

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Colleton County

Thomas W. Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALBERT EDWARD SIDERS,

APPELLANT

APPELLATE CASE NO. 2015-000995

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in sentencing Appellant to life without parole where the solicitor did not prove that he provided the requisite notice of intent to seek life without parole (LWOP) pursuant to the recidivist statute, S.C. CODE ANN. § 17-25-45?

STATEMENT OF THE CASE

Appellant Albert E. Siders was indicted by the Colleton County Grand Jury for armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. R. * (Indictments).

On April 20-22, 2015, Siders proceeded to trial before the Honorable Thomas W. Cooper, Jr. and a jury. Siders was represented by David Mathews, and the State was represented by assistant solicitors Steve Knight and Reed Evans. Trial Tr. 1. The jury found Siders guilty of the indicted offenses. Trial Tr. 270 – 271. Judge Cooper sentenced Siders to concurrent sentences of life imprisonment without parole on the armed robbery and kidnapping offenses. Trial Tr. 282. In light of those life sentences, Judge Cooper did not impose a sentence on the weapons offense, pursuant to S.C. CODE ANN. § 16-23-490. R. * (Solicitor's Memorandum, Apr. 22, 2015).

This appeal follows.

ARGUMENT

The trial court erred in sentencing Appellant to life without parole where the solicitor did not prove that he provided the requisite notice of intent to seek life without parole (LWOP) pursuant to the recidivist statute, S.C. CODE ANN. § 17-25-45.

Introduction

Appellant Siders was eligible for sentencing to life without parole (“LWOP”) pursuant to S.C. CODE ANN. § 17-25-45 based on his prior armed robbery conviction. However, sentencing under the recidivist statute is not a certainty, as the solicitor has the discretion whether to invoke sentencing under the statute. See S.C. CODE ANN. § 17-25-45(G). In the present case, the solicitor purported to have served notice upon Siders and his attorney on July 10, 2014, but the affidavits of service he presented to the trial court were not properly notarized. To the extent that our Supreme Court’s decisions in State v. Washington, 338 S.C. 392, 526 S.E.2d 709 (2000) and James v. State, 372 S.C. 287, 641 S.E.2d 899 (2007), would require Siders’ sentence to be affirmed, such precedent should be overturned due to the longstanding principals of statutory construction and the more recent legislative amendment to the recidivist statute. Even so, Siders’ case is sufficiently distinguishable in that the solicitor did not show that Siders and his attorney both had “actual notice” of the State’s intent to seek LWOP and notice was not conceded.

Relevant Facts

Siders admitted that he entered a BP gas station store, pulled out a BB gun, and demanded money from the clerk. However, he testified that he engaged in that conduct while under duress from two black males, who found out that Siders had worked as a confidential informant for the drug enforcement task force the prior year. Siders testified that the men were setting him up in retribution for the controlled buys he made from Sharonda Mitchell and Celestra “Cornbread” Rivers. Trial Tr. 166 – 189. Though Siders had a ski mask when he entered the BP, he did not pull

it down to cover his face and looked directly at the surveillance camera. Siders also did not take the store clerk's cell phone before leaving the store, but rather told her that he knew she was going to "call the cops" and that was her job. App. 179, ll. 12-16; see also State's Ex. 4 (Surveillance Video), on file with this Court.

Siders made a pre-trial motion to relieve his public defender, David Mathews, citing both a failure to communicate and a pending civil lawsuit Siders filed against Mathews in federal court. Pre-trial Tr. 1 – 13; Trial Tr. 3 – 24. During the colloquy regarding trial counsel's representation, Mr. Mathews explained that Siders was fearful that his testimony at trial may put him in danger from those individuals who he would testify coerced him into committing the armed robbery. Thus, Mr. Mathews said that Sider was "in a bit of dilemma." Trial Tr. 3, l. 20 – 5, l. 24. "He [Siders] can either just accept – he's got a prior armed robbery, so this would be – and I believe we've been LWOP'd noticed -- so he'd get life without parole if he's convicted . . . [or he take the solicitor's offer of twenty years]." Trial Tr. 5, l. 24 – 6, l. 9. Given the context and generality of this statement, along with the vast number of cases Mathews handles as a public defender, this statement did not constitute a stipulation that the LWOP notice was properly served or that Mathews had actual notice that the State was seeking LWOP ten days prior to the trial.

