E. Joshua Schultz, Esquire, ("Counsel") represented Bonner. Solicitor Barry Barnette represented the State. After lengthy mitigation by Counsel on behalf of Bonner, Judge Cole resentenced Bonner to imprisonment for a term of 60 years for the first degree burglary charge.

Bonner filed a timely notice of appeal. (App. p. 433). The appeal was perfected by Susan B. Hackett, Esquire, by way of an Anders brief. (App. p. 437). The South Carolina Court of Appeals denied Hackett's request to be relieved as counsel and directed the parties to brief the issue of "Did the trial court err in sentencing Bonner to sixty years' imprisonment for a non-homicide offense when he was seventeen years old and his sentence is cruel and unusual under the Eighth Amendment." (App. p. 453). After further briefing by the parties, the South Carolina Court of Appeals affirmed Bonner's resentence on September 1, 2014. State v. Bonner, Op. No. 2014-UP-401 (S.C. Ct. App. filed November 12, 2014[1]). (App. p. 508). The Remittitur was returned on December 2, 2014. (App. p. 510).

PCR

On May 12, 2015, Bonner filed an application for post-conviction relief. (App. p. 511). On July 10, 2015, Steven D. Epps, Esquire, was appointed to represent Bonner. (App. p. 518). On or about February 16, 2016, the State made its return requesting an evidentiary hearing. (App. p. 519). An evidentiary hearing was scheduled for September 21, 2016 and continued by order filed September 15, 2016. (App. p. 525).

On October 26, 2016, Petitioner made a motion to stay the proceedings pending the outcome of State v. Slocumb, which was and is pending before the South Carolina Supreme

[1] The South Carolina Supreme Court's opinion in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), was filed the same day.

Court in its original jurisdiction. (App. p. 526). On the same day, Petitioner also filed a supplemental petition for PCR alleging Counsel was ineffective for failing to argue Bonner's sentence, individually and in the aggregate, was unconstitutional and Appellate Counsel was ineffective in failing to argue same on appeal or advise Bonner of the possible implications Aiken had on him. (App. p. 528). On November 9, 2016, the State made its return to Bonner's motion to stay. (App. p. 534).

On November 9, 2016, an evidentiary hearing was convened at the Spartanburg County Courthouse before the Honorable Frank R. Addy, Jr. (App. p. 538). Bonner was present and represented by Epps ("PCR Counsel"). Assistant Attorney General Alicia A. Olive represented the State. Subsequently, on November 29, 2016, Judge Addy filed a FORM 4 Order granting relief on the sole issue of Counsel's ineffectiveness to preserve the issue of his sentence being a *de facto* life sentence by failing to object to or file a motion for reconsideration of his sentence. (App. p. 601). PCR Counsel prepared a proposed order which was signed by Judge Addy and filed on January 30, 2017. (App. p. 603). In Judge Addy's written order, he found Counsel ineffective for "failing to object to, or file a motion to reconsider, Judge Cole's [sixty] year sentencing on the LWOP charge, particularly in that there was also a [ten] year concurrent (sic) sentence for ABHAN after it." The order stated, "[t]his ineffectiveness was prejudicial to Petitioner as it denied him any meaningful opportunity to appeal this 60 + 10 year sentence[.]" Judge Addy granted relief by way of granting Bonner the opportunity to file a motion for reconsideration as to his sixty year sentence for first degree burglary with a consecutive ten year sentence for ABHAN. This appeal follows.

STATEMENT OF THE FACTS

Facts Adduced at Trial

On the night of April 1, 2008, Bonner and his accomplices met at his home and planned the robbery of a Cherokee County convenience store and the victim, Ms. Dipali Darji. (App. p. 102, ll. 1-25; p. 103, ll. 1-13). Bonner told the group that he had observed Ms. Darji carry money from the convenience store where she was employed to her home behind the store after closing. The group planned to take the money from her as she walked home that night. (App. p. 103, ll. 12-21). The group took two cars and parked in a nearby apartment complex where they waited for Ms. Darji to leave work. (App. p. 104, ll. 7-20). While two accomplices stayed back at the cars, Bonner and others hid in bushes near Ms. Darji's house to watch for her. (App. p. 142, ll. 6-14).

When Ms. Darji left work around midnight, she was accompanied by Mr. Milseli Patel and did not have a bag of money with her. (App. 143, ll. 14-20). Bonner's group returned to the car and decided to break into her home in search of the money and the key to the store. (App. p. 133, ll. 23-25 – p. 134, ll. 1-3). An accomplice climbed through a back window and unlocked a door. (App. p. 105, ll. 16-17). The group waited for her to go to sleep before entering the house. (App. p. 185, ll. 22-25 – p. 186, 1-7). When the group returned to her house, they wore socks on their hands and covered their faces. (App. p. 105, ll. 18-24; p. 125, ll. 23-25). Bonner fired a .22 caliber pistol upon entering the home. (App. p. 136, ll. 1-7; p. 187, ll. 12-17). Officer Mike Segina testified they found a small bullet hole in the wall above Ms. Darji's bed. (App. p. 165, ll. 3-14). Bonner and others proceeded to pin her down and beat her while asking her where the money was. They then removed her clothing and kept "continuously" beating her all the while ransacking her home. (App. p. 187, ll. 21-25 – p. 188, ll. 1-7). She eventually relented and told

them where to find the key to the store after they had choked her and put her over a chair without her clothes on. (App. p. 188, ll. 22-25 – p. 189, ll. 1-19).

Bonner retrieved the key and went over to take money from the store with Labrontae Agnew (App. p. 189, ll. 21-24). The store's surveillance system captured them entering the store and taking money. (App. p. 94, ll. 2-20). Fortunately, the store's security alarm was triggered. Bonner then left the store with the money, along with Agnew, and everyone returned to the cars. (App. p. 106, ll. 7-18). The group then went to Kwame Douglas's home to split up the money. (App. p. 192, ll. 7-8). Officer Sizemore testified that the group stole approximately $13,000 in cash from the store, $5,000 in cash from the house, $5,000 in jewelry from the house, and also Ms. Darji's credit card. (App. p. 85, ll. 11-19).

