STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHELDON LAMAR KELLY,

APPELLANT

APPELLATE CASE NO. 2014-000918

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.

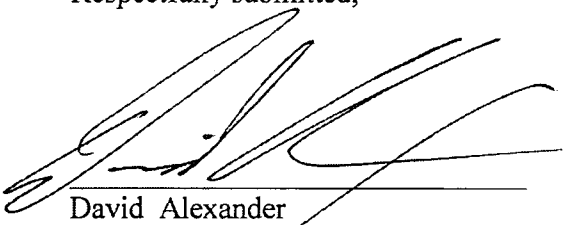
South Carolina already holds that a juvenile adjudication may not be used as a "strike." State v. Ellis 345 S.C. 175, 179-80, 547 S.E.2d 490, 492 (2001). In 2002, the South Carolina Supreme Court considered the exact question presented by this case. State v. Standard, 351 S.C. 199, 204-07, 569 S.E.2d 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,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th 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 19th, 2015

David Alexander
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHELDON LAMAR KELLY,

APPELLANT

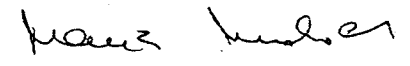
CERTIFICATE OF SERVICE

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 19th day of February, 2015.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of February, 2015.



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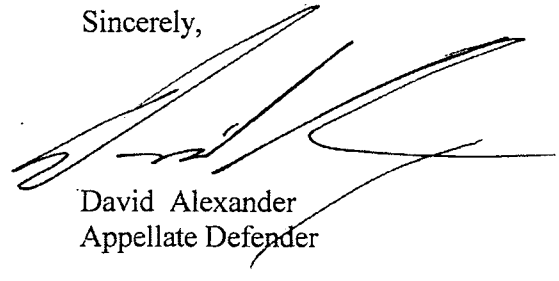
Re: The State v. Sheldon Lamar Kelly

Dear Mark:

Enclosed are two copies of the Final Brief of Appellant in the above-entitled case, which I have filed today with the South Carolina Court of Appeals.

Please call me if you have any questions.

Sincerely,



David Alexander
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DAA/mpm

Enclosure

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Roger M. Young, Sr., Circuit Court Judge
Appellate Case No. 2014-000918

THE STATE,

Respondent,

vs.

SHELDON LAMAR KELLY,

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STATEMENT OF ISSUE ON APPEAL

The trial judge properly sentenced Appellant to a sentence of life without parole pursuant to S.C. Code Ann. § 17-25-45 after Appellant was convicted of a second "most serious" offense during his lifetime, and the enhancement of Appellant's sentence based on his prior juvenile conviction for a "most serious" offense did not render his life without parole sentence unconstitutional in any way.

STATEMENT OF THE CASE

In June of 2012, Appellant Sheldon Lamar Kelly was arrested following an investigation into an attempted carjacking and kidnapping that occurred in North Charleston, South Carolina, in December of 2011. In November of 2012, the Charleston County grand jury indicted Appellant for kidnapping, carjacking, and possession of a knife during the commission of a violent crime. Prior to trial, the solicitor served timely notice on Appellant indicating the State would seek a sentence of life without parole upon conviction based on Appellant's prior conviction for the "most serious" offense of voluntary manslaughter. On April 7, 2014, a jury trial was commenced in the Charleston County court of general sessions with the Honorable Roger M. Young, Sr., circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant of the "most serious" offense of kidnapping and acquitted Appellant of the remaining charges. Following the verdict, the trial judge sentenced Appellant to life without parole pursuant to S.C. Code Ann. § 17-25-45 for the kidnapping conviction. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

