STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County
The Honorable Donald B. Hocker, Circuit Court Judge
Appellate Case No. 2018-002176

THE STATE,

Respondent,

vs.

ZANTRAVIOUS RANDELL HALL,

Appellant.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err in failing to permit Appellant to present social media messages providing evidence of an alibi for one of his co-defendants, who was not on trial, where the social media messages were authenticated properly pursuant to Rule 901, SCRE, because the person who received the messages was prepared to testify and where the circumstantial evidence of distinctive characteristics established the evidence was what it purported to be?

II. Did the trial judge improperly sentence Appellant to life imprisonment without the possibility of parole pursuant to the recidivist statute where Appellant's prior conviction did not constitute a "strike" because (1) the family court failed to made adequate findings of fact pursuant to In re Sullivan, 274 S.C. 544, 548, 265 S.E.2d 527, 529 (1980), and (2) using a prior conviction for an offense committed while Appellant was a juvenile violated the Eighth Amendment's prohibition on cruel and unusual punishment?

RESPONDENT'S COUNTER-STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge abuse his discretion by excluding testimony as well as a Snapchat video and screenshot that allegedly would have provided his non-testifying co-defendant, Elmore, with an alibi because the proffered defense witness could not authenticate the Snapchat video and screenshot?

II. Even assuming *arguendo* that the Snapchat video and screenshot were properly authenticated, did the trial judge abuse his discretion in excluding this evidence where it was inadmissible hearsay that was irrelevant to Appellant's guilt or innocence and its prejudicial effect substantially outweighed any *de minimis* probative value it might have?

III. Did the trial judge abuse his discretion by relying on Appellant's 2011 conviction for assault and battery with intent to kill (ABIK) as a strike for sentencing purposes and imposing sentences of life without the possibility of parole (LWOP) under S.C. Code § 17-25-45 (Supp. 2020) for his 2018 murder and attempted murder convictions where (1) the ABIK conviction constituted a strike under the recidivist statute and, Appellant could not collaterally attack the facial validity of his 2011 conviction following his 2018 trial, and (2) relying on the ABIK conviction to enhance a sentence for crimes committed as an adult did not violate the Eighth Amendment.

STATEMENT OF THE CASE

The Greenwood County Grand Jury indicted Appellant on March 9, 2018 for murder (2018-GS-24-408) and possession of a weapon during the commission of a violent crime (2018-GS-24-409), in connection with the murder of Emyle Markial McDuffie. ***R. 577-578; 580-581.*** ___-__. On July 13, 2018, the Greenwood County Grand Jury indicted him for the attempted murder of Michael D. Lukie (2018-GS-24-1246). ***R. 583-584.*** All of these crimes occurred on November 21, 2017, at the Phoenix Place Apartments. On July 26, 2018, the State served its intent to seek a sentence of life imprisonment without the possibility of parole (LWOP) pursuant to S.C. Code Ann. § 17-25-45 (Supp. 2020). *See also e.g., James v. State*, 372 S.C. 287, 641 S.E.2d 899 (2007). Appellant received a jury trial before the Honorable Donald B. Hocker on October 8-12, 2018, and the jury convicted him of all charges.

Judge Hocker deferred sentencing to consider Appellant's memorandum in opposition to LWOP. ***Tr. 732-33; R. 496-497.*** (Memo). Assistant Public Defenders Janna Nelson and Elizabeth Able represented him at trial. Judge Hocker held the sentencing hearing on November 30, 2018. ***Nov. R. 498.*** Following the hearing, he sentenced Appellant to LWOP for murder and

attempted murder but he did not impose a sentence on the weapon conviction in light of the life sentences. ***Nov. R. 510-514.*** Ms. Nelson and Assistant Public Defender Tristan Shaffer represented him at sentencing.

STATEMENT OF FACTS

Viewed in the light most favorable to the prosecution, the direct and circumstantial evidence presented at trial was that Michael "Luke" Lukie and Timothy Wilson wanted to smoke a blunt behind one of the buildings at Phoenix Place Apartments on the afternoon of November 21, 2017. However, they saw the landlord and immediately went across the street to smoke it. While they were smoking it, Emyle "Gump"

McDuffie (the murder victim) came out of his apartment and asked Luke for a pair of pants. Luke told his friends to follow him. Emyle followed Luke towards Building 3, but Wilson stayed behind Building 7 because his "old lady" called and said that she was coming to get him. ***R. 81-84.***

Unfortunately, Emyle and Luke never reached Building 3. Wilson testified that he saw a red or burgundy car pull in front of Building 4. Then, someone shouted, ""he['s] fixing to shoot that boy" and Wilson ran for cover. Wilson testified that he did not see who got out of the car, but he saw Emyle "hit the ground." Emyle "didn't stand a chance" to run because "it happened so fast." Wilson ran to the front of the building where he had been standing and he saw that Luke had been shot. He thereafter saw Luke run and jump into a white car. ***R. 83-87; 92-93.***

Twenty-seven year old Michael "Luke" Lukie testified that Emyle McDuffie was a friend who was "like a brother" to him. He confirmed that he, Wilson, and Emyle smoked marijuana behind Building 7 of Phoenix Place Apartments on November 21, 2017. Once they finished smoking it, he and Emyle walked towards the residence of Luke's mother in Building 3 to get a

pair of pants. They briefly spoke to Emyle's sister, Kumarie Cobb. Soon, a red car pulled in front of Building 4 and someone in the car called Emyle over to it. ***R. 96-99; 102.***

As soon as Emyle walked over to the car, however, Appellant got out of it, asked Emyle "[W]hy you steal that gangster stuff," and immediately fired "multiple shots."[1] Luke was struck in the left hip by one of the bullets Appellant fired, and he ran to where Kumarie and her friend were standing. Her friend drove him to the hospital. When Det. McClinton spoke to him at the hospital, he initially said that he did not know who had shot him because he first wanted to tell Emyle's mother and sister who had done it. ***R. 98-102; 104-105; 113; 117; 127-129.***

Luke spoke to Det. McClinton and Sgt. Martin Haralson, of the City of Greenwood Police Department, a week later and identified Appellant as the person who had shot him and he repeatedly testified that he had no doubt about who shot him. ***R. 101-103; 114; 116-118; 129-131; 330-331.*** Luke identified State's Exs. 37; and 40 as the red car that Appellant had driven. ***R. 101.***

Terrance Gilchrest testified that he was at a nearby 7-Eleven getting ready to pump gas on November 21, 2017, when he heard "multiple gunshots." He got into his vehicle and drove to Phoenix Place Apartments. After he pulled into the driveway, he saw a number of people standing around Emyle McDuffie, who was lying on the ground. With the help of several men, Mr. Gilchrest got Emyle into his vehicle and drove to the hospital. The nurses took Emyle at that point. ***R. 119-121.***

Emyle was taken straight into surgery and nurse English Rogers collected a bullet that fell out of his clothing when his body was turned. She gave the bullet to law enforcement. ***R. 123-125; 170.*** Emyle was pronounced dead at the hospital. ***R. 166-167.***

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[1] Appellant was the only person who fired any shots (***R. 98; 100; 116***), and Luke did not know if anyone else was in the car. ***R. 105.***

Lakisha Bletcher testified that she lives in Phoenix Place Apartments with her daughter. On the afternoon of November 21st, she was upstairs in her room when she heard gunshots. She immediately ran outside and saw a red car (State's Ex. 37) backing out of a parking spot and Emyle McDuffie fall to the ground. She stayed with Emyle until Mr. Gilchrest took him to the hospital. She also saw the red car drive away from the scene. She later told police what she had seen. ***R. 48-49; 51-53; 57; 60-63.***

Ms. Bletcher's daughter, Marisha C., testified that she was in her room most of November 21st. She was looking out the window when the shooting occurred. She saw a red car and a white car. Although she only heard the shooting, she saw Emyle walk toward the red car and talk to an occupant "through the window on the passenger side" before it took place. Emyle tried to walk away but he turned around when his name was called and "that's when he got shot." ***R. 65-67; 72.***

Marisha ran outside to see what had happened, and she saw that Emyle had been shot and was lying next to where the car had been parked. She also saw the red car drive in the same direction as her mother had. Marisha could not see who was in the red car because the windows were heavily tinted, but she identified State's Exs. 37-38 and 41 as photographs of the car that she had seen. ***R. 68-69; 71-72; 74-75.***

Mary Lomax testified that she also lives at Phoenix Place Apartments. She was in her living room on the afternoon of November 21, 2017, when she heard noises that "sounded like someone hammering into concrete." She got up to investigate and saw a red car leaving the apartment complex. She only saw the car from behind, but she testified that State's Exs. 37-38 and 41 were photographs of the same type and color car as the one she had seen. She did not realize that Emyle had been shot until someone later told her. ***R. 75-79.***

Officer Jonathan Vaughn, a uniformed patrol officer with the City of Greenwood Police Department, testified that he was dispatched to the shooting at Phoenix Place Apartments on November 21, 2017, and that he arrived around 2:00 pm. He was the first of many officers who went to the scene that afternoon. He noticed a number of shell casings on the ground and "people ... all over the place in a panic." So, he and Capt. Morgan cornered off the crime scene and he recorded the people who were present with his body cam (State's Ex. 55). ***R. 12-15; 27.***

In all, officers collected thirteen shell casings (State's 58) that were on the ground where the shooting occurred. They also removed a bullet (State's 59) from a wall in Renarda Duncan's nearby apartment. ***R. 15-16; 19-20; 22; 25; 132-137; 162.*** Before they left the scene, they had a description of the car the shooter had driven: a red, four door car with tinted windows. After Officer Devon Holmes reviewed the surveillance video from the 7-Eleven, officers learned that the car likewise had chrome wheels, and a BOLO was issued for the car. ***R. 19; 36-37; 137; 202-203.***

Shortly after 5:00 pm., Lt. Jamie Davis saw a car matching that description traveling north on Greene St., between a mile and a half and two miles from the crime scene. He attempted a traffic stop, but the suspect vehicle accelerated. So, Lt. Davis activated his blue lights and siren, and he radioed that he was in pursuit of the car in rush hour traffic.[2] ***R. 44; 192-195.***[3] Appellant eventually crashed the red car and fled on foot, but officers soon caught him and arrested him for failure to stop for a blue light. ***R. 195-196.***

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[2] This automatically caused his dash cam and body cam to activate. ***R. 193-195;*** State's Exs. 89 and 90.

