STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dillon County
Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2011-193887

THE STATE,

Respondent,

v.

DAMIEN INMAN,

Appellant

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. The trial judge erred in sentencing Appellant to life without parole for burglary in the first degree, a non-homicide offense, because Appellant was seventeen-years old at the time of the offense; thus, his sentence is cruel and unusual punishment in the violation of the Eighth Amendment to the United States Constitution.

II. The trial judge erred in sentencing Appellant to thirty years for kidnapping because the South Carolina Code forbids the imposition of a sentence for kidnapping when a defendant is also convicted of murder concerning the same alleged victim.

III. The trial judge erred in granting the prosecutor's first motion pursuant to Batson v. Kentucky, 476 U.S. 79 (1986) where Appellant presented a race and gender neutral explanation for striking Juror #60 - his employment - and the prosecutor failed to present evidence or argument that the reason was a pretext.

IV. The trial judge erred in granting the prosecutor's second motion pursuant to Batson v. Kentucky, 476 U.S. 79 (1986) where Appellant presented race and gender neutral explanations for striking the jurors and the prosecutor failed to present evidence or argument that the reasons were pretexts.

V. The trial judge erred in permitting a witness to testify to her in-court and out-of-court identification of Appellant where the out-of-court identification procedure was unnecessarily suggestive and conducive to irreparable mistaken identification in violation of Appellant's right to due process of law.

VI. The trial judge erred in sentencing Appellant to life without parole for murder because Appellant was seventeen years of age at the time of the offenses and his sentence is cruel and unusual punishment in violation of the Eighth Amendment to the Untied States Constitution.

RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Damien Inman, was indicted at the May 13, 2010 term of the Court of General Sessions for Dillon County for murder (2009-GS-17-1210), possession of a weapon during a violent crime (2009-GS-17-1211), burglary in the first degree (2009-GS-17-1212), kidnapping (2009-GS-17-1213), armed robbery (2009-GS-17-1214), grand larceny (2009-GS-17-1215), and criminal conspiracy (2009-GS-17-1217). The matter involves the death of Mary Stutts on August 17, 2009. The case was called to trial before the Honorable Thomas A. Russo, presiding judge, and a jury on December 13-16, 2010. The Appellant was present and represented by Rosalind Sellers, Assistant Public Defender. The State was represented by Deputy Solicitor Kernard E. Redmond and Assistant Solicitor Shipp Daniel of the Fourth Circuit Solicitor's Office. On December 16, 2010, the jury found the appellant guilty on all charges. ROA p. 303, l. 10 - p. 304, l. 5. Judge Russo sentenced Inman to a life sentence on murder, five (5) years on possession of a weapon during a violent crime, life imprisonment on burglary in the first degree, life imprisonment on kidnapping, thirty (30) years on armed robbery, ten (10) years on grand larceny, five (5) years on conspiracy. Judge Russo ordered that all sentences were to run consecutively. ROA 317-18. No objection was raised to any sentence. ROA 318.

The Appellant, through counsel Sellers, made a timely notice of appeal on December 28, 2010. This briefing follows.

RESPONDENT'S STATEMENT OF THE FACTS

This case involves the tragic and unnecessary murder of Mary Stutts on August 17, 2009. The crime involved the combined efforts of Damien Inman, his brother Lorenzo Inman and Henry Bridges. The State's theory was that Damien Inman was the shooter who actually killed Ms. Stutts.

According to Henry, he was with Appellant on August 17 when he was going to a store to try to get a job. ROA 252. Henry stated that Appellant asked him if he wanted to "hit a lick" (to rob somebody) and showed him a .25 automatic gun. ROA 253. His brother Lozenzo was walking toward them and Damien asked him similarly if he wanted to commit a robbery (" hit a lick"). ROA 253-54. They walked around and then an uncle gave them a ride by the football stadium. Id. After they got out, they saw Mary Stutts standing in her yard getting groceries out of her trunk. They initially were about to walk in the yard when they saw another lady on a telephone across the road . ROA 255. They walked on, when they returned a car then pulled up and they went a different direction. ROA 255-56.

They walked around the school and then came up in her backyard and had decided to ask her for some water. ROA .p. 256, ll. 1-13. He described their arrival at her home after the agreed intent to rob her:

> Like we rung the doorbell and we ask her for some water, she came to the door. She was like, yeah, there's a water faucet around the back. So we went around the back. I was the one to try to turn the water and she been looking out a little window, I guess, from her kitchen. And I told her I didn't know how to turn it on. I didn't see the little water faucet thing, that's when she came out there, that's when Lorenzo hit her in the back of the head with the gun. That's when she been like oh Lord, oh Lord like that. . . That when bog brother [Lorenzo] hit Ms. Mary Stutts in the head with the .25. When she fell it was like, of Lord , of Lord . . ."

ROA 256-57. Henry next searched through the house, got the victim's car keys and pulled the victim's car around. Then Henry and Lorenzo placed her in the trunk of her own car. They drove off and Henry described that the victim was saying "oh Lord oh Lord" so loud that the Lorenzo turned up the car radio so they could not hear her. ROA p. 259, ll. 5-6. Once they arrived at Bunker Hill Road, Damien stated that they were going to kill Ms. Stutts. ROA p. 259, ll. 15-24. They stopped

the car and pulled the victim from the trunk and she hit the ground. **She stated "Oh Lord, y'all ain't got to do this." ROA p. 261, ll. 5-6.** According to Henry, Damien then ran up to the victim and then shot her twice between the eyes and the head and then in the head. ROA 259-260. As Henry stood by the trunk, Damien and Lorenzo dragged the victim into the woods.

Henry stated that Damien was the person who shot and killed Mary Stutts. ROA p. 273, ll. 18-24.

Evidence was also presented about Damien Inman admitting to Eddy Boone, who was incarcerated with Appellant at the detention center, that " he said I shot her one time in her face and her head turn to the side and I shot her again in the side of the head." ROA p. 290, ll. 9-14. "He said killing that woman was just like killing a damn dog." ROA p. 293, ll. 5-6. Boone also described that Appellant had told him that he should have killed Henry and left him where the woman was. ROA p. 292, ll. 14-18. He stated that he was going to "put it on little Henry" by using his mother to see his brother to keep their stories straight to put it on Henry. ROA 292-93.

The Appellant's version of the crime in his statement to law enforcement reveals a different role placing the blame on Henry.[Exhibit 56] :

> "It was me and brother three o'clock, walk down road in Jacksonville. Then I saw the murderer. Then they told me and brother to walk to get the car. Then he said to walk the clock to get car around 4:30. Then told us to go to the house and get or he will kill me and my brother if we don't do it. Then Henry went the door and ask the old woman for some water out the water hole. Then he said that he didn't know how to turn the water on, that when she come outside. That when he point the gun to her heard to give-to her to give the money. Then she said that she does have the money. Then she run, then he knocked her down, took her to give him the key or he will kill her. That when he told me to drive car in the back. So he told my brother to help him put in the trunk of the car.
>
> Then he told us to come with him or he will kill us in car. Then he when ride through Little Rock in that cut off throw-I don't know what that says. Throw

land road into drop her body off, then open the trunk Henry dragged her out the trunk and shot her twice in the head. That drag body in the wood. He told us to get the car, told us that if you told me that he will kill my brother and my mother, that when Henry drive the car through Oakland and Riverdale and Newtown and Jacksonville. Then he told to get out the car at the house told me again not to talk. Told my brother to come with him or he will kill him too. Around 10:30 they left. Henry told my brother to help drag or he will shoot me. Henry told me to put the bag of shell in my house or him kill my mother. Then plan the whole thing. I tried to warrant her but put the gun to my head and told me to stop of he will shot. I was scared that why did say in thing to police because Henry said I was going to kill her. Then I thought about came in and then told the truth."

ROA 165-66.

The pathologist opined that the victim's death revealed taht she was shot twice and beaten about the head. ROA 248. It appeared that she had been pistol whipped. Id. She may have been subject to a cigarette burn on her leg. Id.

ARGUMENT

I. Where the Appellant was sentenced to a life sentence for burglary after Graham v. Florida, 130 S.Ct. 2011 (2010) was decided, the sentencing error is not preserved where no objection to the life sentence was made under any theory and is more properly presented in a post-conviction relief setting. However, this Court in State v. Bonner, 400 S.C. 561, 735 S.E.2d 525 (Ct. App. 2012) recently addressed an analogous situation and vacated the non-homicide life sentence and remanded for re-sentencing when the issue was not preserved.

On December 16, 2010, Appellant was sentenced to life imprisonment for the offense of burglary in the first degree on Indictment 2009- GS-17-1212. ROA p. 317, ll. 10-13. At the time of the crime on August 17, 2009, the Appellant was 17 years old, having been born on August 2, 1992. Sentencing Sheets ROA _, See also ROA p. 189, ll. 11-13 (reference that Appellant was charged as adult since he was 17 at the time of the crime); ROA p. 311, ll. 18-20 (defense counsel noted his age of 17 at the crime and 18 years old now in mitigation of sentence). No objection to the life sentence

for burglary was made by counsel in any fashion at the sentencing.

However, prior to the December 2010 trial and sentencing, on July 6, 2010, in Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011 (2010), the United States Supreme Court held that the Eighth Amendment's cruel and unusual punishment clause "prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." 130 S.Ct. at 2034. The Court explained: "A State is not required to guarantee eventual freedom to a juvenile offender convicted of a non-homicide crime. What the State must do, however, is give [these offenders] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation before the end of that term." 130 S.Ct. at 2030.

It is well settled that "[i]ssues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 - 694 (2003). Thus, "a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review." State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999). At the time of Appellant's sentencing, there was no challenge to the sentence at all by defense counsel. Since Graham had been decided at the time of the trial, an objection was available and appropriate. However, no objection was made. Therefore, the sentencing issue is not preserved for review, and should not be addressed in this direct appeal. Id.

Even so, Respondent notes the issue will, most likely, be addressed in pursuant to the Uniform Post-Conviction Relief Act, section 17-27-10 *et. seq.* of the South Carolina Code, which was expressly created to address this precise issue. See S.C. Code Ann. § 17-27-20(3) (Supp. 2010) (finding PCR appropriate where sentence exceeds the maximum authorized by law); Accord, Owens v. State, 331 S.C. 582, 584-85, 503 S.E.2d 462, 463 (1998)(relief given in PCR setting).

At the time of the crime, Appellant was seventeen years old and a juvenile under the Graham test. Thus, while Appellant suffers no harm from the instant sentencing error, the life without parole or natural life sentence is sentencing error under Graham, and likely will be addressed in a PCR proceeding where counsel's failure to object to the sentence under the existing precedent of Graham would be addressed. Here, however, the issue is procedurally barred from review, and should not be addressed. Appellant's argument to the contrary should be rejected.

