STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

The Honorable James R. Barber, III, Circuit Court Judge

Appellate Case No. 2011-201588

Willis Weary, ...Respondent,

v.

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

BRIEF OF PETITIONER

ALAN WILSON
Attorney General

MEGAN E. HARRIGAN
Assistant Attorney General
S.C. Bar No. 100108

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

TABLE OF AUTHORITIES

Federal Cases

South Carolina Cases

State Statutes

STATEMENT OF ISSUE ON APPEAL

Did the post-conviction relief court err in determining that counsel was ineffective for failing to present evidence that two of Respondent's burglary convictions should be considered one offense for enhancement purposes, where Respondent has three prior burglary convictions and his sentence was appropriately enhanced based on his prior convictions?

STATEMENT OF THE CASE

Respondent is presently confined in the South Carolina Department of Corrections pursuant to an order of commitment of the Richland County Clerk of Court. Respondent was indicted during the April 2006 term of the Richland County Grand Jury for Burglary in the First Degree (2006-GS-40-00006). He was represented by Ian Deysach, Esquire. On February 28 – March 2, 2007, Respondent proceeded to a jury trial before the Honorable G. Thomas Cooper, Jr., where he was convicted as indicted. On March 2, 2007 Judge Cooper sentenced Respondent to eighteen years imprisonment.

Respondent appealed his conviction. Following the submission of an Anders[1] brief, the South Carolina Court of Appeals dismissed Respondent's appeal. State v. Willis Weary, Op. No. 2009-UP-559 (S.C. Ct. App. Filed November 23, 2009). The Remittitur was sent on December 9, 2009.

Thereafter, Respondent filed an application for post-conviction relief on February 19, 2010. The State made its Return on May 20, 2010, requesting an evidentiary hearing be held. Applicant, through his counsel, filed an amended application on August 22, 2011. A hearing was convened on August 31, 2011 at the Richland County Courthouse before the Honorable James R. Barber, III. Respondent was present and was represented by counsel, Kristy G. Goldberg. Petitioner was represented by Assistant Attorney General Brian T. Petrano. Following testimony from Respondent and trial counsel, the post-conviction relief court granted Respondent relief in the form of resentencing for Burglary in the Second Degree. An Order to this effect was signed on September 27, 2011 and filed on October 3, 2011.

[1] Anders v. California, 386 U.S. 738 (1967).

Petitioner filed a Notice of Appeal on October 20, 2011, followed by a Petition for Writ of Certiorari on December 15, 2011. Respondent submitted a Return to the Petition for Writ of Certiorari on May 14, 2012. On March 5, 2014, this Court granted certiorari and requested briefing. This Brief of Petitioner follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, 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). If the post-conviction relief court's conclusions of law are erroneous, it should be reversed. Suber v. State, 371 S.C. 554, 640 S.E.2d 884 (2007) (holding that this Court shall reverse the decision of a post-conviction relief court when it is controlled by an error of law).

When an applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, supra. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, supra. The applicant must overcome this presumption in order to receive relief. Cherry, supra.

A two-pronged test is used in evaluating 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 117, 386 S.E.2d at 625, citing Strickland, supra. 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., 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

ARGUMENT

The post-conviction relief court erred in determining that counsel was ineffective for failing to present evidence that two of Respondent's burglary convictions should be considered one offense for enhancement purposes, where Respondent has three prior burglary convictions and his sentence was appropriately enhanced based on his prior convictions.

This Court has explained that S.C. Code Ann. § 16-11-311 "allows the State to punish Defendant's recidivism by using his previous convictions to elevate actions that would normally constitute a charge to a charge of burglary, first degree." State v. Washington, 338 S.C. 392, 396, 526 S.E.2d 709, 711 (2000). Whether "two prior convictions" exist is an element of First Degree Burglary that the jury must find, or, whether the existence of "two prior convictions" is a sentencing issue only that the trial court can find to exist as part of sentencing, the result is the same – the post-conviction relief court erred in granting relief.