Ms. Darji testified that she ran to a nearby neighborhood to call for help once the group was gone. (App. p. 242, ll. 20-25). Officer Sizemore was the first responding officer, and he testified that Ms. Darji was bleeding from the face when he arrived. (App. p. 78, ll. 17-23). Officer Sizemore felt the need to stay with her at the hospital that night, and Ms. Darji spent two days there. (App. p. 86, ll. 2-7; p. 243, ll. 2-6).

Bonner, on the other hand, testified on his own behalf that he was at home the night of the incident. (App. 252, ll. 15-22). According to Bonner, Fred Douglas woke Bonner up around two o'clock in the morning on April 2, 2008, and told him that they planned to rob somebody. Bonner testified that he declined to participate and went back in his home, where he stayed for the rest of the night. (App. p. 253, ll. 7-25). On direct examination, Counsel asked Bonner why the witnesses would testify that he committed these crimes, and Bonner responded that it must have been part of their plea deal or they had something against him. (App. p. 254, ll. 18-24). Bonner testified he heard that a robbery occurred the next day, but he did not know who

committed the robbery. Also, Bonner testified he noticed the codefendants acting funny and spending a lot of money. The next day, investigators questioned Bonner as to where he was the morning of the incident, to which Bonner responded he was at home and knew nothing about the crime. (App. p. 256, ll. 5-25).

On cross-examination of Bonner, Solicitor Barnette asked why he ran to North Carolina if he was indeed innocent. Bonner replied that he was there for a week and was visiting a friend. (App. p. 258, ll. 2-17; ll. 16-24). As noted by Solicitor Barnette on cross-examination, police had to bring Bonner back from North Carolina. (App. p. 259, ll. 9-11).

Testimony from Resentencing Hearing

Counsel began the resentencing hearing by informing the court that Bonner felt it was in his best interest to continue the case. Counsel felt he had done all the research necessary in the case, but did first ask for a continuance on Bonner's behalf. (App. p. 385, ll. 12-19). Bonner wanted a continuance to research whether he could be resentenced on other underlying charges, but the court informed Bonner that the only new sentence that could be given was for the first degree burglary charge. (App. p. 386, ll. 10-25). After the discussion, Bonner no longer wished to pursue a continuance. (App. p. 387, ll. 9-19).

At the hearing, Solicitor Barnette noted that Bonner was "one of the main instigators" in this case, and the victim may not have survived that night but for the store's security alarm. (App. p. 388, ll. 22-25 – p. 389, ll. 1-7). On behalf of Bonner, Counsel testified that Bonner lacked any positive male role models in his life and came from strained familial circumstances. (App. p. 390, ll. 7-23). Counsel also noted that Bonner was only seventeen when the crimes were committed, and eighteen when he was sentenced. (App. p. 389, ll. 23-25 – p. 390, l. 1). Counsel told the court about the two young children Bonner had fathered before his incarceration

and how Bonner hoped for a chance to rehabilitate and form a relationship with them. (App. p. 391, ll. 3-10).

Counsel repeatedly referenced Graham v. Florida, 560 U.S. 48 (2010). Counsel argued that the reasoning in Graham that minors are less culpable than adults due to the susceptibility of minors and the greater likelihood that a minor's character deficiencies will be reformed applied to Bonner. (App. p. 391, ll. 15-25 – p. 392, ll. 1-16). Counsel touted Bonner's obtainment of his GED as well as his carpentry and electrician certifications. He also described Bonner as a religiously devout, goal-oriented individual deserving of a meaningful chance of rehabilitation. (App. p. 392, ll. 23-25 – p. 393, ll. 1-18). Counsel conceded that the State is not required to guarantee eventual freedom, but asked for a sentence that provides "some meaningful opportunity for release, based upon demonstrated maturity and rehabilitation." (App. p. 393, ll. 24-25 – p. 394, ll. 1-4). Counsel argued Bonner was not "irredeemably depraved" so as to warrant a life without parole sentence under Graham. (App. p. 394, ll. 10-14).

The court observed that the Court of Appeals said a life sentence could not be imposed without providing guidance as to what sentence could be imposed. Counsel suggested this would be a qualitative judgment based on his research. (App. p. 394, l. 25 – p. 395, ll. 1-7).

Bonner's mother testified and reemphasized Bonner's lack of positive role models as well as the fact that his children will have to grow up without a father. (App. p. 397, ll. 24-25 – p. 398, ll. 1-4). Chris Dewberry, Bonner's middle school football coach, also testified on Bonner's behalf. Dewberry testified he still believed Bonner will be a good citizen of Cherokee County and asked the court to have mercy on him. (App. p. 398, ll. 12-23). Solicitor Barnette again noted that Bonner was one of the main instigators of this case. Bonner actually entered both the house and the store, while six codefendants did not even enter the house. (App. p. 399, ll. 1-12).

Finally, Bonner testified on his own that he had rehabilitated himself and was ready for society. He also noted that he had a family that needs him. Bonner told the court he felt like he deserved a second chance, and "we are all just human." (App. p. 400, ll. 18-25 – p. 401, ll. 1-13). Judge Cole then sentenced Bonner to imprisonment for sixty years for first degree burglary. (App p. 401, ll. 14-17).