The State recognizes this Court has recently addressed similar issues on direct appeal in State v. Bonner, 400 S.C. 561, 735 S.E.2d 525 (Ct. App. 2012). In Bonner, the Court found that the sentence of LWOP for burglary in the first degree should be vacated under Graham, even though no objection had been made to the sentence and it occurred before Graham was decided. He contends, like Bonner did, that the Eighth and Fourteenth Amendments of the U.S. Constitution, as interpreted in Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), forbid the imposition of a LWOP sentence for a non-homicide crime committed by a juvenile. The Court of Appeals in Bonner agreed. The Court then applied the procedure used in State v. Vick to vacate the sentence and remand for resentencing. State v. Vick, 384 S.C. 189, 201-203, 682 S.E.2d 275, 281-282 (Ct. App. 2009). Therefore, applying this Court's precedent in State v. Vick and State v. Bonner, vacation of the sentence for burglary in the first degree may be appropriate if this Court chooses to extend this limited exception to the preservation rules.[1] Id.

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[1]Respondent however asserts that the most appropriate vehicle for raising the un-preserved claim consistent with the legislate intent would be a state post-conviction relief application, Section 17-27-10, *et seq.*, which was specifically created to address claims related to counsel's failure to object to evidence, sentences and other collateral issues. Accord, Owens v. State, 331 S.C. 582, 584-85, 503 S.E.2d 462, 463 (1998)

II. **Appellant's conclusion that the sentence on the kidnapping conviction on 2009-GS-17-1213 should be vacated is not preserved for appeal as that issue was never raised before the trial judge. Even so, while it appears that the sentence should not have been imposed in light of the murder conviction and sentence, the kidnapping conviction still stands pursuant to S.C. Code § 16-3-910.**

In his conclusion to the Brief of Appellant, Damien Inman asserts that in the interest of judicial economy the sentence for Appellant's kidnapping conviction should be vacated. As set forth below, only the additional sentence on Indictment 2009-GS-17-1213 is at issue because it relates to the kidnapping of Mary Stutts and the murder conviction on Indictment 2009-GS-17-1210 concerned the murder of Mary Stutts. As set forth below, the sentencing proviso in S.C. Code Ann. § 16-3-910 does not preclude a conviction for kidnapping - only additional sentencing when the defendant is sentenced for murder of the same person kidnapped.

HOW THE ISSUE WAS NOT RAISED BELOW

The Appellant was sentenced to life imprisonment for murder; five years for possession of a weapon during the commission of a violent crime; life imprisonment for burglary in the first degree; thirty years for armed robbery; thirty years for kidnapping; ten years for grand larceny and five years for criminal conspiracy. ROA 316-18 No objection was made to the sentences. ROA p. 318, ll. 5-6.

Respondent will address the issue as one of whether the sentence should be vacated. Respondent would note that even if the sentence is vacated, in any proceeding, pursuant to S.C. Code Ann. § 16-3-910, the conviction itself still stands. State v. Perry, 278 S.C. 490, 299 S.E.2d 324 (1983).

1. THIS SENTENCING ISSUED IS NOT PRESERVED FOR APPEAL BY THE FAILURE OF AN OBJECTION.

It is well settled that "[i]ssues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 - 694 (2003). Thus, "a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review." State v. Johnston, 333 S.C. 462; State v. Passmore, 363 S.C. 568, 586, 611 S.E.2d 273, 282 - 283 (Ct. App. 2005). There was no challenge to the sentence at all; therefore, the instant issue is not preserved for review, and should not be addressed in this direct appeal. Id. Even so, Respondent notes that the issue will, most likely, be addressed in another forum.

S.C. Code Ann. § 16-3-910 provides:

> Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony and, upon conviction, must be imprisoned for a period not to exceed thirty years **unless sentenced for murder as provided in Section 16-3-20.**

S.C. Code Ann. § 16-3-910(emphasis added).

"Generally, when a defendant is convicted for murder, any sentence for the kidnapping of the victim would be vacated." State v. Vazsquez, 364 S.C. 293, 302, 613 S.E.2d 359, 363 (2005). It is error to sentence a defendant for kidnapping of the victim when he is also convicted of the murder of the victim. Id. If imposed, however, the sentence is considered "ineffective." State v. Council, 335 S.C. 1, 6 n. 2, 515 S.E.2d 508, 510 n.2 (1999).Cf. State v. Elders, 386 S.C. 474, 483 n. 6, 688 S.E.2d 857, 862 n. 6 (Ct. App. 2010). Thus, while appellant suffers no harm from the instant sentencing error, it is error, and likely will be addressed in a separate PCR proceeding. Here, however, the issue is procedurally barred from review, and may not be addressed. Appellant's argument to the contrary should be rejected.

2. THIS COURT HAS PREVIOUSLY VACATED SIMILAR KIDNAPPING

SENTENCES WHERE THE ISSUE WAS NOT PRESERVED.

This Court addressed a similar unpreserved kidnapping sentencing issue in State v. Vick, 384 S.C. 189, 201-203, 682 S.E.2d 275, 281 - 282 (Ct. App. 2009). Recently, this Court addressed a different issue in State v. Bonner, 400 S.C. 561, 735 S.E.2d 525 (Ct.App. 2012) involving a life without parole sentence for a non-homicide kidnapping for a 17 year old. This is more fully addressed in arguments 1 and 6 within this brief.

Applying this Court's precedent in State v. Vick, and State v. Bonner vacation of the sentence for kidnapping on the particular indictment related to Mary Stutts would be appropriate in this limited exception to the preservation rules for kidnapping sentences. State v. Vick, 384 S.C. 189, 682 S.E.2d 275 (S.C. App. 2009); State v. Livington. 282 S.C. 1, 317 S.E.2d 129 (1984), should this Court chose to ignore the preservation issue.

III. The trial judge did not err in finding the defense violated the mandates of Batson v. Kentucky in its strike of white male potential juror 60 for the reason that he was a farmer and his occupation was not sophisticated because it was a pretext because he did not strike similarly situated African American jurors who were either unemployed, worked at a farm, or had less sophisticated employment at a deli.

Appellant contends the trial court erred in finding strikes made by the defense violated Batson v. Kentucky, 476 U.S. 79 (1986). Argument three concerns the decision that juror 60, David Cox, who ultimately sat on the jury, was improperly struck by the defense in the initial strike of the jury. Argument four addresses the second strike and the trial court's determination that juror Jennifer Blackard (#25), juror Susan Cook (#56) and juror Ashley Hyatt (#129) were improperly struck by the defense in violation of Batson. Further, he maintains the trial court improperly prevented him from striking the same jurors when they were called in the subsequent jury draw. The explanations

given by counsel for the strikes of the four jurors were clear pretext and the trial court did not abuse its discretion in finding the strikes violated Batson. As a result, the jurors were properly reinstated into the jury pool and could not be struck during the subsequent jury draw. This argument concerns the pretexual assertion concerning the strike of David Cox.

STANDARD OF REVIEW

"Whether a Batson violation has occurred must be determined by examining the totality of the facts and circumstances in the record." State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). "Appellate courts give the trial judge's finding great deference on appeal, and review the trial judge's ruling with a clearly erroneous standard." Id. "A finding is clearly erroneous if it is not supported by the record." Id. at 620, 545 S.E.2d at 813.

"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender." Id. at 615, 545 S.E.2d 805, 545 S.E.2d at 810. "The purposes of Batson and its progeny are to protect the defendant's right to a fair trial by a jury of the defendant's peers, protect each venireperson's right not to be excluded from jury service for discriminatory reasons, and preserve public confidence in the fairness of our system of justice by seeking to eradicate discrimination in the jury selection process." State v. Haigler, 334 S.C. 623, 628–29, 515 S.E.2d 88, 90 (1999) (citations omitted). "When one party strikes a member of a cognizable racial group or gender, the trial court must hold a Batson hearing if the opposing party requests one." Shuler, 344 S.C. at 615, 545 S.E.2d at 810.

In Purkett v. Elem, 514 U.S. 765, 767, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), the Supreme Court of the United States explained the proper procedure for a Batson hearing as follows:

Under our Batson jurisprudence, once the opponent of a peremptory challenge has

> made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Step two of this process does not demand an explanation that is persuasive or even plausible. State v. Rogers, _ S.C_, _ S.E.2d _, 2013 Westlaw 4734571 (S.C. App. Sept. 4, 2013); State v. Cochran, 369 S.C. 308, 314, 631 S.E.2d 294, 298 (Ct.App.2006) (quoting Purkett, 514 U.S. at 767–68). At step two, "the proponent of the strike does not carry 'any burden of presenting reasonably specific, legitimate explanations for the strikes.' " Id. (quoting State v. Adams, 322 S.C. 114, 123, 470 S.E.2d 366, 371 (1996)). "Therefore, '[u]nless a discriminatory intent is inherent' in the explanation provided by the proponent of the strike, 'the reason offered will be deemed race neutral' and the trial court must proceed to the third step of the Batson process." Id. (quoting Purkett, 514 U.S. at 768).

"At step three, the opponent of the strike must show the reason offered, though facially race-neutral, was actually mere pretext to engage in purposeful racial discrimination." Cochran, 369 S.C. at 315, 631 S.E.2d at 298 (citing Adams, 322 S.C. at 124, 470 S.E.2d at 372). "The burden of persuading the court that a Batson violation has occurred remains at all times on the opponent of the strike." Haigler, 334 S.C. at 629, 515 S.E.2d at 91. "This burden is generally established by showing similarly situated members of another race were seated on the jury." Cochran, 369 S.C. at 315, 631 S.E.2d at 298.

"Under some circumstances, the race-neutral explanation given by the proponent may be so fundamentally implausible that the judge may determine, at the third step of the analysis, that the

explanation was mere pretext even without a showing of disparate treatment." Payton v. Kearse, 329 S.C. 51, 55, 495 S.E.2d 205, 208 (1998). "When the opponent of the strike proves the proponent of the strike practiced purposeful racial discrimination, the trial court must quash the entire jury panel and initiate another jury selection de novo." Cochran, 369 S.C. at 315, 631 S.E.2d at 298.

"If a trial court improperly grants the State's Batson motion, but none of the disputed jurors serve on the jury, any error in improperly quashing the jury is harmless because a defendant is not entitled to the jury of her choice." State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 823 (2009). "However, if one of the disputed jurors is seated on the jury, then the erroneous Batson ruling has tainted the jury and prejudice is presumed in such cases 'because there is no way to determine with any degree of certainty whether a defendant's right to a fair trial by an impartial jury was abridged.' " Id. (quoting State v. Rayfield, 369 S.C. 106, 114, 631 S.E.2d 244, 248 (2006)). "The proper remedy in such cases is the granting of a new trial." Id.

South Carolina has rejected the "dual-motivation" doctrine in Batson cases, and instead, "South Carolina follows the 'tainted' approach whereby a discriminatory explanation for the exercise of a peremptory challenge will vitiate other nondiscriminatory explanations for the strike." State v. Rayfield, 357 S.C. 497, 503, 593 S.E.2d 486, 489 (Ct. App. 2004) (citing Payton v. Kearse, 329 S.C. 51, 59, 495 S.E.2d 205, 210 (1998)).

