STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARVIN BOWENS GREEN,

APPELLANT

Appellate Case No. 2012-212739

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On April 4, 2011, a Charleston County grand jury indicated Appellant for armed robbery (2011-GS-10-2338) and possession of a firearm during the commission of a violent crime (2011-GS-10-2339). R. * (Indictments). The state, represented by Bruce Durant and Rutledge Durant, called the case for trial before the Honorable Kristi L. Harrington and a jury on June 11, 2012. Andrew Grimes and Cody Groeber represented Appellant. Tr. 1. The jury found Appellant guilty as charged. Tr. 771, line 20 – Tr. 772, line 9. Judge Harrington sentenced Appellant to life imprisonment without the possibility of parole (LWOP) pursuant to the recidivist statute concerning the armed robbery conviction and to five years' imprisonment concerning the firearm charge. Tr. 779, lines 15-23; R. * (sentence sheet).

After the trial, on June 25, 2012, Appellant filed a motion to vacate his sentence. R. * (motion to vacate). By order filed July 31, 2012, Judge Harrington denied Appellant's motion. R. * (Order).

Appellant filed a timely notice of appeal. This brief follows.

ARGUMENT

I. Violating Appellant's Sixth Amendment right to a fair trial, the trial judge erred in failing to provide the jury with specific instructions concerning how to analyze the evidence presented concerning the identification of Appellant as the perpetrator, including expert testimony on the subject, significant language barriers between the police officers and the eyewitness who participated in the photographic line-up, and the use of surveillance video to make an identification.

Relevant facts

The state's entire case rested upon identifications of Appellant as the robber of a gas station made by one eyewitness and three witnesses of a surveillance video. Natubhai Patel, the owner of the gas station, testified that at 7:45 a.m. on December 24, 2010, a man, wearing sunglasses and a hat, entered the store with a gun. Tr. 289, lines 10-20. The man robbed the store of a small amount of money and a pack of cigarettes. Tr. 291, lines 7-16. Natubhai identified Appellant as the robber. He claimed he knew Appellant as a customer of the store. In fact, he claimed Appellant was in the store three times per week over the previous year. Tr. 289, line 24 - Tr. 290, line 25. While Appellant was his customer, Natubhai engaged in some small talk with him – primarily consisting of a shared joke regarding President Barack Obama having signed Appellant's identification. Tr. 290, lines 6-8. After the robbery, Natubhai contacted law enforcement, and then his wife. Tr. 291, lines 17-18; Tr. 295, lines 1-2. Natubhai, along with his wife and son, watched the surveillance video with police. Tr. 291, lines 19-25.

On December 29, 2010, Natubhai met with two police officers in the parking lot of a local shopping mall for a photo line-up. Tr. 296, lines 5-8. Due to Natubhai's

limited ability to speak, read, and understand English, Natubhai's son, Dhruval, translated the admonitions. Tr. 295, lines 18-20; Tr. 297, lines 8-22; Tr. 299, line 23 – Tr. 300, line 1.[1] Natubhai identified Appellant's photograph from the line-up. Tr. 297, lines 23 – 25; Tr. 359, lines 1-8.

Natubhai was approximately two feet from the individual in the well-lit store. Tr. 302, lines 9-14. Despite the individual's wearing of sunglasses, Natubhai claimed he could see the individual's face clearly. Tr. 303, lines 2-5. Natubhai also claimed that 80% of his customers were African-American. Tr. 303, lines 12 – 14. He admitted that he was scared when the gun was pointed at him. Tr. 307, line 22 – Tr. 308, line 3; Tr. 309, lines 23 – 25. Additionally, he admitted the robber was wearing a hat but claimed it was pushed slightly back. Although he recalled the jacket having a hood attached, he could not recall whether the perpetrator wore the attached hood as well. Tr. 308, lines 4 – 19. Natubhai admitted that he had spoken to his wife and son regarding the robbery, and he had watched the surveillance video from the robbery multiple times. Tr. 310, lines 1 – 22.

