STATE OF SOUTH CAROLINA
In the Court of Appeals

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas
Grace G. Knie, Circuit Court Judge

Appellate Case No. 2018-001839

Calvin Terrell Williams,

Petitioner,

v.

State of South Carolina,

Respondent.

BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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PETITIONER'S 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?

RESPONDENT'S ISSUE PRESENTED

Trial counsel properly determined the two federal convictions meet the requirements to enhance Petitioner's sentence to life without parole and was not ineffective for failing to object.

STATEMENT OF THE CASE

Petitioner was indicted at the April 2015 term of the Spartanburg County Grand Jury for armed robbery and bank robbery (2015-GS-42-02312, Ct. II).[1] Matthew W. Shealy, Esquire (Counsel) represented Petitioner, and Solicitor Barry J. Barnette prosecuted the case. On June 6, 2016, Petitioner proceeded to trial before and a jury. The jury found Petitioner guilty as indicted on June 8, 2016. Pursuant to S.C. Code Ann. § 17-25-45, the presiding judge, Honorable Roger L. Couch, sentenced Petitioner to life imprisonment without the possibility of parole.

Petitioner appealed and represented by Laura R. Baer, Esquire. The appeal was dismissed by this Court pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Williams, Op. No. 2017-UP-395 (S.C. Ct. App. filed Oct. 18, 2017). The remittitur was issued on November 3, 2017.

Petitioner filed an application for post-conviction relief on January 8, 2018 (2018-CP-42-00057). Respondent made its return on April 18, 2018, and the Honorable Grace G. Knie presided over the evidentiary hearing held June 18, 2018. Judge Knie denied the application by written order dated August 6, 2018. Petitioner moved to alter or amend the judgment on August 17, 2018, and Respondent filed its return on September 24, 2018. Judge Knie denied the motion to alter or amend by order filed September 28, 2018.

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[1] Petitioner was additionally indicted for armed robbery (2015-GS-42-02312, Ct. I), and at the May 2016 term, accessory before the fact to felony bank robbery (2016-GS-42-02368). The armed robbery indictment was dismissed *nolle prosequi* prior to trial. The accessory indictment was dismissed *nolle prosequi* after the jury convicted Petitioner of bank robbery.

STATEMENT OF THE FACTS

Petitioner Williams planned and directed his sixteen year-old son to rob the Spartanburg BB&T. On January 22, 2015, his son, Shyquone, walked in the Spartanburg BB&T on W.O. Ezell Boulevard waited in line until summoned by the bank teller, and slid a note to the teller which 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. pp. 166-67; App. pp. 170-71. The teller thought Shyquone was scared, perhaps because he forgot the book bag. App. pp. 167-68; App. pp. 169-70; App. p. 171, ll. 2-4. The teller communicated to a coworker she was being robbed, placed $2,000 and a dye pack into bank envelopes, and then gave the "three or four bank envelopes" to Shyquone. App. p. 168, ll. 4-21; App. p. 175, ll. 23-25. After Shyquone left and the teller locked the doors, she saw the bank manager across the street returning from lunch as the dye pack detonated on Shyquone. App. pp. 168-69; App. p. 178, ll. 6-13.

The bank manager, testified he returned from lunch to see Shyquone walk out from the bank while red dye emanated from his clothes. App. pp. 179-83. The manager realized the man "probably just robbed the bank[,]" and saw the teller lock the bank doors. App. p. 183, ll. 2-7. Shyquone threw the stolen money beneath a nearby vehicle and ran away. App. pp. 183-84.

Shyquone testified he met Petitioner the day before the robbery. App. pp. 187-90. Petitioner proposed they rob a bank. App. p. 191, ll. 1-8. Shyquone stayed overnight, and the following morning, Petitioner declared it was the day to rob the bank. App. pp. 187-91. Foster dropped Shyquone off at his cousin's house, where he rested until Petitioner woke him. Petitioner wrote Shyquone a note and instructed him to copy it in his own handwriting. App. pp.