The trial court's finding of purposeful discrimination rests on its evaluation of demeanor and credibility. Id. at 509, 682 S.E.2d at 823. "Often the demeanor of the challenged attorney will be the best and only evidence of discrimination, and an 'evaluation of the [attorney's] mind lies peculiarly within a trial [court's] province.'" Id. (quoting Hernandez v. New York, 500 U.S. 352, 365 (1991)).

HOW THE ISSUE WAS RAISED BELOW

This initial issue concerns the defense strike of David Cox. The general juror qualification revealed that David Cox, juror number 60, declared that he was a "self-employed farmer" and that his wife worked with him. Juror Qualification ROA p. 2, ll. 21-22.

During the initial strike of the jurors, Inman's counsel struck Cox and others during the first striking of the jury. ROA p. 26, l. 25 - p. 35, l. 22. The prosecution moved to quash the jury panel based upon an alleged violation of Batson v. Kentucky, 476 U.S. 79, 89 (1986). ROA p. 36, ll. 21-24. Deputy Solicitor Redmond challenged Appellant's striking of seven white jurors: #166, 60, 281, 21, 100, 17, and 174. ROA p. 37, ll. 2-16. Only Juror #60 ultimately sat on Appellant's jury.

The Defense's Dual Reasons

Counsel stated that she struck Juror #60 because "**he's a farmer**, your Honor, just in terms of **education,**" noting that forensics is going to be introduced. ROA p. 38, ll. 8-10. She stated that she wanted **"someone in a more sophisticated occupation."** ROA p. 38, ll. 13-15. When the judge challenged counsel with the fact that he "graduated from law school with a farmer" and asked if being a farmer were the equivalent of being uneducated, counsel responded that the strike was "based on his employment." ROA p. 38, ll. 8-19.

The State's Response.

The prosecutor stated on the remaining juror strikes that he was challenging that they were pretext and requested that the jury be redrawn. ROA p. 40, ll. 17-23. He stated that the defense had failed in his burden of showing race-neutral or non-pretexual reasons for having struck the jurors. ROA p. 40, ll. 20-25.

The defense responded to the challenge that none of the reasons given was either race or gender based and that they were valid reasons. ROA p. 41, ll. 3-18.

The Court's Response and Conclusion.

Although the court found some of the struck jurors had a reasoned basis for the challenge, he stated that "as far as juror 60, the jurors a farmer and you based that on the fact that farmers are uneducated." ROA p. 42, ll. 19-22. Judge Russo declared that he was granting the state's motion with respect to jurors 17, 60, and 166 finding that the reasons given were not sufficient [and implicitly pretextual]. ROA p. 43, ll. 1-5. In addition, he stated:

> And let me just state when a juror announces in open court what they do for living and then the defense or the State either one whoever ends up using that strike for that reason, didn't get the appropriate work place and struck somebody, the Court cannot accept that as a race neutral reason for the simple fact is that would just circumvent the entire Batson system because anyone could stand up and say, well, judge we thought they work somewhere else, when the folks stood up in open court and clearly stated where they work. So based on that, I'm going to grant the motion. We will restrike a jury. Juror 17, 16[60] and 166. Well, actually, all the jurors will be placed back into the jury pool, but jurors 17, 60, and 166 should those names be called again would not be subject to being struck by the defense based on the Court's ruling. Jurors 281, 100 and 174, I would agree with the defense that those were appropriate reasons for striking.

ROA p. 43, ll. 7-21.[2]

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[2] Judge Russo also granted the state's motion as to Jurors #17 (Crystal Berry) and #166 (Alexander Jones). ROA p. 43, ll. 1-4. Appellant struck Juror #17 because the juror worked at the Herald, which Appellant believed was a media outlet and had supplied and furnished information to the public. ROA p. 39, l. 24 - ROA p. 40, l. 2. The prosecutor countered that the juror worked at "Herald Multiple Forms, i.e. office supply, separate from a newspaper. ROA p. 40, ll. 3-7. See ROA Qual. Tr.p. 324 ll. 19-21 ("work at Herald Uniformers").

Judge Russo called Appellant's reason for striking Juror #17 a "mischaracterization or a misunderstanding of the Juror's] place of employment." He stated that the Appellant stated that he thought he worked at the newspaper when in fact he works for an office supply place." He further explained that he could not accept such as race neutral because it would "circumvent the entire Batson system." ROA p. 42, l. 23 - p. 43, l. 21.

Appellant stated that she struck Juror #166 based upon his employment and there was information he worked at a pawnshop. She stated that he would have had interaction with law enforcement there. ROA p. 37, l. 22 - p. 38, l. 2. The prosecutor countered that the juror said he worked at a body shop. ROA p. 38, ll. 3-5. Appellant admitted she may have misheard, but her information was that he worked at a pawnshop and that was the basis for the strike. ROA p. 38, ll. 3-8. See ROA Qual. Tr.p. 333, ll. 16-17 ("self-employed in a bond shop").

The Jurors Not Struck By Appellant Shows Pretext in the Strike of #60.

A review of the jury qualification reveal the Appellant did not strike African American jurors who could be considered to have lower "education" or a less "sophisticated occupation" that a self-employed farmer:

#37 Tonya Brown - works at deli at Carl's - (ROA p. 326, l. 25- 326, l. 2)

#5 Kendra Armstrong - unemployed - (ROA p. 323, l. 20-22)

#226 Mary Palmer - works at Perdue Farms - (ROA 338, l. 4-6).

Since these jurors that were not struck by Inman show occupations are similar or plainly less "sophisticated" than a self-employed farmer, the trial court was correct in rejecting the particular dual reasons of the defense as pretext.

ANALYSIS

Here, we do not dispute that the occupation of "farmer" and a "more sophisticated occupation" appear to be race neutral reasons. However, we submit that pretext was shown in his strike and the reasons declared. In Rogers, the Court held that ""[P]retext generally will be established by showing that similarly situated members of another race were seated on the jury, " citing State v. Haigler, 334 S.C. at 629, 515 S.E.2d at 91 (emphasis added). Inman claimed that being a farmer was not educated and he wanted a more "sophisticated occupation." Judge Russo immediately questioned the validity and credibility of his stated reason for the use of the strike, noting that he graduated from law school with a farmer. However, the pretext in the statement was

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Concerning Juror #166, Judge Russo stated he had concerns because the juror stated that he worked or owned a body shop. ROA p. 42, ll. 16-18. He stated he did not know where the information came from the defense had. ROA p. 42, ll. 18-19.

Neither Juror#17 nor Juror #166 was a member of the jury that tried Appellant.

revealed in his actual failure to strike African American jurors who were plainly similarly situated. He failed to strike an unemployed juror - #5 (Kendra Armstrong), a juror who worked at a deli - #37 (Tonya Brown) and a juror who worked at Perdue Farms - #226 (Mary Palmer). Did these potential jurors occupation reflect more sophistication to understand "forensic" matters that the Appellant was seeking. Surely an unemployed individual who he failed to strike shows clearly the pretext in his stated reason. Particularly, the Court's rejection of the dual motivation standard in Payton, shows that the trial judge's rejection of the defense strike of Cox is wholly supported.

Contrary to the argument of Appellant, this is not merely the use of a strike based upon occupation - an overtly proper neutral reason. This is the showing of the lack of credibility of that reason - given without a sound basis - as pretext when the dual reason - seeking a more sophisticated occupation - undermined by his actual actions in seating similarly situated juror of the opposite race.

Nor is this situation comparable to State v. Rogers concerning the striking of the teacher as a strict disciplinarian as a stereotype. In Rogers, the Court found the fact that defense counsel's strike was based on a stereotype of the teaching profession, in itself, was insufficient to establish that his explanation was pretextual, citing State v. Ford, 334 S.C. 59, 64, 512 S.E.2d 500, 503 (1999) (stating the opponent of a strike can show pretext, "either by showing similarly situated members of another race were seated on the jury or the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment"). Here, it is not the stereotype of a farmer that established pretext, it was because his added reason was to have "more sophisticated occupations" that reflected the pretext in his reasons when it was not what he allowed by failing to strike certain jurors of a different race. Although Judge Russo noted that he had graduated from law school with a farmer, reflecting the defense stereotype may not have been accurate, it was the nature

of his failure to strike that showed the pretext in his reasons.

The Appellant also relies upon State v. McMillan, Appellate Case No. 2008-11046, 400 S.C. 298, 734 S.E.2d 171 (S.C. Ct. App. 2012). At the time of this filing, certiorari is pending. In vacating the conviction and remanding for a new trial. However, McMillan is distinguishable. In McMillan, the Court of Appeals concluded, in pertinent part:

> Here, McMillan's stated reason for striking juror 34 was that he had reason to believe the juror would not be unbiased based on his counsel's conversation with members of the Lee County Bar. **We find this reason, although questionable, is race neutral.** See id. [State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996)] at 123, 470 S.E.2d at 371 (stating the defendant's reasons for striking a juror do not have to be reasonably specific or legitimate -the reason need only be race neutral); Cochran, 369 S.C. at 321, 631 S.E.2d at 301 ("Because a juror's perceived bias (for whatever reason) lies at the core of virtually every peremptory challenge, courts should intervene only when it is demonstrated that the strike runs afoul of the Constitution."); State v. Short, 327 S.C. 329, 335, 489 S.E.2d 209, 212 (Ct.App.1997) ("The principal function of the peremptory strike is to allow for the removal of a juror in whom the challenging party perceives bias or prejudice, even where the juror is not challengeable for cause."). We also find the State, as the opponent of the strike, failed to prove McMillan's strike was purposeful racial discrimination. Furthermore, the fact that McMillan "used most of his challenges to strike white jurors is not sufficient, in itself, to establish purposeful discrimination." State v. Ford, 334 S.C. 59, 66, 512 S.E.2d 500, 504 (1999). **Therefore, we find the trial court erred in ruling McMillan's stated reason for striking juror 34 was not race neutral and in granting the State's Batson motion.**

State v. McMillan, supra., p. 7 (emphasis added). However, here, the reasons shown to seek a person with more a more sophisticated occupation was shown to be pretext. In McMillan, it was not shown that the defense's statement was pretext by his contrary actions with other jurors. Here, it has been done.

The trial judge did not err in finding that Batson had been violated in the strike of juror #60. His ultimate seating on the jury was not improper.

IV. The trial court did not err in concluding that the defense had violated the mandates of Batson when he struck two white jurors (#56 and #120) for the stated reason that they were employed by the Department of Social Services when the defense did not strike an African American juror (#168) who was also employed with D.S.S. and the trial court found pretext. Further, the trial court correctly rejected defense explanation for strike of juror #25 because she worked in the school system and may have a predisposition for youth and criminal activity was not a sufficient reason under Batson where other juror who had significant interaction with youth were not struck.

