THE STATE OF SOUTH CAROLINA
SUPREME COURT

APPEAL FROM PICKENS COUNTY

R. Knox McMahon, Circuit Court Judge

Case No. 2014-CP-39-0397

Eli Torrence, #00356338... Petitioner,

v.

State of South Carolina...Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court should grant a Writ of Certiorari to review the circuit court's decision denying Appellant post-conviction relief, based on trial counsel's failure to object to the amendment of Appellant's charges to burglary second degree under subsection (B), where Appellant had no prior notice of the charge and did not waive indictment as to burglary second degree subsection (B), as it is not a lesser-included offense of the charges for which he had been indicted?

2. Whether the Court should grant a Writ of Certiorari to review the circuit court's decision denying Appellant post-conviction relief, based on Appellant not waiving indictment to the escape charge on the record?

STATEMENT OF THE FACTS

On July 29, 2013, Eli Torrence (Appellant) pled guilty to three counts of burglary second degree subsection (A), two counts of burglary second degree subsection (B), three counts of grand larceny, escape, and malicious injury to courthouse or jail. (App. 39, lines 20-25; p. 40, lines 1-5). A Post Conviction Relief hearing was held on April 18, 2016. (App. 56). There, Appellant raised two issues: (1) that trial counsel was ineffective for failing to object to the amendment of Appellant's charges to burglary second degree under subsection (B), where Appellant had no prior notice of the charge and did not waive indictment as to burglary second degree subsection (B) as it is not a lesser-included offense of the charges for which he had been indicted; and (2) that Appellant did not waive indictment as to the escape charge. Id. The Circuit Court denied relief on both grounds. Id.

Appellant was indicted for the charges related to his plea in December 2012 and January 2013 (App. 58, lines 5-8). In December 2012, the grand jury indicted Appellant on three counts of first degree burglary and grand larceny. (App. 58, lines 6-7). In January 2013, Appellant was indicted for two counts of second degree burglary subsection (A) and two counts of grand larceny. (App. 58, lines 7-8). Appellant was not indicted for the escape or malicious injury to the courthouse or jail charges, but he waived presentment as to the malicious injury to the courthouse or jail on the record during his plea. (App. 41, lines 6-15).

During the plea hearing, the State explained the plea deal to the Court. The State said they reduced two burglary first degree charges to burglary second degree violent, which is subsection (B), and one burglary first degree charge to burglary second degree

non-violent, which is subsection (A). (App. 43, lines 5-8). Appellant did not waive indictment on the two burglary second degree violent charges (App. 41, lines 6-15) nor did he initial and check "defendant waives presentment to grand jury" on the sentencing sheet. (App. 15). Burglary second degree violent under subsection (B) is not a lesser included offense of burglary first degree, as will be discussed below.

Appellant was also not indicted on the charges of escape or malicious injury to the courthouse or jail. During the plea hearing, the Court asked, "You've got at least one charge that has not been indicted by the Pickens County Grand Jury. You want to give up that right and plead guilty to that anyway?" (App. 41, lines 6-9). Appellant asked the Court what charge that was, and the Court said "That's the malicious injury to the courthouse or jail." (App. 41, lines 10-14). The Appellant responded "Yes, ma'am." (App. 41, line 15). Even after Appellant specifically asked the Court what charges were not indicted, the Court failed to reference the escape charge. The escape charge was not indicted by the grand jury, and Appellant did not waive indictment of that charge. (App. 112-113).

At the Post Conviction Relief hearing, Appellant testified that he did not discuss the different elements of burglary second degree subsections (A) and (B) with his attorney. (App. 61, lines 11-15). He testified that the Court did not explain the different elements of the two subsections either. (App. 61, lines 16-19). Appellant testified that, when he entered the plea, he did not know that he was pleading guilty to entering a building instead of a dwelling and that at no time was he accused of entering a building. (App. 61, lines 20-25, p. 62, line 1). He testified that, had he known he was pleading guilty to entering a building, he would have taken the charges to trial because he did not

commit a burglary in a building. (App. 62, lines 5-13). Appellant also testified that he did not waive indictment on the burglary second degree violent charges on the record or by initialing the sentencing sheet. (App. 62, lines 14-20, p. 15).

At the hearing, Appellant's trial counsel, John William DeJong, testified as to the nature of the burglary charges. DeJong was asked, "[A]s far as you know, the burglary first degree charges that he had those were definitely based on homes that had people living in them, is that right?" (App. 85, lines 9-11), and DeJong responded by saying "correct." (App. 85, line 12). At the PCR hearing, DeJong said "whether I actually went over the elements of the crime, that is, burglary second violent, I can't say that I did that." (App. 83, line 25, p. 84, lines 1-2).

