

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Horry County
Larry B. Hyman, Circuit Court Judge

Opinion No. 2016-UP-479 (S.C. Ct. App. filed Nov. 16, 2016)

Indictment Nos. 2012-GS-26-02057, -02058, -02059

THE STATE,

RESPONDENT,

V.

ABDUL FURQUAN,

PETITIONER

APPELLATE CASE NO. 2017-000469

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ORIGINAL

RECEIVED
FEB 27 2017
S.C. SUPREME COURT

INDEX

INDEX i

CERTIFICATE OF COUNSEL1

QUESTION PRESENTED2

STATEMENT OF THE CASE.....3

ARGUMENT

The trial judge violated the Eighth Amendment’s bar against cruel and unusual punishment by imposing a sentence of life imprisonment without the possibility of parole pursuant to the recidivist statute where the offense used to enhance the sentence occurred two decades before the instant crime. 7

CONCLUSION.....13

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on January 20, 2017. App. 10.

QUESTION PRESENTED

Did the trial judge violate the Eighth Amendment's bar against cruel and unusual punishment by imposing a sentence of life imprisonment without the possibility of parole pursuant to the recidivist statute where the offense used to enhance the sentence occurred two decades before the instant crime?

STATEMENT OF THE CASE

On October 16, 2011, Taylor Smith picked up Petitioner, Jeremy Fleming, Tyler Topolski, and Samantha Topolski. R. 21, line 19 – R. 22, line 7; R. 32, line 20 – R. 33, line 14; R. 50, lines 7-18. The group drove to the Ivystone Apartments. R. 22, lines 8-10; R. 33, lines 23-25; R. 52, lines 1-3; R. 54, lines 6-8. At Petitioner's trial, some testified the purpose of the trip was for Jeremy to get money that was owed to him while others testified the purpose of the trip was for the purchase of marijuana. R. 22, lines 2-3; R. 32, lines 24-25; R. 33, line 6; R. 34, lines 19-22; R. 44, lines 13-20; R. 52, lines 4-6; R. 56, line 24 – R. 57, line 8; R. 110, lines 19-22; R. 114, lines 23-24. Tyler, Samantha, and Taylor stayed in the car while Petitioner and Jeremy went into the apartment complex. R. 22, lines 10-22; R. 34, lines 6-18; R. 35, lines 5-7; R. 42, lines 17-22; R. 52, lines 9-11; R. 54, lines 9-14; R. 58, lines 16-25. Jeremy was wearing gloves with skulls on them. R. 23, lines 3-7; R. 29, lines 10-22; R. 45, lines 14-21; R. 115, lines 11-14.

Shots fired

Eric Collins and David Moran shared an apartment at Ivystone. R. 126, lines 8-11; R. 13, lines 16-20. On the evening of October 16, 2011, Eric was in his room taking a nap. R. 13, line 21 – R. 14, lines 4. David heard a knock at his door. R. 127, lines 5-13. Unable to see through his peephole because the lights in the hallway were not functioning, David opened his door to determine who had knocked. R. 127, lines 14-23. He saw two men wearing bandanas standing outside his door. R. 127, lines 23-25; R. 128, lines 19-20; R. 130, lines 14-17; R. 130, lines 22-23. He tried to shut the door, but one of the men got his foot inside the door and prevented the closure. While David tried to shut the door, one of the men punched him. R. 128, lines 1-7; R. 129, lines 6-7. David stumbled backward. R. 128, line 7. When David opened his eyes he saw a man standing over him with a silver revolver. He heard a pop. R. 128, lines 7-11. David's next memory was of

sitting in the emergency room. R. 129, lines 9-22. David had been shot in the head. R. 128, lines 12-13; R. 130, lines 2-7.

Eric heard a “sound [like] a light bulb makes when it pops,” only “four times louder.” R. 14, lines 4-6. He woke up, grabbed his rifle, and walked toward the living room. R. 14, lines 6-11. Eric saw two males standing in the doorway. R. 14, lines 11-12. He saw one of the men had a gun pointing in the general direction of David. R. 14, lines 23-17. When the two males saw Eric, they ran. R. 14, lines 20-22. Eric was unable to identify the men because they wore hoodies and bandanas. R. 14, lines 18-19; R. 15, lines 3-6; R. 17, line 23 – R. 18, line 5; R. 18, lines 18-23. Because Eric arrived after the shot was fired, he could not say the individuals he saw in his home had fired the shot at David. R. 20, lines 3-9.

