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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5302 (S.C. Ct. App. filed March 11, 2015)

11-GS-10-2338-2339

THE STATE,

RESPONDENT,

V.

MARVIN BOWENS GREEN,

PETITIONER

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Marvin Bowens Green, Appellant.

Appellate Case No. 2012-212739

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5302
Heard January 8, 2015 – Filed March 11, 2015

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Jennifer Ellis Roberts, both of Columbia; Amie L. Clifford, of the South Carolina Commission on Prosecution Coordination, of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

LOCKEMY, J.: Marvin Bowens Green was convicted of possession of a weapon during the commission of a violent crime (possession of a weapon) and armed robbery. The trial court sentenced him concurrently to five years' imprisonment for possession of a weapon and life imprisonment without the possibility of parole (LWOP) for armed robbery. Green appeals, arguing the trial court erred in (1) not

giving the jury specific instructions concerning how to analyze identification evidence; (2) allowing the State to introduce his "mug shot"; and (3) sentencing him to LWOP in violation of the Eighth Amendment's ban on cruel and unusual punishment. We affirm.

FACTS

On December 24, 2010, a man entered Natubhai Patel's (Victim's) convenience store and robbed him at gunpoint. At trial, Victim testified the man was "wearing sunglasses, a red hat, a black jacket, and khaki pants." He recognized the man as a regular customer he had known for approximately one year, who came into his store three times a week to purchase cigarettes, gas, and lottery tickets. Victim explained he and the man had a running joke about President Barack Obama's signature being on the man's identification. Victim identified Green in court as the man who robbed him. According to Victim, the police arrived at the store after the robbery and viewed surveillance video of the robbery with him. Thereafter, the trial court admitted the surveillance video without objection.

Detective Charles Lawrence investigated the robbery. He reviewed the surveillance video and recognized the perpetrator as Green. Detective Lawrence knew Green and was able to identify him as the robber because of Green's "walk, height, weight[,] and structure of his face." He explained Green had a distinctive nose that led him to identify Green as the man in the video. Detective Lawrence asserted he was 100% positive Green was the man in the surveillance video. After he identified Green as the robber, Detective Lawrence generated a six-person photo line-up and arranged to meet with Victim to see if he could identify the man who robbed him. According to Detective Lawrence, Victim identified Green as the robber in a photographic line-up. The trial court admitted the line-up photo of Green over his objection.

The State then asked to hold a bench conference outside the presence of the jury. It moved to admit a "booking photo" of Green (the booking photo) that was taken following his arrest for the robbery. The State argued the booking photo was relevant because

> [i]t shows [Green's] 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 [Rule] 404(b)[,SCRE,] but it's relevant so the jury can see him and be able to look at this and look at the [surveillance] video.

Green objected, arguing it was reversible error to admit a "booking photo" and the following colloquy occurred:

> [The State]: I don't have a problem if you want me to cut those photos, cut the top half off.
>
> [Green]: Yeah, but, I mean, it still shows it's a booking photo.
>
> The Court: Let's just mark it for identification.

Thereafter, the State moved to admit the booking photo, and Green objected under Rule 404(b). The trial court overruled the objection and admitted the photo as State's Exhibit 5, but it did not allow the State to publish the photo to the jury at that time.

SLED investigator Joseph West testified he obtained still photographs from the surveillance video of the robbery. The trial court admitted the still photos over Green's objection.

Jagruti Patel, Victim's wife, testified she recognized the man in the surveillance video as a regular customer who often came into the store to buy cigarettes, lottery tickets, and gas. She recalled him joking about President Obama signing his driver's license. Patel identified Green in court as the man in the video.

After the State rested, Green asked for clarification regarding the trial court's ruling on the booking photo. The trial court noted it admitted the photo earlier but did not allow the State to publish it to the jury. The court explained the State planned to submit a redacted, color copy of the photo that was enlarged so that it was "in conformity" with "all the other paper page sizes." Green renewed his objection to the booking photo, and the following exchange occurred:

> [Green]: And we believe we have sort of a front picture, side pictures. 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 [Green] was arrested and there was indication that he was booked, and the case that you

provided me . . . the date was around his neck on his booking photo, which was prior to the arrest that he was being tried for.[1]

[Green]: Yes, [y]our Honor. Basically, when you look at the three factors in the case we don't believe the [State] need[s] to introduce the photograph.

