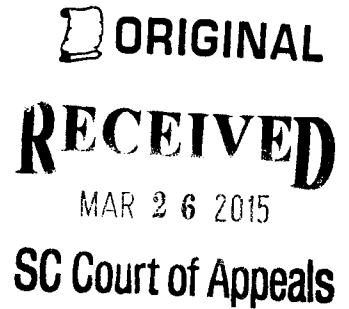


THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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 ORIGINAL  
RECEIVED  
MAR 26 2015  
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

MARVIN BOWENS GREEN,

APPELLANT

Appellate Case No. 2012-212739

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Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

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Opinion No. 5302

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PETITION FOR REHEARING

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On March 11, 2015, this Court affirmed Appellant's convictions and sentences in a published opinion. State v. Green, Op. No. 5302 (S.C. Ct. App. filed Mar. 11, 2015). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter based on the significant points overlooked and/or misapprehended by this Court as explained more fully below. Specifically, Appellant requests rehearing on each of the issues presented in his brief.

**Jury Instructions**

Appellant's first issue concerned the jury instructions regarding analysis of eyewitness identification evidence. Without question, the prosecution's case rested upon the store owner's identification of Appellant as the alleged robber. Although there was surveillance video of the

alleged robbery, the video was of very low quality and the perpetrator's facial features were obscured. However, three individuals who observed the video claimed Appellant was the alleged perpetrator shown. Despite the seemingly straightforward nature of this identification evidence, it was fraught with reliability challenges, including, but not limited to, the inherent unreliability of making an identification based upon video, communication among the witnesses regarding the identification, language barriers between the police and the store owner, cross-racial identification, weapons focus, and the use of a disguise.

One example of the reliability challenges was the language barrier between the store owner and the police and the use of the owner's minor son as a translator/interpreter. On December 29, 2010, Natubhai Patel, the store owner, met with two police officers in the parking lot of a local shopping mall for a photo line-up. R. 14, lines 5-8. Due to Natubhai's limited ability to speak, read, and understand English, Natubhai's son, Dhruval, translated the admonitions. R. 13, lines 18-20; R. 15, lines 8-22; R. 17, line 23 – R. 18, line 1. Natubhai identified Appellant's photograph from the line-up. R. 15, lines 23 – 25; R. 75, lines 1-8. Dhruval testified that he interpreted the entire admonitions sheet for his father from English to their Indian dialect. R. 33, line 2 – R. 34, line 25. On the other hand, James Perkins, the officer who administered the lineup, testified that Dhruval assisted but did not act as a translator. R. 168, lines 18 – 21. Specifically Perkins testified that Dhruval did not translate each paragraph or sentence. R. 169, lines 1 – 11.

Another example of the unreliability of the witnesses' identification was Natubhai's admission that he had spoken to his wife and son regarding the robbery, and he had watched the surveillance video from the robbery multiple times. R. 26, lines 1 – 22. Subsequently,

Natubhai's wife claimed she could identify Appellant as the alleged perpetrator. Supp. R. 1, line 16 – Supp. R. 2, line 1; Supp. R. 3, line 22 – Supp. R. 4, line 5.

Two officers, one of whom was former Detective Charles Lawrence, whose testimony was critical to this Court's opinion and is discussed more fully below, also claimed they could identify Appellant as the alleged perpetrator in the video. R. 50, lines 10 -25; R. 51, lines 1 -2; R. 51, line 24 – R. 52, line 5; R. 67, line 24 – R. 68, line 15.

In light of the prosecution's heavy reliance upon eyewitness and witness identifications, Appellant called Dr. Jennifer Beaudry, an uncontested expert in human memory and eyewitness identification, to testify regarding the reliability of eyewitness identifications and how memory works. Dr. Beaudry testified regarding several common misconceptions regarding memory including that memory acts like a video recorder and that a traumatic event improves memory. R. 208, lines 8 – 20. Additionally, Dr. Beaudry testified regarding factors that affect an individual's ability to acquire memories including the phenomenon of the weapon focus, the effect of disguises, and exposure time. R. 285, line 14 – R. 216, line 23; R. 221, line 13 – R. 224, lines 7. Dr. Beaudry testified that research indicated individuals are much better at identifying someone of the individual's own race than identifying someone of a different race. R. 220, lines 13 – 24. She further explained to the jury how memory fades in as little as two hours. R. 224, line 17 – R. 225, line 8. Memory also changes as additional information is presented after the event. R. 225, lines 9 – 24.