The State is required to prove all elements of first degree burglary beyond a reasonable doubt; the jury must be informed of the priors because it is an element of the offense. State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (Ct. App. 2002). In Simmons, the Court of Appeals held:

> "[T]o ensure that the defendant is not convicted on an improper basis while allowing the State to prove the elements of first degree burglary, the trial court should limit the evidence to the prior burglary and/or housebreaking convictions. Detailed, particular information about the prior burglaries and/or housebreaking convictions should not be admitted. In addition, the trial court should, on request, instruct the jury that the information should only be considered for the limited purpose of proving one of the elements of first degree burglary.

Id. at 357, 864 (internal citations omitted). The post-conviction relief court granted relief because it found that trial counsel was ineffective for failing to present detailed, particular

information about the prior burglaries in that they would be considered one offense because they were too closely related in time to be considered two offenses. (App p. 473 - 476). The post-conviction relief court concluded that counsel should have presented "this information outside of the presence of the jury during the directed verdict motion" or during "an in-camera hearing on the matter." (App. p. 475, 479). The post-conviction relief court held that if such an argument had been made at the trial then the trial court would have granted a directed verdict as to the First Degree Burglary charge because there would have been no evidence of two or more prior burglary convictions and the case would have gone to the jury as a Second Degree Burglary. (App. p. 473 – 476). Ultimately, the post-conviction relief court ordered that the Respondent's "case be remanded for sentencing for the charge of Second Degree Burglary." (App. p. 481).

The present case is relatively straight-forward and the facts are not in dispute. At Respondent's trial for first degree burglary, the State introduced evidence of two prior burglary convictions (2001-GS-40-09127 and 2001-GS-40-09128). (App. p. 281, 418 - 419). Respondent does not dispute the existence of those two prior burglary convictions. (App. p. 420-432).[2] The post-conviction relief court erred, as a matter of law, in finding that Respondent's two prior burglary convictions do not satisfy the requirements for a later first degree burglary conviction based on those two priors. The post-conviction relief court correctly explained that First Degree Burglary occurs when "the burglary is committed by **a person with a prior record of two or more convictions for burglary** or housebreaking or a combination of both." S.C. Code Ann. § 16-11-311(A)(2). (App. p. 477) (emphasis added). The statute is clear and unambigious. At the trial, the State

[2] In fact, the Respondent also has another prior burglary conviction (2001-GS-40-09125), making his total number of prior burglary convictions three. (App. p. 492).

presented undisputed evidence that Respondent had two prior burglary convictions. (App. p. 281). The post-conviction relief court erred by reading into the burglary statute an erroneous requirement that the two or more prior convictions cannot be closely related. The post-conviction relief court's conclusions of law are in error and require reversal. See Suber, supra (holding that this Court shall reverse the decision of a post-conviction relief court when it is controlled by an error of law).

The Court of Appeals held that the plain language of S.C. Code Ann. § 16-11-311(A)(2) provides for enhancement of the offense of burglary based on prior burglary convictions and rejected the argument to restrict that plain language based on an allegation that it was ambiguous when compared to the recidivism statute (S.C. Code Ann. § 17-25-45). State v. Zulfer, 345 S.C. 258, 547 S.E.2d 885 (Ct. App. 2001). "To restrict the predicate offenses for a first-degree burglary charge . . . would give the statute a meaning that the legislature clearly did not intend." Id., at 262, 887. See also State v. Donahue, 400 S.C. 604, 607, 735 S.E.2d 547, 549 (Ct. App. 2012) (holding "nothing in the language of subsection 16–11–313(B) limits a circuit court to considering only South Carolina offenses"). Accordingly, if the legislature wanted limitations to the type of prior burglary convictions as an element of first degree burglary then they easily could have and would have added those limitations to the statue. As no such limitations involving the current scenario are included within the plain reading of the statute, the post-conviction relief court erred as a matter of law.