On the afternoon of December 19, 2011, Matthew O'Donnell and David May were working at Charles Blanchard Construction, a business located in North Charleston, South Carolina, when they heard the sounds of someone frantically honking a car horn outside in the parking lot. (R. pp. 35-36; pp. 41-42; pp. 61-62). Alarmed, the two quickly ran outside to investigate, and they noticed a car that belonged to Veronica Frutchey ("Victim"), one of their co-workers, was partially backed out of a parking space, the vehicle's alarm appeared to be going off, the vehicle's windshield wipers had been activated, and the vehicle's passenger door was ajar.[1] (R. pp. 35-36; pp. 42-43). In response, May ran to the open passenger door, realized Victim's feet were sticking out of the door, and looked inside. (R. p. 43). When he did so, he observed Victim, who had blood on her mouth and red marks across her neck, fighting to get away from a large man seated in the driver's seat of Victim's vehicle who was restraining Victim by her hair and body. (R. pp. 36-37; p. 39; p. 43; p. 46). Immediately, May began trying to pull Victim to safety, but the large man, who was dressed entirely in black clothing, would not release her. (R. pp. 36-37; p. 43; p. 45). May then began attacking the large man, and the man quickly let go of Victim, jumped out of Victim's vehicle, and fled behind a nearby abandoned building. (R. p. 37; pp. 43-44).

After Victim's assailant had fled, O'Donnell called the police, and officers from the North Charleston Police Department quickly responded to the parking lot of Charles Blanchard Construction. (R. p. 37; pp. 53-54; pp. 60-62; pp. 79-80). Upon arriving, the officers secured the scene, and several detectives discussed the incident with Victim, who

[1] During trial, May explained Victim had left Charles Blanchard Construction only moments before the attack and had only been gone from the building long enough to walk to her car and get inside before he heard her frantically honking her car horn. (R. p. 46; p. 50).

was visibly injured, distraught, and shaking. (R. pp. 55-56; p. 79; p. 96; p. 115; p. 207). While speaking with the detectives, Victim provided a description of her assailant, whom she did not know, and indicated the man forced his way into her car after she got inside to leave work, made her get into the passenger seat, threatened her with a knife, and grabbed her by the hair and assaulted her when she attempted to exit her vehicle. (R. pp. 15-19; p. 23; pp. 28-29; p. 80). Officers then began searching the area for Victim's assailant while a crime scene investigator collected evidence from the scene, including scrapings from underneath Victim's fingernails and a black knit cap and knife found in Victim's car. (R. pp. 63-65; p. 88; pp. 99-100; p. 113; pp. 115-116). However, the search for Victim's assailant was unsuccessful that day. (R. pp. 64-65).

As the investigation into the incident continued, the evidence collected from scene was submitted for analysis, and the officers unsuccessfully attempted to identify the perpetrator of the incident by showing Victim several photographic line-ups prepared from her description of her assailant. (R. pp. 29-30; pp. 64-65). Victim's assailant remained unknown until approximately six months after the incident when an analysis of the D.N.A. profile developed from the fingernail scrapings collected from Victim was discovered to be a match for the D.N.A. profile of Appellant Sheldon Lamar Kelly. (R. p. 66). Based on that discovery, officers prepared a photographic line-up that included Appellant's photograph and showed it to Victim, and Victim quickly identified Appellant as her attacker. (R. p. 30; pp. 66-68; pp. 81-83; p. 86). Appellant was then arrested, and further analysis of the evidence collected at the scene confirmed Appellant's D.N.A. was present on the swabs collected from underneath Victim's fingernails, the black knit cap found in Victim's vehicle, hair recovered from the black knit cap, and a piece of cloth collected at the incident location. (R. p. 69; pp. 125-129).

Subsequently, Appellant was indicted for kidnapping, carjacking, and possession of a knife during the commission of a violent crime, and he proceeded to trial. (R. pp. 5-6; pp. 266-271). At the conclusion of trial, the jury convicted Appellant of the "most serious" offense of kidnapping and acquitted him of the other charges. (R. p. 256). Thereafter, during the sentencing proceedings, the solicitor confirmed Appellant had previously been convicted of the "most serious" offense of voluntary manslaughter in December of 1996 and was timely served with notice of the State's intention to seek a sentence of life without parole pursuant to S.C. Code Ann. § 17-25-45 upon conviction. (R. p. 261). In response, defense counsel acknowledged Appellant had previously been convicted of voluntary manslaughter but objected to the application of Section 17-25-45 to Appellant's case as violative of both the United States Constitution and the South Carolina Constitution. (R. p. 262). In support of his objection, defense counsel argued:

> I think [Appellant] was convicted when he was 15, and it would be our position, given the case law that has developed since then in Miller versus Alabama and Florida, which is Graham, that using a prior conviction from when someone was a minor to enhance [a] subsequent conviction would violate the Eighth Amendment, and especially in a case like this, where it seems at least to me at first glance it could be inconsistent verdicts. He was found not guilty of using a weapon, and kidnapping is so broad it could almost be one second or, you know, half an hour. Given those combinations, we believe that [e]volving standards of decency, our Court should not impose a sentence of life without parole.

