

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

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Appeal from Richland County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

MAR 08 2017

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

EMMANUEL BASHAN ELLEBY,

APPELLANT

APPELLATE CASE NO 2015-002620

RECORD ON APPEAL

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1 (WHEREUPON, the jury came into open
2 court at 1:31 p.m.)

3 THE BAILIFF: The jury is seated, Your Honor.

4 THE COURT: All right. Mr. Foreman, I am
5 informed by the bailiff that you all have reached a
6 verdict; is that correct?

7 THE FOREMAN: Yes, ma'am, we have.

8 THE COURT: And is that verdict unanimous?

9 THE FOREMAN: Yes, ma'am.

10 THE COURT: If you can hand that to the
11 bailiff, he will pass it up, and then I will give
12 it to the clerk to publish.

13 (Complies.)

14 (Court views verdict form.)

15 THE COURT: All right. I will ask the clerk
16 to publish the verdict.

17 VERDICT

18 THE CLERK: The Court of General Sessions of
19 the Fifth Judicial Circuit, State of South
20 Carolina, County of Richland, State of South
21 Carolina v. Emmanuel Elleby, Indictment Number
22 2014-GS-40-7355 and Indictment Number 2014-GS-40-
23 7364.

24 As to the indictment alleging armed robbery:
25 We, the jury, unanimously find the Defendant

1 guilty.

2 As to the indictment alleging kidnapping: We,
3 the jury, unanimously find the Defendant guilty.

4 Signed by the foreperson, Derek Scott.

5 And it is dated 9/17/2015.

6 Mr. Foreman, is this your verdict, and the
7 verdict of the entire jury?

8 THE FOREMAN: Yes, it is.

9 THE CLERK: Thank you.

10 THE COURT: All right. And I will ask the
11 clerk to poll the jury.

12 THE CLERK: Ladies and gentlemen of the jury,
13 I am going to ask each of you two questions, and I
14 need you to answer both the questions.

15 Number 244. Was this your verdict?

16 THE JUROR: Yes.

17 THE CLERK: Is it still your verdict?

18 THE JUROR: Yes.

19 THE CLERK: Number 238. Was this your
20 verdict?

21 THE JUROR: Yes.

22 THE CLERK: Is it still your verdict?

23 THE JUROR: Yes.

24 THE CLERK: Number 270. Was this your
25 verdict?

1 THE JUROR: Yes.

2 THE CLERK: Is it still your verdict?

3 THE JUROR: Yes.

4 THE CLERK: Number 302. Was this your
5 verdict?

6 THE JUROR: Yes.

7 THE CLERK: Is it still your verdict?

8 THE JUROR: Yes.

9 THE CLERK: Number 201. Was this your
10 verdict?

11 THE JUROR: Yes.

12 THE CLERK: Is it still your verdict?

13 THE JUROR: Yes.

14 THE CLERK: Number 99. Was this your verdict?

15 THE JUROR: Yes.

16 THE CLERK: Is it still your verdict?

17 THE JUROR: Yes.

18 THE CLERK: Number 161. Was this your
19 verdict?

20 THE JUROR: Yes.

21 THE CLERK: Is it still your verdict?

22 THE JUROR: Yes.

23 THE CLERK: Number 136. Was this your
24 verdict?

25 THE JUROR: Yes.

1 THE CLERK: Is it still your verdict?

2 THE JUROR: Yes.

3 THE CLERK: Number 26. Was this your verdict?

4 THE JUROR: Yes.

5 THE CLERK: Is it still your verdict?

6 THE JUROR: Yes.

7 THE CLERK: Number 207. Was this your

8 verdict?

9 THE JUROR: Yes.

10 THE CLERK: Is it still your verdict?

11 THE JUROR: Yes.

12 THE CLERK: Number 20. Was this your verdict?

13 THE JUROR: Yes.

14 THE CLERK: Is it still your verdict?

15 THE JUROR: Yes.

16 THE CLERK: Number 49. Was this your verdict?

17 THE JUROR: Yes.

18 THE CLERK: Is it still your verdict?

19 THE JUROR: Yes.

20 THE CLERK: The jury is polled, Your Honor.

21 THE COURT: All right. Let the record reflect
22 that all of the jurors have indicated that this is
23 their verdict. This would be a unanimous verdict
24 of the jury.

25 Ladies and gentlemen of the jury, I would like

1 to thank you all for your service here this week.
2 I hope that your time here has been enjoyable and
3 that you have learned something about our court
4 system, learned something about the court system
5 and the judicial process.

6 I believe the clerk will have some remarks --
7 some paperwork for you, not remarks, but some
8 paperwork, but you will be free to leave and
9 dismissed for the rest of the week.

10 But, once again, I would like to thank you on
11 behalf of the State, on behalf of the Defense, on
12 behalf of the court staff here, and the clerk of
13 court for your service here this week.

14 Thank you. And have a wonderful weekend. And
15 as we told you, I don't know if they told you this
16 on Monday, but you will not have to serve in this
17 court for three years. I cannot promise you you
18 will not have federal court, magistrate's court or
19 city court, but as for this court you will not have
20 to serve here for three years unless you choose to
21 do so after the first year.

22 All right, thank you. Have a wonderful
23 weekend.

24 (WHEREUPON, the jury is excused at 1:36
25 p.m.)

