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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson, Circuit Court Judge

Case No. 2010-CP-10-3800
Appellate Case No. 2011-201112

Onrae Williams, #284437, ... Petitioner,

v.

State of South Carolina, ... Respondent.

APPENDIX TO THE PETITION FOR A
WRIT OF CERTIORARI
VOLUME II

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ORIGINAL

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380 S.C. 336
Court of Appeals of South Carolina.

The STATE, Respondent,
v.
Onrae WILLIAMS, Appellant.

No. 4447. | Heard Sept. 18, 2008. | Decided Oct. 22,
2008. | Rehearing Denied Dec. 19, 2008. | Certiorari
Denied Oct. 20, 2009.

Synopsis

Background: Defendant was convicted in a jury trial in the Circuit Court, Charleston County, R. Markley Dennis, Jr., J., of distribution of crack cocaine and distribution of crack cocaine within proximity of a school. Defendant appealed.

Holdings: The Court of Appeals, Huff, J., held that:

[1] trial court's error, if any, in refusing to allow impeachment evidence of confidential informant's prior convictions was harmless, and

[2] sentence of life imprisonment without parole was not cruel and unusual punishment.

Affirmed.

Attorneys and Law Firms

**642 Mark A. Peper, of Charleston, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Scarlett Wilson, of Charleston, for Respondent.

Opinion

HUFF, J.:

*339 Onrae Williams was convicted of distribution of crack cocaine and distribution of crack cocaine within proximity of a school. Based upon two prior "serious" convictions, the trial court sentenced Williams to life

imprisonment without the possibility of parole on both charges. On appeal, Williams asserts error in (1) the trial court's refusal to allow him to impeach the testimony of the confidential informant with evidence of several former convictions that were older than ten years and (2) the trial court's sentencing of him to life without parole (LWOP) in violation of his constitutional protection from cruel and unusual punishment. We affirm.

*340 FACTUAL/PROCEDURAL BACKGROUND

This case involves a controlled buy set up by the City of Charleston Police Department using a confidential informant (CI). On August 10, 2004, officers met with the CI, searched him to insure he had no contraband on his person, provided him with money, and equipped him with a button camera capable of capturing video. Because there had been numerous complaints about drug activity near Harmon Park, the CI was taken close to that area with a bicycle, which the CI then used to ride into the area. Following along with the videotape of the incident admitted into evidence, Officer Womack indicated where the CI came in contact with someone, and ultimately completed a drug transaction approximately one hundred yards away from Burke High School. Officer Womack testified he maintained a constant visual on the CI during the entire process, as well as a constant audio transmission. When the informant was searched before being let out to make the buy, he had no drugs on him. When he returned, the CI had crack cocaine in his hand.

Officer Hurteau, who was present with Officer Womack at the controlled buy, also testified as the video of the incident was played to the jury. He testified the CI was not working off charges, but was a paid informant. Officer Hurteau pointed out on the video an individual on a fence who was talking on a cell phone and yelled out "Onrae," and that one could then observe Williams walking up from the fence area. He then noted where the CI hands Williams money. Williams is off the camera for a moment and then reappears, approaching the CI, at which point Williams is referred to as "On." Williams is seen holding something in his hand, which he places in the CI's hand, and then walks away. When the CI returned to Officer Hurteau's location, he handed him two, off-white rock-like substances. Officer Jenkins, who was also present in the area, testified he was on perimeter duty during the controlled buy and he observed **643 Williams with another man near the fence as the CI approached the area. After reviewing the video of the incident, Officers Hurteau and Womack, as well as Officer Jenkins, "all immediately without hesitation

recognized him and said that was Onrae Williams.”

*341 The CI also testified to the events of that day. As with Officers Womack and Hurteau, he followed along with the videotape of the event, identifying Onrae Williams on the tape and noting the completion of the transaction where Williams handed him drugs in exchange for money. He testified that after Williams handed him the drugs, he got back on the bicycle and rode back to the police officers and gave them the drugs. The CI confirmed that the officers searched him before the transaction, as well as upon his return. Subsequent analysis of the item showed it to be .3 grams of crack cocaine.

At the start of the case, Williams made an in limine motion seeking to admit evidence of several prior convictions of the CI that were greater than ten years old. Specifically, Williams sought to introduce evidence of the CI’s 1988 conviction for armed robbery, for which he was released from prison on August 1, 1996, as well as several forgeries and a larceny that occurred around 1981 and 1982. Williams argued the CI’s credibility was key to the trial as the video was not completely clear, and that under Rule 609(b), SCRE, the jury should have this information in the interest of justice. Williams also noted the CI had a 2002 conviction for receiving stolen goods, showing the CI has continued to break the law. Finally, Williams maintained that the matter had been pending for about a year, and had the State tried the case within the first six months, the armed robbery conviction would have fallen within the ten year limit under the rule. He argued it was the State’s delay in bringing the case that caused the ten-year period to expire between the time of his arrest and the trial, as his arrest occurred in January 2005, a time within the ten-year period. Williams acknowledged, however, that he had not made a motion for a speedy trial.

The trial court noted Williams would be able to challenge the CI’s credibility with the prior conviction for receiving stolen goods. It found no reason under the facts of this case to extend the time limit for the other convictions beyond the cut-off date under the rule, but stated it would rule on the matter after Williams proffered the evidence.

During the CI’s direct examination, he admitted to having a 2002 conviction for receiving stolen goods. During the CI’s *342 cross-examination, counsel questioned why the CI would become a confidential informant. The CI stated it was “[t]o try to keep ‘em from hurting people,” and that it was not always about the money he received. Counsel then asked the CI about his conviction for receiving stolen goods and asked whether that did not hurt people as well. Counsel continued with this line of questioning, asking how long the CI had been working as a confidential

informant at which point the following colloquy occurred:

[Counsel]: But it had nothing to do with the money?

[CI]: No, it ain’t about the money. I had money, you know. It was about the drug deals. I figure it’s about time to make a change now. I’ve done spent half of my life in the penitentiary.

[Counsel]: You’ve spent half your life in prison?

[CI]: Yeah.

[Counsel]: And now you’ve turned your life around?

[CI]: Trying to.

[Counsel]: It was time to make a change?

[CI]: It was time to make a change, for sure.

[Counsel]: You’re an honest man now?

[CI]: I ain’t going to say honest because I trip up sometimes.

Thereafter, defense counsel asserted the CI opened the door to testimony concerning his older prior convictions when he stated he had spent half of his life in the penitentiary. The court noted Williams had already received a benefit by that answer to the question, and still found no exceptional circumstances in light of the CI’s testimony that would warrant allowing convictions outside the time limit, but allowed counsel to proffer **644 the evidence. Outside the jury’s hearing, the CI admitted he had a 1988 conviction for armed robbery for which he served time and was released in August 1996. He further acknowledged a 1982 larceny conviction resulting in a two-year sentence, suspended to six months, as well as some forgeries and a housebreaking conviction in 1982 for which he received a ten-year sentence. The solicitor objected to introduction of the prior convictions, arguing it was not probative, it was unduly prejudicial, and defense counsel had already *343 accomplished his goals through the testimony he elicited from the CI. The trial court ruled the circumstances did not warrant allowing the older prior convictions, and the issue was resolved by the CI’s answers on cross-examination.

The jury found Williams guilty of the distribution and proximity charges. The solicitor stated Williams had several previous convictions, including a 2000 possession with intent to distribute cocaine and a proximity charge, as well as a possession of crack charge, and in 2003 had distribution of marijuana, distribution of cocaine, proximity, and possession of cocaine charges. The court

noted Williams had at least two previous serious offenses such that this offense would qualify as a third. Defense counsel agreed and further stated he did not believe the court had "much discretion" as far as sentencing, but placed an objection on the record to a life without parole sentence. Counsel maintained such a sentence would constitute cruel and unusual punishment as this was a drug crime and not a violent crime. He argued, in this case, life without parole would be excessive, unduly severe, and would violate the due process clause. The court sentenced Williams to life without parole on both offenses. This appeal followed.

LAW/ANALYSIS

A. Prior remote convictions

¹⁴¹ Williams first contends the trial court erred by refusing to allow evidence of the CI's former convictions for armed robbery, larceny, forgery and housebreaking. He argues the trial court erred in failing to admit this evidence because (1) the CI opened the door to the evidence by stating he spent half his life in prison and (2) the court failed to apply the proper balancing test in ruling Williams could not challenge the CI's credibility pursuant to Rule 609, SCRE. We find no reversible error.

¹⁴² ¹⁴³ ¹⁴⁴ ¹⁴⁵ ¹⁴⁶ The admission or exclusion of evidence falls within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *State v. Morris*, 376 S.C. 189, 205, 656 S.E.2d 359, 368 (2008). As well, the scope of cross-examination is within the discretion of the trial court, and the court's decision will not be reversed on appeal *344 absent a showing of prejudice. *State v. Colf*, 337 S.C. 622, 625, 525 S.E.2d 246, 247-48 (2000). Further, any error in the trial court's failure to conduct the proper balancing test in determining whether remote convictions are admissible may be harmless. *State v. Johnson*, 363 S.C. 53, 60, 609 S.E.2d 520, 524 (2005). To constitute error, the trial court's ruling to admit or exclude evidence must affect a substantial right. *Id.*; Rule 103(a), SCRE. Error is considered harmless where it could not reasonably have affected the outcome of the trial. *State v. Bryant*, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006). "Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Thus, an insubstantial error not affecting the result of the trial is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." *Id.* (citations omitted). In determining whether error is harmless, the

circumstances of each individual case are to be considered. *Id.*; *Johnson*, 363 S.C. at 60, 609 S.E.2d at 524.

Even assuming arguendo that the trial court failed to apply the proper balancing test or that the court erred in refusing to admit the evidence based on the CI's opening door, we find any such error would be harmless. Here, contrary to Williams' assertion, the CI was not the only witness for the State who could identify him and place him at the scene. Officer Hurteau testified, while following the videotape, that you could hear an individual at the scene yelling out the name **645 "Onrae," and at a later point on the tape noted Williams is referred to as "On." He further indicated you could observe Williams on the videotape and also could see Williams holding a small substance in his hand, which he places in the CI's hand. Officer Jenkins, who was on perimeter duty during the controlled buy, testified he observed Williams with another man near the fence as the CI approached the area. Officer Womack testified he maintained a constant visual on the CI during the entire process, and that the CI was searched before being let out to make the buy and had no drugs on him, but had crack cocaine in his hand when he returned. Finally, after reviewing the video of the incident, Officer Hurteau testified he and Officer Womack, as well as Officer Jenkins, all *345 immediately and without hesitation recognized Onrae Williams as the individual who sold the drugs to the CI.¹

Further, the CI was already impeached with admission of his conviction of receiving stolen goods, a crime the CI acknowledged before the jury was a crime of dishonesty. The CI's credibility was clearly called into question by this, along with his admission he had spent half of his life in the penitentiary and his refusal to characterize himself as honest. *See State v. Cooper*, 312 S.C. 90, 92, 439 S.E.2d 276, 277 (1994) (holding any error in excluding evidence of witness' prior bad acts harmless, where witness was thoroughly impeached by admission of numerous previous convictions and acknowledgment his testimony was given for favorable treatment on pending charges), *overruled in part on other grounds by Franklin v. Catoe*, 346 S.C. 563, 575, 552 S.E.2d 718, 725 (2001); *State v. Tillman*, 304 S.C. 512, 520, 405 S.E.2d 607, 612 (Ct.App.1991) (finding, where witness was thoroughly impeached by admission of numerous prior convictions and his acknowledgment that he was testifying under an agreement to receive favorable treatment on some outstanding charges, any error in excluding evidence of a particular crime he might have committed was harmless).

Aside from the CI's testimony, there is evidence of record placing Williams at the scene and identifying him as the individual engaged in the drug transaction with the CI.

There is also evidence showing the CI, while under constant visual, returned with drugs that he did not have when he left the officers. Given all this evidence, along with the fact that the CI was thoroughly impeached by evidence of his crime of dishonesty and his admissions he had spent half of his life in jail and that he would not characterize himself as honest, we find exclusion of the CI's remote convictions could not reasonably have affected the result of the trial. Considering the circumstances of this case, we therefore conclude any possible error in the exclusion of the evidence is harmless.

B. LWOP sentence

¹⁷¹ Williams next contends the trial court erred in sentencing him to life in prison without parole in violation of his *346 constitutional protection from cruel and unusual punishment. He asserts, under *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007), *cert. denied*, 552 U.S. 1314, 128 S.Ct. 1872, 170 L.Ed.2d 751 (2008), the two principles to consider in determining whether a punishment is cruel and unusual are (1) the evolving standards of decency that mark the progress of a maturing society and (2) the proportionality between the punishment and the offense. He argues an LWOP sentence for distribution of less than half a gram of a controlled substance is inconsistent with evolving standards of contemporary values. Williams further asserts an LWOP sentence under the recidivist statute is grossly disproportionate to the punishment deserved for distribution of less than half a gram of cocaine, especially where the first conviction used to qualify him for LWOP was committed as a juvenile. We disagree.

Section 17-25-45(B) of the South Carolina Code requires that "upon a conviction for a serious offense ... a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has two or more prior convictions for: (1) a serious offense." S.C.Code Ann. § 17-25-45(B) (2003).

¹⁸¹ The Eighth Amendment to the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines **646 imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. XIII. The cruel and unusual punishment clause requires that the duration of a sentence not be grossly disproportionate with the severity of the crime. *State v. McKnight*, 352 S.C. 635, 652, 576 S.E.2d 168, 177 (2003).

¹⁹¹ ¹⁰¹ Most recently, our courts have recognized that "what constitutes cruel and unusual punishment, and thus, what

violates the Eighth Amendment, is determined by 'evolving standards of decency that mark the progress of a maturing society.' " *State v. Pittman*, 373 S.C. 527, 562, 647 S.E.2d 144, 162 (2007), *cert. denied*, 552 U.S. 1314, 128 S.Ct. 1872, 170 L.Ed.2d 751 (2008) (quoting *State v. Standard*, 351 S.C. 199, 204, 569 S.E.2d 325, 328 (2002)). In implementing this test, the court looks to objective evidence of how our society views a particular punishment today. *State v. Wilson*, 306 S.C. 498, 509-10, 413 S.E.2d 19, 26 (1992). Legislation enacted by the *347 country's legislatures is the "clearest and most reliable objective evidence of contemporary values." *Pittman*, 373 S.C. at 563, 647 S.E.2d at 162. "[T]he Constitution requires the court's own judgment to be brought to bear on the issue by 'asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.'" *Id.* at 563, 647 S.E.2d at 163 (quoting *Atkins v. Virginia*, 536 U.S. 304, 313, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)). It is not the burden of the state to establish a national consensus approving what their citizens have voted to do; rather, it is the heavy burden of the defendant to establish a national consensus against it. *Wilson*, 306 S.C. at 510, 413 S.E.2d at 26.

¹¹¹ ¹¹² ¹¹³ Additionally, the " 'proportionality' bedrock of Eighth Amendment jurisprudence" is equally important a principle as the "evolving standards of decency," and " 'it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" *Pittman*, 373 S.C. at 564-65, 647 S.E.2d at 163 (quoting *Atkins*, 536 U.S. at 311, 122 S.Ct. 2242). In order to establish that evolving standards of decency preclude his punishment, appellant bears the " 'heavy burden' of showing that our culture and laws emphatically and well nigh universally reject it." *Id.* at 565, 647 S.E.2d at 164 (quoting *Harris v. Wright*, 93 F.3d 581, 583 (1996)).

In *State v. Standard*, 351 S.C. 199, 569 S.E.2d 325 (2002), our supreme court found, based upon sentences imposed in other cases, that lengthy sentences or sentences of life without parole imposed upon juveniles do not violate contemporary standards of decency so as to constitute cruel and unusual punishment, and that an enhanced sentence based upon a prior "most serious" conviction for a crime which was committed as a juvenile does not offend evolving standards of decency so as to constitute cruel and unusual punishment. *Id.* at 205-06, 569 S.E.2d at 329. Accordingly, Standard's sentence of LWOP based on a previous "most serious" armed robbery conviction when he was seventeen and his subsequent "most serious" conviction of burglary in the first degree did not violate the Eighth Amendment.

¹¹⁴ Our courts have also determined stiff penalties for drug

crimes do not violate the constitutional prohibition *348 against cruel and unusual punishment. See *State v. Brown*, 303 S.C. 169, 172, 399 S.E.2d 593, 594 (1991) (holding sentence of 25 years without parole upon conviction of trafficking in cocaine was not cruel and unusual punishment); *State v. Kiser*, 288 S.C. 441, 443-44, 343 S.E.2d 292, 293 (1986) (holding mandatory minimum sentence of 25 years in prison for trafficking in marijuana was not grossly out of proportion with severity of crime and, therefore, complied with cruel and unusual punishment clause). Additionally, in considering the implications of drugs on our society today, the United States Supreme Court has noted as follows:

Possession, use, and distribution of illegal drugs represent "one of the greatest problems affecting the health and welfare of our population." Petitioner's suggestion that his crime was nonviolent and victimless, echoed by the dissent, is false to the point of absurdity. To the contrary, petitioner's crime threatened to cause grave harm to society.

Quite apart from the pernicious effects on the individual who consumes illegal drugs, such drugs relate to crime in at least three ways: (1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) A drug user may commit crime in order to obtain money to buy drugs; **647 and (3) A violent crime may occur as part of the drug business or culture. Studies bear out these possibilities and demonstrate a direct nexus between illegal drugs and crimes of violence.

Harmelin v. Michigan, 501 U.S. 957, 1002-03, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (citations omitted). Finally, the United States Supreme Court has also held a state is justified in punishing a recidivist more severely than it does a first offender. *Riggs v. California*, 525 U.S. 1114, 119 S.Ct. 890, 891, 142 L.Ed.2d 789 (1999). Under recidivist sentencing schemes, the enhanced punishment imposed for a present offense is not to be viewed as an

additional penalty for the earlier crimes, but instead as a stiffened penalty for the latest crime, which is considered to be an aggravated offense because it is a repetitive one. *Id.*

In light of our court's decisions in finding sentences of LWOP imposed upon juveniles do not violate contemporary standards of decency so as to constitute cruel and unusual *349 punishment and that an enhanced sentence based upon a prior "most serious" conviction for a crime which was committed as a juvenile does not offend evolving standards of decency so as to constitute cruel and unusual punishment, that stiff penalties for drug crimes do not violate the constitutional prohibition against cruel and unusual punishment, and in consideration of the implications of drugs on our society today as noted by the United States Supreme Court in *Harmelin*, combined with the United States Supreme Court's determination that a State is justified in punishing a recidivist more severely than it does a first offender, we find Williams has failed to meet his burden of establishing evolving standards of decency preclude his punishment, or that his sentence is disproportionate to the crime.

For the foregoing reasons, Williams' convictions and sentences are

AFFIRMED.

HEARN, C.J., and GEATHERS, J., concur.

Parallel Citations

669 S.E.2d 640

Footnotes

¹ We note our review of the video exhibit supports the officers' testimony.

