STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2012-212739

THE STATE,

Respondent,

v.

MARVIN BOWENS GREEN,

Appellant.

INITIAL BRIEF OF RESPONDENT

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II.

The trial court properly admitted Appellant's "mug shot" into evidence where it was relevant to Appellant's identification, where its probative value outweighed any danger of undue prejudice, and where it was merely cumulative to other evidence used to establish Appellant's identity.

III.

The trial court properly sentenced Appellant to life imprisonment without the possibility of parole under S.C. Code Ann. § 17-25-45. Furthermore, the use of a prior juvenile conviction to enhance Appellant's sentence under the statute did not constitute cruel and unusual punishment.

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Appellant for armed robbery and possession of a weapon during the commission of a violent crime. (R.* Indictments.) On June 11-14, 2012, Appellant proceeded to trial before a jury. Andrew Grimes, Esquire, and Cody Groeber, Esquire, represented Appellant, and Chief Deputy Solicitor D. Bruce Durant and Assistant Solicitor Rutledge Durant represented the State. The jury found Appellant guilty of both charges. (Tr. 771.) The Honorable Kristi Lea Harrington sentenced Appellant to five years' imprisonment for possession of a weapon during the commission of a violent crime and life in prison without the possibility of parole (LWOP) for armed robbery. (Tr. 779.)

On August 13, 2012, Judge Harrington denied Appellant's motions to vacate sentence and for mistrial. Subsequently, Appellant filed a Notice of Intent to Appeal.

STATEMENT OF FACTS

At 7:45 a.m. on December 24, 2010, a man entered Natubhai Patel's (Victim) convenience store and robbed him at gunpoint. (Tr. 289, lines 10-13.) Victim called the police immediately, and the police arrived and viewed the surveillance video with Victim. (Tr. 291, lines 17-22.) Victim told the police he recognized the robber as a regular customer but did not know his name. (Tr. 294, lines 14-23.) On December 29, 2010, police met with Victim and showed him a six-person photo lineup from which he chose a photo of the man who robbed him. (Tr. 296, line 5-Tr. 300, line 13.) Police generated an arrest warrant for Appellant and charged him with armed robbery and possession of a weapon during the commission of a violent crime. (Tr. 359, lines 4-8; R.* Indictments.)

At trial, the State called Victim, who described what happened the day of the robbery. (Tr. 286, line 19-Tr. 291, line 22.) Victim testified that the man who entered his store with a gun on December 24, 2010, was a regular customer he had known for approximately one year. (Tr. 289, lines 10-25.) The man came into the store approximately three times a week to buy cigarettes, gas, and lottery tickets. (Tr. 290, lines 1-5.) Victim explained he and the man had a running joke about Obama's signature being on the man's identification. (Tr. 290, lines 6-8.) Victim identified the robber in court as Appellant. (Tr. 290, line-Tr. 291, line 2.) He was able to recognize Appellant by his voice and by seeing his face, despite the fact he was wearing sunglasses and holding a gun during the robbery. (Tr. 302, line 24-Tr. 303, line 11.) Victim testified regarding his selection of Appellant out of a six-person lineup. (Tr. 296, line 5-Tr. 300, line 13.) He explained that he does not read English well, so his son read and explained the lineup

procedure. (Tr. 297, lines 13-22.) He verified he was 100% positive when he circled Appellant's photo in the lineup and was able to identify Appellant within a half second. (Tr. 298, lines 16-25; Tr. 300, lines 10-13.)

Deputy Dustin Luckadoo, of the Charleston County Sheriff's Office, testified that he responded to the scene, talked to Victim, and viewed the video tape from the scene. (Tr. 326, line 21-Tr. 327, line 8; Tr. 332, line 8-Tr. 334, line 11.) He recognized Appellant as the robber, based on general dealings with him including a traffic stop, and identified him in court with 100% certainty. (Tr. 334, line 23-Tr. 336, line 12; Tr. 345, lines 20-24.)

Detective Charles Lawrence of the Charleston County Sheriff's Office testified that he was brought on to investigate the crime after it had occurred. (Tr. 346, line 8-Tr. 349, line 16.) When Lawrence viewed the video from the crime scene on December 29, 2010, he recognized Appellant as the perpetrator based on having dealt with him before. (Tr. 351, line 1-Tr. 352, line 23.) Lawrence testified he had the opportunity to observe Appellant's face, mannerisms, voice, and gait for hours at a time. (Tr. 352, line 24-Tr. 353, line 16.) He testified he recognized Appellant's walk in the video because it was distinctive; he also was able to identify Appellant's distinctive nose, as well as his height and weight. (Tr. 353, line 25-Tr. 354, line 9.) Lawrence testified he was 100% positive the man pointing the gun at Victim in the video was Appellant. (Tr. 354, lines 10-Tr. 355, line 20.)

Once Detective Lawrence identified Appellant in the video, he generated a six-person photo lineup through SLED. (Tr. 355, lines 22-25.) He then arranged to meet with Victim to see if he could pick out the man who robbed him. (Tr. 356, lines 3-15.) Lawrence took Detective James Perkins with him to conduct the actual lineup with

Victim because policy prohibits an officer from performing the lineup identification if he knows who the suspect is. (Tr. 356, line 16-Tr. 357, line 8.) On December 29, 2010, Lawrence and Perkins met Victim outside a Sears store and Perkins conducted the lineup while Lawrence stayed away from the procedure. (Tr. 357, line 10-Tr. 358, line 18.) Lawrence testified that Victim made an identification and that Lawrence then generated an arrest warrant for Appellant based on that identification. (Tr. 359, lines 1-8.)

Next, the State requested to approach the bench and the trial court held the following bench conference:

> [The State]: I think we probably are going to have a matter of law outside the presence of the jury on the booking photo.
>
> The Court: On the booking photo? Why?
>
> [The State]: Because we want to put the booking photo in because it's relevant. It shows his side profile, it's from when he was arrested from this instance so it's not a prior incident. It has nothing to do with 404(b) but it's relevant so the jury can see him and be able to look at this and look at the video.
>
> The Court: Let me see.
> What's your objection?
>
> [Appellant]: The booking photo. I was researching lineups last night - -
>
> The Court: Which is different - -
>
> [Appellant]: I understand, and I was going through some South Carolina cases on booking photos - -
>
> . . . .
>
> [The State]: I don't have a problem if you want me to cut those photos, cut the top half off.
>
> [Appellant]: Yeah, but, I mean, it still shows it's a booking photo.

The Court: Let's just mark it for identification.