In explaining his version of events to the court pre-trial, Siders said that he told the men who coerced him to commit the robbery: "I'm not going to rob no [sic] store, because I got a[n] armed robbery record already. I said, If I rob a store and get caught in the store, I said, **I could be facing life.**" Trial Tr. 18, ll. 19-25 (emphasis added). Siders never agreed that he was served an LWOP notice or that he understood that he was facing a *mandatory* LWOP sentence if convicted. Based on Siders' statement during the pre-trial hearing, the solicitor made two motions for the defense to be precluded from making any reference to LWOP, even as it related

to Siders' claim of duress and coercion, which were granted without opposition from trial counsel. Trial Tr. 129, l. 8 – 130, l. 14; Trial Tr. 141, l. 12 – 142, l. 21.

After the jury returned a guilty verdict, the court proceeded to sentencing. The following exchange occurred between the solicitor and the trial judge:

MR. KNIGHT: Judge, as you know, this is an LWOP case.

THE COURT: Right.

MR. KNIGHT: Where is the file? (Pause.) Just to show the Court that we have served him properly, and his attorney.

THE COURT: Thank you.

MR. KNIGHT: He has a prior conviction for armed robbery. There is a copy of the sentencing sheet and indictment to the notice of LWOP that was served on Mathews and the Defendant.

THE COURT: All right.

MR. KNIGHT: Also, as I understand it and I stand to be corrected if the law has changed, the indictment for possession of a weapon during the commission of a violent crime, the sentencing on that would not be applicable because of the LWOP.

THE COURT: That is right. Okay. Madam Reporter, the record reflects an indictment and sentencing sheet indicating that Mr. Albert Edward Siders plead guilty to the crime of armed robbery here in this courtroom on March the 27th of 2003. He was sentenced to ten years for the armed robbery. The notation, of course, is that it is a violent and most serious crime in the eyes of the law.

There's also a signed notice of intention to seek life imprisonment signed by Mr. Knight on July the 10th of 2014 based on the most serious offense of armed robbery to which he was earlier -- earlier plead guilty. **There is further two affidavits of service indicating that one was served on Mr. Albert Edward Siders at the Colleton County Detention Center on the 10th of July, 2014. Signed by Ms. Jodie Taylor, but not properly notarized or witnessed. The affidavit of service was on Mr. Mathews, [no] date given but signed -- well, it is dated in another place, July the 10th, 2014, by Mr. Horton, the investigator. Both of these need to**

be properly notarized as affidavits of service and they have not been, so I'll give those to you. Those individuals are going to have to be contacted and those affidavits are going to have to be properly done. Okay.

The question of notice, of course, is not a real question. It was indicated earlier and stated on the record that notice had been given, but that record is going to need to be completed in order to get those sentence -- both of those services, both of them, properly noticed and made a part of that file. That is too important of a thing to be left undone given the nature of this case, given the ultimate outcome of this case and the mandatory sentence that has to be given.

Trial Tr. 277, l. 12 – Trial Tr. 279, l. 15 (emphasis added).

When defense counsel was given an opportunity to speak on Siders' behalf, he asked the Court not to impose an LWOP sentence, arguing:

Your Honor, you know, **if this is a matter of any discretion, with the defects in service of the notice, I -- whatever benefit would behoove Mr. Siders, I would ask the Court to consider in that.** You know, if there is any discretion in this matter at all I would ask the Court to consider the circumstances, some of which were heard during trial. He has steadfastly maintained this is what happened. The jury, of course, did not concur.

During the course of this his mother and sister have been here. His aunt also was here briefly. He's battled a drug addiction for quite some time. He says five years, but perhaps it may well have been longer, but he indicated five years. He's 52, you know, if he served ten years he would be at least 60 by the time he got out. If there's any discretion in the matter, Your Honor, **I would ask the Court to consider a sentence of 10 years concurrent, concurrent and 5 years concurrent.**

Trial Tr. 280, l. 18 – 281, l. 13 (emphasis added). After hearing from Siders, the Court ruled:

All right, sir. Mr. Mathews, as you know this is one of those areas where the General Assembly does not leave any discretion in the hands of the trial judge. It is -- and this is one of those situations, Mr. Siders, where **if this Court had discretion it would exercise that discretion.** The matter of the notice, **the fact that the -- the proofs of service were not notarized I see at this point in juncture as an administerial act,** that can and will be corrected. And I'm sure that I'll get notice of that correction as soon as it's been done because it is important. **But lack of notice has never been an issue in this particular case, in any event and is not now.**

And given the fact that notice has been provided and that there is a prior most serious conviction on Mr. Siders' record, this Court is left with no discretion and must follow the mandate of the law, Section 17-25-45.

