THE STATE OF SOUTH CAROLINA
In the Supreme Court

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5302 (S.C. Ct. App. filed March 11, 2015)
Appellate Case No. 2015-001103

State of South Carolina, ... Respondent,

v.

Marvin Bowens Green, ... Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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III. Did the Court of Appeals properly affirm the trial court's sentence of life imprisonment without the possibility of parole under S.C. Code Ann. § 17-25-45 because the use of a prior juvenile conviction to enhance Petitioner's sentence under the statute did not constitute cruel and unusual punishment?

STATEMENT OF THE CASE

Procedural History

A Charleston County Grand Jury indicted Petitioner for armed robbery and possession of a weapon during the commission of a violent crime. (R.p.414-19.) On June 11-14, 2012, Petitioner proceeded to trial before a jury. Andrew Grimes, Esquire, and Cody Groeber, Esquire, represented Petitioner, and Chief Deputy Solicitor D. Bruce Durant and Assistant Solicitor Rutledge Durant represented the State. The jury found Petitioner guilty of both charges. (R.p.343.) The Honorable Kristi Lea Harrington sentenced Petitioner to five years' imprisonment for possession of a weapon during the commission of a violent crime and life in prison without the possibility of parole (LWOP) for armed robbery. (R.p.351.) On August 13, 2012, Judge Harrington denied Petitioner's motions to vacate sentence and for mistrial. Subsequently, Petitioner filed a Notice of Intent to Appeal.

On March 11, 2015, the South Carolina Court of Appeals affirmed Petitioner's conviction in a published opinion. See State v. Green, Op. No. 5302 (S.C. Ct. App. filed March 11, 2015). Petitioner filed a petition for rehearing on March 26, 2015, which was denied on April 21, 2015. (App.19-34.) A Petition for Writ of Certiorari to the Court of Appeals was submitted on May 21, 2015, and this Return follows.

Factual Background

At 7:45 a.m. on December 24, 2010, a man entered Natubhai Patel's (Victim) convenience store and robbed him at gunpoint. (R.p.7, lines 10-13.) Victim called the police immediately, and the police arrived and viewed the surveillance video with Victim. (R.p.9, lines 17-22.) Victim told the police he recognized the robber as a regular customer but did not know his name. (R.p.12, lines 14-23.) On December 29, 2010,

police met with Victim and showed him a six-person photo lineup from which he chose a photo of the man who robbed him. (R. p.14, line 5-R. p.18, line 13.) Police generated an arrest warrant for Petitioner and charged him with armed robbery and possession of a weapon during the commission of a violent crime. (R. p.75, lines 4-8; R.p.414-419.)

At trial, the State called Victim, who described what happened the day of the robbery. (R. p.4, line 19-R. p.9, line 22.) Victim testified that the man who entered his store with a gun on December 24, 2010, was a regular customer he had known for approximately one year. (R. p.7, lines 10-25.) The man came into the store approximately three times a week to buy cigarettes, gas, and lottery tickets. (R. p.8, lines 1-5.) Victim explained he and the man had a running joke about Obama's signature being on the man's identification. (R. p.8, lines 6-8.) Victim identified the robber in court as Petitioner. (R. p.8, line-R. p.9, line 2.) He was able to recognize Petitioner by his voice and by seeing his face, despite the fact he was wearing sunglasses and holding a gun during the robbery. (R. p.20, line 24-R. p.21, line 11.) Victim testified regarding his selection of Petitioner out of a six-person lineup. (R. p.14, line 5-R. p.18, line 13.) He explained that he does not read English well, so his son read and explained the lineup procedure. (R. p.15, lines 13-22.) He verified he was 100% positive when he circled Petitioner's photo in the lineup and was able to identify Petitioner within a half second. (R. p.16, lines 16-25; R. p.18, lines 10-13.)

Deputy Dustin Luckadoo, of the Charleston County Sheriff's Office, testified that he responded to the scene, talked to Victim, and viewed the video tape from the scene. (R. p.42, line 21-R. p.43, line 8; R. p.48, line 8-R. p.50, line 11.) He recognized Petitioner as the robber, based on general dealings with him including a traffic stop, and

identified him in court with 100% certainty. (R. p.50, line 23-R. p.52, line 12; R. p.61, lines 20-24.)