(Tr. 359, line 13-Tr. 360, line 24.) Immediately following the bench conference, the State moved to admit the booking photo, State's Exhibit #5, and Appellant objected under Rule 404(b). (Tr. 361, lines 21-23.) The trial court overruled the objection but did not allow the State to publish the exhibit at that time. (Tr. 361, lines 24-25.)

Joseph L. West, a SLED investigator, testified regarding his role in obtaining still photographs from the video captured at the scene. (Tr. 450, line 1-Tr. 452, line 23.) Appellant objected to the still photos, State's Exhibit #6, being admitted. (Tr. 456, line 4-Tr. 457, line 23.) After hearing arguments, the trial court admitted State's #6 over Appellant's objection. (Tr. 490, lines 1-Tr. 494, line 18.)

Jagruti Patel, Victim's wife, testified that she recognized the man in the store video as a regular customer who often came in to buy Newport cigarettes, lottery tickets, and gas. (Tr. 532, line 5-Tr. 535, line 25.) She recounted him joking about Obama signing his identification when she would ask for it. (Tr. 536, lines 1-5.) Patel positively identified Appellant in court as the man in the video. (Tr. 538, lines 9-25; Tr. 539, lines 1-16.)

Next, the trial court addressed the booking photo again. (Tr. 556, lines 1-5.) The trial court noted that the booking photo was admitted earlier, but was not published yet, and discussed the size of the photo after redaction. (Tr. 556, line 6-Tr. 557, line 12.) The following exchange took place:

> [Appellant]: And we believe we have sort of a front picture, side pictures. Any jury can - - any reasonable juror can infer that's a booking photo.
>
> The Court: But that's not standard, is it? That's not what I'm concerned with. We can infer anything from

anything and the case that you provided indicates that it was a different type of photo. It was the actual booking photo. We all know that he was arrested and there was indication that he was booked, and the case that you provided me it was from a - - the date was around his neck on his booking photo, which was prior to the arrest that he was being tried for.

[Appellant]: Yes, Your Honor. Basically, when you look at the three factors in the case we don't believe the evidence need [sic] to introduce the photograph.

The Court: The reason that they indicated to the Court that they needed it is because they needed a side profile picture. When we approached at the bench there was a discussion, because I'm not sure if it was on the record, there was a discussion on what would be admissible.

Mr. Groeber indicated that his major objection was to the top and to the bottom row because it clearly then indicated that it came from Charleston County. There's absolutely no distinguishing marks on the remaining two photographs. There's nothing to indicate that they - - he's in a jail suit or anything around the neck as in the case that you provided, and so I made the decision to cut the top and the bottom off of those pictures. So back to my initial question, Mr. Grimes.

[Appellant]: Yes, ma'am.

The Court: They have a larger picture of what I have had redacted. Okay. So it's now - - that picture is a full page. There was an objection because during the redaction now it's a smaller page.

[Appellant]: Yes, ma'am.

The Court: So which would you prefer me, preserving all of your objections, give the bigger page so that it's in conformity with all the other paper page sizes or the smaller page that's black and white?

[Appellant]: Preserving everything we prefer the bigger photo to go back.

The Court: All right. If we will, just so the record is clear, we will mark that as 5-A. Five does not go back.

> Did you understand, Mr. Grimes? Did you hear what I said?
>
> [Appellant]: They are substituting the - -
>
> The Court: I'm not substituting because I want the record to be thoroughly preserved. This will be 5-A, and 5, the redaction that I did cutting, it will not go back but it will remains as 5. The one 5-A will go back.
>
> [Appellant]: Thank you.
>
> (Whereupon, State's Exhibit Number 5-A, a Photograph, was marked and admitted into evidence.)

(Tr. 557, line 13-Tr. 559, line 17.)

The State rested, and Appellant then presented his case. After recalling Detective Lawrence, Appellant called Dr. Jennifer Beaudry, an assistant professor of psychology at the University of South Carolina Beaufort. (Tr. 593, line 5-Tr. 594, line 1.) Dr. Beaudry testified she wrote her dissertation about eyewitness identification procedures and people's perceptions of those procedures. (Tr. 594, lines 16-20.) The trial court admitted her as an expert in human memory and eyewitness identification without objection. (Tr. 599, lines 1-19.) Dr. Beaudry testified that factors such as the presence of a weapon, whether someone is wearing a disguise, and whether a perpetrator and witness are of the same race can affect an observer's ability to encode information. (Tr. 609, line 25-Tr. 610, line 9.) She admitted there are no studies regarding one's ability to recognize somebody one already knows but who is wearing a disguise. (Tr. 642, lines 2-4.)

Appellant requested jury charges via email, which the trial court marked as Court's Exhibit #9, that included a specific request as to identification as it relates to expert testimony based on State v. Long, 721 P.2d 483 (Utah 1986). (Tr. 701, lines 5-13; Tr. 702, lines 10-13.) The trial court informed Appellant it would be charging its

standard identification charge that lists all elements and factors that may be considered. (Tr. 701, lines 20-23; Tr. 702, lines 13-15.) The portion of the jury charges in regard to identification stated:

> An issue in this case is the identification of the defendant as the person who committed the crime charged. The State has the burden of proving identity beyond a reasonable doubt. You must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict the defendant.
>
> Identification testimony is an expression of belief or impression by a witness. You must determine the accuracy of the identification of the defendant. You must consider the believability of each identification witness in the same way as any other witness.
>
> You may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense. This will be affected by things like how long or short a time was available, how far or close the witness was, the lighting conditions, and whether the witness had a chance to see or know the person in the past.
>
> Once again, I instruct you, the burden of proof on the State extends to every element of the crime charged and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the crime.
>
> If after examining the testimony you have a reasonable doubt as to the accuracy of the identification you must find the defendant not guilty.

(Tr. 750, line 5-Tr. 751, line 5.) Specifically as to expert witnesses, the trial court charged:

> The rules of evidence ordinarily do not permit witnesses to testify to opinions or to conclusions. An exception to this rule exists for witnesses we call expert witnesses.
>
> A witness who by education and experience has become expert in some art, science, profession or calling may state an opinion as to relevant and material matter in which the witness claims to be an expert and may also state the reasons for the opinion.
>
> You should consider any expert opinion received in evidence in this case and like any other evidence give it the

> weight you think it deserves. If you decided that the opinion of an expert witness is not based on sufficient education and experience or if you conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence you may disregard the opinion entirely.
>
> An expert witness's testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert. Further, you are not required to accept an expert's opinion even though it is not contradicted.

(Tr. 747, line 13-Tr. 748, line 9.)