Prior burglary convictions are an element of first degree burglary to be found by the jury. Simmons, Supra. S.C. Code Ann. § 17-25-50 expressly applies only "for the purpose of imposition of sentence . . . ." The prior offenses for first degree burglary are

not simply a collateral sentencing matter akin to serious or most-serious classifications. This Court has previously held that the language in S.C. Code Ann. § 17-25-50 applies only for the purposes of sentencing under that recidivist section of the code. State v. Muldrow, 259 S.C. 417, 192 S.E.2d 211 (1972).[3] However, even if § 17-25-50 were to apply in a classic recidivism sentencing analysis, the sentencing court could find the existence of the requisite priors without the need of the jury. See generally Almendarez-Torres v. United States, 523 U.S. 224 (1998) and Apprendi v.New Jersev, 530 U.S. 466 (2000). If this is a sentencing issue only, and not an element of the offense, Respondent's third burglary conviction (2001-GS-40-09125) could, and should, be applied during [re]sentencing without a finding by the jury - meaning that Respondent would still have at least two prior burglary convictions and the current first degree burglary conviction and sentence is completely valid. Therefore, Respondent can show no prejudice and the post-conviction relief court should be reversed. Strickland, supra at 670, 2056.

Furthermore, Respondent's assertions that the two offenses that occurred within a short time period would only be considered one offense in this context is erroneous. The offense date for 2001-GS-40-09127 and 2001-GS-40-09128 was November 24, 2000, but each offense occurred at a separate residence with separate victims. (App. p. 424-430; p. 471). The offense date for 2001-GS-40-09125 was November 3, 2000. For the purposes of S.C. Code Ann. § 17-25-50, it matters not that the Respondent pled to all of the charges on the same day. See Bryant v. State, 384 S.C. 525 (2009). See also Koon v. State,372 S.C. 531 (2007) (holding that as a matter of law, another burglary of a different building, in a different location, which occurred two weeks later was a separate burglary

[3] S.C. Code Ann. § 17-25-50 is the same language as the previously numbered statute existing at the time of Muldrow, i.e. S.C. Code Ann. § 17-553.2 (1962).

for the purposes of S.C. Code § 17-25-50).

Had trial counsel presented evidence to the trial court, as the post-conviction relief court found he should have, and had argued to the trial court that the two prior burglaries (2001-GS-40-09127 and 2001-GS-40-09128) were too close in time to be considered two separate offenses, the State would have simply submitted the sentencing sheet from the Respondent's third prior burglary (2001-GS-40-09125), which is ***not*** closely related in time to the other priors and clearly would qualify as a subsequent offense. Therefore, Respondent cannot show any resulting prejudice. (App. p. 281, 418 – 419, 492). The post-conviction relief court should be reversed.

CONCLUSION

For the reasons stated above, this Court should reverse the post-conviction relief court.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN E. HARRIGAN
Assistant Attorney General
S.C. Bar No. 100108

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

By: Megan E. Harrigan
ATTORNEYS FOR PETITIONER

June 25, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Richland County
The Honorable James R. Barber, III, Circuit Court Judge
Case No. 2010-CP-40-01172
Appellate Case No. 2011-201588

WILLIS WEARY, RESPONDENT,

v.

STATE OF SOUTH CAROLINA, PETITIONER.

PROOF OF SERVICE

I, Megan E. Harrigan, certify that I have served the within **Brief of Petitioner** on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 25th day of June, 2014

Megan E. Harrigan

MEGAN E. HARRIGAN
Assistant Attorney General
S.C. Bar No. 100108

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

James R. Barber, III, Circuit Court Judge

WILLIS WEARY,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

BRIEF OF RESPONDENT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR RESPONDENT.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUE ON APPEAL

Did the PCR judge correctly grant relief finding that trial counsel was ineffective for failing to investigate and properly challenge, at the directed verdict stage in a trial for burglary first degree, two prior burglary convictions which elevated the charge to burglary first degree when the two prior burglary convictions were committed at times so closely connected in point of time that they should have been considered one offense under S.C. Code §17-25-50?

STATEMENT OF THE CASE

In April of 2006, the Richland County Grand Jury indicted Weary for burglary first degree, indictment #2006-GS-40-0006. The indictment was later amended on January 25, 2007, to include, in addition to the allegation that the burglary took place at night, the additional allegation that Weary had two or more prior convictions for burglary. On February 28, 2007, Weary proceeded to jury trial before the Honorable G. Thomas Cooper, Jr. Ian Deysach represented Weary at trial. The jury returned a verdict of guilty and the judge sentenced Weary to 18 years imprisonment. Weary appealed his conviction and sentence. Appellate counsel Celia Robinson submitted a brief pursuant to Anders. The South Carolina Court of Appeals dismissed the appeal. State v. Weary, Op. No. 2009-UP-559 (S.C.Ct.App. filed November 23, 2009).