(R. pp. 262-263). However, the trial judge disagreed, noting Appellant's most recent "most serious" offense was committed after he reached the age of majority. (R. p. 263). As a result, the trial judge sentenced Appellant to life without parole. (R. p. 263).

ARGUMENT

The trial judge properly sentenced Appellant to a sentence of life without parole pursuant to S.C. Code Ann. § 17-25-45 after Appellant was convicted of a second "most serious" offense during his lifetime, and the enhancement of Appellant's sentence based on his prior juvenile conviction for a "most serious" offense did not render his life without parole sentence unconstitutional in any way.

Appellant contends his sentence of life without parole imposed after he was convicted of a second "most serious" offense violates his constitutional rights under the United States Constitution and the South Carolina Constitution. In support of that contention, Appellant maintains the trial judge was constitutionally forbidden from sentencing him to a mandatory sentence of life without parole based on a crime he committed as a juvenile. Contrary to Appellant's contentions, there is no constitutional prohibition against using a prior juvenile conviction for a "most serious" offense to enhance the sentence of an adult offender who chose to continue committing "most serious" offenses into adulthood. Moreover, in Appellant's case, the trial judge did not sentence Appellant to life without parole based on a crime he committed as a juvenile. Instead, the trial judge properly and correctly sentenced Appellant to life without parole pursuant to S.C. Code Ann. § 17-25-45 after Appellant, who was a recidivist offender due to his prior conviction as a juvenile for the "most serious" offense of voluntary manslaughter, was convicted as an adult of the "most serious" offense of kidnapping. As a result, the trial judge committed no error in sentencing Appellant to life without parole for the "most serious" crime he committed as an adult, and Appellant's sentence did not violate the constitutional prohibition against cruel and unusual punishment in any way. Appellant's conviction and sentence should be affirmed.

In criminal cases, a trial judge has broad discretion in imposing a sentence within the statutory limits. State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974); see State

v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) ("A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed."). Generally, appellate courts will only interfere with the discretion of a judge in the imposition of a sentence in rare and unusual circumstances. State v. Ferguson, 221 S.C. 300, 307, 70 S.E.2d 355, 358 (1952). "Absent partiality, prejudice, oppression, or corrupt motive, [the appellate court] lacks jurisdiction to disturb a sentence that is within the limits prescribed by statute." State v. Barton, 325 S.C. 522, 531, 481 S.E.2d 439, 444 (Ct. App. 1997).

Notwithstanding a trial judge's authority to impose a sentence falling within the statutory limits, both the United States Constitution and the South Carolina Constitution preclude a criminal defendant from being subjected to cruel and unusual punishment. See U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); S.C. Const. art. I, § 15 ("Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained."). Pursuant to those constitutional provisions, punishments must not be "inherently barbaric" and must be graduated and proportioned to the offense. Graham v. Florida, 560 U.S. 48, 59 (2011); see Atkins v. Virginia, 536 U.S. 304, 311 (2002) (instructing it is a precept of justice punishment for a crime should be graduated and proportioned to the offense). However, the prohibition against cruel and unusual punishment does **not** require strict proportionality between the offense and the sentence.

Harmelin v. Michigan, 501 U.S. 957, 1001 (1991). Instead, "it forbids only extreme sentences that are 'grossly disproportionate' to the crime." Id. (citations omitted).