The South Carolina Court of Appeals

The State,

Respondent,

v.

Onrae Williams,

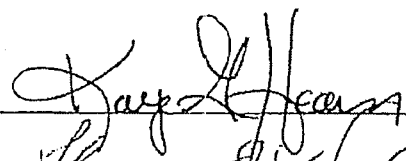
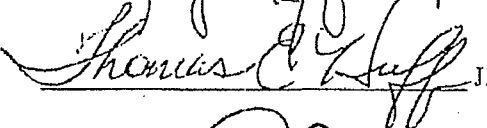
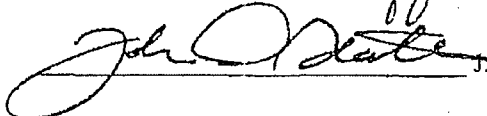
Appellant.

The Honorable R. Markley Dennis, Jr.
Charleston County
Trial Court Case No. 2005-GS-10-03592
2005-GS-10-03593

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.

 C. J.
 J.


Columbia, South Carolina
December 19, 2008

cc: Mark Andrew Peper, Esquire
Attorney General Henry Dargan McMaster
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Salley W. Elliott
Senior Assistant Attorney General Norman Mark Rapoport
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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

The Honorable Deadra L. Jefferson, Circuit Court Judge

Case No. 2010-CP-10-3800

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<i>State v. Standard</i> , 351 S.C. 199, 569 S.E.2d 325 (2002)	13
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<i>Stevens v. State</i> , 365 S.C. 209, 617 S.E.2d 366 (2005)	12
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<i>Villegas v. Yearwood</i> , 131 Fed. Appx. 93 (9th Cir. 2005)	17, 20

Statutes

S.C. Code § 17-25-45	10
S.C. Code § 24-19-10, <i>et seq.</i>	4
S.C. Code section 44-53-445(D)(1)	5

Pursuant to Rule 243 of the South Carolina Appellate Court Rules, Petitioner Onrae Williams hereby petitions this Court to issue a writ of certiorari to review the Orders of the Court of Common Pleas dated August 4, 2011, and September 2, 2011. For the reasons set forth below, the petition should be granted and the decision of the Court of Common Pleas reversed.

QUESTIONS PRESENTED FOR REVIEW

- I. **Did the Court of Common Pleas err in failing to grant post-conviction relief for ineffective assistance of counsel because its Orders are inconsistent with this Court's previous opinions finding ineffective assistance of counsel where trial counsel failed to research, notify the client, notify the State and/or object to an enhanced sentence where there was legal uncertainty as to whether the sentence could be enhanced?**
- II. **Did the Court of Common Pleas err in failing to grant post-conviction relief for ineffective assistance of counsel because its Orders are inconsistent with the record showing that trial counsel failed to ensure that the petitioner understood the consequences of rejecting a plea bargain and proceeding to trial where the State was seeking mandatory life in prison without parole?**

STATEMENT OF THE CASE

On January 17, 2007, Petitioner Onrae Williams was convicted of selling approximately \$15 worth of crack cocaine to an informant within one-half mile of a high school, and he was sentenced to Life Without Parole ("LWOP"). This sentence was under the South Carolina's recidivism statute and was based on two prior offenses: (1) one offense was based on a guilty plea for distribution of approximately \$5-10 worth of crack cocaine within the proximity of a school, adjudicated under South Carolina's Youthful Offender's Act and (2) the other conviction was based on a guilty plea for possession of cocaine with intent to distribute within close proximity of a school. All three convictions fell under the recidivism statute because of the proximity to Burke High School, which was 50 yards from where Mr. Williams lived, and all were based on sales to adults.

Mr. Williams' trial counsel was ineffective because he neither researched nor raised whether a prior youthful-offender conviction could be used to enhance a sentence to life without parole. Counsel's failures resulted in the State of South Carolina ("the State") pursuing, and Mr. Williams receiving, an LWOP sentence.

Mr. Williams' trial counsel was also ineffective for failing to ensure that his learning-disabled client understood that a conviction of LWOP carried a mandatory life sentence.

The PCR court erred in ruling that trial counsel was effective and that Mr. Williams suffered no prejudice, based on the facts and law in this case.

A. Procedural History

In May 2005, Mr. Williams was indicted for distribution of crack cocaine (2005-GS-10-3592) and distribution of crack cocaine within proximity of a school (2005-GS-10-3593). On January 17, 2007, a jury found Mr. Williams guilty as indicted, and

sentenced Mr. Williams to LWOP. After exhausting the direct appeal process, Mr. Williams applied for post-conviction relief ("PCR"), and amended his application to state that his trial counsel was ineffective for failing to research, inform him and the State, and object to the State's Notice of Intention to Seek Sentence of LWOP.

Additionally, at the PCR hearing, new evidence was presented that trial counsel failed to adequately inform Mr. Williams that he faced mandatory LWOP if he rejected a plea offer and proceeded to trial. The Court of Common Pleas dismissed Mr. Williams' amended PCR application on both grounds by Order dated August 4, 2011, and denied Mr. Williams' Motion to Alter or Amend by Order dated September 2, 2011.

B. Facts Giving Rise To Mr. Williams' Life Without Parole Sentence

1. 2007 Conviction (2005-GS-10-3592 and 2005-GS-10-3593)

During Mr. Williams' January 2007 trial, Charleston County Police officers testified that on August 10, 2004, officers equipped a confidential informant with hidden audio and video, gave the informant official funds from the narcotics account, and patted him down to ensure that he did not have any drugs with him. (App. p. 227:1-11, 232:24 to 233:2.) Under visual police surveillance, the confidential informant approached Mr. Williams near the corner of President and Line Streets in Charleston, which is thirty yards from where Mr. Williams lived with his grandmother and happens to be less than one-half mile from Burke High School. (App. p. 227:13 to 228:7, 229:4-10; 409:3-5.) The confidential informant testified that Mr. Williams handed him drugs in exchange for \$50. (App. p. 257:9-25.) The confidential informant returned to the police officers, holding what appeared to be drugs, which lab tests later confirmed to be 0.3 grams of crack cocaine—about \$15 worth of drugs. (App. p. 233:3-5, 250:22 to 251:2, 258:3-8,

288:5-12, 321:16-22; 409:10-12; 414:23 to 415:4.) On January 17, 2007, a jury found Mr. Williams guilty as indicted. (App. p. 371:19 to 372:14.)

Before the trial, the State served Notice of Intention to Seek Sentence of Life Without Parole pursuant to South Carolina Code section 17-25-45 because distribution of crack cocaine within proximity of a school constituted what the State claimed was Mr. Williams' third "serious offense" under South Carolina's recidivism statute. The Court sentenced Mr. Williams to LWOP. (App. p. 383:15 to 384:2.)

2. 2003 Plea (2003-GS-10-0171)

The State based its Notice of Intention to Seek Sentence of Life Without Parole on two prior offenses of Mr. Williams. The first was Mr. Williams' 2003 plea to distribution of crack cocaine within proximity of school. The affidavit giving rise to the indictment provides that on October 14, 2002, Mr. Williams sold 0.2 grams of crack cocaine (between \$5 and \$10 worth of drugs) to a confidential informant. (See App. p. 408:13-15.) The transaction occurred in the area of Norman and Alway Streets (within fifty yards of Mr. Williams' grandmother's house, where he lived, and within one-half mile of Burke High School). At age twenty, Mr. Williams pleaded guilty under the Youthful Offender Act, S.C. Code § 24-19-10, *et seq.*

3. 2000 Plea (1999-GS-10-7722)

The second offense was Mr. Williams' 2000 plea to possession of cocaine with intent to distribute within close proximity of a school. The affidavit giving rise to the indictment provides that on October 5, 1999, the police department received complaints of narcotic activity at the corner of Norman and Bogard Streets (within fifty yards of Mr. Williams' grandmother's house and within one-half mile of Burke High School). At approximately 6:45 p.m., two officers arrived to investigate the complaint, and saw two

people on a bike, one of whom was Mr. Williams. The affidavit notes that when Mr. Williams saw the officers, he ran and placed a baggie of cocaine in a hole in a brick wall. Mr. Williams was caught, and the field test confirmed that the bag contained cocaine. At age seventeen, Mr. Williams pleaded guilty.

C. Facts Giving Rise To Ineffective Assistance of Counsel Claims

1. Failure To Research and Advise Client

Mr. Williams' trial counsel did not research whether Mr. Williams' 1999 or 2002 offenses qualified to enhance the maximum statutory sentence of ten years for Mr. Williams 2004 offense under S.C. Code section 44-53-445(D)(1) to LWOP under South Carolina's recidivism statute; nor did counsel inform Mr. Williams or the State that legal uncertainty existed as to whether these prior offenses could be used to enhance his sentence to LWOP; nor did counsel object to the State's Notice of Intent to Seek LWOP. (*See App. p. 423:5-16.*) Moreover, at sentencing, the Court asked Mr. Williams' trial counsel whether Mr. Williams objected to the prior convictions for possession with intent to distribute cocaine in proximity of a school (2003-GS-10-0171 and 1999-GS-10-7722) as triggering the recidivism statute. (*App. p. 380:17 to 381:11.*) Trial counsel's response: "No, sir, I don't have any argument on that." (*App. p. 381:10-13; see also App. p. 423:14 to 424:1.*)

2. Failure To Inform Client Before Trial that LWOP Means Mandatory LWOP

Before the trial, the State offered Mr. Williams several plea deals, including three years, five years, and ten years, all of which Mr. Williams rejected. (*App. p. 443:9-17.*) At his PCR hearing, Mr. Williams testified that although he learned that the State could seek, and later did seek, LWOP, he believed that the judge had discretion to sentence him

to anything from no time to LWOP, and that his trial counsel never explained to him that LWOP he meant mandatory LWOP. (App. p. 409:15-25.)

Nor did Mr. Williams have reason to believe that LWOP meant mandatory LWOP, particularly when the arrest involved only 0.3 grams (approximately \$15 worth) of drugs. The Trial Court only asked counsel for the State, "Did you offer something other than life without parole?" (App. p. 175:24-25.) After counsel for the State responded "yes," the Trial Court said, "That being the case, you've made your choice. If he's going to be burned, he'll be burned. No question about that." (App. p. 176:1-5.) After a brief recess, the Court and Mr. Williams' trial counsel had the following exchange:

Mr. King: Judge, I think Numbers 13 and 14, I would prefer the Court's standard charge on those [voir dire] issues.

The Court: We will address those. You can object but I am going to discuss those aspects of it. Once they come into the room, the deal is gone. The only sentence is LWOP. He has made his decision. Do you understand?

Mr. King: Yes, Your Honor.

(App. p. 179:5-14.) None of these comments from counsel or the Trial Court were directed to Mr. Williams. And the Trial Court never asked Mr. Williams if he understood that by rejecting the State's plea offer and proceeding to trial, that he faced mandatory LWOP.

Moreover, Mr. Williams' trial counsel testified during the PCR hearing that he does not know whether he informed Mr. Williams that LWOP meant mandatory LWOP.

Counsel stated, "I knew then the case was possible life without parole, and I advised him to take the deal because the risk was very high, but -- so I don't remember specifically what we discussed about that parole. I did imply that it was up to life, so if I advised

him, it would have been that this -- if they served notice on him that he could get life without parole." (App. p. 425:12-21 (emphasis added).) Trial counsel later testified that although he discussed LWOP with Mr. Williams, "I can't remember that issue coming up with him ever asking, you know, is it up to life or is it mandatory life? I don't remember discussing that specific issue" (App. p. 427:14-17.)

Even though trial counsel did "imply" that it "was possible" that Mr. Williams "could" receive "up to" LWOP, Mr. Williams has a learning disability (which his trial counsel admitted that he did not know) (*see* App. p. 421:21-23), and he did not understand the significance of the distinction between LWOP and mandatory LWOP. In fact, Mr. Williams testified that he thought that "[t]he judge could give me anything from zero, no time, to life without parole." (App. p. 409:18-25; 421:21-23.)

As Mr. Williams' appellate counsel also explained:

It became extremely apparent to me in the first 20 minutes that I went and saw Onrae up at Leiber that he had no idea that if he was convicted the only choice the Court had was to sentence him to life without parole. . . . It's very apparent he did not understand. It was not explained to him thoroughly that if he is to be found guilty, there is no sentencing, there is no mitigation on what your sentence is going to be. Your sentence is going to be life without parole. It's very clear to me he did not understand that. . . . We had to go over things three or four times, and when I met him, I still do not think he had understood the gravity of what LWOP meant, even after the court expressly told him, See you later. You are not going home.

(App. p. 413:18-23; 414:7-15, 18-22.) Indeed, appellate counsel explained that the fact that Mr. Williams rejected a plea offer for ten years (and, in fact, Mr. Williams also rejected offers of three years and five years) reinforced the fact that Mr. Williams did not know that he would receive LWOP for selling 0.3 grams of drugs. (App. p. 413:24 to 414:6 ("Nobody [turns down a plea offer of 10 years] if you know that if you get convicted, you are going to jail for the rest of your life and you are going to die in jail.").)

ARGUMENT

The PCR Court erred in finding that trial counsel had no basis to challenge a sentence enhancement to mandatory LWOP. Trial counsel failed to research whether the sentence enhancement was proper, and if he had done so, he would have found legal uncertainty in this Court's precedent, which amounts to ineffective assistance of counsel regardless of the ultimate resolution of the legal uncertainty.

Likewise, the PCR Court erred in finding that trial counsel properly communicated all plea offers to Mr. Williams and explained to Mr. Williams that LWOP was his only possible sentence if convicted at trial. The Court's finding in this regard is unsupported by the record.

These errors amount to ineffective assistance of counsel because counsel has a duty to advise, research, and raise legal issues "under prevailing professional norms," and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" because Mr. Williams may have accepted a lesser plea, received a more favorable plea deal, or would have received a maximum prison term of ten years under the applicable statute. *See Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989) (quoting *Strickland v. Washington*, 446 U.S. 668, 688 (1984)). The prejudice to Mr. Williams is heightened given the fact that, as the United States Supreme Court has acknowledged, the only sentence worse than LWOP is death. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991). Accordingly, this Court should issue a writ and review the PCR Court's decision in this matter.

A. The PCR Court's Denial of PCR Is Inconsistent with this Court's Previous Opinions Finding Trial Counsel Was Ineffective for Failing To Research, Notify the Client, Notify the State, and/or Object To an Enhanced Sentence When Sentence Enhancement Is a Legal Uncertainty, and Petitioner Was Prejudiced by the Ineffective Assistance

1. Trial Counsel Was Ineffective

Although Mr. Williams was sentenced to LWOP pursuant to South Carolina's recidivism statute, South Carolina law is unclear as to whether Mr. Williams' 2003 plea under the Youthful Offender Act is an eligible conviction to enhance a maximum ten-year sentence to LWOP. Mr. Williams' trial counsel's failure to investigate this issue, raise it with Mr. Williams, raise it with the State, and object to the Notice of Intent to Seek LWOP—regardless of the ultimate resolution of the legal uncertainty—constitutes ineffective assistance of counsel under this Court's precedent.

In *Berry v. State*, 381 S.C. 630, 675 S.E.2d 425 (2009), this Court found that counsel was ineffective for failing to consider, inform his client, and object to whether the petitioner's prior conviction for possession of drug paraphernalia could be used to enhance his sentence for manufacturing methamphetamine. At the time of the petitioner's guilty plea, South Carolina courts had not clearly addressed whether the State could use the prior conviction to enhance the petitioner's sentence. This Court found that such uncertainty "may well provide a defendant a catalyst in plea negotiations with the State." *Id.* at 633-35, 675 S.E.2d at 426-27. That is, even where legal issues are not clearly defined, trial counsel has a duty to research, inform the client, and raise the legal ambiguity on the client's behalf because the ambiguity in itself could impact plea negotiations and sentencing.¹

¹ The PCR Court erred in narrowly construing this Court's opinion in *Berry*, finding that this Court limited its decision to "the issue of whether a guilty plea was entered

As in *Berry*, whether the State may use Mr. Williams' prior convictions to enhance his sentence to LWOP is not clear. South Carolina's recidivism statute, S.C. Code § 17-25-45, allows for sentences of LWOP only when the offender has the requisite number eligible adult convictions. See *State v. Ellis*, 345 S.C. 175, 345 S.E.2d 490 (2001) (finding that a prior juvenile conviction does not apply toward the recidivism statute). One of Mr. Williams' prior convictions that the State used to enhance Mr. Williams' sentence to LWOP was a "youthful offender" conviction, not an adult conviction. And this Court has long held that "a person between the ages of seventeen and twenty-five is, by definition, a youthful offender," *Creel v. State*, 262 S.C. 558, 564, 206 S.E.2d 825, 828 (1974) (per curiam), and has explicitly found that convictions of "youthful offenders" are not adult convictions. *Gay v. Ariail*, 381 S.C. 341, 673 S.E.2d 418 (2009) (finding that a twenty-two year old "was convicted as a 'youthful offender,'" and rejecting the State's argument that the defendant was convicted as an adult).

Therefore, because (1) the recidivism statute only applies to adult convictions, *Ellis, supra*, and (2) Mr. Williams received a youthful-offender conviction in 2003, not an adult conviction, *Creel, supra*; *Gay, supra*, legal uncertainty existed as to whether Mr. Williams' 2003 conviction could be used to enhance his sentence under the recidivism statute. And counsel's failure to research and raise this legal uncertainty constitutes ineffective assistance of counsel. *Berry, supra*.

knowingly and voluntarily." (Order of Dismissal, 7, Aug. 4, 2011.) Although *Berry* took place in the context of a plea agreement, the decision applies with equal weight to Mr. Williams' case because the failure of trial counsel to research and consider a key legal issues in determining whether Mr. Williams' sentence could be enhanced would have played a key role in plea negotiations and the State's decision concerning whether to pursue LWOP. *Berry*, 381 S.C. at 635, 675 S.E.2d at 427.

2. Petitioner Was Prejudiced by Trial Counsel's Ineffective Assistance.

Mr. Williams' prior offenses played a central role in plea negotiations and sentencing. Mr. Williams was charged with violating South Carolina Code section 44-53-445, which carries a maximum prison sentence of ten years. S.C. Code § 44-53-445(D)(1) ("A person who violates the provisions of this section . . . must be fined not more than ten thousand dollars, or imprisoned not more than ten years, or both."). The State used Mr. Williams' prior convictions as a basis for invoking the enhanced sentencing of South Carolina Code section 17-25-45 to seek LWOP.