On February 19, 2010, Weary filed an application for post conviction relief. The State filed a return on May 20, 2010. Weary filed an amended post conviction relief application on August 22, 2011. On August 31, 2011, an evidentiary hearing was held before the Honorable James R. Barber. Kristy Goldberg represented Weary at the PCR hearing. In a written order filed October 3, 2011, Judge Barber granted relief and remanded for sentencing on the charge of burglary second degree. The State filed a notice of intent to appeal. On December 16, 2011, the State filed a petition for writ of certiorari. On May 14, 2012, Respondent Weary filed a return to the State's petition for writ of certiorari.

On March 5, 2014, this Court granted the State's petition for writ of certiorari and asked for further briefing. On June 25, 2014, the State filed the brief of petitioner. This brief of respondent follows.

ARGUMENT

The PCR judge correctly granted relief finding that trial counsel was ineffective for failing to investigate and properly challenge, at the directed verdict stage in a trial for burglary first degree, two prior burglary convictions which elevated the charge to burglary first degree when the two prior burglary convictions were committed at times so closely connected in point of time that they should have been considered one offense under S.C. Code §17-25-50.

The Richland County Grand Jury indicted Weary for burglary first degree. The indictment, amended in January of 2007, reads, "That WILLIS WEARY did in Richland County on or about August 20, 2005, unlawfully enter the dwelling of JOSE GONZALEZ, without consent and with the intent to commit a crime therein; the defendant having a prior record of two or more convictions for burglary and/or housebreaking and/or such unlawful entering and/or remaining occurring in the nighttime, all in violation of Code Section §16-11-311, Code of Laws of South Carolina (1976, as amended)." (App. p. 483).

At trial the victim, Jose Gonzalez, testified that on the day of the burglary he left for work at 6:00 AM. When he returned home at 4:00 PM he discovered that his home had been burglarized. (App. p. 146, lines 8 – p. 147, 148, lines 1-13). According to an investigator, Weary stated that around 12 AM or 1 AM he saw Darryl, "Fab" throw a brick through the "Hispanic dude's apartment." (App. p. 241, lines 11-15). The investigator admitted, however, based on the victim's testimony, that this time must be incorrect. (App. p. 260, lines 16-21). The State presented no other evidence that the burglary took place at nighttime.

The State went forward on the burglary first degree charge by entering into evidence sentencing sheets for two prior convictions for burglary second degree, indictments #2001-GS-40-9127, 28. (App. p. 281, lines 17-p.282, lines 1-2). At the close of the State's case, trial counsel moved for a directed verdict for the burglary first charge arguing that the State

failed to present sufficient evidence of burglary first degree. Specifically, trial counsel argued that the case should be sent to the jury as a burglary second because the State did not disprove that the two prior convictions, the element required for burglary first degree, were "so closely linked as to basically constitute one offense." (App. p. 283, lines 2-14). Trial counsel argued, ". . . [M]y understanding of the law, in order to use the enhancement, the two offenses cannot be so closely linked as to basically constitute the same offense. I don't think that there is anything on these pieces of paper that indicates that these two cases aren't so linked." (App. p. 283, lines 9-14).

The State argued, "They are two different warrant numbers. The law is that it's just two prior burglary convictions. These are two different warrant numbers, two different indictment numbers. The indictments themselves are two different owners, two different victims. They are two separate burglary convictions. And that's what the statute calls for." (App. p. 284, lines 6-13).