1 THE COURT: All right. I don't know if you
2 have a sentence sheet.

3 MS. SAMPSON: No.

4 THE COURT: I think the Defense is in the
5 position that the ten days is after the sentence is
6 imposed. And I think we all agree, but just to
7 protect the record, I will allow ten days for
8 motions after -- I'll go ahead and do the sentence,
9 but allow for ten days after the sentence is
10 published for motions to be filed with the court.

11 MS. SAMPSON: Do you want me to get you some
12 sentencing sheets?

13 THE COURT: Yes. I have to seal it.

14 MS. SAMPSON: I couldn't leave the room after
15 the question.

16 THE COURT: Yes, I will need a sentencing
17 sheet. And I will seal it and give it to the
18 clerk.

19 MS. SAMPSON: Okay. I'll do that now and get
20 it to you.

21 MR. RUFFIN: And I guess I just want to renew
22 all my objections and pretrial motions for the
23 record, Judge.

24 THE COURT: Yes, sir. All right. And those
25 are preserved for the record and respectfully

1 denied. And, once again, you will have ten days
2 after the publishing of the verdict -- I mean, of
3 the sentencing sheets to file any appeal.

4 MR. RUFFIN: Thank you, Judge.

5 MS. EIGENBROT: Thank you, Your Honor.

6 (WHEREUPON, the proceedings were
7 concluded at 1:37 p.m.)

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(END OF TRANSCRIPT)

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STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND) COURT OF GENERAL SESSIONS
2014-GS-40-07355
2014-GS-40-07364

State of South Carolina,)
Plaintiff,)
vs.) TRANSCRIPT OF RECORD
Emmanuel Elleby,)
Defendant.)

October 16, 2015
Columbia, South Carolina

B E F O R E:

THE HONORABLE DEANDREA G. BENJAMIN, JUDGE.

A P P E A R A N C E S:

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Attorney for the Plaintiff

ADAM S. RUFFIN, ASSISTANT PUBLIC DEFENDER
Attorney for the Defendant

DEBORAH M. McCURDY, RPR
Official Court Reporter

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4 (WHEREUPON, no witnesses were called
5 during these proceedings.)
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10 EXHIBITS

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13 (WHEREUPON, no exhibits were introduced
14 during these proceedings.)
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1 MR. RUFFIN: I was told by medical personnel
2 the other day that shaking side to side is
3 impossible during a seizure.

4 THE COURT: Is impossible?

5 MR. RUFFIN: To shake from side to side.

6 THE COURT: Mr. Elleby?

7 MS. SAMPSON: As the Court is aware, he has
8 done this before.

9 MR. RUFFIN: Judge, I'm fine to go forward
10 under the sealed sentence.

11 THE COURT: All right. Do y'all want to call
12 an ambulance up here for him?

13 MS. SAMPSON: You can take him back
14 downstairs, I assume, as soon as she sentences.

15 THE DEPUTY: Yes, we will take him downstairs.

16 THE COURT: All right. I am going to unseal
17 the sentence. I will unseal the sentence.

18 Mr. Elleby was tried in his absence and found
19 guilty by the jury. The State had served the
20 Defendant with a life without parole notice on -- I
21 don't have the exact date.

22 On Indictment 2014-GS-40-7355, Mr. Elleby, the
23 sentence of the Court is that you will be sentenced
24 to the State Department of Corrections for -- and
25 the indictment is for armed robbery -- life without

1 parole. And the sentence date is September 17th,
2 2015.

3 MS. SAMPSON: Sorry, I stated the wrong date.
4 I couldn't remember.

5 THE COURT: All right. Thank you. And you
6 are going to get me the -- you have ten days to
7 file the appeal.

8 MR. RUFFIN: Yes. And, Judge, I also have
9 some post-trial motions I'll file with the Court,
10 if that is all right with you.

11 THE COURT: All right, post-trial motions?
12 Yes. Ten days is good?

13 MR. RUFFIN: Right.

14 THE COURT: Let me know if you need an
15 extension.

16 MR. RUFFIN: Thank you, Judge.

17 MS. SAMPSON: Thank you, Your Honor.

18 THE COURT: And, Mr. Ruffin, we will handle
19 the -- I guess there is a week in November I'm
20 here?

21 MS. SAMPSON: November 9th.

22 THE COURT: Y'all get together and let me know
23 what works for you and I'll block off the
24 afternoon.

25 MR. RUFFIN: Okay. Thank you, Judge.

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MS. SAMPSON: Thank you, Your Honor.

(WHEREUPON, the proceedings were concluded.)

(END OF TRANSCRIPT)

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STATE OF SOUTH CAROLINA)	
COUNTY OF RICHLAND)	COURT OF GENERAL SESSIONS
		2014-GS-40-07355
		2014-GS-40-07364

State of South Carolina,)	
Plaintiff,)	
vs.)	TRANSCRIPT OF RECORD
Emmanuel Elleby,)	
Defendant.)	

November 12, 2015
Columbia, South Carolina

B E F O R E:

THE HONORABLE DEANDREA G. BENJAMIN, JUDGE.

A P P E A R A N C E S:

APRIL W. SAMPSON, ASSISTANT SOLICITOR
Attorney for the Plaintiff

ADAM S. RUFFIN, ASSISTANT PUBLIC DEFENDER
Attorney for the Defendant

DEBORAH M. McCURDY, RPR
Official Court Reporter

1 I N D E X O F W I T N E S S E S

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4 (WHEREUPON, no witnesses were called

5 during these proceedings.)

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10 E X H I B I T S

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13 (WHEREUPON, no exhibits were introduced

14 during these proceedings.)

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1 basically the only limits in that statute is, does
2 a person have a record that makes them eligible for
3 it.

