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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Spartanburg County

Honorable Grace Gilchrist Knie, Circuit Court Judge

CALVIN TERRELL WILLIAMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001839

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in denying relief, where two prior federal crimes were used against Petitioner to sentence him to life imprisonment without the possibility of parole, where the state served notice that it was seeking life without the possibility of parole, where those two crimes did not qualify as predicate offenses, and where trial counsel failed to object to the sentence of life without the possibility of parole?

STATEMENT

A Spartanburg County grand jury indicted Petitioner on the charges of armed robbery and bank robbery on April 30, 2015. Supplemental Appendix 1 – 2. He was also indicted on bank robbery and accessory before the fact to bank robbery in May 2016. App. 549 – 550. He proceeded to trial before the Honorable Roger L. Couch and a jury on June 6, 2016. App. 1. Barry Barnette served as the solicitor, and Matthew Shealy represented Petitioner.

After a three-day trial, the jury found Petitioner guilty entering a bank with the intent to steal. App. 355 l. 24 – App. 356 l. 3. The state had served a notice of life sentence pursuant to S.C. Code Ann. § 17-25-45(a), and Judge Couch sentenced Petitioner to life. App. 356 l. 17 – App. 359 l. 13; App. 368 ll. 11 – 16. Petitioner's sentence was affirmed. State v. Williams, Op. No. 2017-UP-395 (S.C. Ct. App. filed October 18, 2017).

Petitioner filed a timely application for post-conviction relief ("PCR") on January 8, 2018. App. 370 – App. 399. It contained allegations of ineffective assistance of counsel, including the claim that trial counsel was ineffective for failing to object to the notice of life without parole. App. 377. The state made its Return on or about April 18, 2018. Ap. 401 – 407.

An evidentiary hearing took place before the Honorable Grace Knie on June 18, 2018. App. 408. Susannah Ross represented Petitioner, and Megan Jameson and Jordan Cox appeared on behalf of the state. Petitioner, Petitioner's son, trial counsel, and the solicitor testified at the hearing. The PCR court took the matter under advisement and requested post-hearing memoranda. App. 506 l. 7 – App. 507 l. 10. Both parties submitted memoranda. App. 509 – 525.

Judge Knie signed an Order of Dismissal closely resembling the state's memorandum which was filed on August 7, 2018. She found that trial counsel "cannot be deemed

constitutionally ineffective for failing to challenge his sentence" because Petitioner "was properly noticed, served, and sentenced to life without the possibility of parole pursuant to S.C. Code Ann. § 17-25-45." App. 533.

Counsel for Petitioner filed a Motion to Alter or Amend the Judgment on August 17, 2018. App. 538 – 539. The state filed a Return to the Motion on or about September 21, 2018. App. 540 – App. 544. An Order Denying Applicant's Motion to Alter or Amend the Judgment closely resembling the state's Return was filed on September 29, 2018. App. 545.

A Petition for Writ of Certiorari and accompanying Appendix were filed on May 6, 2019. A Supplemental Appendix was filed on August 14, 2019. The state filed its Return on September 20, 2019. This Court granted certiorari on September 27, 2021.

This Brief of Petitioner follows.

STANDARD OF REVIEW

Appellate courts defer to a PCR court's findings of fact and will uphold them if there is any evidence of probative value in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, if there is no evidence to support the PCR court's ruling, this Court will reverse. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000) (citation omitted). Questions of law are reviewed de novo, with no deference to trial courts. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018); Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

ARGUMENT

The PCR court erred in denying relief, where two prior federal crimes were used against Petitioner to sentence him to life imprisonment without the possibility of parole, where the state served notice that it was seeking life without the possibility of parole, where those two crimes did not qualify as predicate offenses, and where trial counsel failed to object to the sentence of life without the possibility of parole.

Relevant facts

The facts giving rise to Petitioner's arrest as alleged by the state at trial were as follows: Petitioner's sixteen year old son, Shyquone Williams (hereinafter "Shyquone"), went into a BB&T bank in Spartanburg, South Carolina on January 22, 2015. He handed the teller a handwritten note that read:

> This is an armed robbery. This is an armed bank robbery. I demand $40,000 in large bills with no bands around the money. No dye packs. No bait money. No tracking devices. I want all the money placed in my book bag. No silent alarms. If you obey me nobody will get hurt.

App. 166 l. 13 – 171, l. 4. Because there was no book bag, the teller put approximately two thousand dollars in envelopes, along with a dye pack, and gave it to Shyquone. App. 173, l. 18 – 175, l. 9. The defense's theory of the case was that Shyquone acted alone in robbing the bank and lied to Petitioner about his need to go to the bank to pick up money from someone that day. App. 162, l. 1 – 163, l. 22.