The trial judge found a violation of Batson when the defense struck two white females because they were employed by the Department of Social Services, but seated a black female who also worked at the Department of Social Service when he had an available peremptory challenge. The trial judge also found that a strike against a white female juror who was employed by the school system (as a seams operator) and therefore a person who may have predisposition for youth and criminal activity was not a sufficient reason. Argument four addresses the second strike of jurors after the Batson holding concerning the first striking of the jury. This issue concerns the trial court's determination that jurors Jennifer Blackard (#25), juror Susan Cook (#56) and juror Ashley Hyatt (#129) were improperly struck by the defense in violation of Batson. The standards of review are the same as issue three.

HOW THE ISSUES WERE RAISED

During the second strikes, the prosecution challenged under Batson, the defense strikes of white female juror 56 (Susan Cook), white female juror 252 (Christine Sandell), white male juror 177 (Ricky Martin), white female juror 25 (Jennifer Blackard), white male juror 77 (Steven Fitzgerald), white male juror 286 (Edward Walsh), white female juror 129 (Ashley Hyatt) and white male alternate juror 237 (Jason Price). ROA p. 60, l. 21 - p. 61, l. 10. See ROA 50-59 (second striking of jury). The State did not challenge juror 118 (Steven Horvath - ROA Qual. Tr. p. 330, ll.

15-18), a white male who worked for the City of Dillon in the case where the Dillon Police Department was involved. ROA 60-61. However, Deputy Solicitor Redmond immediately noted that two of the white female strikes were D.S.S. employees, but that the defense had seated Dawnyelle Livingston, juror number 168, who also worked with D.S.S. ROA p. 61, ll. 5-10.

A. The D.S.S. Employee Pretextual Reasoning.

During the juror qualifications, juror 56, Susan Cook, a white female, stated that she is employed by the Department of Social Services, married and that her husband works construction. ROA Qual. Tr.p. 330-32. Ashley Hyatt, a white female, juror 129 stated that she worked a at the S.C. Department of Social Services adoption office in Florence, was married and her husband was a self-employed truck driver. ROA Qual. Tr.p. 331, ll. 16-20.

Juror 168, Dawnyelle Livingston, an African American female, stated that she worked at the Dillon County D.S.S. and was single. ROA Qual. Tr. p. 333, ll. 21-23.

The Defense's Explanation

When asked by the court to explain these strikes, counsel referred first to juror 56 as a D.S.S. employee. ROA p. 61, ll. 16-19. She stated that this family and several members of their family had received services. She suggested that "these workers may know some more intimate details about the family than we even know." ROA p. 61, ll. 16-19.

When asked about the juror he did not strike, counsel stated:

> Counsel: Ms. Dawnyelle Livingston if you would look at that point in time I only had one strike left. Ms. Dawnyelle Livingston was on the first jury and I did strike her. But based on the position that I was in, it was our last strike and I still had four or five more jurors to go. I was in no position at that time to strike her.
>
> COURT: There was -- you had four jurors to go.

Counsel: I was at the end of my strikes.

COURT: Well, you had a strike though.

Counsel: I did have one strike left and I could have used that one strike.

COURT: And you used it earlier on a white juror who's in the same position.

Counsel: I did.

COURT: Okay.

Counsel: But it was based solely on only having one remaining strike and we went through this list and dealt with Mr. Inman on specific individuals we did not want on the jury. And they were still all remaining in the jury pool.

ROA p. 61, l. 22 - p. 62, l. 18.

Counsel later addressed juror 129, white female Ashley Hyatt. She stated the strike was based upon her employment with D.S.S. She stated, again, that "the family has received services. We didn't feel comfortable." ROA p. 64, ll. 12-14.

At that point, Judge Russo questioned defense counsel concerning her reasons concerning the seating of the DSS employed juror:

THE COURT: I'm going to stop here, Roz. You struck two white people that work for DSS and the black lady that works for DSS you put on the jury.

MS. SELLERS: Your Honor, I struck her the first jury.

THE COURT: I don't care, we're not talking about a first jury here. We're talking about this jury. You put two -- you struck two white DSS workers because they work for DSS. And then you have a black lady that works for DSS and you put her on.

MS. SELLERS: And again, I would tell you that I would still strike her had I had an additional strike —

THE COURT: You had a strike.

MS. SELLERS: without those individuals remain in the jury pool.

COURT: You got how many individuals remaining in the jury pool?

MS. SELLERS: Well, four or five.

COURT: And you have one strike left; right?

MS. SELLERS: You ask me for my rational, Your Honor, I can only give you the rational.

COURT: Well, **your rationale isn't sufficient**. . .

ROA p. 64, l. 15- p. 65, l.12.

The Court's Finding of Pretext on the DSS Strikes.

Judge Russo next concluded the reasoning was pretextual:

COURT: Your DSS worker you use two strikes on two white DSS workers and you put a black DSS worker on the jury. You say your reason was because you only had one strike left. And there were four others jurors you were concerned about. Well one strike wouldn't help you with four jurors. So you struck a white DSS worker, **it makes no rational reason that you would have let the black DSS worker except for the fact it was pretextual**.

ROA p. 65, l. 24 - p. 66, l. 7 (emphasis added). See also ROA p. 72, ll. 13-21. Subsequently, the judge stated: "the DSS number 56, I find is not a race neutral reason. Number 129 I find is not a race neutral reason. Number 25 I find is not a race neutral reason, the fact that she works in the public school system." ROA p. 82, ll. 10-15.

ANALYSIS

Here, the trial judge expressly found that the failure to strike an African American juror who worked at D.S.S. revealed a pretext in the counsel's reasoning why he struck two jurors because of their similar employment at D.S.S. As Appellant acknowledged, he had a strike remaining when Ms. Livingston was selected and could have struck her, but he did not. His reasoning why the D.S.S.

employment was a sound basis was because the family had received benefits from them and may know something about them. Ms. Livingston actually worked in the Dillon Office, unlike Ms. Hyatt who worked in the Florence adoption office. Judge Russo was correct in finding as a fact that the reasoning stated was pretext and concluding that Batson was violated.

The Appellant's claim that he needed to save the last strike for others is insufficient to overcome the pretext showing. Counsel did not clarify what particular jurors he intended to use the strike upon and did not use it. Further, such an assertion could generally undermine any presentation against a showing of pretext against a similarly situated juror. The trial judge saw through the ruse and concluded that it was pretext. This finding should be given deference in this record.

B. Juror 25 - Jennifer Blackard.

During the initial qualification, juror Blackard advised the court that she worked at the public schools as a seams operator. She stated her husband worked putting up shutters. ROA Qualification Tr.p.325, ll. 10-12.

When asked for the reasons of the strike of the juror, the following colloquy occurred:

MS. SELLERS: Juror 25 works in the public school systems in Lumberton. There's going to be some information that comes to light. And since all the individuals are in this trial were **very young**, she may have some **pre-dispositions for youth and criminal activity**, so I didn't think she was an appropriate candidate for the jury.

COURT: Because she works in the school system?

MS. SELLERS: Yes, sir. She's around kids all day. The defendants in this case are going to be very young. There's some things that may be brought out in terms that we don't know it's going to be admissible or not, but some things, of course, such as **rags of a particular color. She may associate that with gang activity since she does work with that population.**

ROA p. 63, ll. 9-24.(emphasis added).

Judge Russo requested the prosecution to explain the position regarding anyone who works in the school system as not qualified to serve on a jury involving young people. ROA p. 73, ll. 4-5. Deputy Solicitor Redmond responded, in equating employment within the school system, as being a teacher, that it goes beyond race issues, but that it was pretext to assert that any teacher because of their exposure to youth or children may be predisposed. He stated that if you look at the number of strikes, in their totality, it "reeks of pretext." Redmond contended that he was not pointing the finger at counsel, but blamed the apparent input that Inman had on the decisions. He stated that her position is that no teacher can serve because there is a kid involved. The deputy solicitor asked the court to reject the argument. ROA 73-74.

Counsel Sellers contended that she was not asserting that there was a bias against her client because he was 18, but a potential bias because the juror spends all day with teenagers. Deputy Solicitor Redmond cited Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205(1998) as suggesting that it was an insufficient reason to strike a generalization of an entire group. ROA p. 75, ll. 1-8.

Counsel Sellers responded that she was not talking of a group, but of this particular person who is a school teacher.[3] ROA p. 75, ll. 9-11. Judge Russo responded that she was not talking about an individual person, but that she would not put schoolteachers on a jury that involves this defendant. ROA p. 75, ll. 12-15. Counsel Sellers attempted to qualify her response by noting that she worked at a high school at Lumberton High School in Robeson County, which is known for "gang activity." ROA 9-13.

[3]It was only reported by Ms. Blackard on her voir dire that she was a seams operator in the Robeson County school district. ROA Qual. Tr. p. 325, ll. 10-12.

Subsequently, the judge stated : "the DSS number 56, I find is not a race neutral reason. Number 129 I find is not a race neutral reason. Number 25 I find is not a race neutral reason, the fact that she works in the public school system." ROA p. 82, ll. 10-15.

ANALYSIS

Respondent submits that in rejecting this use of a strike, the trial judge found that the mere employment in a public school system was an identifier not a basis. The reason that he stated that he struck the person was actually that she had contact with youth and worked in an area known for "gang activity." At points counsel equated the juror as teacher, but the record reflected that she was a "seams operator" not a teacher. Nevertheless, the record reveals that other jurors were not struck by Appellant who were similarly situated to Blackard.

Although neither employed by a school district or a seams operator, one non-struck black female juror has significant contact with youth or were around kids all day. Juror Pamela Brown, #36, was a full-time student. ROA Qual. Tr. p. 326. She was the seventh juror seated. Other jurors seated who would have daily contact with youth was Myra McCrimmon, #181, who worked at Wendy's. ROA Qual. 334-35. She was the second juror seated by Appellant. These reflect that the dual reasoning of the Appellant shows pretext as a basis for the exclusion of juror Blackard.

While employment is admitted a race neutral reason on its face, the explanation of the reasoning for the actual use of the strike - interaction with youth and potential knowledge of gang paraphernalia - as applied to jurors Appellant did not strike who were African American shows that the trial court's correctness in rejecting the strike. While his final conclusion could have better reflected his ruling, his "not a race neutral reason" appears to be that he was finding instead a race basis for the actual use of the strike, as noted in his finding of pretext with the DSS workers.

For these reasons a new trial is not warranted.

V. The trial court did not abuse his discretion in admitting an in-court identification of Appellant as being near the scene with accomplice Henry Bridges on the day of the crime because the witness constantly viewed them for forty-five minutes at 50 yards in low stress able to recognize Henry who already knew during the encounter was accurate in her descriptions and reported it the next day. Under the totality of the circumstances, there was no substantial likelihood of irreparable misidentification.

A. Any error in the admission is harmless where evidence was also presented by Henry Bridges consistent with witness about their location and movement, the Appellant gave a statement to law enforcement admitting being in the area with Bridges that day, and a jailhouse informant gave a statement that Appellant advised him he was with Henry at the scene of the crime.