191-93; App. pp. 214-15. Petitioner and Shyquone walked from the house to Union Street, where they met a man driving a van who drove them to East Main Street. App. pp. 193-94. The van parked out of sight of the BB&T. App. pp. 215-16.

Shyquone followed his father's instructions: he walked to the bank, gave the note, received the money, and then walked outside. App. pp. 194-95. The dye pack exploded. Shyquone pushed the money out of his pocket, kicked it under a nearby car, and rushed to the van. App. pp. 195-96. Petitioner asked Shyquone if he had the money; Shyquone said no and they pulled off while Shyquone tried to conceal his red-dye stains from the unsuspecting driver. App. p. 196, ll. 4-19. The van driver refused to take them back to Union Street, and left them close to Quail Pointe Apartments instead. App. pp. 196-97. Shyquone exchanged his khaki pants, hoodie, and coat with Petitioner for an orange hoodie, and Petitioner tossed the dye stained clothes into the bushes. App. pp. 197-98. Law enforcement appeared and detained both father and son in the Quail Pointe parking lot. App. p. 198, ll. 3-10. Shyquone, afraid of his father and hoping to keep him out of trouble, initially told law enforcement he did not know his father and Petitioner had nothing to do with the robbery, but Shyquone ultimately confirmed Petitioner planned the robbery and told him what to do. App. pp. 198-200; App. p. 205, ll. 6-16; App. p. 207-08.

The van driver, Kenneth Blassingame, testified an acquaintance of his stopped him and advised "that these two young men was looking for a ride to go pick some money up and they would pay me." App. pp. 232-34, quote at App. p. 234, ll. 12-14; App. pp. 241-42. Blassingame explained he could take the men wherever they needed to go, but he would not be returning to that side of town and would not be able to bring them back. App. p. 234, ll. 14-18. Petitioner explained they were meeting with somebody at the bank to collect some money, and he could

give gas money in exchange for a ride. Petitioner, directed him to park on the other side of a gas station near the bank. App. pp. 234-36; App. p. 247, ll. 5-24. On a tight schedule, Blassingame questioned if the men saw the person from whom they were supposed to collect, and the younger of the two volunteered to see if he was there. App. p. 236, ll. 16-25. After about ten to fifteen minutes, the young man got back into Blassingame's vehicle and said the contact was not there. App. p. 237, ll. 1-12; App. p. 244, ll. 19-25. An impatient Blassingame told the men not to worry about the gas money – he needed to pick up his wife. He refused Petitioner's requests to make a return trip to where he picked them up, and instead dropped them off near an apartment complex. App. pp. 237-38. The younger man never said anything except when he left the van and when he returned; Blassingame primarily dealt with Petitioner. App. p. 238, ll. 11-22; App. pp. 240-41. Later that day, Blassingame learned the bank was robbed and told his wife about giving the men a ride. Police appeared at Blassingame's house and Blassingame explained his involvement. App. pp. 238-39.

Jason Moore and his fiancé Jalessa Burgess, sitting at a stoplight near the BB&T, saw a man cut "through the Jiffy Lube parking lot[,]" with red smoke trailing from him. App. pp. 221-22; App. pp. 226-27. Jason and Jalessa took a turn at the light and saw the young man hop into a "tannish gray" Pontiac minivan and leave. App. p. 222, ll. 12-22. Jalessa called 911, they followed the van. App. pp. 222-23. The van pulled into a gas station near the Quail Pointe Apartments and they saw two people hop out after the police drove by. App. p. 223, ll. 12-23. Jalessa directed law enforcement into Quail Pointe and reported one of the perpetrators changed into an orange hoodie. App. pp. 223-26.

