

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Kristi Lea Harrington, Circuit Court Judge

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SC Court of Appeals

Opinion No. 5302 (S.C. Ct. App. filed March 11, 2015)

11-GS-10-2338-2339

THE STATE,

RESPONDENT,

V.

MARVIN BOWENS GREEN,

PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on April 21, 2015. App. 33-34.

QUESTIONS PRESENTED

- I. Did the Court of Appeals err in affirming the trial judge's refusal to provide the jury with specific instructions concerning how to analyze the evidence presented concerning the identification of Petitioner as the perpetrator, including expert testimony on the subject, in violation of Petitioner's Sixth Amendment right to a fair trial?
- II. Did the Court of Appeals err in affirming the trial judge's ruling to allow the prosecution to introduce Petitioner'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 Petitioner by suggesting to the jury that Petitioner had a prior criminal record?
- III. Did the Court of Appeals err in affirming Petitioner's sentence of life imprisonment without the possibility of parole pursuant to the state's recidivist statute where such a sentence violated the Eighth Amendment's ban on cruel and unusual punishment because Petitioner's prior conviction was committed when he was seventeen-years old?

STATEMENT OF THE CASE

On April 4, 2011, a Charleston County grand jury indicted Petitioner for armed robbery (2011-GS-10-2338) and possession of a firearm during the commission of a violent crime (2011-GS-10-2339). R. 414. 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 Petitioner. R. 1. The jury found Petitioner guilty as charged. R. 343, line 20 – R. 344, line 9. Judge Harrington sentenced Petitioner 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. R. 351, lines 15-23; R. 416.

After the trial, on June 25, 2012, Petitioner filed a motion to vacate his sentence. R. 397. By order filed July 31, 2012, Judge Harrington denied Petitioner's motion. R. 403. Petitioner filed a timely notice of appeal, which was perfected. After oral argument before the Honorable John C. Few, the Honorable James E. Lockemy, and the Honorable Paula H. Thomas on January 8, 2015, the Court of Appeals affirmed Petitioner's convictions and sentences in a published opinion on March 11, 2015. State v. Green, Op. No. 5302 (S.C. Ct. App. filed Mar. 11, 2015); App. 1-18. Petitioner filed a timely petition for rehearing on March 26, 2015. App. 19-32. On April 21, 2015, the Court of Appeals denied the petition for rehearing. App. 33-34. Now, Petitioner seeks a writ of certiorari for this Court to review the lower court's decision.

ARGUMENT

I. The Court of Appeals erred in affirming the trial judge's refusal to provide the jury with specific instructions concerning how to analyze the evidence presented concerning the identification of Petitioner as the perpetrator, including expert testimony on the subject, in violation of Petitioner's Sixth Amendment right to a fair trial.

Relevant facts

The state's entire case rested upon identifications of Petitioner 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. R. 7, lines 10-20. The man robbed the store of a small amount of money and a pack of cigarettes. R. 9, lines 7-16. Natubhai identified Petitioner as the robber. He claimed he knew Petitioner as a customer of the store. In fact, he claimed Petitioner was in the store three times per week over the previous year. R. 7, line 24 – R. 8, line 25. While Petitioner was his customer, Natubhai engaged in some small talk with him – primarily consisting of a shared joke regarding President Barack Obama having signed Petitioner's identification. R. 8, lines 6-8. After the robbery, Natubhai contacted law enforcement, and then his wife. R. 9, lines 17-18; R. 13, lines 1-2. Natubhai, along with his wife and son, watched the surveillance video with police. R. 9, 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. R. 14, lines 5-8. Due to Natubhai's limited ability to speak, read, and understand English, Natubhai's son, Dhruval, translated the admonitions. R. 13,

lines 18-20; R. 15, lines 8-22; R. 17, line 23 – R. 18, line 1.¹ Natubhai identified Petitioner's photograph from the line-up. R. 15, lines 23 – 25; R. 75, lines 1-8.