After the trial court instructed the jury, Appellant asked that he be permitted to place on the record the reasons he requested certain charges. (Tr. 755, lines 20-25.) He then went through each portion of the specific charges he requested and how he believed the trial court's charges did or did not comply with what he requested. (Tr. 756, line 3-Tr. 761, line 9.) The trial court recognized the preservation of his argument and objection and ruled that it would not change the charge given. (Tr. 761, lines 10-23.)

Ultimately, the jury found Appellant guilty of both charges. (Tr. 771.) The trial court sentenced Appellant to five years' imprisonment for possession of a weapon during the commission of a violent crime, to be served concurrently to a sentence of life in prison without the possibility of parole for armed robbery. (Tr. 779.) On August 13, 2012, the trial court denied Appellant's motions to vacate sentence and for mistrial.

ARGUMENTS

I.

Appellant's specific arguments regarding the trial court's failure to provide jury instructions concerning identification with respect to language barriers and the use of surveillance video are abandoned because those two issues were not addressed in his brief. As for Appellant's argument regarding the trial court's failure to provide jury instructions concerning identification with respect to expert testimony, the trial court properly denied Appellant's request for specific jury instructions and properly charged the jury.

Appellant argues his Sixth Amendment right to a fair trial was violated when the trial judge failed to provide the jury with specific instructions concerning how to analyze the evidence presented concerning the identification of Appellant as the perpetrator. Specifically, he argues the areas not addressed in the jury instructions included: (1) expert testimony on the subject, (2) significant language barriers between police and Victim, and (3) the use of surveillance video. However, Appellant did not articulate any argument on bases (2) and (3) in his brief. Therefore, those two particular areas of argument are effectively abandoned. Appellant did articulate his argument regarding the trial court's failure to provide jury instructions concerning identification with respect to expert testimony; however, the trial court properly denied his request for specific jury instructions and properly charged the jury. Thus, this Court should affirm the trial court's ruling.

Where a party fails to cite to any authority that supports a specific argument, the argument will be deemed abandoned on appeal. State v. Porter, 389 S.C. 27, 35-36, 698 S.E.2d 237, 241 (Ct. App. 2010). "An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."

Bryson v. Bryson, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008). Appellant merely mentioned arguments (2) and (3) in his issue statement but did not address them in the body of his brief and did not cite authority to support them; therefore, those arguments have been abandoned.

"Generally, the trial judge is required to charge only the current and correct law of South Carolina." State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Id. Here, the charge was a current and correct statement of the law on identification testimony in South Carolina.

Appellant cites State v. Motes, 264 S.C. 317, 215 S.E.2d 190 (1975), and its discussion of the model jury instruction from United States v. Telfaire, 469 F.2d 525 (D.C. Cir 1972). In Motes, the Supreme Court held there was no error in the trial court's refusal to charge the Telfaire model instruction, noting the model instruction was "designed to focus the attention of the jury on the identification issue and minimize the risk of conviction through false or mistaken identification." Motes, 264 S.C. at 326, 215 S.E.2d at 194. The Court found, "The trial, and the instructions given, adequately focused the attention of the jury on the necessity for a finding that the testimony identified defendant as the offender beyond a reasonable doubt; therefore, no prejudice resulted to defendant from the failure to give the requested instruction." Id.

Here, the trial judge instructed the jury, "You must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict the defendant." (Tr. 750, lines 8-10.) She also instructed the jury, "The State has the burden of proving identity beyond a reasonable doubt."

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." State v. Commander, 396 S.C. 254, 270-71, 721 S.E.2d 413, 422 (2011).

> A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. The law to be charged must be determined from the evidence presented at trial. When reviewing the trial court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant.

Id. "Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues." State v. Dickey, 394 S.C. 491, 512, 716 S.E.2d 97, 108 (2011).

> When a party requests the trial court charge a correct and applicable principle of law, the court must charge it. However, the court is not required to use any particular language in explaining the principle. When reviewing a challenge to a trial court's refusal to use the specific language in a request to charge, an appellate court must consider the charge as a whole in evaluating whether the trial court charged the correct law applicable to the case. Therefore, there is no error of law in refusing to give a specific request to charge where (1) the charge requested is an incorrect statement of law, or (2) the trial court used language different from that requested, but considering the charge as a whole, the charge as given stated the requested principle of law correctly.

State v. Marin, 404 S.C. 615, 620, 745 S.E.2d 148, 151 (Ct. App. 2013) (emphasis added). "The substance of the law is what must be charged to the jury, not any particular verbiage." State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011).

In the instant case, the trial court gave the following jury charge regarding identification:

> An issue in this case is the identification of the defendant as the person who committed the crime charged. The State has the burden of proving identity beyond a reasonable doubt. You must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict the defendant.
>
> Identification testimony is an expression of belief or impression by a witness. You must determine the accuracy of the identification of the defendant. You must consider the believability of each identification witness in the same way as any other witness.
>
> You may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense. This will be affected by things like how long or short a time was available, how far or close the witness was, the lighting conditions, and whether the witness had a chance to see or know the person in the past.
>
> Once again, I instruct you, the burden of proof on the State extends to every element of the crime charged and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the crime.
>
> If after examining the testimony you have a reasonable doubt as to the accuracy of the identification you must find the defendant not guilty.

(Tr. 750, line 5-Tr. 751, line 5.) When considered as a whole, the above charge contains the correct definition and adequately covers the law of identification testimony. Our Supreme Court determined in State v. Liverman, 398 S.C. 130, 144, 727 S.E.2d 422, 429 (2012), that "the trial court instructed the jury thoroughly on identification testimony and the factors that should be considered when evaluating it." (emphasis added). The trial court in Liverman gave nearly identical charges to the ones given here, and the Supreme Court considered them thorough. Therefore, the jury charges given here were certainly adequate. The charges "adequately focused the attention of the jury on the necessity for a finding that the testimony identified defendant as the offender beyond a reasonable doubt; therefore, no prejudice resulted to defendant from the failure to give the requested instruction." Motes, 264 S.C. at 326, 215 S.E.2d at 194. Thus, Appellant's

reference to the Supreme Court, in State v. Simmons, 308 S.C. 80, 83-84, 417 S.E.2d 92, 94 (1992), admonishing trial courts that they "should instruct the jury that the burden of proving the identity of the defendant rests with the state," is misplaced. No admonishment is necessary where, as here, the instruction did just that.

Appellant also cites State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991), presumably to demonstrate the Supreme Court's support for allowing expert testimony to explain human perception and memory and their effect on eyewitness identification. Again, this seems out of place as the trial court permitted Dr. Jennifer Beaudry to testify extensively on this topic.