Armed with the research that Mr. Williams' 2003 youthful-offender conviction may not apply towards enhancing a sentence, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (quoting *Strickland*, 446 U.S. at 688)). Plea negotiations would have been different because there was legal uncertainty as to whether Mr. Williams was eligible to an LWOP sentence, the solicitor likely would not have pursued a life sentence, and/or the trial court likely would not have applied the prior youthful-offender conviction toward the recidivism statute. Each of these issues establishes that Mr. Williams was prejudiced in receiving an LWOP sentence and in being deprived of "a catalyst in plea negotiations with the State." *Berry*, 381 S.C. at 635, 675 S.E.2d at 427; see *Robinson v. State*, 380 S.C. 201, 206, 669 S.E.2d 588, 590 (2008) (finding in a drug case that trial counsel's failure to challenge the defendant's prior convictions in enhancing the sentence amounted to ineffective assistance of counsel) (citing *United States v. Tucker*, 404 U.S. 443 (1972) (finding that the defendant should be resentenced when the trial judge improperly considered the defendant's prior convictions in determining the sentence)); *State v. Rich*, 269 S.C. 701,

239 S.E.2d 731 (1977) (same); *see also Stevens v. State*, 365 S.C. 209, 617 S.E.2d 366 (2005) (reversing PCR court's ruling and finding that the petitioner's plea attorney was ineffective for not researching whether the petitioner was properly charged with eighteen counts of receiving stolen goods); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833, 836 (1999) (finding that counsel's failure to raise an argument relevant to sentencing that was available pursuant to South Carolina case law constitutes deficient performance under the prevailing professional norms).

Moreover, trial counsel's failure to research and raise this legal uncertainty regarding sentencing enhancement is particularly problematic because the error resulted in an LWOP sentence for Mr. Williams, which is a facially unjust result considering the small amount of drugs at issue and Mr. Williams' prior offenses. *See Strickland v. Washington*, 446 U.S. 668, 686 (1984) (noting that whether counsel was ineffective should be measured against whether the trial produced a just result). Mr. Williams was sentenced to LWOP for selling 0.3 grams of crack cocaine (approximately \$15 dollars worth of drugs) when he was twenty-one years old, and his prior offenses included selling 0.2 grams crack cocaine (\$5 to \$10 dollars worth of drugs) as a minor at seventeen years of age, and possession of cocaine. These crimes were all committed within blocks of Mr. Williams' grandmother's house where he lived, which happened to be in close proximity to a Charleston high school, thereby implicating "serious" offenses under South Carolina's recidivism statute.

Indeed, the injustice of Mr. Williams' sentence is highlighted by its contrast to the U.S. Supreme Court's decision in *Harmelin v. Michigan*, 501 U.S. 957 (1991), which the Court of Appeals discussed in affirming Mr. Williams' LWOP sentence. *See State v. Williams*, 380 S.C. 336, 348, 669 S.E.2d 640, 646 (Ct. App. 2008). In *Harmelin*, a

defendant was sentenced to LWOP for possessing drugs, but the amount of drugs at issue was 672 grams of pure cocaine, which had a yield of between 32,500 and 65,000 doses, and was worth potentially many hundreds of thousands of dollars. The Supreme Court considered possession of such a large amount of drugs as "a grave harm to society," and the Court considered the large quantity of drugs at issue to be a key factor in its decision to affirm the sentence. *Harmelin*, 501 U.S. at 1002.

Contrast the danger to society in *Harmelin* with the single dose of 0.3 grams of cocaine involved in Mr. Williams' case and the 0.2 grams of cocaine at issue in one of his prior offenses. Although Mr. Williams' offense warrants punishment, LWOP for selling 0.3 grams of drugs is far afield of facts and policy considerations of the U.S. Supreme Court's *Harmelin* decision and this Court's precedent for affirming an LWOP sentence. *See State v. Standard*, 351 S.C. 199, 569 S.E.2d 325 (2002) (affirming LWOP sentence for a defendant whose offenses included the violent crimes of armed robbery and vandalizing a home, including killing a cat and beating a dog so severely that it had to be put to sleep; and citing like cases across the country involving LWOP for violent crimes). Nothing in any of Mr. Williams' convictions suggests that he poses a grave harm to society that would warrant an LWOP sentence, as in either *Harmelin* where an extremely large quantity of drugs was at issue or in *Standard* when the defendant had committed violent and heinous crimes. Therefore, the injustice of Mr. Williams' resulting sentence should weigh heavily in considering the ineffectiveness of his counsel in failing to research and raise the legal uncertainty in the law with Mr. Williams, the State, and the trial court. As such, this Court should issue a writ and review the PCR Court's decision in this matter.

B. The PCR Court Erred in Failing To Grant Post-Conviction Relief Because Its Orders Are Inconsistent with the Record Showing that Trial Counsel Failed To Ensure that Mr. Williams Understood the Consequences of Rejecting a Plea Bargain and Proceeding To Trial Where the State Was Seeking LWOP.

1. Trial Counsel Was Ineffective

Although this Court has not squarely addressed the issue of whether failing to ensure that a defendant understands the severity of his or her sentence constitutes ineffective assistance of counsel, the guiding principle of PCR that trial produce a just result strongly suggests that such failure constitutes ineffective assistance of counsel. Others courts have addressed this issue in a PCR context and found ineffective assistance of counsel.

a. South Carolina Law Supports a Finding of Ineffective Assistance of Counsel for Failure To Ensure that a Defendant Understands the Nature of LWOP When Negotiating a Plea.

As this Court has noted in the context of plea negotiations, "We believe the Sixth Amendment guarantee of effective assistance of counsel requires that counsel accurately inform a defendant, to the extent possible, of the qualifying nature of a prior offense for enhancement purposes." *Berry v. State*, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009); *Judge v. State*, 321 S.C. 554, 560, 471 S.E.2d 146, 149 (1996), *overruled on other grounds by Jackson v. State*, 342 S.C. 95, 535 S.E.2d 926 (2000) (finding that the right to effective assistance of counsel applies during the plea negotiation process, even where the plea is rejected). Thus, ensuring that the defendant understands the maximum and minimum penalties at stake in considering and rejecting a plea, and proceeding to trial is akin to the defendant understanding the penalties at stake when entering a voluntary guilty plea.

For example, in *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999), this Court found that PCR was appropriate were the defendant entered a guilty plea, did not understand that the plea carried a mandatory minimum sentence, and the defendant's counsel "had little recollection of the exact nature of the matters discussed during the meetings with the Defendant." *See State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980) (finding that the defendant's plea was involuntary because she was never informed of the mandatory minimum sentence, and court suggested that the he "could" impose a "maximum" sentence of life imprisonment; "thus the plea [was] entered in ignorance of its direct consequence . . ."). Considering that "plea agreements allow our overly burdened criminal courts to function," *Berry v. State*, 381 S.C. 630, 675 S.E.2d 425 (2009), the same rationale for effective assistance of counsel should apply for ensuring that in rejecting a plea, the defendant understands that the risk of proceeding to trial carries a mandatory minimum sentence.

Requiring counsel to inform defendants of the mandatory nature of their potential sentence is also consistent with South Carolina's Rule of Professional Conduct 1.4(b), which defines "prevailing professional norms," *Strickland v. Washington*, 466 U.S. 668, 688 (1984), and which provides that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Moreover, the Comments to Rule 1.4 provide that "when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement." As applied to plea negotiations, the Rules of Professional Conduct require counsel to ensure that the defendant understands the potential sentence at stake in deciding to proceed to trial. *See Jackson*, 342 S.C. at 97, 535 S.E.2d at 927 (finding ineffective assistance of counsel

where the defendant accepted a plea, and later testified at the PCR hearing that he did not understand the import of the offense to which he pled, and would not have accepted the plea if he had); *Alexander v. State*, 303 S.C. 539, 402 S.E.2d 484 (1991) (finding ineffective assistance of counsel where petitioner testified that accepted a plea because he misunderstood the amount of time that he could have received upon conviction at trial); *State v. Armstrong*, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975) (stating that the defendant must be apprised of the direct consequences, which are the direct and immediate results, of a guilty plea).²

b. Decisions from Other Jurisdictions Support a Finding of Ineffective Assistance of Counsel for Failure To Ensure that a Defendant Understands the Nature of LWOP When Negotiating a Plea.

Requiring counsel to inform defendants of the mandatory nature of their potential sentence is also consistent with similar decisions in other jurisdictions. For example, in *Johnson v. State*, 712 S.E.2d 811 (Ga. 2011), the Georgia Supreme Court reversed the dismissal of a PCR application on grounds of ineffective assistance of counsel where the trial counsel failed to advise the petitioner that if he rejected the State's plea offer, he would face a mandatory sentence of LWOP. The Court found that without knowledge of a mandatory LWOP sentence, the petitioner "could not make an informed decision about whether to accept or reject a State's plea offer [and thus the petitioner] has fulfilled his

² See also *State v. Reed*, 332 S.C. 35, 39, 40, 503 S.E.2d 747, 749 (1998) (noting that for a criminal defendant to be competent to stand trial, the defendant must have "a rational as well as factual understanding of the proceedings against him," and finding a defendant competent to stand trial when a physician concluded that the defendant "had a factual knowledge of the charges against him, the potential penalty he faced and his options in pleading.") (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)) (emphasis added). Thus, because Mr. Williams did not have a correct understanding of the sentence that he faced when proceeding to trial, he was not competent to stand trial.

burden of showing that his counsel's representation fell below an objective standard of reasonableness." *Id.* at 813 (quotation omitted).

Similarly, in *Villegas v. Yearwood*, 131 Fed. App'x 93 (9th Cir. 2005), the Ninth Circuit reversed the District Court's denial of a claim of ineffective assistance of counsel where the petitioner's trial counsel failed to advise that proceeding to trial would implicate a mandatory sentence of LWOP. The Court found that counsel's failure to inform the petitioner about the "crucial distinction" between a possible sentence of LWOP and a mandatory sentence of LWOP amounted to ineffective assistance of counsel because there was a reasonable probability that the petitioner would have accepted the prosecution's offer of 15 years to life if he had been properly informed of the consequences of proceeding to trial. *Id.* at 95.

c. The Record Reflects that Counsel Did Not Inform Mr. Williams that LWOP Meant Mandatory LWOP, and the PCR Court Erred in Finding Otherwise.

Having established that the "prevailing professional norms" require that counsel to inform defendants of the mandatory nature of their potential sentence, the evidence presented at the PCR hearing establishes that trial counsel failed to inform Mr. Williams that the State could seek, and later did seek, mandatory LWOP. As such, trial counsel was ineffective.

Mr. Williams' actions during plea negotiations, and his testimony during the PCR hearing reflects that he did not understand that LWOP meant mandatory LWOP. Mr. Williams—who suffered from a learning disability, although trial counsel was unaware of that fact even though it was in Petitioner's records—was arrested for selling only 0.3 grams of drugs worth approximately \$15 and testified that he thought that "[t]he judge could give me anything from zero, no time, to life without parole." (App. p. 409:18-25;

421:21-23.) His actions during plea negotiations bear out this stated belief because he rejected a three-year deal, five-year deal, and a ten-year deal. (App. p. 443:9-17.) And nowhere on the State's Notice of Intent to Seek LWOP did it say that LWOP was a mandatory sentence.

Moreover, trial counsel testified during the PCR hearing that he did not know whether he informed Mr. Williams that LWOP meant mandatory LWOP. Counsel stated, "I knew then the case was possible life without parole, and I advised him to take the deal because the risk was very high, but -- so I don't remember specifically what we discussed about that parole. I did imply that it was up to life, so if I advised him, it would have been that this -- if they served notice on him that he could get life without parole." (App. p. 425:12-21 (emphasis added).) Trial counsel later testified that although he discussed the LWOP with Mr. Williams, "I can't remember that issue coming up with him ever asking, you know, is it up to life or is it mandatory life? I don't remember discussing that specific issue" (App. p. 427:14-17.)

Finally, appellate counsel testified at the PCR hearing that it was "extremely apparent" that Mr. Williams "had no idea that if he was convicted the only choice the Court had was to sentence him to life without parole. . . . It's very apparent he did not understand." (App. p. 413:19-23, 414:7.) His appellate counsel was shocked that Mr. Williams rejected a plea offer for ten years, let alone the offers for three years and five years. (App. p. 413:24 to 414:6.)

The PCR Court erred in several respects in failing to find ineffective assistance of counsel when presented with the foregoing evidence:

- The PCR Court erred in completely discounting Mr. Williams' testimony as "not credible" and appellate counsel's testimony as "based on hindsight

which was founded on his relationship with the Applicant," particularly when considering the actions of Mr. Williams in rejecting a plea deal of three years where mandatory LWOP was at stake. (Order of Dismissal at 4, 6.)

- The PCR Court erred in finding that trial counsel "explained to [Mr. Williams] that LWOP was his only possible sentence if convicted." (*Id.* at 7.) Such a finding is unsupported by the trial counsel's testimony, discussed *supra*.
- The PCR Court erred in finding that "the trial court explained to Applicant that the plea offer expires when the jury comes in and then LWOP is the only possible sentence if convicted." (*Id.* at 8.) Rather, the trial court's lone mention that "the only sentence is LWOP" was directed to counsel, not Mr. Williams.
- The PCR Court erred in finding that Mr. Williams knew the mandatory nature of LWOP based on "standard colloquy for the plea judge to advise a defendant if a charge is a strike offense and the potential consequences of future strikes." (*Id.* at 8.) In fact, the PCR Court admitted that this was an "extrapolati[on]" because the court "[didn't] know who he pled before" and did not have the transcripts at issue. (App. p. 447:12-14.)

Accordingly, the evidence demonstrates that trial counsel did not inform Mr. Williams of the mandatory nature of LWOP, and therefore counsel provided ineffective assistance.

2. Petitioner Was Prejudiced by Counsel's Ineffective Assistance.

The fact that Mr. Williams did not understand that LWOP meant mandatory LWOP prevented him from making an informed plea decision and prevented him from understanding the risks of rejecting plea offers and proceeding to trial. Accordingly, had counsel properly informed Mr. Williams of the risk of mandatory LWOP, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" because Mr. Williams would have accepted a three-year, five-year, or ten-year plea offer instead of proceeding to trial where he was sentenced to LWOP. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (quoting *Strickland*, 446 U.S. at 688)).

Mr. Williams' case is akin to *Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999) and *State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980), in that Mr. Williams did not understand that the charges against him carried a mandatory minimum sentence, and Mr. Williams' trial counsel testified that he has no specific recollection of informing Mr. Williams that LWOP meant mandatory LWOP, just that he did "imply" that Mr. Williams "could" receive "up to" LWOP. Thus—as in *Johnson v. State*, 712 S.E.2d 811 (Ga. 2011) and *Villegas v. Yearwood*, 131 Fed. Appx. 93 (9th Cir. 2005)—trial counsel was ineffective for failing to stress the "crucial distinction" between possible LWOP and mandatory LWOP and thereby prejudicing and preventing Mr. Williams from making an informed decision about whether to accept any of the State's plea offers of three years, five years, or ten years. Nor did the trial court cure the inadequacies of counsel by mentioning LWOP because Mr. Williams was never asked whether he understood that proceeding to trial would result in a mandatory sentence of LWOP if convicted, and all discussion of LWOP was in passing between the court and counsel. (App. p. 175:24-25;

176:1-5; 179:5-14); *see Pittman*, 337 S.C. at 599, 524 S.E.2d at 625 (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). For these reasons, and particularly considering the unjust result of Mr. Williams' trial, as discussed in Part A, *supra*, this Court should issue a writ and review the PCR Court's decision in this matter.

CONCLUSION

For the above-stated reasons, this Court should issue a writ of certiorari to review the Court of Common Pleas decision in this matter.

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Charleston, South Carolina
December 23, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Charleston County
Court of Common Pleas
Deadra L. Jefferson, Circuit Court Judge

2010-CP-10-3800

ONRAE WILLIAMS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

- I. Did the PCR court properly find that trial counsel had no basis to challenge the sentence enhancement because a juvenile sentence can be used as an enhancement for a sentence of life without parole?
- II. Did the PCR court properly find that trial counsel communicated all plea offers to Petitioner and explained to him that LWOP was his only possible sentence if convicted at trial?

STATEMENT OF THE CASE

Petitioner was indicted at the May 2005 term of the Charleston County Grand Jury for distribution of crack cocaine – 3rd offense (2005-GS-10-3592) and distribution of crack cocaine within proximity of a school (2005-GS-10-3593). Jason King, Esquire, represented him. Petitioner proceeded to trial on January 16-17, 2007, after which a jury found him guilty as indicted. The Honorable R. Markley Dennis, Jr. sentenced him to confinement for life without parole (LWOP) for each offense.

A timely Notice of Appeal was filed on Petitioner's behalf. Mark A. Peper, Esquire, represented Petitioner on appeal. After full briefing, the South Carolina Court of Appeals affirmed the conviction and sentence. State v. Williams, Opinion No. 4447 (S.C. Ct. App. filed October 22, 2008). Petitioner's Petition for Rehearing was denied by Order dated December 19, 2008. Petitioner's Petition for Writ of Certiorari to the South Carolina Supreme Court was denied by Order dated October 21, 2009. The Remittitur was issued on October 26, 2009.

Petitioner filed a PCR application on May 11, 2010 and amended on May 16, 2011. Respondent made its Return on August 18, 2010. An evidentiary hearing was held on May 24, 2011 at the Charleston County Courthouse. By Order dated August 1, 2011, the Honorable Deadra L. Jefferson denied and dismissed the application with prejudice. Petitioner filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRCP, on August 18, 2011. The State made a Return and Motion to Dismiss the 59(e) motion on August 24, 2011. By Order dated August 31, 2011, Judge Jefferson denied the 59(e) motion.

Petitioner appealed and submitted a Petition for Writ of Certiorari on December 23, 2011. This Return follows.

STANDARD OF REVIEW

The proper standard of review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a PCR proceeding, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged 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, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The applicant must overcome this presumption in order to receive relief. Cherry, 386 S.E.2d 624.

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Id. at 625 (citing Strickland, 466 U.S. 668). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 625.

ARGUMENT

I. **The PCR court properly found that trial counsel had no basis to challenge the sentence enhancement because a juvenile sentence can be used as an enhancement for a sentence of life without parole.**

Petitioner contends that the PCR court erred in failing to grant post-conviction relief for ineffective assistance of counsel because its Orders are inconsistent with this Court's previous opinions finding ineffective assistance of counsel where trial counsel failed to research, notify the client, notify the State and/or object to an enhanced sentence where there was legal uncertainty as to whether the sentence could be enhanced. Respondent submits that the PCR court properly found that trial counsel had no basis to challenge the sentence enhancement because a juvenile sentence can be used as an enhancement for a sentence of life without parole.

In State v. Standard, 351 S.C. 199, 569 S.E.2d 325 (2002), this Court found that sentences of life without parole imposed upon juveniles do not violate contemporary standards of decency so as to constitute cruel and unusual punishment, and that an enhanced sentence based upon a prior "most serious" conviction for a crime which was committed as a juvenile does not offend evolving standards of decency so as to constitute cruel and unusual punishment. Here, Petitioner did not have a prior most serious conviction, but he had two prior serious convictions – possession with intent to distribute cocaine within proximity of a school and distribution of cocaine within proximity of a school. Even his prior YOA sentence for distribution of cocaine within proximity of a school was classified as a serious offense. Upon a conviction for a serious offense, a person with two or more prior convictions for serious offenses must be sentenced to a term of imprisonment for life without parole. See S.C. Code Ann. §17-25-45. Thus, counsel had no basis to challenge the enhancement. Moreover, in light of the Court of Appeals' opinion

affirming the conviction and sentence. Petitioner was not prejudiced by counsel's failure to object to the LWOP sentence. Respondent submits that the PCR court properly found that the issue of cruel and unusual punishment was made on direct appeal and ruled upon by the Court of Appeals, and thus was beyond the scope of the PCR proceeding.