Bobby Turner, of the Spartanburg County Sheriff's Office, was not far away from the BB&T when dispatch issued a BOLO in reference to the robbery, and reported the suspects were

last seen leaving a van at the Quail Pointe Apartments. App. pp. 277-79. Turner arrived to see one man wearing an orange hoodie with khaki shorts, and another man wearing a dark jacket with blue jeans. App. p. 279, ll. 1-8. Turner detained Petitioner while another officer detained Shyquone. App. p. 279, ll. 9-24. Petitioner carried a black book bag, empty but for a couple pairs of boxer shorts, and he denied Shyquone was his son. App. pp. 280-81; App. p. 282, ll. 10-13; App. p. 285, ll. 5-18; App. p. 286-87.

Sheriff's Deputy Courtney Burgess, investigated the crime scenes at the bank and at the Quail Pointe Apartments. App. pp. 250-51. The money stolen from the bank and the exploded dye pack were recovered from beneath a Dodge Ram pickup in the parking lot of the oil change shop. App. pp. 256-57. At the Quail Pointe Apartments, Burgess recovered "a pair of khaki pants, a black hooded sweatshirt, and I think was a dark brown leather type jacket. All of the items had a red dye substance on them." App. p. 259, ll. 21-25. The clothes were recovered from hedges and bushes behind one of the apartment buildings. App. pp. 260-65.

Evidence and discussion of Petitioner's two prior federal guilty plea convictions for armed bank robbery.

Prior to trial, the State introduced as Court's Exhibits records reflecting Petitioner's two prior convictions and proffered the testimony of Jim Lannamann, the retired Federal Bureau of Investigation agent who worked those cases. App. pp. 43-48. Lannamann explained he investigated the August 7, 2003, robbery of the Central Carolina Bank on East Henry Street in Spartanburg, South Carolina by Petitioner and eighteen-year-old Aderian Fair, as well as the August 12, 2003, robbery of the First Citizens Bank on North Church Street in Spartanburg, South Carolina by Petitioner and sixteen-year-old Anastasia P. App. pp. 48-49. Over Counsel's strenuous objections, Lannamann testified *in camera* he interviewed Fair, who explained Petitioner was the mastermind and:

> . . . had generated a demand note and had provided a black bag and instructed Aderian Fair how to commit this bank robbery, and Fair committed the robbery and was caught immediately thereafter by the YMCA in a Wendy's on South Pine, and he was transported to Spartanburg.

App. pp. 57-78. The money from the bank was found inside the bag, alongside a prescription pill bottle with Petitioner's name on the label. App. p. 58, ll. 15-23. Over the same objections, Lannamann further testified *in camera* that Anastasia P. entered the First Citizens Bank with a demand note that threatened explosives. App. p. 60, ll. 3-8. Anastasia was identified from bank surveillance pictures, located, and interviewed, at which time she implicated Petitioner in the robbery. App. p. 73, ll. 22-25.

Petitioner appeared in federal district court before the Honorable Henry Herlong and pled guilty to the two counts of armed bank robbery on October 31, 2003, and was sentenced to concurrent terms of 125 months. App. pp. 50-53; App. pp. 74-75. On cross-examination, Lannamann read the substance of each federal count into the record:

> The Grand Jury charges that on or about August the 7th, 2003, in the District of South Carolina, the defendants, Aderian Jawone Fair and Calvin Terrell Williams, with force, violence, and intimidation, did take from the person and presence of employees of Central Carolina Bank, 453 East Henry Street, Spartanburg, South Carolina, money belonging to and in the care, custody, control, management, and possession of said financial institution the funds of which were insured by the Federal Deposit Insurance Corporation and the committing said, 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 in violation of Title 18, United States Code Section 2113(a), 2113(d)(2).
>
> . . .
>
> Grand Jury further charges that on or about August 12, 2003, in the District of South Carolina, the defendant, Calvin Terrell Williams, and a person known to the Grand Jury, by force, violence, and intimidation, did take from the person and presence of employees

> of First Citizens Bank, 305 North Church Street, Spartanburg, South Carolina, money belonging to and in the care, custody, control, management, and possession of said financial institution, the funds of which were insured by the Federal Deposit Insurance Corporation, 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 in violation of Title 18 United States Code Section 2113(a), 2113(d)(2).