4 Beyond that, the sole -- all the discretion
5 then is up to the individual prosecutor in a case.
6 So they have total discretion as to who they will
7 seek it against and who they will not.

8 So basically my contention is that the South
9 Carolina General Assembly has created a system that
10 is inherently arbitrary as to who gets life without
11 parole and who does not just based on the
12 individual prosecutor's feeling.

13 The two cases that I'm going to rely on are
14 actually death penalty cases. If I could pass them
15 up, Judge.

16 THE COURT: Yes, sir.

17 (Complies.)

18 MR. RUFFIN: It is Furman v. Georgia and
19 Gregg -- or Georgia v. Gregg. I'm sure you are
20 familiar with those cases.

21 Furman, which was in 1972, I think established
22 or highlights the problem of arbitrary sentencing.
23 And if I could, I'd like to maybe read just a
24 little bit from the case. I think if you will look
25 on Page 5. I know these are long opinions, that is

1 why I want to point you to the page.

2 And in Furman, as you know, Furman v. Georgia,
3 the only thing that the majority agreed to was that
4 the death penalty as applied in those cases was
5 unconstitutional. And there were five justices
6 that agreed to that rationale.

7 There is some disagreement as to the
8 rationale. Some of the justices found the death
9 penalty was unconstitutional always, and some found
10 that it was unconstitutional only in this case, or
11 as applied in these cases.

12 I'd like to point you to Page 5, the first
13 paragraph. This is Justice Douglas' concurrence, I
14 believe.

15 And he says:

16 "We cannot say from the facts
17 disclosed in these records that
18 these defendants were sentenced to
19 death because they were black."

20 Now, that is not my argument for Mr. Elleby.
21 I'm not arguing that they sought the life without
22 parole because he is black.

23 They go on to say:

24 "Yet our task is not restricted to
25 an effort to divine what motives

1 impelled these death penalties.
2 Rather, we deal with a system of
3 law and of justice that leaves to
4 the uncontrolled discretion of
5 judges or juries the determination
6 whether defendants committing these
7 crimes should die or be imprisoned.
8 Under these laws no standards
9 govern the selection of the
10 penalty. People live or die,
11 dependent on the whim of one man or
12 of 12."

13 There is more language in here that I would
14 like to point out to you. On the bottom of Page 9,
15 Judge:

16 "In determining whether a
17 punishment comports with human
18 dignity, we are aided by a second
19 principle inherent in the Clause --
20 that the State must not arbitrarily
21 inflict a severe punishment. The
22 principle derives from the notion
23 that the State does not respect
24 human dignity when, without reason,
25 it inflicts upon some people a

1 severe punishment that it does not
2 inflict upon others. Indeed, the
3 very words 'cruel and unusual'
4 imply condemnation of the arbitrary
5 infliction of severe punishments."

6 So Furman I think and those sentiments are
7 echoed throughout the concurring opinions in that
8 case.

9 Basically, in Furman, the sentencer was a
10 jury. So I understand there is obviously a
11 difference here because under South Carolina's life
12 without parole statute, the sentencer essentially
13 becomes the State. They get to choose whether you
14 are going to get life or whether you are going to
15 get something less than life.

16 And I don't think there can be any contention
17 that among people who are eligible under the life
18 without parole statute, there is huge disparity in
19 their sentences and huge -- and I think the reason
20 is because of the arbitrariness -- the State is
21 going to pick among which armed robbers, which
22 murderers, which rapists are going to get life and
23 which are going to get something less than life.

24 So that is the problem, I think. And even
25 though these were death penalty cases, you know, I

1 think that from a practical standpoint, the death
2 penalty is rapidly disappearing in South Carolina
3 and across the country.

4 I don't think South Carolina has executed
5 somebody in four years or so. There are no
6 scheduled executions on the horizon, from my
7 knowledge. So the penalty of death today in 2015
8 is the practical equivalent of life without parole.
9 With most Defendants, whether you are sentenced to
10 death or whether you are sentenced to life without
11 parole, you will go to prison and be locked in a
12 cage until you die. Same end result.

13 And so I think that life without parole,
14 because it is becoming -- rapidly becoming the most
15 severe punishment a person can receive -- not only
16 in this state, but anywhere in the country -- I
17 think that this arbitrariness standard should be
18 applied also to life without parole.

19 Now, what I'm -- I want to just say real quick
20 what I'm not arguing is, I'm not arguing that life
21 is unreasonably disproportionate. That argument
22 has been raised in a number of life without parole
23 cases under the cruel and unusual punishment. That
24 is not what I'm arguing. I'm not saying that it is
25 disproportionate. What I'm saying is that it is

1 arbitrarily inflicted. And it is the most severe
2 punishment that you can receive.

3 Now, Gregg comes along, Judge, Gregg v.
4 Georgia came along and basically said -- this is
5 four years after Furman. Georgia had revamped --
6 rewritten their death penalty statute to include a
7 bunch of factors. But basically they were saying:

8 We can't have juries or judges
9 sentencing people, you know,
10 without regards to some standard or
11 without being in accordance with a
12 set of standards that will reduce
13 the arbitrariness of the infliction
14 of these penalties.

15 So Georgia -- and South Carolina also has a
16 very similar death penalty statute, which basically
17 lists a bunch of aggregators and mitigators for a
18 juror or a judge to consider before they impose a
19 life without parole sentence or a death sentence.