Petitioner relies on Berry v. State, 381 S.C. 630, 675 S.E.2d 425 (2009), to contend that counsel failed to research and raise basic legal issues regarding sentencing. However, in Berry, this Court was addressing the issue of whether a guilty plea was entered knowingly and voluntarily. Here, Petitioner proceeded to trial with a full understanding that he was facing a potential LWOP sentence.

Because the evidence supports the PCR court's findings, the Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

II. The PCR court properly found that trial counsel communicated all plea offers to Petitioner and explained to him that LWOP was his only possible sentence if convicted at trial.

Petitioner contends that the PCR court erred in failing to grant post-conviction relief for ineffective assistance of counsel because its Orders are inconsistent with the record showing that trial counsel failed to ensure that Petitioner understood the consequences of rejecting a plea bargain and proceeding to trial where the State was seeking mandatory life in prison without parole. Respondent submits that the PCR court properly found that trial counsel communicated all plea offers to Petitioner and explained to him that LWOP was his only possible sentence if convicted at trial.

Respondent submits that counsel properly communicated all plea offers to Petitioner and explained to him that LWOP was his only possible sentence at trial. (App. p. 425, line 9 – p.

426, line 14; p. 427, line 7-18). Petitioner ultimately made the decision to reject the plea offers and proceed to trial. In addition, the solicitor informed the trial judge that an offer other than LWOP was made and rejected, and the trial court explained to Petitioner that the plea offer expires when the jury comes in and then LWOP is the only possible sentence if he is convicted. (App. p. 175, line 23 – 176, line 5; p. 179, lines 8-14).

The record clearly reflects that counsel and the trial court informed Petitioner that he was facing LWOP if convicted at trial. Because the evidence supports the PCR court's findings, the Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied.

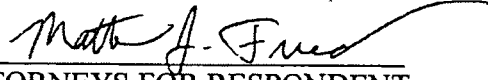
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March 20, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

The Honorable Deadra L. Jefferson, Circuit Court Judge

ONRAE WILLIAMS,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

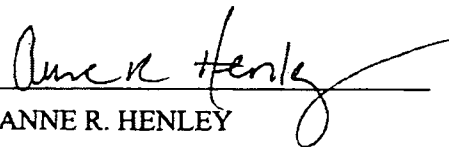
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Mr. Matthew Edward Brown
Nelson Mullins Riley & Scarborough, LLP
PO Box 1806
Charleston, SC 29402

This 20th day of March, 2012



ANNE R. HENLEY
LEGAL ASSISTANT

The South Carolina Court of Appeals

Onrae Williams, Petitioner,

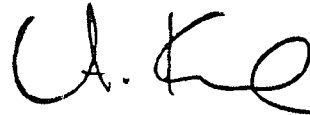
v.

State of South Carolina, Respondent.

Appellate Case No. 2011-201112

ORDER

This matter is before the Court on a petition for a writ of certiorari. The petition for a writ of certiorari is granted. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.



J.

Columbia, South Carolina

cc:

Matthew J. Friedman, Esquire

Matthew Edward Brown, Esquire

FILED

May 22, 2014 27

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2011-201112

RECEIVED

JUN 20 2014

SC Court of Appeals

State of South Carolina, ... Respondent,

v.

Onrae Williams, #284437, ... Appellant.

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Pursuant to Rule 243 of the South Carolina Appellate Court Rules, Appellant Onrae Williams hereby asks this Court to review the Orders of the Court of Common Pleas dated August 4, 2011, and September 2, 2011, and reverse the PCR court's denial of relief. For the reasons set forth below, the decision of the Court of Common Pleas should be reversed.

STATEMENT OF ISSUES ON APPEAL

- I. Did the Court of Common Pleas err in failing to grant post-conviction relief for ineffective assistance of counsel because its Orders are inconsistent with the South Carolina Supreme Court's previous opinions finding ineffective assistance of counsel when trial counsel failed to research, notify the client, notify the State and/or object to an enhanced sentence when legal uncertainty existed as to whether the sentence could be enhanced?
- II. Did the Court of Common Pleas err in failing to grant post-conviction relief for ineffective assistance of counsel because its Orders are inconsistent with the record showing that trial counsel failed to ensure that Appellant understood the consequences of rejecting a plea bargain and proceeding to trial where the State was seeking mandatory life in prison without parole?

STATEMENT OF THE CASE

On January 17, 2007, Petitioner Onrae Williams was convicted of selling approximately \$15 worth of crack cocaine to an informant within one-half mile of a high school, and he was sentenced to Life Without Parole ("LWOP"). This sentence was under the South Carolina's recidivism statute and was based on two prior offenses: (1) one offense was based on a guilty plea for distribution of approximately \$5-10 worth of crack cocaine within the proximity of a school, adjudicated under South Carolina's Youthful Offender's Act and (2) the other conviction was based on a guilty plea for possession of cocaine with intent to distribute within close proximity of a school. All three convictions fell under the recidivism statute because of the proximity to Burke High School, which was 50 yards from where Mr. Williams lived, and all were based on sales to adults.

Mr. Williams' trial counsel was ineffective because he neither researched nor raised whether a prior youthful-offender conviction could be used to enhance a sentence to life without parole. Counsel's failures resulted in the State of South Carolina ("the State") pursuing, and Mr. Williams receiving, an LWOP sentence.

Mr. Williams' trial counsel was also ineffective for failing to ensure that his learning-disabled client understood that a conviction of LWOP carried a mandatory life sentence.

The PCR court erred in ruling that trial counsel was effective and that Mr. Williams suffered no prejudice, based on the facts and law in this case.

A. Procedural History

In May 2005, Mr. Williams was indicted for distribution of crack cocaine (2005-GS-10-3592) and distribution of crack cocaine within proximity of a school (2005-GS-10-3593). On January 17, 2007, a jury found Mr. Williams guilty as indicted, and sentenced Mr. Williams to

LWOP. After exhausting the direct appeal process, Mr. Williams applied for post-conviction relief ("PCR"), and amended his application to state that his trial counsel was ineffective for failing to research, inform him and the State, and object to the State's Notice of Intention to Seek Sentence of LWOP.

Additionally, at the PCR hearing, new evidence was presented that trial counsel failed to adequately inform Mr. Williams that he faced mandatory LWOP if he rejected a plea offer and proceeded to trial. The Court of Common Pleas dismissed Mr. Williams' amended PCR application on both grounds by Order dated August 4, 2011, and denied Mr. Williams' Motion to Alter or Amend by Order dated September 2, 2011. On May 22, 2014, The South Carolina Court of Appeals granted Mr. Williams Petition for Writ of Certiorari.

B. Facts Giving Rise to Mr. Williams' Life Without Parole Sentence

1. 2007 Conviction (2005-GS-10-3592 and 2005-GS-10-3593)

During Mr. Williams' January 2007 trial, Charleston County Police officers testified that on August 10, 2004, officers equipped a confidential informant with hidden audio and video, gave the informant official funds from the narcotics account, and patted him down to ensure that he did not have any drugs with him. (App. p. 227:1-11, 232:24 to 233:2.)¹ Under visual police surveillance, the confidential informant approached Mr. Williams near the corner of President and Line Streets in Charleston, which is thirty yards from where Mr. Williams lived with his grandmother and happens to be less than one-half mile from Burke High School. (App. p. 227:13 to 228:7, 229:4-10; 409:3-5.) The confidential informant testified that Mr. Williams handed him drugs in exchange for \$50. (App. p. 257:9-25.) The confidential informant returned to the police

¹ For purposes of the Initial Brief, all citations to "App." refer to the appendix that was submitted with the Petition for Certiorari. Subsequent orders and other documents will be individually cited pending the compilation of the final Record on Appeal.

officers, holding what appeared to be drugs, which lab tests later confirmed to be 0.3 grams of crack cocaine—about \$15 worth of drugs. (App. p. 233:3-5, 250:22 to 251:2, 258:3-8, 288:5-12, 321:16-22; 409:10-12; 414:23 to 415:4.) On January 17, 2007, a jury found Mr. Williams guilty as indicted. (App. p. 371:19 to 372:14.)

Before the trial, the State served Notice of Intention to Seek Sentence of Life Without Parole pursuant to South Carolina Code section 17-25-45 because distribution of crack cocaine within proximity of a school constituted what the State claimed was Mr. Williams' third "serious offense" under South Carolina's recidivism statute. The trial court sentenced Mr. Williams to LWOP. (App. p. 383:15 to 384:2.)

2. 2003 Plea (2003-GS-10-0171)

The State based its Notice of Intention to Seek Sentence of Life Without Parole on two prior offenses of Mr. Williams. The first was Mr. Williams' 2003 plea to distribution of crack cocaine within proximity of school. (App. p. 463.) The affidavit giving rise to the indictment provides that on October 14, 2002, Mr. Williams sold 0.2 grams of crack cocaine (between \$5 and \$10 worth of drugs) to a confidential informant. (See App. p. 408:13-15; 467.) The transaction occurred in the area of Norman and Alway Streets (within fifty yards of Mr. Williams' grandmother's house, where he lived, and within one-half mile of Burke High School). At age twenty, Mr. Williams pleaded guilty under the Youthful Offender Act, S.C. Code § 24-19-10, *et seq.*

3. 2000 Plea (1999-GS-10-7722)

The second offense was Mr. Williams' 2000 plea to possession of cocaine with intent to distribute within close proximity of a school. (App. p. 468.) The affidavit giving rise to the indictment provides that on October 5, 1999, the police department received complaints of

narcotic activity at the corner of Norman and Bogard Streets (within fifty yards of Mr. Williams' grandmother's house and within one-half mile of Burke High School). (App. p. 471.) At approximately 6:45 p.m., two officers arrived to investigate the complaint, and saw two people on a bike, one of whom was Mr. Williams. (*Id.*) The affidavit notes that when Mr. Williams saw the officers, he ran and placed a baggie of cocaine in a hole in a brick wall. (*Id.*) Mr. Williams was caught, and the field test confirmed that the bag contained cocaine. (*Id.*) At age seventeen, Mr. Williams pleaded guilty.

C. Facts Giving Rise to Ineffective Assistance of Counsel Claims

1. Failure To Research and Advise Client

Mr. Williams' trial counsel did not research whether Mr. Williams' 1999 or 2002 offenses qualified to enhance the maximum statutory sentence of ten years for Mr. Williams 2004 offense under S.C. Code section 44-53-445(D)(1) to LWOP under South Carolina's recidivism statute; nor did counsel inform Mr. Williams or the State that legal uncertainty existed as to whether these prior offenses could be used to enhance his sentence to LWOP; nor did counsel object to the State's Notice of Intent to Seek LWOP. (*See* App. p. 423:5-16.) Moreover, at sentencing, the trial court asked Mr. Williams' trial counsel whether Mr. Williams objected to the prior convictions for possession with intent to distribute cocaine in proximity of a school (2003-GS-10-0171 and 1999-GS-10-7722) as triggering the recidivism statute. (App. p. 380:17 to 381:11.) Trial counsel's response: "No, sir, I don't have any argument on that." (App. p. 381:10-13; *see also* App. p. 423:14 to 424:1.)

2. Failure To Inform Client Before Trial that LWOP Means *Mandatory* LWOP

Before the trial, the State offered Mr. Williams several plea deals, including three years, five years, and ten years, all of which Mr. Williams rejected. (App. p. 443:9-17.) At his PCR

hearing, Mr. Williams testified that although he learned that the State could seek, and later did seek, LWOP, he believed that the judge had discretion to sentence him to anything from no time to LWOP, and that his trial counsel never explained to him that LWOP he meant mandatory LWOP. (App. p. 409:15-25.)

Nor did Mr. Williams have reason to believe that LWOP meant mandatory LWOP, particularly when the arrest involved only 0.3 grams (approximately \$15 worth) of drugs. The trial court only asked counsel for the State, "Did you offer something other than life without parole?" (App. p. 175:24-25.) After counsel for the State responded "yes," the trial court said, "That being the case, you've made your choice. If he's going to be burned, he'll be burned. No question about that." (App. p. 176:1-5.) After a brief recess, the trial court and Mr. Williams' trial counsel had the following exchange:

Mr. King: Judge, I think Numbers 13 and 14, I would prefer the Court's standard charge on those [voir dire] issues.

The Court: We will address those. You can object but I am going to discuss those aspects of it. Once they come into the room, the deal is gone. The only sentence is LWOP. He has made his decision. Do you understand?

Mr. King: Yes, Your Honor.

(App. p. 179:5-14.) None of these comments from counsel or the trial court were directed to Mr. Williams. And the trial court never asked Mr. Williams if he understood that by rejecting the State's plea offer and proceeding to trial, that he faced mandatory LWOP.

Moreover, Mr. Williams' trial counsel testified during the PCR hearing that he does not know whether he informed Mr. Williams that LWOP meant mandatory LWOP. Counsel stated, "I knew then the case was possible life without parole, and I advised him to take the deal because the risk was very high, but -- so I don't remember specifically what we discussed about that parole. I did imply that it was up to life, so if I advised him, it would have been that this --

if they served notice on him that he could get life without parole." (App. p. 425:12-21 (emphasis added).) Trial counsel later testified that although he discussed LWOP with Mr. Williams, "I can't remember that issue coming up with him ever asking, you know, is it up to life or is it mandatory life? I don't remember discussing that specific issue" (App. p. 427:14-17.)

Even though trial counsel did "imply" that it "was possible" that Mr. Williams "could" receive "up to" LWOP, Mr. Williams has a learning disability (which his trial counsel admitted that he did not know) (*see* App. p. 421:21-23), and he did not understand the significance of the distinction between LWOP and mandatory LWOP. In fact, Mr. Williams testified that he thought that "[t]he judge could give me anything from zero, no time, to life without parole." (App. p. 409:18-25; 421:21-23.)

As Mr. Williams' appellate counsel also explained:

It became extremely apparent to me in the first 20 minutes that I went and saw Onrae up at Leiber that he had no idea that if he was convicted the only choice the Court had was to sentence him to life without parole. . . . It's very apparent he did not understand. It was not explained to him thoroughly that if he is to be found guilty, there is no sentencing, there is no mitigation on what your sentence is going to be. Your sentence is going to be life without parole. It's very clear to me he did not understand that. . . . We had to go over things three or four times, and when I met him, I still do not think he had understood the gravity of what LWOP meant, even after the court expressly told him, See you later. You are not going home.

(App. p. 413:18-23; 414:7-15, 18-22.) Indeed, appellate counsel explained that the fact that Mr. Williams rejected a plea offer for ten years (and, in fact, Mr. Williams also rejected offers of three years and five years) reinforced the fact that Mr. Williams did not know that he would receive LWOP for selling 0.3 grams of drugs. (App. p. 413:24 to 414:6 ("Nobody [turns down a plea offer of 10 years] if you know that if you get convicted, you are going to jail for the rest of your life and you are going to die in jail.").)

ARGUMENT

The PCR Court erred in finding that trial counsel had no basis to challenge a sentence enhancement to mandatory LWOP. Trial counsel failed to research whether the sentence enhancement was proper, and if he had done so, he would have found legal uncertainty in this Court's precedent, which amounts to ineffective assistance of counsel regardless of the ultimate resolution of the legal uncertainty.

Likewise, the PCR Court erred in finding that trial counsel properly communicated all plea offers to Mr. Williams and explained to Mr. Williams that LWOP was his only possible sentence if convicted at trial. The PCR court's finding in this regard is unsupported by the record.

These errors amount to ineffective assistance of counsel because counsel has a duty to advise, research, and raise legal issues "under prevailing professional norms," and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" because Mr. Williams may have accepted a lesser plea, received a more favorable plea deal, or would have received a maximum prison term of ten years under the applicable statute. *See Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989) (quoting *Strickland v. Washington*, 446 U.S. 668, 688 (1984)). The prejudice to Mr. Williams is undeniable: as the United States Supreme Court has acknowledged, the only sentence worse than LWOP is death. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991). Accordingly, this Court should review the Orders of the Court of Common Pleas dated August 4, 2011, and September 2, 2011, and reverse the PCR court's denial of relief.

A. The PCR Court's Denial of PCR Is Inconsistent with the South Carolina Supreme Court's Previous Opinions Finding Trial Counsel Was Ineffective for Failing to Research, Notify the Client, Notify the State, and/or Object to an Enhanced Sentence When Sentence Enhancement Is a Legal Uncertainty, and Petitioner Was Prejudiced by the Ineffective Assistance.

1. Trial Counsel Was Ineffective.

Although Mr. Williams was sentenced to LWOP pursuant to South Carolina's recidivism statute, South Carolina law is unclear as to whether Mr. Williams' 2003 plea under the Youthful Offender Act is an eligible conviction to enhance a maximum ten-year sentence to LWOP. Mr. Williams' trial counsel's failure to investigate this issue, raise it with Mr. Williams, raise it with the State, and object to the Notice of Intent to Seek LWOP—regardless of the ultimate resolution of the legal uncertainty—constitutes ineffective assistance of counsel under this Court's precedent.

In *Berry v. State*, 381 S.C. 630, 675 S.E.2d 425 (2009), the South Carolina Supreme Court found that counsel was ineffective for failing to consider, inform his client, and object to whether the petitioner's prior conviction for possession of drug paraphernalia could be used to enhance his sentence for manufacturing methamphetamine. At the time of the petitioner's guilty plea, South Carolina courts had not clearly addressed whether the State could use the prior conviction to enhance the petitioner's sentence. The Supreme Court found that such uncertainty "may well provide a defendant a catalyst in plea negotiations with the State." *Id.* at 633-35, 675 S.E.2d at 426-27. That is, even when legal issues are not clearly defined, trial counsel has a duty to research, inform the client, and raise the legal ambiguity on the client's behalf because the ambiguity in itself could impact plea negotiations and sentencing.²

² The PCR Court erred in narrowly construing this Court's opinion in *Berry*, finding that the Supreme Court limited its decision to "the issue of whether a guilty plea was entered knowingly and voluntarily." (Order of Dismissal, 7, Aug. 4, 2011.) The State set forth the same argument in its Return to Petition for Writ of Certiorari. (State's Return, at 7, Mar. 20, 2012.) Although

As in *Berry*, whether the State may use Mr. Williams' prior convictions to enhance his sentence to LWOP is not clear. South Carolina's recidivism statute, S.C. Code § 17-25-45, allows for sentences of LWOP only when the offender has the requisite number eligible adult convictions. See *State v. Ellis*, 345 S.C. 175, 345 S.E.2d 490 (2001) (finding that a prior juvenile conviction does not apply toward the recidivism statute). One of Mr. Williams' prior convictions that the State used to enhance Mr. Williams' sentence to LWOP was a "youthful offender" conviction, not an adult conviction. And the South Carolina Supreme Court has long held that "a person between the ages of seventeen and twenty-five is, by definition, a youthful offender," see *Creel v. State*, 262 S.C. 558, 564, 206 S.E.2d 825, 828 (1974) (per curiam), and has explicitly found that convictions of "youthful offenders" are not adult convictions. See *Gay v. Ariail*, 381 S.C. 341, 342, 673 S.E.2d 418, 419 (2009) (finding that a twenty-two year old "was convicted as a 'youthful offender,'" and rejecting the State's argument that the defendant was convicted as an adult).