App. pp. 77-78 (emphasis added). Lannamann did not see the plea agreement, nor the facts set forth in that agreement, and he agreed all he knew was there was an indictment and Petitioner pled guilty to that indictment. App. pp. 83-84.

The State also sought to admit the federal court's presentencing report, and prior to trial called Dean Cook, a federal probation agent, to explain that Judge Herlong had released the sentencing report as a public file. App. pp. 102-04; App. pp. 112-13. However, on the morning of the last day of trial, June 8, 2016, the State reported to the trial court that Judge Herlong had ordered all the federal documents be returned to him, and that Cook had "been ordered not to testify or say anything in Court." App. p. 291, ll. 9-14. The State moved to return the items, and the items were so returned. App. pp. 291-93. Neither Cook, Lannamann, nor anybody else ever testified in front of the jury regarding the underlying facts of Petitioner's prior convictions.

The State relied upon the prior convictions for S.C. Code Ann. § 17-25-45(A), and Counsel declined to contest the validity of the prior convictions.

After the jury returned its verdict, the State asserted Petitioner's two prior federal convictions for armed bank robbery would have been classified as "most serious" and "serious" under S.C. Code Ann. § 17-25-45. App. pp. 357-58. The State noted that entering a bank with intent to steal carried a sentence of up to thirty years, such that the federal bank robberies would constitute serious offenses. App. p. 358, ll. 12-25. Counsel conceded the two armed bank robberies were serious offenses. App. p. 359, ll. 1-13.

STANDARD OF REVIEW

Appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). Only pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. A judge's findings concerning matters of credibility are given great deference. Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

Trial counsel properly determined the two federal convictions meet the requirements to enhance Petitioner's sentence to life without parole and was not ineffective for failing to object.

Petitioner maintains his two convictions under section 2113(d) would not qualify as serious or most serious offenses under the recidivist statute. The PCR court's ruling is supported by probative evidence because counsel's assessment of the propriety of both federal bank robbing convictions as prior most serious or serious offenses did not fall below professional norms. Further, Petitioner was not prejudiced because the offenses were properly utilized as predicate offenses to sentence Petitioner to life without parole.

Strickland

When an applicant alleges ineffective assistance of counsel, the applicant must prove "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, 686 (1984). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. The attorney's performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Strickland requires extreme deference to counsel's strategic judgments that are adequately investigated; as Strickland explains: "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. . . ." Strickland, 466 U.S. at 690-91; Dunn v. Reeves, 141 S.Ct. 2405, 2410 (2021) ("[E]ven if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen.") (citation and internal quotation marks omitted); Thornes v. State, 310 S.C. 306, 310, 426 S.E.2d 764, 766 (1993) (finding plea counsel was not ineffective for failing to interview the burglary victim because plea counsel would need to be clairvoyant to expect any benefit would accrue to his client).

The PCR court properly denied the application for post-conviction relief because Counsel reasonably determined Petitioner's prior convictions for robbing banks "by the use of a dangerous weapon and device, that is explosives" were functionally equivalent to armed robbery for purposes of enhancement under S.C. Code Ann. § 17-25-45. Furthermore, even if some distinction could be wedged between "armed bank robbery" and "armed robbery," the prior federal charges also give rise to charges for "entering a bank with intent to steal," a South Carolina offense punishable up to thirty years' imprisonment and therefore a "serious" offense under the recidivist statute. Therefore, Counsel exercised reasonable judgment in determining at the time of trial that he had no basis to contest the life-without-parole sentence.

Prior convictions from other jurisdictions may be relied to enhance a sentence to life without parole if the equivalent offenses are classified as serious or most serious offenses in South Carolina.

South Carolina's recidivist statute provides, with proper notice, that a defendant with two prior "serious" or "most serious" convictions will be sentenced to life imprisonment without parole upon a conviction for another "serious" offense. S.C. Code Ann. § 17-25-45(B). Alternately, a defendant with a *single* prior "most serious" conviction, or two prior "serious" convictions, upon a conviction for another "most serious" offense, a life-without-parole sentence must be imposed. S.C. Code Ann. § 17-25-45(A).