Detective Charles Lawrence of the Charleston County Sheriff's Office testified that he was brought on to investigate the crime after it had occurred. (R. p.62, line 8-R. p.65, line 16.) When Lawrence viewed the video from the crime scene on December 29, 2010, he recognized Petitioner as the perpetrator based on having dealt with him before. (R. p.67, line 1-R. p.68, line 23.) Lawrence testified he had the opportunity to observe Petitioner's face, mannerisms, voice, and gait for hours at a time. (R. p.68, line 24-R. p.69, line 16.) He testified he recognized Petitioner's walk in the video because it was distinctive; he also was able to identify Petitioner's distinctive nose, as well as his height and weight. (R. p.69, line 25-R. p.70, line 9.) Lawrence testified he was 100% positive the man pointing the gun at Victim in the video was Petitioner. (R. p.70, lines 10-R. p.71, line 20.)

Once Detective Lawrence identified Petitioner in the video, he generated a six-person photo lineup through SLED. (R. p.71, lines 22-25.) He then arranged to meet with Victim to see if he could pick out the man who robbed him. (R. p.72, lines 3-15.) Lawrence took Detective James Perkins with him to conduct the actual lineup with Victim because policy prohibits an officer from performing the lineup identification if he knows who the suspect is. (R. p.72, line 16-R. p.73, line 8.) On December 29, 2010, Lawrence and Perkins met Victim outside a Sears store and Perkins conducted the lineup while Lawrence stayed away from the procedure. (R. p.73, line 10-R. p.74, line 18.) Lawrence testified that Victim made an identification and that Lawrence then generated an arrest warrant for Petitioner based on that identification. (R. p.75, lines 1-8.)

Next, the State requested to approach the bench and the trial court held the following bench conference:

> [The State]: I think we probably are going to have a matter of law outside the presence of the jury on the booking photo.
>
> The Court: On the booking photo? Why?
>
> [The State]: Because we want to put the booking photo in because it's relevant. It shows his side profile, it's from when he was arrested from this instance so it's not a prior incident. It has nothing to do with 404(b) but it's relevant so the jury can see him and be able to look at this and look at the video.
>
> The Court: Let me see.
> What's your objection?
>
> [Petitioner]: The booking photo. I was researching lineups last night - -
>
> The Court: Which is different - -
>
> [Petitioner]: I understand, and I was going through some South Carolina cases on booking photos - -
>
> . . . .
>
> [The State]: I don't have a problem if you want me to cut those photos, cut the top half off.
>
> [Petitioner]: Yeah, but, I mean, it still shows it's a booking photo.
>
> The Court: Let's just mark it for identification.

(R. p.75, line 13-R. p.76, line 24.) Immediately following the bench conference, the State moved to admit the booking photo, State's Exhibit #5, and Petitioner objected under Rule 404(b). (R. p.77, lines 21-23.) The trial court overruled the objection but did not allow the State to publish the exhibit at that time. (R. p.77, lines 24-25.)

Joseph L. West, a SLED investigator, testified regarding his role in obtaining still photographs from the video captured at the scene. (R. p.134, line 1-R. p.136, line 23.) Petitioner objected to the still photos, State's Exhibit #6, being admitted. (R. p.140, line 4-R. p.141, line 23.) After hearing arguments, the trial court admitted State's #6 over Petitioner's objection. (R. p.145, lines 1-R. p.149, line 18.)

Jagruti Patel, Victim's wife, testified that she recognized the man in the store video as a regular customer who often came in to buy Newport cigarettes, lottery tickets, and gas. (R. p.178, line 5-R. p.181, line 25.) She recounted him joking about Obama signing his identification when she would ask for it. (R. p.182, lines 1-5.) Patel positively identified Petitioner in court as the man in the video. (R. p.184, lines 9-25; R. p.185, lines 1-16.)

Next, the trial court addressed the booking photo again. (R. p.195, lines 1-5.) The trial court noted that the booking photo was admitted earlier, but was not published yet, and discussed the size of the photo after redaction. (R. p.195, line 6-R. p.196, line 12.) The following exchange took place:

> [Petitioner]: And we believe we have sort of a front picture, side pictures. Any jury can - - any reasonable juror can infer that's a booking photo.
>
> The Court: But that's not standard, is it? That's not what I'm concerned with. We can infer anything from anything and the case that you provided indicates that it was a different type of photo. It was the actual booking photo. We all know that he was arrested and there was indication that he was booked, and the case that you provided me it was from a - - the date was around his neck on his booking photo, which was prior to the arrest that he was being tried for.
>
> [Petitioner]: Yes, Your Honor. Basically, when you look at the three factors in the case we don't believe the evidence need [sic] to introduce the photograph.