Trial counsel argued that the fact that the indictments were consecutively numbered indicates that the crimes were closely related. The trial judge responded, "Well, what's to say they're not, that the defendant was developed as a suspect in both cases even though the events may have occurred months apart and both warrants served on him at the same time and both indictments served on him at the same time? I don't know." (App. p. 286, lines 17-22). Trial counsel then argued that the State failed to present evidence that the prior burglaries were months apart. The trial judge noted that the defense failed to present evidence that the burglaries took place on the same day to which trial counsel responded, "They have the burden of proof in this case." (App. p. 286, lines 23 – p. 287, lines 1-4). The trial judge denied the directed verdict motion.

Trial counsel erred in believing that the State was required to disprove that the prior convictions were closely related. Once the State presents evidence of prior convictions, the burden falls back to the defense to prove, as a matter of law, that the offenses were committed at times so closely connected in point of time that may be considered as one offense under S.C. Code §17-25-50. See generally Scott v. State, 334 S.C. 248, 513 S.E.2d 100 (1999). Trial counsel was deficient in failing to have been more familiar with the prior convictions so that he could have effectively argued that the prior convictions should be treated as one offense.

During the PCR hearing Weary testified that the first indictment alleged only that the burglary took place during the hours of darkness. (App. p. 422, lines 4-5). Weary testified that prior to trial he was unaware of the amended indictment and unaware that the prior convictions were going to be used to enhance the charge to burglary first degree. (App. p. 422, lines 2-10). Weary testified that he never discussed the details of the prior convictions with trial counsel. (App. p. 422, lines 11-18). Weary reviewed the incident report and indictments from the prior convictions and testified that the burglaries took place on the same day, November 24, 2000, in close physical proximity to one another and within fifteen minutes of one another. (App. pp. 423-426).

Despite the above testimony from the PCR hearing, in the brief, Petitioner writes, "Futhermore, Respondent's assertions that the two offenses that occurred within a short time period would only be considered one offense in this context is erroneous. (Brief of Petitioner p. 9). Petitioner cites Bryant v. State, 384 S.C. 525, 683 S.E.2d 280 (2009) and Koon v. State, 372 S.C. 531, 643 S.E.2d 680 (2007) in support of Petitioner's argument that the prior convictions would not be considered one offense pursuant to §17-25-50. Bryant

and Koon, however, are easily distinguished from the present case. Bryant involved imposing a sentence of life without parole pursuant to §17-25-45 and the interplay with §17-25-50. The Court wrote:

> In sum, we hold: (1) section 17–25–45 operates to trigger a life without parole sentence under the respective "two-strikes" and "three-strikes" provisions; (2)subsection (F) of section 17–25–45 sets forth a straightforward timing feature for identifying "a prior conviction;" and (3) section 17–25–50 is intended to serve as a legislatively sanctioned safeguard to ensure that a life without parole sentence is not imposed in cases where the multiple section 17–25–45 offenses are "so closely connected in point of time that they may be considered as one offense," which we construe to mean the offenses are inextricably connected and share an immediate temporal proximity. In essence, what may be charged as two, three or more strikes under section 17–25–45 must be deemed "one-strike" for sentencing purposes under section 17–25–50 and, as a result, preclude a life without parole sentence. We believe this approach most closely hews to legislative intent based on what is admittedly imprecise statutory language.
>
> Bryant v. State, 384 S.C. 525, 534-535, 683 S.E.2d 280, 285 (2009).

In Bryant the Court found that the three different armed robberies with different victims, in three separate locations in three different counties on different days were not so closely connected in point of time that they could be considered one offense. In the present case, on the other hand, the two burglaries took place on the same date, within fifteen minutes and in close proximity to one another. The two convictions in the present case are inextricably connected and share an immediate temporal proximity. The two priors in the present case should have been considered on e offense, as a matter of law.

In Koon the Court held that a burglary committed on March 28th of a different building and a different location clearly constituted a separate offense from burglaries occurring two weeks prior on March 13th and March 14th. Due to this determination, it was not necessary for the Court to determine if the March 13th and March 14th burglaries

were so closely connected to constitute one offense. Again, in contrast to Koon, the priors in the present case took place on the same date, within fifteen minutes and in close proximity to one another.