Offenses classified as "most serious" are specifically enumerated in the statute, including armed robbery. S.C. Code Ann. § 17-25-45(C)(1). As for "serious" offenses, numerous crimes are specifically enumerated, but the law also includes "any offense which is punishable by a maximum term of imprisonment for thirty years or more" which is not already classified as "most serious." S.C. Code Ann. § 17-25-45(C)(2)(a).

If the prosecution and trial court rely upon convictions occurring in a federal or out-of-state jurisdiction, they may look to whether the actions taken by the defendant satisfies the elements of the crime in the other jurisdiction to qualify as either a "serious' or "most serious" offense under the recidivist statute. S.C. Code Ann. §§ 17-25-45(A)(1)(b), -45(A)(2)(b), -45(B)(3); see State v. Washington, 338 S.C. 392, 397-98, 526 S.E.2d 709, 711 (2000) (finding Washington was properly sentenced under the recidivist offender statute where the elements of his prior offense of common law burglary now constituted the offense of first-degree burglary, meaning his prior conviction was the legal equivalent of a "most serious" offense and would have constituted a "most serious" offense pursuant to the statute); Hinton v. South Carolina Dept. of Probation, Parole, and Pardon Services, 357 S.C. 327, 339, 592 S.E.2d 335, 342 (Ct. App.

2004) (noting under the "same-elements" test, when comparing the elements of the offenses, a court 'looks to whether the particular actions taken by the defendant which satisfy the elements of the crime in the other state would satisfy the elements of one of the enumerated crimes.").

In the instant case, Petitioner's armed robbery conviction was enhanced to life without parole by two guilty plea convictions for bank robbery under 18 U.S.C. § 2113(d). The two relevant provisions, 18 U.S.C. § 2113(a) and § 2113(d), provide:

> (a) 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 for 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; . . . Shall be fined under this title or imprisoned not more than twenty years, or both.
>
> . . .
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b)[2] 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.

(emphasis added).

The portion bolded above in paragraph (d) was interpreted in federal court as follows:

> There is a clear distinction between s 2113(a) and s 2113(d). Each involves an element of intimidation, only s 2113(d) requires proof of putting in jeopardy. The additional aggravation present in s 2113(d) permits the imposition of a more severe sentence of twenty-five years rather than twenty.
>
> Our Court has consistently rejected the notion that proof of putting in jeopardy may be established by subjective evidence, such as fear felt by the victim. **The weapon must be objectively capable of putting a victim's life in danger**.

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[2] Under 8 U.S.C. § 2113(b), the "force and violence" element is replaced by the requirement the stolen items exceed $1,000 in value and carries a lesser sentence.

United States v. Cobb, 558 F.2d 486, 488 (8th Cir. 1977) (case citations omitted) (emphasis added). Following the United States Supreme Court opinion in McLaughlin v. United States, 476 U.S. 16, 17-18 n. 3 (1986), a representation of a weapon, whether malfunctioning or a decoy, suffices if it creates a perceived threat to life. See United States v. Hamrick, 43 F.3d 877, 883 (4th Cir. 1995) (Citing the McLaughlin footnote and opining: "But even where, as here, the weapon has been mailed and there is little risk of retaliation against the sender which would endanger those involved, there is still an immediate danger of injury to those who flee **or otherwise furiously react to the perceived threat to their lives**, and to innocent bystanders. In short, the sender of an inoperable mail-bomb, although distant from his victims, **sets in motion events that pose danger to human life** and harm society no less so than the criminal courier who delivers the bomb to his victim by hand." (emphasis added)).

The federal indictments both allege the use of explosives and cites section "2113(a)(d)(2)." "A plea of guilty is an admission or a confession of guilt, and is as conclusive as the verdict of a jury; it admits all matter of fact averments of the accusation." State v. Allen, 261 S.C. 448, 451, 200 S.E.2d 684, 686 (1973). A guilty plea leaves "no issue for the jury, except in those instances where the extent of the punishment is to be imposed or found by the jury." Jamison v. State, 410 S.C. 456, 468, 765 S.E.2d 123, 129 (2014).