20 Now, I understand that the discretion is
21 invested in the prosecutor, so we don't have an
22 issue where -- and my argument is not that the
23 judge must have discretion to not sentence someone
24 to life, my argument is not that a jury must be the
25 sentencer. That is not what I'm arguing here

1 today.

2 What I'm arguing is that if the prosecutor is
3 going to be given that discretion -- which under
4 the statute the only thing that they need to
5 consider is, are you eligible or not. There is no
6 standard beyond that. My argument is that there
7 should be, that there must be, to comport with the
8 8th and 14th Amendments, there has to be standards
9 beyond, do you qualify or not.

10 You know, I don't know what the policies are
11 throughout the state as to when they seek life and
12 when they do not seek life. What I do know is that
13 I have represented several people who are LWOP
14 eligible and who did not receive LWOP. They pled
15 guilty.

16 You know, in my experience it seems that it is
17 used as a hammer basically to punish people who
18 don't plead guilty. That seems to be when they
19 seek it. You know, you either -- so, in my
20 experience, Judge, and I don't have the resources
21 to do a statewide, you know, review of all life
22 eligible cases in the state, but what I can tell
23 you from my experience is it seems that the
24 prosecutors in this circuit consider two things:
25 are you eligible; and are you willing to plead

1 guilty.

2 If you are eligible and not willing to plead
3 guilty, then they will seek life at trial. That is
4 my understanding of it.

5 I believe that that is arbitrary and that
6 there needs to be more standards in place when the
7 State is going to single-handedly choose whether
8 someone receives what I believe is impractical
9 or -- the practical reality is that this is the
10 most severe punishment a person can receive.

11 For that reason, I would ask that you strike
12 the life sentence given to Mr. Elleby as having
13 been arbitrarily inflicted upon him and that you
14 resentence him in the range of 10 to 30, which is
15 what armed robbery carries. And, of course, he was
16 also convicted of kidnapping, which is zero to 30.
17 So I suppose, you know, he is facing 10 to 60, up
18 to 60 years, if you were to run the sentences
19 consecutively.

20 So that is what I'm asking for, Judge.

21 THE COURT: All right. Thank you. I guess
22 you are asking me to find the LWOP statute
23 unconstitutional?

24 MR. RUFFIN: Well, I believe that is the only
25 way you could actually do what I'm asking for,

1 because it is mandatory, obviously, once the State
2 seeks it and he is convicted, the imposition of the
3 life sentence is mandatory upon you. The
4 discretion is not yours.

5 So what I'm asking you, because I think the
6 only way that you could sentence him to anything
7 other than life is to find the statute is
8 unconstitutional by being arbitrarily inflicted at
9 the whim of individual prosecutors.

10 And for that reason, yes, I am asking you to
11 strike that statute and resentence him.

12 THE COURT: All right. Thank you.

13 Yes, ma'am?

14 MS. SAMPSON: Thank you, Your Honor. May it
15 please the Court?

16 Just for the record, the statute number to
17 serve life without the possibility of parole is
18 17-25-45, so we're clear?

19 And what Mr. Ruffin has failed to give you is
20 any case law that supports what he is doing. What
21 I can give you is State v. Jones, which is 344 S.C.
22 48, 543 S.E.2d 541. This is a 2001 case. Our
23 Supreme Court stated that:

24 "Mandatory life without possibility
25 of parole does not violate

1 separation of powers, nor does it
2 violate the cruel and unusual
3 punishment."

4 Basically what the Court stated you should
5 look at, or what they deem that should be looked
6 at, and I think we have done in this case, would
7 be -- let me quote so I'm not saying incorrectly.
8 Requires us to look at:

9 The duration of a sentence not be
10 grossly out of proportion with the
11 severity of the crime.

12 Pursuant to that, they ask that you look at
13 three factors: The gravity of the offense compared
14 to the harshness of the penalty; sentences imposed
15 by other criminals in the same jurisdiction; and
16 sentences for the same crime in other
17 jurisdictions.

18 In this particular case, Your Honor, he was
19 convicted of armed robbery back in May of 2001. He
20 was released in February of 2013, and by August of
21 2014 was charged with another armed robbery. That
22 was the basis for us seeking life without
23 possibility of parole. It was not arbitrary, nor
24 was it based on anything other than the fact that
25 within 18 months of being let out he was committing

1 another armed robbery.

2 LWOP is allowed in our state. It has been
3 allowed. It has been up through the Supreme Court
4 as recently as in State v. Williams, 380 S.C. 336,
5 669 S.E.2d 640. That was a 2008 case. And, again,
6 the Court stated that:

7 The sentence of life without
8 possibility of parole was not cruel
9 and unusual.

10 In that case he received --

11 THE COURT: What is the case?

12 MS. SAMPSON: It is State v. Williams. Again,
13 the case number is 380 S.C. 336, 669 S.E.2d 640.

14 In that case, his first conviction was when he
15 was 17. The second conviction was for drugs. And
16 he again got an LWOP. And the Court found that
17 that was within the State's discretion, it was not
18 against cruel and unusual punishment. If it wasn't
19 for a drug conviction, I don't see how it could be
20 for two armed robberies. Again, we are allowed to
21 do that. It is not arbitrary. It was not due to
22 force him into doing anything other than getting
23 punished for the crime that he committed and that a
24 jury of 12 found him guilty of.

25 Therefore, we think that the sentence should

1 be imposed as it already has been and stay at.