[3] Officer Holmes testified that he joined in chasing the car after hearing Lt. Davis' alert and seeing the car. During the chase, Appellant "narrowly missed hitting "our city dog truck." Officer Holmes' car eventually hit a curb and blew out a tire. This rendered his car inoperable. ***R. 203-205.***

Several officers thereafter responded to the scene of the crash. This was the same car that witnesses had seen earlier that day at Phoenix Place. The car door was open, and officers did a cursory search, looking for insurance information. They saw a cell phone and a red bandana on the floorboard. Capt. Mitch McCallister photographed what they had seen. ***R. 25-26; 38-46; 137-139;*** *see also* State's Exs. 37-38.

The car was towed to the City lot, where it was secured until officers searched it pursuant to a warrant the next day. At that time, they seized the 9 mm. shell casing that was in the cowling of the car (State's Ex. 73),[4] a red bandana (State's Ex. 60), a cell phone, a set of keys, and a glove that were on the floorboard, as well as Appellant's license (*see* State's Ex. 66) and his birth certificate (see State's Ex. 65). ***R. 138-147; 157-158; 172-174; 326-329.*** Fingerprint lifts and swabbing for possible touch DNA were negative. ***R. 172-173; 280-286; 291-294; 298-299.*** However, expert testing of particle lifts from the bandana by Ila Simons, who is employed in the trace evidence department of SLED's forensic laboratory, revealed the presence of particles consistent with gunshot primer residue. Ms. Simmons opined that "nothing else, either man-made or in nature makes that sort of particle." ***R. 356-360.***

Dr. James Fulcher is the forensic pathologist who performed an autopsy on Emyle's body. Dr. Fulcher found that Emyle suffered a total of separate nine gunshot wounds. One was to his head, a second wound was to the upper left chest. The third wound, which was to his back, "was the most significant wound" and Dr. Fulcher opined that it was "clearly" the fatal shot. A fourth wound was "to the pelvis[,] in the groin near the penis/testicle region." The fifth wound was to his hand, the sixth wound was to his right thigh, the seventh was to his left thigh, the eighth wound was to his right lower leg and the ninth wound was to his left lower leg. ***R. 235;***

[4] The cowl of a car the cowl is immediately below the windshield wipers and it supports the rear of the hood. ***R. 144.***

238.

Dr. Fulcher explained that the gunshot wound to the back of the head entered in the scalp and exited on the "upper left vertex, which is the top of the head." This "wounded the brain" by skimming "the outer surface of the occipital lobe of the brain." Dr. Fulcher opined that although this wound would have ultimately caused Emyle's death, it was not immediately fatal. The chest wound skimmed the surface of the skin and only caused soft tissue damage. ***R. 241-242; 247.***

However, the wound to Emyle's back was fatal. ***R. 243; 247-248.***

> That wound enter[ed] in the back, perforate[d] the left lung, and then it perforate[d] the large vessels coming out of the heart, the pulmonary artery and the aorta. These are large vessels. Nearly the diameter of a garden hose that take all of the blood from the heart and push it through the body. So you can imagine, wounding to those causes very, very, very significant internal bleeding. Those were very highly macerated by this wound path. It then goes through the upper chambers of the heart, the atria. Either any of those structures taken individually would have been fatal. The combination, of course, is very significantly fatal. That projectile then finally exits the anterior chest .... So that's the fatal wound, number three. Enters in the back, exits the chest, very significant wounding to ... the great vessels of the chest and the heart.

R. 242-243.

None of the remaining wounds were fatal. Dr. Fulcher testified that he was able to recover a portion of a lead projectile from Emyle's left lower leg, the jacket of a projectile from Emyle's right foot, and a larger projectile from his thigh. ***R. 243-246.*** See also State's Exs. 56; 94-95. Dr. Fulcher opined that the cause of death was a gunshot wound to the chest and that the manner of death was homicide. ***R. 248.***

James Green is a forensic firearms examiner in SLED's forensic laboratory. He analyzed fourteen fired 9 mm. cartridge casings (State's Exs. 58 and 73), and six bullets or bullet fragments (State's Exs. 56-57, 59, and 94-95). He opined that all fourteen cartridge casings were fired by the same weapon and that the weapon had a "Glock type firing pin," which is "very

distinctive."[5] Mr. Green further opined that State's Exs. 56-57, 59 and 94 were "most consistent with bullets loaded into some nine millimeter Luger caliber cartridges." This meant that they were "similar to the cartridge cases." ***R. 374-380; 396.***

Although the fragment introduced as State's Ex. 95 was too damaged and too small to determine its caliber, it had rifling characteristics similar to the other items that were submitted. Finally, Mr. Green explained that the bullets were too damaged to determine whether or not they were fired by same weapon, but he opined that they were consistent with having been fired by a 9 mm. ***R. 380-381; 395-396.***

Finally, the State introduced and published to the jury redacted telephone conversations that Appellant had on November 23, November 30, and December 4, 2017, while he was in the Greenwood County Detention Center. See State's Ex. 93; ***R. 303-307.*** *See also* ***R. 321-322; 331-332.*** On November 23, 2017, Appellant called a male and said at the outset that he was not scared. The man to whom he was speaking said there was a rumor that Appellant was mad at the victim because Emyle was still having sex with Appellant's pregnant girlfriend. Appellant denied this, saying that he was sleeping with her every night, that he was driving her to and from work in her car, that she was otherwise at home, that he had her car "24/7," and that no one had seen her drive the car since he had been "talking to her." *See* State's 93.

He also claimed that she had started the rumor because she had her own phone, and that every time Emyle texted her, he was texting Appellant's phone. Appellant likewise accused the victim of bringing the killing on himself, saying that the whole street knew the victim had posted

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[5] He explained that "[t]he first through fourth generation Glocks and early Smith & Wesson Sigma model pistols have a very 22 distinctive firing pin .... It's oblong as opposed to circular like most firing pins and during the action of firing a Glock or a Smith & Wesson Sigma, when the firing sequence takes place, the barrel drops as it's unlocking and the slide moves to the rear and it will actually shear some of the primer off." ***R. 377-378.***

something on the internet and ended up dead the next day. *See* State's 93.

In the November 30th call, he and an unknown male discuss the search of his girlfriend's car. When the person to whom he is speaking says that police would know his fingerprints would be in the car, Appellant replies, "I wiped that mother -----r down" and he laughs. *See* State's Ex. 93.

In the December 4th call, Appellant has a conversation with his mother, who tells him to "talk in code." She and Appellant then talk about cleaning his shoes and disposing of his shoes, which he says are Air Force Ones. He assures her that his "shoes" were clean and in the box. However, he broke code at the end of their conversation by laughingly saying that someone went into his house before and "got no gun." His mother immediately replied, "Shut up." *See* State's Ex. 93.

STANDARD OF REVIEW

In criminal cases, appellate courts only review errors of law. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing an evidentiary ruling, the appellate court gives great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the sound discretion of a trial judge. *State v. Groome*, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); *see also State v. Torres*, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010). An appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); *State v. Kelley*, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

Further, an appellate court will not overturn a sentence unless the sentencing court abused its discretion in issuing a ruling, which means that the sentencing judge's ruling must amount to an error of law. *State v. Dawson,* 402 S.C. 160, 163, 740 S.E.2d 501, 502 (2013). The issue of whether a criminal defendant is serving an illegal or unconstitutional sentence constitutes a question of law, *Bordeaux v. State*, 410 S.C. 495, 499, 765 S.E.2d 143, 145 (2014), and errors of law are reviewed *de novo* by an appellate court. *Id. See also Catawba Indian Tribe of South Carolina v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

Applying this standard of review, Respondent submits that the Court should affirm the trial judge's ruling and the judgment of conviction should be affirmed.

ARGUMENTS

I. The trial judge did not abuse his discretion by excluding testimony as well as a Snapchat video and screenshot that would allegedly provide Appellant's non-testifying co-defendant, with an alibi because the proffered defense witness could not authenticate the Snapchat video and screenshot. Further, even assuming the proffered evidence was properly authenticated, it was inadmissible hearsay that was irrelevant to Appellant's guilt or innocence, and its prejudicial effect substantially outweighed any *de minimis* probative value it might have.