Dustin Luckadoo, a Charleston County Sheriff's Office employee, responded to the scene of the alleged armed robbery shortly after 8 o'clock in the morning. Tr. 327, lines 6 – 13; Tr. 328, lines 1 – 10. Luckadoo then reviewed the surveillance video. At trial, Luckadoo claimed he recognized the suspect. Tr. 334, lines 10 -25. Luckadoo claimed the suspect was "Marvin Bowens." Tr. 335, lines 1 -2. Luckadoo then identified

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[1] Dhruval testified that he interpreted the entire admonitions sheet for his father from English to their Indian dialect. Tr. 317, line 2 – Tr. 318, line 25. On the other hand, James Perkins, the officer who administered the lineup, testified that Dhurval assisted but did not act as a translator. Tr. 522, lines 18 – 21. Specifically Perkins testified that Dhruval did not translate each paragraph or sentence. Tr. 523, lines 1 – 11.

the perpetrator in the video as Appellant. Tr. 335, line 24 – Tr. 336, line 5. Similarly, Charles Lawrence, the investigator assigned to the case, testified that he identified the perpetrator in the videos Appellant. Tr. 351, line 24 – Tr. 352, line 15. Finally, Jagruti Patel, the wife of Natubhai, testified that she also worked at the store regularly and identified Appellant as the perpetrator in the videotape. Tr. 436, line 16 – Tr. 437, line 1; Tr. 440, line 22 – Tr. 441, line 5.

Appellant called Dr. Jennifer Beaudry, an uncontested expert in human memory and eyewitness identification, to testify regarding the reliability of eyewitness identifications and how memory works. Dr. Beaudry testified regarding several common misconceptions regarding memory including that memory acts like a video recorder and that a traumatic event improves memory. Tr. 602, lines 8 – 20. Additionally, Dr. Beaudry testified regarding factors that affect an individual's ability to acquire memories including the phenomenon of the weapon focus, the effect of disguises, and exposure time. Tr. 679, line 14 – Tr. 610, line 23; Tr. 615, line 13 – Tr. 618, lines 7. Dr. Beaudry testified that research indicated individuals are much better at identifying someone of the individual's own race than identifying someone of a different race. Tr. 614, lines 13 – 24. She further explained to the jury how memory fades in as little as two hours. Tr. 618, line 17 – Tr. 619, line 8. Memory also changes as additional information is presented after the event. Tr. 619, lines 9 – 24.

Appellant submitted multiple proposed jury instructions based upon the single largest issue in the case – identification. Tr. 701, lines 5-13; Tr. 702, lines 10-15; R. * (Court's Exhibit #9). The instruction entitled "Request to Charge Number One" concerned eyewitness identification. Specifically, the proposed instruction advised the

jury to consider the extent to which the perpetrator's features were visible and undisguised, whether there were any distractions during the eyewitness's observation, whether the eyewitness experienced stress or fright at the time of the observation and whether the witness's identification may have been impaired by personal motivations biases or prejudices. Additionally, the instruction allowed the jury to consider issues implicated by cross-racial identifications. The proposed instructions also provided the jury with guidance concerning how to determine whether the identification was a product of the witness's own memory. R. * (Court's exhibit # 9).

Despite these relevant and informative requests, the judge refused to charge the jury as Appellant sought. Instead, the judge issued her "standard identification charge." Tr. 701, lines 20-23.

Specifically, the judge instructed the jury in very limited boiler-plate fashion as follows concerning how to evaluate identifications made by eyewitnesses and other witnesses:

> An issue in this case is the identification of the defendant as the person who committed the crime charged. The state had the burden of proving identity beyond a reasonable doubt. You must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict the defendant.
>
> Identification testimony is an expression of belief or impression by a witness or impression by a witness. You must determine the accuracy of the identification of the defendant. You must consider the believability of each identification witness in the same way as any other witness.
>
> You may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense. This will be affected by things like how long or short a time was available, how far or close the witness was, the lighting conditions, and whether the witness had a chance to see or know the person in the past.

Tr. 750, lines 5-22.