2 MR. RUFFIN: If you will allow me a brief
3 response?

4 THE COURT: Yes.

5 MR. RUFFIN: Just to be clear. You know, I
6 think those cases were upheld and I think I may
7 have said earlier, I know that many life without
8 parole cases have been upheld when the argument to
9 the Court was that it was disproportionate to the
10 crime committed. That is not what I'm arguing.
11 I'm not arguing to you that it is cruel and unusual
12 because it is disproportionate to the crime being
13 committed. I am arguing to you that it is
14 arbitrarily inflicted at the whim of an individual
15 prosecutor.

16 There are many cases with similar severity
17 that result -- that do not result in life without
18 parole convictions, which was the issue and the
19 problem in Furman where they said -- you know, it
20 is like getting struck by lightning. I mean, if I
21 gave you the facts of 100 LWOP-eligible cases and
22 asked you to pick which ones resulted in life
23 without parole and which ones resulted in something
24 less, you wouldn't be able to decide. They are
25 factually indistinguishable cases that result in

1 some getting life without parole based on the
2 decision of the prosecutor and some not.

3 So my argument is not that it is
4 disproportionate, but that it is arbitrarily
5 inflicted at the whim of the prosecutor.

6 And I would just like to note, Ms. Zmroczek
7 has pointed out to me a case that she had that is
8 currently on appeal -- it is State v. Ard -- where
9 she made a similar argument as me, so that argument
10 is currently being heard on appeal now.

11 And I don't believe that my issue, what I'm
12 raising, has been decided by our courts.

13 THE COURT: Okay. All right. I will take a
14 look at the cases and I will get you all an order.

15 MR. RUFFIN: Thank you, Judge.

16 THE COURT: All right. Thank you.

17 MS. SAMPSON: Thank you, Your Honor.

18 (WHEREUPON, the proceedings were concluded.)

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(END OF TRANSCRIPT)

14. 7569 533

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF GENERAL SESSIONS
Indictment Numbers: 2014A400735
2014GS4007364

RECEIVED

The State of South Carolina,)

DEC 22 2015

vs.)

NOTICE OF MOTION TO RECONSIDER
SENTENCE AND DECLARE
SOUTH CAROLINA CODE §17-25-45
UNCONSTITUTIONAL

SC Court of Appeals

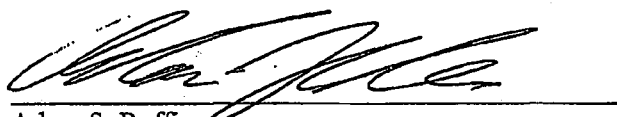
Emmanuel Elleby,)
Defendant.)

2015 OCT 21 PM 12:18
JANETTE W. McBRIDE
C.C.P. & G.S.
FILED
RICHLAND COURT

TO: ASSISTANT SOLICITOR APRIL SAMPSON:
CC: THE HONORABLE DEANDREA BENJAMIN

YOU WILL PLEASE TAKE NOTICE that counsel will move before this Court on November 9, 2015 at 9:30 a.m. or, as soon thereafter as this matter may be heard for a motion to reconsider the defendant's sentence as being pursuant to an unconstitutional state statute. Emmanuel Elleby, through undersigned counsel, asserts that South Carolina Code §17-25-45 violates the Equal Protection Clause of the Fourteenth Amendment and the Eighth Amendment to the United States Constitution. Therefore, Mr. Elleby respectfully moves this Court to reconsider his sentence imposed pursuant to this statute.

This notice is also a formal request for the Solicitor's Office to have the above-named Defendant transported to the Richland County Judicial Center from the South Carolina Department of Corrections.



Adam S. Ruffin
Attorney for Defendant
Richland County Public Defender's Office
P.O. Box 192
Columbia, South Carolina 29202
(803) 765-2592

Columbia, South Carolina

This 20 day of October, 2015

(Handwritten mark)

14
736

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF GENERAL SESSIONS
OF THE FIFTH JUDICIAL CIRCUIT

INDICTMENT NO. 2014-GS-40-7355 ✓
2014-GS-40-7364 ✓

STATE OF SOUTH CAROLINA,

vs.

EMMANUEL ELLEBY
DEFENDANT.

RECEIVED

ORDER DEC 22 2015

SC Court of Appeals

2015 DEC 22 PM 3:08

FILED

This matter came before the Court on November 9, 2015 as a motion to reconsider the above Defendant's sentence of Life Without the Possibility of Parole (LWOP) as unconstitutional. Counsel for the Defendant argued that South Carolina Code § 17-25-45 violates the Equal Protection Clause of the Fourteenth Amendment and the Eighth Amendment to the United States Constitution. For reasons set forth below, the motion to reconsider the Defendant's sentence is denied.

CONSTITUTIONALITY OF STATUTE

Defendant argues that South Carolina Code § 17-25-45, the LWOP statute, is unconstitutional. The statute states that, "upon 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 either: (1) one or more prior convictions for: (a) a most serious offense. . ."¹ This is commonly referred to as the "Two Strikes" law.² South Carolina courts have held numerous times that the LWOP statute is constitutional and is not a violation of

¹ S.C. Code Ann. § 17-25-45(A)(1).

² *State v. Standard*, 351 S.C. 199, 201, 569 S.E.2d 325, 327 (2002).

(Handwritten initials)

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equal protection nor cruel and unusual punishment.³ Here, a jury found the Defendant guilty of Kidnapping⁴ and Robbery/ Armed Robbery, Robbery While Armed or Allegedly Armed With a Deadly Weapon⁵, both of which are eligible for a life without parole sentence under the Two Strikes law.⁶ Therefore, the Defendant's sentence of a term of imprisonment of LWOP for the two strikes was appropriate, and is not a violation of Fourteenth and Eighth Amendment rights.