Appellant submitted multiple proposed jury instructions based upon the single largest issue in the case – identification. R. 290, lines 5-13; R. 291, lines 10-15; R. 388. The proposed instructions advised the jury to consider the extent to which the perpetrator's features were visible and undisguised, whether there were any distractions during the eyewitness's observation,

whether the eyewitness experienced stress or fright at the time of the observation and whether the witness's identification may have been impaired by personal motivations biases or prejudices. Additionally, the instruction allowed the jury to consider issues implicated by cross-racial identifications. The proposed instructions also provided the jury with guidance concerning how to determine whether the identification was a product of the witness's own memory. R. 388. Despite these relevant, informative, and necessary requests, the judge refused to charge the jury as Appellant sought. Instead, the judge issued her "standard identification charge." R. 290, lines 20-23; R. 330, lines 5-22.

Addressing the issue on appeal, this Court found no error in the trial court's refusal to provide the jury with the necessary instructions of how to synthesize the additional facts and factors uncovered during cross-examination of the witnesses and through the testimony of the expert witness. After finding the "standard identification charge" issued by the trial judge was "an accurate statement of the law in South Carolina," this Court held Appellant "failed to show error from the absence of his requested charges because the substance of many of his requested charges were included in the trial court's 'standard identification charge.'" Additionally, this Court "believe[d] some of [Appellant]'s requested charges would have been improper instructions into matters of fact or comments on the weight of the evidence." On this point, this Court stated that Appellant's request to charge regarding cross-racial identifications "would have been improper because it would have asked the jury to place less weight on [the store owner]'s testimony because he was of a different race than [Appellant]."

Appellant respectfully requests this Court rehear this matter to address, among other issues, the due process implications of the trial court's failure to instruct the jury as requested concerning eyewitness identifications. It is undisputed that jury instructions are important

particularly in matters of witness identifications due to the high number of wrongful convictions based upon erroneous identifications. See Perry v. New Hampshire, \_\_\_ U.S. \_\_\_, 132 S.Ct. 716, 728 (2012).

Although this Court relied heavily upon State v. Motes, 264 S.C. 317, 215 S.E.2d 190 (1975) in arriving at its conclusion, this Court failed to appreciate that the identification in Motes presented “no peculiar problem” whereas the identifications at issue here presented a multitude of peculiar problems. Further, the evidence before Appellant’s jury included expert testimony regarding identifications, which required instruction and guidance from the Bench regarding how to analyze and synthesize. Finally, South Carolina permits the introduction of expert testimony concerning eyewitness identifications. State v. Whaley, 305 S.C. 138, 142, 406 S.E.2d 369, 371-372 (1991). Permitting such evidence requires a jury instruction regarding how to use that evidence in arriving at a verdict.

Not only was the judge’s failure to give the requested instructions erroneous, but the instruction given further complicated the matter by its omission of evidence before the jury. Having standard charges benefits judges, but trial judges should not abdicate their duties of charging the jury on the law as presented by the facts to a book of general charges. Rather, trial judges must mold standard charges to fit the particular circumstances of each case. See State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989); State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000). In Appellant’s case, the jury instructions left the jury with the impression that it could only consider the factors expressly stated - whether the witness had an adequate opportunity to observe the offender at the time of the offense, which may have been 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. This left

the jury with no way to use much of the evidence revealed during cross-examination and the evidence presented through the expert.

According to this Court, “South Carolina appears to fall into the class of jurisdictions that view instructions regarding ‘a witness’s level of certainty in his or her identification in assessing the reliability of the identification’ as ‘superfluous when general instructions on witness credibility and burden of proof are given’ or ‘an impermissible judicial comment on the evidence.’” See Brodes v. State, 614 S.E.2d 766 (Ga. 2005). Appellant contends that South Carolina does not fall into this class in light of this jurisdiction’s willingness to tailor instructions to the evidence given, as demonstrated through the case law governing self-defense. Further, to the extent South Carolina does fall into this class, Appellant requests this Court move the law forward to catch up with the science. When identification is an essential issue at trial, appropriate guidelines focusing the jury’s attention on how to analyze and consider factual issues with regard to the reliability of a witness’s identification of a defendant as the perpetrator are critical.

What the instruction failed to do was inform the jury of how it should synthesize and analyze the additional facts and factors uncovered during cross-examination of the witnesses and through the testimony of Appellant’s expert. In fact, the nature of the instruction left the jury with the impression that most of the evidence produced by Appellant was not to be considered by the jury during its deliberations. This was error.

#### **Mug shot**

The South Carolina Supreme Court strongly admonished the prosecution against utilization of such photos except in the rarest of cases. State v. Traylor, 360 S.C. 74, 84, 600 S.E.2d 523, 528 (2004). Further, the Court “caution[ed] trial judges against utilization of mug

shot photos unless absolutely necessary.” Id. Appellant’s case is not one of the rarest of cases in which a mug shot should have been entered into evidence because it was not absolutely necessary to the prosecution. Id.