The Court: The reason that [the State] indicated to the [c]ourt that they needed [the booking photo] 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 . . . [Green is] 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.

[Green]: 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.

[Green]: 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?

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[1] The record does not reveal what case the trial court was referring to.

> [Green]: 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?
>
> [Green]: 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 remain as 5. The one 5-A will go back.

The trial court then admitted the redacted booking photo as State's Exhibit 5-A over Green's objection.

Thereafter, Green called Dr. Jennifer Beaudry, an assistant professor of psychology at the University of South Carolina Beaufort, to testify regarding eyewitness identification procedures and "people's perceptions of those procedures." The trial court qualified her as an expert in "human memory and eyewitness identification" without objection. Dr. Beaudry first testified regarding common misconceptions about human memory, including that memory works "like a video camera," and that a person is more likely to recall the details of a traumatic event. Dr. Beaudry testified factors that can affect a person's ability to encode information, include: the presence of a weapon, whether the perpetrator is wearing a disguise, and whether the perpetrator and witness are of the same race. She further stated that lighting, exposure time, and stress also affect a person's ability to recall information. Specifically, Dr. Beaudry explained stress and "weapon focus" reduce a witness's identification accuracy. She also stated "research shows that [people are] much better at identifying someone of [their] own race than identifying somebody of a different race" and that cross-racial identification increases the chances of a false identification.

Following Dr. Beaudry's testimony, Green submitted proposed jury instructions regarding identification.[2] "Request to Charge Number One" advised the jury to

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[2] The requested charges were based on cases from Utah and North Carolina. *See, e.g., State v. Long*, 721 P.2d 483, 492 (Utah 1986) (stating trial courts must give a "cautionary instruction" whenever eyewitness identification is a central issue in the

consider the extent to which the perpetrator's features were visible, 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, and prejudices. It instructed the jury to consider issues implicated by cross-racial identifications; specifically, that "[i]dentification by a person of a different race may be less reliable than identification by a person of the same race." This instruction also provided the jury with guidance concerning how to determine whether the identification was a product of the witness's own memory.

"Request to Charge Number 2" included instruction regarding the witness's opportunity to observe the subject of his testimony, whether the witness had something to gain by his testimony, motivation to lie, consistency of testimony, believability in light of the other evidence, and whether "there [was] anything about the way the witness testified that made the testimony more or less believable."

The trial court refused to issue Green's requested charges and stated it would charge the jury its "standard identification charge." It then gave the jury the following instruction regarding how to evaluate identifications made by witnesses:

> 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

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case and that instruction is requested by the defense); *Kimiko Toma v. Utah Power & Light Co.*, 365 P.2d 788, 792 (Utah 1961), *overruled on other grounds by Williams v. Melby*, 699 P.2d 723, 729 (Utah 1985) (providing that "[juries] are not bound to believe all that any witness may have testified to nor are they bound to believe any witness. They may believe one witness as against many or many as against one."); *State v. Black*, 239 S.E.2d 276, 278 (N.C. 1977) (reversing the trial court for failing to give a North Carolina standard charge that "'the jury should be directed to scrutinize the evidence of a paid detective and make proper allowances for the bias likely to exist in one having such an interest in the outcome of the prosecution'" (quoting *State v. Boynton*, 71 S.E. 341, 344 (N.C. 1911))).

> 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.

Following the instructions, Green renewed his requests to charge, arguing the omission of his requested charges "deprived [him of] the right to a fair trial, the Sixth Amendment right to a jury trial by his peers." Green explained the proposed charges would assist the jury's evaluation of the identifications made in the case; specifically, relate to the jury its ability to consider whether the witness was distracted and experienced "weapon focus," whether the witnesses had the requisite ability to identify a member of a different race, and allowed the jury to consider the length of time between exposure and identification and the exposure of the witnesses to opinions of other people during the interval. The trial court declined to change its charge.

The jury convicted Green of armed robbery and possession of a weapon. Green had a prior conviction for armed robbery and, before trial, the State had informed him he was facing a mandatory LWOP sentence pursuant to the recidivist statute, section 17-25-45 of the South Carolina Code (2014). Immediately before sentencing, Green argued a sentence of LWOP would violate the Eighth Amendment's ban on cruel and unusual punishment because he was a juvenile at the time of his prior conviction. He explained that although he was twenty years old at the time of sentencing, and nineteen years old at the time of the current offense, he was only seventeen years old when he committed the prior offense that

served as the triggering offense under the recidivist statute. The trial court rejected Green's argument and sentenced him to LWOP for armed robbery.