The Court: The reason that they indicated to the Court that they needed it is because they needed a side profile picture. When we approached at the bench there was a discussion, because I'm not sure if it was on the record, there was a discussion on what would be admissible.

Mr. Groeber indicated that his major objection was to the top and to the bottom row because it clearly then indicated that it came from Charleston County. There's absolutely no distinguishing marks on the remaining two photographs. There's nothing to indicate that they - - he's in a jail suit or anything around the neck as in the case that you provided, and so I made the decision to cut the top and the bottom off of those pictures. So back to my initial question, Mr. Grimes.

[Petitioner]: Yes, ma'am.

The Court: They have a larger picture of what I have had redacted. Okay. So it's now - - that picture is a full page. There was an objection because during the redaction now it's a smaller page.

[Petitioner]: Yes, ma'am.

The Court: So which would you prefer me, preserving all of your objections, give the bigger page so that it's in conformity with all the other paper page sizes or the smaller page that's black and white?

[Petitioner]: Preserving everything we prefer the bigger photo to go back.

The Court: All right. If we will, just so the record is clear, we will mark that as 5-A. Five does not go back.

Did you understand, Mr. Grimes? Did you hear what I said?

[Petitioner]: They are substituting the - -

The Court: I'm not substituting because I want the record to be thoroughly preserved. This will be 5-A, and 5, the redaction that I did cutting, it will not go back but it will remain as 5. The one 5-A will go back.

[Petitioner]: Thank you.

> (Whereupon, State's Exhibit Number 5-A, a Photograph, was marked and admitted into evidence.)

(R. p.196, line 13-R. p.198, line 17.)

The State rested, and Petitioner then presented his case. After recalling Detective Lawrence, Petitioner called Dr. Jennifer Beaudry, an assistant professor of psychology at the University of South Carolina Beaufort. (R. p.199, line 5-R. p.200, line 1.) Dr. Beaudry testified she wrote her dissertation about eyewitness identification procedures and people's perceptions of those procedures. (R. p.200, lines 16-20.) The trial court admitted her as an expert in human memory and eyewitness identification without objection. (R. p.205, lines 1-19.) Dr. Beaudry testified that factors such as the presence of a weapon, whether someone is wearing a disguise, and whether a perpetrator and witness are of the same race can affect an observer's ability to encode information. (R. p.215, line 25-R. p.216, line 9.) She admitted there are no studies regarding one's ability to recognize somebody one already knows but who is wearing a disguise. (R. p.248, lines 2-4.)

Petitioner requested jury charges via email, which the trial court marked as Court's Exhibit #9, that included a specific request as to identification as it relates to expert testimony based on State v. Long, 721 P.2d 483 (Utah 1986). (R. p.290, lines 5-13; R. p.291, lines 10-13.) The trial court informed Petitioner it would be charging its standard identification charge that lists all elements and factors that may be considered. (R. p.290, lines 20-23; R. p.291, lines 13-15.) The portion of the jury charges in regard to identification stated:

> An issue in this case is the identification of the defendant as the person who committed the crime charged. The State has 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. 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.
>
> Once again, I instruct you, the burden of proof on the State extends to every element of the crime charged and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the crime.
>
> If after examining the testimony you have a reasonable doubt as to the accuracy of the identification you must find the defendant not guilty.

(R. p.330, line 5-R. p.331, line 5.) Specifically as to expert witnesses, the trial court charged:

> The rules of evidence ordinarily do not permit witnesses to testify to opinions or to conclusions. An exception to this rule exists for witnesses we call expert witnesses.
>
> A witness who by education and experience has become expert in some art, science, profession or calling may state an opinion as to relevant and material matter in which the witness claims to be an expert and may also state the reasons for the opinion.
>
> You should consider any expert opinion received in evidence in this case and like any other evidence give it the weight you think it deserves. If you decide that the opinion of an expert witness is not based on sufficient education and experience or if you conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence you may disregard the opinion entirely.
>
> An expert witness's testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert. Further, you are not required to accept an expert's opinion even though it is not contradicted.