Trial counsel testified at the PCR hearing that he should have investigated the prior convictions and been better prepared to argue to the trial judge from a factual and legal standpoint that the prior convictions were closely connected. (App. pp. 442 – 444). Trial counsel was ineffective for failing to investigate and properly challenge, at the directed verdict stage in a trial for burglary first degree, the two prior burglary convictions which elevated the charge to burglary first degree when the two prior burglary convictions were committed at times so closely connected in point of time that they should have been considered one offense under S.C. Code §17-25-50.

In the order granting relief the PCR judge wrote, "In summation, this Court finds that trial counsel was deficient in failing to investigate the Applicant's prior burglaries and research whether they should be considered a single incident. Trial counsel's deficiency resulted in the Applicant's charge being submitted to the jury as a First Degree Burglary. If not for trial counsel's deficiency a different outcome would have resulted." (App. p. 480). The PCR judge's finding is supported by the record.

S.C. Code §17-25-50 states:

> In determining the number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses.

S.C. Code §16-11-311(A)(2) provides:

> A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling and . . .
>
> the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both . . .

Pursuant to the burglary statute, both the charge and the sentence are enhanced if the State proves two or more prior convictions. Prior convictions constitute an element of burglary first degree. State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (Ct.App. 2002). While the prior convictions constitute an element of burglary first degree and the jury must determine, as a matter of fact, if the State has proved that element, the determination of whether the prior convictions are so closely related as to constitute one offense is a matter of law to be determined by the judge. Bryant v. State, 384 S.C. 525, 683 S.E.2d 280 (2009). Trial counsel was ineffective in not meeting his burden of proof to establish that the two prior burglary convictions were committed at times so closely connected in point of time that they should have been considered one offense under S.C. Code §17-25-50.

Petitioner, relying on State v. Muldrow, 259 S.C. 417, 192 S.E.2d 211 (1972), argues that §17-25-50 does not apply in the context of the burglary first statute. Petitioner's reliance on Muldrow is misplaced. Muldrow did not involve **prior** convictions used as sentencing enhancements. In Muldrow the defendant was brought to trial on an indictment charging him with murder and armed robbery. Muldrow was convicted and the judge sentenced him separately on each count. The Court held that the statute directing the trial court to treat as one offense any number of offenses committed at times so closely connected in point of time that they may be considered as one offense is applicable only for purpose of sentencing under a recidivist statute and did not apply to

Muldrow who was convicted of the separate and distinct crimes of murder and armed robbery and properly sentenced for each crime separately.

The burglary statute, S.C. Code §16-11-311(A)(2), which provides that prior burglary convictions can enhance a burglary second degree, punishable by up to fifteen years in prison, to a burglary first degree, punishable by up to life in prison, is a recidivist statute. S.C. Code §17-25-50 applies to other recidivist statutes such as S.C. Code §17-25-45. See State v. Woody, 359 S.C. 1, 596 S.E.2d 907 (2004); Koon v. State, 372 S.C. 531, 643 S.E.2d 680 (2007). There is nothing in the burglary statute to indicate that §17-25-50 is inapplicable. There is nothing in §17-25-50 to indicate that this statute is not applicable to the recidivist portion of the burglary statute found in §16-11-311(A)(2).

The statutes at issue in the present case are clear and unambiguous. The two prior convictions in the present case which took place on the same date, within fifteen minutes and in close proximity to one another should count as one offense pursuant to §17-15-50. However, if there is ambiguity in the interplay of §16-11-311(A)(2) and §17-15-50, that ambiguity should be resolved in favor of Respondent Weary. In Bryant v. State, 384 S.C. 525, 533, 683 S.E.2d 280, 284 (2009), the Court wrote:

> When a *genuine* ambiguity exists as a result of the proposed application of section 17–25–50 to a given situation, the rule of lenity requires that the doubt must be resolved in the defendant's favor. State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (recognizing the settled rule that penal statutes must be strictly construed in the defendant's favor);see also United States v. Shabani, 513 U.S. 10, 17, 115 S.Ct. 382, 130 L.Ed.2d 225 (1994) (observing that the rule of lenity "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute"). Bifulco v. United States, 447 U.S. 381, 387, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980) ("[T]he 'touchstone' of the rule of lenity 'is statutory ambiguity.' ").