Natubhai was approximately two feet from the individual in the well-lit store. R. 20, lines 9-14. Despite the individual's wearing of sunglasses, Natubhai claimed he could see the individual's face clearly. R. 21, lines 2-5. Natubhai also claimed that 80% of his customers were African-American. R. 21, lines 12-14. He admitted that he was scared when the gun was pointed at him. R. 23, line 22 – R. 24, line 3; R. 25, 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. R. 24, 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. R. 26, 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. R. 43, lines 6-13; R. 44, lines 1-10. Luckadoo then reviewed the surveillance video. At trial, Luckadoo said he recognized the suspect. R. 50, lines 10-25. Luckadoo claimed the suspect was "Marvin Bowens." R. 51, lines 1-2. Luckadoo then identified the perpetrator in the video as Petitioner. R. 51, line 24 – R. 52, line 5. Similarly, Charles Lawrence, the investigator assigned to the case, identified the perpetrator in the videos as Petitioner. R. 67, line 24 – R. 68, line 15. Finally,

¹ Dhruval testified that he interpreted the entire admonitions sheet for his father from English to their Indian dialect. R. 33, line 2 – R. 34, line 25. On the other hand, James Perkins, the officer who administered the lineup, testified that Dhruval assisted but did not act as a translator. R. 168, lines 18-21. Specifically Perkins testified that Dhruval did not translate each paragraph or sentence. R. 169, lines 1-11.

Jagruti Patel, the wife of Natubhai, testified that she also worked at the store regularly and identified Petitioner as the perpetrator in the videotape. Supp. R. 1, line 16 – Supp. R. 2, line 1; Supp. R. 3, line 22 – Supp. R. 4, line 5.

Petitioner 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 presented several common misconceptions regarding memory, including that memory acts like a video recorder and that a traumatic event improves memory. R. 208, lines 8-20. Additionally, Dr. Beaudry informed the jury 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. R. 285, line 14 – R. 216, line 23; R. 221, line 13 – R. 224, lines 7. Research indicates individuals are much better at identifying someone of the individual's own race than identifying someone of a different race. R. 220, lines 13-24. She further explained how memory fades in as little as two hours. R. 224, line 17 – R. 225, line 8. Memory also changes as additional information is presented after the event. R. 225, lines 9-24.

Petitioner submitted multiple proposed jury instructions based upon the single largest issue in the case – identification. R. 290, lines 5-13; R. 291, lines 10-15; R. 388. 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 indeed a product of the witness's own memory. R. 388.

Despite these relevant and informative requests, the judge refused to charge the jury as Petitioner sought. Instead, the judge issued her "standard identification charge." R. 290, lines 20-23. Specifically, the judge instructed the jury in very limited boiler-plate fashion as follows:

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.

R. 330, lines 5-22.

At the conclusion of the instructions, Petitioner renewed his requests to charge. Petitioner explained how the defense's 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 permitted 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. R. 335, line 23 – R. 342, line 9.

Addressing the issue on appeal, the Court of Appeals found no error in the trial court's refusal to provide the jury with the necessary instructions of how to synthesize the numerous facts and factors uncovered during cross-examination of the witnesses and through the testimony of the expert witness. After finding the "standard identification charge" issued by the trial judge was "an accurate statement of the law in South Carolina," the Court held Petitioner "failed to show error from the absence of his requested charges because the substance of many of his requested charges were included in the trial court's 'standard identification charge.'" App. 9. Additionally, the Court "believe[d] some of [Petitioner]'s requested charges would have been improper instructions into matters of fact or comments on the weight of the evidence." App. 9. On this point, the Court stated that Petitioner's request to charge regarding cross-racial identifications "would have been improper because it would have asked the jury to place less weight on [the store owner]'s testimony because he was of a different race than [Petitioner]."

App. 9-10.

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, 406 S.C. 118, 749 S.E.2d 165 (Ct. App. 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). This Court addressed jury instructions concerning witness identifications in State v. Motes, 264 S.C. 317, 215 S.E.2d 190 (1975). This Court held that the trial judge’s failure to provide the model instruction² 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, this 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, this Court noted the identification presented “no peculiar problem.” Id.

Although this 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, this Court “admonish[ed] the trial bench that in

² In the United States v. Telfaire, 469 F.2d 552, 555 (D.C. Cir.1972), the 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.

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).

In State v. Whaley, 305 S.C. 138, 142, 406 S.E.2d 369, 371-372 (1991), this 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. This 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.

Petitioner’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 provision that would have allowed the jury to consider all of the evidence presented. 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 this Court explained in reversing the conviction in State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989) “standard charges” or “approved charges” do not excuse 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, this 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, this 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).