Additionally, the Defendant argues the prosecutor in this case arbitrarily chose to pursue LWOP as a sentence recommendation. The South Carolina Constitution and South Carolina case law place the "unfettered discretion to prosecute" solely in their hands. . . and they "may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they may simply decide not to prosecute the offense in its entirety."⁷ It is important to note that the prosecutor's discretion is subject to constitutional constraints and may not base a decision to prosecute on unjustifiable standards such as "race, religion, or other arbitrary classifications."⁸ Further, the Judicial Branch does not have the power to encroach on a prosecutor for exercising this discretion.⁹ The Defendant presented no persuasive evidence to indicate the prosecutor made an arbitrary decision to take the Defendant's case to trial. Because the prosecutor, in her allowed discretion, sought to try the Defendant for two crimes that are under the Two Strikes law, the Defendant's sentence must be LWOP if found guilty in accordance to the statute.¹⁰

³ *State v. Jones*, 344 S.C. 48, 543 S.E.2d 541 (2001); *State v. White*, 349, S.C. 33, 562 S.E.2d 305 (2002).

⁴ S.C. Code Ann. § 16-03-0910

⁵ S.C. Code Ann. § 16-11-0330 (A)

⁶ S.C. Code Ann. § 17-25-45 (C)(1)

⁷ *State v. Needs*, 333 S.C. 134, 146, 508 S.E.2d 857, 863 (1998).

⁸ *Id.*

⁹ *Id.*

¹⁰ S.C. Code Ann. § 17-25-45(A)

For these reasons, the Defendant's motion to reconsider his LWOP sentence is denied.

IT IS SO ORDERED.



DeAndrea G. Benjamin
Judge, Fifth Judicial Circuit

12-13, 2015

Columbia, South Carolina

FILED
2015 DEC 16 PM 3:28
JEANETTE R. MURPHY
C.C.P. & G.S.

WITNESSES

(S) John Garwell JR
- Richland County Sheriff

ARREST WARRANT NUMBER

2014A4010203052

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date:

NOV 13 2014

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2014GS4007355

The State of South Carolina

County of
Richland

COURT OF GENERAL SESSIONS

NOVEMBER TERM 2014
91.

**THE STATE
vs.**

Emmanuel Bashan Elleby

**Indictment for
ROBBERY // ARMED ROBBERY, ROBBERY
WHILE ARMED OR ALLEGEDLY ARMED,
WITH A DEADLY WEAPON**

SC Code: 16-11-0330(A)
CDR Code: 0139

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on NOVEMBER 12 2014,
 the Grand Jurors of Richland County present upon their oath:

ARMED ROBBERY

That Emmanuel Bashan Elleby did in Richland County on or about August 22, 2014, commit robbery by feloniously taking from the person or presence of Kenneth C. Gardner, by means of force or intimidation, goods or monies of Dollar General and/or Kenneth C. Gardner, such goods or monies being described as U.S. currency in the amount of three hundred and eighty-seven dollars (\$387.00), and/or five (5) packs of cigarettes, and/or a cell phone, with the intent to deprive the owner permanently of such property, while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by actions or words, that he or she was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon. All in violation of §16-11-330(A), SC Code of Laws (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



 DAN JOHNSON, SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Richland VS. STATE

INDICTMENT/CASE#: 2014GS4007355

Emmanuel Bashan Elleby

A/W#: 2014A4010203052

AKA:

Date of Offense: 8/22/2014

Race: BLACK Sex: M Age: 34

S.C. Code §: 16-11-0330(A)

DOB: SS#

CDR Code #: 0139

Address:

City, State, Zip: Columbia, SC 29201

DL#: SID#

*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was CONVICTED OF or PLEAS TO: Robbery / Armed Robbery, robbery while armed or allegedly armed with a deadly weapon

in violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC w/minor 1st or Lewd Act) §17-25-45

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. (defendant's initials)

The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: AMPSON, APRIL Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center, for a determinate term of Life days/months/years or under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on: The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP Total: \$ plus 20% fee: \$ days/hours Public Service Employment

Payment Terms: Obtain GED Attend Voc. Rehab. or Job Corp. May serve W/E beginning

Substance Abuse Counseling Random Drug/Alcohol testing Fine may be pd. in equal, consecutive weekly/monthly prmts. of \$ beginning \$ paid to Public Defender Fund Other:

Table with 2 columns: Description and Amount. Includes items like § 14-1-206 (Assessments 107.5%), § 14-1-211(A)(1) (Conv. Surcharge) \$100, § 14-1-211(A)(2) (DUI Surcharge) \$100, § 56-5-2995 (DUI Assessment) \$12, § 56-1-286 (DUI Breath Test) \$25, Proviso 47.9 (Public Def/Prob) \$500, § 14-1-212 (Law Enforce. Funding) \$25, § 14-1-213 (Drug Court Surcharge) \$150, § 50-21-114(BUI Breath Test Fee) \$50, § 56-5-2942(J) (Vehicle Assessment) \$40/ea, Proviso 90.5 (SCCJA Surcharge) \$5, 3% to County (if paid in installments) \$ 3.90, TOTAL \$ 133.90

Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk: Jante W. McBride Court Reporter: D. McCurdy Presiding Judge: Judge Code: 2161 Sentence Date: 9-17-15

WITNESSES

(S) John Carwell, Jr.