Lisa Alford's attention was drawn to Appellant and his accomplices for forty-five minutes while she waited to leave work. In this 45 minutes of viewing, she was able to accurately identify a Henry Bridges as a person she knew and studied their movements back and forth along the street near the future victim's home and Ms. Alford's car. On this sunny day, she developed the ability to identify someone she did not previously know - Damien Inman. From a clear view, albeit through a window and a chain link fence, she saw the three individuals' movements and stopping for 10 to 15 minutes outside the school were she worked. Under a totality of the circumstances, her identification of Inman at trial was not so tainted by an earlier photo array of the Appellant to create a substantial likelihood of misidentification. To the contrary, Judge Russo did not abuse his discretion after a hearing to authorize its admission.

STANDARD OF REVIEW

"The admission of evidence is within the sound discretion of the circuit court." State v. Simmons, 384 S.C. 145, 166, 682 S.E.2d 19, 30 (Ct.App.2009). "Accordingly, a circuit court's

decision to allow the in-court identification of an accused will not be reversed absent an abuse of discretion or prejudicial legal error." Id. "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

An out-of-court identification of the defendant violates due process and must be suppressed when the identification procedure used by police was impermissibly suggestive and conducive to a substantial likelihood of misidentification. State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 425 (2012). A witness's subsequent in-court identification is inadmissible "if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (emphasis added); see also Neil v. Biggers, 409 U.S. 188, 198, 93 S.Ct. 375, 381, 34 L.Ed.2d 401, 410 (1972) ("While the phrase ['a very substantial likelihood of irreparable misidentification'] was coined as a standard for determining whether an in-court identification would be admissible ..., with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself.").

Trial courts employ a two-pronged inquiry to determine whether due process requires suppression of an out-of-court eyewitness identification. Liverman, 398 S.C. at 138, 727 S.E.2d at 426. First, the court must determine whether the identification resulted from "unnecessarily suggestive" police procedures. Biggers, 409 U.S. at 198–99, 93 S.Ct. at 381–82, 34 L.Ed.2d at 410–11; see also Perry v. New Hampshire, _U.S. _,_ n. 1, 132 S.Ct. 716, 721 n. 1, 181 L.Ed.2d 694, 703 n. 1 (2012) (stating "what triggers due process concerns is police use of an unnecessarily

suggestive identification procedure"); Liverman, 398 S.C. at 138, 727 S.E.2d at 426 (stating the standard for impermissible suggestiveness as whether the police procedures were "unnecessary and unduly suggestive"); Traylor, 360 S.C. at 81, 600 S.E.2d at 526 (stating the standard as whether the police procedures were "unduly suggestive"). If the court finds the identification did not result from impermissibly suggestive police procedures, the inquiry ends there and the court does not need to consider the second prong. See United States v. Sanders, 708 F.3d 976, 984 (7th Cir.2013) (citing Perry for the proposition that "courts will only consider the second prong if a challenged procedure does not pass muster under the first"). If the court finds, however, that the police used an impermissibly suggestive identification procedure, it must then determine whether the identification was nevertheless "so reliable that no substantial likelihood of misidentification existed." Liverman, 398 S.C. at 138, 727 S.E.2d at 426 (citing Biggers, 409 U.S. at 199, 93 S.Ct. at 382, 34 L.Ed.2d at 411).

"The inquiry must focus upon whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification." State v. Turner, 373 S.C. 121, 127, 644 S.E.2d 693, 696 (2007). When determining the likelihood of misidentification, courts must evaluate the totality of the circumstances using the following factors: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Id. at 127, 644 S.E.2d at 697.

HARMLESS ERROR

Any error may be harmless in light of the overwhelming evidence of guilt presented at trial. See State v. Singleton. 395 S.C. 6, 14-15, 716 S.E.2d 332, 336 (S.C.App.,2011) (any error in the admission of identification was harmless where two co-conspirators testified against Singleton and identified him as a participant in the robbery); State v. Fields, 363 S.C. at 26, 609 S.E.2d at 509 (noting that to warrant reversal based on the admission of evidence, an appellant must demonstrate both error and prejudice). An admission of an unnecessarily suggestive identification may amount to harmless error if other evidence of the defendant's guilt is overwhelming. See, e.g., Satcher v. Pruett, 126 F.3d 561, 567 (4th Cir. 1997) (harmless error when court admitted arguably suggestive in-court identification because other identification evidence present); U.S. v. Washington, 353 F.3d 42, 45-46 (D.C. Cir. 2004) (harmless error when court admitted impermissibly suggestive photo array because testimony of coconspirators and physical evidence indicated guilt). But see, e.g., Abdur Raheem v. Kelly, 257 F.3d 122, 142 (2d Cir. 2001) (not harmless error when court admitted impermissibly suggestive identification because state presented no other evidence of identity at trial); U.S. v. Emanuele, 51 F.3d 1123, 1132 (3d Cir. 1995) (not harmless error when court admitted impermissibly suggestive in-court identification because defendant's identity crucial issue at trial).

HOW THE ISSUE WAS RAISED BELOW

The prosecution expressed its intent to present the testimony of Melissa Alford concerning an out-of-court identification of the Appellant and his accomplices near the crime scene the day of the crime. The defense asserted that there was a photographic layout of three pictures which included the Appellant and her brother. ROA 197.[4]

[4]The particular photographs were never made an exhibit at trial.

In an *in camera* hearing., Ms. Alford testified that she works as a custodian at Stewart Heights Elementary School. ROA 198. She stated that she knew where Mary Stutts lived. There is one house between the school and the victim's house. ROA 199. Ms. Alford stated she arrived to work and saw police cars at Ms. Stutts home. After that, she had a conversation with the school resource office, Officer Harold Carmichael, and asked him what was going on and learned that her car was missing and later learned that Ms. Stutts was also missing. Tr.p. 366. She then told him that she saw three boys walking down the street Monday afternoon before she got off of work. Id.

Ms. Alford stated that she was sitting in the front of the school. She pointed out her location on State Exhibit 59. She was sitting inside the entrance looking through the window when she saw the boys. ROA p. 200, ll. 14-24. They were walking on Calhoun Street. She stated that she was sitting out front of the school for approximately 45 minutes waiting to get off work when she saw the boys from 6:15 until she got off work at 7 PM.

> "They pass the school three times. The third time Henry, which I knew Henry. He came and he caught up with the two boys, the two brothers, but the two boys was standing in front where I was sitting and just standing there."

ROA p. 201, ll. 14-18. She stated that she did not know that they were brothers until she was talking with the officer. She did state that she already knew Henry from the neighborhood. She stated his grandmother stays in her neighborhood which was about a block or two over from the school. Ms. Alford stated that she had lived in that neighborhood for 14 years, which is how she knew Henry. ROA 201-02. She stated that she saw them walk back and forth three times. She described that the two shortest stopped once in front of a grey house in front of the school. She stated that they stood there 10 or 15 minutes. She described Henry as the tallest of the three. She did not personally know

the Inmans. She stated that the 45 minutes that she watched them, she had a good look at them "the whole time she was sitting there because they walk past the school and I had a good look" and " when they stop I have a real good look at them." ROA p. 203, ll. 4-10.

She stated it was a sunny day and that she was paying close attention to them. She stated that her car was parked in the front of the school so it caught her attention because they were just standing there. ROA 203.

She identified Appellant in the courtroom during the in camera proceeding. ROA p. 204, ll. 7-8. She confirmed that there was no doubt in her mind that Appellant was one of the three she saw walking that night. ROA p. 204, ll. 12-15.

On cross-examination, she confirmed that she was inside the school looking out the window. She stated that there was a chain link fence around the school and that the three were outside the fence. ROA 205. She stated that the distance between her and the three was maybe half the length of a football field. ROA 205. She confirmed what she told Officer Carmichael:

> Well, I told him I said maybe there was - - it was three boys walking down the street. I said maybe they can tell you - one of the boys that I knew Henry, Henry can tell you something of who came up behind him was walking and...

ROA p. 206, ll. 3-7. She gave the following description: "[A]ll two of them - the two Inman boys was wearing - - had dreads at the time. Henry like beginning his dreads or plats." ROA p. 206, ll. 12-14.

Concerning the three photographs that she was shown, Ms. Alford stated that all three in the photographs had dreads. ROA p. 206, ll. 22-25. She said on the photos, all of them had the same complexion and one had the beginnings of facial hair. ROA p. 207, ll. 2–7. She stated that she "picked out the brothers that I seen" and that the other [pictured] person she did not know him. ROA

p. 207, ll. 6-9. She stated that when she gave her original description she did not say that one of them had facial hair, but that one of the pictures did have it. ROA p. 207, ll. 10-16. She stated that in her observation at school, all three had medium skin tone and in the pictures everyone had the same skin tone. ROA 207.

On reply, she re-confirmed that she saw the three boys for 45 minutes while she was sitting there. She confirmed that she had no doubt in her mind that Damien was one of them. ROA p. 208, ll. 7-12.

The Defense Argument on Suppression

Counsel asserted that the matter was a show-up and claimed the photographs and procedure used were patently suggestive. ROA p. 208, ll. 15-18. She observed that Alford did not have an opportunity to review multiple suspects with no facial hair based upon her description. Counsel claimed that she had no choice but to pick out the two brothers. She urged that her out of court identification should be suppressed and that it was based upon the suggestive photograph that she had seen last August. ROA 209.

The State's Response

Assistant Solicitor Daniel noted that Alford had testified that she had 45 minutes to view the three men who were walking on the roadway, 45 minutes in sunny weather that she was 50 yards from. He argued that State v. Brown, 356 S.C. 496, 589 S.E.2d 781 (S.C. Ct App. 2003) held that a show up may be proper if the witness's memory is still fresh among the reasons. He noted that it was less than 24 hours after that she went and spoke to law enforcement about it. He noted that she went to law enforcement noting that she saw some guys in the area and she knew one and was able to give a description of the other two because she had observed them for 45 minutes and could today

pick out the Appellant. He described the clarity of her identification in support of its admission. ROA 7-20.

The defense asserted that the witness testified that she told the police that the only physical description she gave the police were the dreadlocks and the medium complexion. ROA p. 211, ll. 2-8.[5] She complained that the officer came back and showed her three photographs, one of which had facial hair that Alford did not mention.[6] She complained that the officer had told Alford that they were brothers. ROA 211-12. However, as the defense and trial court pointed out, if the witness did not personally know them if would not make a difference if she knew they were brothers.[7] The defense suggested that she picked out two individuals with similar characteristics because she knew they were brothers. ROA 212. Counsel cited to State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004) and State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000).

The prosecution responded that they were not introducing a line-up in the case. Further, they declared "we've never seen the line-up." ROA p. 212, ll. 21-23. The state's position was the issue was whether based upon what the witness observed that date whether she is able to pick out someone today as one of the men she saw on the road. ROA 212-13.

The Trial Court's Ruling

Judge Russo reviewed the caselaw provided and then returned for a ruling in which he allowed the admission of the evidence of the identification. ROA p. 215, l. 22 - p. 217, l. 16.

> Let me say that in reviewing the cases that were passed up and viewing the

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[5] She also represented that Henry Bridges was taller than the other two persons.