Following his trial, Green filed a motion to vacate his sentence, reasserting that his sentence *violated the* Eighth Amendment's ban of cruel and unusual punishment because he was under the age of eighteen at the time of the triggering offense. The trial court denied Green's motion to vacate, finding that because Green was seventeen years old at the time of his prior conviction, he was not a "juvenile" under subsection 63-19-20(1) of the South Carolina Code (2010). *See id.* (defining juvenile as a "person less than seventeen years of age"). In addition, the trial court found Green was not a juvenile at the time of his second armed robbery conviction; therefore, it "ha[d] no other alternative but to sentence [him] to mandatory [LWOP] pursuant to [section] 17-25-45." This appeal followed.

LAW/ANALYSIS

I. Jury Charges

Green argues the trial court erred in refusing to give his proposed jury charges related to identification. According to Green, the trial court's "standard" identification charge "failed to . . . inform the jury of how it should synthesize the additional facts and factors uncovered during cross-examination of the witnesses and through the testimony of [his] expert." We disagree.

"An appellate court will not reverse the trial [court]'s decision regarding a jury charge absent an abuse of discretion." *State v. Commander*, 396 S.C. 254, 270, 721 S.E.2d 413, 421-22 (2011) (internal quotation marks omitted). "To warrant reversal, a trial [court]'s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Id.* at 270, 721 S.E.2d at 422 (internal quotation marks omitted). "A jury charge which is substantially correct and covers the law does not require reversal." *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). "[T]he trial court is required to charge only the current and correct law of South Carolina." *Id.* (alteration in original) (internal quotation marks omitted).

In *State v. Motes*, the defendant argued the trial court erred in refusing to give a "*Telfaire*"[3] instruction, which was designed to "focus the attention of the jury on the identification issue and minimize the risk of conviction through false or

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[3] *See United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972) (fashioning a model instruction trial courts should give when identification is a crucial issue).

mistaken identification." 264 S.C. 317, 326, 215 S.E.2d 190, 194 (1975). Our supreme court found no prejudice in refusing the requested instruction because the trial court instructed the jury that it must find the testimony identified the defendant as the offender beyond a reasonable doubt. *Id.* The court also noted identification in the case presented no "peculiar problem" because two witnesses, one of whom was the defendant's wife and another who "had ample opportunity" to observe the defendant, both identified him as the perpetrator. *Id.* at 326-27, 215 S.E.2d at 194.

In the present case, the trial court did not err in refusing to issue Green's proposed charges. The trial court's "standard identification charge" was an accurate statement of the law in South Carolina. *See Brandt*, 393 S.C. at 549, 713 S.E.2d at 603 (explaining the "trial court is required to charge only the current and correct law of South Carolina"). Specifically, the trial court properly instructed the jury that it could "consider whether the witness had an adequate opportunity to observe the offender at the time of the offense," and that "[t]his 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." Although Green requested the trial court further instruct the jury in such matters as the extent to which the perpetrator's features were visible, 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, Green has 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." Further, the trial court informed the jury that the State had the burden of proving beyond a reasonable doubt that Green committed the crime; therefore, the trial court's charge "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." *Motes*, 264 S.C. at 326, 215 S.E.2d at 194.

In addition, we believe some of Green's requested charges would have been improper instructions into matters of fact or comments on the weight of the evidence. *See* S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); *State v. Jackson*, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989) (stating "a trial judge should refrain from all comment which tends to indicate to the jury his opinion on the credibility of the witnesses, the weight of the evidence, or the guilt of the accused"). Specifically, Green's request to charge the jury that "[i]dentification by a person of a different race may

be less reliable than identification by a person of the same race" would have been improper because it would have asked the jury to place less weight on Victim's testimony because he was of a different race than Green.

Finally, we note that Green's reliance on two out-of-state cases—*Brodes v. State*, 614 S.E.2d 766 (Ga. 2005) and *State v. Long*, 721 P.2d 483 (Utah 1986)—is misplaced.