The prior federal bank robbery convictions are comparable to entering a bank with intent to steal, such that they would be classified as "serious" offenses.

South Carolina also prohibits bank robberies: "It is unlawful for a person to enter a building 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). The offense carries a maximum sentence of thirty years imprisonment, and therefore constitutes a "serious offense" under 17-25-45(C)(2)(a).

Roughly speaking, the statute requires proof of (1) entering a bank, (2) with intent to steal money, securities or property, (3) "by force, intimidation, or threats." Id.; Samuels v. State, 356 S.C. 635 (2004). The third element, "by force, intimidation, or threats" is the equivalent of "by force and violence, or by intimidation" found in paragraph (a) of section 2113 of the federal statute, and of course, paragraph (d) encompasses paragraph (a), or perhaps more accurately, paragraph (d) is an enhancement of paragraph (a).

In pleading guilty to each of the indictments, Petitioner admitted targeting banks (". . . from the person and presence of [building address] . . .") to steal money (". . . did take . . . money . . .") either by force, intimidation, or threats (". . . with force, violence, and intimidation . . ."). As such, Petitioner pled to what would qualify as entering a bank with intent to steal under South Carolina law. Because entering a bank with intent to steal carries a maximum sentencing exposure of 30 years, it qualifies as a "serious" offense under the recidivist statute. Because sections 2113(a)(d) of the federal code are equivalent to our state's offense of entering a bank with intent to steal, the federal convictions properly enhanced Petitioner's sentence to life without parole.

Petitioner contends the "entering" language of our statute distinguishes it from the federal statute. However, this merely means the federal statute does not require any intent upon entering a bank to steal (the intent may form later); and under the doctrine of accomplice liability, Petitioner would be guilty of our bank robbery statute. State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002) ("Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by

his confederate incidental to the execution of the common design and purpose."). Accordingly, counsel was not ineffective for declining to challenge the use of the convictions to effectuate life without parole.

> **The dangerous weapons clause of section 2113(d) is the equivalent of the armed with a deadly weapon element of our state's armed robbery offense and proof of the elements of section 2113(d) necessarily satisfies the elements of armed robbery.**

Second, all of the elements of the South Carolina offense of armed robbery are also encompassed by the facts set out in the indictments to which Petitioner pled guilty in federal court. "Robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear." State v. Moore, 374 S.C. 468, 476, 649 S.E.2d 84, 88 (Ct. App. 2007). "A person who commits robbery while armed with a . . . deadly weapon . . . is guilty of a felony[.]" S.C. Code Ann. § 16-11-330(A). "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). "Whether an object has been used as a deadly weapon depends upon the facts and circumstances of each case." State v. Simmons, 360 S.C. 33, 43, 599 S.E.2d 448, 453 (2004).

In pleading guilty to each of the indictments, Petitioner admitted to taking money (". . . did take . . . money . . .") either by force, intimidation, or threats (". . . with force, violence, and intimidation . . .") by the use of a deadly weapon in the form of explosives (". . . by the use of a dangerous weapon and device, that is explosives . . ."). As such, Petitioner pled to what would qualify as armed robbery under South Carolina law. Armed robbery is specifically enumerated as a "most serious" offense under the recidivist statute.

At the PCR hearing, counsel explained he looked at the elements set out in the federal indictments, and explained, "And the elements of those 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." App. p. 457, lines 6-22. Counsel concluded, "So in my opinion, you know, I would . . . love to have challenged something, but I have to have a good faith basis to believe that that challenge is going to be somewhat successful. I can't just argue things cause they're fun to argue." App. p. 457, line 24 –p. 458, line 4.[3] Counsel continued, "Those are black letter armed robberies. I mean they just are." App. p. 458, lines 5-10. Confronted with Petitioner's contention of a distinction between a "dangerous" or a "deadly" weapon, counsel countered both federal indictments alleged the use of explosives and counsel expressed his view, "[I]n every case, [explosives] would be considered a deadly weapon in an armed robbery prosecution." App. p. 472, lines 5-19.