In general, there are two classifications of cases involving challenges raised pursuant to the prohibition against cruel and unusual punishment: (1) cases involving a case-specific challenge to a term-of-years sentence based on the circumstances of a particular case; and (2) cases involving a categorical challenge to a particular sentencing practice. Graham, 560 U.S. at 59. On one hand, the appropriate analysis in cases involving a case-specific challenge involves first comparing the gravity of the offense to the severity of the sentence imposed. Harmelin, 501 U.S. at 1004-1005. Then, if that comparison leads to an inference of "gross" disproportionality, the court should compare the defendant's sentence to the sentences of offenders who committed the same offense in the defendant's jurisdiction along with the sentences of offenders who committed the same offense in other jurisdictions to determine if the defendant's sentence actually was grossly disproportionate to his crime. Id. at 1005. Importantly though, no single factor is dispositive in the proportionality analysis. See Solem v. Helm, 463 U.S. 277, 291, n. 17 (1983) ("[N]o single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment."). On the other hand, the appropriate analysis in cases involving a categorical challenge to a particular sentencing practice involves the court first considering objective indicia of society's standards to determine whether a national consensus exists against the challenged sentencing practice. Graham, 560 U.S. at 61; see also Trop v. Dulles, 356 U.S. 86, 101 (1958) ("The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."). In making that determination, the court should look to legislation enacted by the legislatures in the United States because the clearest and most reliable expression of

society's contemporary values can be derived from such legislation. State v. Pittman, 373 S.C. 527, 563, 647 S.E.2d 144, 162 (2007). Furthermore, the court making such a determination should remember that "[i]t is not the burden of the state to establish a national consensus approving what their citizens have voted to do; rather, it is the heavy burden of the defendant to establish a national consensus against it." State v. Williams, 380 S.C. 336, 347, 669 S.E.2d 640, 646 (Ct. App. 2008); see Gregg v. Georgia, 428 U.S. 153, 175 (1976) ("[I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people."). Next, after determining whether a national consensus exists against a particular sentencing practice, the court "must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution." Graham, 560 U.S. at 61. Critically, that determination should be "guided by 'the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose[.]' " Id. (quoting Kennedy v. Louisiana, 554 U.S. 407, 421 (2008)).

In the case sub judice, Appellant was sentenced to life without parole for a kidnapping he committed as an adult based on his status as a recidivist offender in light of his prior conviction as a juvenile for the "most serious" offense of voluntary manslaughter. On appeal, Appellant is categorically challenging the use of his prior juvenile conviction for sentencing enhancement purposes under South Carolina's recidivist offender statute. In support of that categorical challenge, Appellant contends

the recent holdings of the United States Supreme Court in Graham v. Florida, 560 U.S. 48 (2010), and Miller v. Alabama, __ U.S. __, 132 S. Ct. 2455 (2012), "logically" support a conclusion the constitutional prohibition against cruel and unusual punishment forbids the imposition of a mandatory life without parole sentence based on a crime committed as a juvenile and call into question the South Carolina Supreme Court's previous holding that found the use of juvenile convictions for sentencing enhancement purposes to be constitutionally proper. See State v. Standard, 351 S.C. 199, 206, 569 S.E.2d 325, 329 (2002) ("[A]n enhanced sentence 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." (emphasis in original)). Significantly though, Appellant's contentions entirely ignore the facts he was not a juvenile offender with lessened culpability at the time he kidnapped his most recent victim and he was not in any way sentenced to life without parole for an offense he committed as a juvenile.

Looking to the United States Supreme Court's decisions in Graham and Miller, those decisions had no impact on our Supreme Court's earlier holding affirming the use of prior juvenile convictions for sentencing enhancement purposes for recidivist offenders because neither Graham nor Miller addressed that particular issue. See United States v. Hoffman, 710 F.3d 1228, 1233 (11th Cir. 2013) ("Nothing in Miller suggests that an adult offender who has committed prior crimes as a juvenile should not receive a mandatory life sentence *as an adult*, after committing a further crime as an adult." (italics in original)); United States v. Scott, 610 F.3d 1009, 1018 (8th Cir. 2010) ("The Court in Graham did not call into question the constitutionality of using prior convictions, juvenile or otherwise, to enhance the sentence of a convicted adult."); see generally Hutto v. S.