After his initial arrest, Shyquone repeatedly denied that his father had any involvement in the bank robbery. App. 198, ll. 11-16; App. 199, l. 23 – 201, l. 12. However, he eventually told the police that the robbery was Petitioner's idea, that Petitioner told him how to write the demand note, and that Petitioner procured their ride to the bank. App. 188, l. 17 – 195, l. 16;

App. 198, ll. 17-25. Shyquone admitted that he walked from the van where Petitioner and the driver were waiting and robbed the bank. On his way back to the van, the red dye pack in the money exploded. App. 195, l. 17 – 196, l. 3. When he got to the van, Petitioner asked Shyquone whether he "had it" and Shyquone responded "no, he wasn't there." App. 196, ll. 4-7. The driver dropped them off near Quail Pointe apartments, where they were later apprehended by police. Shyquone claimed that Petitioner threw Shyquone's stained clothing into the bushes and gave him an orange hoodie to wear. App. 196, l. 20 – 198, l. 10. Bobby Turner, an officer with the Spartanburg County Sheriff's Office, detained Petitioner shortly thereafter. App. 278 l. 9 – 279 l. 24.

Prior convictions

At trial, the state sought to introduce some documents related to Petitioner's federal pleas, both under Rule 404(b), SCRE and to substantiate its life without parole ("LWOP") notice. App. 45 l. 4 – App. 46 l. 4; App. 101 l. 3 – App. 102 l. 3; App. 133 ll. 5 – 10. Prior to opening statements, the state elicited testimony from James Lannamann, a retired FBI agent, regarding two prior alleged bank robberies which supposedly involved Petitioner. App. 47 – 84. As Lannamann began offering details regarding one of the two previous incidents, trial counsel objected:

> Objection, Your Honor. I don't believe he has any personal knowledge as to this. It's all hearsay. I think this is when I'm going to object. He has no personal knowledge. There's a foundation problem, judge. I just believe these are conclusions of whose - - this will be impermissible opinion testimony.

App. 49 ll. 20 – 25.

In response, the solicitor provided Lannamann a copy of Court's Exhibit 1, a two-count indictment. App. 50 ll. 17 – 24. According to Lannamann, that indictment alleged conduct from

an August 7, 2003 and an August 12, 2003 robbery.[1] App. 48 l. 14 – App. 51 l. 10. The sentences on both were crafted to run concurrently. App. 51 ll. 22 – 24. Lannamann testified that Petitioner's guilty plea regarding those offenses occurred on October 30, 2003. App. 52 l. 24 – App. 53 l. 4.

As the solicitor again began questioning Lannamann about specific facts regarding the alleged robberies, particularly as to whether Petitioner entered the bank(s), trial counsel again objected. App. 53 l. 20 – App. 56 l. 16. The trial judge indicated he wanted to know what evidence the FBI reviewed during its investigation. Id. After another objection, the trial judge ruled:

> He is testifying as to what investigations he did and what steps he took. At this point in time I'm not necessarily gonna find that this is being offered for the truth of the matter asserted. You asked for a foundation. He has to state what he did in order to investigate the claims to lay a foundation.

App. 57 ll. 10 – 15.

As to the second alleged robbery, a woman named Anastasia Pitts entered a bank "with a demand note that threatened explosives," according to Lannamann. App. 60 ll. 3 – 6. Lannamann did not testify that Petitioner went into the bank. Following further objections and a back-and-forth with the solicitor, the trial judge admitted he did not know "exactly what [Petitioner] signed in connection with this guilty plea in Federal Court." App. 66 ll. 24 – 25.

The solicitor then provided a document that was marked Court's Exhibit 2, grand jury information. App. 67 l. 18 – App. 68 l. 24. Court's Exhibit 3 was a similar document. App. 69

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[1] Regarding the latter which supposedly occurred at a First Citizens Bank, the trial judge noted "there's no statement of fact other than a robbery occurred, [another individual] participated in it, and this defendant may have been somehow involved, but it doesn't really outline that involvement." App. 132 ll. 10 – 14.

l. 18 – App. 71 l. 3. Court's Exhibit 4 was an incident report from the Spartanburg Department of Public Safety for the August 7, 2013 alleged robbery. App. 71 l. 21 – App. 72 l. 21.

According to Lannamann, Bradley Bennett represented Petitioner on the federal charges. App. 74 ll. 23 – 24. The Honorable Henry M. Herlong, Jr. presided over the guilty plea. App. 74 l. 25 – App. 75 l. 1. Petitioner was sentenced to 125 months' incarceration. App. 51 ll. 3 – 24.

On cross-examination, Lannamann read the two-count indictment. App. 77 l. 2 – App. 78 l. 9. He indicated that he "may [have] read the plea agreement 13 years ago" but could not recall. App. 79 ll. 16 – 25. The trial judge suggested that the solicitor attempt to obtain the plea agreement: "I'll leave it open, Mr. Barnette. If you can obtain the plea agreement. Generally the plea agreement would set out a factual basis for the plea." App. 99 ll. 16 – 19.