Respondent submits that the trial judge did not abuse his discretion by excluding testimony as well as a Snapchat video and a screenshot that would allegedly provide Appellant's non-testifying co-defendant, Elmore, with an alibi because the proffered defense witness could not authenticate the Snapchat video and screenshot, and because assuming it was properly authenticated, it was irrelevant and inadmissible hearsay,[6] and its prejudicial effect substantially outweighed any *de minimis* probative value it might have.

[6] Because the video and its contents were offered to prove the truth of the matter asserted, they constituted hearsay. *See* Rule 801(c), SCRE ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the

A. How Issue developed at trial.

As discussed, the prosecution's evidence tended to show that Appellant shot both Emyle McDuffie and Michael "Luke" Lukie. No prosecution witness testified that he or she saw anyone else who may have been involved in the crimes and the only admitted eyewitness to the shootings, Luke, specifically denied seeing anyone else in the red car at the time of the shooting. ***R. 113-114***. *See also* ***R. 438-453; 470-475***(State's closing argument).

However, Appellant's cross-examination on of prosecution witnesses elicited evidence of the involvement, arrest, and some investigation of Cedric Elmore and Kemad White. He did this even though his co-defendants were not on trial, did not testify, and no witness testified that either man was present at the time Appellant committed the murder and attempted murder. *See, e.g.*, ***R. 182; 254; 310-311; 313-320; 339-343; 347-351***. Appellant later presented Joseph Holland as a defense witness.

Holland admitted that he was present when the shooting occurred but claimed that he had never seen the shooter before, that he could not identify the shooter, and that he had never seen "Tight" (Appellant) before trial, either. Holland allegedly told police that he could not confirm the shooter's identity when questioned. ***R. 399-402; 407-411***.[7] Yet, he admitted that he had told Det. Kay that Appellant was driving the red car and that he saw both Elmore and White get out

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matter asserted"). "The rule against hearsay prohibits the admission of evidence of an out of court statement to prove the truth of the matter asserted unless an exception to the rule applies." *State v. Price*, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006). *See also* Hon. J. Michelle Childs, *Social Media and the Federal Rules of Evidence*, Trial Evidence Committee, ABA Section of Litigation, (Aug. 22, 2013) at 2 ("Statements made via social media sites, because they are extrajudicial, are hearsay if used to prove the truth of the matter asserted, unless an exclusion or exception applies"), digitally available at http://jampac.us/wp-content/uploads/2017/10/Social-Media-and-the-Federal-Rules-of-Evidence-_-Trial-Evidence-Committee-_-ABA-Section-of-Litigation.pdf.

[7] He testified on cross-examination that the shots came "from the red vehicle." ***R. 408***.

of it. He explained that he had been told these facts and that he relayed them to police when Emyle's sister, Kumarie Cobb, asked him to speak to police. *See* ***R. 403-405; 407.***

During a recess in the defense's case, the trial judge noted that he had met with the attorneys in chambers and that defense counsel had indicated her intention to present a witness who would testify about "some Snapchat material." Based on his discussion with the attorneys, the trial judge had ruled that he would not allow Appellant to introduce this evidence but he allowed counsel to make a proffer of it on the record. ***R. 436.***

Trial counsel then stated that:

> Your Honor, I don't think it's going to be necessary to proffer. I just wanted it on the record what Your Honor said, that we had that conference back in chambers. The Defense had intended to call Ms. Raven Jackson, who was the girlfriend of Mr. McDuffie (sic),[8] as is oftentimes in these cases. Our purpose in doing that was to have her testify to the best of her knowledge how Snapchat works and try to introduce a Snapchat she received from Mr. Elmore on the day in question, November 23, 2018. Your Honor, based on our chambers discussion regarding authentication I personally think I could do that through my witness. She would have testified as to when she got the Snapchat, when she saw the Snapchat, and how she went on to download the Snapchat, et cetera. I just wanted to state that for the record, Your Honor.
>
> And I have a few documents, an affidavit and the [DVD], which I would like to have marked as Court's exhibits and placed in the file.

R. 436-437.

The trial judge stated that his concerns were that Appellant could not lay the proper foundation as to the "the actual date and time stamped on this material, and ...the possibility of that being manipulated in some way." So, he ruled that the evidence was inadmissible. He found that this was consistent with his earlier ruling where, based on Appellant's objection, he had excluded video from the 7-Eleven near the crime scene. ***R. 457.*** Ms. Jackson's affidavit

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[8] Ms. Jackson's March 1, 2018 affidavit states that she is the girlfriend of Cedric Elmore. Curiously, she spells Elmore's first name both as "Cedric" and as "Cedrick" in her affidavit. *See* ***R 515-520.***

was marked Court's Ex. 4 (*see* ***R. 515-520***) and the Snapchat video was marked Court's Ex. 5. ***R 437.***

B. The trial judge did not abuse his discretion.

"The conduct of a criminal trial is left largely to the sound discretion of the presiding judge and this Court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way." *State v. Hughes*, 419 S.C. 149, 160, 796 S.E.2d 174, 180 (Ct. App. 2017) (citation omitted). An appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters. *Gaster*, 349 S.C. at 557, 564 S.E.2d at 93; *Kelley*, 319 S.C. at 176, 460 S.E.2d at 370. "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *McDonald*, 343 S.C. at 325, 540 S.E.2d at 467.

It is an "inherent logical necessity" that evidence should not be admitted unless the party offering it can show that the evidence is what it is claimed to be. John Henry Wigmore, *Evidence in Trials at Common Law* § 2129 (James H. Chadbourn rev., 1978). In South Carolina, "[a] party offering evidence must meet '[t]he requirement of authentication ... as a condition precedent to admissibility.'" *Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015) (quoting SCRE 901(a)). "The authentication requirement 'is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.'" *Id.*

This Court has explained that:

> Authentication is a subspecies of relevance, for something that cannot be connected to the case carries no probative force. The trial judge acts as the authentication gatekeeper, and a party may open the gate by laying a foundation from which a reasonable juror could find the evidence is what the party claims.

> Rule 901(a), SCRE ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). The authentication standard is not high, *Deep Keel, LLC v. Atlantic Private Equity Group., LLC*, 413 S.C. 58, 64–65, 773 S.E.2d 607, 610 (Ct. App. 2015), and a party need not rule out any possibility the evidence is not authentic. In the realm of authentication, the law, like science, is content with probabilities.
>
> The court decides whether a reasonable jury could find the evidence authentic; therefore, the proponent need only make "a prima facie showing that the 'true author' is who the proponent claims it to be." *United States v. Davis*, 918 F.3d 397, 402 (4th Cir. 2019). Once the trial court determines the prima facie showing has been met, the evidence is admitted, and the jury decides whether to accept the evidence as genuine and, if so, what weight it carries. Rule 104(b), SCRE; *see United States v. Branch*, 970 F.2d 1368, 1370–72 (4th Cir. 1992); 5 Weinstein et al., *Weinstein's Federal Evidence* § 901.02[3] (2d ed. 2019).

State v. Green, 427 S.C. 223, 230, 830 S.E.2d 711, 714 (Ct. App. 2019), *reh'g denied* (July 31, 2019).[9]

Rule 901(b), SCRE, provides ten "illustrations" of authentication methods that conform to the requirements of authentication. Among these methods, "[t]he first method is the easiest and most direct way to authenticate a writing: having someone with personal knowledge about the writing testify the matter is what it is claimed to be. Rule 901(b)(1), SCRE." *Green*, 427 S.C. at 231, 830 S.E.2d at 715. Yet, "[m]ost writings meet the authenticity test through Rule 901(b)(4), SCRE, which enables authentication to be proven by: '[a]ppearance, contents,

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[9] The Court in *Green* stated that it was "aware of the debates over the 'Maryland Rule' and the 'Texas Rule,' concerning social media authentication." *Id.* at 234, 830 S.E.2d at 716. *See also* Carlson, *When Is A Tweet Not an Admissible Tweet? Closing the Authentication Gap in the Federal Rules of Evidence*, 164 U. Pa. L. Rev. 1033, 1046-48 (March 2016) (discussing the differences between the two approaches); Miller & White, *The Social Medium: Why the Authentication Bar Should Be Raised for Social Media Evidence*, 87 Temp. L. Rev. Online 1, 1 (2014). The Court in *Green* likewise recognized that "[s]ocial media messages and other content may appear to pose unique authentication problems," but it declined to adopt a more stringent requirement for authentication because it found that "[s]ocial media messages and content are writings [under Rule 901, SCRE], and evidence law has always viewed the authorship of writings with a skeptical eye." *Green*, 427 S.C. at 230, 830 S.E.2d at 714 (citing 2 *McCormick On Evidence* § 221).

substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.'" *Green*, 427 S.C. at 232, 830 S.E.2d at 715.

In *Green*, the defendant was convicted of murder and desecration of human remains following a jury trial. In relevant part, he claimed on appeal that trial judge erroneously admitted a series of direct messages from the victim's Facebook account into evidence because the State failed to properly authenticate those messages. *Id.* at 228-29, 830 S.E.2d at 713-14.