Testimony from PCR Hearing

At his PCR hearing, Bonner recounted that he was seventeen at the time of the incident and eighteen at the time of his original sentencing. (App. p. 543, ll. 9-19). Bonner testified he had no conversations with Counsel about his original sentence from the trial. (App. p. 544, ll. 7-25 – p. 545, ll. 1-12). However, Bonner did testify he had conversations with Counsel about his resentencing as a result of Graham. (App. p. 545, ll. 16-24). When asked on direct examination whether he and Counsel discussed resentencing for anything other than the life without parole, Bonner testified Counsel did discuss these sentences with him but informed him that the only sentence at issue for the resentencing would be the life without parole for first degree burglary. Moreover, Bonner answered, "[H]e was telling me that I was going up and getting resentenced on the LWOP they had on paper for me to sign. Like this was some kind of plea, that the LWOP that I was getting sentenced for the burglary first was going down to the minimum, which was fifteen years..." (App. p. 546, ll. 3-23; p. 557, ll. 5-22).

Bonner also testified he did not have any conversations with Appellate Counsel about the sentences after resentencing, but he got a letter informing him that his appeal was dismissed the same day that Aiken v. Byars was decided. (App. p. 547, ll. 18-23; p. 548, ll. 1-4). Bonner claimed no one approached him about filing any motion or petition regarding Aiken v. Byars,

and Appellate Counsel did not mention the case to him. (App. p. 548, ll. 10-16). Bonner testified he believed his youth had a role in the crime. (App. p. 550, l. 25 – p. 551, ll. 1-2).

On cross-examination, the State questioned Bonner as to when he became aware of Aiken v. Byars, and Bonner testified he learned about the case the day his appeal was dismissed. Nevertheless, he did not file any motion for resentencing despite learning of the case. (App. p. 552, ll. 17-25 – p. 553, ll. 1-4). Bonner testified to having the case in his possession yet not reading all of it. (App. p. 553, ll. 5-16). When the State questioned Bonner about his claim under Aiken v. Byars, Bonner testified he only knows "you have to go by five methods when sentencing a juvenile." (App. p. 553, ll. 19-25).

Counsel testified he did not remember a specific conversation with Bonner right after the original sentence, but he testified he had a more in-depth conversation prior to resentencing. (App. p. 560, ll. 8-20). While Counsel could not remember if he used the specific words "cruel and unusual punishment" discussing the underlying convictions with Bonner, Counsel testified he believed the transcript reflects his references to Graham at the resentencing. (App. p. 560, ll. 21-25 – p. 561, ll. 1-6). PCR Counsel asked Counsel whether he believed the resentencing transcript details all of the work or illustration Counsel did or presented on Bonner's behalf regarding the sentencing and Graham. Counsel answered, "Yes, I believe I did that sufficiently." Furthermore, Counsel recounted his references to Graham, his analysis of the oral arguments from Graham, and his argument for a qualitative analysis of the sentence in absence of a bright-line rule. (App. p. 561, ll. 18-25 – p. 562, ll. 1-5). Counsel testified he believed the pending South Carolina Supreme Court case Slocumb v. State might lead to a more quantitative or bright-line analysis. (App. p. 562, ll. 6-13). Counsel also noted that Byars only addressed homicide offenses, and Bonner was not accused or convicted of a homicide crime. (App. p. 562, ll. 8-15).

Counsel testified he realized Bonner was looking at an aggregate sentence of over sixty years after the resentencing because he also had the consecutive ABHAN sentence. (App. p. 562, ll. 19-24). Counsel believed this aggregate seventy year sentence did not provide a meaningful opportunity for rehabilitation. (App. p. 563, ll. 5-8). PCR Counsel asked Counsel to make a hindsight judgment, "sitting here today," as to whether there should have been an issue raised as to whether sixty year sentence complied with Graham. In hindsight, Counsel testified he believed an issue should have been raised, and Byars would have provided more precedent, but of course, Byars was not decided until the year after the resentencing. (App. p. 564, ll. 5-12). Counsel did not file a motion for reconsideration or discuss Byars with Bonner. (App. p. 564, ll. 15-21).

On cross-examination, Counsel testified he believed he preserved the record adequately when it came to Graham. (App. p. 566, ll. 3-4). Counsel contradicted Bonner's testimony that they had no conversations about his resentencing. Counsel recounted having at least one conversation with Bonner prior to resentencing and discussing matters relevant to his youth he might be able to raise in mitigation at the resentencing. (App. p. 567, ll. 13-24). Counsel recalled having discussions with Bonner about the first degree burglary charge being the only charge up for resentencing, and he believed Bonner understood. (App. p. 567, l. 25 – p. 568, ll. 1-7). Furthermore, Counsel refuted Bonner's testimony of the existence of a fifteen year plea deal. Counsel testified he wished there was a fifteen year offer, but there was not. In fact, such an offer was not even extended prior to the original trial. (App. p. 568, ll. 21-25 – p. 569, ll. 1-4). Counsel also testified he felt prepared for the resentencing hearing after reviewing Graham, the oral arguments from Graham, other applicable case law, the Court of Appeals opinion, and

having arranged for Bonner's family members to be present. (App. p. 569, ll. 5-25 – p. 570, ll. 1-8).

After cross-examination, the court asked Counsel for the sentences of the co-defendants. Counsel informed the court that twenty-three year old Joshua Manning received sixty years from Judge Hayes, Lebron Agnew received a thirty year sentence, and the other co-defendants received "quite a substantial prison sentence." (App. p. 570, ll. 15-25, p. 571, ll. 1-5).

Appellate Counsel Susan Hackett, Esquire, who handled Bonner's appeal after his resentencing, testified she first filed an Anders brief about the sentencing issue because her review of the sentencing hearing transcript revealed no preserved error, but was subsequently directed by the court of appeals to file a "merits brief" on the issue. In the briefs, she argued the sixty year sentence, particularly in conjunction with the consecutive ten year sentence, constituted cruel and unusual punishment as a de facto life sentence. (App. p. 573, ll. 22-25 – p. 574, ll. 1-9). Appellate Counsel testified she would have been procedurally barred from a motion for reconsideration, but she could have advised Bonner on a motion for resentencing under Aiken v. Byars. However, she acknowledged that Byars was not actually decided until the day Bonner's appeal was dismissed. (App. p. 575, ll. 17-25 – p. 576, ll. 1-13).