Petitioner and Jeremy ran back to the car where Tyler, Samantha, and Taylor sat waiting.¹ R. 23, lines 17-21; R. 24, lines 17-21; R. 36, lines 3-6; R. 36, line 22 – R. 37, line 2; R. 52, lines 15-16. The group then returned to the home shared² by Petitioner and Jeremy where Jeremy threatened to kill anyone who spoke about the events of that evening. R. 24, line 22 – R. 25, line 3; R. 37, line 9 – R. 38, line 2; R. 54, lines 22-24; R. 55, lines 18-21; R. 112, lines 3-13. Jeremy also told Samantha, his girlfriend at the time, that he had “shot a dude in the head.” R. 43, lines 16-19.

¹ Jeremy Fleming, who had been convicted of attempted murder and burglary arising out of this incident, testified at Petitioner’s trial. R. 110, lines 13-16. He claimed that when he and Petitioner approached the apartment door, he, Jeremy, ran as soon as the door was opened. R. 110, line 22; R. 111, line 9; R. 115, lines 3-4. Jeremy had a prior conviction for assault and battery of a high and aggravated nature involving his entering a man’s home and cutting off a man’s fingers. R. 121, line 20 – R. 122, line 19.

² Jeremy Fleming denied living in the residence. R. 109, line 24 – R. 110, line 2; R. 115, lines 15-17.

Several days later, Samantha and Taylor went to the police and gave statements incriminating Petitioner and Jeremy in the shooting of David. R. 40, lines 4-20; R. 57, lines 19-23; R. 60, lines 15-24. During the investigation, the police found a revolver at the home shared by Petitioner and Jeremy. R. 76, lines 2-18; R. 77, lines 2-9. Additionally, the police found a pair of gloves with a skeleton design on them hidden behind the couch in the residence. R. 74, lines 10-16; R. 85, lines 17-23. Forensic testing on the gloves revealed the presence of gunshot residue. R. 108, lines 3-23.

The trial

An Horry County grand jury indicted Petitioner for burglary in the first degree (2012-GS-23-2057), attempted murder (2012-GS-26-2058), and unlawful possession of a firearm by a person convicted of a violent offense (2012-GS-26-2059) on May 24, 2012. R. 187-188; R. 190-191; R. 193-194. The state, represented by Joshua Holford, called the case for trial before the Honorable Larry B. Hyman, Jr., and a jury on September 18, 2013. R. 1. Ryan Stampfle represented Petitioner. R. 1. The jury found Petitioner guilty as charged. R. 177, lines 7-17. On September 19, 2013, Judge Hyman sentenced Petitioner to life imprisonment without the possibility for parole for burglary in the first degree and attempted murder. He also sentenced Petitioner to five years' imprisonment for the firearm. R. 183, line 9 – R. 184, line 7; R. 189; R. 192; R. 195.

The appeal

On September 25, 2013, Petitioner filed and served a timely notice of appeal. Undersigned counsel perfected his appeal. On November 16, 2016, a three-judge panel of the Court of Appeals, comprised of the Honorable H. Bruce Williams, the Honorable Paula T. Thomas, and the Honorable John D. Geathers, affirmed Petitioner's convictions and sentences in

an unpublished opinion. State v. Furquan, 2016-UP-479 (S.C. Ct. App. filed Nov. 16, 2016); App. 1-2. On December 1, 2016, Petitioner filed a petition for rehearing. App. 3-9. On January 20, 2017, the Court denied the petition in a written order. App. 10.

Petitioner now files this petition for writ of certiorari.

ARGUMENT

The trial judge violated the Eighth Amendment's bar against cruel and unusual punishment by imposing a sentence of life imprisonment without the possibility of parole pursuant to the recidivist statute where the offense used to enhance the sentence occurred two decades before the instant crime.

Relevant facts

On July 23, 2013, the state served Petitioner with notice of its intent to seek a sentence of life imprisonment without the possibility of parole if Petitioner were convicted of burglary in the first degree and/or attempted murder. According to the state's notice, Petitioner had been convicted of criminal sexual conduct with a minor in the second degree, which would serve as a triggering offense of the recidivist statute. R. 178, line 3 – R. 179, line 7; R. 185. Prior to the start of trial, Petitioner moved to dismiss the state's notice based on several theories, including separation of powers and the Eighth Amendment's ban on cruel and unusual punishment in light of the remoteness of the prior offense. R. 3, line 15 – R. 4, line 19. Specifically, Petitioner objected to the prior conviction being used because "this matter is twenty years old" and occurred when Petitioner was only seventeen-years old. R. 6, lines 20-21. The judge reserved ruling on the motion at that time. R. 6, lines 22-24.

