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STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

SC Court of Appeals

Appeal from Orangeburg County

Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SEAN PHILLIP SMITH,

APPELLANT

APPELLATE CASE NO. 2012-212664

ANDERS BRIEF OF APPELLANT

SUSAN B. HACKETT  
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**STATEMENT OF ISSUE ON APPEAL**

Did the plea judge err in sentencing Appellant to twenty-five years' imprisonment for two counts of armed robbery where the sentences were cruel and unusual because they were so disproportionate to the offense that it shocks the moral sense of the community?

## STATEMENT OF THE CASE

On June 22, 2011, an Orangeburg County grand jury indicted Appellant for armed robbery (2011-GS-38-0869) and two counts of assault and battery in the first degree (2011-GS-38-0872 & 2011-GS-38-873). On September 19, 2011, a Charleston County grand jury indicted Appellant for armed robbery (2011-GS-10-5388). R. 99. On September 19, 2011, Appellant pled guilty to all four charges in Orangeburg County before the Honorable Edgar Dickson. Tommy Scott represented the state, and Pete Kulmala represented Appellant. R. 1. Judge Dickson sentenced Appellant to ten years' imprisonment for each count of assault and battery in the first degree and to twenty-five years' imprisonment for each count of armed robbery. He ordered the sentences to be served concurrently. R. 20, lines 13-21; R. 101

On September 28, 2011, Appellant filed a motion for reconsideration of sentence. R. 22. On July 23, 2012, Judge Dickson presided over a hearing on the motion. However, the transcript of the hearing is unavailable. On August 2, 2012, Judge Dickson denied Appellant's motion for reconsideration. R. 29. Appellant filed a timely notice of appeal explaining the basis for the appeal was addressed at the motion for reconsideration hearing.

After the filing of the notice of appeal, Appellant learned the transcript from the hearing on the motion was unavailable. Therefore, Appellant filed a petition for order to reconstruct the record of his hearing on the motion to reconsider. R. 30. The state, represented by Salley Elliott, did not oppose the motion. R. 70. On October 1, 2013, this Court granted the petition and remanded the matter for reconstruction of the record. R. 71. However, the parties subsequently agreed to vacate the order denying the motion for

reconsideration and remand the matter for a new hearing on the motion. R. 72.<sup>1</sup> On December 20, 2013, this Court agreed with the parties and remanded the matter for a new hearing. Further, this Court ordered the appointment of counsel to represent Appellant at the new hearing. R. 76.

On March 13, 2014, the parties convened before Judge Dickson concerning the motion for reconsideration. Tommy Scott represented the state, and Nick Thomas represented Appellant. R. 78. On August 22, 2014, Judge Dickson denied the motion for reconsideration of Appellant's sentences in a written order. R. 97.

This brief follows.

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<sup>1</sup> In the petition, Appellant requested this Court hold the appeal in abeyance pending Judge Dickson's decision on the motion to reconsider. Further, Appellant requested that the appeal proceed in the normal course without the necessity of filing a new notice of appeal upon the issuance of Judge Dickson's decision. R. 72.

## ARGUMENT

The plea judge erred in sentencing Appellant to twenty-five years' imprisonment for two counts of armed robbery where the sentences were cruel and unusual because they were so disproportionate to the offense that it shocks the moral sense of the community.

### **Relevant facts**

On September 19, 2011, Appellant admitted responsibility for his role in two armed robberies and two assault and batteries by entering guilty pleas to the charges. The charges stemmed from Appellant entering pharmacies and taking prescription drugs. Appellant was caught leaving the scene of one of the robberies. Upon his arrest, he immediately admitted his guilt. R. 10, line 21 – R. 14, lines 7. At the plea hearing, Appellant readily admitted his guilt and did not dispute the factual basis presented by the state. R. 8, line 23; R. 9, line 15; R. 10, line 4; R. 10, line 18. During the course of the guilty plea, the judge learned Appellant's prior record included only a driving under suspension conviction. R. 14, lines 8-10. The judge also learned Appellant had become addicted to pain medicine following a back injury. R. 19, lines 6-18. Despite Appellant's very limited criminal history and his acceptance of responsibility, the judge sentenced Appellant to twenty-five years on each count of armed robbery, which was just five years shy of the maximum sentence. R. 20, lines 18-20.