Appellate Counsel further acknowledged that Byars concerned petitioners or juveniles convicted of homicide crimes, not the crimes for which Bonner was convicted. She testified that she was aware the opinion stated that the holding applied to those "similarly situated," but when questioned as to whether she was aware of any case law that delineates "similarly situated," Appellate Counsel answered that the issue is among those being raised in Slocumb. (App. p. 577, ll. 19-25 – p. 578, ll. 1-15).

Appellate Counsel testified she was unable to use life expectancy tables specific to inmates due to Counsel's lack of objection and presentation of evidence at the resentencing hearing, so Appellate Counsel used a 1991 life table of vital statistics. (App. p. 579, ll. 8-19). The information Appellate Counsel provided in her brief listed the life expectancy of an African-American male to be 64.4 years. (App. p. 580, ll. 23-25). Regarding Aiken v. Byars, however, Appellate Counsel testified she was unaware of anyone receiving relief under Byars who was a juvenile convicted of a non-homicide crime. (App. p. 584, ll. 22-25 – p. 585, ll. 1-3). While Appellate Counsel reiterated her belief that Slocumb will decide the issue, she conceded that the only reported decision allowing for resentencing under Byars required a homicide crime. (App. p. 586, ll. 1-14). Moreover, Appellate Counsel believes the aggregate sentence should be considered in determining whether there is a de facto life sentence, and she noted this is being debated in Slocumb and courts across the country. (App. p. 587, ll. 8-16).

On cross-examination, Appellate Counsel testified she should have included a discussion of Aiken v. Byars and Miller v. Alabama in her brief, but conceded the cases were no more applicable than Graham. Appellate Counsel testified Graham was not so strong as to exclude a discussion of the other cases altogether, but she did concede that Graham was the strongest argument. (App. p. 591, ll. 2-13). Appellate Counsel also noted that Aiken v. Byars and Miller v. Alabama dealt with the term of Bonner's sentence, which was sixty years as opposed to life without parole in the other cases, though Appellate Counsel referred to this point as a "game of semantics." (App. p. 592, ll. 10-15). Appellate Counsel then testified that Graham was the strongest case but was unpreserved after resentencing. Therefore, the Court of Appeals refused to consider it. (App. p. 593, ll. 1-9).

The State questioned Appellate Counsel if it was accurate that the court of appeals found the Graham issue was not preserved at all or rather that the argument that the aggregate sentences was not preserved considering Bonner was on the first degree burglary. (App. p. 595, ll. 21-25). Appellate Counsel replied that it seemed to her that the court found the entire issue regarding whether it is a de facto life sentence or aggregate de facto life sentence was completely unpreserved. (App. p. 596, ll. 9-21).

The court ruled from the bench. Although the court felt that Counsel "did an admirable job" of offering mitigation evidence at time of resentencing, and "clearly went above and beyond" in ensuring Bonner would receive a sentence that would perhaps allow him to be released, the court nevertheless found Counsel failed to file a motion to reconsider or ask the court to consider the ramifications of Graham and its holding in a motion for reconsideration. (App. p. 598, ll. 5-22). The court found this failure to preserve affected Appellate Counsel's ability to bring the issue before the Court of Appeals and therefore prejudiced Bonner because the Court of Appeals would not address the merits of the issue. However, the court did not find Appellate Counsel ineffective. (App. p. 598, ll. 23-25 – p. 599, ll. 1-5; ll. 13-18).

STANDARD OF REVIEW

This Court must affirm the post-conviction relief ("PCR") court's factual findings if there is evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). However, the Court should reverse the PCR court where there is no probative evidence to support the decision or the decision was controlled by an error of law. Id. (quoting Dempsey, 363 S.C. at 368, 610 S.E.2d at 814); Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010).

In a PCR action, the applicant bears the burden of proving the allegations in his application by a preponderance of the evidence. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985); SCRCP 71.1(e). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry, 300 S.C. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118,

386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. The record contains no probative evidence to support the PCR court's finding Counsel was ineffective for failing to object to or request reconsideration of Bonner's sixty year individual sentence or seventy year aggregate sentence where Counsel is not required to be clairvoyant to potential changes in the law and Bonner was not prejudiced because there is no reasonable probability that absent Counsel's alleged errors, the outcome of his appeal would have been different.

The PCR court found Counsel ineffective for failing to object to or move for reconsideration of Bonner's sixty year sentence for first degree burglary in conjunction with his previous ten year consecutive sentence for ABHAN. In support of this finding, the PCR court held there is a "strong possibility" Bonner's lengthy aggregate term-of-years sentence will result in the functional equivalent of a life without parole sentence in violation of Graham and, for that reason, granted Bonner another resentencing. (App. p. 605). However, contrary to the PCR court's findings, the Supreme Court's decision in Graham v. Florida, 560 U.S. 48 (2010), is not applicable to the facts and circumstances of Bonner's case because the Supreme Court expressly limited its holding and analysis in Graham to cases in which a juvenile offender has been sentenced to **a** life without parole sentence for **a** non-homicide offense. Since Bonner did **not** receive such a life without parole sentence for a single offense and, instead, received six, separate sentences for multiple crimes, of which only a ten year sentence runs consecutively, a sentence like Bonner's is not categorically prohibited under the mandates of Graham, and Bonner's individual and aggregate sentence does not constitute cruel and unusual punishment.