In its Return to Petition for Writ of Certiorari, the State's argument actually bolsters Mr. Williams' argument. In its Return, the State argues that *State v. Standard*, 351 S.C. 199, 569 S.E.2d 325 (2002), found that LWOP convictions "imposed upon juveniles do not violate contemporary standards of decency so as to constitute cruel and unusual punishment" when the sentence was based on a prior "most serious" conviction that was committed as a juvenile. (State's Return, at 6, Mar. 20, 2012.) The State then points out how Mr. Williams' prior juvenile "serious" plea was different than the prior juvenile "most serious" plea at issue in *Standard*.

Berry took place in the context of a plea agreement, the decision applies with equal weight to Mr. Williams' case because the failure of trial counsel to research and consider a key legal issues in determining whether Mr. Williams' sentence could be enhanced would have played a key role in plea negotiations and the State's decision concerning whether to pursue LWOP. *Berry*, 381 S.C. at 635, 675 S.E.2d at 427.

Indeed, the prior "most serious" offense as a juvenile in *Standard* was the violent crime of armed robbery and vandalizing a home, including killing a cat and beating a dog so severely that it had to be put to sleep. *Standard*, 351 S.C. at 201, 569 S.E.2d at 326-27. *Standard*'s prior violent "most serious" offense is far afield of Mr. Williams' prior nonviolent "serious" offense of distribution of cocaine (0.2 grams of crack, which is between \$5 and \$10 worth of drugs) within half a mile of a school (also within fifty yards of Mr. Williams' grandmother's house, where he lived). The South Carolina Supreme Court did not consider whether a prior juvenile and nonviolent "serious" offense could be used to enhance a sentence to LWOP, which is another source of legal ambiguity.³

Therefore, because (1) the recidivism statute only applies to adult convictions; *Ellis*, 345 S.C. 175, 345 S.E.2d 490 (2001), and (2) Mr. Williams received a youthful-offender conviction in 2003, not an adult conviction, *Creel*, 262 S.C. 558, 564, 206 S.E.2d 825, 828 (1974); *Gay*, 381 S.C. 341, 342, 673 S.E.2d 418, 419 (2009), legal uncertainty existed as to whether Mr. Williams' 2003 conviction could be used to enhance his sentence under the recidivism statute. And counsel's failure to research and raise this legal uncertainty constitutes ineffective assistance of counsel. *Berry*, 381 S.C. 630, 675 S.E.2d 425 (2009).

2. Petitioner Was Prejudiced by Trial Counsel's Ineffective Assistance.

Mr. Williams' prior offenses played a central role in plea negotiations and sentencing. Mr. Williams was charged with violating South Carolina Code § 44-53-445, which carries a maximum prison sentence of ten years. See S.C. Code § 44-53-445(D)(1) ("A person who violates the provisions of this section . . . must be fined not more than ten thousand dollars, or imprisoned not more than ten years, or both."). The State used Mr. Williams' prior convictions

³ Indeed, the legal ambiguity is highlighted by the South Carolina Supreme Court's decision in *Gay v. Ariail*, 381 S.C. 341, 673 S.E.2d 418 (2009), in which the Court explicitly found that convictions/sentences as a youthful offender do not constitute convictions/sentences as an adult.

as a basis for invoking the enhanced sentencing of South Carolina Code section § 17-25-45 to seek LWOP.

Armed with the research that Mr. Williams' 2003 youthful-offender conviction may not apply towards enhancing a sentence, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (quoting *Strickland*, 446 U.S. at 688)). Plea negotiations would have been different for several reasons: (1) legal uncertainty existed as to whether Mr. Williams was eligible to an LWOP sentence; (2) the solicitor may not have pursued a life sentence; and/or (3) the trial court may not have applied the prior youthful-offender conviction toward the recidivism statute. Each of these issues establishes that Mr. Williams was prejudiced in receiving an LWOP sentence and in being deprived of "a catalyst in plea negotiations with the State." *Berry*, 381 S.C. at 635, 675 S.E.2d at 427; see *Robinson v. State*, 380 S.C. 201, 206, 669 S.E.2d 588, 590 (2008) (finding in a drug case that trial counsel's failure to challenge the defendant's prior convictions in enhancing the sentence amounted to ineffective assistance of counsel) (citing *United States v. Tucker*, 404 U.S. 443, 452 (1972) (finding that the defendant should be resentenced when the trial judge improperly considered the defendant's prior convictions in determining the sentence)); *State v. Rich*, 269 S.C. 701, 705, 239 S.E.2d 731, 733 (1977) (same); see also *Stevens v. State*, 365 S.C. 309, 313, 617 S.E.2d 366, 368 (2005) (reversing PCR court's ruling and finding that the petitioner's plea attorney was ineffective for not researching whether the petitioner was properly charged with eighteen counts of receiving stolen goods); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833, 836 (1999) (finding that counsel's failure to raise an argument relevant to sentencing that was available pursuant to South Carolina case law constitutes deficient performance under the prevailing professional norms).

Moreover, trial counsel's failure to research and raise this legal uncertainty regarding sentencing enhancement is particularly problematic because the error resulted in an LWOP sentence for Mr. Williams, which is a facially unjust result considering the small amount of drugs at issue and Mr. Williams' prior offenses. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984) (noting that whether counsel was ineffective should be measured against whether the trial produced a just result). Mr. Williams was sentenced to LWOP for selling 0.3 grams of crack cocaine (approximately \$15 dollars worth of drugs) when he was twenty-one years old, and his prior offenses included selling 0.2 grams crack cocaine (\$5 to \$10 dollars worth of drugs) as a minor at seventeen years of age, and possession of cocaine. These crimes were all committed within blocks of Mr. Williams' grandmother's house where he lived, which happened to be in close proximity to a Charleston high school, thereby implicating "serious" offenses under South Carolina's recidivism statute.

Indeed, the injustice of Mr. Williams' sentence is highlighted by its contrast to the U.S. Supreme Court's decision in *Harmelin v. Michigan*, 501 U.S. 957 (1991), which this Court discussed in affirming Mr. Williams' LWOP sentence. *See State v. Williams*, 380 S.C. 336, 348, 669 S.E.2d 640, 646 (Ct. App. 2008). In *Harmelin*, a defendant was sentenced to LWOP for possessing drugs, but the amount of drugs at issue was 672 grams of pure cocaine, which had a yield of between 32,500 and 65,000 doses, and was worth potentially many hundreds of thousands of dollars. The United States Supreme Court considered possession of such a large amount of drugs as "a grave harm to society," and the Court considered the large quantity of drugs at issue to be a key factor in its decision to affirm the sentence. *Harmelin*, 501 U.S. at 1002.

Contrast the danger to society in *Harmelin* with the single dose of 0.3 grams of cocaine involved in Mr. Williams' case and the 0.2 grams of cocaine at issue in one of his prior offenses. Although Mr. Williams' offense warrants punishment, LWOP for selling 0.3 grams of drugs is far afield of facts and policy considerations of the U.S. Supreme Court's *Harmelin* decision and the South Carolina Supreme Court's precedent for affirming an LWOP sentence. See *State v. Standard*, 351 S.C. 199, 207, 569 S.E.2d 325, 330 (2002) (affirming LWOP sentence for a defendant whose offenses included the violent crimes of armed robbery and vandalizing a home, including killing a cat and beating a dog so severely that it had to be put to sleep; and citing like cases across the country involving LWOP for violent crimes). Nothing in any of Mr. Williams' convictions suggests that he poses a grave harm to society that would warrant an LWOP sentence, as in either *Harmelin* where an extremely large quantity of drugs was at issue or in *Standard* when the defendant had committed violent and heinous crimes. Therefore, the injustice of Mr. Williams' resulting sentence should weigh heavily in considering the ineffectiveness of his counsel in failing to research and raise the legal uncertainty in the law with Mr. Williams, the State, and the trial court. As such, this Court should review the Orders of the Court of Common Pleas dated August 4, 2011, and September 2, 2011, and reverse the PCR court's denial of relief.

B. The PCR Court Erred in Failing to Grant Post-Conviction Relief Because Its Orders Are Inconsistent with the Record Showing that Trial Counsel Failed to Ensure that Mr. Williams Understood the Consequences of Rejecting a Plea Bargain and Proceeding to Trial Where the State Was Seeking LWOP.

1. Trial Counsel Was Ineffective

Although the South Carolina appellate courts have not squarely addressed the issue of whether failing to ensure that a defendant understands the severity of his or her sentence constitutes ineffective assistance of counsel, the guiding principle of PCR that trial produce a just

result strongly suggests that such failure constitutes ineffective assistance of counsel. Others courts have addressed this issue in a PCR context and found ineffective assistance of counsel.

a. South Carolina Law Supports a Finding of Ineffective Assistance of Counsel for Failure To Ensure that a Defendant Understands the Nature of LWOP When Negotiating a Plea.

As the South Carolina Supreme Court has noted in the context of plea negotiations, "We believe the Sixth Amendment guarantee of effective assistance of counsel requires that counsel accurately inform a defendant, to the extent possible, of the qualifying nature of a prior offense for enhancement purposes." *Berry v. State*, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009); *Judge v. State*, 321 S.C. 554, 560, 471 S.E.2d 146, 149 (1996), *overruled on other grounds by Jackson v. State*, 342 S.C. 95, 535 S.E.2d 926 (2000) (finding that the right to effective assistance of counsel applies during the plea negotiation process, even where the plea is rejected). Thus, ensuring that the defendant understands the maximum and minimum penalties at stake in considering and rejecting a plea and proceeding to trial is akin to the defendant understanding the penalties at stake when entering a voluntary guilty plea.

For example, in *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999), the South Carolina Supreme Court found that PCR was appropriate when the defendant entered a guilty plea, did not understand that the plea carried a mandatory minimum sentence, and the defendant's counsel "had little recollection of the exact nature of the matters discussed during the meetings with the Defendant." *See State v. Hazel*, 275 S.C. 392, 395, 271 S.E.2d 602, 602 (1980) (finding that the defendant's plea was involuntary because she was never informed of the mandatory minimum sentence, and court suggested that the he "could" impose a "maximum" sentence of life imprisonment; "thus the plea [was] entered in ignorance of its direct consequence"). Considering that "plea agreements allow our overly burdened criminal courts to function," *Berry v. State*, 381 S.C. at 635, 675 S.E.2d at 427 (2009), asserted the same rationale

for effective assistance of counsel should apply for ensuring that in rejecting a plea, the defendant understands that the risk of proceeding to trial carries a mandatory minimum sentence.

Requiring counsel to inform defendants of the mandatory nature of their potential sentence is also consistent with South Carolina's Rule of Professional Conduct 1.4(b), which defines "prevailing professional norms," *Strickland v. Washington*, 466 U.S. 668, 688 (1984), and which provides that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Moreover, the Comments to Rule 1.4 provide that "when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement." As applied to plea negotiations, the Rules of Professional Conduct require counsel to ensure that the defendant understands the potential sentence at stake in deciding to proceed to trial. See *Jackson*, 342 S.C. at 97, 535 S.E.2d at 927 (finding ineffective assistance of counsel where the defendant accepted a plea, and later testified at the PCR hearing that he did not understand the import of the offense to which he pled, and would not have accepted the plea if he had); *Alexander v. State*, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991) (finding ineffective assistance of counsel where petitioner testified that he accepted a plea because he misunderstood the amount of time that he could have received upon conviction at trial); *State v. Armstrong*, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975) (stating that the defendant must be apprised of the direct consequences, which are the direct and immediate results, of a guilty plea).⁴

⁴ See also *State v. Reed*, 332 S.C. 35, 39, 40, 503 S.E.2d 747, 749 (1998) (noting that for a criminal defendant to be competent to stand trial, the defendant must have "a rational as well as factual understanding of the proceedings against him," and finding a defendant competent to stand trial when a physician concluded that the defendant "had a factual knowledge of the charges against him, the potential penalty he faced and his options in pleading.") (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)) (emphasis added). Thus, because Mr. Williams did

b. Decisions from Other Jurisdictions Support a Finding of Ineffective Assistance of Counsel for Failure To Ensure that a Defendant Understands the Nature of LWOP When Negotiating a Plea.

Requiring counsel to inform defendants of the mandatory nature of their potential sentence is also consistent with similar decisions in other jurisdictions. For example, in *Johnson v. State*, 712 S.E.2d 811, 814 (Ga. 2011), the Georgia Supreme Court reversed the dismissal of a PCR application on grounds of ineffective assistance of counsel where the trial counsel failed to advise the petitioner that if he rejected the State's plea offer, he would face a mandatory sentence of LWOP. The court found that without knowledge of a mandatory LWOP sentence, the defendant "could not make an informed decision about whether to accept or reject a State's plea offer [and thus the petitioner] has fulfilled his burden of showing that his counsel's representation fell below an objective standard of reasonableness." *Id.* at 813 (quotation omitted).

Similarly, in *Villegas v. Yearwood*, 131 Fed. App'x 93, 95 (9th Cir. 2005), the Ninth Circuit reversed the district court's denial of a claim of ineffective assistance of counsel when the defendant's trial counsel failed to advise that proceeding to trial would implicate a mandatory sentence of LWOP. The court found that counsel's failure to inform the petitioner about the "crucial distinction" between a possible sentence of LWOP and a mandatory sentence of LWOP amounted to ineffective assistance of counsel because there was a reasonable probability that the petitioner would have accepted the prosecution's offer of 15 years to life if he had been properly informed of the consequences of proceeding to trial. *Id.*

not have a correct understanding of the sentence that he faced when proceeding to trial, he was not competent to stand trial.

c. The Record Reflects that Counsel Did Not Inform Mr. Williams that LWOP Meant Mandatory LWOP, and the PCR Court Erred in Finding Otherwise.

Having established that the "prevailing professional norms" require that counsel to inform defendants of the mandatory nature of their potential sentence, the evidence presented at the PCR hearing establishes that trial counsel failed to inform Mr. Williams that the State could seek, and later did seek, mandatory LWOP. As such, trial counsel was ineffective.

Mr. Williams' actions during plea negotiations, and his testimony during the PCR hearing reflects that he did not understand that LWOP meant mandatory LWOP. Mr. Williams—who suffered from a learning disability, although trial counsel was unaware of that fact even though it was in Appellant's records—was arrested for selling only 0.3 grams of drugs worth approximately \$15 and testified that he thought that "[t]he judge could give me anything from zero, no time, to life without parole." (App. p. 409:18-25; 421:21-23.) His actions during plea negotiations bear out this stated belief because he rejected a three-year deal, five-year deal, and a ten-year deal. (App. p. 443:9-17.) And nowhere on the State's Notice of Intent to Seek LWOP did it say that LWOP was a mandatory sentence.

Moreover, trial counsel testified during the PCR hearing that he did not know whether he informed Mr. Williams that LWOP meant mandatory LWOP. Counsel stated, "I knew then the case was possible life without parole, and I advised him to take the deal because the risk was very high, but -- so I don't remember specifically what we discussed about that parole. I did imply that it was up to life, so if I advised him, it would have been that this -- if they served notice on him that he could get life without parole." (App. p. 425:12-21 (emphasis added).) Trial counsel later testified that although he discussed the LWOP with Mr. Williams, "I can't remember that issue coming up with him ever asking, you know, is it up to life or is it mandatory life? I don't remember discussing that specific issue" (App. p. 427:14-17.)

Finally, appellate counsel testified at the PCR hearing that it was "extremely apparent" that Mr. Williams "had no idea that if he was convicted the only choice the Court had was to sentence him to life without parole. . . . It's very apparent he did not understand." (App. p. 413:19-23, 414:7.) His appellate counsel was shocked that Mr. Williams rejected a plea offer for ten years, let alone the offers for three years and five years. (App. p. 413:24 to 414:6.)

The PCR Court erred in several respects in failing to find ineffective assistance of counsel when presented with the foregoing evidence:

- The PCR Court erred in completely discounting Mr. Williams' testimony as "not credible" and appellate counsel's testimony as "based on hindsight which was founded on his relationship with the Applicant," particularly when considering the actions of Mr. Williams in rejecting a plea deal of three years where mandatory LWOP was at stake. (App. p. 4, 6.)
- The PCR Court erred in finding that trial counsel "explained to [Mr. Williams] that LWOP was his only possible sentence if convicted." (*Id.* at 7.) Such a finding is unsupported by the trial counsel's testimony, discussed *supra*.
- The PCR Court erred in finding that "the trial court explained to Applicant that the plea offer expires when the jury comes in and then LWOP is the only possible sentence if convicted." (*Id.* at 8.) Rather, the trial court's lone mention that "the only sentence is LWOP" was directed to counsel, not Mr. Williams.
- The PCR Court erred in finding that Mr. Williams knew the mandatory nature of LWOP based on "standard colloquy for the plea judge to advise a defendant if a charge is a strike offense and the potential consequences of future strikes." (*Id.* at 8.) In fact, the PCR Court admitted that this was an "extrapolati[on]" because the

court "[didn't] know who he pled before" and did not have the transcripts at issue.

(App. p. 447:12-14.)

Accordingly, the evidence demonstrates that trial counsel did not inform Mr. Williams of the mandatory nature of LWOP, and therefore counsel provided ineffective assistance.

2. Petitioner Was Prejudiced by Counsel's Ineffective Assistance.

The fact that Mr. Williams did not understand that LWOP meant mandatory LWOP prevented him from making an informed plea decision and prevented him from understanding the risks of rejecting plea offers and proceeding to trial. Accordingly, had counsel properly informed Mr. Williams of the risk of mandatory LWOP, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" because Mr. Williams would have accepted a three-year, five-year, or ten-year plea offer instead of proceeding to trial where he was sentenced to LWOP. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (quoting *Strickland*, 466 U.S. at 688)).