Appellant cites a case from Georgia and one from Utah for the importance and need for tailoring jury instructions on eyewitness identifications to the facts and circumstances of each individual case. The Utah case, State v. Long, 721 P.2d 483 (Utah 1986), is the source for Appellant's proposed jury instructions. However, the Long court did not go so far as to require that particular set of instructions in every eyewitness identification case. Rather, the court stated, "We trust that trial counsel and judges will be able to produce appropriate instructions that satisfy the concerns expressed here today. . . . But . . . we decline to dictate precisely what that instruction must say." In Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005), the Georgia Supreme Court acknowledged that "[w]hile Georgia has decided that a jury instruction on eyewitness identification should be given when testimony warrants, other states see such a charge as superfluous when general instructions on witness credibility and burden of proof are given, or reject such an instruction as an impermissible judicial comment on the evidence." As South Carolina courts routinely give jury charges regarding eyewitness identification, and also include standard instructions on witness credibility and burden of proof, it is clear our courts

agree to an extent with both Utah and Georgia. In this case, the trial court based its jury instructions on the circumstances present, including charging the jury on expert witnesses, eyewitness identification, general witness credibility, and burden of proof.

II.

The trial court properly admitted Appellant's "mug shot" into evidence where it was relevant to Appellant's identification, where its probative value outweighed any danger of undue prejudice, and where it was merely cumulative to other evidence used to establish Appellant's identity.

Appellant argues the trial court erred in allowing the State to introduce Appellant's "mug shot" because it was unnecessary, cumulative to the State's case, and prejudiced Appellant by suggesting he had a prior criminal record. To the contrary, the State demonstrated the photograph was necessary, and it did not suggest Appellant had a criminal record and did not draw attention to its origin or implication. Thus, the introduction of the photograph met the requirements for admission set forth in South Carolina case law and was not reversible error.

Appellant contends the trial court abused its discretion in admitting the photograph into evidence because it was irrelevant and unnecessary to substantiate the identification of the person depicted in the video. Specifically, he argues the "booking" photograph should have been excluded because Appellant was present in the courtroom for identification purposes and it was cumulative to the State's other evidence. Finally, Appellant argues the photo was obviously a mug shot and gave the jury the impression Appellant had been arrested for prior crimes. The State submits these arguments are without merit and should be dismissed.

The State submits Appellant's "mug shot" was properly admitted because it was indeed relevant to Appellant's identification, its probative value outweighed any danger of unfair prejudice, and it was merely cumulative to other evidence used to establish Appellant's identity. A trial judge's ruling on the admissibility of evidence will not be

reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant. State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003). An abuse of discretion occurs where the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

As a general rule, all relevant evidence is admissible. State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); Rule 402, SCRE. Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. In the Matter of Care and Treatment of Corley, 353 S.C. 451, 577 S.E.2d 451 (2003); State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002); Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Because identity was the primary issue in the case, the "booking" photograph, like the video recording, was relevant. Rule 401, SCRE. Also, the probative value of the photograph outweighed any possible prejudice. Even though it was a "booking" photograph taken at the time of Appellant's previous arrest, the photograph itself does not suggest Appellant has a criminal record and was not introduced in a way that would draw attention to its origin. (State's Exhibit #5, #5A). In other words, the photograph in question is not a "mug shot" as described in prevailing case law. Traditionally, South Carolina courts have described "mug shots" as having either frontal or side profile pictures as well as placards, whether redacted or not, evidencing the photographs were taken as part of an arrest. See State v. Tate, 288 S.C. 104, 105, 341 S.E.2d 380, 381 (1986) (photographs in question depicted the appellant in both front and side profile with placard identifying date and county of arrest); State v.

Robinson, 274 S.C. 198, 200, 262 S.E.2d 729, 730 (1980) (photographs showed appellant from full frontal, profile, and frontal head and shoulders perspectives with written material on the face being redacted); State v. Denson, 269 S.C. 407, 410, 237 S.E.2d 761, 762-63 (1977) (photographs at issue depicted appellant from a frontal view with a placard which was mostly redacted). Here, the photograph introduced at trial consisted of a frontal close-up of the head and neck and a side close-up of the same, which contained no placards or other marks indicating when or where it was taken. Accordingly, this picture simply does not fall within the traditional understanding of the phrase "mug shot" and was prejudicial only in the sense that it may have helped the jury conclude Appellant was the man who committed the armed robbery.

Even assuming the photograph in question rises to the level of a "mug shot," the photograph is still admissible under the analysis set forth in Denson and its progeny. In Denson, the South Carolina Supreme Court announced the introduction of a "mug shot" is reversible error unless: (1) the State has a demonstrable need to introduce the photograph; (2) the photograph does not suggest defendant has a criminal record; and (3) the photograph is not introduced so as to draw attention to its origin or implication. Denson, 269 S.C. at 412, 237 S.E.2d at 764; Robinson, 274 S.C. at 200, 262 S.E.2d at 730; Tate, 288 S.C. at 105, 341 S.E.2d at 381. Reviewing these factors, it is clear the trial court did not abuse its discretion in admitting the photo into evidence.

First, the State had an obvious need to introduce the photograph – identity. In his opening statement, Appellant's counsel previewed his defense of mistaken identity by noting: "It will be up to you to determine if the State can prove its case, and the way that they are going to try to prove its [sic] case is to parade in front of you witnesses who will testify about that they believe, who they believe it was on the video, and [Victim] will say

he believes that it was him from his experience." (Tr. 283, line 22-Tr. 284, line 2). During trial, Victim testified he knew the robber as a regular customer and was able to identify him in a lineup without hesitation. Lawrence testified he recognized Appellant in the video and added Appellant's photograph to the six-person lineup. He specifically testified he recognized Appellant's face when Appellant turned to the right. (Tr. 354, lines 3-4, 7-9, 21-24.) Therefore, Appellant's right side profile was a significant piece of evidence to help the jury compare it, the video, and the still photos from the video in order to determine whether Appellant was the man in the video.

Being aware of defense counsel's strategy of "mistaken identity" and understanding that issues of identification and credibility are for the jury, the State recognized the importance of providing the jury with sufficient evidence to prove Appellant's identity. The photograph allowed the jury to review the accuracy of the identifications made by Victim, Victim's wife, Lawrence, and Luckadoo and come to its own conclusions, thereby enhancing the probative value of the photograph. Moreover, as the trial court pointed out, the reason the State needed the mug shot was to show a side profile picture. (Tr. 558, lines 3-8.) Because the video showed Appellant turn his head to the right side, this was critical information for the jury to have when considering the accuracy of the identifications.