Petitioner challenged the reliability of the multiple identifications. This included the language barrier between the store owner and the police and the use of the owner’s minor son as a translator/interpreter, Natubhai’s admission that he had spoken to his wife and son regarding the robbery and had watched the surveillance video from the robbery multiple times, the identifications made by watching the video, and the different races of the individuals involved. Petitioner presented expert testimony on how memory works and does not work. Although the Court of Appeals relied heavily upon Motes, supra, in arriving at its conclusion, the Court failed to appreciate that the identification in Motes presented “no peculiar problem” whereas the identifications at issue here presented a multitude of peculiar problems. Further, the evidence before Petitioner’s jury included expert testimony regarding identifications, which required instruction and guidance from the Bench regarding how to analyze and synthesize. Finally, South Carolina permits the introduction of expert testimony concerning eyewitness identifications.

Permitting such evidence requires a jury instruction regarding how to use that evidence in arriving at a verdict.

According to the Court of Appeals, "South Carolina appears to fall into the class of jurisdictions that view instructions regarding 'a witness's level of certainty in his or her identification in assessing the reliability of the identification' as 'superfluous when general instructions on witness credibility and burden of proof are given' or 'an impermissible judicial comment on the evidence.'" App. 10; See Brodes v. State, 614 S.E.2d 766 (Ga. 2005). Petitioner contends that South Carolina does not fall into this class in light of this jurisdiction's willingness to tailor instructions to the evidence given, as demonstrated through the case law governing self-defense. Further, to the extent South Carolina does fall into this class, Petitioner requests this Court move the law forward to catch up with the science. When identification is an essential issue at trial, appropriate guidelines focusing the jury's attention on how to analyze and consider factual issues with regard to the reliability of a witness's identification of a defendant as the perpetrator are critical.

In Petitioner'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 Petitioner's expert. In fact, the nature of the instruction left the jury with the impression that

most of the evidence produced by Petitioner was not to be considered by the jury during its deliberations. This was error.

II. The Court of Appeals erred in affirming the trial judge's ruling to allow the prosecution to introduce Petitioner'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 Petitioner by suggesting to the jury that Petitioner had a prior criminal record.

Relevant facts

During the testimony of former Detective Charles Lawrence, the prosecution introduced Petitioner's mug shot over Petitioner's objection. Specifically, the prosecution sought to introduce the photograph of Petitioner taken when he was arrested for the incident on which he was on trial; however, the fact that the mug shot was from Petitioner's arrest concerning this charge was never conveyed to the jury. Petitioner objected to the introduction of the mug shot. R. 75, line 13 – R. 76, line 23. Lawrence testified that the mug shot fairly and accurately depicted how Petitioner looked on the day he was arrested; however, Lawrence did not inform the jury that the mug shot was from Petitioner's arrest on the present charge. R. 77, lines 3-25.

The trial court ordered portions of the mug shot be removed so that it would not appear as such. R. 132, line 25 – R. 133, line 1. When Petitioner 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 Petitioner was arrested and booked. The case relied upon by Petitioner 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." R. 196, lines 16-24. The judge also explained that the prosecution indicated the photograph was needed because

it showed Petitioner's side profile. R. 197, lines 3-8. However, the photographs were obviously a mug shot as they were front and side profile shots of Petitioner's face. R. 133, lines 18-25.

In addition to the testimony of Lawrence concerning the mug shot, Lawrence and Luckadoo testified to their prior relationships with Petitioner, 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 Petitioner. He testified that he had "general dealings" with Petitioner, including personal contact through a traffic stop. R. 50, line 23 – R. 51, line 8. Lawrence testified that he believed the person in the surveillance video was Petitioner as well. Lawrence claimed he "had the opportunity to talk with [Petitioner] for hours at a time while patrolling." He claimed that he had interactions with Petitioner but "not because he was in trouble or anything." Despite claiming that Petitioner was not "in trouble" during their prior interactions, he testified that he had the opportunity to view Petitioner's face, hear him talk, observe his mannerisms. In short, Lawrence claimed he knew Petitioner "very well." R. 68, line 10 – R. 69, line 16.

Discussion

The introduction of a mug shot is reversible error unless (1) the prosecutor had a demonstrable need to introduce the photograph, (2) the photograph shown to the jury did not suggest the defendant had a criminal record, and (3) 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, this 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 this Court found no prejudice to Traylor as a result of the photograph, this Court strongly admonished the prosecution against utilization of such photos except in the rarest of cases. Id.

