

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

Larry B. Hyman, Circuit Court Judge

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

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S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

ABDUL FURQUAN,

PETITIONER

APPELLATE CASE NO. 2017-000469

APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Abdul Furquan, Appellant.

Appellate Case No. 2013-002075

Appeal From Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Unpublished Opinion No. 2016-UP-479
Submitted October 1, 2016 – Filed November 16, 2016

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Mark Reynolds Farthing, both of
Columbia; and Solicitor Jimmy A. Richardson, II, of
Conway, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following
authorities: *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991)

("When the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning."); *State v. Morgan*, 352 S.C. 359, 366, 574 S.E.2d 203, 206 (Ct. App. 2002) ("Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation."); S.C. Code Ann. § 17-25-45(A) (2014) ("[U]pon a conviction for a most serious offense as defined by this section, a person *must* be sentenced to a term of imprisonment for life without the possibility of parole if that person has . . . (1) one or more prior convictions for: (a) a most serious offense" (emphasis added)); S.C. Code Ann. § 17-25-45(C) (Supp. 2015) (stating criminal sexual conduct with minors, first-degree burglary, and attempted murder are "[m]ost serious offense[s]"); *State v. Burdette*, 335 S.C. 34, 41, 515 S.E.2d 525, 529 (1999) ("If a defendant is convicted of one of the [section 17-25-45(C)] triggering offenses, the matter of sentencing becomes the province of the legislature."); *State v. Johnson*, 347 S.C. 67, 69, 552 S.E.2d 339, 340 (Ct. App. 2001) ("The General Assembly has made the sentencing provisions of section 17-25-45(A) mandatory."), *overruled on other grounds by James v. State*, 372 S.C. 287, 641 S.E.2d 899 (2007); *State v. Jones*, 344 S.C. 48, 56, 543 S.E.2d 541, 545 (2001) ("The cruel and unusual punishment clause requires the duration of a sentence not be grossly out of proportion with the severity of the crime."); *State v. Rogers*, 361 S.C. 178, 187-88, 603 S.E.2d 910, 915 (Ct. App. 2004) (holding the 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).

AFFIRMED.¹

WILLIAMS, THOMAS, and GEATHERS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ABDUL FURQUAN,

APPELLANT

APPELLATE CASE NO. 2013-002075

Appeal from Horry County

Larry B. Hyman, Circuit Court Judge

Opinion No. 2016-UP-479

PETITION FOR REHEARING

On November 16, 2016, this Court affirmed Appellant's sentence of life imprisonment without the possibility of parole in an unpublished opinion. State v. Furquan, 2016-UP-479 (S.C. Ct. App. filed Nov. 16, 2016). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter based upon the significant points overlooked or misapprehended by this Court in arriving at its conclusion, which are explained more fully below.

On May 24, 2012, an Horry County grand jury indicted Appellant for burglary in the first degree, attempted murder, and unlawful possession of a firearm by a person convicted of a

violent offense. On July 23, 2013, the state served Appellant with notice of its intent to seek a sentence of life without parole (LWOP) if Appellant were convicted of burglary in the first degree and/or attempted murder. According to the state's notice, Appellant 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.¹ After a short trial beginning on September 18, 2013, a jury found Appellant guilty of all charges. In light of the state's notice of intent to LWOP and over Appellant's objection, Judge Hyman sentenced Appellant to life imprisonment for burglary in the first degree and attempted murder.

On appeal, Appellant challenged the constitutionality of the recidivist statute to his case because the triggering offense occurred two decades before his sentencing in the instant matter. Appellant alleged invoking the recidivist statute in his case violated the Eighth Amendment's ban on cruel and unusual punishment. Citing this Court's opinion of State v. Rogers, 361 S.C. 178, 603 S.E. 910 (Ct. App. 2004) 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," this Court affirmed Appellant's sentence. Appellant respectfully requests this Court rehear the issue presented on appeal in his case to address the flawed premise upon which Rogers relied.

In State v. Rogers, 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004), this Court 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, this Court held that

¹ During the sentencing proceeding, the prosecutor provided the judge with a certified copy of a sentence sheet showing Appellant had been convicted on May 12, 1992 of criminal sexual conduct with a minor in the second degree.

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, this Court relied upon State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999) in which the Supreme Court affirmed a defendant's life without parole sentence. Rogers, 361 S.C. at 188, 603 S.E.2d at 915. Notably, this Court explained the Supreme Court affirmed the sentence where the prior offense occurred seventeen years before the triggering offense. *Id.* However, the Burdette Court did **not** address whether the sentence imposed violated the Eighth Amendment based on the remoteness of the prior conviction; rather, the 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. "[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”).

The recidivist statute under which Appellant 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). Likewise, the statute divests the sentencing judges of any discretion in sentencing – once the solicitor invokes the statute, the judge must impose a life sentence. 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).

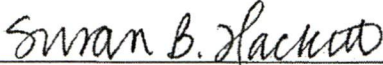
Legislation aimed at recidivism attempts to encourage offenders to stay out of trouble by punishing those who refuse to be deterred even after a conviction. Commonwealth v. Eyster, 585

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 Appellant'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. Appellant 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, Appellant 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, Appellant 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 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).

Appellant respectfully requests this Court rehear his case in order to address the flawed premise upon which Rogers relied, and to hold that using a remote conviction – particularly one that was two decades old – to trigger the recidivist statute violates the Eighth Amendment’s ban on cruel and unusual punishment.

Respectfully Submitted,



SUSAN B. HACKETT
Appellate Defender

This 1st day of December, 2016.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Circuit Court Judge

THE STATE,

RESPONDENT,

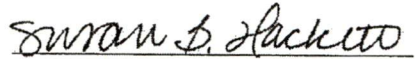
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Abdul Furquan,

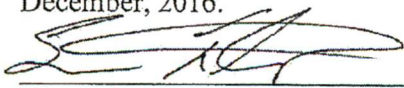
APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon 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 1st day of December, 2016.


Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 1st day of
December, 2016.

 (L.S)

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

The South Carolina Court of Appeals

The State, Respondent,

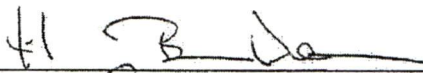
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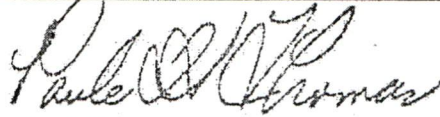
Abdul Furquan, Appellant.

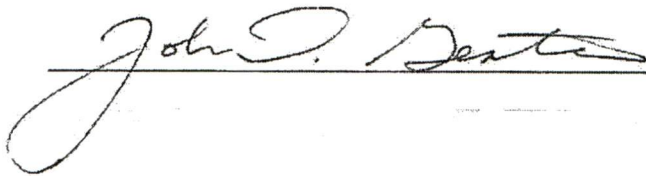
Appellate Case No. 2013-002075

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


 _____ J.


 _____ J.


 _____ J.

Columbia, South Carolina

cc: Alan McCrory Wilson, Esquire
 Susan Barber Hackett, Esquire
 Mark Reynolds Farthing, Esquire
 Jimmy A. Richardson, II, Esquire
 The Honorable Larry B. Hyman, Jr.

FILED

January 20, 2017

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APPELLATE DEFENSE