Appellant also testified at the Post Conviction Relief hearing that he did not waive presentment on the escape charge on the record. Appellant testified that he specifically asked the Court what charge he was waiving his right to presentment on, and the Court told him that he just needed to waive presentment on the charge of malicious injury to courthouse or jail. (App. 63, lines 10-19). While Appellant did initial the sentencing sheet for the escape charge beside a check box waiving presentment to the grand jury (App. 16), Appellant testified at the Post Conviction Relief hearing that "I was shown the sentencing sheets in front of me and they just point and told me, initial here, initial here, initial here, nothin' else was explained except for to initial to the agreement that I understood that charges or the offenses that were bein' accused against me were." (App. 63, lines 4-9).

STANDARD OF REVIEW

In order to establish a claim of ineffective assistance of counsel, a PCR applicant who pleads guilty based on trial counsel's advice must show: (1) that counsel was ineffective and (2) that but for trial counsel's errors, the applicant would have insisted on going to trial. Dalton v. State, 376 S.C. 130, 654 S.E.2d 870, 873 (2007) citing Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). The rule as to guilty pleas is 'the accuracy and truth' of a prisoner's denial of any threats inducing his plea of guilty, given during an examination on the record at his sentencing...will be considered 'conclusively' established by that proceeding unless he offers...a valid reason why he should be permitted to depart from the apparent truth of his earlier statement." Edmonds v. Lewis, 546 F.2d 566, 568 (4th Cir. 1976). In order to satisfy the prejudice prong, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial." Stalk v. State, 681 S.E.2d 592, 594 (2009).

This Court has held that it gives great deference to the PCR court's findings of fact and conclusions of law. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). Thus, on review, a PCR judge's findings will be upheld if there is any evidence of probative value sufficient to support them. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). If no probative evidence exists to support the findings, this Court will reverse. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000). Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

ARGUMENT

Appellant's two burglary second degree subsection (B) convictions and his escape conviction should be vacated and remanded for a new trial. DeJong, trial counsel for Appellant, was ineffective for failing to object to the amendment of Appellant's charges to burglary second degree subsection (B) as it is not a lesser included offense of his indicted charge of burglary first degree. In addition, Appellant did not waive indictment on the record for the escape charge. Appellant specifically asked the Court what charges were not indicted, and the Court's response referenced only the malicious injury to courthouse or jail charge. Trial counsel failed to object to the unindicted burglary second degree subsection (B) charges and Appellant did not waive indictment on either those charges or the escape charge.

I. DeJong was ineffective for not objecting to the amendment of Appellant's first degree burglary charge to burglary second degree under subsection (B).

DeJong was ineffective in not objecting to the amendment of Appellant's charges to burglary second degree (B), which was not a lesser included offense of the charge for which he was indicted. Had DeJong objected to this amendment, the prosecutor could have amended the charge to a proper lesser included offense such as burglary second degree subsection (A), Appellant could have been given the opportunity to waive presentment to the grand jury on the unindicted burglary second degree (B) offense, or Appellant could have proceeded to trial. Appellant's un-contradicted testimony at the PCR hearing was that he would have proceeded to trial had he known that he was pleading guilty to something that he did not do.

In Weinhauer v. State, Petitioner's trial attorney did not object when the solicitor orally amended his burglary second degree subsection (A) charge to burglary second degree subsection (B). Weinhauer v.State, 334 S.C. 327, 329, 513 S.E.2d 840 (1990) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). There, the petitioner pled guilty to several criminal offenses, including first and second degree burglary under subsection (B). Id. at 328. As to the first degree burglary charge, the solicitor orally amended the indictment, saying that the investigation showed that it was not burglary first degree and that instead it was burglary second degree non-violent under subsection (A) because it was a house in the daytime. Id. at 329. More importantly, the solicitor also insisted that the defendant plead guilty to burglary second degree under subsection (B) on a separate offense, because the solicitor stated that offense occurred in the nighttime although the indictments did not say the offense occurred in the nighttime. Id. Weinhauer's attorney did not object to any of the amendments. Id.

In Weinhauer, the South Carolina Supreme Court held that amending the burglary second degree indictment from subsection (A) to subsection (B) changed the nature of the offense. Id. at 332. The Court pointed out that the solicitor changed the crime from a non-violent offense to a violent offense and that Weinhauer was convicted for a nighttime burglary when the indictment itself did not state that the burglary was committed at night. Id.

Here, as in Weinhauer, the solicitor also changed the nature of the offense on the record. Appellant was indicted for first degree burglary for entering a dwelling. Appellant confessed to entering dwellings, and his attorney testified at the PCR hearing

that it was his recollection that Appellant only entered dwellings. At the plea hearing, the State reduced two burglary first degree charges, which require entry into a dwelling, to two burglary second degree violent charges under subsection (B) which require entry into a building. That changed the nature of the offense just as it did in Weinhauer.