At the conclusion of the presentation of evidence, the judge returned to Petitioner's argument regarding the constitutionality of the recidivist statute as applied in his case. The judge found the prior conviction was not "too remote to be included considering the legislative intent." Thus, he permitted the state's notice of intent to seek life imprisonment without the possibility of parole to stand. R. 137, line 6 – R. 138, line 2. Petitioner renewed his motion after the state rested

its case. R. 143, line 23 – R. 144, line 11. The judge again overruled the motion. R. 144, lines 12-25; Supp. R. 1, line 1.

During sentencing, Petitioner again renewed his motion to prohibit the imposition of a sentence of life imprisonment without the possibility of parole; however, the judge overruled the motion again. R. 182, lines 15-25. The prosecutor provided the judge with a certified copy of a sentence sheet showing Petitioner had been convicted on May 12, 1992, of criminal sexual conduct with a minor in the second degree. R. 179, lines 14-24; R. 186. Thereafter, the judge sentenced Petitioner to life imprisonment without the possibility of parole for attempted murder and burglary in the first degree. R. 183, line 25 – R. 184, line 7; R. 189; R. 192; R. 195.

Discussion

The recidivist statute under which Petitioner was sentenced requires a sentence of life imprisonment without the possibility of parole if the person has one or more prior convictions for a most serious offense. S.C. Code Ann. § 17-25-45(A)(1)(a). Attempted murder, burglary first degree, and criminal sexual conduct with a minor are “most serious offenses” pursuant to S.C. Code Ann. § 17-25-45(C)(1). Further, the statutory scheme invests discretionary authority in invoking the recidivist statute *solely* in the solicitor. S.C. Code Ann. § 17-25-45(G). Finally, the statute defines “a prior or previous conviction” to mean “the defendant has been convicted of a most serious ... offense ... on a separate occasion, prior to the instant adjudication.” S.C. Code Ann. § 17-25-45(F).

The Court of Appeals affirmed Petitioner’s sentence in a one-paragraph *per curiam* opinion that consisted of a list of string citations. App. 1-2. After citing case law for the proposition that courts must give statutory language its plain and ordinary meaning and the recidivist statute, the Court recognized the governing Eighth Amendment jurisprudence. App. 1-2. However, in order to resolve the issue presented, the Court of Appeals could cite only to one of its own cases - State v.

Rogers, 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004). Specifically, the Court of Appeals cited to Rogers for the proposition that a “defendant’s sentence of life imprisonment without the possibility of parole pursuant to the recidivist statute was not cruel and unusual punishment when the defendant was convicted of a most serious offense nineteen years prior.” App. 2. The Court relied solely upon its opinion in Rogers because this Court has failed to resolve the issue presented. Thus, Petitioner’s case presents a novel question of law, and this Court should grant certiorari to review the question presented and settle the matter. See Rule 242 (b)(1), SCACR. Additionally, the Court of Appeals’ opinion in Rogers rests upon flawed reasoning, which requires this Court’s attention and resolution.

In State v. Rogers, 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004), the Court of Appeals addressed a defendant’s allegation that permitting remote convictions to serve as triggering offenses violated the federal constitution’s ban against cruel and unusual punishment. Specifically, the Court held that Rogers’ conviction nineteen years before the case in which the state sought to impose a life sentence did not violate the Eighth Amendment. Id. at 188, 603 S.E.2d at 915. In arriving at this conclusion, the Court relied upon State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999) in which this Court affirmed a defendant’s life without parole sentence. Rogers, 361 S.C. at 188, 603 S.E.2d at 915. Notably, the Court of Appeals explained this Court affirmed the sentence where the prior offense occurred seventeen years before the triggering offense. Id. However, this Court did *not* address whether the sentence imposed violated the Eighth Amendment based on the remoteness of the prior conviction; rather, this Court addressed whether the defendant received adequate notice of the charges against him and whether the recidivist statute violated the separation of powers doctrine. Burdette, 335 S.C. 37-38, 515 S.E.2d at 527. Thus, the premise of Rogers is flawed, and it is

necessary to analyze whether using a remote prior conviction to enhance a sentence violates the Eighth Amendment.

The Eighth Amendment to the United States Constitution provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII. The Eighth Amendment is applicable to the states through the Fourteenth Amendment. Robinson v. United States, 370 U.S. 660 (1962).