This Court rejected his arguments that the State failed to properly authenticate the Facebook messages because social media potentially can be manipulated, that a hacker could easily access another person's account or create a fictitious account, that neither the sender nor the recipient of the messages corroborated their authenticity, and that there was evidence both accounts were not secure. The Court found that the State had presented sufficient circumstantial evidence to authenticate the messages, which it summarized as follows:

> We find the content of the messages was distinctive enough that a reasonable jury could find Galarza wrote them. Numerous facts link the Facebook messages to Galarza and, consequently, Green: the use of the screen name "Ruby Rina," which Holman testified was Galarza's; reference to "Julissa" on the messages, which testimony showed was Galarza's sister's name; Ruby Rina's invitation to her home, which she stated was at 108 Queens Circle; Victim's reference to Ruby Rina as "Karina," Galarza's real first name; comments throughout the messages about Ruby Rina's erstwhile boyfriend that were consistent with her relationship with Green; the timing of the messages; and the tragic fact that Victim disappeared shortly after Ruby Rina invited him to 108 Queens Circle, where his blood was later discovered. Taken together, these circumstances serve as sufficient authentication to meet the low bar Rule 901(b)(4), SCRE, sets.

Green, 427 S.C. at 233, 830 S.E.2d at 715-16.

Relying on *Green* and Rule 901(b)(1) and (b)(4), Appellant asserts that the trial judge erred by excluding the proffered evidence because Ms. Jackson's statement (Court's Ex. 4, ***R. 515***) indicates that she received "multiple photographs and videos via Snapchat from Elmore while she was at work on November 21, 2017," and she received the photographs and videos at

times that are inconsistent with him being involved in the crimes. However, his reliance on *Green* and Rules 901(b)(1) and (4) is misplaced. Under Rule 901(b), the authenticating witness must "provide factual specificity about the process by which the electronically stored information is created, acquired, maintained, and preserved without alteration or change, or the process by which it is produced if the result of a system or process that does so ...." *Lorraine v. Markel American Insurance Company*, 241 F.R.D. 534, 545-46 (D. Md. 2007). However, Ms. Jackson's affidavit fails to mention anything about the functionality of Snapchat.

Of greater importance and unlike the Facebook messages in *Green*, Appellant could not authenticate the Snapchat pictures and videos through anyone other than Elmore. Although the Court in *Green* declined to adopt a more stringent standard for the authentication of social media evidence, *Green*, 427 S.C. at 234, 830 S.E.2d at 716, it nevertheless recognized that "some cases may require more technical methods to authenticate social media," and it refused to "downplay the fraud risk surrounding social media." *Id.* at 233-34, 830 SE.2d at 716.

Respondent submits that screenshots, stories, and videos sent via Snapchat in order to establish a specific timeframe - whether for an alibi or otherwise - requires more than the recipient's statement that she received the information at a particular time to properly authenticate the information "because these saved images can easily be edited and reproduced ... . Additionally, features of Snapchat such as geofilters are often inconsistent and misleading, so it may be a factual question as to whether the geofilter may be evidence of a snap taking place in that location." Patrick Ciapciak, *Selfies in Court: Snapchat As Admissible Evidence*, 2017 B.C. Intell. Prop. & Tech. Forum 1, 6 (February 7 2017).

In particular, Respondent submits that the trial judge's concerns about information received on Snapchat were correct. It is exceedingly easy for the sender to alter the time an

image is sent from the actual time the image is sent. A very quick search on Google Chrome of "how to change the time of day on your snapchat story," retrieves the following information:

> Go To Phone Settings. Tap On "Date And Time" Options. Change Phone Time. Open Snapchat Again And Check The Time, It Will Be Changed.

See https://www.google.com/search?rlz=1C1GCEV_enUS840US840&biw=1517&bih=694&ei=f3DzXsHYLOaGggf8w58g&q=how+to+change+the+time+of+day+on+your+snapchat+story&oq=how+to+change+the+time+of+day+on+your+snapchat+story&gs_lcp=CgZwc3ktYWIQAzoECAAQRzoCCABQ7vkBWL6OAmDMlQJoAHACeACAAY4BiAGSBZIBAzUuMpgBAKABAaoBB2d3cy13aXo&sclient=psy-ab&ved=0ahUKEwiBlOS64ZrqAhVmg-AKHfzhBwQQ4dUDCAw&uact=5. There was also a YouTube video on the topic. https://www.youtube.com/watch?v=xEPnBNqjr2c#:~:text=Go%20To%20Phone%20Settings.,Time%20%2CIt%20Will%20Be%20Changed%20.[10]

Although the video in Court' Ex. 5 might have been posted on a specific day, there was no method for determining when it was filmed. Also, there was no time stamp on the video, and there was no IP address to link the video to the device upon which it was taken. Further, neither Court's Exhibit 5 nor the screenshot attached to Ms. Jackson's affidavit has a year on it, only the date of November 21st. *See* ***R. 519-520***, Court's Ex. 5.

Given the ease with which the time a Snapchat video was sent can be altered by the sender, all Appellant presented to the trial judge was hearsay from Elmore that he sent the videos at the times reflected on Ms. Jackson's cell phone. It has been observed that "[t]he requirement of authentication and identification also insures that evidence is trustworthy, which is especially

[10] It is also possible to edit or change a Snapchat Story after it is posted if the sender first saves it as a "memory." See *How To Edit Or Change A Snapchat Story After Posting*, https://social.techjunkie.com/edit-snapchat-story-after-posting/.

important in analyzing hearsay issues. Indeed, these two evidentiary concepts often are considered together when determining the admissibility of exhibits or documents." *Lorraine*, 241 F.R.D. at 542. Appellant's proffer was insufficient to properly authenticate the evidence at issue. *See, e.g., Wady v. Provident Life and Accident Ins. Co. of Am.*, 216 F.Supp.2d 1060 (C.D.Cal. 2002) (sustaining an objection to the affidavit of a witness offered to authenticate an exhibit containing documents taken from defendant's website because the affiant lacked personal knowledge); *Richardson v. State*, 79 N.E.3d 958, 964 (Ind. Ct. App. 2017) (trial court properly denied admission of Facebook messages when the State failed to properly authenticate the messages), *trans. denied. Accord State v. Caslin,* 2018-Ohio-5362, ¶ 20, 2018 WL 6921481, *5 (Oh. Ct.App. 2018) (trial court did not err in admitting screenshot of Facebook page where the witness "had knowledge the screenshot of the Facebook page was what it purported to be" and there was no evidence to support inference that screenshot photographs were contrived or altered).

Rule 220(c), SCACR, provides that an "appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." In the present case, even assuming *arguendo* that Ms. Jackson could properly authenticate Court's Ex. 5 and the information she supposedly received from Elmore on November 21st, the trial judge's ruling must still be affirmed because the proffered evidence was not relevant to Appellant's guilt or innocence under Rule 401, SCRE. Rather, it was inadmissible hearsay and the prejudicial effect of this hearsay evidence substantially outweighed its probative value. *See* Rule 403, SCRE.

"A cornerstone of evidence admissibility is its relevance." *Phillips v. State*, 285 So.3d 685, 691 (Miss. Ct.App. 2019), *reh'g denied* (Oct. 8, 2019), *cert. denied*, 284 So.3d 754 (Miss. 2019). "All relevant evidence is admissible, except as otherwise provided by the Constitution of

the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible." Rule 402, SCRE. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." *State v. Sweat*, 362 S.C. 117, 126–27, 606 S.E.2d 508, 513 (Ct. App. 2004).

Here, *at best*, the proffered evidence would have potentially provided an alibi for Elmore.[11] However, Elmore was not on trial, did not testify, and presumably was not even in the

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[11] The Supreme Court of South Carolina has explained that:

> The literal significance of the word 'alibi' is 'elsewhere'; as used in criminal law, it indicates that line of proof by which an accused undertakes to show that because he was not at the scene of the crime at the time of its commission, having been at another place at the time, he could not have committed the crime. In other words, by an alibi the accused attempts to prove that he was at a place so distant that his participation in the crime was impossible. ... To establish an alibi the accused must show that he was at another specified place at the time the crime was committed, thus making it impossible for him to have been at the scene of the crime.

State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) (citation omitted). Here, Ms. Jackson's affidavit fails to include any information about the distance between the residence from which Elmore supposedly sent the various communications and the crime scene. Accordingly, the effort to establish an alibi would fail. See *Boseman v. Bazzle*, 364 Fed. Appx. 796, 807 (4th Cir. 2010) (unpublished) (reversing grant of habeas corpus relief where the district court "misconstrued the evidence presented during the PCR hearing and did not afford the proper level of deference to the PCR court's factual finding that trial counsel's interviews with the alibi witnesses "only established an incomplete or partial alibi for [Boseman] and did not give him an alibi for the actual time of the alleged incident'").

courtroom during the trial. Ms. Jackson's affidavit does not mention Appellant, which is hardly surprising in light of the fact that while she gave several statements to police, she did not mention Appellant in any of those statements. See ***R. 342-343; 351-352.***

Whether or not she could provide an alibi for Elmore, but not Appellant, is irrelevant to whether Appellant was guilty of the crimes for which he was on trial. *See Johnson v. State*, 872 So. 2d 65, 71 (Miss. App. 2004) (testimony of co-defendant's mother, whose own criminal case had been severed from that of two defendants, that her son suffered from significant mental illness and was at her home night of robbery, was not relevant at trial of two defendants because mother was not attempting to provide alibi for either defendant. Rather, she was attempting to provide alibi for her son who was not on trial and two defendants were attempting to bootstrap their own innocence to that of co-defendant who did not even appear at trial).