Petitioner argues a distinction between the dangerous weapon clause in the federal statute and the deadly weapon element of armed robbery. However, the weapons clause of paragraph (d) of section 2113 requires putting the life of a person in jeopardy by use of the dangerous weapon. See United States v. Cobb, 558 F.2d 486, 488 (8th Cir. 1977) (citations omitted).

Further, "a dangerous weapon and device" is not legally distinct from a "deadly weapon." Black's Law Dictionary defines "dangerous weapon" as "[a]n object or device that, because of the way it is used, is capable of causing serious bodily injury[,]" which constitutes a class of objects and devices encompassed by our jurisdiction's conception of a "deadly weapon" as in relation to "great bodily harm." Weapon Definition, Black's Law Dictionary (11th ed. 2019),

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[3] Counsel testified he explained his assessment of this issue with Petitioner. App. p. 458, lines 11-15.

available at Westlaw; Scurry, 322 S.C. at 517, 473 S.E.2d at 63. Indeed, Black's recognizes the encompassing overlap in its definition of a deadly weapon. See Weapon Definition, Black's Law Dictionary (11th ed. 2019) ("Any firearm or other device, instrument, material, or substance that, from the manner in which it is used or is intended to be used, is calculated or likely to produce death. *In some states, the definition encompasses the likelihood of causing either death or serious physical injury.*") (emphasis added).

Corpus Juris Secundum is clearer in explicitly defining the terms together: "A 'dangerous or deadly weapon' may be defined as one likely to produce death or serious physical injury, when operable, or an object that ostensibly may be used as a tool . . ., but surrounding circumstances indicate that the purpose of carrying the object is its use as a weapon." 94 C.J.S. Weapons § 5. Put simply, any weapon or device that is dangerous is also deadly. Any weapon or device that is deadly is dangerous.

South Carolina jurisprudence accordingly appears to treat the terms "dangerous" and "deadly" as synonymous. See, e.g. State v. Davis, 309 S.C. 326, 343-44, 422 S.E.2d 133, 144-45 (1992) (considering a jury charge which used the phrase "dangerous, or deadly, object" four times before concluding a hand or fist may be considered as a deadly weapon) *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); State v. Wilds, 355 S.C. 269, 584 S.E.2d 138 (Ct. App. 2003) (explaining that "an automobile is regarded as a dangerous instrumentality" such that the use thereof could then be relied upon for a permissive inference of malice instruction).

Federal jurisprudence similarly reflects that "dangerous" and "deadly" weapons are, in effect, one in the same. See, e.g. Prince v. United States, 352 U.S. 322, 324 n.1, 329 n.11 (1957) (quoting the armed bank robbery statute and the "dangerous" language in full in one footnote,

then summarily describing the crime as "robbery aggravated by assault with a deadly weapon" in another footnote); United States v. Johnson, 324 F.2d 264, 266 (4th Cir. 1963) (affirming that a chair, and almost any object, may be a dangerous weapon when as used "is likely to produce death or great bodily harm[.]"); United States v. Dayea, 32 F.3d 1377, 1379 n.2 (9th Cir. 1994) (citing to ten cases as examples of "dangerous" weapons, and recognizing the interchangeable character of the terms "dangerous weapon," "dangerous instruments," and "deadly weapon").

The PCR court properly rejected Petitioner's contention Counsel was ineffective for declining to assert a distinction between the terms "dangerous" and "deadly" weapons and counsel did not render ineffective assistance when he properly determined that the two federal convictions were properly utilized to enhance Petitioner's trial conviction to life without parole.

CONCLUSION

For the foregoing reasons, this Court should affirm the PCR court's denial of the application and affirm Petitioner's life without parole sentence.

Respectfully submitted,

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