The following morning the state submitted Court's Exhibit 6, a federal court opinion regarding an appeal by Petitioner. App. 101 ll. 11 – App. 102 l. 3. The state then called Dean Cook, a sentencing guidelines specialist at the Federal Probation Office, who also testified *in camera* regarding the prior pleas. App. 102 – 121. The presentencing report was entered as Court's Exhibit 5 over an objection that the records did not qualify as public record or report under SCRE 803(8). App. 103 l. 22 – App. 105 l. 24.

The presentencing report contained the pretrial services adjustment section, the offense conduct, and the charges and convictions. App. 110 ll. 1 – 5. Regarding the admissibility of the prior plea information at trial, trial counsel argued:

> [I]t doesn't set out what my client allegedly did or didn't do. We have an indictment. That is what my client pled guilty to. That doesn't set out sufficient facts. We don't know what my client claims he did or did not do. I don't believe that there's any competent evidence.

App. 126 ll. 5 – 10. The solicitor, in turn, noted that "Judge Herlong released it. I mean this is information he released by the judge himself. So, to me, there's no question, question we've met

the clear and convincing part of it." App. 127 ll. 13 – 17. The trial judge expressed concern about one of the former offenses "since it's not described in detail in the document," and indicated that he would "be listening to hear the similarities that might exist between these events" during the state's case-in-chief. App. 140 ll. 1 – 13.

Interestingly, Judge Herlong recalled the federal documents on the third day of Petitioner's trial. App. 291 – 293. Dean Cook, who testified pre-trial, was ordered "not to testify or say anything in Court." Id. The solicitor moved to withdraw Court's Exhibit 5 "per Court Order by the Federal Court." Id. The solicitor indicated that the decision "came from Washington." App. 293 ll. 6 – 7.

After the jury's verdict was read, the trial court recognized defense counsel as sentencing began. App. 356 ll. 20 – 22. In response, counsel simply stated: "Your Honor, we have nothing to say." Id. Regarding two prior bank robberies which the solicitor suggested qualified as most serious offenses, defense counsel articulated: " I don't think we can argue that .. he was not convicted of those two prior armed bank robberies. This would be - - these are serious offenses. We have no legal basis for objection to that." App. 359 ll. 10 – 13. As noted, Petitioner was sentenced to life without the possibility of parole. App. 368 ll. 11 – 16.

Post-conviction relief proceedings

Petitioner's PCR application contained an allegation that trial counsel was ineffective for failing to challenge the LWOP notice. App. 377 – 379. He similarly contended that counsel was ineffective for failing to investigate the seriousness of his prior offenses under the LWOP statute. Id.

At the PCR evidentiary hearing on June 18, 2018 before Judge Knie, Petitioner noted how his previous charges do not qualify to enhance his sentence. App. 414 l. 21 – App. 416 l.

25. Petitioner seemingly discovered this fact on his own, as trial counsel never discussed S.C. Code Ann. § 17-25-45 with Petitioner nor showed him a copy of the statute. App. 417 ll. 8 – 11. Petitioner admitted to pleading guilty to two federal bank robbery charges. App. 430 ll. 7 – 12. He served "a little over ten years in federal prison for those sentences." Id. Petitioner was served with the state's notice to seek life without parole based on those convictions while he was in the county jail, without access to legal resources. App. 430 ll. 17 – 23.

Trial counsel testified that he was appointed to represent Petitioner. App. 452 ll. 20 – 23. Regarding the life without parole (LWOP) notice, trial counsel confirmed that Petitioner was served. App. 457 ll. 3 – 10. He opined that the two federal armed bank robberies which Petitioner pleaded guilty to served as the qualifying offenses. Id. When asked what research he performed, trial counsel testified that he looked at the statute and then looked at the elements of the indictments. App. 457 ll. 11 – 22. He claimed that the elements of the federal indictments were that there was a taking of money from the person of another while armed with a deadly weapon which he equated to armed robbery in South Carolina. Id. Trial counsel, seemingly displaying a misunderstanding as to the specific elements of each statute, testified that he did not see where a legal argument could be made:

> And the elements of those [federal] indictments are that there was a taking of money from the person of another while armed with a deadly weapon, which is, in our State, armed robbery.
>
> And so those are most serious - - and an, an armed robbery is a most serious offense under our statutes. So, in my opinion, you know, I would, I would love to have challenged something, but I have to have a good faith basis to believe that the challenge is going to be somewhat successful. I can't just argue things cause they're fun to argue.
>
> Those are black letter armed robberies. I mean they just are. Even though they don't carry these same penalty section, I mean they're not 30 year charges in our State, they are still - - the elements count as armed robbery. And so I just - - he had two most serious offenses on his record. This would [have] been a serious.

App. 457 ll. 19 – App. 458 l. 10.

Counsel testified that he explained the above to Petitioner but did not go over the specific statutory provisions. App. 458 ll. 11 – 15. On cross-examination, trial counsel agreed that the federal indictments used the language "dangerous weapon and device" versus "deadly weapon" in S.C. Code Ann. § 16-11-330. App. 470 l. 21 – App. 472 l. 19. Counsel admitted that he never required the state to put up a witness during sentencing or challenged the life without parole notice. App. 473 ll. 13 – 23. Counsel eventually agreed that he should have forced the state to produce a witness regarding the prior offenses. App. 477 l. 2 – App. 478 l. 7. He remarked that he should have objected to the state making the indictments a court's exhibit. App. 478 l. 16 – App. 479 l. 7. Further, he did not bring up the discrepancy in elements. App. 473 l. 24 – App. 474 l. 7.