Even assuming *arguendo* that the Court finds that the proffered evidence was somehow *marginally* relevant, the video statements, as well as the information in the screenshot by Elmore were hearsay and Appellant did not proffer any exception to the rule barring the admission of hearsay. *See* Rule 801(c), SCRE; *Price*, 368 S.C. at 499, 629 S.E.2d at 366. *See also* Childs, *Social Media and the Federal Rules of Evidence*, at 2.

As the Court explained in *People v. Johnson*, 28 N.Y.S.3d 783, 795 (N.Y. Co. Ct. 2015):

> "Where postings from internet websites are not statements made by declarants testifying at trial and are offered to prove the truth of the matter asserted, such postings generally constitute hearsay under Fed.R.Evid. 801. *United States v. Jackson,* 208 F.3d 633, 638 [7th Cir.2000] (declining to admit web postings where defendant was unable to show that the postings were authentic, and holding that even if such documents qualified under a hearsay exception, they are inadmissible 'if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness') (quoting *United States v. Croft,* 750 F.2d 1354, 1367 [7th Cir.1984]); see also *St. Clair v. Johnny's Oyster & Shrimp, Inc., supra,* 76, F.Supp.2d at 775 ('[A]ny evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation

> of the hearsay exception rules.')." *Novak v. Tucows, Inc.*, 2007 WL 922306, *5, 2007 U.S. Dist. LEXIS 21269, *15–16 [E.D.N.Y. Mar. 26, 2007].[12]

(Footnote added).

Furthermore, the prejudicial effect of this evidence substantially outweighed any *de minimis* probative value it might have. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury ...." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." *State v. Spears*, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct.App.2013) (citation omitted).

The probative value of the proffered evidence was, at best, negligible. Again, this hearsay evidence does not provide Appellant with an alibi. Indeed, it is not relevant to any defense for him and it also does nothing to refute or rebut the prosecution's case against him. It only attempts to provide Elmore with an alibi. Further, it was cumulative to other evidence that was already before the jury that police had initially received statements that Elmore and White were involved in shooting the victims, but the investigation ultimately concluded that Appellant was the only shooter. ***R. 343-351.***

The proffered evidence was likewise cumulative to evidence that Ms. Jackson had provided police with unverifiable cell information that was not incriminating and left open the possibility of his involvement in the crimes. Specifically, Respondent directs the Court's attention to the following exchange on Appellant's cross-examination of Sgt. Haralson:

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[12] The defendant in *Johnson* was tried on one count of predatory sexual assault against a child. *Id.* at 786-87. He sought to introduce evidence of the sexual assault victim's purported "likes" on social media pages containing electronically stored images depicting sexually suggestive images taken from other websites. In pertinent part, the Court found both that the defendant failed to properly authenticate the evidence in question, *id.* at 8 N.Y.S.3d at 794–95, and that it was inadmissible hearsay. *Id.* at 795-96.

Q And after Cedric Elmore was arrested, were you involved in taking a statement from Raven, his girlfriend?

A I've spoke[n] to Raven on many occasions.

Q Okay. How many?

A I couldn't tell you. It's been many. She came up to the office quite frequently.

Q Did she give you an affidavit about this case?

A She talked to me. She gave me an affidavit about some cell phone issues. Nothing that helped or hurt the case. It was kind of irrelevant, what she brought.

Q It was information about Cedric Elmore, at least?

A It was information about him. Something -- it was non-verifiable. We couldn't verify that it was true.

Q And you couldn't verify that it wasn't?

A We verified that it didn't help him out.

Q And it didn't hurt him?

A It definitely didn't help him in any way, shape or form.

Q Did it definitely not hurt him in any way, shape or form?

A It still left the fact that he could have been there. So that's, it was irrelevant information.

Q Well, you just keep putting the emphasis on, it didn't help him, but it also didn't hurt him, ---

A. Correct.

Q --- did it?

A No. There was nothing incriminating about it. No.

R. 342, line 24 – 343, line 25.

On the other hand the prejudicial effect of the proffered evidence was great because it would have misled jurors and diverted their attention away from the only issue properly before them: whether or not Appellant was guilty of the crimes for which he was on trial. If the proffered evidence had been presented, jurors' attention would have improperly been focused on the irrelevant issue of whether Elmore possibly had an alibi, when the State was not contending that he shot the victims. See *Johnson*, 872 So. 2d at 71. *Cf. State v. Henley*, 428 S.C. 649, 663, 837 S.E.2d 639, 646 (Ct. App. 2019), *reh'g denied* (Feb. 13, 2020) ("The evidence of Henley's prior acquittal had little to no probative value as it did not prove or disprove any element necessary to the first degree burglary charge; yet, admission of the evidence would have likely led to jury confusion because it would have invited the jury to speculate about what occurred at the first trial"); *Kennedy v. Richland County Sch. Dist. Two*, 833 S.E.2d 414, 431–32 (S.C. App. 2019), *reh'g denied* (Oct. 24, 2019), *cert. dismissed* (Mar. 9, 2020) (finding trial court did not abuse its discretion in excluding evidence of alleged petty theft charges against plaintiff, which occurred at SCANA while he was employed as a night-shift security guard, because plaintiff's reputation had already been damaged when the petit theft occurred and introduction of the evidence "would be unfairly prejudicial or cause confusion of the issues because it would present difficulty in determining when the actual injury to [plaintiff's] reputation occurred"). Therefore, the trial judge did not abuse his discretion by excluding the proffered evidence.

II. The trial judge did not abuse his discretion by relying on Appellant's 2011 conviction for assault and battery with intent to kill (ABIK) as a strike for sentencing purposes and imposing sentences of life without the possibility of parole (LWOP) under S.C. Code § 17-25-45 (Supp. 2020) for his 2018 murder and attempted murder convictions.

Notwithstanding that Appellant was a juvenile when he committed his prior offense, the trial judge did not err in relying on his 2011 assault and battery with intent to kill (ABIK) conviction as a strike for sentencing purposes and imposing sentences of life without the

possibility of parole (LWOP) under S.C. Code § 17-25-45 (Supp. 2020) for his 2018 murder and attempted murder convictions because the ABIK conviction constituted a strike under the recidivist statute. Also, Appellant could not collaterally attack the facial validity of his 2011 conviction following his 2018 trial. Instead, his only proper remedy was to challenge the ABIK conviction at a trial and appeal, or in an Application under the Uniform Post-Conviction Relief Act, S.C. Code Ann. §§ 17-27-10, et seq. (2014) ("the PCR Act"), which he failed to do. Furthermore, relying on the ABIK conviction to enhance a sentence for crimes committed as an adult did not violate the Eighth Amendment.

A. Proceedings in the trial court.

On July 26, 2018, the State timely served Appellant with notice it would seek LWOP if Appellant was convicted on the murder and attempted murder charges.[13] Following Appellant's convictions for both offenses, the trial judge stated that he had just been handed "a memorandum with some attachments," which Appellant had filed in opposition to the State's July 26, 2018 notice. Because Appellant's memorandum was lengthy, he deferred sentencing to adequately consider it and to give the State an opportunity to respond. ***R. 496-497; see also R. 521-559.*** (Appellant's Memorandum). The State filed a response to Appellant's motion on October 25, 2018. ***R. 560-576.*** (State's response).

At the November 30, 2018 sentencing hearing, the trial judge stated that he had read both Appellant's memorandum and the State's response to it, and that he was thoroughly familiar with the parties' respective positions. However, Appellant had indicated a desire to argue that LWOP sentencing violate his right to equal protection. So, the trial judge allowed him to do so. ***R. 499-500.***

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[13] See Exhibit A to Appellant's Memorandum, ***R. 533.*** ABIK was in 2011 and remains a "most serious offense" under § 17-25-45(C)(1).

Appellant argued that a juvenile adjudication could not be used as a strike under South Carolina case law and that using his conviction as a juvenile as a strike would likewise violate equal protection. He added that:

> We believe that the proper – I guess, if there should be heightened scrutiny on this due to the fact that, you know, [a] juvenile ... adjudication is somewhat of a protected class, but even under the rational basis test, we would submit that even under the rational basis test, there's no rational basis for treating Mr. Hall differently just because of the fact that he got transferred to adult court versus juvenile court.

R. 501.

The State maintained that there was a legitimate State interest in allowing "juveniles who have committed atrocious crimes to be waived up to General Sessions Court." The statute "puts those protections into place" by requiring a transfer hearing. The State also observed that while there was not a lot of case law on the issue, *People v. Cole*, 152 Cal.App.4th 230, 61 Cal. Rptr.3d 238 (Cal. App. 2007), *as mod. on denial of reh'g* (July 18, 2007), held that treating prior convictions in adult court for crimes committed as juvenile, as strikes under a recidivist statute, did not violate equal protection. ***R. 501-503.***

Appellant argued in reply that South Carolina and California waive up juveniles differently because juveniles in South Carolina are waived up "based off of a variety of factors that are not just ... the atrociousness of a crime." He added that:

> It doesn't have to necessarily deal with the crime. Also, if you look at ... perhaps he got waived up. And ... it's our position that the Court really can't determine exactly why he was waived up because of the lack of description in the waiver order from the lower court, but ... if part of ... the reason is ... that ... you can get waived up in South Carolina simply because of the fact that ... the Court doesn't find that you're necessarily a great candidate or that ... a variety of other reasons.
>
> It can just be the atrociousness of the crime, but all of ... those factors don't necessarily submit a valid state interest, each and every individual factor does not, for treating these people differently.