In Petitioner's case, the mug shot was irrelevant and unnecessary to substantiate the identification of the person depicted in the video recording for several reasons. Petitioner was present in the courtroom for identification purposes. The prosecution presented no evidence indicating that Petitioner'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. Despite the fact that Petitioner appeared at trial and the jury could see his face – even in profile, the Court of Appeals found the state “had a demonstrable need to introduce” the mug shot because it included a side-view of Petitioner's face, which “allowed the jury to compare the photo to the still photos from the surveillance video of the robbery.” The Court of Appeals further found the side-view photo of mug shot was “highly probative” because “it depicted a clear shot of [Petitioner]'s nose, which [former] Detective [Charles] Lawrence described as very distinctive and one of the reasons he was able to identify [Petitioner] as the assailant from the surveillance video.”

The Court of Appeals placed significant emphasis on the testimony of former Detective Charles Lawrence to support introduction of the mug shot, particularly the portion of the testimony regarding a “distinctive nose.” This emphasis was misplaced. During the trial, former Detective Charles Lawrence claimed that he identified Petitioner as the perpetrator from the video based on Petitioner having a “distinctive walk” and a “distinctive nose.” R. 70, lines 1-5. There was no testimony from former Detective Charles Lawrence regarding what was actually distinctive about Petitioner's nose or anything to suggest that such a distinguishing characteristic

could be observed only from a profile view. Noses may be distinctive for several reasons, many of which could be observed only from the front profile. For example, the width of the nose and the nostrils, which are commonly used to distinguish a person's face, would be revealed in a front profile photograph, not a side profile.

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). The mug shot was obviously a mug shot despite the alterations required by the trial judge prior to its admission. The photograph showed Petitioner in two profiles: facing forward and side. See State v. Tate, 288 S.C. 104, 341 S.E.2d 380 (1986) ("The photographs in question were typical police photographs, taken when a person has been arrested, depicting the appellant in two classic poses; a standing close-up facial view and a standing close-up side view"). Without question, the general public is very familiar with mug shots showing an individual from front and side profiles. The mug shot gave the jury the impression that Petitioner had been arrested and/or convicted of prior crimes by its very nature of being a mug shot.

Further, the mug shot was introduced in a way to draw attention to its origin or implication. The mug shot was introduced through former Detective Charles Lawrence, not a lay witness who could have testified as to Petitioner's appearance. Former Detective Charles Lawrence and another police officer testified to their prior relationships with Petitioner, which were acquired as part of their jobs in law enforcement. The other officer testified that he had "general dealings" with Petitioner, including personal contact through a traffic stop. R. 50, line 23 – R. 51, line 8. Former Detective Charles Lawrence testified that he believed the person in the surveillance video was Petitioner as well. Former Detective Charles Lawrence claimed he

“had the opportunity to talk with [Petitioner] for hours at a time while patrolling.” He claimed that he had interactions with Petitioner “not because he was in trouble or anything.” Despite claiming that Petitioner was not “in trouble” during their prior interactions, he testified that he had the opportunity to view Petitioner’s face, hear him talk, observe his mannerisms. In short, former Detective Charles Lawrence claimed he knew Petitioner “very well.” R. 68, line 10 – R. 69, line 16.

The mug shot was different from the photo used in the photographic line-up as well. Thus, the cumulative effect of the mug shot, the testimony of the officers regarding how they allegedly knew Petitioner, and the difference in the photographs was that the jury knew Petitioner had been arrested and/or convicted of prior crimes. The obvious nature of the mug shot as a mug shot, and its implication that Petitioner had been convicted of a prior offense was reinforced by the testimony of former Detective Charles Lawrence and the other officer who indicated they knew Petitioner from prior experience related to law enforcement. The jury could draw but one conclusion – Petitioner 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 Petitioner to impart upon the jury the undeniable impression that Petitioner had a prior criminal record.

III. The Court of Appeals erred in affirming Petitioner's sentence of life imprisonment without the possibility of parole pursuant to the state's recidivist statute where such a sentence violated the Eighth Amendment's ban on cruel and unusual punishment because Petitioner's prior conviction was committed when he was seventeen-years old.