Furthermore, the photograph at issue provides no suggestion Appellant had a criminal record. Instead, the photograph consists of simple frontal and side close-ups with no placards, redacted or visible, or other marks to identify the photograph as a "mug shot." This serves as a marked departure from the photographs used in Tate, Robinson and Denson, all of which possessed placards, words identifying a particular county, or

blackened out areas on the defendant's face.[1] See Tate, 288 S.C. at 105, 341 S.E.2d at 381 (photographs in question depicted the appellant in both front and side profile with placard identifying date and county of arrest); Robinson, 274 S.C. at 200, 262 S.E.2d at 730 (photographs showed appellant from full frontal, profile, and frontal head and shoulders perspectives with written material on the face being redacted) Denson, 269 S.C. at 410, 237 S.E.2d at 762-63 (photographs at issue depicted appellant from a frontal view with a placard which was mostly redacted).

Addressing the third Denson prong, there is no evidence indicating the photograph was introduced so as to draw attention to its origin or implication. Rather, the photograph was introduced during the direct examination of Detective Lawrence in an effort to provide the jury with another tool to use in determining identity. (Tr. 359, line 9-Tr. 361, line 25.) Furthermore, the trial court cut the top and bottom off the photo in response Appellant's objection that the top and bottom rows indicated the photo came from Charleston County, assuring no distinguishing marks remained on the photograph before the jury had the opportunity to view it. (Tr. 558, lines 9-16.) Accordingly, the State submits the third prong of Denson is satisfied.

Appellant cites State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004), where our supreme court found the State failed to demonstrate a need to include a mug shot as part of the defendant's photographic lineup. While the Court did not find reversible error, Appellant emphasized the Court's admonition against utilization of such photographs

[1] By comparison, the photographs most similar to the present case were those in State v. Ford, 334 S.C. 444, 513 S.E.2d 385 (Ct. App. 1999). In Ford this Court affirmed the admission of a photographic lineup containing "mug shots" using the Denson analysis. Ford, 334 S.C. at 450, 513 S.E.2d at 388. Addressing the second prong of Denson, the Court, describing the "mug shots" as "[o]nly the heads and necks of the individuals in the lineup" with "no identifying clothing or placards," concluded there was nothing about the photographs to suggest appellant had a prior criminal record. Id.

except in the rarest of cases. Id. at 84, 600 S.E.2d at 528. It is important to note that although the Court found no demonstrable need to introduce the photo lineup in Traylor because an accomplice had already identified Traylor by name, it still found no prejudice. Id. The Court clarified that it focused its holding in Denson regarding the three criteria for reversible error on the rationale "that such photos are prejudicial because they imply a defendant's prior bad acts." Id. at 84 n.12, 600 S.E.2d at 528 n.12.

Here, nothing about the mug shot could have implied any prior bad acts on the part of Appellant. Not only did the trial court remove Charleston County from the top and bottom of the photo in response to Appellant's objection, no other evidence was provided that Appellant had ever been arrested before. Appellant asserts in his brief that Lawrence and Luckadoo indicated they knew Appellant from prior experience related to law enforcement, thus leading the jury to the only conclusion it could draw—that Appellant had a criminal record. However, both Lawrence and Luckadoo were careful during their testimony not to indicate in any way that Appellant had any past criminal history. Luckadoo testified he had general dealings with Appellant before and had personal contact with him on a traffic stop. (Tr. 335, lines 2-8.) Lawrence testified specifically, "I've had interactions with him, not because he was in trouble or anything." (Tr. 352, lines 16-22.) Appellant's final argument regarding the mug shot seems to imply "the omission of the mug shot's temporal origin" played a role in giving the jury the impression Appellant had a prior criminal record. The record does not specifically indicate any temporal origin on the mug shot that was later removed; the record only refers to the removal of "Charleston County." However, as pointed out earlier, the trial court removed all identifying characteristics on the top and bottom of the mug shot in

direct response to Appellant's objection, so if there was a date or other temporal origin removed, Appellant cannot now complain about a result he requested and was granted.

Harmless Error

Even assuming admitting the "booking" photograph was error, it was harmless in light of the overwhelming evidence of Appellant's guilt and the cumulative nature of the photo. Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 663 S.E.2d 480, 484 (2008). The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). When overwhelming evidence of guilt has been established, any trial error may be harmless. State v. Gathers, 295 S.C. 476, 480-81, 369 S.E.2d 140, 143 (1988).

Here, the video recording, the still shot photographs from that video recording, and the six-person lineup were all admitted into evidence; therefore, the additional admission of the "booking" photo was cumulative and could not have affected the outcome of the trial. This is particularly true given the identification testimony elicited from Victim and his wife. Therefore, any error in admission of the photograph would

have been harmless. See, e.g., State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (a conviction should not be set aside because of errors not affecting the result when the defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion could be reached); State v. Livingston, 282 S.C. 1, 317 S.E.2d 129 (1984).

Based on the collective weight of this testimony and evidence, Appellant's guilt was conclusively proven. The jury could not have reached any conclusion other than a guilty verdict. Any alleged errors were insubstantial and could not have affected the ultimate result of the trial. Thus, any error in admitting the photo was harmless and Appellant's conviction should be affirmed.

III.

The trial court properly sentenced Appellant to life imprisonment without the possibility of parole under S.C. Code Ann. § 17-25-45 because he committed his prior offense at the age of seventeen and was convicted as an adult. Furthermore, even if seventeen were to be considered a juvenile contrary to South Carolina's statutory definition, the use of a prior juvenile conviction to enhance Appellant's sentence under the statute would not constitute cruel and unusual punishment.

Appellant maintains his sentence of life imprisonment without the possibility of parole constitutes cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution because the sentence was enhanced based on Appellant's prior conviction for a crime committed when he was seventeen years old. However, the trial judge properly sentenced Appellant under S.C. Code Ann. § 17-25-45 because Appellant's prior conviction for a most serious offense constituted a qualifying prior conviction for enhancement purposes under the statute. Furthermore, the enhancement of Appellant's sentence with the prior conviction did not offend modern standards of decency and did not constitute cruel and unusual punishment. Appellant's convictions and sentence should be affirmed.

A. Propriety of the Sentencing Enhancement

In criminal cases, the appellate court sits to review errors of law only. State v. Jacobs, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011). "[T]he trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-86 (Ct. App. 2001). An abuse of discretion occurs where the trial court's conclusions lack evidentiary support or are

controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010).