R. 503-504.

The State then offered a photograph of Emyle McDuffie that was taken shortly before his death and victim impact testimony from his mother, Trista Faye McDuffie. ***R. 504-506.*** Likewise, the State introduced the sentencing sheet and indictment for the prior conviction, as Court's Ex. 1-A. ***R. 506.*** When Appellant deferred further argument until after the trial judge's ruling on the motion, the trial judge stated that he was denying the motion and ruling in favor of the State. He also incorporated the State's sixteen page memorandum in denying the motion. ***R. 507-508; 560-76.***

The trial judge also stated that he had "spent a considerable amount of time reviewing this case, reviewing the memorandum, the memorandum in opposition, [and] all the cases cited ... in support of each position." Based on this review, he denied Appellant's motion and sentenced Appellant to LWOP for murder and attempted murder pursuant to § 17-25-45. ***Nov. R. 510-514.***

B. Discussion.

On February 10, 2009, Appellant and his brother went to a girl's house when her parents did not give her permission to have visitors. Her cousin and some of his friends, including the victim, were in the area and stopped by the house to check on her. When her cousin asked Appellant and his brother to leave the house, they refused and a verbal argument eventually escalated into a brawl. Outnumbered, Appellant and his brother left the residence on a moped and returned to their residence. Once there, Appellant retrieved a handgun. He then set out to find the cousin and the cousin's friends. *See* State's Memorandum, ***R. 562.***

Appellant eventually located the victim walking down the sidewalk. The victim saw Appellant on the moped with a handgun in his hand. So, he ran into a nearby house and closed

the door behind him. Appellant and his brother, who was now holding the handgun, followed him into the house and attempted to provoke the victim into fighting again. When the victim refused, Defendant encouraged his brother to shoot the victim. The brother only fired one shot and that shot struck the victim in the wrist. Appellant then took the gun from his brother and began shooting at the victim. One shot struck the victim in the back. Several witnesses in the house identified Appellant and his brother, and both of them gave full confessions. *See* State's Memorandum, ***R. 562.***

A juvenile petition was subsequently issued charging the fifteen year old Appellant with ABIK, first-degree burglary, and possession of a weapon during the commission of a violent crime. The State sought to have the charges waived from family court to the Court of General Sessions. The Honorable Joseph W. McGowan III held a transfer hearing on November 23, 2009. Based on the testimony presented at the hearing and the evaluation and recommendation of the South Carolina Department of Juvenile Justice (DJJ), Judge McGowan found that Appellant's case should be transferred to the Court of General Sessions. *See* State's Memorandum, ***R. 562-63***. *See also* Order, ***R. 536-37.***

Appellant then appeared before the Honorable J. Cordell Maddox Jr. on December 7, 2011, and pled guilty to ABIK and second-degree burglary (violent).[14] Judge Maddox accepted a recommended plea bargain and sentenced Appellant on both counts to fifteen years of incarceration, suspended upon the service of eight years of incarceration and five years of probation. *See* State's Memorandum, ***R. 563***. Instead of timely serving a timely notice of appeal or a timely PCR Application challenging his prior conviction, Appellant waited until October 11,

[14] Robert J. Tinsley Sr., Esquire, represented Appellant at his plea.

2018 - the day before the jury convicted him of the present charges – to file a PCR Application challenging his prior ABIK conviction. *See* ***R. 555-559.***

1. Appellant could not attack his facially valid 2011 conviction in his 2018 trial.

To the extent Appellant wished to attack the 2011 conviction, he was required to timely raise any challenges to his 2011 conviction at a trial and on direct appeal or in a timely-filed PCR Application filed under the PCR Act, §§ 17-27-10, *et seq*. He did not object to the family court's transfer Order. Instead, he pled guilty. In South Carolina, all guilty pleas are unconditional. *State v. Easler*, 355 S.C. 79, 81, 584 S.E.2d 117, 119 (2003) ("[t]o be valid, a guilty plea must be unconditional"); *State v. O'Leary*, 302 S.C. 17, 18, 393 S.E.2d 186, 187 (1990) ("guilty pleas are unconditional and, if an accused attempts to attach any condition, the trial Court must direct a plea of not guilty . . . it is, thus, impermissible for a defendant to preserve constitutional issues while entertaining a guilty plea; the trial Court may not accept the plea on such terms"). As a result, he could not challenge the transfer order in his plea. Also, he did not perfect an appeal.

Thus, his only method to properly challenge any perceived defects in the family court's transfer Order was to file a timely PCR Application and allege that his plea counsel was ineffective in failing to object to the Order. When the General Assembly passed the PCR Act, it created the PCR Application, filed in the Court of Common Pleas, as the exclusive method for any collateral attacks upon a conviction. *See* S.C. Code Ann. § 17-27-20(B) (2014) ("Except as otherwise provided in this chapter, [this remedy] comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them"); *Simpson v. State*, 329 S.C. 43, 45-46, 495 S.E.2d 429, 430 (1998) ("The Uniform Act encompassed the relief available under the common law writ of habeas corpus, the relief available under the expansion of the writ,

and the relief available by collateral attack under any common law, statutory or other writ, motion, petition, proceeding, or remedy." (Citations omitted)). *See also Al-Shabazz v. State*, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (2000) ("The applicant submits his claims on a standard PCR application, initiating a civil action governed by the South Carolina Rules of Civil Procedure in the Court of Common Pleas in the county where he was convicted. .... The applicant must raise all available grounds for relief in his first application because successive applications usually are barred." (Citations omitted); *Aice v. State,* 305 S.C. 448, 409 S.E.2d 392 (1991).

Therefore, Appellant should have, but did not, raise any issues concerning the sufficiency of the family court's transfer order of the 2011 charges in either a direct appeal or a PCR action. Because he did not do so, he was precluded from attacking the facial validity of his prior conviction in his 2018 sentencing proceeding. Indeed, the Supreme Court of South Carolina has previously rejected virtually identical efforts of a capital defendant to challenge his prior murder conviction in the resentencing proceeding for a subsequent murder in which he was sentenced to death. *See State v. Atkins*, 303 S.C. 214, 399 S.E.2d 760 (1990).

Atkins murdered his 75 year old father, Benjamin Atkins, and his 13 year old next-door neighbor, Karen Patterson. *Id.* at 217, 399 S.E.2d at 761. His original death sentence was reversed on direct appeal and a resentencing hearing was held. The resentencing jury imposed a death sentence.

The only statutory aggravating circumstance relied upon by the State was Atkins' 1970 murder conviction. *See* § 16-3-20(C)(a)(2) (Supp. 1990). Atkins contended that this 1970 conviction was invalid because he has received to ineffective assistance of counsel in the earlier trial, but the resentencing judge denied his request to contest the facially valid conviction.

Atkins, 303 S.C. at 217-18, 399 S.E.2d at 762. The Supreme Court affirmed the trial judge's ruling:

> Atkins relies upon the United States Supreme Court decision in *Johnson v. Mississippi,* 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). However, the facts here are clearly distinguishable from those in *Johnson.*
>
> In *Johnson,* the aggravating circumstance relied upon by the State was the defendant's prior felony conviction. Subsequent to his death sentence, that conviction was invalidated. Understandably, the U.S. Supreme Court held impermissible the State's reliance upon the invalid conviction as an aggravating circumstance warranting the death penalty.
>
> Here, Atkins' 1970 murder conviction has not been reversed or set aside.[1] His resentencing trial was not the proper forum for collateral attack upon that conviction. *See, Dewitt v. South Carolina Department of Highways,* 274 S.C. 184, 262 S.E.2d 28 (1980).
>
> [FN1]Atkins' 1986 application for Post-Conviction Relief was dismissed on the ground of laches and this Court denied his Petition for Certiorari. We express no opinion as to any relief Atkins may obtain in a Federal Habeas Corpus proceeding. However, the fact that Atkins may be allowed to collaterally attack the prior conviction in another forum does not entitle him to relief unless and until the conviction is invalidated. *See, e.g., Eutzy v. State*, 541 So.2d 1143 (Fla.1989); *Bundy v. State*, 538 So.2d 445 (Fla.1989); *Moon v. State*, 258 Ga. 748, 375 S.E.2d 442 (Ga.1988).

Atkins, 303 S.C. at 218, 399 S.E.2d at 762.