In *Brodes v. State*, the trial court gave a "pattern jury instruction" on eyewitness identification that informed the jury "they may consider a witness's level of certainty in his or her identification in assessing the reliability of the identification." 614 S.E.2d at 767. The Supreme Court of Georgia noted that although Georgia has decided a jury instruction on eyewitness identification should be given when warranted by the evidence, "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." *Id.* at 771 n.6. The court concluded, "When identification is an essential issue at trial, appropriate guidelines focusing the jury's attention on how to analyze and consider the factual issues with regard to the reliability of a witness's identification of a defendant as the perpetrator are critical." *Id.* at 771.

In *State v. Long*, the Supreme Court of Utah held that "cautionary instructions" based on those suggested in *United States v. Telfaire*, should be given when eyewitness identification is a central issue in the case and the defendant requests the instruction. 721 P.2d at 492. The court, however, declined to adopt one specific instruction and decided to grant the trial court discretion in crafting the instructions. *Id.*

Our review of *Brodes* and *Long* does not convince us that the trial court's failure to give Green's requested charges was reversible error. As noted in *Brodes*, South Carolina appears to fall in 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." 614 S.E.2d at 771 n.6. Moreover, *Long*'s approval of the *Telfaire* instruction is insignificant because our supreme court has declined to find error from the failure to give a *Telfaire* charge when, as here, the trial court properly instructed the jury concerning the credibility of witness testimony and the believability of a victim's identification. *See, e.g.*, *State v. Jones*, 273 S.C. 723, 735, 259 S.E.2d 120, 126 (1979) (finding "no merit" to the appellant's argument that the trial court erred in not issuing a *Telfaire* charge when the trial court's

instruction on the credibility of the witnesses' testimony sufficiently covered the believability of the victim's identification); *State v. Jones*, 344 S.C. 48, 60, 543 S.E.2d 541, 547 (2001) (holding a *Telfaire* charge was unnecessary when the case did not involve a single witness identification). Therefore, the trial court did not err in refusing to give Green's requested identification charges.

II. Mug Shot

Green argues the trial court erred in allowing the State to introduce his "mug shot" because it was unnecessary, cumulative to the State's case, and prejudicial because it suggested he had a prior criminal record. We disagree.

"Evidence which is not relevant is not admissible." Rule 402, SCRE. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

"A trial [court]'s decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in 'exceptional circumstances.'" *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 207 (Ct. App. 2008). "A trial [court]'s balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." *Id.* at 339, 665 S.E.2d at 207. "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." *Id.*

"The introduction of a 'mug-shot' of a defendant is reversible error unless: (1) the [S]tate has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication." *State v. Traylor*, 360 S.C. 74, 84, 600 S.E.2d 523, 528 (2004) (citing *State v. Denson*, 269 S.C. 407, 412, 237 S.E.2d 761, 763-64 (1977)).

In *State v. Traylor*, the defendant argued the trial court committed reversible error in admitting "mug shots" of him into evidence. 360 S.C. at 83, 600 S.E.2d at 528. In the photos, the defendant was not shown holding a "placard" with an arrest date

and there was no indication of a law enforcement agency; however, the photos "had numerical markings on the side, indicating a height in inches." *Id.* at 77-78, 600 S.E.2d at 524-25. According to the opinion, however, "the photo of [the defendant] was clearly a mug shot, revealed by the front and side poses, and the height indicators." *Id.* at 80, 600 S.E.2d at 526. Our supreme court found the trial court erred in admitting the "mug shots" because the State did not have a demonstrable need to introduce them. *Id.* at 84, 600 S.E.2d at 528. The court rejected the State's argument that it could not prove the defendant was in the victim's home without the mug shots because the defendant's accomplice testified the defendant was at the scene of the crime, and the victims testified at trial, describing the attack and the identity of the assailants. *Id.* Our supreme court noted the State could "very easily have questioned the victims as to their observations of the white male assailant at the time of the crime, his tall thin frame and thin face, in order to support their in-court identifications without resort to the photo line-up." *Id.* Nevertheless, the court found the defendant suffered no prejudice by the admission of the mug shots because during cross-examination, a police officer testified the defendant's photo was taken after his arrest for his current charges. *Id.* at 84-85, 600 S.E.2d at 528.