(R. p.327, line 13-R. p.328, line 9.)

After the trial court instructed the jury, Petitioner asked that he be permitted to place on the record the reasons he requested certain charges. (R. p.335, lines 20-25.) He then went through each portion of the specific charges he requested and how he believed the trial court's charges did or did not comply with what he requested. (R. p.336, line 3-R. p.341, line 9.) The trial court recognized the preservation of his argument and objection and ruled that it would not change the charge given. (R. p.341, lines 10-23.)

Ultimately, the jury found Petitioner guilty of both charges. (R. p.343.) The trial court sentenced Petitioner to five years' imprisonment for possession of a weapon during the commission of a violent crime, to be served concurrently with a sentence of life in prison without the possibility of parole for armed robbery. (R. p.351.) On August 13, 2012, the trial court denied Petitioner's motions to vacate sentence and for mistrial.

ARGUMENT

I.

The Court of Appeals properly affirmed the trial court's denial of Petitioner's request for specific jury instructions concerning identification with respect to expert testimony.

Petitioner argued to the Court of Appeals that his Sixth Amendment right to a fair trial was violated when the trial judge failed to provide the jury with specific instructions concerning how to analyze the evidence presented concerning the identification of Petitioner as the perpetrator. Specifically, he argued the areas not addressed in the jury instructions included: (1) expert testimony on the subject, (2) significant language barriers between police and Victim, and (3) the use of surveillance video. However, Petitioner did not articulate any argument on bases (2) and (3) in his brief—effectively abandoning those two particular areas of argument—and the Court of Appeals failed to address them in its opinion. Petitioner articulated his argument regarding the trial court's failure to provide jury instructions concerning identification with respect to expert testimony; however, the trial court properly denied his request for specific jury instructions and properly charged the jury, and the Court of Appeals properly affirmed the trial court's ruling.

The Court of Appeals stated in its opinion that the trial judge is required to charge only the current and correct law of South Carolina, based on State v. Brandt, 393 S.C. 526, 549, 721 S.E.2d 591, 603 (2011). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Id. Here, the Court of Appeals correctly found the trial court's "standard identification charge" was an accurate statement of the law on identification testimony in South Carolina.

The Court of Appeals addressed State v. Motes, 264 S.C. 317, 215 S.E.2d 190 (1975), and its discussion of the model jury instruction from United States v. Telfaire, 469 F.2d 525 (D.C. Cir 1972). In Motes, this Court found no prejudice in refusing the requested instruction because the trial court instructed the jury that it must find the testimony identified the defendant as the offender beyond a reasonable doubt. This Court held there was no error in the trial court's refusal to charge the Telfaire model instruction, noting the model instruction was "designed to focus the attention of the jury on the identification issue and minimize the risk of conviction through false or mistaken identification." Motes, 264 S.C. at 326, 215 S.E.2d at 194. This Court found, "The trial, and the instructions given, adequately focused the attention of the jury on the necessity for a finding that the testimony identified defendant as the offender beyond a reasonable doubt; therefore, no prejudice resulted to defendant from the failure to give the requested instruction." Id.

Here, the Court of Appeals found the trial judge properly instructed the jury that it could consider whether the witness had an adequate opportunity to observe the offender at the time of the offense and such things as how much time was available, how close the witness was, lighting conditions, and whether the witness had a chance to see or know the person in the past. The Court pointed out that Petitioner failed to show error from the absence of the requested charges because the substance was included in the trial court's "standard identification charge." Further, the Court of Appeals found Petitioner's request regarding identification by a person of a different race would have been an improper instruction on the facts or weight of the evidence, as it would have asked the jury to place less weight on Victim's testimony because he was of a different race than Petitioner.

The Court of Appeals distinguished two out-of-state cases Petitioner relied on. In Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005), the Georgia Supreme Court acknowledged that "[w]hile Georgia has decided that a jury instruction on eyewitness identification should be given when testimony warrants, other states see such a charge as superfluous when general instructions on witness credibility and burden of proof are given, or reject such an instruction as an impermissible judicial comment on the evidence." (emphasis added). The Court of Appeals noted that South Carolina appears to fall into this class. State v. Long, 721 P.2d 483 (Utah 1986), is the source for Petitioner's proposed jury instructions. However, the Long court did not go so far as to require that particular set of instructions in every eyewitness identification case but, rather, decided to grant courts discretion in crafting instructions. The Court of Appeals determined both Brodes and Long did not require it to find the failure to give Petitioner's requested instructions was reversible error, noting this Court declined to find error from the failure to give a Telfaire charge when the trial court properly instructed the jury concerning the credibility of witness testimony and the believability of a victim's identification, as the trial court did here.