Outside of Graham, there is little to no existing case law in South Carolina to guide the defense bar in drawing lines for juvenile non-homicide sentences. But see Aiken v. Byars, 410 S.C. 534, 545, 765 S.E.2d 572, 578 (2014) (applying Miller v. Alabama, 567 U.S. 460 (2012), retroactively to juvenile offenders sentenced to life without the possibility of parole and

affording them resentencing "where the mitigating hallmark features of youth are fully explored."). In fact, South Carolina appellate courts have never addressed the issue advanced by Bonner and accepted by the PCR court – that a term-of-years sentence can be a *de facto* life sentence in violation of Graham. Notably, in advancing this argument, Bonner did not cite to any primary State or Federal authority in which the term *de facto* life sentence has been defined or applied. It follows that Counsel could not possibly have been deficient for failing to advance an argument at resentencing with no legal basis or precedent for doing so.

Furthermore, there is a significant split of authorities from the courts that have addressed the issue of *de facto* life sentences. The federal appellate courts disagree about Graham's scope. On the one hand, the Sixth Circuit held that Graham "did not clearly establish that consecutive, fixed-term sentences for juveniles who commit multiple nonhomicide offenses are unconstitutional when they amount to the practical equivalent of life without parole." Bunch v. Smith, 685 F. 3d 546, 550 (6th Cir. 2012). In contrast, the Ninth Circuit, like the Tenth Circuit here, concluded that Graham extends to consecutive term-of-years sentences that, when aggregated, are the practical equivalent of life without parole. Moore v. Biter, 725 F.3d 1184, 1192-93 (9th Cir. 2013); but see Moore v. Biter, 742 F.3d 917, 917-22 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of rehearing en banc).

Among state courts, the divide is even deeper. The state high courts in Colorado, Louisiana, Minnesota, Missouri, Oklahoma, and Virginia have all declined to extend Graham's holding to consecutive sentences. Lucero v. People, 394 P.3d 1128, 1131-32 (Colo. 2017), petition for cert. pending, No. 17-5677 (filed August 18, 2017) (Graham did not bar aggregate sentences of 84 years); State v. Brown, 118 So. 3d 332, 341 (La. 2013) ("[W]e see nothing in Graham that even applies to sentences for multiple convictions, as Graham conducted no

analysis of sentences for multiple convictions and provides no guidance on how to handle such sentences."); State v. Ali, 895 N.W.2d 237, 246 (Minn. 2017), petition for cert. pending, No. 17-5578 (filed August 8, 2017) (Miller does not extend to juvenile offenders being sentenced for multiple crimes); Willbanks v. Missouri Dep't of Corr., 522 S.W.3d 238, 240 (Mo. 2017), petition for cert. denied 583 U.S. ___ (Oct. 2, 2017) (No. 17-165) ("Because Graham did not address juveniles who were convicted of multiple nonhomicide offenses and received multiple fixed-term sentences, as Willbanks had, Graham is not controlling."); Vasquez v. Commonwealth, 781 S.E.2d 920, 928 (Va. 2016) (the Eighth Amendment is not violated by aggregate term-of-years sentences amounting to 133 years and 68 years).

Intermediate state courts in Arizona, Kansas, Maryland, Tennessee, and Texas have also declined to extend Graham beyond a single sentence for a single conviction. State v. Kasic, 265 P.3d 410, 413, 415-16 (Ariz. Ct. App. 2011) (prison terms for 32 felonies, some of which were committed when the defendant was a juvenile, totaling 139.75 years was not barred by Graham); State v. Redmon, 380 P.3d 718 (Kan. Ct. App. 2016) (consecutive sentencing totaling 61 years was not a de facto sentence of life without the possibility of parole requiring the application of Graham); McCullough v. State, No. 1081, 2017 WL 3725714, at 1 (Md. Ct. Spec. App. Aug. 30, 2017) (Graham did not extend to categorically bar four consecutive 25-year sentences, with multiple victims); State v. Merritt, No. M2012-00829-CCA-R3CD, 2013 WL 6505145, at 6 (Tenn. Crim. App. 2013) (Graham only applies to sentences of life without the possibility of parole, not aggregate sentences); Carmon v. State, 456 S.W.3d 594, 601 (Tex. App. 2014) (nothing in Graham precludes 99-year sentence for aggravated robbery from being served consecutively to a life sentence with the possibility of parole for murder).

Additionally, the Supreme Court of Georgia, relying on Justice Alito's dissent in Graham, concluded that Graham does not apply to term-of-years sentences at all. Adams v. State, 707 S.E.2d 359, 365 (Ga. 2011) ("Clearly, '[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole.'" (quoting Graham, 560 U.S. at 124 (Alito, J., dissenting)).

On the other side of the divide are courts in California, Florida, Illinois, Indiana, Iowa, Nevada, New Jersey, Ohio, and Wyoming. These courts have ruled that Graham's holding or logic dictate that its categorical rule extends to aggregate sentences. See People v. Caballero, 282 P.3d 291, 295 (Cal. 2012) (consecutive sentencing of over 100 years before parole eligibility found to violate Graham); Henry v. State, 175 So. 3d 675, 679 (Fla. 2015) (reviewing aggregate sentences amounting to 90 years in prison, the court held Graham bars juvenile nonhomicide sentences when there is no meaningful opportunity to obtain release); People v. Reyes, 63 N.E.3d 884, 888 (Ill. 2016) (citing to both Graham and Miller v. Alabama, 567 U.S. 460 (2012), to find the consecutive sentences at issue unconstitutional); Brown v. State, 10 N.E.3d 1, 8 (Ind. 2014) (relying on the principles in Graham to modify an aggregated 150-year sentence to an aggregated 80-year sentence); State v. Null, 836 N.W.2d 41, 71 (Iowa 2013) (relying on both Graham and Miller to find the aggregated sentences unconstitutional); State v. Boston, 363 P.3d 453, 457 (Nev. 2015) (Graham "applies to aggregate sentences that are the functional equivalent of life without the possibility of parole."); State v. Zuber, 152 A.3d 197 (N.J. 2017), petition for cert. denied, 583 U.S. ___ (Oct. 2, 2017) (No. 16-1496) (applying principles of both Graham and Miller to consecutive sentences); State v. Moore, 76 N.E.3d 1127, 1137-38 (Ohio 2016), petition for cert. denied, 583 U.S. ___ (Oct. 2, 2017) (No. 16-1167) (concluding Graham's principles "apply equally to a juvenile nonhomicide offender sentenced to prison for a term of years that

extends beyond the offender's life expectancy" when determining whether the aggregate sentences at issue in the case were lawful); Bear Cloud v. State, 334 P.3d 132 (Wyo. 2014) (relying on both Graham and Miller to find the consecutive sentences at issue unconstitutional).