- Richland County Sheriff Department

DOCKET NO. 2014GS4007364

The State of South Carolina

County of

Richland

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

COURT OF GENERAL SESSIONS

NOVEMBER TERM 2014

ARREST WARRANT NUMBER

DP14298

91

**THE STATE
vs.**

Emmanuel Elleby

Defendant

Witness:

C.C.C. PLS. AND G.S.

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

NOV 13 2014

VERDICT

**Indictment for
KIDNAPPING / KIDNAPPING**

SC Code: 16-03-0910

CDR Code: 0095

Foreperson of Petit Jury

Date:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on NOVEMBER 12, 2014,
the Grand Jurors of Richland County present upon their oath:

KIDNAPPING

That Emmanuel Elleby did in Richland County on or about October 28, 2014, unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away one Kenneth C. Gardner, without authority of law, in violation of Section 16-03-0910, S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



DAN JOHNSON, SOLICITOR

NOV 13 2014

RECEIVED

542

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Richland
STATE VS. Emmanuel Elleby

INDICTMENT/CASE#: 2014GS4007364
A/W#: DP14298
Date of Offense: 10/28/2014
S.C. Code § : 16-03-0910
CDR Code #: 0095

AKA:
Race: BLACK Sex: M Age: 34
DOB: SS#:
Address:
City, State, Zip:
DL#: SID#:

SENTENCE SHEET

*CDL Yes No CMV Yes No Hazmat Yes No
In disposition of the said indictment comes now the Defendant who was TO: Kidnapping / Kidnapping

CONVICTED OF or PLEADS

in violation of § 16-03-0910 of the S.C. Code of Laws, bearing CDR Code # 0095
NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC w/minor 1st or Lewd Act) §17-25-45

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury.
The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: APRIL SAMPSON, APRIL SC Bar# 15968 Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
for a determinate term of Life days/months/years or under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:
The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP
Total: \$ plus 20% fee: \$
Payment Terms:
Set by SCDPPPS

Recipient:

Table with 3 columns: Description, Amount, Total. Includes items like § 14-1-206 (Assessments 107.5 %), § 14-1-211(A)(1) (Conv. Surcharge) \$100, § 14-1-211(A)(2) (DUI Surcharge) \$100, § 56-5-2995 (DUI Assessment) \$12, § 56-1-286 (DUI Breath Test) \$25, Proviso 47.9 (Public Def/Prob) \$500, § 14-1-212 (Law Enforce. Funding) \$25, § 14-1-213 (Drug Court Surcharge) \$150, § 50-21-114(BUI Breath Test Fee) \$50, § 56-5-2942(J) (Vehicle Assessment) \$40/ea, Proviso 90.5 (SCCJA Surcharge) \$5, 3% to County (if paid in installments) \$ 3.90, TOTAL \$ 133.90

days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning
\$ paid to Public Defender Fund
Other:

Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Jeannette W. McBride
Court Reporter: D. McCurdy
SCCA/217 (03/2011)

Presiding Judge [Signature]
Judge Code: 2161
Sentence Date: 9-17-15

ACKNOWLEDGEMENT BY DEFENDANT

I understand that if I violate any condition of this Order, a warrant for my arrest will be issued.

I understand and have been informed that I have a right and obligation to be present at trial and should I fail to attend the court, the trial will proceed in my absence.

It has been explained to me that if I fail to appear before the court as required, a warrant for my arrest will be issued.

Defendant information form including name (Barnes St), address (Columbia, SC 29201), telephone (251-49-8857), signature of defendant (dated AUG 26 2014), and social security number.

SPECIAL CONDITIONS OF RELEASE

a. Placement in custody. The defendant is placed in the custody of: _____ NAME OF PERSON OR ORGANIZATION

who agrees (1) to supervise the defendant as set forth by the court, (2) to use every effort to assure the appearance of the defendant at all scheduled hearings before the court, and (3) to notify the court immediately in the event the defendant violates any conditions of his release or disappears.

SIGNATURE OF CUSTODIAN (IF APPROVED) _____ DATE _____

b. Restrictions on Travel, Association or Residence. The defendant will comply with each of the following conditions: _____

c. Part-time Release. The defendant will be released from custody from _____ o' clock, _____ AM/PM to _____ o' clock, _____ AM/PM on _____ DATE(S) on condition that he return to the custody of _____ NAME OF PERSON OR ORGANIZATION at _____ LOCATION as designated.

d. Other conditions. The defendant will comply with the following other conditions of release: No Contact With Victim directly/indirectly; Do Not Return to Incident Location

APPEARANCE RECOGNIZANCE WITH SURETY

On the 2 day of April, 2015, personally appeared before the undersigned judge the surety named below who acknowledged himself indebted to the State of South Carolina, in the sum of \$ 60,000, such sum to be levied on his real and personal property for the use of the State, should named defendant fail in performing the conditions of this Order.

The surety, being duly sworn, says that he is a resident and free holder within the State and is worth the sum acknowledged and underwritten herein, over all his debts and liabilities, and exclusive of property exempt from execution.