Like the defendant in *Atkins*, because Appellant did not timely attack the validity of the 2011 ABIK conviction, it was a facially valid conviction and it was properly relied upon for sentencing under § 17-25-45. Accordingly, Appellant could not challenge his facially valid prior conviction in a sentencing proceeding for another, subsequent conviction, and his claim that the family court failed to made adequate findings of fact pursuant to *In re Sullivan*, 274 S.C. 544, 548, 265 S.E.2d 527, 529 (1980), is without merit. *See id.*[15] *See also Daniels v. United States*,

[15] Nor is this result changed by his filing of an untimely PCR Application challenging his 2011 conviction in October 2018. First, the 2018 Application is by the statute of limitations for PCR

532 U.S. 374, 383 (2001) ("[A] defendant generally has ample opportunity to obtain constitutional review of a state conviction. But once the door to such review has been closed by the defendant himself—either because he failed to pursue otherwise available remedies or because he failed to prove a constitutional violation—the conviction becomes final and the defendant is not entitled to another bite at the apple simply because that conviction is later used to enhance another sentence") (internal quotation marks and citations omitted); *Custis v. United States*, 511 U.S. 485, 487 (1994) (holding that a defendant in a federal sentencing proceeding

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actions, S.C. Code Ann. § 17-27-45(A) (Supp. 2020), since it was filed more than six years after expiration of the limitations period. Also, the 2018 Application is barred by the doctrine of laches. To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. *See McElrath v. State*, 276 S.C. 282, 284, 277 S.E.2d 890, 891 (1981). This requirement "guards the state's legitimate expectation that it will not be called upon without due cause, to defend the integrity of convictions that occurred many years ago, where records and witnesses are no longer available." *Id.* (citing *Honeycutt v. Ward*, 612 F.2d 36 (2nd Cir. 1979)). As a result, the doctrine of laches bars any post-conviction relief action where the applicant has failed to exercise his rights for an unreasonable period. *Whitehead v. State*, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002) (quoting *Hallums v. Hallums*, 296 S.C. 195, 371 S.E.2d 525 (1988)).

Records and exhibits from the Family Court waiver hearing and the General Sessions guilty plea may no longer be available, and witnesses may be difficult to locate or may have no recollection of events. See, *e.g.*, Rule 607(i), SCACR (court reporter only required to retain records for five years); Rule 1 . 1 5(i), Rule 407, SCACR (attorney may destroy files after six years). The State should not be called upon to defend the constitutionality of convictions after such a long delay because this would run afoul of the need for finality of litigation.

Both the United States Supreme Court and the Supreme Court of South Carolina have emphasized the necessity for finality of litigation in criminal cases. "[T]he principle of finality ... is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989). And, in *Aice*, the Court stated, ("Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice." *Aice*, 305 S.C. at 451, 409 S.E.2d at 394. See also *Anderson v. Leeke*, 271 S.C. 435, 441, 248 S.E.2d 120, 123 (1978) (quoting with approval, Justice Harlan's concurring and dissenting opinion in *Mackey v. United States*, 401 U.S. 667, 691 (1971). Moreover, to the extent that he asserts in the 2018 PCR that the prior conviction should be considered a juvenile adjudication because the Court of General Sessions did not have subject matter jurisdiction, that argument is patently meritless. *See State v. Rice*, 401 S.C. 330, 333, 737 S.E.2d 485, 486 (2013) (holding that an erroneous order transferring a juvenile to general sessions court is judicial error, not jurisdictional error).

could not collaterally attack the validity of prior state convictions used to enhance his or her sentence under the Armed Career Criminal Act of 1984).

Yet, even assuming *arguendo* that his claim was properly before the Court, it is without merit. Appellant acknowledges that a family court order transferring a case to the Court of General Sessions is reviewed for an abuse of discretion. *State v. Pittman*, 373 S.C. 527, 559, 647 S.E.2d 144, 161 (2007). The order must only be "sufficient to demonstrate that the statutory requirement of full investigation has been met and that the question has received full and careful consideration by the family court." *In re Sullivan*, 274 S.C. at 548, 265 S.E.2d at 529. While mere "conclusory statements," *id.*, are frowned upon, the appellate court will not disturb a family court order so long as it appears from the record that the family court has competently reviewed the waiver request. *See Pittman*, 373 S.C. at 560, 647 S.E.2d at 161 ("Although the family court's order is not extremely detailed, the order sufficiently demonstrates that a full investigation occurred. Additionally, the record supports the family court's decision").

Judge McGowan made the following findings in his Order:

> 1. The Defendant, Zantravious Hall, was born on October 21, 1993, and is currently sixteen (16) years old.
>
> 2. The Defendant has been charged with Burglary First Degree, Assault and Battery with Intent to Kill (ABWIK), and Possession of a Weapon during the commission of a Violent Crime.
>
> 3. The alleged offense occurred in Greenwood County on or about February 10, 2009, when the Defendant was fifteen (15) years old.
>
> (The following findings are based on the criteria listed by the United States Supreme Court in Kent v. United States, 383 U.S. 541 (1966).)
>
> 4. There is probable cause to believe the Defendant committed the crime for which he is charged.
>
> 5. The seriousness of the offense is against persons and is of such gravity as to require waiver for the protection of the community.

6. The alleged offense is of an aggressive, violent, premeditated or willful manner.

7. There is sufficient merit to warrant the Grand Jury returning a True Bill on the charge.

8. The Defendant's younger brother is his co-defendant and that charge has already been adjudicated in Family Court.

9. The pre-waiver evaluation report and testimony indicated that the Defendant has been engaging in pseudo-adult activities and therefore has an enhanced level of sophistication and maturity.

10. The crime for which the Defendant is charged is of a serious nature and if found guilty, would suggested he is capable of acting without regard for others.

11. It is the opinion of the pre-waiver evaluation team that it is not likely the Defendant could be rehabilitated.

Order, ***R. 536-537.***

In light of these findings, Judge McGowan concluded that "there is little likelihood that [Appellant] can be rehabilitated in the Juvenile Justice System" and that it was in Appellant's best interest to waive him "to the Court of General Sessions for proceedings on charges" he faced. ***R. 536-537.***

Even if the findings in the order were inadequate, the proper remedy in most instances would be to remand to the family Court for further fact finding, not to overturn the conviction. *Cf. State v. Avery*, 333 S.C. 284, 297, 509 S.E.2d 476, 483 (1998) (Finney, J., dissenting) (dissenting from a holding of an adequate order and encouraging "remand to the family court for reconsideration of the waiver issue"). However, here, the DJJ waiver evaluation report[16]

[16] Indeed, the concerns of the DJJ evaluator about Appellant's potential recidivism and inability to conform his conduct to the expectations of society mirror the concerns legislatures across the nation have sought to address through their recidivist statutes. *See Moore v. Missouri*, 159 U.S. 673, 677 (1895) ("[T]he statute imposes a higher punishment for the same offense upon one who proves, by a second or third conviction, that the former punishment has been inefficacious in

attached to Appellant's memorandum as Exhibit 3 (***R. 538-554***) makes a remand unnecessary, since it provides a sufficient factual basis to conclude that Appellant's 2011 case was properly transferred to the Court of General Sessions. *See Pittman*, 373 S.C. at 560, 647 S.E. 2d at 161 (2007) (holding order adequately supported waiver where, "while there was evidence Appellant was cooperative and capable of rehabilitation, the record also reflects that Appellant engaged in 5 escape plans, made shanks, and caused other disruptions while in the custody of DJJ").[17] Ultimately, it was Appellant's conduct that persuaded Judge McGowan to waive the case to General Sessions, and that decision was not an abuse of his broad discretion. *See Avery*, 333 S.C. at 292, 509 S.E. 2d at 481 ("The serious nature of the offense is a major factor in the transfer decision") (citations omitted)).

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doing the work of reform, for which it was designed [and] that the punishment for the second is increased, because, by his persistence in the perpetration of crime, he has evinced a depravity, which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offense") (citations omitted).

[17] *See also Graham v. Florida*, 560 U.S. 48, 1 17-18 (Thomas, J., dissenting) ("But research relied upon by the *amici* cited in the Court's opinion differentiates between adolescents for whom antisocial behavior is a fleeting symptom and those for whom it is a lifelong pattern. See Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 Psychological Rev. 674, 678 (1993) (distinguishing between adolescents who are 'antisocial only during adolescence' and a smaller group who engage in antisocial behavior 'at every life stage' despite 'drift[ing] through successive systems aimed at curbing their deviance'). That research further suggests that the pattern of behavior in the latter group often sets in before 18. *Id*, at 684 ('The well-documented resistance of antisocial personality disorder to treatments of all kinds seems to suggest that the life-course-persistent style is fixed sometime before age 18.'). And, notably, it suggests that violence itself is evidence that an adolescent offender's antisocial behavior is not transient. See Moffitt, *A Review of Research on the Taxonomy of Life-Course Persistent Versus Adolescence-Limited Antisocial Behavior, in Taking Stock: the Status of Criminological Theory* 277, 292-293 (F. Cullen, J. Wright, & K. Blevins eds. 2006) (observing that 'life-course-persistent' males 'tended to specialize in serious offenses (carrying a hidden weapon, assault, robbery, violating court orders),' whereas 'adolescence-limited' ones 'specialized in non-serious offenses (theft less than $5, public drunkenness, giving false information on application forms, pirating computer software, etc.)'").

Judge McGowan's order in Appellant's 2011 case sufficiently complies with the requirements of specificity, and would not have precluded meaningful appellate review had it been timely challenged. For these reasons, Appellant's contention that his 2011 ABIK conviction was not properly transferred to the Court of General Session and should not be viewed as a prior conviction under the recidivist statute is without merit.