The significant divide among many jurisdictions, both State and Federal, in addition to our own lack of jurisprudence in this State on the issue further demonstrates Graham's application to Bonner's sentence is not clearly established. If fair-minded jurists can disagree as to Graham's application to the case at bar, and those similarly situated, then Counsel's failure to advance the argument that Bonner's term-of-life sentence (individual or aggregate) was practically equivalent to a life without parole sentence cannot be held unreasonable. Counsel's representation is measured against a standard of "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). This standard does not require Counsel to pioneer novel arguments poised to create new law among the high courts of this State. Nor does it require an attorney to be clairvoyant to "anticipate or discover changes in the law, or facts which did not exist, at the time of trial." Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993).

The PCR court also based its finding of ineffective assistance of counsel partly on the fact Counsel did not contest Bonner's ten year sentence for ABHAN which was to run consecutively to Bonner's new sixty year sentence for first degree burglary. However, Counsel did note to the resentencing court that Bonner was concerned about his consecutive sentence for ABHAN. (App. p. 386, ll. 1-9). Counsel stated to the court that Bonner wished to continue the resentencing to have more time to research further whether "the court can grant him any . . . less time on the thirty year sentences . . . and also the ten year sentence on the [ABHAN], which ran consecutive. . . ." (App. p. 386, 1-9). The Court stated: "I can't change those sentences." (App.

p. 386, ll. 10-11). The Solicitor noted, and the Court of Appeals opinion reflects, Applicant "[did] not challenge his conviction or sentence for any other charge" in his direct appeal. (App. p. 386, ll. 12-23; State v. Bonner, 400 S.C. 561, 564 n. 4, 735 S.E.2d 525, 526 (Ct. App. 2012)). The Court then reiterated that it could only resentence Bonner on the burglary conviction.

Furthermore, Counsel argued at resentencing that Bonner deserved a "meaningful chance at rehabilitation." (App. p. 390, ll. 5-6). After discussing Bonner's childhood and background in detail, Counsel referred to Graham multiple times, arguing Bonner was entitled to a "meaningful chance at rehabilitation." (App. pp. 390-394). He stated "the sentence we are asking for is a sentence that provides some meaningful opportunity for release, based upon demonstrated maturity and rehabilitation." (App. p. 394, ll. 2-4). Judge Cole asked Counsel if Graham had provided any guidance as to what sentence would be appropriate, and Counsel explained to Judge Cole that Graham had not provided any bright-line or categorical rules to guide the courts, other than the sentence having to provide some meaningful opportunity for release. (App. p. 394, l. 22 – p. 396, l. 21).

The record reflects Counsel did not fail to preserve the issues regarding Bonner's ten year consecutive ABHAN sentence. Rather, Bonner did not raise the other sentences in his direct appeal, and therefore, the Court of Appeals only vacated Bonner's burglary sentence and remanded back for resentencing *on that charge alone*. The circuit court has no jurisdiction to reconsider a criminal sentence once the term of court has expired. State v. Slocumb, 412 S.C. 88, 92, 770 S.E.2d 436, 438 (Ct. App. 2015) (citing State v. Warren, 392 S.C. 235, 238, 708 S.E.2d 234, 235 (Ct. App 2011)). Here, the resentencing court lacked jurisdiction or authority to resentence Bonner on any other charge than the first degree burglary. Id. at 92, 708 S.E.2d at 439 (finding circuit court only had jurisdiction and authority to resentence on one of five charges

where federal district court remanded back to state circuit court for resentencing on one charge). Counsel could not have sought reconsideration of any of Bonner's other sentences at his resentencing hearing. Accordingly, there was no deficiency.

Additionally, there is no probative evidence in the record to support the PCR court's conclusion that Bonner was prejudiced by Counsel's alleged deficiency. The PCR court found Bonner was prejudiced by Counsel's alleged failure to preserve the sentencing issue because it "denied him meaningful opportunity to appeal his 60 + 10 year sentence." (App. p. 605). However, the PCR court failed to apply the appropriate standard for finding prejudice. The standard is not whether Bonner was denied meaningful appellate review, but rather whether there is a reasonable probability he would have prevailed on appeal. Strickland, 466 U.S. 668 (1984). (Applicant required to prove both deficient conduct and resulting prejudice, i.e., that but for the error, there is a reasonable probability the outcome would have been different.). In finding prejudice, the PCR court relied upon mere speculation that the outcome would have been different on appeal. But, nothing in the record or existing case law supports this supposition.

Contrary to the PCR court's findings, the only comparable case in South Carolina is that of Slocumb, supra. In Slocumb, the Court of Appeals affirmed an aggregate one hundred and thirty year sentence[2] post-Graham, despite Slocumb's argument that his lengthy aggregate term-of-years sentence was the functional equivalent of a life without parole sentence and, for that reason, the Court should have found his sentence to be categorically unconstitutional in light of Graham, which prohibits the imposition of a life without parole upon a juvenile who committed a non-homicide offense. Id. The Court of Appeals found the sentencing court was without jurisdiction to address Slocumb's four other consecutive sentences. Id. at 92, 770 S.E.2d at 439.