Generally, the trial judge has broad discretion in imposing a sentence within the statutory limits. State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974). "A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008). Appellate courts typically only interfere in a trial judge's discretionary sentencing decision in rare and unusual circumstances. State v. Ferguson, 221 S.C. 300, 307, 70 S.E.2d 355, 358 (1952).

However, under S.C. Code Ann. § 17-25-45(A), once the State seeks LWOP, the trial judge has no discretion in sentencing and must sentence a defendant to a term of imprisonment of life without the possibility of parole where the defendant was convicted of a most serious offense and has either one or more prior convictions for a most serious offense or two or more prior convictions for a serious offense. Kidnapping, first-degree burglary, armed robbery, and assault and battery with intent to kill are all classified as most serious offenses under the statute. S.C. Code Ann. § 17-25-45(C)(1) (2003 & Supp. 2012).

A "conviction" for purposes of the recidivist offender statute means any conviction, guilty plea, or plea of nolo contendere. S.C. Code Ann. § 17-25-45(C)(3) (2003 & Supp. 2012). A juvenile adjudication in family court does not qualify as a conviction for purposes of sentencing enhancement under the statute. State v. Ellis, 345 S.C. 175, 179, 547 S.E.2d 490, 492 (2001). However, where a juvenile is tried as an

adult in general sessions court, a resulting conviction or guilty plea is a conviction for enhancement purposes. State v. Standard, 351 S.C. 199, 203, 569 S.E.2d 325, 328 (2002).

Prior to being convicted of these crimes, Appellant had been convicted of an earlier most serious offense stemming from a crime he committed at the age of seventeen. His prior conviction was not a juvenile adjudication, meaning it constituted a conviction for statutory sentencing enhancement purposes. Therefore, due to the fact Appellant was convicted of a most serious offense and had a prior conviction for a most serious offense, the trial judge properly determined she was required to sentence Appellant to a term of life imprisonment without the possibility of parole. The trial judge committed no statutory error in enhancing Appellant's sentence under the clear and unambiguous requirements of S.C. Code Ann. § 17-25-45. Appellant's convictions and sentence should be affirmed.

B. Sentence Enhancement and Cruel and Unusual Punishment

The Eighth Amendment of the United States Constitution prohibits the imposition of cruel and unusual punishment. U.S. Const. amend. VIII. However, the Eighth Amendment only forbids extreme sentences that are grossly disproportionate to the crime. Harmelin v. Michigan, 501 U.S. 957, 1001 (1991). What constitutes cruel and unusual punishment is an evolving standard and involves looking at how society presently views a particular punishment. State v. Wilson, 306 S.C. 498, 509-10, 413 S.E.2d 19, 26 (1992). "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trops v. Dulles, 356 U.S. 86, 101 (1958).

The clearest and most reliable expression of society's contemporary values is derived from legislation enacted by this country's legislatures. State v. Pittman, 373 S.C. 527, 563, 647 S.E.2d 144, 162 (2007). However, a reviewing court's own judgment should also be employed by asking whether there is reason to disagree with the judgment reached by the citizenry and the legislature. Id. at 563, 647 S.E.2d at 163. In order to establish that evolving standards of decency preclude a particular punishment, the defendant bears the heavy burden of showing our culture and laws have emphatically and virtually universally rejected a particular sentencing practice. Id. at 565, 647 S.E.2d at 164. "It is not the burden of the state to establish a national consensus approving what their citizens have voted to do; rather, it is the heavy burden of the defendant to establish a national consensus against it." State v. Williams, 380 S.C. 336, 347, 669 S.E.2d 640, 646 (Ct. App. 2008).

In State v. Standard, the South Carolina Supreme Court determined the enhancement of a sentence under S.C. Code Ann. § 17-25-45 with a prior juvenile conviction did not constitute cruel and unusual punishment. 351 S.C. 199, 204, 569 S.E.2d 325, 328 (2002). "[The Court held] that an enhanced sentence based upon a prior most serious **conviction** for a crime which was committed as a juvenile does not offend evolving standards of decency so as to constitute cruel and unusual punishment." Id. at 206, 569 S.E.2d at 329. Subsequently, in State v. Williams, the Court of Appeals also found the imposition of a sentence of life without parole based on a prior juvenile conviction did not constitute cruel and unusual punishment. 380 S.C. at 348-49, 669 S.E.2d at 647. Even if Appellant were treated as a juvenile in considering his past conviction, a review of the case law in South Carolina supports using his prior conviction as an enhancement for section 17-25-45. The fact is that any juvenile can be waived up

to general sessions to be tried as an adult based on S.C. Code Ann. § 63-19-1210 (6) (2010). It would be absurd to speculate at this point whether Appellant would have been tried as a juvenile or waived up to general sessions if he had been under seventeen at the time he committed the prior crime. However, it is interesting to note that the crime for which Standard was waived up at the age of fifteen was the same crime of which Appellant was convicted at age seventeen: armed robbery.

In the present case, Appellant is categorically challenging the use of what could be treated as a juvenile conviction (though it is not, according to our state's statutory scheme) for enhancement purposes under South Carolina's recidivist offender statute. Appellant contends the recent holdings of the United States Supreme Court, including Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011 (2010), Roper v. Simmons, 543 U.S. 551 (2005), and Miller v. Alabama, 132 S. Ct. 2455 (2012), suggest a change in contemporary values and call into question the South Carolina Supreme Court's holding in Standard. Appellant maintains a prior juvenile conviction should not aggravate a subsequent offense to the same degree as a prior adult conviction because juvenile offenders are more likely to act with "recklessness, impulsivity, and needless risk-taking." Miller, 132 S. Ct. at 2464. Assuming the issue was properly preserved and that seventeen could be considered a juvenile, the State submits the use of juvenile convictions for enhancement purposes under S.C. Code Ann. § 17-25-45 still does not constitute cruel and unusual punishment.

Initially, the United States Supreme Court's holding in Graham had no impact on our Supreme Court's holding in Standard. In a sharply divided decision, the Supreme Court in Graham determined the Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit a homicide. Graham, 560

U.S. at 82. In reaching this holding, the Court concluded juveniles have lessened culpability compared to adult offenders, meaning their crimes are less morally reprehensible than those committed by adults. Id. at 68. Due to minors' potential to reform their character deficiencies, the Court found the sentencing practice to be unconstitutional because "[a] life without parole sentence improperly denies the **juvenile offender** a chance to demonstrate growth and maturity." Id. at 73 (emphasis added). However, the Court instructed: "Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." Id. at 75. The Court's reasoning here demonstrates that even juveniles are sometimes viewed as culpable enough to deserve the imposition of LWOP. Furthermore, it is critical to remember that in this case, Appellant was not a juvenile when he committed the crime for which he was sentenced to LWOP.