The introduction of a mug shot is reversible error unless the prosecutor had a demonstrable need to introduce the photograph, the photograph shown to the jury did not suggest the defendant had a criminal record, and the photograph was not introduced in such a way as to draw attention to its origin or implication. Id. (citing State v. Denson, 269 S.C. 407, 237 S.E.2d 761 (1977)). This Court held the trial court did not err in admitting Appellant’s mug shot “because the probative value of the booking photo was not substantially outweighed by the danger of unfair prejudice, and the state satisfied the three-factor test for admissibility of a mug shot.”

Despite the fact that Appellant appeared at trial and the jury could see his face – even in profile, this Court found the state “had a demonstrable need to introduce” the mug shot because it included a side-view of Appellant’s face, which “allowed the jury to compare the photo to the still photos from the surveillance video of the robbery.” This Court further found the side-view photo of mug shot was “highly probative” because “it depicted a clear shot of [Appellant]’s nose, which [former] Detective [Charles] Lawrence described as very distinctive and one of the reasons he was able to identify [Appellant] as the assailant from the surveillance video.”

This Court’s significant emphasis on the testimony of former Detective Charles Lawrence to support introduction of the mug shot, particularly the portion of the testimony regarding a “distinctive nose” was misplaced when the testimony is examined closely. During the trial, former Detective Charles Lawrence claimed that he identified Appellant as the perpetrator from the video based on Appellant having a “distinctive walk” and a “distinctive

nose.” R. 70, lines 1-5. There was no testimony from former Detective Charles Lawrence regarding what was actually distinctive about Appellant’s nose or anything to suggest that such a distinguishing characteristic could be observed only from a profile view. Noses may be distinctive for several reasons, many of which could be observed only from the front profile. For example, the width of the nose and the nostrils, which are commonly used to distinguish a person’s face, would be revealed in a front profile photograph, not a side profile.

In Appellant’s case, the mug shot was irrelevant and unnecessary to substantiate the identification of the person depicted in the video recording for several reasons. As this Court acknowledged, Appellant was present in the courtroom for identification purposes. There was no evidence indicating that Appellant’s physical appearance had changed since the date of the video recording, which was presented to the jury, or since the date the photograph contained in the line-up, which also was presented to the jury. There was no evidence Appellant’s profile was not visible to the jury to the extent his profile was important for the identification. The mug shot was cumulative to the prosecution’s evidence (e.g., the video recording, the “still” photographs taken from the video recording, and the photographic line-up). See State v. Langley, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999).

Despite the trial court’s redaction of the mug shot and Appellant not holding a placard of other information indicating an arrest, the mug shot was obviously a mug shot. The photograph showed Appellant in two profiles: facing forward and side. Without question, the general public is very familiar with mug shots showing an individual from front and side profiles. The South Carolina Supreme Court explained that a “typical” police photograph, taken when a person has been arrested, depicts the person “in two classic poses; a standing close-up facial view and a standing close-up side view.” State v. Tate, 288 S.C. 104, 105, 341 S.E.2d 380, 381 (1986).

Further, the mug shot was introduced in a way to draw attention to its origin or implication. The mug shot was introduced through former Detective Charles Lawrence, not a lay witness who could have testified as to Appellant's appearance. Former Detective Charles Lawrence and another police officer testified to their prior relationships with Appellant, which were acquired as part of their jobs in law enforcement. The other officer testified that he had "general dealings" with Appellant, including personal contact through a traffic stop. R. 50, line 23 – R. 51, line 8. Former Detective Charles Lawrence testified that he believed the person in the surveillance video was Appellant as well. Former Detective Charles Lawrence claimed he "had the opportunity to talk with [Appellant] for hours at a time while patrolling." He claimed that he had interactions with Appellant "not because he was in trouble or anything." Despite claiming that Appellant was not "in trouble" during their prior interactions, he testified that he had the opportunity to view Appellant's face, hear him talk, observe his mannerisms. In short, former Detective Charles Lawrence claimed he knew Appellant "very well." R. 68, line 10 – R. 69, line 16.

The mug shot was different from the photo used in the photographic line-up as well. Thus, the cumulative effect of the mug shot, the testimony of the officers regarding how they allegedly knew Appellant, and the difference in the photographs was that the jury knew Appellant had been arrested and/or convicted of prior crimes. The obvious nature of the mug shot as a mug shot, and its implication that Appellant had been convicted of a prior offense was reinforced by the testimony of former Detective Charles Lawrence and the other officer who indicated they knew Appellant from prior experience related to law enforcement. The jury could draw but one conclusion – Appellant had a criminal record. The mug shot combined with the omission of the mug shot's temporal origin compounded by the testimony of two police officers

concerning their prior relationships with Appellant to impart upon the jury the undeniable impression that Appellant had a prior criminal record.