Relevant facts

The jury found Petitioner guilty of armed robbery and possession of a firearm during the commission of a violent crime. R. 343, line 20 – R. 344, line 7. Although Petitioner 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. R. 345, line 8 – R. 346, line 16. Petitioner 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 only seventeen-years old at the time of the prior offense which served as the triggering offense for application of the recidivist statute. R. 345, line 25 – R. 346, line 10. Specifically, Petitioner challenged the imposition of life without parole (LWOP) as a sentence because it violated the Eighth Amendment's ban on cruel and unusual punishment. R. 349, lines 19-20. Nevertheless, the judge sentenced Petitioner to LWOP. R. 351, lines 18-22; R. 416.

After the trial, Petitioner filed a motion to vacate his sentence of LWOP. Petitioner 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. 397. Denying Petitioner's motion, the trial judge's order explained that Petitioner 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, Petitioner was

seventeen-years old. A jury found Petitioner 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 Petitioner's motion, the judge first determined that because Petitioner 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 Petitioner was under the age of eighteen at the time. Next, the judge found dispositive only the age of Petitioner at the time at the second offense with no consideration of Petitioner's age at the time of the triggering offence. Thus, the Court refused to vacate Petitioner's LWOP sentence. R. 403.

Discussion

In affirming Petitioner's LWOP sentence, the Court of Appeals relied upon this Court's decision in State v. Standard, 351 S.C. 199, 569 S.E.2d 325 (2002). This was error because the legal analysis on which Standard was based as been altered by controlling United States Supreme Court precedent. In Standard, 351 S.C. at 205, 569 S.E.2d at 329, this 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. Although Standard was a statutorily-defined juvenile at the time of the triggering offense, jurisdiction over his case had been transferred from the juvenile courts to general sessions. Thus, Standard was tried and sentenced as if he were an adult concerning the triggering offense. This 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, this 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.

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 this Court’s decision in Standard, supra. Now is the appropriate time to visit the issue presented. In fact, the Standard Court’s holding that sentences of LWOP for juveniles⁴ comport with contemporary standards of decency has been overruled by recent decisions of the United States Supreme Court. Thus, this Court should grant certiorari to Petitioner to resolve the conflict in the law between this Court’s decision in Standard, the Court of Appeals’ decision in this case, and Miller, infra.⁵

“[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

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, thus, 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.

⁵ One of the characters of reasons for consideration on certiorari is where the case involves a federal question and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Rule 242(b)(5), SCACR.

evolving standards of decency concerning juvenile justice jurisprudence. In Roper, the Court held death sentences for juveniles were cruel 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.

Additionally, this Court embraced the Supreme Court's Miller decision in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). As expressed by this Court, "Miller does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered." Aiken, 410 S.C. at 543, 765 S.E.2d at 577. This Court explained that "whether their sentence is mandatory or permissible, any juvenile offender who receives a sentence of life without the possibility of parole is entitled to the same constitutional protections afforded by the Eighth Amendment's guarantee against cruel and unusual punishment." Id. at 544, 765 S.E.2d at 577.

The Miller Court reserved ruling on whether individuals under age eighteen could ever be sentenced to LWOP. Miller, 132 S.Ct. 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 based upon the same constitutional reasoning. 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 “incurability 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, ‘impetuosity[,] and recklessness.’” Id. at 2467 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

Miller, thus, eradicated the rationale underpinning Standard. Therefore, it is necessary that this Court address the disconnect between the Court of Appeals’ reliance on Standard, which was based upon the reasoning that imposition of life imprisonment without the possibility of parole was not violative of the Constitution, and current Supreme Court precedent finding mandatory life imprisonment in homicide cases to be unconstitutional, and discretionary life imprisonment in non-homicide cases to be unconstitutional.

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 Petitioner 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, 562 U.S. 476, 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).

Petitioner’s sentence of LWOP, which was mandatory pursuant to the recidivist statute, violates the Eighth Amendment’s ban on cruel and unusual punishment because Petitioner 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 Petitioner’s prior record, which included an offense committed prior to his attaining the age of eighteen.

CONCLUSION

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

Respectfully submitted,

Susan B. Hackett

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Appellate Defender

ATTORNEY FOR PETITIONER.

This 21st day of May, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
MAY 21 2015
SC Court of Appeals

Certiorari to Charleston County

Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5302 (S.C. Ct. App. filed 3/11/2015)
11-GS-10-2338-2339

THE STATE,

RESPONDENT,

V.

MARVIN BOWENS GREEN,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Jennifer Ellis Roberts, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Marvin Bowens Green #346650, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, and the S.C. Court of Appeals this 21st day of May, 2015.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day
of May, 2015.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022