Trial Tr. 281, l. 20 – 282, l. 14 (emphasis added). The judge imposed concurrent LWOP sentences for both the kidnapping and armed robbery charges.

Discussion

A.

The Plain Language of S.C. CODE ANN. § 17-25-45

S.C. CODE ANN. § 17-25-45, commonly called the recidivist statute, provides for sentencing to a term of imprisonment for life without the possibility of parole (“LWOP”) for certain repeat offenders. With regards to notice, the statute provides:

Where the solicitor is required to seek or determines to seek sentencing of a defendant under this section, **written notice must** be given by the solicitor to the defendant **and** defendant’s counsel not less than ten days before trial.

S.C. CODE ANN. § 17-25-45(H). When the recidivist sentencing statute was first enacted in 1982, the decision of whether to invoke sentencing under the statute was left to the solicitors’ discretion. 1982 Act No. 358, §§ 1, 2. A 1995 amendment to the statute made sentencing under the statute mandatory for defendants convicted of a subsequent most serious offense but maintained prosecutorial discretion as to defendants convicted of a subsequent serious offense. 1995 Act No. 83, § 18, eff. Jan. 1, 1996. With the passage of the Omnibus Crime Reduction and Sentencing Reform Act of 2010, the legislature removed any mandatory application of the statute and restored full discretion to the solicitor regarding whether to invoke sentencing under section 17-25-45 as to all repeat offenders. 2010 Act No. 273, § 20, eff. June 2, 2010. Thus, the

decision to invoke sentencing under S.C. CODE ANN. § 17-25-45 at the time of Sider's trial was "in the discretion of the solicitor." S.C. CODE ANN. § 17-25-45(G).

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. Joint Legislative Comm. v. Huff, 320 S.C. 241, 464 S.E.2d 324 (1995). When the terms of the statute are **clear and unambiguous**, the court **must** apply them according to their literal meaning. Id. Furthermore, in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988). Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant. State v. Cutler, 274 S.C. 376, 264 S.E.2d 420 (1980). A review of S.C. CODE ANN. § 17-25-45 reveals that there is nothing ambiguous about the **requirement** that the solicitor provide **written** notice to both the defendant **and** his attorney in order to invoke sentencing pursuant to the statute. Thus, the courts are bound by the statute's plain language.

The burden of establishing that the statutory requirements were met would rest upon the solicitor, as the party seeking application of the enhanced penalty. Cf., Strother v. Lexington County Recreation Com'n, 332 S.C. 54, 504 S.E.2d 117 (1998) ([U]usually the plaintiff has the burden of establishing notice in a negligence action."). In such cases where the requisite notice is not given, the defendant will not go unpunished if convicted. Rather, sentencing would be under the ordinary sentencing provisions related to the offense charged. In the present case, S.C. CODE ANN. § 16-11-330 provides that the penalty for armed robbery is "a mandatory minimum term of not less than ten years or more than thirty years, no part of which may be suspended or probation granted."

B.

The Holdings of *Washington*, *Johnson*, and *James*

In *State v. Washington*, the defendant was indicted for first degree burglary and was sent written notice of the State's intent to seek LWOP under section 17-25-45. 338 S.C. 392, 394-95, 526 S.E.2d 709, 710 (2000). Due to errors in the indictment, the defendant was re-indicted but no second LWOP notice was sent. *Id.* at 398, 526 S.E.2d at 711. Our Supreme Court held that a second notice was not required because "under such notices statutes, the law only requires actual notice." *Id.* at 398, 526 S.E.2d at 712.