At the conclusion of the instructions, Appellant renewed his requests to charge. Appellant explained how the proposed charges guided the jury's evaluation of the identifications made in the case, particularly in light of the multiple identifications having been made, only one of which was by an eyewitness, and a disguise hiding key features. The proposed charges also related to the jury its ability to consider whether the witness was distracted and experienced "weapon focus." The charge allowed the jury to consider whether the witnesses had the requisite ability to identify a member of a different race. The charges allowed the jury to consider the length of time between exposure and identification and the exposure of the witnesses to opinions of others during the interval. Tr. 755, line 23 – Tr. 762, line 9.

Discussion

Due Process requires the prosecution prove every element of the charged offense beyond a reasonable doubt – including the element that the defendant is the actual perpetrator. In re Winship, 397 U.S. 358 (1970); Todd v. State, 355 S.C. 396, 400, 585 S.E.2d 305, 307 (2003); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); State v. Lane, Op. No. 5175 (S.C. Ct. App. filed Oct. 9, 2013). Therefore, a trial court must instruct the jury to ensure the jury's verdict is based upon the evidence presented. Jury instructions are important particularly in matters of witness identifications due to the high number of wrongful convictions based upon erroneous identifications. See Perry v. New Hampshire, __ U.S. ___, 132 S.Ct. 716, 728 (2012).

"The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "If there is any evidence to support a jury charge, the trial judge should grant the requested charge. The

refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006). The South Carolina Supreme Court addressed jury instructions concerning witness identifications in State v. Motes, 264 S.C. 317, 215 S.E.2d 190 (1975). The Court held that the trial judge's failure to provide the model instruction[2] concerning identification was not error where two witnesses identified the defendant as the perpetrator of the crime. Id. at 326, 215 S.E.2d at 194. Nevertheless, the Court explained its holding was based upon the fact that the trial court's instructions adequately focused the attention of the jury on the necessity of finding that the testimony identified the defendant as the perpetrator beyond a reasonable doubt in order to convict. Additionally, the Court noted the identification presented "no peculiar problem." Id.

Although the Supreme Court found no error in a trial court's instructions to the jury on the issue of identification where the judge instructed the jury that the defendant had asserted an alibi claiming she was not at the scene of the crime, the court "admonish[ed] the trial bench that in single witness identification cases the court should instruct the jury that the burden of proving the identity of the defendant rests with the state." State v. Simmons, 308 S.C. 80, 83-84, 417 S.E.2d 92, 94 (1992).

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[2] In the United States v. Telfaire, 469 F.2d 552, 555 (D.C. Cir.1972), Court of Appeals for the District of Columbia explained that the presumption of innocence "must be a premise that is realized in instruction and not merely a promise." Thus, the judicial system required "special instruction on the key issue of identification, which emphasize[d] to the jury the need for finding that the circumstances of the identification are convincing beyond a reasonable doubt." Id. As a result of the concerns attendant to criminal prosecutions based upon witness identifications, the Court issued a model jury instruction. Id. at 558-559.

In State v. Whaley, 305 S.C. 138, 142, 406 S.E.2d 369, 371 – 372 (1991), the South Carolina Supreme Court held that expert testimony concerning eyewitness identification was admissible where the witness was a qualified psychologist who explained how certain aspects of everyday experience affect human perception and memory and therefore affects the accuracy of eyewitness identification. The Court further explained that the expert's testimony was particularly relevant where the witness testified that her assailant's features were partially obscured during the entire incident, the identification involved cross race, and each witness had been exposed to the assailant for a short length of time. Id. at 143, 406 S.E.2d at 372.

The trial judge erred in failing to instruct the jury with the specific requests made by Appellant concerning evaluating witness identifications. Appellant's proposed instructions encompassed the evidence presented to the jurors and allowed them to synthesize the matter in evaluating the evidence. Not only did the judge refuse to give the proposed charge, but she used her "standard charge," which omitted certain items and failed to include any type of catch-all provision. Having standard charges benefits judges, but trial judges should not abdicate their duties of charging the jury on the law as presented by the facts to a book of general charges. Rather, trial judges must mold standard charges to fit the particular circumstances of each case.