[6] It is not shown in this record whose photograph had facial hair.

[7] It was not suggested that these were twins.

facts and circumstances, I'm going to all the identification. I do believe that there is some-I have some concern that the photographs that were shown to Ms. Alford were-I'm going to say somewhat suggestive. I'm not going to say patently suggestive or blatantly suggestive, but certainly somewhat suggestive, which I think then requires the Court to go to step two and that is to the look at the totality of the circumstances and a Neil v. Biggers test, the five-prong test to see whether or not the in-court identification was in fact effective by the suggestive out-of-court lineup or show up. In this case, it was photos in several of the cases that were given to me. They were actually one individual being shown to the witness, but in applying those tests, that five-prong test based on the information before the Court and taken into consideration the totality of the circumstances.

Step one the witnesses opportunity to view the perpetrator at the time. And Ms. Alford's testimony was that she under very low stress situation just basically buying sometime there at the school had about 45 minutes and that these folks caught her attention because it was odd for them to-people just to be out there hanging out in front of the school and that she had an opportunity of over 45 minutes to observe these folks.

The degree of her attention based on her testimony was pretty much all she was doing was watching and seeing what was going on with those folks.

The accuracy of her description, she described African-America males. She described them as being a medium complexion with dreads, not a detail description but not inaccurate. She has indicated that she's certain that she knew one of the individuals, I believe is John Henry Bridges, has known him for years and that there was no question about that.

And then her identification of Mr. Inman based on her testimony seems to be certain, that she's certain of that. And then she was able to give that information in less than 24 hours after observing them. A little bit different from some of the cases here because in these cases a lot of times the person who's being identified was actually seen committing a crime, that's not the case here.

But all in all in viewing the circumstances and the totality of the circumstances, I'm going to all the in-court identification.

ROA p. 215, l. 24- p. 217, l. 16. [8]

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[8] The witness proceeded to testify before the jury. Ms. Alford stated that she worked at the elementary school from 11 to 7 PM. ROA 218. On August 18, when she went to work, she noticed police cars down the street at Mary Stutts house. She noted it was one house between the school and Ms. Stutts home. At that point, she had a conversation of the Officer Carmichael, the

ANALYSIS

Applying the Neil v. Biggers standard to the present case, it is clear that the trial judge's ruling must be affirmed because the record, and in particular Ms. Alford's testimony, supports his findings and conclusions of law. In particular, the out-of-court identification was so reliable under

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resource officer, and learned that Ms. Stutts' car was missing and that she was missing. No one took a statement from her that day. However, she felt she had information and told Officer Carmichael that she had seen three boys walking down the street and that she knew one of the boys, and told the officer "maybe you get in touch with Henry , he can tell you who was walking behind him or in front of him." ROA p. 220, ll. 8-14. She described to the jury that in the afternoon before she got off work, her attention was caught when she saw two boys shorter than Henry standing in front of the school. She stated that they had walked past the school three times before. She said the third time the two shorter boys stood there and Henry came running up behind them. ROA p. 220, ll. 15-22. She used State Exhibit 59 to identify the locations of the school and its entrance where she was located when she saw the boys, Ms. Stutts home, and a vacant house. ROA 221-22.

Ms. Alford described that on the 17th, she was in the school waiting area at the entrance between 6:15 and 7 PM. It was a sunny day and she was sitting there with another lady she worked with. She stated that when she sat down, she saw all three boys walking together one way and then turn around and come back. She clarified that they "go down this way, they turn around, went back, went back, coming back, the two shorter boys came back, but Henry did not." ROA 221-23. Ms. Alford stated that she already knew Henry from the neighborhood and that his grandmother lived about two blocks away. She stated that she had lived in the area for 14 years. ROA p. 224, ll. 9-16.

She stated that after the two boy came back, Henry came from behind and joined them. She said that they then proceeded down the road and she did not see them again. ROA p. 225, ll. 1-8.

She said that she saw them for 45 minutes until 7 PM. She said that although she knew Henry, she did not know the other two. She said they caught her attention because they were just standing in front of the school and her car was parked outside the gate. She said she was killing time to get off while she was sitting there because she could not leave until 7. While she initially stated that they were about 50 feet away when she saw them, she clarified on cross-examination it was around 50 yards. ROA p. 226, p. 227, ll. 19-24. She described it as a day with sunny weather and plenty of light. Id.

She identified one of the three men in the courtroom pointing to the Appellant. ROA 226. She stated that "there's no doubt in my mind." ROA p. 227, ll. 4-9.

On cross-examination, Ms. Alford stated that she initially did not know it was Henry Bridges. She did state that when he walked up to the other two, he was wiping his face with a white tee-shirt. ROA 229.

On reply, Ms. Alford stated that the fence around the school was a chain link fence that could easily be seen through. ROA 229.

the totality of the circumstances that no substantial likelihood of misidentification existed, even assuming suggestiveness in the identification procedure. Biggers, 409 U.S. at 198. Again, the relevant factors to be considered under the totality of circumstances include: (1) the opportunity of the witness to view the accused; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Id* at 199-200. See also Liverman, 398 S.C. at 138, 727 S.E.2d at 426.

First, the Appellant claims the in-court identification of Appellant should have been suppressed because the manner of showing the witness three photographs was unnecessarily suggestive.[9] The State nor the defense never presented the three photographs in the in camera proceeding before Judge Russo. In fact, the prosecution stated that they have never seen the photographs.[10] It is not clear from the testimony whose photographs included the facial hair Ms. Alford described. Nevertheless, Judge Russo found the display of the photographs to be "somewhat suggestive" and went the totality prong of Neil v. Biggers. There was no error in trial court's action.

Because courts apply a totality of the circumstances approach, the use of inherently suggestive identification methods does not automatically violate due process or require the

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[9]In the Initial Brief of Appellant, p. 27, Inman claims the according to Alford's testimony, she did not select the photographs of the individuals she saw in front of the school, but selected the photographs of the brothers. A fair reading of Ms. Alford's testimony is contrary this limited characterization. In fact, Ms. Alford testified: " I picked out the two brothers that I seen, other person I didn't know." Plainly she is stating she had seen the two brothers - not that she was asked to pick out two brothers.

[10] There was no due process violation in failing to preserve the particular display of photographs. See U.S. v. Honer, 225 F.3d 549, 553-54 (5th Cir. 2000) (no due process violation though government did not preserve photo array, which creates presumption that lineup was impermissibly suggestive, because identifier had ample opportunity to observe defendant before incident)

suppression of identification evidence. See, e.g., U.S. v. De Leon-Quinones, 588 F.3d 748, 754 (1st Cir. 2009) (no due process violation where defendant presented in 1-man showup because witness saw defendant at close range and identification was corroborated); Dunnigan v. Keane, 137 F.3d 117, 129 (2d Cir. 1998) (no due process violation though agent called victim to view photos, and then presented more than 30 photos of defendant and none of anyone else, because witness had a clear opportunity to observe, was focused, and made identification after only 3 days), abrogated by Perry v. N.H., 1132 S. Ct. 716 (2012); U.S. v. Saunders, 501 F.3d 384, 391-93 (4th Cir. 2007) (no due process violation despite unduly suggestive identification procedure involving photograph taken under different circumstances from control group because witness had good opportunity to see suspect, provided reliable information on him prior to identification, and identified suspect 2 hours after crime); U.S. v. Smith, 156 F.3d 1046, 1048, 1051-52 (10th Cir. 1998) (no due process violation though government agent left names on photos pulled from defendant's high school yearbook for use in photo array, then presented array to identification witness who had attended same school, because identifications were corroborated); O'Brien v. Wainwright, 738 F.2d 1139, 1141-43 (11th Cir. 1984) (no due process violation though police displayed defendant in only color photo in black and white array because witness had clear view and never identified anyone else); U.S. v. Rattler, 475 F.3d 408, 414 (D.C. Cir. 2007) (no due process violation when witnesses shown surveillance tape of suspect prior to identification and defendant stood out in photo array due to long hair because witnesses saw suspect for several minutes during crime and gave detailed descriptions of suspect that were substantially similar). But see, e.g., Abdur Raheem v. Kelly, 257 F.3d 122, 140-42 (2d Cir. 2001) (due process violation because defendant identified in suggestive lineup on basis of his coat without other indicia of reliability); Marsden v. Moore, 847 F.2d 1536, 1545-46 (11th Cir. 1988) (due

process violation because defendant only male in photo array and totality of circumstances did not support witness reliability).

Contrary to the claim at trial, the August 2009 was not a show-up in which a single individual fitting a witness's description of the suspect is presented to the witness for identification. See, e.g., U.S. v. De Leon-Quinones, 588 F.3d 748, 754 (1st Cir. 2009) ("one man show up" identification impermissibly suggestive where witness saw defendant handcuffed outside of courthouse before in-court identification). Rather it was a photo array. See, e.g., U.S. v. DeCologero, 530 F.3d 36, 62 (1st Cir. 2008) (photo array impermissibly suggestive because 4 of 6 photos provided by police did not resemble defendant); U.S. v. Drake, 543 F.3d 1080, 1089 (9th Cir. 2008) (photo array not impermissibly suggestive because witness's initial description of defendant was accurate and witness demonstrated high level of certainty in her identification of defendant). However, Judge Russo went to the second step.

The Appellant asserts that the totality of the circumstances rendered the identification unreliable. However, a cautious review of the record shows Appellant's claim is not supported. The trial judge used the Bigger factors to support a conclusion under the totality of the circumstances.

(1) the opportunity of the witness to view the accused.

It is undisputed that Ms. Alford had 45 minutes of viewing Appellant while she waited to leave. She was alerted to their presence while they were standing in an area near her car - something that would draw their attention. Ms. Alford was clear that she viewed them the entire 45 minute period until they left. The Appellant seeks to mitigate this factor by noting that she was looking through a glass window and saw the three at 50 yards through a chain link fence. However, this fact does not divest the probative power of the length and opportunity to view the Appellant's strange

back and forth movements near the school for this lengthy period.

(2) the witness' degree of attention.

Judge Russo found that the degree of her attention based on her testimony was pretty much all she was doing was watching and seeing what was going on with the three boys' back and forth movements. Because her car was outside the fence near where they were standing, she was cognizant of their presence and able to describe their movements.[11] The Appellant claims attention was not great because she was merely observing individuals walking. However, he ignores that the trigger factor for her attention in the 45 minute period was the presence of her car and the standing and odd back and forth movements for this lengthy.

(3) the accuracy of the witness' prior description.

Judge Russo found accuracy in her descriptions. The record supports that Ms. Alford described African-American males with a medium complexion with dreads. While the trial court found that this was not a detailed description, it was not shown to be inaccurate. Importantly, she has indicated that she was certain that she knew already one of the individuals, John Henry Bridges from the area for a number of years and that the two others were shorter than Bridges.