In support of his request for reconsideration of his sentence, Appellant argued his twenty-five year sentences violated the Eighth Amendment because the sentences were so disproportionate to the offense that they shocked the moral sense of the community. Specifically, plea counsel reviewed over one thousand guilty pleas, including armed robberies, over the last five years. R. 82, lines 3-5. This review yielded "only one sentence

[that] even came close]" to the sentence received by Appellant. That case "involved three counts of attempted murder in which people were shot." R. 84, lines 3-6. Plea counsel also noted that Appellant's co-defendant, who drove the getaway car from one of the armed robberies, received a sentence of eight years' imprisonment suspended upon the service of one year imprisonment and five years of probation. R. 82, lines 13-16; R. 84, lines 21-23. Based upon his research, plea counsel asked the judge to reduce Appellant's sentence on the armed robberies from twenty-five years to seventeen years to bring Appellant's sentence in line with other sentences received by individuals convicted of the same offense during the same period of time and under similar circumstances. R. 84, lines 12-15; R. 92, lines 21-23.

In his written order, Judge Dickson found "the existing sentence is appropriate." Therefore, he denied the motion to reconsider the sentence. R. 97.

### **Discussion**

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. The Eighth Amendment is applicable to the states by reason of the Fourteenth Amendment. Robinson v. United States, 370 U.S. 660 (1962). While the prohibitions of the Eighth Amendment are aimed at inhuman and barbarous penalties such as torture, the duration of punishment also falls within the purview of the amendment when the duration of imprisonment is so disproportionate to the offense that it shocks the moral sense of the community. Solem v. Helm, 463 U.S. 277, 284 (1983). The United States Supreme Court held imprisonment of twelve to twenty years for falsifying a public document was held to constitute cruel and unusual punishment. Weems v. United States, 217 U.S. 349 (1910). Similarly, a sentence of life imprisonment without the possibility of parole for the crime of forcible rape has also

been held unconstitutional as to juvenile defendants. Workman v. Commonwealth, 429 S.W.2d 374 (Ky. 1968). The “proportionality” bedrock of Eighth Amendment jurisprudence is equally important a principle as “evolving standards of decency” when determining whether a sentence constitutes cruel and unusual punishment. State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) (upholding thirty year sentence for twelve year old who killed his grandparents with a shotgun, then lied about it, after finding other courts have given similar sentences).

The United States Supreme Court has applied a proportionality analysis in granting an Eighth Amendment challenge to a penalty of life without parole for juveniles who are not charged with homicide. Graham v. Florida, 560 U.S. 48 (2010). In Graham, the Court noted that Eighth Amendment challenges based on proportionality fall into two general classes. The first of these classes, which applies in the instant case, is a challenge to the “length of term-of-years sentences given all the circumstances in a particular case.” Id. at 59. The Court noted the test used in its previous opinions on Eighth Amendment challenges to penalties in Solem v. Helm, 463 U.S. 277 (1983) and Harmelin v. Michigan, 501 U.S. 957 (1991). Id. This test first involves a comparison of the gravity of the offense with the severity of the sentence. Harmelin, 501 U.S. at 1005. When this comparison “leads to an inference of gross disproportionality,” the court should then compare sentences imposed for the same crime in other jurisdictions to see if that comparison “validate[s] an initial judgment that [the] sentence is grossly disproportionate.” Id.

In State v. McKnight, 352 S.C. 635, 576 S.E.2d 168 (2003), the South Carolina Supreme Court recognized that the Eighth Amendment requires the duration of the sentence not be grossly out of proportion with the severity of the crime. The Court examined the

penalty for homicide by child abuse and found that it was not disproportionate under the Eighth Amendment. In doing so, the Court reviewed the factors articulated in Solem: (1) the gravity of the offense compared to the harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction; and (3) sentences for the same crime in other jurisdictions. The Court found that twenty years in prison, suspended upon service of twelve years, for causing stillbirth of defendant's viable fetus by using cocaine was not cruel and usual punishment, considering that homicide was a severe offense, the penalty was no harsher than that imposed upon any other individual charged with murder, and other states imposed severe sentences on those found guilty of murder or neglect of a child. Id. 352 S.C. at 652-53, 647 S.E.2d at 177.