As the South Carolina Supreme Court explained in State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989) "standard charges" or "approved charges" do not prohibit a trial judge from crafting charges designed to address the specific case. In Fuller, 297 S.C. at 443, 377 S.E.2d at 331, the Court explained that "[i]n charging self-defense, we instruct the trial court to consider the facts and circumstances of the case at bar in order to fashion

an appropriate charge." The trial courts are required to "specifically tailor the self-defense instruction to adequately reflect the facts and theories presented by the defendant." State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000). In Day, the Court further stated that "[a] self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant." Id. As with jury instructions on self-defense, there is no logical reason to refrain from charging the jury on facts and theories presented by the defendant in an eyewitness identification case. See Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005); State v. Long, 721 P.2d 483 (Utah 1986) (discussing the importance and need for tailoring jury instructions on eyewitness identifications to the facts and circumstances of each individual case).

In Appellant's case, the jury instructions left the jury with the impression that it could only consider the factors expressly stated - whether the witness had an adequate opportunity to observe the offender at the time of the offense, which may have been affected by things like how long or short a time was available, how far or close the witness was, the lighting conditions, and whether the witness had a chance to see or know the person in the past. What the instruction failed to do was inform the jury of how it should synthesize and analyze the additional facts and factors uncovered during cross-examination of the witnesses and through the testimony of Appellant's expert. In fact, the nature of the instruction left the jury with the impression that most of the evidence produced by Appellant was not to be considered by the jury during its deliberations. This was error.

II. The trial judge erred in allowing the prosecution to introduce Appellant's mug shot where no demonstrable need of the mug shot was established, the mug shot was unnecessary and cumulative to the prosecution's case, and the mug shot prejudiced Appellant by suggesting to the jury that Appellant had a prior criminal record.

Relevant facts

During the testimony of Lawrence, the prosecution introduced Appellant's mug shot over Appellant's objection. Specifically, the prosecution sought to introduce the photograph of Appellant taken when he was arrested for the incident on which he was on trial; however, the fact that the mug shot was from Appellant's arrest concerning this charge was never conveyed to the jury. Appellant objected to the introduction of the mug shot. Tr. 359, line 13 – Tr. 360, line 23. Lawrence testified that the mug shot fairly and accurately depicted how Appellant looked on the day he was arrested; however, Lawrence did not inform the jury that the mug shot was from Appellant's arrest on the present charge. Tr. 361, lines 3 – 25.

The trial court ordered portions of the mug shot be removed so that it would not appear as a mug shot. Tr. 417, line 25 – Tr. 418, line 1. When Appellant explained his objection remained the same because even with the redaction, "any reasonable juror [could] infer that's a booking photo," the judge cryptically responded "[t]hat's not what I'm concerned with." The trial judge ruled the mug shot was admissible because it "was the actual booking photo." She remarked that everyone knew Appellant was arrested and booked. The case relied upon by Appellant for exclusion of the mug shot apparently involved a photograph showing a defendant with a "date ... around his neck ..., which was prior to the arrest that he was being tried for." Tr. 557, lines 16-24. The judge also

explained that the prosecution indicated the photograph was needed because it showed Appellant's side profile. Tr. 558, lines 3-8. However, the photographs were obviously a mug shot as they were front and side profile shots of Appellant's face. Tr. 418, lines 18 – 25.

In addition to the testimony of Lawrence concerning the mug shot, Lawrence and Luckadoo testified to their prior relationships with Appellant, which were acquired as part of their jobs in law enforcement. Luckadoo testified that when he watched the surveillance video, he recognized the assailant as Appellant. He testified that he had "general dealings" with Appellant, including personal contact through a traffic stop. Tr. 334, line 23 – Tr. 335, line 8. Lawrence testified that he believed the person in the surveillance video was Appellant as well. Lawrence claimed he "had the opportunity to talk with [Appellant] for hours at a time while patrolling." He claimed that he had interactions with Appellant "not because he was in trouble or anything." Despite claiming that Appellant was not "in trouble" during their prior interactions, he testified that he had the opportunity to view Appellant's face, hear him talk, observe his mannerisms. In short, Lawrence claimed he knew Appellant "very well." Tr. 352, line 10 – Tr. 353, line 16.