Petitioner argues the Court of Appeals failed to appreciate Motes presented "no peculiar problem" while here, he argues a multitude of peculiar problems existed. However, two of the problems included the language barrier and the surveillance video, which were not argued on appeal, were thus effectively abandoned, and were not addressed by the Court of Appeals in its opinion. Furthermore, the Court of Appeals noted the Motes opinion had no peculiar problems because the wife and another person identified him as the perpetrator. Here, too, Victim's wife, Victim, and Detective Lawrence all identified Petitioner.

II.

The Court of Appeals properly affirmed the trial court's admission of Petitioner's "mug shot" into evidence where it was relevant to his identification, where its probative value outweighed any danger of undue prejudice, and where it was merely cumulative to other evidence used to establish Petitioner's identity.

Petitioner argued to the Court of Appeals that the trial court erred in allowing the State to introduce Petitioner's "mug shot" because it was unnecessary, cumulative to the State's case, and prejudiced Petitioner by suggesting he had a prior criminal record. To the contrary, the State demonstrated the photograph was necessary, did not suggest Petitioner had a criminal record, and did not draw attention to its origin or implication. Thus, the introduction of the photograph met the requirements for admission set forth in South Carolina case law, was not reversible error, and was properly affirmed by the Court of Appeals.

In State v. Denson, 269 S.C. 407, 412, 237 S.E.2d 761, 764 (1977), the South Carolina Supreme Court announced the introduction of a "mug shot" is reversible error unless: (1) the State has a demonstrable need to introduce the photograph; (2) the photograph does not suggest defendant has a criminal record; and (3) the photograph is not introduced so as to draw attention to its origin or implication. Reviewing these factors, the Court of Appeals correctly found the trial court did not abuse its discretion in admitting Appellant's booking photo into evidence.

First, the Court found the State had a demonstrable need to introduce the booking photo because it showed a side view of Petitioner's face that allowed the jury to compare it to the still photos from the surveillance video. Even though the jury was able to view Petitioner's face during trial, the Court of Appeals noted the importance of allowing the jury to compare the photos during deliberations. Additionally, the Court noted the side-

view photo was highly probative because it gave a clear shot of Petitioner's nose, which was distinctive and one of the reasons Detective Lawrence was able to identify him. The Court also pointed out the jury could use the photo when assessing witness credibility. Because Petitioner challenged the reliability of Victim's identification, it became even more important for the jury to assess Victim's and Detective Lawrence's identification of him.

Next, the Court determined the photo was not introduced in a way that drew attention to its origin, noting that the trial court enlarged the photo to be in conformity with all the other paper evidence and also cut off the top and bottom to remove any reference to a law enforcement agency. Critically, the Court pointed out the photo was introduced during Detective Lawrence's testifying that the photo was a fair and accurate description of Petitioner when he was arrested, implying it was taken following that arrest.

Finally, the Court noted Petitioner suffered little prejudice, if any, from the photo because it did not suggest any prior bad acts. Nothing on the photo indicated it was taken at any time other than the current arrest; thus, nothing suggested a prior criminal record. In addition, the Court noted the booking photo was cumulative to the lineup photo the trial court admitted and that ruling was not challenged on appeal.

Accordingly, Petitioner's petition for writ of certiorari should be denied.

III.

The Court of Appeals properly affirmed the trial court's sentence of life imprisonment without the possibility of parole under S.C. Code Ann. § 17-25-45 because the use of a prior juvenile conviction to enhance Petitioner's sentence under the statute did not constitute cruel and unusual punishment.

Petitioner argued to the Court of Appeals that his sentence of life imprisonment without the possibility of parole (LWOP) constitutes cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution because the sentence was enhanced based on Petitioner's prior conviction for a crime committed when he was seventeen years old. However, the Court of Appeals correctly found the trial judge properly sentenced Petitioner for his current conviction under S.C. Code Ann. § 17-25-45 because his prior conviction for a most serious offense constituted a qualifying prior conviction for enhancement purposes under the statute. Furthermore, the enhancement of Petitioner's sentence with the prior conviction did not offend modern standards of decency and did not constitute cruel and unusual punishment.