In *State v. Johnson*, the trial judge found that the solicitor had not complied with section 17-25-45 where the solicitor sent the written notice to Johnson and filed it with the clerk, but never sent it to defense counsel. 347 S.C. 67, 68-69, 552 S.E.2d 339, 339-40 (Ct. App. 2001), *cert. denied* Mar. 6, 2002, *overruled by James v. State*, 372 S.C. 287, 641 S.E.2d 899 (2007). In finding that defense counsel's actual notice of the State's intention to seek LWOP was not sufficient, the Court of Appeals wrote:

By its words in the recidivist statute, the General Assembly has mandated that the solicitor "must" notify the defendant and the defendant's counsel in writing if the solicitor intends to seek a life sentence without the possibility of parole. **For this Court to dismiss the clear and unambiguous language of the statute and merely require the defendant's counsel to have actual notice of the solicitor's intent to seek life without parole would have the effect of amending the statute. In our view, actual notice under section 17-25-45(H) is insufficient unless and until the General Assembly decides otherwise and amends the statute itself.**

Id. at 70, 552 S.E.2d at 340 (emphasis added). The Court of Appeals distinguished *Washington* on two grounds. *Id.* at 71, 552 S.E.2d at 341. First, the defendant in *Washington* did receive the requisite written LWOP notice at least once, whereas Johnson's attorney never received the solicitor's written notice. *Id.* Secondly, the Court of Appeals noted the *Washington* Court's

reliance on cases dealing with death penalty notice, which does not specify a manner in which the notice shall be given by the solicitor. Id. at 71-72, 552 S.E.2d at 341. Thus, the Johnson Court reasoned:

We do not believe the Supreme Court intended to adopt a broad rule that, regardless of the circumstances of the particular case, all notice requirements in criminal statutes are satisfied by actual notice, notwithstanding the General Assembly's legislative mandate to the contrary. Therefore, we have concluded that the holding in *Washington* is limited to the specific facts set forth in the Supreme Court's opinion.

Id.

In James v. State, 372 S.C. 287, 641 S.E.2d 899 (2007), our Supreme Court held that the defendant and his counsel need only possess actual notice of the State's intention to seek LWOP in order for the requirements of the recidivist statute to be met, overruling Johnson, supra. In James, the applicant argued that his trial attorney was ineffective in failing to object to the sufficiency of the LWOP notice. 372 S.C. at 291, 641 S.E.2d at 901. During the preliminary motions phase, both James and his trial attorney "indicated that each was aware that [James] was facing the possibility of an LWOP sentence." Id. Despite the fact that James was never served with written notice of the State's intent to seek LWOP, trial counsel "stipulated that the defense had received adequate notice" at the pre-trial stage. Id.

The James Court found that even if trial counsel was deficient in so stipulating, James could not demonstrate any resulting prejudice. Id. at 292, 641 S.E.2d at 901-02. The Court reasoned that because jeopardy had not yet attached when the stipulation occurred, the solicitor could have responded to any objection by counsel by dismissing the indictment, re-indicting the defendant, and then providing the written notice. Id. The Court also found that the solicitor could have postponed the trial to allow time to provide the defendant with written notice. Id. at 292, 641 S.E.2d at 902. Additionally, the relief requested in James was a new trial such that the solicitor could, and under

the statute in place at the time would be required to, seek sentencing under the recidivist statute on remand. Id. at 292 n. 1, 641 S.E.2d at 902 n. 1; see S.C. CODE ANN. § 17-25-45(G) (2003) (“The decision to invoke sentencing under Section 17–25–45(B) is in the discretion of the solicitor. The provisions of Section 17–25–45(A) shall be mandatory.”). Finding that there was no reasonable probability that the result would have been different, the Court held that Respondent did not receive ineffective assistance of counsel. Id. at 292, 641 S.E.2d at 902-03.

The James Court, relying on Washington, further held that S.C. CODE ANN. § 17-25-45(H) requires only “actual notice.” 372 S.C. at 293, 641 S.E.2d at 902. The James Court found the distinctions cited in Johnson “insignificant” and determined that there was “no sufficient rationale for adopting a rule contrary to the one . . . advanced [in Washington].” 372 S.C. at 294, 641 S.E.2d at 902-03. Thus, the James Court held:

The purpose of § 17-25-45(H) is to assure that a defendant and his counsel have actual notice that the State is seeking a sentence under the recidivist statute at least ten days prior to trial. Accordingly, so long as the defendant and his counsel, at least ten days prior to trial, possess actual notice of the State's intention to seek a sentence under South Carolina’s recidivist statute, the statute has been satisfied.

Id. at 294-95, 641 S.E.2d at 903. However, the Court noted that “the most effective way of assuring that both defendant and counsel receive actual notice in the required time frame is to provide them notice in writing.” Id. at 295 n.5, 641 S.E.2d at 903 n. 5. Though the Court characterized the provision of notice as a “simple task,” it recognized that it is “overlooked with surprising regularity” and that the “problem ought to be easily identifiable and preventable.” Id.