At the evidentiary hearing, the solicitor reiterated Judge Herlong recalled the federal bank robbery documents:

> I contacted the U.S. Attorney's Office. They gave me the information concerning the offenses. At first we had the FBI agent testify that actually worked the cases that then - - we needed additional information, according to Judge Couch.
>
> I contacted Dean Cook, which is one of the probation officers at that time. He's now an attorney here in our circuit. At that time, he was a, a probation agent for them.
>
> ... I was getting ready - - went out for lunch, and I got a phone call from Mr. Cook saying you cannot use any of the documents. Judge Herlong has ruled that he is gonna take the documents back. I've never had this situation happen in my career, and hopefully it will never happen again.
>
> So I had to go down and I let Mr. Shealy know. We went back in chambers, and told him that I had to make a motion to withdraw all those items, and they had to be returned back to Mr. Cook, and they had to be returned back to the U.S., to the U.S. Courts, which we did, and obviously, none of that was mentioned in front of the jury. It was in pretrial motions.

App. 484 l. 18 – App. 485 l. 22. The solicitor confirmed that the prior plea documents were removed from the record. App. 496 ll. 4 – 8.

The PCR court took the matter under advisement, and the parties submitted additional written memoranda. App. 506 ll. 7 – 25; App. 509 – 524. The PCR court's Order of Dismissal was filed soon thereafter. App. 526 – 537. Regarding the LWOP issue in particular, the PCR court outright concluded that the elements of the federal offense matched South Carolina's armed robbery statute:

> In the present case, [Petitioner] previously pled guilty on October 31, 2003, before the Honorable Henry M. Herlong, Jr., United States District Judge, to two counts of armed bank robbery pursuant to 18 U.S.C. § 2113 (a) and (d). These charges stemmed from two instances that occurred on August 7, 2003 and August 12, 2003, wherein [Petitioner] and co-defendants did rob two separate banks with the use of a dangerous weapon or device (an explosive). When comparing the element[s], it is clear that [Petitioner's] federal armed bank robbery convictions pursuant to 18 U.S.C. § 2113 (a) and (d) [ ] equate to the 'most serious' offense of armed robbery in South Carolina. (S.C. Code Ann. §16-11-330(A)). Therefore, the State properly sought to enhance [Petitioner's] sentence as armed robbery is classified as a 'most serious' offense under the statute. S.C. Code Ann. § 17-25-45(C)(1).

App. 530 – 531.

The PCR court did not perform an extensive analysis; rather, it concluded, in summary fashion, that the elements were identical. Curiously, the PCR court assigned a credibility finding as to both trial counsel and the solicitor's personal opinions that Petitioner was "properly sentenced pursuant to [the LWOP statute] because his federal convictions for armed bank robbery were the legal equivalent of armed robbery." App. 530.

Counsel for Petitioner filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRCP. The motion dealt solely with the LWOP issue; Petitioner refuted the PCR court's findings that trial counsel and the solicitor "compared the factual background and elements of [Petitioner's]

federal bank robbery convictions before using them as enhancing charges." App. 538. As correctly stated by PCR counsel

> The mere fact that Mr. Williams [pled] guilty to indictments charging violations of the Federal Bank Robbery and Incidental Crimes statute 18 U.S.C. Sec. 2113 does not amount to admission to armed robbery under S.C. Code Ann. § 16-11-330(A) because the Federal charge does not require that a defendant actually be armed or allege to be armed by action or words while using a representation of a deadly weapon like the State charge does.

App. 539.

The state filed a Return to the motion. App. 540 – 543. The Order Denying Applicant's Motion to Alter or Amend the Judgment closely mirrored the state's Return. App. 545 – 548.

Discussion

The LWOP notice was improper, as the predicate offenses did not qualify as suitable convictions such that Petitioner's sentence could be enhanced. The PCR court erred in concluding that "[Petitioner's] two prior convictions for armed bank robbery ... were the legal equivalent of the statutory offense of armed robbery in South Carolina." App. 529 – 530. This was a legal conclusion, subject to *de novo* review by this Court. As will be discussed below, the federal bank robbery statute is distinguishable from armed robbery in South Carolina.

South Carolina's life without parole statute

Upon conviction of a serious offense, a person must be sentenced to LWOP if the person has two or more prior convictions for a serious offense. S.C. Code Ann. § 17–25–45(B). When a prior conviction is for an offense not found in § 17–25–45, trial judges can look to the elements of the prior offense to determine if they are equivalent to the elements of an offense found in the statute for purposes of sentence enhancement. See State v. Lindsey, 355 S.C. 15, 583 S.E.2d 740 (2003); State v. Washington, 338 S.C. 392, 526 S.E.2d 709 (2000). In seeking an LWOP sentence based upon S.C. Code Ann. § 17-25-45, the state bears the burden of establishing

defendant's convictions for serious or most serious offenses. State v. Johnson, 350 S.C. 543, 547-48, 567 S.E.2d 486, 488 (Ct. App. 2002).