Burglary first degree is defined as entering "a dwelling without consent and with intent to commit a crime in the dwelling…." S.C.Code Ann. § 16-11-311 (Supp. 2012). Unlike burglary first degree, burglary second degree subsection (B) states that "a person is guilty of burglary in the second degree, if the person enters a building without consent and with intent to commit a crime therein…." S.C. Code Ann. § 16-11-312(B) (Supp. 2012). The burglary first degree statute applies only to dwellings, whereas the burglary second degree subsection (B) statute applies only to buildings. The un-contradicted testimony at the PCR hearing is that Appellant entered only dwellings and not buildings.

Furthermore, DeJong was ineffective for not explaining the difference between the elements of the crime Appellant was charged with and the elements of the crime Appellant was being asked to plead guilty to. Appellant was not informed that burglary second degree subsection (A) has different elements than burglary second degree subsection (B). Appellant testified that neither DeJong nor the Court explained the difference. At the PCR hearing, DeJong admitted he could not say he went over the elements of the crime with Appellant. Appellant said that had he known he was pleading guilty to entering a building, he would have gone to trial because he did not enter a building. DeJong was ineffective when he failed to object to the amendment of burglary first degree to burglary second degree subsection (B).

This resulted in prejudice to Appellant because he was subjected to more time. Had the charge been properly reduced to a lesser included offense of first degree burglary, such as burglary second degree subsection (A), Appellant would have faced a maximum of 10 years instead of what he received at the plea which was 15 years.

In Hope v. State, the South Carolina Supreme Court held that entering without breaking was not a lesser included of first degree burglary. Hope v. State, 328 S.C. 78, 79, 492 S.E.2d 76 (1997). Hope was convicted by a jury of assault to commit first degree criminal sexual conduct and first degree burglary. Id. at 78. The PCR judge found that trial counsel was "ineffective in failing to request a jury charge on 'entering without breaking,' holding it is a lesser included offense of first degree burglary. Id. However, the South Carolina Supreme Court reversed that decision and found that entering without breaking is not a lesser included offense of first degree burglary. Id. at 79.

In Hope, the Supreme Court said the greater offense—burglary first degree—did not have all the elements of entering without breaking. The Court defined first degree burglary as "entering 'a dwelling without consent and with intent to commit a crime in the dwelling.'" Id. quoting S.C. Code Ann. § 16-11-311 (Supp. 1996). The Court defined entering without breaking as "entering, without breaking, or attempting to enter any house or vessel, with intent to steal or commit any other crime." Id. quoting S.C. Code Ann. § 16-13-170 (Supp. 1976). In both crimes, it must be shown that entering was accomplished. Id. However, with burglary first degree "without consent" is an element, whereas entering without breaking requires the element of "without breaking." Id. The Court said "one can be convicted of first degree burglary whether or not a breaking occurred...but to be convicted of the lesser it must be shown the entering was

accomplished without a breaking." Id. at 79. Since burglary first degree does not include all of the elements of "entering without breaking," the Court held it was not a lesser included offense. Id.

Burglary second degree violent under subsection (B) is also not a lesser included offense of burglary first degree. Appellant pled guilty to burglary second degree subsection (B). Appellant was indicted for burglary first degree. Entering a dwelling is a required element of burglary first degree. Burglary second degree subsection (B) requires the different element of entering a building but not a dwelling. This is very similar to the issue of breaking in Hope. The test articulated in Hope states that the greater offense must have all of the elements of the lesser offense in order to be a lesser-included offense. Therefore, burglary second degree subsection (A) is a lesser-included offense of burglary first degree, because both burglary first degree and burglary second degree subsection (A) require entering a dwelling. Burglary second degree subsection (B) has the different element of entering a building and is therefore not a lesser included offense of burglary first degree.

Because burglary second degree subsection (B) is not a lesser included offense of burglary first degree, Appellant was not indicted on the offense of burglary second degree subsection (B) nor did he waive indictment as to burglary second degree subsection (B). Appellant was indicted for burglary first degree, which is entering a dwelling. Appellant did not waive presentment on the record to burglary second degree subsection (B), which is entering a building. He also did not initial on the sentencing sheet that he was waiving indictment. A waiver of indictment cannot be presumed from a silent record. Boykin v. Alabama, 395 U.S. 238, 242 (1969).

Appellant's attorney was ineffective for failing to object to the amendment of Appellant's charges to burglary second degree violent under subsection (B). DeJong did not inform Appellant of the difference between the elements of burglary first degree and burglary second degree subsections (A) and (B). DeJong did not inform Appellant he was pleading guilty to a charge that is not a lesser-included offense. Appellant testified that had he known he was pleading guilty to entering a building, he would have gone to trial on those charges. Appellant did not waive presentment to the grand jury for the charges of burglary second degree subsection (B). Therefore, the two counts of burglary second degree subsection (B) should be vacated.