C.

Washington and James Should be Overturned

As discussed supra, the principles of statutory construction require the Court to abide by the plain and unambiguous language of a statute. See State v. Leopard, 349 S.C. 467, 473, 563

S.E.2d 342, 345 (2002) (“[T]he plain language of the statute cannot be contravened.”); State v. Blackmon, 304 S.C. 270, 273-74, 403 S.E.2d 660, 662 (1991) (applying the plain language of the statute to find that defendant could not be convicted of operating a gambling house even if the result appeared “anomalous”). The holdings of Washington and James are premised upon prior decisions related to the notice requirements of the death penalty statute despite its differing language from that of the recidivist statute. Compare S.C. CODE ANN. § 16-3-26(A) (“Whenever the solicitor seeks the death penalty he **shall notify** the defense attorney of his intention to seek such penalty at least thirty days prior to the trial of the case. At the request of the defense attorney, the defense attorney shall be excused from all other trial duties ten days prior to the term of court in which the trial is to be held.” (emphasis added)), with S.C. CODE ANN. § 17-25-45(H) (“Where the solicitor is required to seek or determines to seek sentencing of a defendant under this section, **written notice must be given** by the solicitor to the defendant and defendant’s counsel not less than ten days before trial.” (emphasis added)). Additionally, the 2010 amendment to S.C. CODE ANN. § 17-25-45(G) removed any mandatory applicability and restored full discretion over the statutes’ invocation to the solicitor, affecting the prejudice analysis in James. See 2010 Act No. 273, § 20, eff. June 2, 2010.

The Washington Court cited two death penalty cases in support of its holding, State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996), and State v. Young, 319 S.C. 33, 459 S.E.2d 84 (1995). 338 S.C. at 398-99, 526 S.E.2d at 712. In Young, the Court reviewed S.C.CODE ANN. § 16-3-26(A), which provides:

Whenever the solicitor seeks the death penalty **he shall notify the defense attorney** of his intention to seek such penalty at least thirty days prior to the trial of the case. At the request of the defense attorney, the defense attorney shall be excused from all other trial duties ten days prior to the term of court in which the trial is to be held.

319 S.C. at 36, 459 S.E.2d at 85 (emphasis added). The Young Court held that “[t]here is no requirement of **written** notice in the statute.” Id. (emphasis in original). The McWee Court found that the defendant’s attorneys had actual notice that the State was seeking the death penalty months prior to the State’s calling the indictment for trial and held that “actual notice is all the statute [S.C. CODE ANN. § 16-3-26(A)] requires.” 322 S.C. at 390-91, 472 S.E.2d at 237-38 (citing Young). The Washington Court did not mention the differences in the language of the recidivist and death penalty statutes. Yet, it found McWee factually similar, as it dealt with the failure to serve a second notice of intent to seek the death penalty after the defendant was re-indicted. Id. at 399, 526 S.E.2d at 712.

Significantly, the plain language of the death penalty notice statute only requires that the solicitor “notify the defense attorney.” S.C. CODE ANN. § 16-3-26(A). The recidivist statute, on the other hand, provides “**written notice** must be given by the solicitor to the defendant **and** defendant’s counsel.” S.C. CODE ANN. § 17-25-45(H) (emphasis added). These differences are not minor and illustrate the legislature’s ability to fashion statutes with varying notice requirements. Cf. S.C. Dept. of Social Services v. Johnson, 386 S.C. 426, 434, 688 S.E.2d 588, 591-92 (Ct. App. 2009) (finding that the legislature’s use of “or” in S.C. CODE ANN. § 20-7-1140(A) (2007) “illustrates its intent to grant the registering tribunal the option of how to effectuate service.”); Strother, 332 S.C. at 62-65, 504 S.E.2d at 121-23 (interpreting the meaning of “actual notice” in the context of the Tort Claims Act). The judicial revision of the recidivist statute via Washington and James has effectively removed the “written” requirement and interpreted “defendant and defendant’s counsel” to mean “defendant *or* defendant’s counsel.”