Farm Bureau Life Ins. Co., 259 S.C. 170, 173, 191 S.E.2d 7, 8-9 (1972) ("It is, of course, settled law that 'a case cannot be considered as a binding precedent on a legal point that was not argued in the case and not mentioned in the opinion.' " (citations omitted)). Instead, in Graham, a narrow majority of the United States Supreme Court determined the constitutional prohibition against cruel and unusual punishment prohibited the imposition of a life without parole sentence on a juvenile non-homicide offender based on its determination juveniles have lessened culpability when compared to adults. Graham, 560 U.S. at 74. Similarly, in Miller, a narrow majority of the United States Supreme Court determined even juvenile offenders who committed homicide could not be sentenced to mandatory life without parole. Miller, 132 S. Ct. at 2469. Importantly though, the majority in Graham and Miller did **not** conclude juvenile offenders lacked any and all culpability for their actions and did **not** determine – either directly or indirectly – adult offenders' juvenile convictions could not be used against them in the future to enhance their sentences if they chose to continue committing crimes into adulthood. Cf. United States v. Wilks, 464 F.3d 1240, 1243 (11th Cir. 2006) ("Our conclusion that youthful offender convictions can qualify as predicate offenses for sentencing enhancement purposes remain valid because Roper does not deal specifically – or even tangentially – with sentence enhancement. It is one thing to prohibit capital punishment for those under the age of eighteen, but an entirely different thing to prohibit consideration of prior youthful offenses when sentencing criminals who continue their illegal activity into adulthood. Roper does not mandate that we wipe clean the records of every criminal on his or her eighteenth birthday."). In fact, the majority in both Graham and Miller specifically recognized the consequences of juvenile offenders' crimes could continue into adulthood and result in such offenders spending the remainder of their

natural lives in jail for crimes they committed **as juveniles**. See Miller, 132 S. Ct. at 2469 (holding the Eighth Amendment forbids mandatory life without parole sentences for juvenile offenders but declining to "forclose a sentencer's ability" to sentence a juvenile offender convicted of homicide to life without parole); Graham, 560 U.S. at 75 ("It bears emphasis . . . that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life."). As a result, the holdings in Graham and Miller are simply not applicable or relevant to the situation in Appellant's case and do not support a conclusion it is unconstitutional to enhance the sentence of an adult offender based on the offender's prior juvenile convictions. See United States v. Hunter, 735 F.3d 172, 176 (4th Cir. 2013) (holding the use of a juvenile conviction for sentencing enhancement purposes was not unconstitutional and did not violate the mandates of Miller, which was determined to be inapplicable since Hunter was not a juvenile with diminished culpability at the time he committed the offense for which his sentence was enhanced); United States v. Graham, 622 F.3d 445, 463 (6th Cir. 2010) (finding the imposition of a sentence of life imprisonment under a recidivist statute based upon a prior juvenile conviction was not unconstitutional because the instant offense was committed by an adult offender and not a juvenile with lessened culpability); see also Counts v. State, 338 P.3d 902, 906 (Wyo. 2014) ("Miller did not address adult sentences nor did it address habitual criminal statutes. We conclude that the Miller holding does not extend to adult sentences enhanced to life imprisonment based upon habitual criminal status.").

Critically, despite Appellant's misguided appellate assertion to the contrary, Appellant did **not** receive the life sentence for any offense he committed before reaching the age of maturity. Instead, Appellant was sentenced to life without parole for a "most

serious" offense he committed as an adult. See Gryger v. Burke, 334 U.S. 728, 732 (1948) ("The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."); State v. Washington, 338 S.C. 392, 397, 526 S.E.2d 709, 711 (2000) ("Defendant's current sentence does not punish him a second time for his previous transgression. Instead, the State is punishing Defendant to a greater extent for the current offense due to his repetitive illegal actions."); see also Monge v. California, 524 U.S. 721, 728 (1998) (instructing a sentencing enhancement based on a prior conviction is not to be construed as an additional punishment for the previous offense but rather an increased sentence for the latest crime based on the offender's repetitive criminal behavior). Because Appellant was an adult at the time he kidnapped his most recent victim, Appellant could no longer claim he had any diminished or reduced culpability for his actions based on his age, maturity, or level of brain development.[2] See Counts, 338 P.3d at 906-907 ("[T]he district court did not sentence Mr. Counts to life imprisonment for his juvenile conviction; rather, it enhanced his punishment for his convictions for the crimes he committed as an adult. . . . Mr. Counts was not a juvenile at the time he was sentenced. The mitigating factors of youth were simply not an issue when he was sentenced."). Therefore, there was – and is – no rational basis to exclude Appellant's prior conviction from consideration for sentencing enhancement purposes in regard to his sentence for a crime he committed as a fully culpable adult **regardless** of whether that prior conviction was for an offense committed when he was a juvenile.