[2] Similar to Bonner, Slocumb was convicted of various non-homicide offenses. Slocumb received life without parole for first degree burglary. Slocumb was ultimately remanded back for resentencing *only for the first degree burglary conviction*, pursuant to Graham.

Subsequently, this Court denied Slocumb's petition for writ of certiorari from the Court of Appeals decision.[3] Therefore, as of March of 2015, the case law is in contradiction of the PCR court's contention that there was a reasonable probability that the outcome of Bonner's appeal would have been different.

Accordingly, there is no evidence supporting the PCR court's finding that Counsel was deficient or that Bonner was prejudiced by any alleged deficiency.

[3] In denying Slocumb's petition, this Court took the extraordinary step of appointing appellate counsel to Slocumb and directing appellate counsel to file a petition for a writ of certiorari in the Court's original jurisdiction on Slocumb's behalf addressing "whether the aggregate sentence imposed for non-homicide offenses committed while [Slocumb] was a juvenile constitutes a *de facto* life sentence, and if so, whether or how [Slocumb]'s aggregate sentence of 130 years' imprisonment may afford [Slocumb] a meaningful opportunity for release in compliance with Graham . . . and the Eighth Amendment." While this Court understandably wants to address the issue, it has not yet done so and therefore Counsel, in this case, cannot be held to a standard as though the law was established and settled at the time Bonner was resentenced.

II. The PCR court committed an error of law in finding Counsel ineffective on the basis that Bonner's sixty year individual sentence and seventy year aggregate sentence amounted to a *de facto* life sentence in violation of Graham v. Florida.

The PCR court's finding of ineffective assistance of counsel is grounded in the idea that Bonner's aggregate seventy year sentence (or even his individual sixty year sentence) is a *de facto* life sentence in violation of Graham. However, Bonner's sixty year sentence for first degree burglary or his aggregate sentence of seventy years for first degree burglary and ABHAN is not violative of Graham and the constitutional prohibition against cruel and unusual punishment.

Significantly, in Graham v. Florida, a narrow majority of the United States Supreme Court applied the analysis applicable to categorical challenges to sentencing practices and concluded the imposition of a life sentence without the possibility of parole upon a juvenile offender who committed a non-homicide offense violates the Eighth Amendment's prohibition against cruel and unusual punishment. Id., 560 U.S. at 81. In reaching that conclusion, the Supreme Court limited its consideration only to life without parole sentences for juvenile non-homicide offenders and found a national consensus existed against such sentences for such offenders based on the small number of life without parole sentences that had actually been imposed on juvenile non-homicide offenders in the United States. Id. at 67. The Supreme Court then applied its own "independent judgment" and concluded life without parole sentences for juvenile non-homicide offenders were unconstitutional due to the lessened culpability of juveniles, the severity of life with parole sentences, and the lack of sufficient penalogical justifications for the sentencing practice in regard to juveniles. Id. at 74. For those reasons, the Supreme Court held:

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity for release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid the State from making the judgment at the outset that those offenders never will be fit to reenter society.

Id. at 75.

Subsequent to the decision in Graham, numerous appellate courts across the country have struggled with the question of whether the Supreme Court's holding in that case is applicable to lengthy term-of-years sentences for juvenile non-homicide offenders even though such sentences are not actually sentences of life without parole. Many of the appellate courts considering the question have concluded the holding in Graham does not apply to term-of-years sentences for juvenile non-homicide offenders due to the fact the decision in Graham was expressly limited to life without parole sentences. See Bunch v. Smith, 685 F.3d 546, 552 (6th Cir. 2012) (finding Bunch's eighty-nine-year-aggregate sentence did not clearly violate Graham even though it may have been the functional equivalent of a life without parole sentence and noting the Supreme Court's analysis in Graham did not address such a situation); Walle v. State, 99 So. 3d 967, 973 (Fla. Dist. Ct. App. 2012) (declining to apply Graham to an aggregate ninety-two-year term of imprisonment for a juvenile non-homicide offender); Adams v. State, 288 Ga. 695, 701, 707 S.E.2d 359, 365 (Ga. 2011) (finding the decision in Graham did not categorically bar anything other than life without parole sentences for juvenile non-homicide offenders); State v. Brown, 118 So. 3d 332, 341-342 (La. 2013) ("In our view, Graham does not prohibit consecutive term of

year sentences for multiple offenses committed while a defendant was under the age of 18, even if they might exceed a defendant's lifetime, and, absent any further guidance from the United States Supreme Court, we defer to the legislature which has the constitutional authority to authorize such sentences."); see also Graham, 560 U.S. at 63 ("The instant case concerns **only** those juvenile offenders sentenced to life without parole solely for a nonhomicide offense." (emphasis added)). However, a few appellate courts have reached a different conclusion and have found term-of-years sentences carrying the same practical effect as life sentences violate the Graham decision's explicit prohibition against life without parole sentences for juvenile non-homicide offenders. See People v. Caballero, 55 Cal. 4th 262, 268, 282 P.3d 291, 295 (Cal. 2012) (concluding based on Graham "that sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment"); Floyd v. State, 87 So. 3d 45, 46 (Fla. Dist. Ct. App. 2012) (finding an aggregate eighty-year sentence for a juvenile non-homicide offender to be unconstitutional in light of the decision in Graham).

Notably, in State v. Kasic, 228 Ariz. 228, 229, 265 P.3d 410, 411 (Ariz. Ct. App. 2011), the Arizona Court of Appeals considered the impact of the Graham decision upon a situation highly similar to the facts and circumstances of Bonner's case. In that case, Kasic argued the reasoning of the Graham decision warranted a finding his aggregate sentence of nearly one-hundred-and-forty years for offenses he committed as both a juvenile and an adult was unconstitutional. Id. at 232, 265 P.3d at 414. However, the Court of Appeals rejected that argument. Id. In doing so, the Court of Appeals initially found Graham did not categorically bar a term-of-years sentence like Kasic's based on the fact the Supreme Court expressly limited its decision in Graham solely to life without parole sentences for juvenile non-homicide offenders.