2. Appellant's LWOP sentence does not violate the Eighth Amendment.

The Eighth Amendment does not forbid sentencing Appellant to life imprisonment under § 17-25-45. His prior conviction for a most serious offense constituted a qualifying prior conviction for enhancement purposes under the recidivist statute, and *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012), are inapplicable to his case.[18]

A juvenile adjudication in family court does not qualify as a conviction for purposes of sentencing enhancement under the recidivist statute. *See State v. Ellis*, 345 S.C. 175, 179, 547 S.E.2d 490, 492 (2001). However, when a juvenile[19] is tried as an adult in the Court of General Sessions, his resulting conviction or guilty plea is a "conviction" for enhancement purposes. *State v. Standard*, 351 S.C. 199, 203, 569 S.E.2d 325, 328 (2002), *cert. denied*, 537 U.S. 1195 (2003).

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[18] Justice Alito's dissent in *Miller* warned that "[fjuture cases may extrapolate from today's holding, and this process may continue until the majority brings sentencing practices into line with whatever the majority views as truly evolved standards of decency." *See id.* at 509-15 (Alito, J., dissenting). Appellant's attempt to extend *Miller* to his case shows that Justice Alito's fear has been realized.

[19] In South Carolina, pursuant to Section 63-19-20 of the South Carolina Code (2010), a juvenile is a person less than seventeen years of age. However, *Miller* extends to defendants under eighteen years of age and therefore for the purposes of this opinion we consider juveniles to be individuals under eighteen." *Aiken v. Byars*, 410 S.C. 534, 537 n. 1, 765 S.E.2d 572, 573 n. 1 (2014).

In *Standard*, the Supreme Court of South Carolina determined that the use of a conviction for a crime committed while a juvenile to enhance the sentence of an adult under the recidivist statute did not violate the Eighth Amendment. *Id.* at 204, 569 S.E.2d at 328. The Court held that "an 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." *Id.* at 206, 569 S.E.2d at 329.

Subsequently, this Court likewise held that the imposition of a sentence of life imprisonment based on a prior adult conviction for a crime committed while a juvenile did not constitute cruel and unusual punishment in *State v. Williams*, 380 S.C. 336, 348-49, 669 S.E.2d 640, 647 (Ct. App. 2008). This Court has reached the same result after the United States Supreme Court's decisions in *Graham* and *Miller*. *See State v. Green*, 412 S.C. 65, 84-85, 770 S.E.2d 424, 434-35 (Ct. App. 2015).

After a jury trial, the appellant in *Green* was of armed robbery. The State sought a life sentence based on his prior conviction for an armed robbery committed while he was seventeen years old. The appellant argued that "a sentence of LWOP would violate the Eighth Amendment's ban on cruel and unusual punishment because [...] although he was twenty years old at the time of sentencing, and nineteen years old at the time of the current offense, he was only seventeen years old when he committed the prior offense that served as the triggering offense[.]" *Id.* at 75, 770 S.E.2d at 429.

This Court rejected this argument. Relying on *Standard*, the Court found that because the defendant "was tried and adjudicated as an adult, his prior armed robbery conviction is a 'conviction' for purposes" of the recidivist statute. *Id.* at 84, 770 S.E.2d at 435. The Court likewise rejected the appellant's Eighth Amendment and held that:

> We also find Green's reliance on *Miller* is misplaced. Although *Miller* held that mandatory LWOP sentences for juveniles violate the Eighth Amendment, Green was twenty years old at the time of sentencing; therefore, he was not a juvenile when he was sentenced to LWOP. *Miller's* holding was based, in part, on the "recklessness, impulsivity, and heedless risk-taking" of children; however, because Green was not a juvenile at the time he committed the current armed robbery, the policy considerations from *Miller* are inapplicable. 132 S.Ct. at 2458; *see also Aiken,* 410 S.C. at 541–42, 765 S.E.2d at 576 ("[T]he Court in *Miller* noted that ... children were constitutionally different from adults for sentencing purposes, a conclusion that was based on common sense as well as science and social science."). Therefore, Green's LWOP sentence did not violate the Eighth Amendment.

Green, 412 S.C. at 86-87, 770 S.E.2d at 436.[20]

Additionally, neither the holding of *Graham*, nor the holding in *Miller*, applies to sentencing of a defendant for crimes that he committed as an adult. In *Graham*, the Court held that an LWOP sentence to be unconstitutional for a juvenile offender who did not commit a

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[20] Contrary to Appellant's suggestion, *Miller* did not "eradicate[] the rationale underpinning *Standard.*" Simply put, the Eighth Amendment's "[evolving standards of decency that mark the progress of a maturing society[,]" *Standard*, 351 S.C. at 204, 569 S.E.2d at 328 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 821 (1988)), do not prohibit the imposition of a life sentence in this case, where Appellant committed the crimes for which he received life sentences as an adult.

Other courts have considered the impact of *Roper*, *Graham*, and *Miller* on recidivist life sentences and have found that enhancement from the use of an adult conviction for a crime committed while a juvenile is proper. *See United States v. Hunter*, 735 F.3d 172 (4th Cir. 2013) (citing *Rodriguez*, *supra*, and rejecting defendant's challenge because "100% of the punishment is for the offense of conviction. None is for the prior convictions ...."); *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 subsequent offense was committed by an adult offender and not a juvenile with lessened culpability as discussed in *Graham*); *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 also, e.g., 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").

homicide. *See Graham*, 560 U.S. at 75. The Court explained that juveniles have a "'lack of maturity and an underdeveloped sense of responsibility[;]'" they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure[;]" and their characters are "not as well formed." *Id.* at 68 (quoting *Roper v. Simmons*, 543 U.S. 551 (2005)). The Court also found that "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." *Id.*

In *Miller*, the Court held a mandatory LWOP sentence for a juvenile homicide offender violated the Eighth Amendment. *Miller*, 567 U.S. at 479-80. Relying on *Roper* and *Graham*, the Court again discussed the differences between a juvenile and an adult and found that those differences were significant because the transition from juvenile to adult is one in which maturing occurs, in which changes occur in the parts of the brain that control behavior, and "as the years go by and neurological development occurs, [the juvenile's] 'deficiencies will be reformed.'" *Id.* at 472 (quoting *Roper, supra*).

Yet, Appellant was not a juvenile when he committed the crime for which he received an LWOP sentence. Rather, he had just turned twenty-four years old when he committed the murder and attempted murder in this case. At that age, he can no longer claim diminished responsibility for his actions based on age or maturity and neither *Graham* nor *Miller* apply to his sentencing. Therefore, his LWOP sentence does not violate the Eighth Amendment.

Additionally, the punishment he received in this case was not further punishing him for his prior conduct as a juvenile. To the contrary, it is punishing him as a repeat offender who did not reform his behavior and, instead, demonstrated a continued disdain for the law and for the lives of others. *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 [it is] a repetitive one"); *see also Solem v. Helm*, 463 U.S. 277, 296 (1983) ("[A] State is justified in punishing a recidivist more severely than it punishes a first offender"). Additionally, his enhanced sentence for murder and attempted murder is entirely consistent with the rationale behind recidivist offender statutes, which is to more severely punish offenders who continue to break the law. *See United States v. Rodriguez*, 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").

Finally, the Eighth Amendment's prohibition on sentences that are "grossly out of proportion with the severity of the crime[,]" *see State v. Jones*, 344 S.C. 48, 56, 543 S.E.2d 541, 545 (2001), is likewise inapplicable. Murder carries a potential life sentence regardless of the defendant's prior record, see S.C. Code Ann. 16-3-10 (2020), and the recidivist statute has withstood numerous prior Eighth Amendment challenges. *See, e.g., id.* at 55-59, 543 S.E.2d at 544-47 (rejecting a various constitutional challenges to the recidivist statute); *State v. Brannon*, 341 S.C. 271, 281, 533 S.E.2d 345, 350 (Ct. App. 2000) (recidivist statute "is not unconstitutional *per se*"); *see also State v. White*, 349 S.C. 33, 37-38, 562 S.E.2d 305, 306-07 (2002) (rejecting Eighth Amendment challenge based on first-degree burglary conviction because, in part, first-degree burglary carries life sentence notwithstanding implications of recidivist statute). In this case, the General Assembly has determined a repeat offender of a violent and most serious crime should be punished severely with life imprisonment. *See State v.*

Washington. 338 S.C. 392, 400, 526 S.E.2d 709, 713 (2000) ("The Legislature has the power, within constitutional limits, to define and punish crimes") (quoting *Guinyard v. State*, 260 S.C. 220, 226, 195 S.E.2d 392, 395 (1973))). *Roper*, *Graham*, and *Miller* do not invalidate that determination embodied in the recidivist statute. Accordingly, the trial judge did not err in sentencing Appellant to LWOP for murder and attempted murder.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, convictions, and sentence of the circuit court should be affirmed.

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August 11, 2020.

RECEIVED
Aug 11 2020
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenwood County
The Honorable Donald B. Hocker, Circuit Court Judge
Appellate Case No. 2018-002176

THE STATE,

Respondent,

vs.

ZANTRAVIOUS RANDELL HALL,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This11th day of August, 2020.

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