Discussion

The introduction of a mug shot is reversible error unless the prosecutor had a demonstrable need to introduce the photograph, the photograph shown to the jury did not suggest the defendant had a criminal record, and the photograph was not introduced in such a way as to draw attention to its origin or implication. State v. Traylor, 360 S.C. 74, 84, 600 S.E.2d 523, 528 (2004)(citing State v. Denson, 269 S.C. 407, 237 S.E.2d 761

(1977)). In Traylor, the Court found that the prosecution failed to demonstrate a need to include the photographic lineup, which included the defendant's mug shot, where other evidence showed that the defendant had been involved. However, the photograph was taken upon the defendant's arrest for the offense being tried, as opposed to some prior bad act. Although the Court found no prejudice to Traylor as a result of the photograph, the Court strongly admonished the prosecution against utilization of such photos except in the rarest of cases. Id.

In Appellant's case, the mug shot was irrelevant and unnecessary to substantiate the identification of the person depicted in the video recording for several reasons. First, Appellant was present in the courtroom for identification purposes. Second, the prosecution presented no evidence indicating that Appellant's physical appearance had changed since the date of the video recording, which was presented to the jury, or the photograph contained in the line-up, which also was presented to the jury. Third, the mug shot was cumulative to the prosecution's evidence (e.g., the video recording, the "still" photographs taken from the video recording, and the photographic line-up). See State v. Langley, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999). Fourth, the mug shot was obviously a mug shot despite the alterations required by the trial judge prior to its admission. The photograph showed Appellant in two profiles: facing forward and side. Without question, the general public is very familiar with mug shots showing an individual from front and side profiles. Fifth, the mug shot gave the jury the impression that Appellant had been arrested and/or convicted of prior crimes by its very nature of being a mug shot.

The obvious nature of the mug shot as a mug shot, and its implication that Appellant had been convicted of a prior offense was reinforced by the testimony of

Lawrence and Luckadoo who indicated they knew Appellant from prior experience related to law enforcement. The jury could draw but one conclusion – Appellant had a criminal record. The mug shot combined with the omission of the mug shot's temporal origin compounded by the testimony of two police officers concerning their prior relationships with Appellant to impart upon the jury the undeniable impression that Appellant had a prior criminal record.

III. Violating the Eighth Amendment's ban on cruel and unusual punishment, the trial court erred in sentencing Appellant to life imprisonment without the possibility of parole pursuant to the state's recidivist statute because Appellant's prior conviction was committed when he was seventeen-years old.

Relevant facts

The jury found Appellant guilty of armed robbery and possession of a firearm during the commission of a violent crime. Tr. 771, line 20 – Tr. 772, line 7. Although Appellant asked the trial judge to delay sentencing pending a decision from the United States Supreme Court concerning a challenge to life sentences imposed on juvenile offenders, the judge determined a delay was unnecessary. Tr. 773, line 8 – Tr. 774, line 16. Appellant explained that he was twenty-years old at the time of sentencing, and nineteen-years old at the time of the offense for which he was facing sentencing. However, he was seventeen-years old at the time of a prior offense, which served as the triggering offense for application of the recidivist statute. Tr. 773, line 25 – Tr. 774, line 10. Specifically, Appellant challenged the imposition of life without parole (LWOP) as a sentence because it violated the Eighth Amendment's ban on cruel and unusual punishment. Tr. 777, lines 19-20. Nevertheless, the judge sentenced Appellant to LWOP. Tr. 779, lines 18-22; R. * (sentence sheet).