[2] Notably, Appellant has not raised any challenge to his kidnapping conviction on appeal and, instead, has only objected to the constitutionality of his sentence. Thus, Appellant's conviction is the law of the case. See State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (finding unchallenged and unappealed rulings are the law of the case).

Furthermore, Appellant's enhanced sentence was entirely consistent with the rationale behind recidivist offender statutes, which are designed to discourage and incapacitate repeat offenders by severely punishing those offenders who choose to continue to break the law time and time again. See United States v. Rodriquez, 553 U.S. 377, 385 (2008) ("[A]n offense committed by a repeat offender is often thought to reflect greater culpability and thus to merit a greater punishment. Similarly, a second or subsequent offense is often regarded as more serious because it portends greater future danger and therefore warrants an increased sentence for purposes of deterrence and incapacitation."). Appellant's sentence was properly enhanced based on the increased culpability inherent in his status as an offender who had previously been convicted of an earlier "most serious" offense. Although aware of the consequences of his earlier crime committed as a juvenile, Appellant elected to continue to engage in highly serious and dangerous criminal conduct after being released from prison. Appellant could not claim any diminished culpability for the crimes he committed as an adult, especially in light of the knowledge and experience he should have gained following his juvenile conviction. Thus, unlike the juvenile offenders in Graham and Miller who were presumed to have lessened culpability based on their age, Appellant was not only fully responsible for his crimes as an adult but **more** culpable than a first-time offender due to the fact he had previously committed – and been severely punished for – a "most serious" crime. See generally Ewing v. California, 538 U.S. 11, 29 (2003) ("Ewing's sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record. . . . To be sure, Ewing's sentence is a long one. But it reflects a rational legislative judgment, entitled to

deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated.").

Significantly, few people could have been in a better position than Appellant to appreciate the serious nature of and consequences for the commission of a serious criminal offense because, prior to committing his most recent crime, Appellant had been convicted as a juvenile of committing the "most serious" offense of voluntary manslaughter. Based on that earlier conviction, Appellant served a substantial and lengthy prison sentence, and the service of that sentence extended well into his adult years.[3] However, despite having served a lengthy term of incarceration for his juvenile "most serious" offense, Appellant committed another criminal offense of a grave and "most serious" nature not long after he was released from incarceration. See State v. Johnson, 350 S.C. 543, 547, 567 S.E.2d 486, 488 (Ct. App. 2002) ("[F]ew would argue that first-degree burglary, armed robbery, and **kidnapping** are anything other than grave offenses of the 'most serious' nature." (emphasis added)). For that reason, Appellant's personal awareness of the consequences of criminal wrongdoing coupled with his conscious decision to nonetheless engage in extremely serious criminal behavior subsequent to his release illustrates exactly why his earlier juvenile conviction properly was – and logically should have been – used to enhance his sentence for his most recent crime. Cf. United States v. Banks, 679 F.3d 505, 508 (6th Cir. 2012) (declining to adopt a categorical prohibition against the possibility of life without parole for an adult offender based on the enhancement of a sentence with a juvenile-age criminal conviction and noting "Banks, 33 years old at the time of his felon-in-possession offense, remained fully

[3] Specifically, Appellant was convicted of voluntary manslaughter in 1996, received a seventeen-year sentence for that offense, and was not released from prison until 2009, which was roughly two years prior to his commission of the kidnapping for which he received his sentence of life without parole. (R. p. 15; p. 261; Supp. R. p. 1).

culpable as an adult for his violation and fully capable of appreciating that his earlier criminal history could enhance his punishment").