Petitioner's reliance on State v. Zulfer, 345 S.C. 258, 547 S.E.2d 885 (Ct.App. 2001) is also misplaced. In Zulfer the Court held that prior convictions for purposes of the burglary first statute, S.C. Code §16-11-311(A)(2), were not limited to in state convictions because the statute unambiguously allowed out of state convictions. In the present case, if the legislature intended for S.C. Code §17-25-50 to not apply in regard to the burglary statute, the legislature would have specifically included language to that effect. There is nothing in the burglary statute to indicate that §17-25-50 is inapplicable.

Additionally, petitioner argues that Weary failed to demonstrate prejudice because of a third prior burglary conviction. This prior conviction, however, was never submitted to the judge or the jury during the trial. The PCR judge correctly found "[I]ts [the third prior conviction] existence is not relevant to trial counsel's performance regarding the directed verdict motion made after the State concluded their case and rested." (App. p. 478). The proper remedy is a remand for re-sentencing for burglary second degree, as ordered by the PCR judge.

In Boan v. State, 388 S.C. 272, 277, 695 S.E.2d 850, 852 - 853 (2010), the Court wrote:

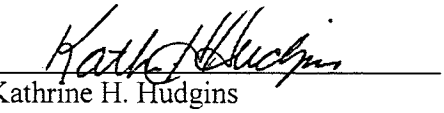
> This Court has previously held that post-conviction relief may be tailored to remedy the precise prejudice resulting from trial counsel's deficient performance. Rolen v. State, 384 S.C. 409, 414-15, 683 S.E.2d 471, 474 (2009) (citing United States v. Morrison, 449 U.S. 361, 364, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981) (recognizing that the remedy for a violation of the Sixth Amendment right to counsel "should be tailored to the injury suffered from the constitutional violation")). Because Petitioner's only argument on appeal is the error in sentencing regarding the offense of criminal sexual conduct with a minor first degree, we remand for resentencing only as to that offense. See Dervin v. State, 386 S.C. 164, 169, 687 S.E.2d 712, 714 (2009) (remanding for resentencing when defendant given a 25-year sentence but 10 years was the maximum allowed for the offense); Davie v. State, 381 S.C. 601, 616, 675 S.E.2d 416, 424 (2009) (remanding for resentencing).

On certiorari in a PCR action, the Appellate Court applies the "any evidence" standard. Accordingly, the Appellate Court will affirm if any evidence of probative value in the record exists to support the findings of the PCR court. Terry v. State, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011). There is ample evidence of probative value to support the finding of the PCR judge. Under the Strickland test, trial counsel was ineffective in failing to investigate and properly challenge the two prior burglary convictions which were committed at times so closely connected in point of time that they should have been considered one offense under S.C. Code §17-25-50. If trial counsel had challenged the two prior convictions at the directed verdict stage, after the State rested, the case would have been submitted to the jury as a burglary second degree, rather than a burglary first degree and Weary would have faced a maximum penalty of fifteen years. The PCR judge correctly tailored the PCR remedy as a remand for re-sentencing for burglary second degree.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be dismissed as improvidently granted and the case remanded for re-sentencing.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 19th day of September, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
James R. Barber, III, Judge

WILLIS WEARY,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Respondent and Designation of Matter in the above referenced case has been served upon Megan E. Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 19th day of September, 2014.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 19th day of September, 2014.

Bailey Reed (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021 .

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Acting Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

September 19, 2014

Brian Petrano
Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

Re: The State v. Willis Weary

Dear Brian

Enclosed please find two copies of the Initial Brief of Respondent and Designation of Matter in the above entitled case, which I have filed today with the South Carolina Court of Appeals.

Should you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

Kathrine H. Hudgins
Appellate Defender

KHH/khh

Enclosure

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Acting Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

September 19, 2014

Willis Weary # 283431
McCormick Correctional Institution
386 Redemption Way
McCormick, SC 29899

Re: Your appeal

Dear Mr. Weary:

Enclosed please find a copy of the Initial Brief of Respondent in your case, which I have filed with the South Carolina Court of Appeals.

Should you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

Kathrine H. Hudgins
Appellate Defender

KHH/khh

Enclosure