In State v. Phillips, the South Carolina Supreme Court reviewed this Court's 2011 opinion. 400 S.C. 460, 734 S.E.2d 650 (2012). Regarding the elements comparison test that is to be conducted by the trial judge, the South Carolina Supreme Court noted "[t]he Court of Appeals did not err in determining the State failed to meet its burden of proving respondent burned a school facility" in a case where the state sought a LWOP sentence. This Court analyzed Phillips' 1979 conviction for burning against the second degree arson statute. The South Carolina Supreme Court summarized:

> The Court of Appeals found respondent's 1979 conviction for burning did not contain the same elements as the second-degree arson statute and thus did not qualify as a serious offense for LWOP purposes. The Court of Appeals determined the two statutes contained many of the same elements but differed in identifying the type of building harmed.

Id. at 463, 734 S.E.2d at 651.

Although the Supreme Court disagreed with this Court's interpretation of particular details within the arson statute, the Supreme Court nonetheless concluded that this Court "properly concluded the 1979 conviction should have not been used for sentence enhancement purposes under S.C. Code Ann. § 17-25-45.

This Court's opinion in State v. Phillips explored the General Assembly's restructuring of the arson statutes in 1982. 393 S.C. 407, 415, 712 S.E.2d 457, 461 (Ct. App. 2011), aff'd as modified, 400 S.C. 460, 734 S.E.2d 650 (2012). As a result of analyzing seemingly tedious arson statutes from over the years, this Court reversed the trial court's determination that Phillips' 1979 conviction for burning contained the same elements as the 2007 second-degree arson statute and therefore qualified as a serious offense for sentence enhancement purposes. Id.

at 416, 712 S.E.2d at 462. This Court expressly stated that the state "failed to prove Phillips was convicted of those elements belonging to second-degree arson." Id. at 417, 712 S.E.2d at 462.

In State v. Washington, 338 S.C. 392, 526 S.E.2d 709 (2000), the South Carolina Supreme Court undertook a similar analysis regarding burglary statutes. Washington argued that the state could not use his prior convictions for common law burglary and housebreaking to seek a life sentence without parole because those offenses were not specifically listed in S.C. Code Ann. § 17-25-45. Id. at 397, 526 S.E.2d at 711. The Supreme Court disagreed. Id. Following a brief discussion on the legislative history of burglary, the Court held:

> The elements of common law burglary now constitute burglary, first degree under section 16-11-311(A)(3). In other words, common law burglary is **legally the equivalent** of burglary, first degree.

Id. (emphasis added).

The Supreme Court held the trial court properly ruled that the prior conviction would constitute a "most serious" offense because it contained the same legal elements as burglary, first degree, as was contained within the LWOP statute. Id. at 397-98, 526 S.E.2d at 711.

Our Supreme Court also wrestled with a similar question in State v. Lindsey, 355 S.C. 15, 583 S.E.2d 740 (2003). In that instance, the Court examined whether Lindsey's 1976 rape conviction "necessarily fell into the category of a first or second degree CSC, so as to be considered a 'most serious' offense." Id. at 17, 583 S.E.2d at 740. The question facing the Court was "whether Lindsey's 1976 rape conviction **necessarily** contains all the elements of the 'most serious' CSC offenses specified" within the LWOP statute. Id. at 18-19, 583 S.E.2d at 740 (emphasis in original). The Court noted how the record was devoid of details:

> Here, there is no evidence in the record containing Lindsey's 1976 rape conviction. The only indication concerning that conviction is a form indictment, which gives no details of the facts or circumstances concerning the rape. Accordingly, the 1976 rape may have fallen into the category of third degree

> CSC, involving a sexual battery using force or coercion, but without aggravating circumstances. Since third degree CSC is not a 'most serious offense' for which ha life sentence may be imposed pursuant to § 17-25-45, we find Lindsey's 1976 rape conviction, absent evidence it involved aggravated force or coercion, insufficient to warrant application of the recidivist statute. Accordingly, the LWOP sentence is reversed and the matter remanded for resentencing.

Id. at 19-20, 583 S.E.2d at 742.

Six years ago, the United States District Court, District of South Carolina issued a thorough opinion on a situation like Petitioner's. Bowers v. McFadden, 153 F.Supp.3d 875 (2015). In that instance, Judge Gergel granted Bowers' petition for a writ of habeas corpus where trial counsel conceded that the common law crime of assault with intent to ravish was the legal equivalent to assault with intent to commit criminal sexual conduct. This Court had presciently noted in its unpublished opinion at the PCR appeal stage how Bowers could potentially seek relief through habeas corpus. Bowers v. State, Op. No. 2013-UP-272 (S.C. Ct. App. filed June 19, 2013).