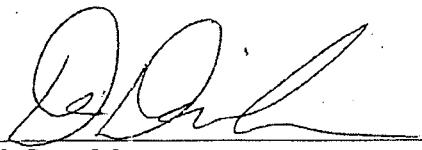
Mr. Williams' case is similar to *Pittman v. State*, 337 S.C. 597, 600, 524 S.E.2d 623, 625 (1999) and *State v. Hazel*, 275 S.C. 392 394, 271 S.E.2d 602, 602 (1980), in that Mr. Williams did not understand that the charges against him carried a mandatory minimum sentence, and Mr. Williams' trial counsel testified that he has no specific recollection of informing Mr. Williams that LWOP meant mandatory LWOP, just that he did "imply" that Mr. Williams "could" receive "up to" LWOP. Thus—as in *Johnson v. State*, 712 S.E.2d 811, 814 (Ga. 2011) and *Villegas v. Yearwood*, 131 Fed. Appx. 93, 95 (9th Cir. 2005)—trial counsel was ineffective for failing to stress the "crucial distinction" between possible LWOP and mandatory LWOP and thereby prejudicing and preventing Mr. Williams from making an informed decision about whether to accept any of the State's plea offers of three years, five years, or ten years. Nor did the trial court cure the inadequacies of counsel by mentioning LWOP because Mr. Williams was

never asked whether he understood that proceeding to trial would result in a mandatory sentence of LWOP if convicted, and all discussion of LWOP was in passing between the court and counsel. (App. p. 175:24-25; 176:1-5; 179:5-14); *see Pittman*, 337 S.C. at 599, 524 S.E.2d at 625 (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). For these reasons, and particularly considering the unjust result of Mr. Williams' trial, as discussed in Part A, above, this Court should review the Orders of the Court of Common Pleas dated August 4, 2011, and September 2, 2011, and reverse the PCR court's denial of relief.

CONCLUSION

For the above-stated reasons, this Court should review the Orders of the Court of Common Pleas dated August 4, 2011, and September 2, 2011, and reverse the PCR court's denial of relief.

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CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Onrae Williams, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

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JUN 20 2014

SC Court of Appeals

Lisa P. Winkum

June 20, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Deadra Jefferson, Circuit Court Judge

Appellate Case No. 2011-20112

ONRAE WILLIAMS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

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<u>United States v. Crumblin</u> , 441 F. App'x 180, 183 (4th Cir. 2011), <u>cert. denied</u> , 132 S. Ct. 1037 (2012).	9
<u>Wolfe v. State</u> , 326 S.C. 158, 485 S.E.2d 369 (1997).	5

Other Authorities:

S.C. Code Ann. § 17-19-10, et al. (1976).	5
S.C. Code Ann. §17-25-45 (1976).	5, 6, 7
S.C. Code Ann. § 63-19-20, et al. (1976).	8

QUESTION PRESENTED

I. Whether there is probative evidence to support the lower court's ruling that counsel was not ineffective for failing to challenge the Petitioner's sentence enhancement based on a prior conviction for which the Petitioner received a Youthful Offender Act sentence when use of the conviction for enhancement was proper and counsel had no basis to challenge the enhancement?

II. Whether there is probative evidence to support the lower court's ruling that counsel properly explained to the Petitioner that life without parole (LWOP) was the only possible sentence the Petitioner could receive if convicted at trial when counsel and the trial court both advised the Applicant of the mandatory nature of the life without parole sentence he would receive if convicted at trial?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. The Petitioner was indicted at the May 2005 term of the Charleston County Grand Jury for distribution of crack cocaine- 3rd offense (2005-GS-10-3592) and distribution of crack cocaine within proximity of a school (2005-GS-10-3592). Jason King, Esquire, represented the Petitioner. The Petitioner proceeded to trial on January 16-17, 2007, after which a jury found him guilty as indicted. The Honorable R. Markley Dennis, Jr. sentenced the Petitioner to confinement for life without parole (LWOP) for each offense.

A timely Notice of Appeal was filed on the Petitioner's behalf on January 25, 2007 and an appeal was perfected. Mark Peper, Esquire, represented the Petitioner on appeal. After full briefing by both sides, the South Carolina Court of Appeals affirmed the Petitioner's convictions and sentences. State v. Williams, Opinion No. 4447 (S.C. Ct. App. October 22, 2008). The Petitioner's Petition for Rehearing was denied on December 19, 2008. The Petitioner's Petition for Writ of Certiorari to the South Carolina Supreme Court was denied by Order dated October 21, 2009. The Remittitur was issued on October 26, 2009.

The Petitioner filed an application for post-conviction relief on May 11, 2010 and amended the application on May 16, 2011. The Respondent made its Return on August 18, 2010 which was filed on August 20, 2010. An evidentiary hearing into the matter was convened on May 24, 2011 at the Charleston County Courthouse. The Petitioner was present at the hearing and represented by Elizabeth Scott Moise, Esquire, and Matthew E. Brown, Esquire. Matthew Friedman, Esquire, of the South Carolina Office of the Attorney General represented the Respondent. Testifying at the hearing were the Petitioner, trial counsel- Jason King, and

appellate counsel- Mark Peper. By Order dated August 1, 2011, the Honorable Deadra L. Jefferson denied and dismissed the Petitioner's application with prejudice. The Petitioner subsequently filed a Motion to Alter and Amend and the Respondent filed a Return to the motion. By Order dated August 31, 2011, the Court denied the Petitioner's Motion to Alter and Amend. The Petitioner filed a timely Notice of Appeal. This Court granted Petition for Writ of Certiorari by Order dated May 22, 2014. This Brief of Respondent follows.

ARGUMENT

The Petitioner asserts that the post-conviction relief court erred by finding trial counsel did not provide ineffective assistance of counsel. The Respondent submits probative evidence exists to support the post-conviction relief court's findings. The lower court's ruling should be affirmed.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, 104 S.Ct. 2052, 80 L.Ed.2d 674, (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. 5

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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 professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

I. There is probative evidence to support the lower court's finding that counsel was not ineffective for failing to challenge the use of the Petitioner's prior conviction to enhance the Petitioner's sentence to life without parole when the Petitioner's prior 2003 conviction for which he received a youthful offender sentence was properly used for enhancement purposes.

The Petitioner claims the lower court erred by finding trial counsel was not ineffective for failing to challenge the use of the Petitioner's 2003 drug conviction to enhance a sentence to life without parole pursuant to S.C. Code Ann. §17-25-45 (1976). The Petitioner argues there is an ambiguity in the law and trial counsel should have argued the Petitioner's 2003 drug conviction sentence should not have been used for enhancement purposes since the Petitioner received a sentence under the Youthful Offender Act (YOA)¹. The Respondent submits there is no ambiguity in South Carolina law and a conviction for which a defendant received a youthful offender sentence can be used to enhance a sentence pursuant to S.C. Code Ann. § 17-25-45.

On January 16-17, 2007, the Petitioner proceeded to trial for distribution of crack cocaine- 3rd offense (2005-GS-10-3592) and distribution of crack cocaine within proximity of a school (2005-GS-10-3593). The Petitioner was found guilty as indicted by a jury. During the Petitioner's sentencing proceeding, the State proffered two certified convictions in support of its intention to seek life without parole pursuant to S.C. Code Ann. § 17-25-45(B)². The State relied

¹ S.C. Code Ann. § 17-19-10, et al. (1976).

² S.C. Code Ann. § 17-25-45 outlines what is commonly referred to as the two-strikes/three-strikes law. Under the "three-strikes law" a person can be sentenced to life without parole after being convicted of three serious offenses. Under the "two-strikes law" a person can be sentenced to life without parole after being convicted of two most

on two prior convictions for possession with intent to distribute cocaine in proximity of a school (1999-GS-10-7722 and 2003-GS-10-0171) to show the Petitioner had two prior serious offenses. (App. 380-381). For the 1999 distribution of cocaine in proximity of a school conviction, the Petitioner received a five year sentence. (App. 486). For the 2003 distribution of cocaine in proximity of a school conviction, the Petitioner received a Youthful Offender Act sentence not to exceed one to six years. (App. 463). Trial counsel made no challenge to the prior convictions being serious offenses, but objected to the sentence of life without parole on a drug offense as constituting cruel and unusual punishment. (App. 382). Because the Petitioner's conviction for distribution of crack cocaine within proximity of a school constituted a third serious offense pursuant to S.C. Code Ann. § 17-25-45(C)(2), the Court sentenced the Petitioner to life without parole. (App. 384).

The Respondent submits trial counsel was not ineffective for failing to challenge the use of the Petitioner's 2003 drug conviction for sentence enhancement purposes. The fact that the Petitioner received a sentence under the Youthful Offender Act for his 2003 drug conviction does not preclude the use of this conviction to enhance a sentence to life without parole. Counsel cannot be found ineffective for his performance because he had no basis to challenge the use of the Petitioner's 2003 drug conviction and the Petitioner was properly sentenced to life without parole.

The South Carolina Supreme Court in State v. Standard explicitly held that a conviction for which a person receives a Youthful Offender Act sentence is a conviction for purposes of sentencing under S.C. Code Ann. § 17-25-45(C)(3). 351 S.C. 199, 569 S.E.2d 325 (2002). In

serious offenses. For purposes of this statute, a "conviction means any conviction, guilty plea, or plea of nolo contendere. S.C. Code § 17-25-45(C)(3) (1976) (emphasis added). To "distribute, sell, manufacture, or possess with intent to distribute controlled substances within the proximity of a school" is defined as a serious offense. S.C. Code § 17-25-45(C)(2)(b) (1976).

Standard, the defendant committed an armed robbery two months prior to his 16th birthday. Standard was waived up to general sessions court where he pled guilty to armed robbery at age 17 and was sentenced to a youthful offender sentence not to exceed six years. Standard subsequently was convicted of first degree burglary and grand larceny. Based upon his prior “most serious” armed robbery conviction, the trial court sentenced Standard to life without parole for burglary under the “two-strikes law”. Id. at 201, 569 S.E.2d at 327.

In Standard, the Court held the defendant “was tried and adjudicated as an adult, such that his guilty plea to armed robbery in general sessions court [for which the Petitioner received a youthful offender sentence] is a “conviction” for purposes of sentencing under S.C. Code Ann. § 17-25-45(C)(3).” Id. at 203, 569 S.E.2d at 328. S.C. Code Ann. § 17-25-45(C)(3) defines conviction for purposes of the two-strikes/three-strikes statute as “any conviction, guilty plea, or plea of nolo contendere.” It is clear from Standard, that an adult conviction for which a defendant received a youthful offender sentence is a conviction that can used to enhance a sentence to life without the possibility of parole pursuant to S.C. Code Ann. § 17-25-45.

The Petitioner’s case is analogous to Standard. Like in Standard, the Petitioner pled guilty as an adult³ to an offense in general sessions court, was tried and adjudicated as an adult, and received a youthful offender sentence. (App. 463). Also, like in Standard, the Petitioner’s prior conviction for which he received a youthful offender sentence was properly used by the Court to enhance the Petitioner’s sentence for a subsequent conviction to life without parole. Based on the Court’s finding in Standard, trial counsel had no basis to challenge the use of the Petitioner’s prior 2003 drug conviction for sentencing enhancement.

³ The record reflects on the Petitioner’s sentencing sheet, the Petitioner was 20 years old in 2003 when he pled guilty to distribution of cocaine within proximity of a school. (App. 463).

The Petitioner claims that his case should be distinguished from Standard because Standard involved sentence enhancement under the two-strike law for most serious offenses and his case involved sentence enhancement under the three-strike law for serious offenses. The Respondent submits this distinction does not affect the applicability of the Court's clear holding in Standard to the Petitioner's case. The two-strike and three-strike laws are enumerated in the same statute- S.C. Code Ann. § 17-25-45 and are both governed by the same definition of "conviction" cited by the Court in Standard. The Petitioner's argument is without merit.

The Petitioner also claims that a conviction in which a defendant receives a sentence pursuant to the Youthful Offender Act is not an adult conviction. The Respondent submits the Petitioner's 2003 conviction for distribution of cocaine within proximity of a school was an adult conviction despite the Petitioner receiving a youthful offender sentence.

Juvenile adjudications may not be used to enhance a sentence under the recidivist statute. State v. Ellis, 345 S.C. 175, 179, 547 S.E.2d 490, 492 (2001).⁴ However, a juvenile adjudication is different from a sentence as a youthful offender. In South Carolina, a juvenile is a "person less than seventeen years of age." S.C. Code Ann. § 63-19-20(1). A juvenile is also subject to the exclusive jurisdiction of the family court. State v. England, 271 S.C. 129, 130, 245 S.E.2d 608, 609 (1978).

Although South Carolina courts have not had an opportunity to address whether a youthful offender sentence is a "juvenile conviction," federal courts have held that sentences under South Carolina's Youthful Offender Act ("YOA") are not "juvenile convictions." See

⁴ The Respondent notes that the Supreme Court explicitly distinguished its holding in Ellis from its holding in State v. Standard. The Court stated in Standard, "[r]ecently, in State v. Ellis (citation omitted), we held a juvenile adjudication is not a conviction, guilty plea, or plea of nolo contendere, such that it may not be used to invoke the mandatory LWOP provisions of the recidivist statute. Unlike Ellis, however, Standard here was tried and adjudicated as an adult, such that his guilty plea to armed robbery in general sessions court is a conviction for purposes of sentencing under S.C. Code Ann. § 17-2-45(C)." Standard, 351 S.C. at 203, 569 S.E.2d at 328.

United States v. Crumblin, 441 F. App'x 180, 183 (4th Cir. 2011), cert. denied, 132 S. Ct. 1037 (2012) ("Crumblin's 1994 conviction was not a juvenile conviction, despite his YOA sentence..."); United States v. Brown, 324 F. App'x 231, 233 (4th Cir. 2009) ("We agree that the convictions under the state Youthful Offender Act were properly considered in designating Brown a career offender.").

The Court in Crumblin specifically held that YOA sentences are not juvenile convictions because the family court has exclusive jurisdiction over juvenile offenses. Crumblin, 441 F. App'x at 183. Because the YOA is a sentencing option for individuals up to twenty-four (24) years old, an individual can be sentenced under the YOA and not be a juvenile. Id. The opinion in Crumblin is especially instructive because the District of Columbia, like South Carolina, also gives the Superior Court Family Division exclusive jurisdiction over juveniles. Logan, 483 A.2d at 667. Also, individuals who are not juveniles may be sentenced under both the federal youth corrections act and the YOA. Compare 18 U.S.C. 5006(e) (defining "youth offender" as individual under 22) and S.C. Code Ann. § 24-19-10(d) (defining "youthful offender as various individuals under 25).

The Respondent submits the Petitioner's 2003 conviction for distribution of cocaine within proximity of a school was not a juvenile conviction and was properly used for sentencing enhancement. The Petitioner, who was 20 years old at the time, was not a juvenile when he pled guilty to the 2003 drug offense in general sessions court. The Petitioner's 2003 drug offense was also not adjudicated in family court. The Respondent submits there is probative evidence to support the lower court's finding that the Petitioner failed to carry his burden of proving counsel was ineffective for failing to challenge the use of the Petitioner 2003 drug conviction to enhance a sentence on the basis that the 2003 conviction in which the Petitioner received a youthful

offender sentence could not be used for enhancement purposes. The Respondent submits the Court's finding in State v. Standard clearly shows the use of the Petitioner's 2003 conviction to enhance a sentence to life without parole pursuant to S.C. Code Ann. § 17-25-45 was proper. The Respondent submits further the Petitioner was not prejudiced by counsel's failure to advance a challenge based on his 2003 conviction since a challenge on the basis asserted by the Petitioner would likely have been futile. This Court should affirm the lower court's denial of post-conviction relief.

II. There is probative evidence to support the lower court's finding that trial counsel properly advised and explained to the Applicant that life without the possibility of parole was the Petitioner's only possible sentence if convicted at trial when counsel provided credible testimony that he never indicated to the Petitioner that the LWOP sentence would be anything but mandatory and the Petitioner never indicated to the trial court that he was not aware the LWOP sentence was mandatory.

The Petitioner claims counsel was ineffective for failing to inform him of the mandatory nature of the life without the possibility of parole sentence he would face if he went to trial. The Respondent submits the Petitioner failed to carry his burden of proving he was unaware he would receive a mandatory life without parole sentence if convicted at trial. At the evidentiary hearing, counsel provided credible testimony that he had no problems communicating with the Petitioner and that he advised the Petitioner that if he was served notice and convicted of a third strike he could get life without parole. (App. 425-425). Counsel testified further that when explaining life without parole to the Petitioner he "wouldn't have implied in any way that it was not a mandatory life without parole" sentence. (App. 427). The lower court found trial counsel's testimony to be credible. (App. 6).

The Respondents submits counsel's credible testimony regarding his advice to the Petitioner about the life without parole sentence he was facing is sufficient to support the lower court's finding that the Petitioner failed to carry his burden of proving counsel did not properly

advise him of the mandatory nature of the life without parole sentence. However, the trial court also made repeated comments throughout the Petitioner's trial about the mandatory nature of the life without parole sentence the Petitioner was facing. The Respondent submits any alleged deficiency by counsel was cured by the Court's comments during the Petitioner's trial. The following exchanges took place during the Petitioner's trial:

The Court: Thank you sir. You all made that call. Did you offer something other than life without parole?

Solicitor: Yes, sire we did.

The Court: That being the case, you've made your choice. If he is going to be burned he'll be burned. No questioned about that. Okay. Thank you very much. (App. 175-176).

Trial Counsel: Judge, I think Numbers 13 and 14, I would prefer the Court's standard charge on those issues.

The Court: We will address those. You can object, but I am going to discuss those aspects of it. **Once they come into the room, the deal is gone. The only sentence is LWOP. He's made his decision.** Do you understand?

Trial Counsel: Yes your honor. (App. 179) (emphasis added).

The Court: The reviewing Court—you'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) (emphasis added).

The Respondent submits the trial court's comments before the start of the Petitioner's trial and during the Petitioner's sentencing proceeding clearly show the Petitioner was made aware of the mandatory nature of the life without parole sentence he was facing if convicted. The Respondent also submits the Petitioner never indicated to the Court during the course of his trial that that he was not aware the life without parole sentence he was facing would be mandatory. The Petitioner spoke during his sentencing proceeding and never indicated he did not know LWOP was mandatory. (App. 383).

Lastly, the Petitioner's testimony at his post-conviction relief hearing is the sole evidence presented by the Petitioner in support of his claim that counsel did not advise him of the mandatory nature of the life sentence he was facing if he were convicted at trial. This Court should not consider the Petitioner's testimony dispositive of this issue since the lower court found the Petitioner's testimony at the post-conviction relief hearing was not credible. In the Order of Dismissal, the lower court found "the Applicant's testimony is not credible while also finding that trial counsel's testimony is credible." (App. 6). This Court should give great deference to the PCR judge's findings where matters of credibility are involved. Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). The Respondent submits the Petitioner has failed to carry his burden of proving counsel was ineffective for failing to advise the Petitioner of the mandatory nature of the life without parole sentence he was facing if convicted at trial. This Court should affirm the lower court's denial of post-conviction relief.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the lower court's ruling should be affirmed.

[Signature on the following page.]

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October 20, 2014

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

The Honorable Deadra Jefferson, Circuit Court Judge

Appellate Case No. 2011-20112

Onrae Williams,

Petitioner,

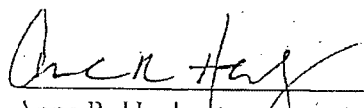
v.

State of South Carolina

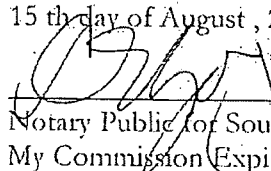
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Respondent has been served upon opposing counsel, Elizabeth Scott Moise, by mailing two (2) copies in an envelope properly addressed with postage prepaid this 20th day of October, 2014.


Anne R. Henley
Legal Assistant for Petitioner

SWORN to before me this
15th day of August, 2014.