Importantly, while the Court in Graham found sentences of life without parole were unconstitutional for non-homicide juvenile offenders, the Court did not directly or indirectly state offenses committed by juveniles could not be used to enhance sentences for adults under recidivist offender statutes. The Court merely concluded juveniles were less culpable for their crimes while specifically noting juvenile offenders are "not absolved of responsibility for [their] actions[.]" Id. at 68. The holding in Graham is simply not applicable or relevant to the situation in Appellant's case. See United States v. Graham, 622 F.3d 445, 463 (6th Cir. 2010) (finding the imposition of a sentence of life imprisonment under a recidivist statute based upon a prior juvenile conviction was not unconstitutional because the instant offense was committed by an adult offender and not a juvenile with lessened culpability as discussed in Graham v. Florida); United States v. Scott, 610 F.3d 1009, 1018 (8th Cir. 2010) ("The Court in Graham did not call into

question the constitutionality of using prior convictions, juvenile or otherwise, to enhance the sentence of a convicted adult."); see, e.g., United States v. Wilks, 464 F.3d 1240, 1243 (11th Cir. 2006) ("Our conclusion that youthful offender convictions can qualify as predicate offenses for sentencing enhancement purposes remains valid because Roper does not deal specifically – or even tangentially – with sentence enhancement. It is one thing to prohibit capital punishment for those under the age of eighteen, but an entirely different thing to prohibit consideration of prior youthful offenses when sentencing criminals who continue their illegal activity into adulthood. Roper does not mandate that we wipe clean the records of every criminal on his or her eighteenth birthday.").

Notably, when one examines other states' recidivist statutes, Appellant's conviction in the present case would have been enhanced with his prior conviction even if he was classified as a juvenile under some of the statutes based on his age at the time of the commission of the earlier offenses. See Cal. Penal Code § 667(d)(3)(A) (stating a prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentencing enhancement under the habitual criminal statute if the offender was sixteen years of age or older at the time of the offense); Or. Rev. Stat. Ann. § 161.725(1)(3)(a) (precluding the use of a prior conviction committed by an offender less than sixteen years of age for sentencing enhancement purposes); Lee v. State, 267 Ga. App. 834, 837, 600 S.E.2d 825, 829 (Ga. Ct. App. 2004) (holding the enhancement of Lee' s sentence under Georgia' s recidivist statute was constitutional where the sentence was enhanced with a prior conviction stemming from when Lee was tried as an adult for offenses committed when he was thirteen years old).

At the time of Appellant's trial, Miller had not yet been decided. Appellant requested the trial court delay his sentencing until a decision was reached, but the trial

court declined to do so. Miller, however, did not change Standard. Appellant acknowledges the Miller court reserved ruling on whether individuals under age eighteen could ever be sentenced to LWOP. However, Appellant still argues this Court should hold the Eighth Amendment precludes mandatory LWOP sentences under the recidivist statute where the defendant was under eighteen at the time of the triggering offense. He bases his argument on the Miller court's focus on the notion that the character traits of children are "more transitory and less fixed" and that they lack maturity and responsibility. Miller, 132 S. Ct. at 2464. However, as Appellant himself points out, the Miller court refers to "children" and "at this early age," which seems unlikely to apply to a seventeen-and-a-half-year-old who is just months away from adulthood. Similarly in Eddings v. Oklahoma, 455 U.S. 104 (1983), the Court stated: "Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults." Id. at 115-56 (emphasis added) (citations and internal quotation marks omitted).

Critically, Appellant was an adult of age twenty when he committed the crimes for which he was sentenced to life without parole. Regardless of whether the age of seventeen could be considered a juvenile, that prior crime is not the focus. Appellant did not receive the life sentence for any offense he committed before reaching the age of maturity. See Gryger v. Burke, 334 U.S. 728, 732 (1948) ("The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."). Instead, he was

sentenced for the extremely serious offense he committed as an adult without any excuse of lessened or reduced culpability. At the time Appellant carefully planned and executed his most recent crime, he could no longer claim he had any diminished responsibility for his actions based on his age or maturity. Instead, he acted as a mature adult, with presumed knowledge of possible sentence enhancement when he acted. Therefore, there is no rational basis to exclude his prior conviction at age seventeen from consideration for sentencing purposes, even if seventeen could be considered a juvenile.

Appellant's enhanced sentence is entirely consistent with the rationale behind recidivist offender statutes, which is to more severely punish offenders who continue to break the law time and time again. See United States v. Rodriquez, 553 U.S. 377, 385 (2008) ("[A]n offense committed by a repeat offender is often thought to reflect greater culpability and thus to merit a greater punishment. Similarly, a second or subsequent offense is often regarded as more serious because it portends greater future danger and therefore warrants an increased sentence for purposes of deterrence and incapacitation."). Appellant's sentence was properly enhanced based on the increased culpability inherent in his status as an offender who had previously been convicted of an earlier most serious offense. Indeed, a large part of the rationale in Miller is built around the juvenile capacity for rehabilitation and reform, characteristics Appellant failed to display by becoming a recidivist.

Our courts have repeatedly found S.C. Code Ann. § 17-25-45 to be constitutional, and it is consistent with the recidivist offender statutes adopted in many other states. See State v. Rogers, 361 S.C. 178, 188, 603 S.E.2d 910, 915 (Ct. App. 2004) (finding no error in the enhancement of a sentence with a nineteen-year-old prior conviction and noting the recidivist offender statute has repeatedly withstood constitutional challenges); see also

United States v. Mays, 466 F.3d 335, 340 (5th Cir. 2006) (concluding there is no national consensus that a sentencing enhancement to life imprisonment based on a juvenile conviction violates modern standards of decency); United States v. Salahuddin, 509 F.3d 858, 864 (7th Cir. 2007) (holding the enhancement of an adult offender's sentence with a prior juvenile conviction does not constitute cruel and unusual punishment); Mullins v. State, 571 S.W.2d 852, 858 (Tenn. Crim. App. 1978) ("[I]t must be remembered that the defendant is not being punished for his prior [juvenile] crimes. Those crimes brought about his status, but his present sentence is the enhanced punishment for this 23 year old defendant's present crime."). Appellant has failed to establish a clear or universal rejection of the use of prior juvenile convictions for enhancement purposes under recidivist offender statutes. Without a clear showing to the contrary, there is no basis to determine the statutory sentencing practice is unconstitutional. See State v. Jones, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) ("When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution."). Furthermore, if Miller is extended to the circumstances surrounding Appellant's sentence, it is solely in the province of the United States Supreme Court to make that extension on Eighth Amendment grounds.