Id. at 232-233, 265 P.3d at 414-415. Then, after concluding Kasic's aggregate term-of-years sentence was not categorically barred through Graham, the Court of Appeals considered whether Kasic's sentences taken individually and in the aggregate were grossly disproportionate to his crimes. Id. at 233-234, 265 P.3d at 415-416. Upon finding they were not, the Court of Appeals held "the Eighth Amendment does not prohibit Kasic's sentences for the crimes he committed as a juvenile." Id. at 234, 265 P.3d at 416.

Likewise, in Vasquez v. Commonwealth, 291 Va. 232, 236, 781 S.E.2d 920, 922 (Va. 2016), the Virginia Supreme Court recently addressed an Eighth Amendment challenge to the constitutionality of lengthy aggregate term-of-years sentences imposed upon two individuals for offenses they committed when they were sixteen years old. In that case, Vasquez and his co-defendant, Valentin, committed a brutal rape along with a number of other crimes and were each ultimately convicted of a dozen or more felonies. Id. Following their convictions, Vasquez received multiple term-of-years sentences that aggregately required him to serve a term of imprisonment of one-hundred-and-thirty-three years while Valentin received aggregate sentences requiring him to serve a total of sixty-eight years of incarceration. Id. at 239, 781 S.E.2d at 924. Vasquez and Valentin then appealed their aggregate sentences, arguing those sentences were unconstitutional in light of the fact they exceeded their expected lifespans, and the Supreme Court affirmed. Id. at 246, 781 S.E.2d at 928. In affirming, the Supreme Court noted the decision in Graham only addressed the constitutionality of a life without parole sentence imposed upon a juvenile offender for a single non-homicide offense and did not "address multiple term-of-years sentences imposed on multiple crimes that, by virtue of their accumulation, exceeded the criminal defendant's life expectancy." Id. at 241, 781 S.E.2d at 925. As a result, the Supreme Court indicated it was constrained to enforce the Eighth Amendment in

a manner consistent with the limited holding in Graham and not to proactively extend that holding beyond its limits to a different factual situation not analyzed or addressed in the Graham decision. Id. at 246, 781 S.E.2d at 928. Accordingly, the Supreme Court concluded Vasquez's and Valentin's sentences were not unconstitutional and did not violate the limited mandates of Graham as those sentences were not life without parole sentences imposed for a single non-homicide offense. Id.

In the case at bar, Bonner was **not** sentenced to a life without parole sentence for a non-homicide offense. See Graham, 560 U.S. at 63 ("The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense."). Instead, like the defendants in Kasic and Vasquez, Bonner was sentenced to concurrent and consecutive terms of imprisonment for multiple distinct and serious crimes with all of his individual sentences falling within the permissible sentencing limits for those crimes. For that reason, the decision in Graham is not applicable to Bonner's case. See Walle, 99 So. 3d at 970 ("The Supreme Court itself limited the scope and breadth of its decision in Graham by stating that its decision 'concern[ed] only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.' From this statement we identify the four necessary analytical factors: (1) the offender was a juvenile when he committed his offense, (2) the sentence imposed applied to a singular nonhomicide offense, (3) the offender was 'sentenced to life,' and (4) the sentence does not provide the offender with any possibility of release during his lifetime." (brackets in original and citations omitted)).

In implying the unconstitutionality of Bonner's term-of-years sentence, the PCR court did not find, nor did Bonner allege, his aggregate sentence was grossly disproportionate to his specific crimes. See Graham, 560 U.S. at 75 (recognizing a juvenile non-homicide offender can

constitutionally receive a sentence for an offense that would result in the offender spending the remainder of his life in jail); see also State v. Johnson, 350 S.C. 543, 547, 567 S.E.2d 486, 488 (Ct. App. 2002) ("[F]ew would argue that first-degree burglary, armed robbery, and kidnapping are anything other than grave offenses of the 'most serious' nature."); see generally Kasic, 228 Ariz. at 233, 265 P.3d at 415 ("[I]f a sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate. This proposition holds true even if a defendant faces a total sentence exceeding a normal life expectancy as a result of consecutive sentences." (brackets in original and citations omitted)). Instead, the PCR court implied Bonner's individual sixty year sentence and aggregate seventy year sentence are unconstitutional because both are the functional equivalent of a life without parole sentence. Based on that contention, the PCR court implicitly extended the Graham decision beyond its express limits, applied it to consecutive term-of-years sentences, and found Bonner's sentence to be categorically unconstitutional. However, the Graham decision cannot properly be – and should not be – extended beyond the express limits the Supreme Court placed upon its holding in that case.

Accordingly, the PCR court's finding of ineffectiveness was based on an error of law. Because the specific and limited holding of Graham is not applicable to Bonner's case, his sixty or seventy year sentence neither violates the mandates of the Graham decision nor is categorically unconstitutional. As a result, the PCR court committed an error of law in misinterpreting and misapplying Graham to find Counsel was ineffective for failing to preserve the *de facto* life sentence issue for appellate review.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court grant certiorari to review the PCR court's erroneous finding of ineffective assistance of counsel.

Respectfully submitted,

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By: 
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November 21, 2017.

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
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S.C. SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2017-000758

John B. Bonner,.....Respondent,

v.

State of South Carolina,.....Petitioner.

CERTIFICATE OF SERVICE

I, Valerie Garcia Giovanoli, certify that I have today served the within Petition for Writ of Certiorari and Appendix upon Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Lindsey S. Vann, Esquire
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201

I further certify that all parties required by Rule to be served have been served.
This 21st day of November, 2017.

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