Importantly, South Carolina courts have repeatedly found S.C. Code Ann. § 17-25-45 to be constitutional, and it is consistent with the recidivist offender statutes adopted in many other states. See State v. Rogers, 361 S.C. 178, 188, 603 S.E.2d 910, 915 (Ct. App. 2004) (finding no error in the enhancement of a sentence with a nineteen-year-old prior conviction and noting the recidivist offender statute has repeatedly withstood constitutional challenges); see also United States v. Mays, 466 F.3d 335, 340 (5th Cir. 2006) (concluding there is no national consensus a sentencing enhancement to life imprisonment based on a juvenile conviction violates modern standards of decency); United States v. Salahuddin, 509 F.3d 858, 864 (7th Cir. 2007) (holding the enhancement of an adult offender's sentence with a prior juvenile conviction does not constitute cruel and unusual punishment); Mullins v. State, 571 S.W.2d 852, 858 (Tenn. Crim. App. 1978) ("[I]t must be remembered that the defendant is not being punished for his prior [juvenile] crimes. Those crimes brought about his status, but his present sentence is the enhanced punishment for this 23 year old defendant's present crime."); see generally Nichols v. United States, 511 U.S. 738, 747 (1994) ("Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or **recidivist statutes that are commonplace** in state criminal laws, do not change the penalty imposed for the earlier conviction." (emphasis added)). In seeking to have his sentence declared unconstitutional, Appellant failed to establish a clear or universal rejection of the use of prior juvenile convictions for sentencing enhancement purposes under recidivist offender statutes, and, without such a showing, there was – and is – simply no basis to conclude the statutory sentencing practice applied in Appellant's

case constituted cruel and unusual punishment. See State v. Jones, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) ("When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution."). Under those circumstances, the trial judge properly sentenced Appellant to life without parole upon his second conviction for a "most serious" offense.

In conclusion, the use of prior "most serious" convictions for sentencing enhancement purposes – regardless of whether the offenses were committed by juvenile or adult offenders – serves the legitimate penological goals of discouraging and preventing the commission of crimes by habitual offenders and is entirely proper under both the United States Constitution and the South Carolina Constitution. See Solem, 463 U.S. at 296 ("[A] State is justified in punishing a recidivist more severely than it punishes a first offender."). Therefore, the statutory enhancement of Appellant's sentence based on his prior juvenile conviction was not unconstitutional, and there was no legitimate reason for the trial judge to ignore Appellant's prior juvenile conviction when considering Appellant's sentence for his most recent crime. Because Appellant's sentence was not unconstitutional and was a statutorily proper sentence for his crime, the trial judge committed no error in sentencing Appellant to life without parole. See S.C. Code Ann. § 17-25-45(A) (mandating a sentencing judge must sentence a defendant to life imprisonment without parole upon conviction for a "most serious" offense when that defendant has either one or more prior convictions for a "most serious" offense or two or more prior convictions for a "serious" offense). Appellant's conviction and sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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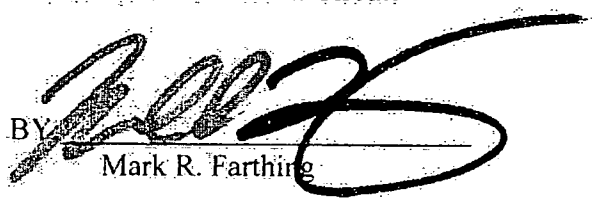
BY: 
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February 13, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Roger M. Young, Sr., Circuit Court Judge
Appellate Case No. 2014-000918

THE STATE,

Respondent,

vs.

SHELDON LAMAR KELLY,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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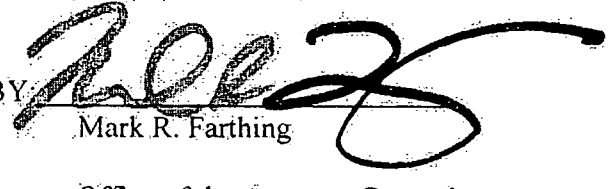
BY: 
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PROOF OF SERVICE

I, Angela S. Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served. This 13th day of February, 2015.

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