In Bowers, the state sought to use a 1976 assault with intent to ravish conviction to secure a mandatory sentence of LWOP following a 2004 armed robbery indictment. Id. at 879. Trial counsel "responded that he was satisfied that the common law offense of assault with the intent to ravish was 'the same basically' as assault with intent to commit criminal sexual conduct first or second degree." Id. Bowers was sentenced to LWOP. Id.

The District Court examined the two offenses as well as the Lindsey case, supra. Id. at 879-80. The Court noted:

> [I]t is obvious that Petitioner's criminal trial counsel erred when he stated that Petitioner's prior assault with intent to ravish 'was the same offense, basically' as the crimes of assault with intent to commit criminal sexual conduct first or second offense. State criminal trial counsel could have avoided this error of law on this critical issue by performing one or both of these relatively simple tasks: (1) reviewing the common law definition of assault with intent to ravish as previously defined by the South Carolina Supreme Court in published decisions and

> comparing it with the statutory definition of assault with intent to commit criminal sexual conduct first or second degree and/or (2) reading the South Carolina Supreme Court's 2003 decision in State v. Lindsey, then the most recent decision of the state's highest court interpreting the two strike law. State trial counsel's failure to perform these basic research tasks when his client faced a potential sentence of LWOP falls below an objectively reasonable professional standard.

Id. at 880.

Ultimately, after exploring Phillips, supra, and the extent of what a court can review[2] in a case such as this one, the District Court concluded "counsel's error of law created a substantial likelihood that had Petitioner's trial counsel properly presented to the sentencing court the disparity between the elements of [the two offenses] and/or brought to the sentencing court's attention the South Carolina Supreme Court's decision the year before in State v. Lindsey, Petitioner would not have been sentenced to LWOP." Id. at 883.

Petitioner's situation in the matter *sub judice* is no different. Counsel should have conducted an elements comparison test in order to gain an understanding of the disparity. Furthermore, he should have brought Lindsey to the trial judge's attention. The failure to do so constituted ineffective assistance of counsel.

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2 The Ninth Circuit has held that pre-sentence reports, such as the one the state initially relied on as Court's Exhibit 5, is "insufficient evidence of facts of a divisible offense." See Lara-Chacon v. Ashcroft, 345 F.3d 1148 (9th Cir. 2003); See also Hernandez-Martinez v. Ashcroft, 343 F.3d 1075, 1076 (9th Cir. 2003) (holding that a PSI report is insufficient to prove that a conviction embodied every element of an enumerated offense (citing United States v. Corona-Sanchez, 291 F.3d 1201, 1212 (9th Cir. 2002) (*en banc*).

Robbery while armed with deadly weapon | S.C. Code Ann. § 16-11-330

In South Carolina:

> A person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty of a felony and, upon conviction, must be imprisoned for a mandatory minimum of not less than ten years or more than thirty years, no part of which may be suspended or probation granted.

S.C. Code Ann. § 16-11-330(A).

Under this section, the state may prove armed robbery by establishing the commission of a robbery and either one of two additional elements: (1) that the robber was armed with a deadly weapon or (2) that the robber alleged he was armed with a deadly weapon, either by action or words, while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon. State v. Dodd, 354 S.C. 13, 579 S.E.2d 331 (Ct. App. 2003); see also State v. Muldrow, 348 S.C. 264, 267-68, 599 S.E.2d 849 (2002).

Under Muldrow, words alone are not sufficient to establish a representation of a deadly weapon, for purposes of the armed robbery statute. 348 S.C. at 268-69, 849-50. "[T]he State must still show evidence corroborating the allegation of being armed, *i.e.*, the use of a physical representation of a deadly weapon, to establish the armed robbery." Id. at 269, 559 S.E.2d at 850. The South Carolina Supreme Court held this Court "erred in finding the evidence in this case meets all the elements of armed robbery under S.C. Code Ann. § 16-11-330(A) since there is no evidence of a deadly weapon or physical representation of a deadly weapon." Id. Similarly, here the federal bank robbery statute does not require the use of a deadly weapon. Stated differently, an individual charged with armed robbery in South Carolina could possibly be

acquitted if armed only with a dangerous weapon; the deadly weapon requirement sets this offense apart from the federal charge. "[I]t is the use or alleged use of a deadly weapon that distinguishes armed robbery from robbery, and the employment of force or threat of force that differentiates a robbery from a larceny. State v. Moore, 374 S.C. 468, 477-78, 649 S.E.2d 84, 88 (Ct. App. 2007).

A "deadly weapon" is generally defined as any article, instrument, or substance which is likely to produce death or great bodily harm. State v. Scurry, 322 S.C. 514, 517, 473 S.E.2d 61, 63 (Ct. App. 1996). "Deadly weapon" is not defined in the *Definitions* code section within Title 16, Chapter 11, Article 5. S.C. Code Ann. § 16-11-310.