Notary Public for South Carolina

My Commission Expires: 10/28/2014

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

RECEIVED

NOV 10 2014

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

SC Court of Appeals

The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2011-201112

State of South Carolina, ... Respondent,

v.

Onrae Williams, #284437, ... Appellant.

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PRELIMINARY STATEMENT OF THE CASE

This case involves a sentence of life without parole ("LWOP") under South Carolina's three-strikes law for three non-violent drug offenses that Appellant, Onrae Williams, committed between the ages of seventeen and twenty-one. Two of the offenses involved the sale of drugs valued at approximately \$15 or less. Although the sales of drugs were to adults, these offenses occurred within fifty yards of where Mr. Williams lived with his grandmother, which happens to be less than one-half mile from a high school thereby bringing the offenses within the scope of South Carolina's recidivism statute.

The appeal to this Court concerns two issues giving rise to ineffective assistance of Mr. Williams' trial counsel: (1) trial counsel's failure to research, identify, and inform Mr. Williams about a legal uncertainty in South Carolina law that would preclude use of Mr. Williams' "Youthful Offender" conviction to enhance the maximum statutory sentence for Mr. Williams' third offense from ten years to LWOP; and (2) trial counsel's failure to explain to Mr. Williams that "LWOP" meant "mandatory LWOP."

ARGUMENT

A. The PCR court's denial of PCR is inconsistent with this Court's previous opinions finding trial counsel was ineffective for failing to research, notify the client, notify the State, and/or object to an enhanced sentence when enhancement is a legal uncertainty, and Petitioner was prejudiced by the ineffective assistance.

Although the State argues that Onrae Williams' 2003 conviction can properly be used to enhance his 2007 sentence to life without parole ("LWOP"), the State does not address whether uncertainty in the law existed, which is the issue before the Court. A review of South Carolina law demonstrates that uncertainty existed as to whether a sentence as a "Youthful Offender" amounted to an adult conviction, and failure to research and raise this legal uncertainty constitutes ineffective assistance of counsel that resulted in severe prejudice to Mr. Williams.

Berry v. State, 381 S.C. 630, 675 S.E.2d 425 (2009); *see also Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (noting that the only sentence worse than LWOP is death).

Mr. Williams has established that legal ambiguity concerning whether a Youthful Offender sentence can be used to enhance a sentence to LWOP:

- South Carolina's recidivism statute—S.C. Code § 17-25-45, which is the basis for an LWOP sentence—must be given a strict construction in favor of the defendant. *See State v. Ellis*, 345 S.C. 175, 179, 547 S.E.2d 490, 492 (2001). Moreover, South Carolina courts are guided by the rule of lenity in construing criminal statutes, whereby any ambiguity must be resolved in favor of the defendant. *See Berry v. State*, 381 S.C. 630, 633-34, 675 S.E.2d 425, 426 (2009) (citing *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (“[W]hen a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.”)).
- The recidivism statute allows for sentences of LWOP only when the offender has the requisite number eligible adult convictions. *See Ellis*, 345 S.C. at 179, 547 S.E.2d at 492.
- The South Carolina Supreme Court has long held that “a person between the ages of seventeen and twenty-five is, by definition, a youthful offender,” not an adult. *See Creel v. State*, 262 S.C. 558, 564, 206 S.E.2d 825, 828 (1974) (per curiam).
- The South Carolina Supreme Court previously found that a prior juvenile conviction does not apply toward the recidivism statute. *See Ellis*, 345 S.C. at 179, 547 S.E.2d at 492.

Taken together, these points of law provide Mr. Williams with a colorable legal argument that using his 2003 Youthful Offender to enhance his 2007 sentence to LWOP was improper under South Carolina law.

Although *State v. Standard*, 351 S.C. 199, 569 S.E.2d 325 (2002), represents authority supporting the State's position, the case is distinguishable from Mr. Williams' case on several grounds (*see* App. Br., at 12-13), and the case does not vitiate the legal ambiguity in South Carolina law that Mr. Williams has identified. Indeed, legal uncertainty in South Carolina law regarding the "youthful offender vs. adult" distinction remained after *Standard* and is highlighted by the South Carolina Supreme Court's later decision, *Gay v. Ariail*, 381 S.C. 341, 342, 673 S.E.2d 418, 419 (2009), in which the Court rejected the State's argument that a twenty-two year old defendant was convicted as an adult, finding instead that he "was convicted as a 'youthful offender.'" Finally, the legal uncertainty that Mr. Williams has identified is further highlighted by the fact that the State's argument rests largely on citation to non-controlling authority in the Fourth Circuit decided years after Mr. Williams' conviction (rather than to any controlling South Carolina authority decided before Mr. Williams' conviction). (Br. of Resp., at 8-9, Oct. 20, 2014.)

The fact of legal uncertainty, regardless of the ultimate outcome, is the issue before the Court. Mr. Williams has identified legal uncertainty in South Carolina law, and as further detailed in the appellate brief, trial counsel's failure to research and inform Mr. Williams of this legal uncertainty amounted to ineffective assistance of counsel and prejudice because there is a reasonable probability that Mr. Williams' sentence would have been different if this ambiguity had been brought to his attention and was used as catalyst during plea negotiations. *See Berry*, 381 S.C. at 633-35, 675 S.E.2d at 426-27; *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d

624, 625 (1989) (quoting *Strickland v. Washington*, 446 U.S. 668, 688 (1984)). For these reasons, this Court should review the PCR court's Orders dated August 4, 2011, and September 2, 2011, and reverse the court's denial of relief.

B. The PCR court erred in failing to grant post-conviction relief because its Orders are inconsistent with the record showing that trial counsel failed to ensure that Mr. Williams understood the consequences of rejecting a plea bargain and proceeding to trial when the State was seeking LWOP.

The State does not dispute that failing to ensure that a defendant understands the severity of his or her potential sentence constitutes ineffective assistance of counsel. Furthermore, the State's arguments that Mr. Williams understood that "LWOP" meant "mandatory LWOP" are incorrectly based on (1) a narrow reading of the record, which omits critical testimony of Mr. Williams, his trial counsel, and his appellate counsel and (2) speculation that Mr. Williams listened and understood brief exchanges between the trial court and the lawyers at trial about LWOP. To the contrary, the overwhelming evidence presented at the PCR hearing established that trial counsel failed to inform Mr. Williams that the State could seek, and later did seek, mandatory LWOP. As a result, trial counsel was ineffective, and Mr. Williams was prejudiced.

(1) *Narrow reading of the record and omission of critical testimony.* The State argues that Mr. Williams was informed and understood that he was facing mandatory LWOP because trial counsel testified that he did not have trouble communicating with Mr. Williams and that he "wouldn't have implied in any way that [LWOP] was not a mandatory life without parole [sentence]." (Br. of Resp., at 10, Oct. 20, 2014.)

Critically, however, the State omitted the rest of trial counsel's testimony that "I knew then the case was possible life without parole, and I advised him to take the deal because the risk was very high, but -- so I don't remember specifically what we discussed about that parole. I did imply that it was up to life, so if I advised him, it would have been that this -- if they served

notice on him that he could get life without parole.” (App. at 425:12-21 (emphasis added).) Trial counsel later testified that although he discussed LWOP with Mr. Williams, “I can’t remember that issue coming up with him ever asking, you know, is it up to life or is it mandatory life? I don’t remember discussing that specific issue” (App. at 427:14-17.)

Moreover, the State ignores the corroborative testimony and evidence that trial counsel failed to inform Mr. Williams that “LWOP” meant “mandatory LWOP”:

- Mr. Williams’ appellate counsel testified at the PCR hearing that it was “extremely apparent” that Mr. Williams “had no idea that if he was convicted the only choice the Court had was to sentence him to life without parole. . . . It’s very apparent he did not understand.” (App. at 413:19-23, 414:7.)
- Mr. Williams’ testimony that he thought that “[t]he judge could give me anything from zero, no time, to life without parole.” (App. at 409:18-25; 421:21-23.)
- Mr. Williams’ actions during plea negotiations where, in the face of mandatory LWOP, he rejected a three-year deal, five-year deal, and a ten-year deal. (App. at 443:9-17.)
- The State’s Notice of Intent to Seek LWOP that did not say that LWOP was a mandatory sentence.

Thus, the overwhelming weight of the evidence is that Mr. Williams’ trial counsel did not inform him that “LWOP” meant “mandatory LWOP.”

(2) *Speculation about the trial judge’s exchanges with the lawyers at trial.* The State argues—without citing a single case in support—that any ineffectiveness of trial counsel was cured by the trial court’s comments to the lawyers at trial. The State cites three very brief exchanges between the Court and the lawyers, each of which lasted seconds (and the last of

which was made after Mr. Williams was convicted). None of the trial court's comments were directed to Mr. Williams, and to conclude that seconds-long comments made during the course of an entire trial documented in a 235-page trial transcript proves that Mr. Williams understood that "LWOP" meant "mandatory LWOP" is impermissibly speculative. *See Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (finding that the discussion of the mandatory minimum sentence that was mentioned in passing could not cure the inadequacy of failing to inform the defendant of the mandatory minimum sentence).

Even assuming that Mr. Williams was listening in the moments when the trial court made these comments, Mr. Williams has a learning disability, and nothing suggests that he understood the trial court's comments (for example, the judge's cryptic comment, "[i]f he's going to be burned he'll be burned"). Indeed, the last of the three comments that the State quotes, which the trial court made after Mr. Williams was convicted, suggests that the trial court believed that Mr. Williams did not understand that he would be sentenced to mandatory LWOP: "[Y]ou're correct, mine is without any discretion, but clearly this case, the facts observed, and the fact of recent convictions, -- there was a gentleman this morning that entered a plea to avoid. I think that he finally perceived the gravity of the situation; **unfortunately some don't, and Mr. Williams falls into that.**" (App. 382:15-22) (emphasis added).

Mr. Williams is thirty-two years old and has already been in jail for more than seven years. Keeping him in jail for the rest of his life (for three non-violent crimes) based on his trial counsel's testimony that he "wouldn't have implied in any way that it was not a mandatory life without parole" (App. 427:11-12), and speculation that Mr. Williams was listening to and understood a couple of stray comments by the trial court is counter to the overwhelming weight of the evidence that he was not directly told and did not understand that "LWOP" meant

“mandatory LWOP.” A ten-second, on-the-record dialogue with the trial court to ensure that Mr. Williams understood the gravity of proceeding with trial could have avoided the trial, the direct appeal, the PCR application, and appeal to this Court. Accordingly, and as discussed in greater detail in the appellate brief, the Court should review the Orders of the Court of Common Pleas dated August 4, 2011, and September 2, 2011, and reverse the PCR court’s denial of relief.

CONCLUSION

For the above-stated reasons, and as further detailed in the appellate brief, this Court should review the Orders of the Court of Common Pleas dated August 4, 2011, and September 2, 2011, and reverse the PCR court’s denial of relief.

[SIGNATURE ON FOLLOWING PAGE]

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Attorneys for Appellant Onrae Williams

Charleston, South Carolina
November 10, 2014

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2011-201112

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SC Court of Appeals

State of South Carolina, ... Respondent,

v.

Onrae Williams, #284437, ... Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

REPLY BRIEF FOR APPELLANT ONRAE WILLIAMS

Counsel Served:

Matthew J. Friedman, Esq.
Ashleigh R. Wilson, Esq.
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P.O. Box 11549
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Lisa P. Whitehurst

November 10, 2014



The South Carolina Court of Appeals

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October 13, 2015

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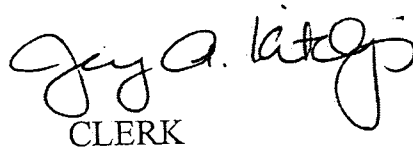
Ms. Alicia A. Olive, Esquire
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Re: Williams, Onrae v. The State
Appellate Case No. 2011-201112

Dear Counsel:

After careful consideration, and as a result of the need to reschedule oral arguments due to flooding, the Court has elected to decide this case on the record and briefs during the October term without oral argument.

Very truly yours,


CLERK

cc: Alan McCrory Wilson, Esquire
Ashleigh Rayanna Wilson, Esquire

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OCT 19 2015

NELSON, MULLINS

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

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

Onrae Williams, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-201112

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Unpublished Opinion No. 2016-UP-015
Submitted October 13, 2015 – Filed January 13, 2016

AFFIRMED

Elizabeth Scott Moise and Matthew Edward Brown, of
Nelson Mullins Riley & Scarborough, LLP, of
Charleston, for Petitioner.

Attorney General Alan McCrory Wilson, Assistant
Attorney General Ashleigh Rayanna Wilson, and
Assistant Attorney General Alicia A. Olive, of Columbia,
for Respondent.

PER CURIAM: In this post-conviction relief (PCR) action, Onrae Williams appeals the PCR court's denial of his application for PCR. Williams claims this court should reverse the PCR court's decision because (1) trial counsel failed to properly research and subsequently object to an enhanced mandatory life without parole (LWOP) sentence when legal uncertainty existed as to whether Williams' sentence could be enhanced, and (2) trial counsel failed to ensure Williams understood the consequences of rejecting a plea bargain and proceeding to trial when the State was seeking mandatory LWOP. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether trial counsel was ineffective for failing to properly research and subsequently object to an enhanced mandatory LWOP sentence: *State v. Morgan*, 352 S.C. 359, 366–67, 574 S.E.2d 203, 206–07 (Ct. App. 2002) ("If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation and the court has no right to look for or impose another meaning."); S.C. Code Ann. § 17-25-45(A)(2)(a) (2014) ("Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a most serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has . . . two or more prior convictions for . . . a serious offense . . ."); S.C. Code Ann. § 17-25-45(C)(2)(b) (Supp. 2015) (stating felony convictions for possession with intent to distribute cocaine within the proximity of a school and distribution of cocaine within the proximity of a school are each classified as a "serious offense"); S.C. Code Ann. § 17-25-45(C)(3) (2014) ("Conviction" means any conviction, *guilty plea*, or plea of *nolo contendere*." (emphasis added)); *see also* S.C. Code Ann. § 63-19-20(1) (2010) ("Child" or "juvenile" means a person less than seventeen years of age."); *United States v. Crumblin*, 441 F. App'x 180, 183–84 (4th Cir. 2011) (holding defendant's felony conviction at the age of seventeen for purposes of his career offender status was not a juvenile conviction, despite defendant's youthful offender sentence, because he was neither a child as defined by section 63-19-20 nor did the family court have exclusive jurisdiction over defendant as required for sentencing as a juvenile).

2. As to whether trial counsel failed to ensure Williams understood the consequences of rejecting his plea bargain and proceeding to trial when the State was seeking mandatory LWOP: *Walker v. State*, 407 S.C. 400, 404–05, 756 S.E.2d 144, 146 (2014) (stating to prevail on an ineffective assistance of counsel claim, a PCR applicant must demonstrate (1) "counsel was deficient" and (2) "the

deficiency resulted in prejudice" (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)); *id.* at 405, 756 S.E.2d at 146 (acknowledging an appellate court's great deference to a PCR court's findings on matters of credibility); *Lafler v. Cooper*, 132 S. Ct. 1376, 1385 (2012) (requiring an applicant alleging he rejected a plea offer because of counsel's deficient advice to establish prejudice by showing "there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed" (emphasis omitted)); *Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000) (establishing the burden of proving entitlement to PCR is upon the PCR applicant).

AFFIRMED.¹

HUFF, WILLIAMS, and THOMAS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Deadra L. Jefferson

FEB 12 2016

SC Court of Appeals

Case No. 2010-CP-10-03800
Appellate Case No. 2011-201112

Onrae Williams,..... Appellant,

v.

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

PETITION FOR REHEARING AND REHEARING EN BANC

Pursuant to Rule 221 of the South Carolina Rules of Appellate Procedure, Onrae Williams petitions the Court for rehearing and rehearing en banc. Oral arguments regarding this appeal were originally set for October 6, 2015, but were postponed because of flooding in Columbia; on October 13, the Court wrote to the parties that it would decide the appeal without oral arguments. The grounds for the petition are as follows:

The first issue before the Court in Mr. Williams' appeal from Post Conviction Relief denial was whether trial counsel's failure to research, notify the client, notify the State, and/or object to an enhanced sentence when the enhancement was legally uncertain amounts to ineffective assistance of counsel. The Court's opinion, however, overlooked the issue on appeal. Rather, in affirming the PCR Court's denial of relief, the Court appears to have reached a legal conclusion about the availability of sentencing enhancement while overlooking whether legal uncertainty existed. The Court also overlooked South Carolina Supreme Court precedent identified in the Appellant's

briefing that demonstrates the existence of legal uncertainty as to whether a sentence as a “Youthful Offender” amounts to an adult conviction. Finally, the Court misapprehended the import of an unpublished Fourth Circuit opinion that is distinguishable from Mr. Williams’ case in several significant respects, such as the fact that it was decided four years after Mr. Williams was sentenced.

The second issue before the Court in Mr. Williams’ appeal from Post Conviction Relief denial was whether trial counsel was ineffective for failing to ensure that Mr. Williams understood the consequences of rejecting a plea bargain and proceeding to trial where the State was seeking mandatory life in prison without parole. The Court’s opinion, however, overlooked the issue on appeal by not applying any of the law that it cited to any of the facts of Mr. Williams’ case. Moreover, the Court appears to have overlooked many of the PCR Court’s relevant findings that were entirely unsupported by the record. The Court also overlooked South Carolina Supreme Court precedent that granted PCR on records similar to the one here, and Georgia Supreme Court and Ninth Circuit cases concerning records nearly identical to the record here that granted relief for ineffective assistance of counsel for failing to inform about the mandatory minimum sentence at issue. Finally, the Court misapprehended the import of a U.S. Supreme Court decision on the outcome of Mr. Williams’ appeal.

For each of these reasons, the Court should grant rehearing and issue a revised opinion reversing the PCR Court’s denial of post-conviction relief. Failing that, rehearing en banc should be granted by the full court in order to secure uniformity of the decisional law regarding actions of this type. Rule 219, SCACR.

Argument

I. The Court overlooked the first issue on appeal, overlooked all of the key cases discussed in Appellant's briefing, and misapprehended an unpublished Fourth Circuit opinion.

A. The Court overlooked the first issue on appeal.

The first issue before the Court on appeal was as follows: Did the Court of Common Pleas err in failing to grant post-conviction relief for ineffective assistance of counsel because its Orders are inconsistent with the South Carolina Supreme Court's previous opinions finding ineffective assistance of counsel when trial counsel failed to research, notify the client, notify the State and/or object to an enhanced sentence when legal uncertainty existed as to whether the sentence could be enhanced? The Court did not address this question. Rather, the Court appears to have reached a conclusion that Mr. Williams was eligible for an enhanced sentence under South Carolina law, and thus, the Court seems to imply, if Mr. Williams' sentence was properly enhanced, then there could be no ineffective assistance of counsel. The key issue on appeal, however, is not whether Mr. Williams' sentence could be enhanced, but rather whether legal uncertainty existed on the enhancement issue. Because the Court did not address whether legal uncertainty existed, a rehearing is appropriate.

