

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Charleston County

Roger M. Young, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

SHELDON LAMAR KELLY,

APPELLANT

APPELLATE CASE NO. 2014-000918

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FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the United States and South Carolina constitutions forbid sentencing an adult defendant to mandatory life without parole when one of his prior "strikes" was a crime committed as a juvenile?

## STATEMENT OF THE CASE

Appellant was indicted by a Charleston County grand jury for carjacking, possession of a knife during the commission of a violent crime, and kidnapping. R. 5, l. 20 – 6, l. 25. On April 7, 2014, appellant was tried before the Honorable Roger M. Young, Sr., and a jury. R. 1. Jessica Baldwin and Stephanie Linder represented the State. R. 1. Andrew Grimes and Christina Parnall represented appellant. R. 1. The jury acquitted appellant of carjacking and the knife charge. R. 256, ll. 2 – 10. The jury convicted appellant of kidnapping. R. 256, ll. 2 – 10. Judge Young sentenced appellant to mandatory life imprisonment without the possibility of parole based on South Carolina's recidivist statute. R. 261, l. 8 – 263, l. 15. This appeal follows.

## ARGUMENT

The United States and South Carolina constitutions forbid sentencing an adult defendant to mandatory life without parole when one of his prior “strikes” was a crime committed as a juvenile.

### **Relevant Facts**

As shown by its decision to acquit appellant Sheldon Kelly (“Kelly”) of carjacking and possession of a knife during the commission of a violent crime, the jury did not believe all of the alleged victim’s story. R. 256, ll. 2 – 10. Veronica Frutchey (“Frutchey”) claimed that when she was getting into her car after work, a black male she did not know appeared next to her car and said, “Move over, bitch.” R. 16, ll. 1 – 23. Frutchey claimed she had already started her car and that her driver’s side door was still open. R. 16, ll. 14 – 19. The man forced his way into the car, put a knife to her stomach, and said, “Don’t do anything stupid.” R. 17, ll. 1 – 10.

Frutchey tried to jump out of the car. R. 18, ll. 3 – 11. The man grabbed her by her hair and pulled her back into the car. R. 18, ll. 3 – 11. Frutchey screamed for help and honked the horn and struggled with the man when he tried to put the car into gear. R. 18, ll. 3 – 18. She “scratched him to make sure I had his skin under my fingers....” R. 19, ll. 22 – 25. The man fled after two of her co-workers came to her assistance. R. 19, ll. 5 – 17. Frutchey’s co-workers largely corroborated her account of the struggle and saw the man flee. R. 35, l. 24 – 37, l. 21. R. 42, l. 10 – 46, l. 14.

The police found a knife in the floorboard of Frutchey’s car, but it did not test positive for Kelly’s DNA. R. 63, ll. 11 – 18. R. 133, ll. 12 – 17. Also found in the car was a black toboggan. R. 63, ll. 10 – 15. DNA collected from the hat matched Kelly. R.

126, ll. 6 – 16. DNA collected from Frutchey's fingernails matched Kelly. R. 125, ll. 16 – 126, l. 5.

Kelly testified in his own defense and denied carjacking or trying to kidnap Frutchey. R. 145, l. 22 – 146, l. 7. Kelly also denied having a knife. R. 153, ll. 6 – 12. Kelly described his altercation with Frutchey as “a drug deal that went bad.” R. 146, ll. 8 – 12.

Kelly lived in the neighborhood behind Frutchey's employer. R. 147, l. 9 – 148, l. 9. The police testified that this neighborhood was a high crime area with a lot of drug activity. R. 57, l. 19 – 58, l. 8. Kelly worked at a trucking company on the same road as Frutchey's employer and often walked through the parking lot on his way to work. R. 147, ll. 12 – 148, l. 9. He first met Frutchey in August 2011. R. 148, ll. 18 – 22. Subsequently, Frutchey asked Kelly to buy cocaine for her. R. 149, ll. 7 – 21. Kelly bought small amounts of cocaine for Frutchey on “[n]umerous occasions.” R. 150, ll. 4 – 17.

On the day in question, Frutchey asked Kelly to buy a much larger amount of cocaine – seven grams for \$225.00. R. 150, l. 18 – 151, l. 5. Kelly admitted that he planned to “rip off” Frutchey and got a fake bag of cocaine from his supplier in addition to a real bag of cocaine for her \$225.00. R. 153, l. 22 – 156, l. 7. When Kelly tried to give Frutchey the fake cocaine, she was not fooled and demanded her money. R. 156, l. 8 – 157, l. 3. Kelly described her as “belligerent,” and “wild and crazy about it.” R. 157, ll. 1 – 3. Frutchey began to hit Kelly in the face and held him in the car while he tried to escape. R. 157, l. 4 – 158, l. 25. He finally escaped from her car and went home. R. 159, ll. 1 – 6. The defense argued that Frutchey fabricated the carjacking to hide her drug

use from her co-workers who witnessed her altercation with Kelly. R. 225, l. 19 – 229, l. 2. R. 232, ll. 1 – 11.