Entering a bank with intent to steal | S.C. Code Ann. § 16-11-380

"It is unlawful for a person to enter a part or part of a building occupied as a bank, depository, or building and loan association with intent to steal money, securities for money, or property, either by force, intimidation, or threats." S.C. Code Ann. § 16-11-380(A). Although the PCR judge did not find that this provision was identical to the federal bank robbery statute, the state posits that it is sufficiently similar to federal bank robbery. This assertion lacks merit.

This statute outlaws entering a bank with the intent to steal; section (A) does not criminalize the actual taking.[3] The federal bank robbery statute criminalizes the actual taking or attempted taking. Under state law, the crime is committed when the person *enters* the building with the intent to steal. Under federal law, the crime occurs when the money is taken. As such, the two are not entirely comparable.

Additionally, there is no requirement in § 16-11-380 that the person be armed. As will be explored below, Petitioner was convicted of 18 U.S.C.A. § 2113(d) which includes an additional

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[3] By comparison, S.C. Code Ann. § 16-11-380(B) makes it unlawful for a person "to steal money" from a person who has just finished using a bank.

element not present in South Carolina's entering a bank statute. Thus, there is a categorical "elements mismatch" such that this statute is not **legally the equivalent** of armed federal bank robbery.

Bank robbery | 18 U.S.C.A. § 2113

According to a witness at Petitioner's trial, the two previous federal offenses were "in violation of Title 18, United States Code Section 2113(a), 2113(d)(2). App. 77 l. 2 – App. 78 l. 9. The federal offense, bank robbery (18 U.S.C.A. § 2113) to which Petitioner pled is not specifically listed within the LWOP statute, S.C. Code Ann. § 17-25-45.

Regarding the August 7, 2003 alleged conduct, the indictment contended:

> [I]n the District of South Carolina, the defendants, Aderian Jawone Fair and [Petitioner], with force, violence, and intimidation, did take from the person and presence of employees at Central Carolina Bank... money belonging to and in the care, custody, control, management, and possession of said financial institution... and the committing said [ ] violation did assault and put in jeopardy the lives of other persons by the use of a dangerous weapon and device, that is explosives, and did aid and abet each other in the commission of the aforesaid offense.

App. 77 ll. 5 – 17.

The government made similar allegations under the same federal statutory provision arising out of conduct on August 12, 2003:

> [I]n the District of South Carolina, [Petitioner], and a person known to the Grant Jury, by force, violence, and intimidation, did take from the person and presence of employees of First Citizens Bank ... money belonging to and in the care, custody, control, management, and possession of said financial institution... and in committing said violation did assault and put in jeopardy the lives of other persons by the use of a dangerous weapon and device, that is explosives, and did aid and abet each other in the commission of aforesaid offense.

App. 77 l. 21 – App. 78 l. 8.

The text of 18 U.S.C.A. § 2113(a) is as follows:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by

> extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny--
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C.A. § 2113.

Additionally, the maximum sentence is five years longer if certain requirements are proven:

> Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

18 U.S.C.A. § 2113(d).

The federal Sentencing Guidelines define a dangerous weapon as "an instrument capable of inflicting death or serious bodily injury" or an object closely resembling such an instrument. See USSG § 2A2.2 cmt. n.1. (looking to USSG § 1B1.1 cmt. n. 1(D)).

In the matter at bar, the state seemed to admit that the federal offenses were *only similar*, rather than identical, to South Carolina's armed robbery statute. At the PCR evidentiary hearing, counsel for the state argued:

> [T]he State submits that these federal armed bank robberies, and armed is the important word here, meet the qualifications for 17-25-45. It's one of the enumerated offenses. It's, it's most similar - - it is similar when you look at the elements test, which is what Solicitor Barnette was required to do when, when deciding to serve the LWOP notice, and in the Court in determining whether the LWOP notice was proper. Armed robbery is one of those enumerated offenses.

App. 501 ll. 7 – 17.

Contrasting the offenses

Neither armed robbery nor entering a bank with the intent to steal are the legal equivalent of the federal bank robbery statute. There exists an "elements mismatch" between the offenses such that the LWOP sentence is improper in this case, and trial counsel should have objected accordingly.

South Carolina has long recognized the principle that penal statutes are to be strictly construed. State v. Germany, 216 S.C. 182, 57 S.E.2d 165, 168 (1949) ("[A] criminal statute must be strictly construed against the State and any doubt must be resolved in favor of the defendant..."); State v. Lewis, 141 S.C. 207, 211, 139 S.E. 386, 389 (1927) ("This is a penal statute, and must be strictly construed."); State v. Dupree, 354 S.C. 676, 693, 583 S.E.2d 437, 446 (Ct. App. 2003) ("Penal statutes are strictly construed against the State and in favor of the defendant.").