### **Cruel and Unusual Punishment**

Appellant's third issue requested vacation of his sentence of life imprisonment without the possibility of parole (LWOP) based upon the Eighth Amendment's ban on cruel and unusual punishment. Specifically, Appellant argued the mandatory imposition of LWOP under the recidivist statute violated the Eighth Amendment because the triggering offense occurred when Appellant was a juvenile. In rejecting Appellant's argument, this Court relied heavily upon State v. Standard, 351 S.C. 199, 569 S.E.2d 325 (2002). Appellant respectfully requests this Court rehear this matter to reconcile Standard with subsequent controlling case law from the United States Supreme Court and the South Carolina Supreme Court.

The South Carolina Supreme Court held a LWOP sentence is not cruel and unusual if the triggering offense was committed at the time the defendant was a juvenile as long as the defendant was tried and sentenced as an adult for the triggering offense. Standard, 351 S.C. at 205, 569 S.E.2d at 329. Although Standard was a statutorily-defined juvenile at the time of the triggering offense, jurisdiction over his case was transferred from the juvenile courts to general sessions. Thus, Standard was tried and sentenced as if he were an adult concerning the triggering offense. The Court based its decision upon sentences imposed in other cases to "find lengthy sentences or sentences of life without parole imposed upon juveniles do not violate contemporary standards of decency so as to constitute cruel and unusual punishment." Id.<sup>1</sup> Using this analysis, the Court determined that "an enhanced sentence based upon a prior most serious conviction for a crime

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<sup>1</sup> Cf. State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001)(holding that a juvenile adjudication is not a conviction, guilty plea, or plea of nolo contendere, such that it may not be used to trigger the recidivist statute).

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.

Inasmuch as Eighth Amendment jurisprudence involves “evolving standards of decency” and recent decisions by the United States Supreme Court concerning juveniles and the Eighth Amendment indicate an evolution in those standards since the South Carolina Supreme Court’s decision in Standard, supra, now is an appropriate time to visit the issue presented. In fact, the Standard Court’s holding that sentences of LWOP for juveniles comport with contemporary standards of decency has been overruled by recent decisions of the United States Supreme Court. See Miller v. Alabama, \_\_\_ U.S. \_\_\_, 132 S.Ct. 2455, 2464 (2012); Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); see also Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014).

Even if the Eighth Amendment’s ban on cruel and unusual punishment does not forbid sentencing individuals to mandatory LWOP where the triggering offense occurred when the individual was under the age of eighteen, the Eighth Amendment requires courts to make individualized sentencing decisions. Therefore, the mandatory nature of LWOP pursuant to the recidivist statute where the triggering offense occurred when Appellant was only seventeen-years old violated the requirement of individualized sentencing. The Supreme Court has recognized the importance of individualized sentencing in numerous cases. For example, Justice Sotomayor discussed the longstanding tradition of individualized sentencing: “It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” Peppers v. United States, 562 U.S. 476, \_\_\_, 131 S.Ct. 1229, 1239-1240 (2011)(quoting Koon v. United States, 518

U.S. 81, 113 (1996)). The tradition is premised upon the principle that “the punishment should fit the offender and not merely the crime.” *Id.* at 1240 (quoting Williams v. New York, 337 U.S. 241, 247 (1949)). Thus, the sentence must have the “fullest information possible concerning the defendant’s life and characteristics.” *Id.* (quoting Williams, 337 U.S. at 247).

The Supreme Court has recognized the differences between adults and adolescents in sentencing considerations:

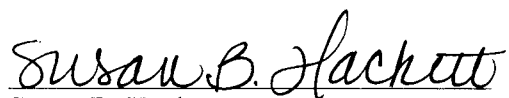
The trial judge recognized that youth must be considered a relevant mitigating factor. But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition 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.

Eddings v. Oklahoma, 455 U.S. 104, 115-116 (1982)(footnotes and internal quotations omitted).

Appellant’s sentence of LWOP, which was mandatory pursuant to the recidivist statute, violates the Eighth Amendment’s ban on cruel and unusual punishment because Appellant was under the age of eighteen at the time of the triggering offense. At a minimum, the Eighth Amendment requires the trial judge have discretion in his sentencing where the sentence necessarily involved consideration of Appellant’s prior record, which included an offense committed prior to his attaining the age of eighteen.

Appellant respectfully requests rehearing of all three issues presented in his appeal pursuant to Rule 221(a), SCACR based upon the aforementioned points misapprehended and/or overlooked by this Court in issuing its opinion.

Respectfully submitted,



Susan B. Hackett  
Appellate Defender

This 26th day of March, 2015.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Charleston County  
Kristi Lea Harrington, Circuit Court Judge  
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CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Jennifer Ellis Roberts, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Marvin Bowens Green #346650, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 26th day of March, 2015.

*Susan B. Hackett*

Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 26th day  
of March, 2015.

*Sam Rhy...* (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.