

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM CHARLESTON COUNTY  
COURT OF COMMON PLEAS

RECEIVED

MAR 26 2018

The Honorable Deadra L. Jefferson, Circuit Court Judge

S.C. SUPREME COURT

Case No. 2010-CP-10-3800

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

Onrae Williams, ..... Petitioner,

v.

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

**WILLIAMS' RESPONSE TO THE PETITION FOR REHEARING**

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Pursuant to SCACR 240(e), Onrae Williams files this Return to the State of South Carolina's petition for rehearing. Rehearing is not warranted. The Court correctly held in its opinion filed February 28, 2018 (the "Opinion") that a new trial was warranted based on the facts and law in this case. The Court did not overlook or misapprehend any points of law or fact. The Court correctly reversed the decision below and remanded the case for a new trial.

**I. The petition should be denied because the Court understood and applied the correct standard of review, the same standard that Respondent raised and argued below.**

The State's position that the Court "misapprehended the standard of review in post-conviction relief" is incorrect. (Pet. Reh'g at 2.) The State dedicated an entire section of its response brief to the standard of review and quoted the same language from *Suber v. State*, 371 S.C. 554, 558–59, 640 S.E.2d 884, 886 (2007), that it re-quoted for the Court in its petition for rehearing. (Resp. Br. at 4.) No other standard was ever cited in the briefing or discussed with the Court during oral arguments. Indeed, the first point that counsel for the State raised during oral argument was a recitation of the standard of review.

The Court understood and correctly applied this standard in reaching its decision. Contrary to the State's argument, there was no probative evidence showing that Williams was accurately informed, prior to conviction, that if he was convicted the only sentence he could possibly receive was life without possibility of parole—not "up to life" or anything less. For these reasons, the petition for rehearing should be denied.

**II. The petition should be denied because Respondent merely rehashes the same arguments on deficiency of counsel previously presented to the Court.**

The State proceeds to argue issues that it already briefed and argued before this Court: (1) that trial counsel informed Mr. Williams about the mandatory nature of LWOP and (2) that the

trial court's comments cured the deficiency. This Court has already considered and ruled on these arguments, and it should not reconsider them in this case, which has uncomplicated facts and a straightforward application of the law.

The State's argument that the Court misapprehended the deficiency of trial counsel based on trial counsel's testimony at the PCR hearing does not survive scrutiny. At the PCR hearing, trial counsel was asked two questions about his discussions with Williams about LWOP. (App. 425:9–21; 427:7–18.)

In the first question, the State only asked whether trial counsel ever explained “what life without parole meant as far as how much time you have to do?” The question did not even address the key point. The issue is not “how long does life without parole last,” but whether counsel ever unequivocally told Williams that if convicted, the only sentence he could receive was life without possibility of parole and absolutely nothing else. Trial counsel's response, even to the wrong question, was equivocal as to the real issue, which was that LWOP was the one and only sentence that could be imposed in these circumstances if Williams was convicted. Thus, trial counsel, who had no notes of what was actually discussed regarding LWOP (App. 427:19–22), couldn't “remember specifically what we discussed about that parole,” (App. 425:16–17), but characterized the discussion as “possible life without parole” and that he “did imply it was up to life,” or that “he could get life without parole.” (App. 425:18–21.) Not once in response to the first question did trial counsel state that he advised Williams that he absolutely would get LWOP and nothing less if convicted.

The second question on redirect actually addressed the issue—“that life without parole meant mandatory.” (App. 427:8–9.) Again, trial counsel couldn't “remember exactly what we discussed,” and couldn't “remember that issue coming up with him [Williams] ever asking, you

know, is it up to life or is it mandatory life. I don't remember discussing that specific issue. . . .” (App. 427:14–17.)

All of trial counsel's testimony about what he may have discussed with Mr. Williams was speculative, and even that speculative testimony was equivocal (“possible life without parole . . . I did imply that it was up to life . . . he could get life without parole. . . . I wouldn't have implied in any way that it was not a mandatory life without parole”). Contrary to the State's attempt to recast the PCR Court's decision as a credibility determination, trial counsel's testimony is insufficient probative evidence to support the PCR Court's findings in the Order of Dismissal that “Counsel testified that he told Applicant if the State served LWOP notice that they were pursuing a third strike, and Applicant would get LWOP if he was convicted” (App. 4); and counsel “explained to him that LWOP was his only possible sentence if convicted at trial” (App. 7). Therefore, this Court did not misapprehend the deficiency of trial counsel.