In People v. Brown, a California appellate court concluded that the "inherently dangerous" nature of a weapon does not establish that it is a "deadly weapon." 210 Cal. App. 4th 1, 147 Cal. Rptr. 3d 848 (2012). California defined a deadly weapon as "any object, instrument, or weapon that is inherently deadly or dangerous or one that is used to cause death or great bodily injury."[4] Id. at 8-9, 147 Cal. Rptr. 3d at 853. The Brown opinion noted how some weapons do not fall into the deadly category while still being dangerous: "However, in a narrow category of cases, such as one involving, perhaps, a paintball marker or a slingshot, the distinction [between deadly and dangerous] could be critical." Id. at 11, 147 Cal. Rptr. 3d at 11.

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[4] As previously noted, a deadly weapon is generally defined as "any article, instrument, or substance which is likely to produce death or great bodily harm" in South Carolina. State v. Scurry, 322 S.C. 514, 517, 473 S.E.2d 61, 63 (1996).

The opinion discussed another California case, In re Bartholomew D., 131 Cal. App. 4th 317, 31 Cal. Rptr. 3d 728 (2005) wherein a juvenile had been convicted of a statutory provision outlawing use of a "deadly or dangerous weapon" after using a BB gun during a robbery. The Bartholomew D. court explained how the relevant statute used the words "dangerous or deadly" disjunctively. As a result, it disregarded the juvenile's argument there was insufficient evidence to find the BB gun a deadly weapon. Nonetheless, the two words have distinct meanings.

The Fourth Circuit has held that an unloaded, inoperable, or fake weapon may constitute a dangerous weapon for purposes of the armed bank robbery statute. United States v. Hamrick, 43 F.3d 877, 882-83 (4th Cir. 1995) (citing McLaughlin v. United States, 476 U.S. 16, 17-18 & n. 3 (1986)). Dangerous does not always mean deadly, however.

A number of weapons can be dangerous but not deadly. In addition to a paintball gun, a fencing sword, an airsoft gun, a plastic chair, a Wiffle bat, or a butter knife would not be likely to produce death or great bodily harm.

Trial counsel recognized the distinction between the offenses too late. Near the end of the evidentiary hearing, trial counsel concluded, repeatedly, that he should have objected to the state's attempt to have Petitioner sentenced to life in prison without parole:

> Well, my objection would [have] been they can't prove it. I mean, I think [PCR counsel is] right. I ... probably could [have] argued well, they need to prove that - - just like whatever - - a shoplifting case, a person is convicted of shoplifting third or subsequent, they have to prove those other two convictions. Now, that's very easy to do. Again, I think that Mr. Barnette would have been able to prove that, but, at a life without parole case, I probably should have made them prove it.

App. 479 l. 21 – App. 480 l. 8.

Had counsel delved into this issue as part of the adversarial process, he likely would have discovered the discrepancy. As correctly pointed out by PCR counsel, this is not the equivalent of armed robbery under S.C. Code Ann. § 16-11-330. App. 498 l. 20 – App. 499 l. 16.

Ineffective assistance of counsel

In order to prove counsel was ineffective, a PCR applicant must show: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id.

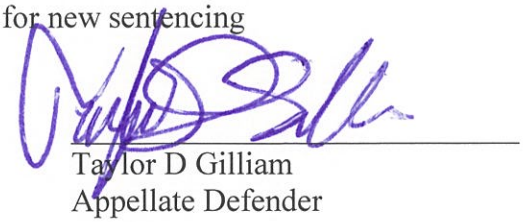
Trial counsel was ineffective for failing to object to the state's use of the prior offenses, especially where the documents had been recalled by the federal court. Based upon a comparison of the applicable statutes, the federal crime of bank robbery does not require a deadly weapon like South Carolina's armed robbery charge. Furthermore, the federal offenses are distinguishable from South Carolina's entering a bank with intent to steal law. Therefore, the two federal convictions cannot serve as the predicate offenses upon which a sentence of life without the possibility of parole is based.

As noted above, trial judges can look to the elements of the prior offense to determine if they are equivalent to the elements of an offense found in the statute for purposes of sentence enhancement. Because trial counsel acquiesced and failed to object, the trial judge was not prompted to analyze the elements. Had counsel objected, the scrutiny offered by PCR counsel at the evidentiary hearing could have been explored by the circuit court. The trial judge likely would have concluded that the offenses were different such that the prior federal charges could not be used to enhance Petitioner's sentence. This issue could then have been raised on direct appeal if necessary. However, because trial counsel failed to offer an objection or advance an argument against the LWOP notice, Petitioner was sentenced to life without parole, the improper

prior offenses notwithstanding. Trial counsel repeatedly objected to the admission of the federal plea materials when the argument was regarding prior bad acts, but he failed to object when the discussion shifted to sentencing. As admitted by trial counsel at the evidentiary hearing, he should have objected. Because he failed to do so, Petitioner was sentenced to life without the possibility of parole based on federal charges which do not qualify as most serious or serious offenses. Had he objected and convinced the trial judge of the correct conclusion—that these prior convictions were ineligible to enhance—Petitioner would not have received an LWOP sentence. As a result, he was prejudiced.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court reverse the denial of post-conviction relief and remand his case for new sentencing



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of November, 2021.