The Appellant asserts before this Court that the identification failed in this area. He claims in his brief that the description was devoid of any facial features, such as eye color, face shape and nose shape. Oddly, he now asserts that her description lacked any distinctive marks, such as scars, moles or freckles. However, at trial when testing the "accuracy" factor, there was no suggestion that Appellant possessed any distinctive marks, scars, moles or freckles that could have been noted by

[11] See U.S. v. Saunders, 501 F.3d 384, 392 (4th Cir. 2007) (identification reliable because witness had greater incentive to observe defendant after he observed defendant patting down security guard);

the witness and identified. The Appellant further claims that the lack of other details was understandable based upon the distance of 50 yards. However, he acknowledges that she identified Henry after viewing them for thirty minutes. However, there is no question that her identification of Henry was accurate and it does not suggest that her concentrated viewing of the other was not similarly accurate.

This belated attempt to mitigate this factor does not have probative power.

(4) the level of certainty demonstrated by the witness at the confrontation

Judge Russo found that her identification of Mr. Inman based on her testimony seems to be certain. On this factor, the witness expressed a high level of certainty. See U.S. v. Brownlee, 454 F.3d 131, 140 (3d Cir. 2006) (identification reliable when witnesses' degree of certainty was "absolute"); U.S v. Saunders, 501 F.3d 384, 392 (4th Cir. 2007) (identification reliable because witness did not hesitate when selecting defendant's photo from array); U.S. v. Rice, 607 F.3d 133, 142-43 (5th Cir. 2010) (identification reliable because witness expressed no doubt before and during trial that defendant's voice was identical to carjacker's); Keene v. Mitchell, 525 F.3d 461, 466 (6th Cir. 2008) (identification reliable because witness displayed a high degree of certainty at pretrial identification). There was no evidence of uncertainty in the identification presented.

(5) the length of time between the crime and the confrontation.

Judge Russo noted that she was able to give the information about the Appellant and his accomplices within a day of the event of her viewing. It is clear that her specific identity of Bridges was made known the next day, as well as the fact that others were with him who may know something about the crime. The photo array occurred shortly thereafter. However, her in court identification occurred December 2010.

CONCLUSION

The trial court properly refused to suppress the in-court identification by Melissa Alford. Applying the totality of the circumstances, there was a no substantial likelihood of irreparable misidentification. This assertion n must be denied.

HARMLESS ERROR

Assuming arguendo that the identification of Appellant in the area with Henry Bridges should have been suppressed, any error in its admission is harmless error. There is significant probative evidence of guilt that places Appellant in the area and of guilt. First, the Appellant's own statement to the police places him in the Stutts home with his brother and Henry. ROA 164-66. Further, the Appellant admitted to Eddy Boone of his involvement in the killing with the others. ROA 289-293. His accomplice, John Henry Bridges testified in court about his criminal interaction with Appellant that date, including walking back and forth on the street prior to the assault on Ms. Stutts. ROA 254-55, Also ROA 261. The Appellant was seen in a white Camry that evening with Bridges. ROA 232-33, 238-240. The Camry belonged to Mary Stutts. ROA 149-151.

For these reasons, a new trial is not warranted on this issue.

VI. Appellant is not entitled to vacation of his sentence of life imprisonment without parole for murder and new sentencing hearing where:

(1) no objection to the life sentence was made to the trial judge under any factor and no mitigating evidence was excluded by the Court for a lesser sentence of thirty years;

(2) Miller v. Alabama merely held the Eighth Amendment prohibits *mandatory* life without parole (LWOP) sentences for juveniles convicted of homicide, but did not prohibit or otherwise create a presumption against non-mandatory LWOP sentences which was available to Inman and the sentencing court's consideration; and

(3) Inman was provided an individualized sentencing proceeding with the opportunity to present mitigating evidence in regard to his age and the circumstances of the crime and family background.

On June 25, 2012, while Damien Inman's appeal from his murder and additional convictions was pending, the United States Supreme Court announced its decision in Miller v. Alabama, _ U.S. _, 132 S.Ct. 2455, 2469, 183 L.Ed.2d 407 (2012), that the Eighth Amendment forbids sentencing a juvenile defendant to a mandatory life without parole sentence when there has been **no** consideration of the particular circumstances of the crime or the offender's age and development. "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." Id. Miller does not hold that a pre-18 offender never can receive this sentence for murder. It holds only that life without parole may not be imposed unless the sentencer is given an opportunity to consider the individual facts and circumstances that might make such a sentence unjust or disproportionate. Since South Carolina authorizes a sentence of thirty years to life for murder in this case and consideration by the sentencer of youth and other factors, Miller provides no basis for either vacation of his life sentence or a new sentencing proceeding. However, the issues he seeks to present to the Court this day were never preserved in the trial court. For these reasons, the appeal should be denied.

1. The Federal Constitutional Claim Is Not Preserved.

Respondent initially submits that the issue of whether Damien Inman was improperly sentenced to life imprisonment on his conviction for murder is not properly before this Court. Simply put, no objection was made after the sentence of life imprisonment for murder was given. ROA 318. This retrospective attempt to preserve an issue in the direct appeal is wholly insufficient to preserve

this claim.

The Appellant never objected to the life sentence for murder. The Appellant never claimed that a life sentence was forbidden under the federal constitution to him for his convicted crime of murder, particularly under the Eighth Amendment cruel and unusual punishment clause. Simply put, Inman never asked the trial court to address the federal constitutional claim he is presenting today. The only reference the defense made to his age was in mitigation, counsel Sellers began by stating that Inman was a life long resident of Dillon , South Carolina. He is 18 years old. At the time the crime occurred, he was 17 years old. . ." ROA p. 311, ll. 16-22.[12] The defense never suggested that as a matter of federal constitutional or state law that a life sentence was forbidden for murder.

It is well settled that issues not raised and ruled on in the trial court will not be considered on appeal. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003); State v. Passmore, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct.App.2005). Thus, "a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review." State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999). In State v. Bonner, 400 S.C. 561, 735 S.E.2d 525 (2012), the Court of Appeal declared that an exception to the general rule of issue preservation exists authorizing the appellate court to consider an unpreserved issue in the interest of judicial economy under appropriate circumstances, citing State v. Vick, 384 S.C. 189, 203, 682 S.E.2d 275, 282 (Ct.App.2009) (vacating a kidnapping sentence in the interest of judicial economy, even though the issue was not preserved for review); see also Jeter v. S.C. Dep't of Transp., 369 S.C. 433, 441 n. 6, 633 S.E.2d 143, 147 n. 6 (2006) (holding the appellate court would address an issue in the interest

[12]According to the court records, the Appellant was born on August 2, 1992. The crime occurred on August 17, 2009. ROA ____. See Sentencing Sheets, ROA _. See also, ROA p. 189, ll. 11-13 (Appellant charged as an adult because he was 17 at the time of the crime).

of judicial economy despite any preservation problems).

However, unlike Bonner, Vick, and Johnston, the Respondent does not concede error in sentencing Appellant, who was seventeen at the time of the crime and eighteen at his sentencing, to a sentence of life without parole. As set forth, he was not facing or sentenced to a mandatory sentence of life without parole. Unlike Bonner who received a life without parole sentence for a non-homicide which was expressly forbidden by Graham v. Florida, 560 U.S. 48 (2010), which the State had conceded was improper, Miller v. Florida, does not expressly forbid a life without parole sentence in a murder case committed by a 17 year old. Unlike Johnston, who the court found that the sentence that the State had conceded was erroneous and excessive and that the defendant could have remain in custody beyond the term of the correct sentence, nether circumstance exist in Inman's case. Further, reliance upon Vick is misplaced here also because there the State had conceded that Vick's kidnapping sentence was improper. Thus, the judicial economy seen in each of those cases is not present here. Here, prior to the filing of the Appellant's brief, the State had already taken a position on preservation and lack of merit in its opposition to the stay request. Therefore, the "extraordinary circumstances" present in Johnston, Vick and Bonner are not present here.

Clearly, the Appellant was asking for a sentence in plea of mitigation for mercy - a sentence of less than life without parole, but was not claiming that such a sentence was forbidden or that a different sentencing proceeding was required. As the Supreme Court has stated, "a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review." State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999); State v. Garner, 304 S.C. 220, 403 S.E.2d 631 (1991); State v. Shumate, 276 S.C. 46, 275 S.E.2d 288 (1981); State v. Winestock, 271 S.C. 473, 248 S.E.2d 307 (1978).

2. *Miller v. Florida Does Not Preclude a Life Without Parole Sentence Upon Appellant As A Matter of Law.*

In Miller v. Alabama, two separate juvenile defendants were found guilty of murder—one of murder in the course of arson and the other of capital murder. Id. at 2461. Both sentencing schemes provided a mandatory sentence of either death or life without parole when convicted of either of those offenses. Because the Supreme Court had previously invalidated the death penalty for juvenile offenders, the trial court had only one possible option in sentencing upon conviction - life without parole. Id.; see Roper v. Simmons, 543 U.S. 551, 575, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (holding the death penalty cannot be imposed upon juvenile offenders). A sentence of life without parole was the required, mandatory sentence for a juvenile offender convicted under the statute and was automatically imposed upon conviction, with no exercise of discretion as to whether such a sentence was appropriate. The Miller Court held such a sentencing scheme providing for a required, mandatory sentence of life without parole for juvenile offenders violated the Constitution, and precluded a sentencer from taking into account an offender's age, life circumstances, and the circumstances of the homicide offense. Miller, 132 S.Ct. at 2464, 2467–68. However, the Court did not hold that discretionary life without parole sentences violate the Eighth Amendment. See id. at 2469 ("[A] sentencer needed to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty."). Instead, in regards to life-without-parole sentences for juvenile offenders, the Miller Court stated, "[a]lthough we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. The Court emphasized its decision "does not categorically bar a penalty for

a class of offenders or type of crime.... Instead, it mandates only that a sentencer follow a certain process - *considering an offender's youth and attendant characteristics* - before imposing a particular penalty." Id. at p. 2471 (italics added).

In sum, Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011 (2010) prevented the imposition of life without parole for juvenile offenders convicted of non-homicide offenses.[13] Miller prevented the *mandatory* imposition of life without parole for juvenile offenders, but specifically allowed a discretionary sentence of life without parole when the circumstances justify it. Therefore, nothing prevents such a discretionary sentence when, as here, Appellant has been found guilty of both a homicide offense of murder and non-homicide offenses in a particularly heinous crime.

Unlike the sentences in Miller, Appellant Inman's sentence of life without parole was not the mandatory sentence for his murder conviction. He was sentenced pursuant to S.C. Code Section 16-3-20 (A) which provided: " a person who is convicted of or pleads guilty to murder must be punished by death, or by a mandatory minimum term of imprisonment for thirty years to life. . ."

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[13] In Graham, the juvenile defendant pled guilty to armed burglary and attempted armed robbery, for which he was placed on deferred adjudication probation pursuant to a plea bargain. Id. at 2018. When he violated his probation, the trial court found him guilty of the offenses and sentenced him to life without parole for the armed burglary and fifteen years' imprisonment for the attempted armed robbery, both non-homicide offenses. Id. at 2020. The Court held the Eighth Amendment forbids a State from imposing a sentence of life without parole on a juvenile offender who does not commit homicide. Id. at 2030. However, in clarifying its ruling, the Court noted:

> Juvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide. It is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination. The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.