After the trial, Appellant filed a motion to vacate his sentence of LWOP. Appellant argued, as he did at trial, that his sentence violated the Eighth Amendment's prohibition of cruel and unusual punishment because he was under the age of eighteen at the time of the triggering offense. R. * (motion to vacate). Denying Appellant's motion, the trial judge's order explained that Appellant was indicted in July 2009 by a Charleston

County grand jury for an armed robbery of a gas station in Hollywood on December 20, 2008. At the time of that armed robbery, Appellant was seventeen-years old. A jury found Appellant guilty of the Hollywood armed robbery, and he was sentenced to twenty years' imprisonment on June 24, 2011. After establishing the relevant facts in support of Appellant's motion, the judge first determined that because Appellant was seventeen-years old at the time of the first offense, he was not a "juvenile" as defined by South Carolina's statutory scheme. She pretermitted the fact that Appellant was under the age of eighteen at the time. Next, the judge found dispositive only the age of Appellant at the time at the second offense with no consideration of Appellant's age at the time of the triggering offence. Thus, the Court refused to vacate Appellant's LWOP sentence. R. *(order).

Discussion

As an initial matter, Appellant recognizes the South Carolina Supreme Court held a LWOP sentence is not cruel and unusual if the triggering offense was committed at the time the defendant was a juvenile as long as the defendant was tried and sentenced as an adult for the triggering offense. State v. Standard, 351 S.C. 199, 205, 569 S.E.2d 325, 329 (2002). Although Standard was a statutorily-defined juvenile at the time of the triggering offense, jurisdiction over his case was transferred from the juvenile courts to general sessions. Thus, Standard was tried and sentenced as if he were an adult concerning the triggering offense. The Court based its decision upon sentences imposed in other cases to "find lengthy sentences or sentences of life without parole imposed upon juveniles do not violate

contemporary standards of decency so as to constitute cruel and unusual punishment." Id.[3] Using this analysis, the Court determined that "an enhanced sentenced based upon a prior most serious conviction for a crime which was committed as a juvenile does not offend evolving standards of decency so as to constitute cruel and unusual punishment." Id. at 206, 569 S.E.2d at 329.

Inasmuch as Eighth Amendment jurisprudence involves "evolving standards of decency" and recent decisions by the United States Supreme Court concerning juveniles and the Eighth Amendment indicate an evolution in those standards since the South Carolina Supreme Court's decision in Standard, supra, now is an appropriate time to visit the issue presented. In fact, the Standard Court's holding that sentences of LWOP for juveniles[4] comport with contemporary standards of decency has been overruled by recent decisions of the United States Supreme Court.

"[C]hildren are constitutionally different from adults for purpose of sentencing." Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2455, 2464 (2012). On June 25, 2012, the United States Supreme Court held mandatory sentences of life without parole (LWOP) imposed upon juveniles violate the Eighth Amendment to the United States Constitution. Id. Beginning in 2005 with its decision in Roper v. Simmons, 543 U.S. 551 (2005), the Supreme Court recognized society's evolving standards of decency concerning juvenile justice jurisprudence. In Roper, the Court held death sentences for juveniles were cruel

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[3] Cf. State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001)(holding that a juvenile adjudication is not a conviction, guilty plea, or plea of nolo contendere, such that it may not be used to trigger the recidivist statute.

[4] The recent United States Supreme Court cases concerning this issue address individuals under the age of eighteen even if such individuals do not meet a state's statutory definition of juvenile.

and unusual punishment. Four years later, the Court held that a LWOP sentence imposed upon a juvenile for a non-homicide offense violated the Eighth Amendment's ban on cruel and unusual punishment. Graham v. Florida, 560 U.S. 48 (2010). Not surprisingly, when presented with the question of whether mandatory LWOP sentences for juveniles, even in homicide cases, violated the Eighth Amendment, the Supreme Court held they did. Miller, 132 S.Ct. at 2464.