A. <u>Propriety of Sentencing Enhancement</u>

Under S.C. Code Ann. § 17-25-45(A), once the State seeks LWOP, the trial judge has no discretion in sentencing and must sentence a defendant to a term of imprisonment of life without the possibility of parole where the defendant was convicted of a most serious offense and has either one or more prior convictions for a most serious offense or two or more prior convictions for a serious offense. Kidnapping, first-degree burglary, armed robbery, and assault and battery with intent to kill are all classified as most serious offenses under the statute. S.C. Code Ann. § 17-25-45(C)(1) (2003 & Supp. 2012).

A "conviction" for purposes of the recidivist offender statute means any conviction, guilty plea, or plea of nolo contendere. S.C. Code Ann. § 17-25-45(C)(3)

(2003 & Supp. 2012). A juvenile adjudication in family court does not qualify as a conviction for purposes of sentencing enhancement under the statute. State v. Ellis, 345 S.C. 175, 179, 547 S.E.2d 490, 492 (2001). However, as the Court of Appeals noted in its opinion, where a juvenile is tried as an adult in general sessions court, a resulting conviction or guilty plea is a conviction for enhancement purposes. State v. Standard, 351 S.C. 199, 203, 569 S.E.2d 325, 328 (2002).

Prior to being convicted of these crimes, Petitioner had been convicted of an earlier most serious offense stemming from a crime he committed at the age of seventeen. His prior conviction was not a juvenile adjudication, meaning it constituted a conviction for statutory sentencing enhancement purposes. Therefore, due to the fact Petitioner was convicted of a most serious offense and had a prior conviction for a most serious offense, the trial judge properly determined she was required to sentence Petitioner to a term of life imprisonment without the possibility of parole. The trial judge committed no statutory error in enhancing Petitioner's sentence under the clear and unambiguous requirements of S.C. Code Ann. § 17-25-45. The Court of Appeals correctly affirmed the trial court's sentence.

B. Sentence Enhancement as Cruel and Unusual Punishment

The Eighth Amendment of the United States Constitution prohibits the imposition of cruel and unusual punishment. U.S. Const. amend. VIII. However, the Eighth Amendment only forbids extreme sentences that are grossly disproportionate to the crime. Harmelin v. Michigan, 501 U.S. 957, 1001 (1991); Curtis v. State, 345 S.C. 557, 575, 549 S.E.2d 591, 600 (2001). What constitutes cruel and unusual punishment is an evolving standard and involves looking at how society presently views a particular punishment. State v. Wilson, 306 S.C. 498, 509-10, 413 S.E.2d 19, 26 (1992). "The

Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958).

In his appeal, Petitioner categorically challenged the use of a juvenile conviction for enhancement purposes under South Carolina's recidivist offender statute. Petitioner argued the recent holdings of the United States Supreme Court, including Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011 (2010), Roper v. Simmons, 543 U.S. 551 (2005), and Miller v. Alabama, 132 S. Ct. 2455 (2012), suggest a change in contemporary values and call into question the South Carolina Supreme Court's holding in Standard. Petitioner maintained a prior juvenile conviction should not aggravate a subsequent offense to the same degree as a prior adult conviction because juvenile offenders are more likely to act with "recklessness, impulsivity, and needless risk-taking." Miller, 132 S. Ct. at 2464.

The Court of Appeals analyzed Petitioner's prior conviction by considering him a juvenile at that time. The Court based this consideration on Aiken v. Byars, 410 S.C. 534, 537 n.1, 765 S.E.2d 572, 573 n.1 (2014). The Court determined the trial court erred in finding Petitioner was not a juvenile at the time of his prior conviction. However, the Court found the trial court was correct in determining the sentence did not constitute cruel and unusual punishment because our appellate courts have rejected the argument that it is cruel and unusual punishment to use prior convictions for offenses committed as juveniles for sentencing enhancement under the recidivist state in both Standard and State v. Williams, 380 S.C. 336, 669 S.E.2d 640 (Ct. App. 2008).