The use of prior convictions for most serious offenses, regardless of whether the offenses were committed by juvenile or adult offenders, serves the legitimate penological goals of discouraging and preventing the commission of crimes by habitual offenders. See Solem v. Helm, 463 U.S. 277, 296 (1983) ("[A] State is justified in punishing a recidivist more severely than it punishes a first offender."). Therefore, even assuming Appellant properly preserved his constitutional challenge to the enhancement of his

sentence and that seventeen could be considered a juvenile, the statutory enhancement based on that conviction was not unconstitutional. Appellant's sentence was neither cruel and unusual nor grossly disproportionate to his offense. There was no legitimate reason to ignore Appellant's prior conviction when considering his sentence for subsequent crimes. This Court should reject Appellant's argument.

In fact, a closer analysis of Miller and its predecessors supports rejecting Appellant's claims. Roper and Graham "establish[ed] that children are constitutionally different from adults for purposes of sentencing," Miller, 132 S. Ct. at 2464; however, unlike its predecessors, Miller specifically declined to impose a categorical ban on sentencing juveniles to life in prison without parole. Id. at 2459, 2469. The Miller court indicated that its ruling was procedural in nature, stating, "Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in Roper or Graham. Instead, it mandates only that a sentence follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." Id. at 2471 (emphasis added). While the Miller court commented that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon," it specifically did not "foreclose a sentencer's ability to make that judgment in homicide cases . . . ." Miller, 132 S. Ct. at 2469. Thus, the Court made clear that certain circumstances call for the harshest possible penalty. Here, our Legislature has already determined that certain circumstances require LWOP under our recidivist statute.

In contrast, the Supreme Court in Graham drew a line and distinguished between homicide and non-homicide juvenile offenders and the sentences that could be imposed in conformance with the Eighth Amendment. That distinction was reasserted in the

Miller court's refusal to impose a categorical ban regarding the sentencing of juvenile homicide offenders to life in prison without parole. The Miller court merely altered the permissible methods by which the State can exercise its continuing power to punish juvenile homicide offenders by life imprisonment without the possibility of parole. Miller only prohibits a specific sentencing method, procedure, or scheme - namely, mandatory sentencing statutes for juveniles. Miller does not create a presumption against sentences of life without parole for juveniles. Rather, in specifically rejecting Miller's alternative argument "that the Eighth Amendment requires a categorical bar on life without parole for juveniles," the Supreme Court simply noted that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon," Miller at 567, 132 S. Ct. at 2469 (emphasis added). 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 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 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. Miller holds that the exclusion of an

individual defendant's age and circumstances from the sentencing judge's consideration would violate the Eighth Amendment when imposing a sentence of life without parole. However, the logic in Miller is inapplicable here because Appellant was not a juvenile at the time of this trial and LWOP sentencing. He was twenty years old. Further, even if Appellant's age at the time of his enhancing crime—seventeen—could be construed as a minor, that sentence is not at issue in this case. Here, Appellant was sentenced to twenty years for his prior conviction, not LWOP. The only issue before this court involves the LWOP sentence Appellant received as an adult for a crime committed at the age of twenty. Thus, Miller is inapplicable.

The debate over any proposed changes to the sentencing laws based on Miller, and the changes themselves, are solely in the province of the South Carolina General Assembly. Indeed, any effort by this Court to establish particular sentencing procedures not already contemplated by existing statutes would exceed the scope of its judicial authority and invade the province of the legislature, thereby violating the doctrine of separation of powers. S.C. Const. Art 1, § 8; See also State v. Corey D., 339 S.C. 107, 120-21, 529 S.E.2d 20, 27 (2000) (citing Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (the Court does not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly)); Henderson v. Evans, 268 S.C. 127, 130, 232 S.E.2d 331, 333 (1977) ("[c]ertainly it is not the province of this Court to perform legislative functions."); State v. Byrd, 267 S.C. 87, 91-92, 226 S.E.2d 244, 246 (1976) ("We bear in mind that when a court is called upon to determine the constitutionality of a legislative enactment, it must be careful not to usurp the legislative function."); Page v. Winter, 240 S.C. 516, 518, 126 S.E.2d 570, 571 (1962) ("[I]t is the function of the legislature, not the courts, to make, amend or repeal laws. . . . We do not

have the right 'to repeal, alter, modify, or change the law of the land, even when it plainly appears that the law in force may be wrong.'" (citations omitted)); Hadden v. South Carolina Tax Comm'n, 183 S.C. 38, 190 S.E. 249, 253 (1937) ("This court is not a lawmaking body[.]"); State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999) ("We, of course, must take the statute as we find it, giving effect to the legislative intent as expressed in its language. We cannot under our power of construction supply an omission in the statute."). For all of these reasons, the Court should find Appellant's LWOP sentence does not violate the Eighth Amendment ban on cruel and unusual punishment.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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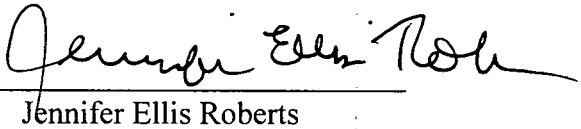
BY: 
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February 10, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2012-212739

THE STATE,

Respondent,

v.

MARVIN BOWENS GREEN,

Appellant.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

In addition to the matter designated by Appellant, Respondent proposes the following to be included in the Record on Appeal:

(1) Trial transcript pages 283-84, 286, 701.

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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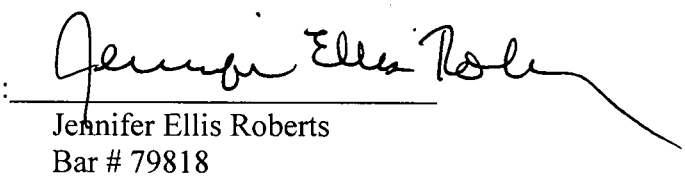
BY: 

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ATTORNEYS FOR RESPONDENT

February 10, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2012-212739

THE STATE,

Respondent,

v.

MARVIN BOWENS GREEN,

Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 10th day of February, 2014.

Angela Bennett

ANGELA BENNETT
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

February 10, 2014

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

RE: State v. Marvin Bowens Green
Appellate Case No. 2012-212739

Dear Ms. Hackett,

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Jennifer Ellis Roberts
Assistant Attorney General
Bar # 79818

JER/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original enclosed)
Victim Services