II. Appellant did not waive presentment on the record as to his escape charge.

During the plea hearing, Appellant did not waive presentment on the record to the Pickens County Grand Jury on his escape charge. Although he initialed the sentencing sheet indicating a waiver of presentment, he did not waive presentment on the record and he specifically asked the Court on what charges he was waiving presentment to the grand jury. For these reasons, the escape conviction should be vacated and a new trial ordered.

"[D]ue process requires the judge's oral pronouncement control over a conflicting written sentencing order." Boan v. State, 388 S.C. 272, 277, 695 S.E.2d 850 (2010). In Boan, the petitioner was sentenced on criminal sexual conduct with a minor first degree and two counts of lewd act upon a child to 20 years for the first offense, 15 years on the second, and 10 years on the third. Id. at 274-275. The trial judge announced orally that the first two sentences would run concurrently while the last sentence would run consecutively. Id. at 275. However, the written sentencing order did not reflect what the

judge had announced from the bench and instead had Boan serving 30 years on the first offense. Id.

The South Carolina Supreme Court reversed the PCR judge's denial of relief based on trial counsel's failure to make the appropriate motion regarding conflicting statements between the judge orally and on the written sentencing sheet. Id. at 276. The Court pointed out that most jurisdictions have held that oral pronouncement controls over a conflicting written statement. Id. The Court gave U.S. v. Martinez, 250 F.3d 941, 942 (5th Cir. 2001) as an example where the Court held that "a defendant's constitutional right to be present at sentencing mandates an oral pronouncement prevail over a conflicting written sentence." Id. at 276-277.

Like Boan, in this case the judge's oral announcement as to presentment of the indictment to the grand jury conflicted with the sentencing sheet. The plea judge, in going through what rights Appellant was waiving, asked Appellant if he was waiving his right to have his indictments presented to the Pickens County Grand Jury. Appellant had initialed this on the sentencing sheet at the direction of his attorney. However, on the record, Appellant asked the plea judge to explain what charges he was waiving presentment on. The plea judge said that it was the charge of malicious injury to courthouse or jail. The plea judge did not mention the escape charge in response to Appellant's very specific question, and Appellant never waived presentment on the record as to that charge. The only charge for which he waived indictment on the record was the charge of malicious injury to courthouse or jail.

The South Carolina Supreme Court addresses the issue of the sentencing sheet in State v. Smalls. State v. Smalls, 364 S.C. 343, 613 S.E.2d 754 (2005). There, Smalls

pled guilty to ABHAN, a charge which he was not indicted on. Id. at 345. Smalls signed the sentencing sheet and indicated on the sheet that he was waiving presentment of the indictment. Id. at 346. This court held that signing the sentencing sheet constituted as a "written waiver of presentment." Id. at 347.

Like Smalls, Appellant did initial waiving presentment on the escape charge on the sentencing sheet. However, like Boan, this written statement conflicted with what the judge said orally from the bench. Smalls does not state what the record said during his guilty plea. Here, there is a transcript. It shows that Appellant specifically asked the judge which charges he was waiving presentment on, and it shows that the judge's response did not include the escape charge.

Had Appellant understood what he initialed on the sentencing sheet, he would not have needed to ask the judge for clarification during the plea. In Boykin v. Alabama, the United States Supreme Court said that presuming waiver from a silent record is not permissible. "The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." Boykin v. Alabama, 395 U.S. 238, 242 (1969) quoting Carnley v. Cochran, 369 U.S. 506, 516 (1962).

Appellant did not waive presentment on the escape charge. He initialed the sentencing sheet but then, during the plea hearing on the record, asked the judge what he was waiving. The judge responded malicious injury to courthouse or jail, and the Appellant agreed only to waive presentment on the malicious injury to courthouse or jail charge. Appellant's questions to the Court about what specifically he was waiving

demonstrate that the Appellant did not waive presentment on the escape charge, and therefore Appellant's escape conviction should be vacated.

CONCLUSION

Appellants two burglary second degree subsection (B) convictions and his escape conviction should be vacated. Appellant did not waive presentment on any of these convictions. DeJong was ineffective for failing to object to the amendment of Appellant's charges to a charge that is neither a lesser-included offense nor a charge that Appellant was indicted on, and Appellant did not waive indictment on the escape charge. Therefore, these convictions should be vacated and a new trial granted.

THE STATE OF SOUTH CAROLINA
SUPREME COURT

APPEAL FROM PICKENS COUNTY

R. Knox McMahon Circuit Court Judge

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Eli Torrence #00356338, Petitioner,

v.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I certify that I have served the Petition for Writ of Certiorari to the following recipient by depositing a copy of it in the United States Mail, postage prepaid, on December 12, 2016, addressed to:

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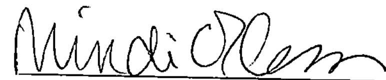

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