Following the James decision, the legislature passed the Omnibus Crime Reduction and Sentencing Reform Act of 2010, the intent of which was “to preserve public safety, reduce crime, and **use correctional resources most effectively.**” 2010 Act No. 273, § 1, eff. June 2, 2010

(emphasis added). The Act amended S.C. CODE ANN. § 17-25-45(G) by removing the prior language mandating application of the statute for those convicted of a subsequent most serious offense and making application of recidivist sentencing entirely up to the discretion of the solicitor.¹ 2010 Act No. 273, § 20, eff. June 2, 2010. Thus, there is no longer a requirement that the solicitor seek an LWOP sentence for a most serious offense, even on a remand for new trial.²

Contra James, 372 S.C. at 292 n. 1, 641 S.E.2d at 902 n. 1.

By amending the statute, the legislature insured that solicitors maintained LWOP as a “bargaining chip” in plea negotiations with subsequent offenders who fell under the recidivist statute. However, the written notice requirement gives a deadline by which the solicitor must make a decision on whether to pursue LWOP and notify the defendant and his counsel of that

¹ The solicitor’s discretion under the statute is not unfettered, as the United States Supreme Court has noted that such statutes may violate the Equal Protection Clause of the Amendment if deliberately applied based on an unjustifiable standard such as race, religion, or other arbitrary classification. See Oyler v. Boyles, 368 U.S. 448, 456, 82 S.Ct. 501, 506 (1962). As of August 2015, there are **744 black males serving LWOP sentences** compared to only 311 white males serving LWOP sentences **in the South Carolina Department of Corrections**. S.C. DEPT. OF CORRECTIONS, SENTENCE LENGTH DISTRIBUTION OF SCDC TOTAL INMATE POPULATION AS OF JUNE 30, 2015 (2015), http://www.doc.sc.gov/pubweb/research/InmatePopulationStats/ASOF_SentenceLengthDistrib_063015.pdf. It is not specified how many of those LWOP sentences were pursuant to the recidivist statute and a significant effort would have to be made to identify the cases in which solicitors have not sought recidivist sentencing and the demographics and reasoning involved. Thus, like Oyler, the South Carolina statistics “may imply a policy of selective enforcement,” but do not yet prove unconstitutional selectivity. See Oyler, 368 U.S. at 456, 82 S.Ct. at 506. Even so, the fact that **62% of South Carolina’s prison population is black** and only **27.8% of South Carolina’s total population is black or African American** should warrant some concern over the racial disparities in incarceration. See S.C. DEPT. OF CORRECTIONS, PROFILE OF INMATES IN INSTITUTIONAL COUNT (INCLUDING INMATES ON AUTHORIZED ABSENCE) AS OF JUNE 30, 2015 (2015), http://www.doc.sc.gov/pubweb/research/InmatePopulationStats/ASOF_InstitutionalCountProfile_FY15.pdf; U.S. Census Bureau, *Quick Facts: South Carolina* (July 1, 2014), available at www.census.gov/quickfacts/table/PST045215/45.

² Notably, Appellant Siders is requesting a remand for resentencing only, not a new trial.

decision. Recidivist sentencing is not, and should not be, employed in every qualifying case, as illustrated by the legislature's removal of the prior mandatory application of the statute.

Notice also gives the defendant and his attorney an opportunity to prepare for any challenge they may make to the propriety of sentencing under the recidivist statute. Among other things, the defense may need time to prepare to challenge the accuracy of the conviction (a.k.a., "I'm not that Albert Siders"), the sufficiency of an out-of-state or federal conviction to serve as a predicate offense, or whether the prior conviction was obtained in violation of the right to counsel. See, e.g. State v. Ellis, 345 S.C. 175, 179-80, 547 S.E.2d 490, 492 (2001) (holding that a prior juvenile adjudication was not a conviction for purposes of the statute); Burgett v. Texas, 389 U.S. 109, 115, 88 S.Ct. 258, 262 (1967) (holding that uncounseled convictions cannot be used "against a person either to support guilt or enhance punishment for another offense."). Of course, some matters, such as the sufficiency of the State's proof of notice or proof of the prior convictions themselves, will not be known to defense counsel until the time comes for sentencing and the solicitor presents its documentation to the court.

D.

Appellant's Case is Nonetheless Distinguishable

Even if Washington and James are not overturned, Siders' case is distinguishable because the solicitor did not prove that the LWOP notice was sent and neither Siders nor his attorney conceded that proper notice was made. In Washington, it was not disputed that the defendant was properly sent written notice of the State's intent to seek LWOP after the first indictment. 338 S.C. at 398, 526 S.E.2d at 712. In James, both the defendant and trial counsel indicated that they were aware that the defendant was facing an LWOP sentence and trial counsel "stipulated that the defense had received adequate notice." 372 S.C. at 291, 641 S.E.2d at 901. "Actual notice may be

shown by direct evidence or inferred from factual circumstances.” Strother, 332 S.C. at 65, 504 S.E.2d at 123.