The Miller Court reserved ruling on whether individuals under age eighteen could ever be sentenced to LWOP. Id. at 2469. Nevertheless, this Court should hold the Eighth Amendment precludes mandatory LWOP sentences under the recidivist statute where the defendant was under eighteen at the time of the triggering offense. Although the Miller Court did not address the precise issue presented here, the same constitutional reasoning applies. The Court's decision was based not only on upon the mandatory nature of the penalty, but on the character of children in general. The Miller Court repeatedly focused on the notion that the character traits of children are "more transitory and less fixed." Id. at 2464. Children by definition lack maturity and responsibility; thus, they are more likely to act with "recklessness, impulsivity, and needless risk-taking." Id. The Court eloquently explained that due to the innate characteristics of children at large, there is a "great difficulty ... of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." In fact, the Court stated "incorrigibility is inconsistent with youth." Id. at 2469. The Court emphasized the potential for reform present in all juveniles and the mitigating qualities of youth, noting "[i]t is a time of

immaturity, irresponsibility, 'impetuousness[,] and recklessness.'" Id. at 2467(quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

Even if the Eighth Amendment's ban on cruel and unusual punishment does not forbid sentencing individuals to mandatory LWOP where the triggering offense occurred when the individual was under the age of eighteen, the Eighth Amendment requires courts to make individualized sentencing decisions. Therefore, the mandatory nature of LWOP pursuant to the recidivist statute where the triggering offense occurred when Appellant was only seventeen-years old violated the requirement of individualized sentencing. The Supreme Court has recognized the importance of individualized sentencing in numerous cases. For example, Justice Sotomayor discussed the longstanding tradition of individualized sentencing: "'It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.'" Peppers v. United States, ___ U.S. ___, 131 S.Ct. 1229, 1239-1240 (2011)(quoting Koon v. United States, 518 U.S. 81, 113 (1996)). The tradition is premised upon the principle that "the punishment should fit the offender and not merely the crime." Id. at 1240(quoting Williams v. New York, 337 U.S. 241, 247 (1949)). Thus, the sentence must have the "fullest information possible concerning the defendant's life and characteristics." Id. (quoting Williams, 337 U.S. at 247).

The Supreme Court has recognized the differences between adults and adolescents in sentencing considerations:

> The trial judge recognized that youth must be considered a relevant mitigating factor. But youth is more than a chronological fact. It is a time

> and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults.

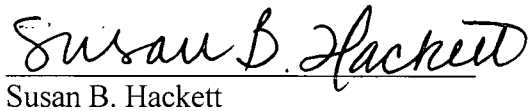
Eddings v. Oklahoma, 455 U.S. 104, 115-116 (1982)(footnotes and internal quotations omitted).

Appellant's sentence of LWOP, which was mandatory pursuant to the recidivist statute, violates the Eighth Amendment's ban on cruel and unusual punishment because Appellant was under the age of eighteen at the time of the triggering offense. At a minimum, the Eighth Amendment requires the trial judge have discretion in his sentencing where the sentence necessarily involved consideration of Appellant's prior record, which included an offense committed prior to his attaining the age of eighteen.

CONCLUSION

Concerning Issues I and II, Appellant respectfully requests this Court reverse his convictions and remand for a new trial. Concerning Issue III, Appellant respectfully requests this Court vacate his sentence and remand for new a sentencing proceeding in which LWOP was not a sentencing option.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of October, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Kristi Lea Harrington, Circuit Court Judge

THE STATE,

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APPELLANT

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) Trial transcript pages: 1; 287-304; 307-415; 417-418; 450-459; 489-494; 504-548; 556-559 593 – 683; 702; 711-739; 741-762; 771-781.
(2) State's Exhibits #3, #5, #5A, #6;
(3) Court's Exhibit #9;
(4) Defendant's Motion to Vacate Sentence;
(5) Order Regarding All Post-Trial Motions;
(6) Notice of Intent to seek Life Without Parole;
(7) True-billed indictments;
(8) Sentence sheets

I certify that this designation contains no matter which is irrelevant to this appeal.

October 16th, 2013

Susan B. Hackett

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Marvin Bowens Green # 346650, at Lee Correctional Institution, 990 Wisacky Hwy, Bishopville, SC 29010, this 16th day of October, 2013.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of October, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.