Likewise, the State's argument that the Court misapprehended the colloquy between the trial judge and Mr. Williams' trial counsel does not survive scrutiny. The State cites a short, seconds-long snippet between the trial court and trial counsel (App. 179, middle of line 12), apparently as the jury is walking back into the courtroom, and argues that “there is no evidence Williams did not hear the statement, and . . . Williams was present in the courtroom at the time and gave no indication he did not hear or understand the trial court's comment, and the statement was made immediately following plea negotiations between Williams and the State.” (Pet. Reh'g at 4.) This is the same argument that State made in its Response Brief and during oral arguments. (Resp. Br. at 9.)

As this Court has previously noted, such a passing comment—in this case not even made to the defendant—is insufficient to cure a prior failure to accurately inform a defendant, like Mr.

Williams, of the mandatory nature of the only sentence he could receive. *See Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (finding that the discussion of the mandatory minimum sentence that was mentioned in passing could not cure the inadequacy of failing to inform the defendant of the mandatory minimum sentence). The trial court, itself, observed, after the fact, that Mr. Williams did not understand that he would be sentenced to mandatory LWOP: “[Y]ou’re correct, mine is without any discretion, but clearly this case, the facts observed, and the fact of recent convictions, -- there was a gentleman this morning that entered a plea to avoid. I think that he finally perceived the gravity of the situation; **unfortunately some don’t, and Mr. Williams falls into that.**” (App. 382:15–22) (emphasis added).

Finally, the State claims, as it did in its Response Brief (Resp. Br. at 9), that Mr. Williams’ statement during the sentencing phase of his trial that his “*family* did not understand what was happening” (Pet. at 5) means that *Mr. Williams* understood that, prior to conviction, his only sentence in proceeding to trial was mandatory LWOP. The State’s argument, however, is speculation and insufficient to warrant a finding that Mr. Williams understood that LWOP meant mandatory LWOP, before he was convicted and sentenced. *See Attaway v. One Chevrolet 5-P Truck*, 228 S.C. 559, 563, 91 S.E.2d 270, 271–72 (1956) (for an circumstantial evidence to warrant a finding of fact, it must lead to the conclusion with a reasonable certainty and not amount to mere speculation).

Accordingly, the Court did not misapprehend whether the trial court cured the deficiency of counsel.

### **III. The remaining arguments were never previously raised to the Court.**

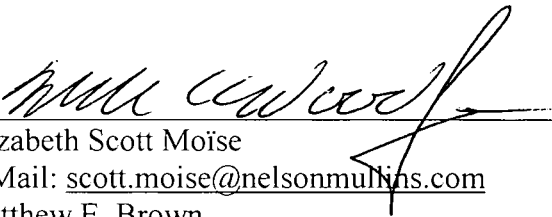
Finally, the remainder of the State’s Petition (last full paragraph of page 5 through page 7) concerns arguments that the State has never raised before, but had every opportunity to raise.

They do not concern points that the Court supposedly overlooked or misapprehended, and therefore are inappropriate to raise in a Petition for Rehearing. SCACR 221(a).

**CONCLUSION**

Based on Mr. Williams' prior briefing and the reasons set forth above, the Court did not misapprehend or overlook the law and evidence in this case. Respondent is not entitled to a rehearing, and the Petition should be denied.

NELSON MULLINS RILEY & SCARBOROUGH, L.L.P.

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March 26, 2018

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**PROOF OF SERVICE**

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I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Onrae Williams #284437, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified to the following address(es):

Pleadings: **Williams' Response to the Petition for Rehearing**

Counsel Served:

**U.S. Mail**

Lindsey A. McCallister, Esquire  
South Carolina Attorney General's Office  
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A handwritten signature in cursive script that reads "Cindy K. Hess". The signature is written in black ink and is positioned above a horizontal line.

Cindy K. Hess  
Sr. Administrative Assistant

March 26, 2018