Here, the trial judge erroneously found that “[i]t was indicated earlier and stated on the record that notice had been given.” Trial Tr. 279, ll. 7-8 (emphasis added). Trial counsel only said that he “believe[d] we’ve been LWOP’d noticed.” Trial Tr. 5, l. 25 – 6, l. 3. It is safe to assume that Siders’ public defender handled hundreds of cases, such that his pre-trial statement during Siders’ motion to relieve counsel was not an unequivocal stipulation that counsel had actual notice of the intent to seek LWOP ten days prior to trial. Further, Siders’ statement “I could be facing life” was made prior to even the commission of the armed robbery, at which point he had certainly not received any written notice from the solicitors office and may well have been referencing the likelihood that any significant period of incarceration would be the functional equivalent of “life” based on his age and general life expectancy. Trial Tr. 18, ll. 19-25. Additionally, as a matter of fairness, the State should not be allowed to rely upon Siders’ statement to his coercers, which the solicitor successfully sought to exclude from the trial. Thus, the trial court’s determination that “lack of notice has never been an issue in this particular case, in any event and is not now” was also in error, where trial counsel cited the “defects in service of the notice” and asked that the trial court exercise its discretion in sentencing. Trial Tr. 280, l. 18 – 281, l. 13; Trial Tr. 281, l. 20 – 282, l. 14.

It was not incumbent upon trial counsel or the defendant to make any pre-trial concession regarding the LWOP notice and none was made. Further, there was no indication that trial counsel had previously seen the affidavits of service; thus, he objected to them at his first opportunity. While a pre-trial discussion occurred in James, there is certainly no requirement that the defense’s objection to an LWOP notice be made pre-trial. 372 S.C. at 291, 641 S.E.2d at 901.

On the contrary, the possibility of re-indictment or a postponement to serve the notice, are exactly why defense counsel should wait until sentencing to object to the notice or the sufficiency of the predicate offenses. Id. at 292, 641 S.E.2d at 901-02.

If the solicitor here did, in fact, serve the notices on July 10, 2014, he had ample time to ensure the affidavits of service were properly executed or to re-serve the defendant and counsel. When the documentation that he brought to sentencing was insufficient, he had no direct evidence that he provided written notice. The solicitor made no alternative argument that actual notice could be inferred from the circumstances. Unlike a death penalty case, which requires qualified attorneys and specific voir dire, a trial where the defendant is subject to a recidivist enhancement proceeds no differently from any other criminal trial. Thus, there is nothing about the trial to indicate the Siders and his attorney knew that the State was seeking LWOP. Moreover, regardless of the form of the notice, it still had to be accomplished ten days prior to trial. S.C Code Ann. § 17-25-45(H). Thus, even evidence of actual notice by both the defendant and trial counsel at the time of trial is no sufficient to show that they had actual notice for the requisite time span of ten days prior to trial.

The obvious response to Appellant's arguments is that the analysis advocated herein will create some sort of windfall to defendants, all based on what the State will surely characterize as a "technicality." The Sixth Circuit Court of Appeals wrote:

We do not doubt that Collins has a very bad record of anti-social behavior. But all the greater need for care lest, perhaps without fully realizing it, we tolerate a little less than procedural due process for him, satisfying ourselves that normal requirements need not be too fastidiously insisted upon in the case of wicked people. **It must always be remembered that the innocent, for whose benefit primarily our fundamental procedural safeguards exist, can be protected effectively only if we insist strictly upon due process for all.** The safeguard of procedural due process will be inadequate unless it shall be inexorable. If a few guilty persons win liberty thereby, the price is a small one to pay for the assurance we all gain that judicial procedure is and will be essentially fair.

United States ex rel. Collins v. Claudy, 204 F.2d 624, 628-29 (1953) (internal citations and quotations omitted) (emphasis added). It is not a windfall that Siders seeks, but rather a ruling that the plain language of the statute applies and that the State is required to abide by the statute, just as any other litigant.

CONCLUSION

Based on the foregoing, Appellant Albert E. Siders respectfully requests that this Court remand his case for resentencing.

Respectfully submitted,



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Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of May, 2016.