In State v. Harrison, 402 S.C. 288, 297, 741 S.E.2d 727, 732 (2013), the South Carolina Supreme Court set out to reconcile the Solem factors with Harmelin. The Court held that "Justice Kennedy's concurrence is the controlling law of Harmelin, and represents a significant constraint on the Solem test." Id. at 298, 741 S.E.2d at 732.

Thus, in analyzing proportionality under the Eighth Amendment outside the capital context, South Carolina courts shall first determine whether a comparison between the sentence and the crime committed gives rise to an inference of gross disproportionality. If no such inference is present, the analysis ends. In the rare instance that this threshold comparison gives rise to such an inference, intrajurisdictional and interjurisdictional analysis is appropriate. Courts may then look to whether more serious crimes carry the same penalty, or more serious penalties, and the sentences imposed for commission of the same crime in other jurisdictions.

Id. at 299-300, 741 S.E.2d at 733.

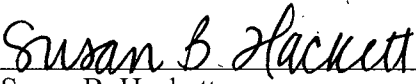
Applying this analysis to Appellant's case reveals his sentence is disproportionate to the crimes committed; thus, the sentence violates the Eighth Amendment. Comparing the sentence of twenty-five years with the crime committed – armed robbery – gives rise to an

inference of gross disproportionality. Appellant's crimes were borne out of drug addiction. Punishing a person by service of twenty-five years in prison for an addiction to prescription pain medicine is cruel and inhuman. Turning to the second step, a comparison of sentences for the same offense in the same jurisdiction reveals Appellant's sentence was grossly disproportionate to the sentences received by others. Plea counsel presented this evidence to the plea judge in the form of his review of over one thousand guilty pleas to the same offense. As stated by plea counsel, he found only one among those thousand where the sentence was even close to the sentence received by Appellant. Thus, using the three part analysis mandated by the South Carolina Supreme Court in reviewing claims for violations of the Eighth Amendment, it is clear Appellant's sentence of twenty-five years violates the prohibition on cruel and unusual punishment.

CONCLUSION

Appellant respectfully requests this Court vacate his sentences and remand for re-sentencing in compliance with the Eighth Amendment.

Respectfully submitted,



Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

This 9<sup>th</sup> day of December, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

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PETITION TO BE RELIEVED AS COUNSEL

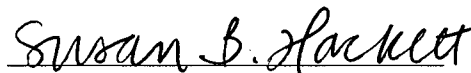
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Counsel for Sean Phillip Smith states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Edgar W. Dickson, which was held on August 2, 2012, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Sean Phillip Smith.

Respectfully submitted,



Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of December, 2014.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Orangeburg County  
Edgar W. Dickson, Circuit Court Judge

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**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

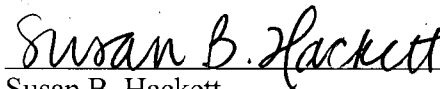
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Appellant proposes the following be included in the Record on Appeal:

- (1) Guilty Plea Transcript dated September 19, 2011;
- (2) Motion to Reconsider Sentence filed September 28, 2011;
- (3) Order denying Motion to Reconsider filed August 2, 2012;
- (4) Petition for Order to Reconstruct the Record;
- (5) Letter from Attorney General dated August 9, 2013;
- (6) Order remanding for reconstruction of the record dated October 1, 2013;
- (7) Petition for consent order to remand for a new hearing;
- (8) Order remanding for new hearing dated December 20, 2013;
- (9) Transcript of Hearing on Motion to Reconsider dated March 13, 2014;
- (10) Order filed August 22, 2014;
- (11) True-billed indictments; and
- (12) Sentence sheets

I certify that this designation contains no matter which is irrelevant to this appeal.

December 9th, 2014



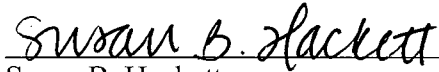
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Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

December 9, 2014



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

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THE STATE,

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CERTIFICATE OF SERVICE

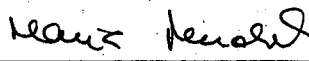
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Sean Phillip Smith, #347944 at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 9<sup>th</sup> day of December, 2014.



Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 9<sup>th</sup> day of December, 2014.

 (L.S.)

Notary Public for South Carolina  
My Commission Expires: July 3, 2023.