Lesia Phipps 7082526 NAME OF SURETY BONDSMAN COMPANY TELEPHONE

Lesia Phipps SIGNATURE OF SURETY BONDSMAN

Smider Southeast Bonding 443 D Meeting St CITY/STATE/ZIP

Azeel SIGNATURE OF JUDGE

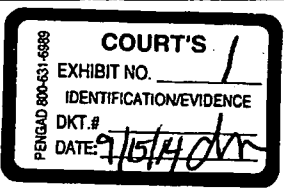
St Columbia, SC 29169 NAME OF INSURANCE COMPANY

DATE APR 02 2015

surety Corp Landing Suite 200 ADDRESS OF INSURANCE COMPANY

29492 CITY/STATE/ZIP

PALMETTO SURETY CORP. Form Approved by S.C. Attorney General Section 26-7-16 SEVEN FARMS DR. S-170 March 21, 2012 CHARLESTON, SC 29492



PSC 100013389

BAIL PROCEEDING FORM II

STATE OF SOUTH CAROLINA COUNTY OF Richland

IN THE Richland County General Sessions

STATE OF SOUTH CAROLINA

ORDER SPECIFYING METHODS AND CONDITIONS OF RELEASE

Elleby, Emmanuel Bashan NAME OF DEFENDANT

Offense Charged: Armed Robbery-[2014A4010203052]

At a bail proceeding conducted by the undersigned judge, for the defendant named above, it was determined by the court (check one or both):

- The release of the defendant on recognizance will not reasonably assure his appearance as required.
The release of the defendant on recognizance will result in an unreasonable danger to the community.

This determination was based upon the following findings of fact:

Nature of Circumstances of Offense; Must Notify Court Immediately of Change of Address; ****For any charge that carries a suspension of your driver's license, you are required to bring and surrender your driver's license to the Court at the time of t

[Considerations: Nature and Circumstances of the offense charged, the defendant's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and any record of flight to avoid prosecution or failure to appear at other court proceedings.]

THEREFORE, IT IS HEREBY ORDERED:

- 1. That the above named defendant be released from custody on the condition that he will personally appear before the designated court at the place, date and time required to answer the charge made against him and do what shall be ordered by the court and not depart the State without the permission of the court and be of good behavior.
2. That the above named defendant be released from custody provided as follows (check all that apply):

CASH IN LIEU OF BOND

The defendant, acknowledges himself to be indebted to the State of South Carolina in the sum of \$ to secure his release from custody. Should the defendant fail to comply with all terms and conditions of this Order, this sum of money is subject to being forfeited to the State.

CASH PERCENTAGE IN LIEU OF BOND

The defendant, acknowledging himself to be indebted to the State of South Carolina in the full amount of \$, his release to be obtained by payment to the court of % (not to exceed 10%) of the full amount of the bond, deposits \$ to secure his release from custody. Should the defendant fail to perform the conditions of this Order, the full amount shall be levied on his real and personal property for the use of the state.

APPEARANCE RECOGNIZANCE WITH SURETY

The defendant will provide good and sufficient surety approved by the court, in the form hereinafter set forth in this Order, acknowledging an indebtedness to the State in the amount of \$ 60,000.

3. That the defendant shall appear at (check one):

- the term of COURT OF GENERAL SESSIONS beginning on September 29, 2014 at 9:00 o'clock, A.M. at Richland County General Sessions - 1701 Main Street/P O Box 192/Columbia, SC 29202 / (803) 576-1999; and remain there throughout that term of court. If no disposition is made during that term, the defendant shall appear and remain throughout each succeeding term of court until final disposition is made of his case, unless otherwise ordered by the court.
the session of MAGISTRATE COURT MUNICIPAL COURT beginning on at o'clock, at If no final disposition is made during that session, the defendant shall appear at such other times and places as ordered by the court.

Bond Amount(s): \$60,000.00 (CS) or \$60,000.00 (SB)

INITIALS OF DEFENDANT

Richland County Sheriff's Office

4. That the defendant will notify the court promptly if he changes his address from the one contained in this order and he will comply with those conditions described hereinafter in the Order.

SIGNATURE OF JUDGE

Signature of Benjamin Byrd

DATE

AUG 26 2014

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
)
The State)
)
-vs-)
)
EMMANUEL ELLEBY,)
)
Defendant.)

IN THE COURT OF GENERAL SESSIONS

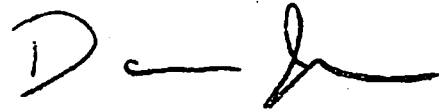
**NOTICE OF INTENTION TO SEEK A
SENTENCE OF LIFE WITHOUT PAROLE**

Indictment Nos.: 2014GS407355, 7364

TO: Emmanuel Elleby, Defendant, and Adam Ruffin, Attorney for Emmanuel Elleby

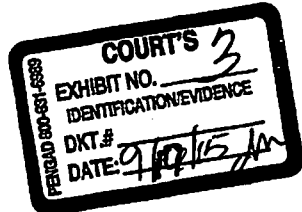
PLEASE TAKE NOTICE that upon conviction (trial or guilty plea) of the above-entitled action to be scheduled on a date at least ten (10) days hence, of which you have been timely notified, the State will seek a sentence of life imprisonment without the possibility of parole, pursuant to South Carolina Code of Laws, Section 17-25-45 (1995), as amended. The State intends to rely upon the following prior conviction of the defendant to statutorily enhance his punishment:

South Carolina conviction for Armed Robbery on May 8, 2001.



Dan Johnson, Solicitor
Fifth Judicial Circuit

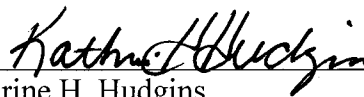
Columbia, South Carolina
This 1st day of September, 2015



CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with 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."

Respectfully Submitted,



Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

ATTORNEY FOR APPELLANT

This 8th day of March, 2017.

RECEIVED

MAR 08 2017

SC Court of Appeals