“[W]hat constitutes cruel and unusual punishment, and thus, what violates the Eighth Amendment, is determined by ‘evolving standards of decency that mark the progress of a maturing society.’” State v. Pittman, 373 S.C. 527, 562, 647 S.E.2d 144, 162 (2007). Likewise, the “‘proportionality’ bedrock of the Eighth Amendment jurisprudence” is equally as important. Id. at 564-565, 647 S.E.2d at 163. “It is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” Atkins v. Virginia, 536 U.S. 304, 311 (2002). “The Eighth Amendment’s prohibition of cruel and unusual punishment ‘guarantees individuals the right not to be subjected to excessive sanctions.’” Miller v. Alabama, 132 S.Ct. 2455, 2463 (2012)(quoting Roper v. Simmons, 543 U.S. 551, 560 (2005)). The Miller Court emphasized that “proportionality is central to the Eighth Amendment.” Id. (quoting Graham v. Florida, 560 U.S. 48(2010)).

The United States Supreme Court has held a state may punish a recidivist more severely than it punishes a first offender. Witte v. United States, 515 U.S. 389, 400 (1995). However, in order to pass constitutional muster, “the enhanced punishment imposed for the [present] offense ‘is not to be viewed as ... [an] additional penalty for the earlier crimes,’ but instead as ‘a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.’” Id. (quoting Gryger v. Burke, 334 U.S. 728, 732 (1948)); see also Moore v. Missouri, 159

U.S. 673, 677 (1895)(explaining that under a recidivist statute, the punishment for the last offense is “rendered more severe in consequence of the situation into which the party had previously brought himself”).

Legislation aimed at recidivism attempts to encourage offenders to stay out of trouble by punishing those who refuse to be deterred even after a conviction. Commonwealth v. Eyster, 585 A.2d 1027 (Pa. Super. Ct. 1991). A recidivist is a person who continues to commit criminal acts after incarceration for an earlier offense, and recidivist statutes punish those who show they are incorrigible. Shannon Thorne, One Strike and You’re Out: Double Counting and Dual Use Undermines the Purpose of California’s Three-Strikes Law, 34 U.S.F.L. Rev. 99 (1999).

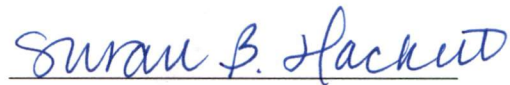
Using a conviction that is very old does nothing to fulfill the deterrent purpose of recidivist statutes. Here, the conviction used to enhance Petitioner’s sentence was two decades old and involved criminal conduct completely unlike the conduct for which he was being sentenced. If the legislature sought to deter continued criminal conduct through enactment of the recidivist statute, then the scenario presented in the instant matter could not have come within the realm of contemplation. Petitioner was convicted of attempted murder and burglary, but his sentence for those offenses was enhanced by his conviction for criminal sexual conduct with a minor when he was only seventeen-years old. The alleged criminal conduct was quite dissimilar. Further, Petitioner had been deterred from engaging in serious criminal activity for over twenty years. His subsequent conviction for attempted murder and burglary twenty years later could not be construed as the actions of a man who was incorrigible. Rather, Petitioner had learned from his prior conduct as exemplified by his not engaging in serious criminal activity during that period. South Carolina imposes time restrictions when considering recidivism in other contexts and should do so in the two strikes and three strikes arena as well. See S.C. Code Ann. § 56-1-1020 (defining a habitual traffic

offender as one who has accumulated the enumerated convictions during a three-year period); S.C. Code Ann. § 44-53-470 (imposing time limits for “second or subsequent” offenses for the drug laws); S.C. Code Ann. § 56-5-2930(E)(restricting enhanced sentences for driving under the influence to those convictions occurring within a period of ten years); cf. Rule 609(b), SCRE (imposing a time limit for the use of a prior conviction as evidence of impeachment).

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event this Court grants the writ, but dispenses with further briefing, Petitioner respectfully requests this Court vacate his sentence and remand for a new sentencing proceeding.

Respectfully Submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of February, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

FEB 27 2017

—————
Certiorari to the Court of Appeals
Appeal from Horry County
Larry B. Hyman, Circuit Court Judge
—————

S.C. SUPREME COURT

Opinion No. 2016-UP-479 (S.C. Ct. App. filed Nov. 16, 2016)
Indictment Nos. 2012-GS-26-02057, -02058, -02059
—————

THE STATE,

RESPONDENT,

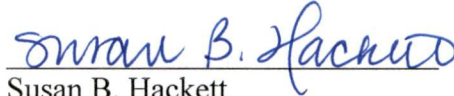
V.

ABDUL FURQUAN,

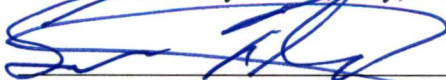
PETITIONER

—————
CERTIFICATE OF SERVICE
—————

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Abdul Furquan, #260214, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 27th day of February, 2017.


Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 27th day of February, 2017.



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