Id. at 2023.

This sentencing statute did not require a mandatory sentence of life without possibility of parole (nor even create a presumption of LWOP), but vested the sentencing courts with the discretion to sentence Inman to a term of thirty years to life. As such, this did not violate the proscription against cruel and unusual punishment set forth in Miller. Respondents submit Miller also fails to support wholesale resentencing.

The Court reiterated the difficulty, recognized in Roper and Graham, of "distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption,'" and held: "Although we do not foreclose a sentencer's ability to make that judgment in a homicide cases, we require it to take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at ___, 132 S.Ct. at 2469. The Court went on to explain that: "Our holding requires factfinders . . . to take into account the differences among defendants and crimes. By contrast, the sentencing schemes that the dissents find permissible altogether preclude considering these factors." Id. at ___ n.8, 132 S.Ct. at 2469 n.8 (emphasis added). It is precisely this preclusion the Court found unconstitutional, not that all juvenile life without parole sentences are unconstitutional, as posited by Miller himself. This distinction and the Court's conscious decision to decline expanding the Eighth Amendment's reach are important. At best they suggest an examination of sentencing proceedings on a case-by-case basis where each Petitioner can attempt to show that he or she did not receive the benefit of the individual consideration described in Miller. But, as addressed in detail above, even this suggestion is in doubt since Miller is procedural and not substantive in nature and does not constitute a watershed ruling.

Here, by comparison, Appellant's age and circumstances was necessarily included in the

discretionary decision to impose a sentence of life without parole rather than the mandatory minimum thirty year sentence. ROA 311-18. The prosecutor urged in sentencing the circumstances of the particular crime that resulted in Ms. Stutts death in urging a maximum sentence. Family members of the deceased made victim impact statements noting urging the fact that she had begged for her life before she was killed and his failure to show mercy toward Ms. Stutts as a basis for a maximum sentence. ROA 309-10.[14]

Defense counsel Rosalind Sellers urged the fact that he was 17 years old at the time of the crime as an initial basis for a lesser sentence. ROA p. 311, ll. 18-20. She declared that the Appellant

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[14]The testimony of accomplice Henry Bridges revealed the incident and described the vicious killing and abduction of Mary Stutts. He described their arrival at her home after the agreed intent to rob her:

> Like we rung the doorbell and we ask her for some water, she came to the door. She was like, yeah, there's a water faucet around the back. So we went around the back. I was the one to try to turn the water and she been looking out a little window, I guess, from her kitchen. And I told her I didn't know how to turn it on. I didn't see the little water faucet thing, that's when she came out there, that's when Lorenzo hit her in the back of the head with the gun. That's when she been like oh Lord, oh Lord like that. . . That when bog brother [Lorenzo] hit Ms. Mary Stutts in the head with the .25. When she fell it was like, of Lord , of Lord . . ."

ROA 256-57. Henry searched through the house, got the car keys and pulled the victim's car around. Then Henry and Lorenzo placed her in the trunk of her own car. The victim was saying oh Lord oh Lord so loud that the Lorenzo turned up the car radio so they could not hear her. ROA p. 259, ll. 5-6. Once they arrived at Bunker Hill Road, Damien stated that they were going to kill Ms. Stutts. ROA p. 259, ll. 15-24. They stopped the car and pulled the victim from the trunk and she hit the ground. **She stated "Oh Lord, y'all ain't got to do this." ROA p. 261, ll. 5-6.** According to Henry, Damien then ran up to the victim and then shot her twice between the eyes and the head and then in the head. ROA 259-260. As Henry stood by the trunk, Damien and Lorenzo dragged the victim into the woods.

Henry stated that Damien was the person who shot and killed Mary Stutts. ROA p. 273, ll. 18-24.

Evidence was also presented about Inman admitting to Eddy Boone who was incarcerated with Appellant that " he said I shot her one time in her face and her head turn to the side and I shot her again in the side of the head." ROA p. 290, ll. 9-14. "He said killing that woman was just like killing a damn dog." ROA p. 293, ll. 5-6.

asked her to express remorse and sympathy to the victim's family for the pain and heartache he had caused. ROA p. 311, ll. 22-25. She stated that nothing had justified the acts done to the victim, but noted that he was immature at the time. ROA 312. She urged that he should not be penalized for having a jury trial rather than a plea. Counsel noted that this was a sad case all around. She stated that the Appellant's mother Gladys Inman and father Alfonzo Inman were present to express that she loved her children deeply and that they were not raised to go out and do harm. Rather, they attended Free Rock Baptist Holiness Church. She noted that the court had heard information from the psychologist [Dr. Geoffrey McKee][15] about the Appellant. She requested mercy from the court and noted that he was facing an incredible amount of time. "We just ask that some possibility if you would find it in your heart to allow him to be released at some time." ROA p. 313, ll. 3-5. She stated that they understood it would be a lengthy sentence , "but Your Honor, in light of no criminal record of the defendant, in light of his age, your Honor, we would [request] for some leniency and mercy in your sentencing." ROA p. 313, ll. 5-8. Also, ROA p. 314, ll. 1-2. The Appellant mother's asserted that his son was innocent and that he would not have killed anyone. ROA 313. Presumably the judge in Inman's case sentenced in accordance with this principle by considering Appellant's age, mental capacity and maturity. In sentencing Inman, Judge Russo considered the facts and circumstances of the crime. As he stated from his experience with the trial of Damien Inman and his

[15]In the pre-trial competency hearing, Dr. McKee testified that he had evaluated Appellant in 2010. He opined that Appellant suffered from "depressive disorder not otherwise specified" and disruptive behavior disorder. ROA 107-08. He indicated that depressive disorder indicated it was not to the point of a major mental illness such as depression. Further, the disruptive disorder was not to the point of a more serious disorder such as a conduct disorder or oppositional defiant disorder. ROA 107-08. On cross-examination of Dr. McKee, he indicated that Appellant had reported to him that he was hearing voices telling him to kill himself, though Dr. McKee rejected that these were auditory hallucinations nor a symptom of psychosis. Tr.p. 125. See Also COURT Exhibit C- 1 (mental evaluation).

brother, "there's nothing in this evidence that helps me understand why it was necessary to kill this woman. Three men rob her, break into her house, take whatever they want and they could have just left. I seriously doubt she could have recognized them or identified them to the police. . ." ROA p. 314, ll. 3-12. He described the perpetrators as terrorists and noted that they had lured her out of her house to ask for help and the victim did not hesitate to give it to them and then he was rewarded with her violent death with her begging ignored. ROA 315. Contrary to the argument of defense counsel, Judge Russo opined that they were not raised to take responsibility for their actions, noting that Henry had given a statement, should them where the victim's body was located so the family could recover their remains and pled guilty,[16] yet here despite the evidence the mother comes forward and claims innocence. Judge Russo noted that Appellant had been offered a 55 year sentence in exchange for a plea, but it was ultimately rejected. ROA 316.[17] In sentencing the Appellant to a sentence of life without parole for murder, he was cognizant of the youth and his ability to sentence to a lesser sentence.

Respondents submit that since Inman was sentenced in 2010, he had the opportunity to present essentially the same arguments and mitigating evidence described in Miller. Despite being provided this opportunity in South Carolina, Inman claims the sentencing proceeding was insufficient - an issue never presented in the state court. It has been argued that since "a number of state courts have similarly concluded that Miller mandates individualized sentencing to take into

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[16]It must also be noted, the Eddy Boone testified that Damien Inman had told him that he should have shot Henry and that they were going to put the crime on Henry by using his mother to share the stories between Lorenzo and Damien to get their stories straight. ROA 292-93.

[17] The plea offer of 50 years and 5 years consecutive and colloquy that ultimately rejected the plea is part of this record. ROA 113-139.

account a number of factors related to the defendant's age and culpability," similar reasoning calls for this Court to order resentencing in pre-18 murder LWOP cases in South Carolina. Respondent disagrees and submits that while the "legal developments" described by Petitioners in Aiken, et al v Byers, Appellate Case No. 2012-213286, certainly present an interesting study on how other jurisdictions have interpreted and responded to the portions of Miller which directly impacted the unconstitutional statutes, practices, or procedures previously followed in those jurisdictions, the noted developments have little if any relevance to South Carolina and the constitutionally sound statutes, practices and procedures followed here and in Inman's case in particular.

Miller simply reminds sentencing judges to continue looking at the facts of the offense and the circumstances of each case, including taking into account "how children are different" when deciding the "appropriate occasions for sentencing juveniles to this harshest possible penalty." Miller at 567, 132 S.Ct. at 2469. It further reminds defense attorneys to present all relevant arguments and evidence in regard to mitigation when given the opportunity to do so. Here, there was no restriction on either. A request for resentencing on the murder conviction must be denied.

CONCLUSION

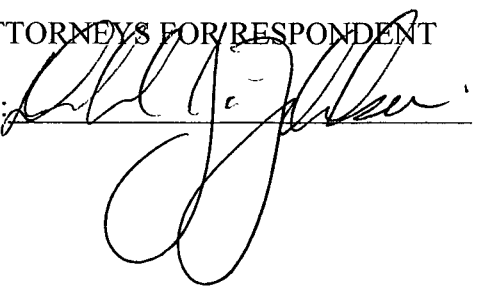
For all the foregoing reasons, the appeal should be dismissed and judgment of conviction affirmed. Should the Court opine that the preservation issues related to the kidnapping sentence be ignored, resentencing should be limited to vacating the kidnapping sentence. Should the Court opine that the presentation issue related to the burglary sentence be ignored, the life sentence for burglary should be vacated and the matter remanded for resentencing in light of Graham v. Florida and State v. Bonner.

Respectfully submitted,

DONALD J. ZELENKA

Senior Assistant Deputy Attorney General
S.C. Bar Number 5758

ATTORNEYS FOR RESPONDENT

By: 

Columbia, South Carolina
October 29, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dillon County
Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2011-193887

THE STATE,

Respondent,

v.

DAMIEN INMAN,

Appellant

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled " Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

October 29, 2013

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, counsel for the Respondent, certify that I have served the within ***Final Brief of Respondent*** in the foregoing action on the Appellant by depositing two (2) copies of the same in the InterAgency Mail to Susan B. Hackett, Appellate Defender, S.C. Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 29th day of October, 2013.

DONALD J. ZELENKA
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ALAN WILSON
ATTORNEY GENERAL

October 29, 2013

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Damien Inman
Appellate Case No. 2011-193887

Dear Ms. Kitchings:

Enclosed please find the original and nine (9) copies of the **Final Brief of Respondent** in the above-referenced case for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Lonetta B. Brawley
Legal Assistant to Donald J. Zelenka
Senior Assistant Deputy Attorney General

DJZ/lbb

cc: Susan B. Hackett, Esquire
William B. Rogers, Jr., Solicitor
Sandi Wofford, Victim Assistance