After the jury's verdict acquitting Kelly of carjacking and possession of a knife, but convicting him of kidnapping, the State placed on the record that it had served its intent to seek life without parole based on Kelly's December 16, 1996, conviction for voluntary manslaughter. R. 256, ll. 2 – 10. Kelly objected to the sentence of mandatory life without parole under both the South Carolina and federal constitutions. R. 262, l. 10 – 263, l. 5. The incident giving rise to the voluntary manslaughter conviction happened when Kelly was fourteen years old and he was convicted when he was fifteen years old. R. 262, ll. 14 – 17. The State did not contest these facts. Citing Miller v. Alabama, 132 S.Ct. 2455 (2012), and Graham v. Florida, 560 U.S. 48, 75 (2010), the defense argued that it was unconstitutional to use a conviction obtained against a person when he was a minor to sentence a defendant to mandatory life imprisonment without the possibility of parole. R. 262, l. 10 – 263, l. 5. The trial court rejected Kelly's argument and sentenced him to life without parole. R. 263, ll. 6 – 15.

### **Discussion**

Kelly received a mandatory sentence of life imprisonment based on a crime he committed when he was fourteen years old. R. 262, ll. 14 – 17. In Graham, the United States Supreme Court held "that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." 560 U.S. 48, 75 (2010). The Supreme Court extended this holding in Miller, stating, "We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." Miller, 132 S.Ct. at 2469. It logically follows

from this rule that the Eighth Amendment forbids mandatory life sentencing based on a crime committed as a juvenile.

The Court stated “that children are constitutionally different from adults for purposes of sentencing.” Id. at 2464. Children have less moral culpability. Id. at 2464-65. The Miller Court emphasized the need for individualized sentencing for juveniles. Id. at 2467. The Court stated that the sentencer must “have the ability to consider the mitigating qualities of youth.” Id. South Carolina’s recidivist law took away the trial judge’s discretion and his ability to consider any possible range of sentences. Removing this discretion from the trial judge violated Kelly’s Eighth Amendment rights.

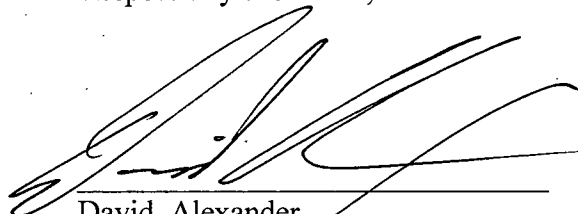
South Carolina already holds that a juvenile adjudication may not be used as a “strike.” State v. Ellis 345 S.C. 175, 179-80, 547 S.E.2d 490, 492 (2001). In 2002, the South Carolina Supreme Court considered the exact question presented by this case. State v. Standard, 351 S.C. 199, 204-07, 569 S.E.2d 325, 328-30 (2002). In Standard, the Court held that if a juvenile had been tried and adjudicated as an adult, that conviction could be used as a strike. Id. Standard relied on now-invalid reasoning in older United States Supreme Court and federal appellate cases to reach that conclusion. Id. For example, Standard held that “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. at 205, 569 S.E.2d at 329. This holding is no longer good law after Miller and Graham. The same analysis applies to Kelly’s claim under the South Carolina Constitution. S.C. Const. art. 1, § 15. State v. Jones, 344 S.C. 48, 56 n.8, 543 S.E.2d 541, 544-45 n.8 (2001) (interpreting a cruel and unusual punishment challenge under both the Eighth Amendment and the South Carolina Constitution).

Since Miller and Graham have overruled the principles underlying Standard, it is time to correct this practice in South Carolina. While this Court cannot overrule state Supreme Court precedent, it can recognize when such precedent has been rendered invalid by decisions of the United States Supreme Court. The Court should do so in this case and overturn Kelly's LWOP sentence.

CONCLUSION

For the foregoing reasons, the Court should overturn appellant's sentence and remand the case for resentencing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

This 19<sup>th</sup> day of February, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 19<sup>th</sup>, 2015



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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 19<sup>th</sup> day of February, 2015.



David Alexander  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 19<sup>th</sup> day of February, 2015.

 (L.S.)

Notary Public for South Carolina  
My Commission Expires: July 3, 2023.