Petitioner asks this Court to "address the disconnect between the Court of Appeals' reliance on Standard . . . 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." (Petition, p. 24). However, the Court of Appeals astutely points out that the holding from Miller does not apply in this case because Petitioner was not a juvenile at the time he was sentenced to LWOP and was not a juvenile at the time of the current armed robbery. For the same reason, this Court's decision in Aiken—that children are constitutionally different from adults for sentencing purposes—does not apply either.

The debate over any proposed changes to the sentencing laws based on Miller, and the changes themselves, are solely in the province of the South Carolina General Assembly. Indeed, any effort by this Court to establish particular sentencing procedures not already contemplated by existing statutes would exceed the scope of its judicial authority and invade the province of the Legislature, thereby violating the doctrine of separation of powers. S.C. Const. Art 1, § 8; See also State v. Corey D., 339 S.C. 107, 120-21, 529 S.E.2d 20, 27 (2000) (citing Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (the Court does not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly)); Henderson v. Evans, 268 S.C. 127, 130, 232 S.E.2d 331, 333 (1977) ("[C]ertainly it is not the province of this Court to perform legislative functions."); State v. Byrd, 267 S.C. 87, 91-92, 226 S.E.2d 244, 246 (1976) ("We bear in mind that when a court is called upon to determine the constitutionality of a legislative enactment, it must be careful not to usurp the legislative function."); Page v. Winter, 240 S.C. 516, 518, 126 S.E.2d 570, 571 (1962) ("[I]t is the function of the legislature, not the courts, to make, amend or repeal laws. . . . We do not have the right 'to repeal, alter, modify, or change the law of the land, even when it plainly appears that the law in force may be wrong.'" (citations omitted)); Hadden v. South Carolina Tax Comm'n, 183 S.C. 38, 190 S.E. 249, 253 (1937) ("This court is not a

lawmaking body[.]"); State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999) ("We, of course, must take the statute as we find it, giving effect to the legislative intent as expressed in its language. We cannot under our power of construction supply an omission in the statute."). Therefore, this Court should reject Petitioner's invitation to amend legislatively enacted sentencing laws that clearly do not run afoul of the Eighth Amendment.

Finally, the Court of Appeals disagreed with Petitioner's argument that "even if the Eighth Amendment's ban on cruel and unusual punishment does not forbid sentencing defendants to mandatory LWOP when the triggering offense occurred when the defendant was under eighteen years old, the Eight Amendment requires trial courts to make individualized sentencing decisions." The Court properly found it had no authority to review Petitioner's sentence because it was within the limits provided for by statute and was not the result of prejudice, oppression, or corrupt motive by the trial court, citing State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976).

For all of these reasons, this Court should deny Petitioner's Petition for Writ of Certiorari. His LWOP sentence does not violate the Eighth Amendment ban on cruel and unusual punishment and it should be affirmed.

CONCLUSION

Respondent submits that this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent asks permission under the rules to fully brief the issues.

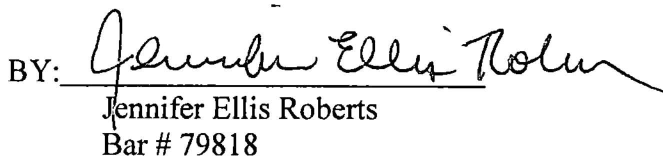
Respectfully submitted,

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY:



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ATTORNEYS FOR RESPONDENT

June 19, 2015

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Kristi Lea Harrington, Circuit Court Judge

RECEIVED
JUN 19 2015
SC Court of Appeals

Opinion No. 5302 (S.C. Ct. App. filed March 11, 2015)
Appellate Case No. 2015-001103

State of South Carolina, ... Respondent,

v.

Marvin Bowens Green, ... Petitioner.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Return to Petition for Writ of Certiorari on petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney, Susan B. Hackett, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 19th day of June, 2015.

ANGELA BENNETT
Administrative Assistant

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RECEIVED

JUN 19 2015

SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

June 19, 2015

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: The State v. Marvin Bowens Green
Appellate Case No: 2015-001103

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Return to Petition for Writ of Certiorari along with proof of service in the above-referenced case.

Sincerely,

Jennifer Ellis Roberts
Assistant Attorney General
S.C. Bar No: 79818

JER/ab
Enclosures

cc: Susan B. Hackett, Esquire
The Honorable Jenny A. Kitchings
Victim Services