B. The Court overlooked all of the key cases discussed in the Appellant's briefing.

In its opinion, the Court provides a string citation that includes several subsections of South Carolina's recidivism statute, S.C. Code section 17-25-45, and a case from the Fourth Circuit to suggest that a youthful offender conviction may be used to enhance a sentence under the recidivism statute. But the Court overlooked each of the South Carolina Supreme Court cases discussed in the Appellant's briefing that would

have allowed the Appellant to argue that his youthful offender conviction could not be used to enhance his sentence to mandatory life without parole (“LWOP”):

- *State v. Ellis*, 345 S.C. 175, 345 S.E.2d 490 (2001), in which the South Carolina Supreme Court found that South Carolina’s recidivism statute, S.C. Code § 17-25-45, allows for sentences of LWOP only when the offender has the requisite number eligible adult convictions. *See id.* at 179, 345 S.E.2d at 492 (finding that a prior juvenile conviction does not apply toward the recidivism statute).
- *Creel v. State*, 262 S.C. 558, 564, 206 S.E.2d 825, 828 (1974) (per curiam), in which the Court held that “a person between the ages of seventeen and twenty-five is, by definition, a youthful offender,” not an adult.
- *Gay v. Ariail*, 381 S.C. 341, 673 S.E.2d 418 (2009), in which the Court explicitly found that convictions of “youthful offenders” are not adult convictions, which further bolster’s Appellant’s interpretation of the law. *See id.* at 342, 673 S.E.2d at 419 (finding that a twenty-two year old “was convicted as a ‘youthful offender,’” and rejecting the State’s argument that the defendant was convicted as an adult).

These South Carolina Supreme Court opinions, coupled with South Carolina’s rules of strict statutory construction in favor of the defendant and the rule of lenity, provided the Appellant with a colorable argument that his youthful offender conviction could not be used to enhance his sentence from a statutory maximum of ten years to mandatory LWOP. *Berry v. State*, 381 S.C. 630, 633-35, 675 S.E.2d 425, 426-27 (2009)

(holding that counsel was ineffective for failing to consider, inform his client, and object to whether Appellant's prior conviction could be used to enhance a later sentence, finding that the legal uncertainty "may well provide a defendant a catalyst in plea negotiations with the State."). Because the Court overlooked these numerous South Carolina Supreme Court cases that the Appellant identified, a rehearing is appropriate.

C. The Court misapprehended the import of the Fourth Circuit case, *United States v. Crumblin*, 441 F. App'x 180 (4th Cir. 2011).

The Court appears to rely on *United States v. Crumblin* as the linchpin for the string citation that appears to suggest that a youthful offender conviction may be used to enhance a sentence under South Carolina's recidivism statute. For several reasons, however, the Appellant submits that the Court misapprehended *Crumblin*, which further bolsters the Appellant's legal uncertainty argument discussed *supra*:

- The Fourth Circuit did not reference any of the South Carolina Supreme Court decisions that the Appellant cited in his appeal as establishing legal uncertainty as to whether a youthful offender conviction can be used to enhance a sentence under South Carolina's recidivism statute (*Berry v. State*, *Creel v. State*, *State v. Ellis*, *Gay v. Ariail*).
- Whether legal uncertainty existed regarding the enhancement issue was not before the Fourth Circuit, and the Fourth Circuit did not address whether legal uncertainty existed regarding the enhancement issue.
- The Fourth Circuit's finding that the defendant's conviction as a seventeen year old under the youthful offender statute amounted to an adult conviction is contrary to South Carolina Supreme Court precedent finding that a conviction as a sixteen year old under the youthful offender statute

was not an adult conviction. *Gay v. Ariail*, 381 S.C. 341, 673 S.E.2d 418 (2009) (rejecting the State's argument that a sixteen year old had an adult conviction, finding instead that he was convicted as a "youthful offender").

- *Crumblin* concerned a violation of a federal criminal statute and application of the *U.S. Sentencing Guidelines Manual* section 4B1.1(c)(3) for a "career offender," not South Carolina's recidivism statute.
- The *Crumblin* decision was issued in July 2011, which is more than four years after Mr. Williams was convicted in January 2007. Thus, any legal findings that the Fourth Circuit made have no bearing on legal uncertainty that existed before Mr. Williams' trial in January 2007.

Because this Court misapprehended the significance of *Crumblin* to suggest that a youthful offender conviction may be used to enhance a sentence under South Carolina's recidivism statute, a rehearing is appropriate.

II. The Court overlooked the second issue on appeal, overlooked key facts and cases discussed in the Appellant's briefing, and misapprehended the import of U.S. Supreme Court precedent.

A. The Court overlooked the second issue on appeal.

The second issue before the Court on appeal was as follows: Did the Court of Common Pleas err in failing to grant post-conviction relief for ineffective assistance of counsel because its Orders are inconsistent with the record showing that trial counsel failed to ensure that Appellant understood the consequences of rejecting a plea bargain and proceeding to trial where the State was seeking mandatory life in prison without parole? The Court did not address this question. Rather, the Court provided a string

citation of cases finding that the PCR Court is entitled to great deference on issues of credibility and enumerating the burden of proof of PCR applicants. The Court did not apply any of the law cited to the facts of the case, however, and therefore did not address the issue on appeal. Accordingly, a rehearing is appropriate.

B. The Court overlooked key facts and cases discussed in Appellant's briefing.

In its opinion, the Court provides a string citation noting an appellate court's great deference to a PCR Court's findings on matters of credibility, and citing a PCR applicant's burden of proof. The Court overlooked numerous points of error raised in the Appellant's briefing that do not concern credibility of witnesses. The Court also overlooks South Carolina Supreme Court precedent, Georgia Supreme Court precedent, and Ninth Circuit precedent cited in the Appellant's briefing.

In support of his argument that he did not understand that LWOP meant mandatory LWOP, the Appellant identified numerous facts that did not concern issues of credibility¹ and which this Court overlooked in its opinion:

¹ The PCR Court's credibility determinations, while entitled to great deference under South Carolina law, also find little support in the factual record. Mr. Williams was arrested for selling only 0.3 grams of drugs worth approximately \$15. (App. p. 233:3-5, 250:22 to 251:2, 258:3-8, 288:5-12, 321:16-22; 409:10-12; 414:23 to 415:4.) He rejected a three-year plea offer, five-year plea offer, and a ten-year plea offer. (*Id.* at 443:9-17.) Nowhere on the State's Notice of Intent to Seek LWOP did it say that LWOP was a mandatory sentence. After Mr. Williams was convicted, the trial judge suggested that 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.*" (*Id.* at 382:15-22) (emphasis added). On this record, and Mr. Williams' testimony that he thought that "[t]he judge could give me anything from zero, no time, to life without parole" (*Id.* at 409:18-25; 421:21-23), the PCR Court found, without any additional explanation, "I do not find the Applicant credible. I think he has a hindsight recollection of what actually happened during the course of these proceedings" (*Id.* at 443:2-4.)

- The circumstances of the plea negotiations through the start of trial suggest that Mr. Williams did not understand that LWOP meant mandatory LWOP. Mr. Williams was arrested for selling only 0.3 grams of drugs worth approximately \$15. (App. p. 233:3-5, 250:22 to 251:2, 258:3-8, 288:5-12, 321:16-22; 409:10-12; 414:23 to 415:4.) Mr. Williams rejected plea offers of three years, five years, and ten years in the face of a mandatory LWOP sentence when the State had video evidence of the drug sale involving Mr. Williams, offered testimony of the confidential informant who purchased the drugs from Mr. Williams, and testimony of officers who saw the drug transaction from a distance. (*Id.* at 426:17-21; 443:9-17.) Nowhere on the State's Notice of Intent to Seek LWOP did it say that LWOP was a mandatory sentence. None of these factual circumstances involves weighing credibility.
- The PCR Court found that trial counsel "explained to [Mr. Williams] that LWOP was his only possible sentence if convicted." (*Id.* at 7.) This finding does not appear in any testimony or evidence in the record. Rather, on this issue, trial counsel testified: "I knew then the case was possible life without parole, and I advised him to take the deal because the

Mr. Williams' appellate counsel testified at the PCR hearing that it was "extremely apparent" that Mr. Williams "had no idea that if he was convicted the only choice the Court had was to sentence him to life without parole. . . . It's very apparent he did not understand." (App. p. 413:19-23, 414:7.) His appellate counsel was shocked that Mr. Williams rejected a plea offer for ten years, let alone the offers for three years and five years. (*Id.* at 413:24 to 414:6.) Despite sworn testimony from a member of the South Carolina Bar, the PCR Court found, "Appellate counsel, Mark Peper, Esquire's, [sic] testimony was based on hindsight which was founded on his relationship with the Applicant." (*Id.* at 4.)

risk was very high, but -- so I don't remember specifically what we discussed about that parole. I did imply that it was up to life, so if I advised him, it would have been that this -- if they served notice on him that he could get life without parole." (*Id.* at 425:12-21 (emphasis added).) Trial counsel later testified that although he discussed the LWOP with Mr. Williams, "I can't remember that issue coming up with him ever asking, you know, is it up to life or is it mandatory life? I don't remember discussing that specific issue" (*Id.* at 427:14-17.) Trial counsel never testified that he explained to Mr. Williams that LWOP was the only possible sentence if convicted, and thus the record does not support the PCR Court's finding.

- The PCR Court found that "the trial court explained to Applicant that the plea offer expires when the jury comes in and then LWOP is the only possible sentence if convicted." (*Id.* at 8.) Rather, the trial court's lone mention that "the only sentence is LWOP" was directed to Mr. Williams' counsel, not to Mr. Williams, as the trial transcript makes clear. (*Id.* at 179:11-14.) Thus, the record does not support the PCR Court's finding.
- The PCR Court found that Mr. Williams knew the mandatory nature of LWOP based on "standard colloquy for the plea judge to advise a defendant if a charge is a strike offense and the potential consequences of future strikes." (*Id.* at 8.) In fact, the PCR Court admitted that this was an "extrapolati[on]" because the court "[didn't] know who he pled before"

and did not have the transcripts at issue. (*Id.* at 447:12-14.) Thus, the record does not support the PCR Court's finding.

In addition to overlooking these numerous factual issues that do not concern determinations of credibility, the Court overlooked many South Carolina Supreme Court opinions that the Appellant identified that support the proposition that failing to ensure that a defendant understands the consequences of a sentence in the context of plea negotiations amounts to ineffective assistance of counsel. *See Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (finding that PCR was appropriate when the defendant entered a guilty plea, did not understand that the plea carried a mandatory minimum sentence, and the defendant's counsel "had little recollection of the exact nature of the matters discussed during the meetings with the Defendant"); *State v. Hazel*, 275 S.C. 392, 395, 271 S.E.2d 602, 602 (1980) (finding that the defendant's plea was involuntary because she was never informed of the mandatory minimum sentence, and court suggested that the he "could" impose a "maximum" sentence of life imprisonment; "thus the plea [was] entered in ignorance of its direct consequence"); *see also Jackson v. State*, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000) (finding ineffective assistance of counsel where the defendant accepted a plea, and later testified at the PCR hearing that he did not understand the import of the offense to which he pled, and would not have accepted the plea if he had); *Alexander v. State*, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991) (finding ineffective assistance of counsel where Appellant testified that he accepted a plea because he misunderstood the amount of time that he could have received upon conviction at trial); *State v. Armstrong*, 263 S.C. 594, 598, 211 S.E.2d 889,

891 (1975) (stating that the defendant must be apprised of the direct consequences, which are the direct and immediate results, of a guilty plea).

Finally, the Court overlooked Georgia Supreme Court precedent and Ninth Circuit precedent that the Appellant cited, which found ineffective assistance of counsel in nearly identical circumstances as Mr. Williams' case for failure to properly explain the consequences of rejecting a plea offer where a conviction carried a mandatory LWOP sentence. *Johnson v. State*, 712 S.E.2d 811, 813-14 (Ga. 2011) (reversing dismissal of a PCR application on grounds of ineffective assistance of counsel where the trial counsel failed to advise the Appellant that if he rejected the State's plea offer, he would face a mandatory sentence of LWOP, and noting that without knowledge of a mandatory LWOP sentence, the defendant "could not make an informed decision about whether to accept or reject a State's plea offer [and thus the Appellant] has fulfilled his burden of showing that his counsel's representation fell below an objective standard of reasonableness"); *Villegas v. Yearwood*, 131 Fed. App'x 93, 95 (9th Cir. 2005) (reversing the district court's denial of a claim of ineffective assistance of counsel when the defendant's trial counsel failed to advise that proceeding to trial would implicate a mandatory sentence of LWOP, further finding that counsel's failure to inform the Appellant about the "crucial distinction" between a possible sentence of LWOP and a mandatory sentence of LWOP amounted to ineffective assistance of counsel because there was a reasonable probability that the Appellant would have accepted the prosecution's offer of 15 years to life if he had been properly informed of the consequences of proceeding to trial).

Accordingly, because of the factual issues and case law that the Court overlooked in its opinion, a rehearing is appropriate.

D. The Court misapprehended the import of the U.S. Supreme Court case, *Lafler v. Cooper*, 132 S.Ct. 1376 (2012).

In its opinion, the Court cited *Lafler v. Cooper*, 132 S.Ct. 1376 (2012) for the proposition that an applicant alleging that he rejected a plea offer because of deficient advice of counsel must prove certain elements to be entitled to relief. Or. ¶ 2 (quoting *Lafler*, 132 S.Ct. at 1385). To the extent that the Court suggests that the test announced in *Lafler* precludes post conviction relief for Mr. Williams, the Appellant submits that the Court misapprehends the import of *Lafler*.

First, *Lafler* was decided ten months after Mr. Williams' PCR hearing, so the rule that the U.S. Supreme Court announced has no bearing on Mr. Williams' case unless and until the South Carolina Supreme Court determines that the rule should apply retroactively. Because the test that the U.S. Supreme Court announced in *Lafler* is neither substantive nor a watershed rule, however, the test should not apply to cases like Mr. Williams' that became final before the new test was announced. See *Aiken v. Byars*, 765 S.E.2d 572, 575, 410 S.C. 534, 540 (2014) (citing *Teague v. Lane*, 489 U.S. 288 (1989)).²

Second, even if the test announced in *Lafler* applied to Mr. Williams' PCR application, the record establishes that Mr. Williams met his burden of proof. In *Lafler*, the U.S. Supreme Court found that for a defendant to be entitled to post conviction relief in the context of a rejected plea, the defendant must prove that "there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it

² Notably, the *Lafler* Court cited all of the federal circuits that previously had adopted the test that it announced for ineffective assistance of counsel in the context of plea offer rejections, and the Fourth Circuit was not among the circuits cited. See *Lafler*, 132 S.Ct. at 1385.

in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." Or. ¶ 2 (quoting *Lafler*, 132 S.Ct. at 1385).

In Mr. Williams' case, there is a reasonable probability that Mr. Williams would have accepted the three-year, five-year, or ten-year plea offers, *Lafler*, 132 S.Ct. at 1385, if he had known that the State was seeking mandatory LWOP in the context of a trial where the State had video evidence of the drug sale involving Mr. Williams, offered testimony of the confidential informant who purchased the drugs from Mr. Williams, and offered testimony of officers who saw the drug transaction from a distance. (App. p. 426:17-21.) Likewise, there is a reasonable probability that the prosecution would not have withdrawn the plea offer in the light of intervening circumstances, *Lafler*, 132 S.Ct. at 1385. Indeed, the record shows no intervening circumstances suggesting that a plea offer would have been revoked, and the State continuously discussed plea offers with Mr. Williams until seconds before the start of trial. (App. p. 426:4-11 (describing the sequence of the plea offers from five years, down to three years, then back to five years); 413:24 (noting that the State offered a ten year plea offer); 175:23-25 (trial judge asking the State whether it had offered anything other than LWOP); 176:23 (noting that plea negotiations continued off the record until seconds before the start of trial); 177:11-14 (trial judge informing trial counsel that "[o]nce they [jury] come into the room, the deal is gone," which demonstrates that a plea offer was still available).

The record reflects reasonable probability that the trial court would have accepted a plea. *Lafler*, 132 S.Ct. at 1385. Before trial, the judge asked the State whether it had

offered a plea (App. p. 175:23-25), and the trial judge addressed Mr. Williams' counsel immediately before the start of trial and said, "[o]nce they [jury] come into the room, the deal is gone" (*id.* at 177:11-14), which reflects a reasonable probability that the trial court would have accepted a plea.

Finally, the record shows that the sentence under the offer's terms would have been less severe than LWOP. *Lafler*, 132 S.Ct. at 1385. Mr. Williams was offered a three-year plea, a five-year plea, and a ten-year plea, all of which are substantially less severe than LWOP. As the U.S. Supreme Court has acknowledged, the only sentence worse than LWOP is death. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991). Therefore, all sentences other than death and LWOP are less severe than LWOP.

For each of these reasons, even if the *Lafler* test applied to Mr. Williams' case, he has met his burden of proof, and the Court overlooked these issues and/or misapprehended the application of *Lafler* to this appeal, and therefore rehearing is appropriate.

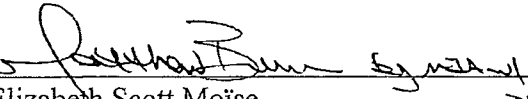
Conclusion

For the reasons set forth above, the Petition for Rehearing should be granted. Failing that, the Petition for Rehearing En Banc should be granted. The Court should

issue a revised opinion, reversing the decision of the PCR Court and granting Mr. Williams post conviction relief.

Respectfully submitted,

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Attorneys for Appellant, Onrae Williams

Charleston, South Carolina
February 12, 2016

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Onrae Williams, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

Pleadings: **PETITION FOR REHEARING AND REHEARING EN BANC**

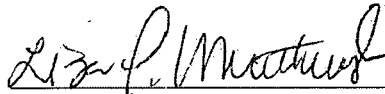
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SC Court of Appeals



Lisa P. Whitehurst
Administrative Assistant

February 12, 2016

The South Carolina Court of Appeals

Onrae Williams, Petitioner,

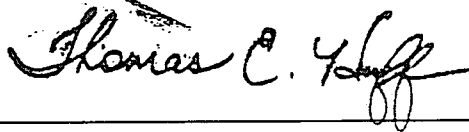
v.

State of South Carolina, Respondent.

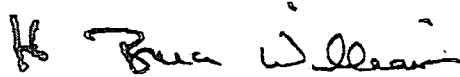
Appellate Case No. 2011-201112

ORDER

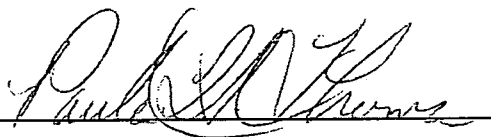
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



A.C.J.



J.



J.

Columbia, South Carolina

cc:

Elizabeth Scott Moise, Esquire
Matthew Edward Brown, Esquire
Alan McCrory Wilson, Esquire
Ashleigh Rayanna Wilson, Esquire
Alicia A. Olive, Esquire

FILED

June 10, 2016 27