In *State v. Denson*, the defendant challenged the trial court's admission of three photographs of him, arguing the photos suggested to the jury that he had a prior criminal record. 269 S.C. at 410, 237 S.E.2d at 763. Our supreme court found the State had a demonstrable need to introduce the photos because the defendant's absence from trial made an in-court identification impossible. *Id.* at 412, 237 S.E.2d at 764. Additionally, the court found the photos did not imply that the defendant had a prior criminal record because they "were not the juxtaposed full face and profile photographic display normally associated with 'mug shots,'" and although one of the photos included the words "Richland County," the jury likely assumed the picture was taken when the defendant was arrested for his current charge. *Id.* at 412-13, 237 S.E.2d at 764. The court further noted the record did not show "the admission of the photographs in any way focused the jury's attention on the source of the pictures." *Id.* at 413, 237 S.E.2d at 764. Although the jury was informed that the photos came from police files, the supreme court found this testimony "only explained the source of the photographs, it did not draw particular attention to the source or implications of the photographs." *Id.* (internal quotation marks omitted).

In *State v. Robinson*, the defendant argued the trial court erred in admitting a photo of him, "consist[ing] of three different poses: (1) a full frontal pose, (2) a profile, and (3) a frontal view of the head and shoulders" with all written material on the

photograph "blackened out." 274 S.C. 198, 200, 262 S.E.2d 729, 730 (1980). There, the victim was the sole eyewitness to a murder, and after the shooting, she identified the defendant's photo as that of the assailant; however, at a subsequent police line-up, she identified another individual as the assailant. *Id.* at 199, 262 S.E.2d at 730. After the defense cross-examined the victim about her failure to identify the defendant at the police line-up, the State introduced the photo of the defendant. *Id.* at 199-200, 262 S.E.2d at 730. On appeal, our supreme court found the State had a demonstrable need to introduce the photo because the defendant emphasized the victim's failure to identify the defendant at the police line-up and her description of the assailant after the shooting; therefore, the photo was needed to show the jury that the photographic identification was valid and reliable. *Id.* at 200-01, 262 S.E.2d at 730. Additionally, the court found nothing on the face of the photo indicated that the defendant had a prior criminal record, and the jury could have easily inferred that the photo was taken when the defendant was arrested for the current charge. *Id.* at 201, 262 S.E.2d at 730.

Here, the trial court did not err in admitting the booking photo 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 the admissibility of a mug shot under *State v. Denson*. *See* Rule 403; *Traylor*, 360 S.C. at 84, 600 S.E.2d at 528 (stating "[t]he introduction of a 'mug-shot' of a defendant is reversible error unless: (1) the [S]tate has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication." (citing *Denson*, 269 S.C. 407, 237 S.E.2d 761)).

First, the State had a demonstrable need to introduce the booking photo. The photo included a side-view of Green's face, which the State needed to show the jury because it allowed the jury to compare the photo to the still photos from the surveillance video of the robbery, which also showed the side of the assailant's face. Although Green appeared at trial and the jury presumably could see his face, admitting the booking photo into evidence allowed the jury to compare the booking photo to the photos of the robbery during its deliberations. In addition, the side-view photo of Green's face was highly probative because it depicted a clear shot of Green's nose, which Detective Lawrence described as very distinctive and one of the reasons he was able to identify Green as the assailant from the surveillance video. Thus, the booking photo was also important for witness credibility because it allowed the jury to assess Detective Lawrence's identification of Green as the man in the surveillance video. The probative value of the booking

photo was further enhanced because Green challenged the reliability of Victim's identification; therefore, it became crucial for the jury to assess Victim's and Detective Lawrence's identification of Green. *See State v. Stephens*, 398 S.C. 314, 321, 728 S.E.2d 68, 72 (Ct. App. 2012) (finding the probative value of a mug shot of the defendant increased when the defendant challenged the reliability of the victim's identification). Accordingly, the State had a demonstrable need to introduce the booking photo.

Next, the booking photo did not "suggest [Green] has a criminal record." *Traylor*, 360 S.C. at 84, 600 S.E.2d at 528. The trial court redacted the booking photo, removing any identifying marks that indicated the photo was taken as a result of an arrest. Green is wearing street clothes and is not holding a placard or other information indicating an arrest. *See State v. Ford*, 334 S.C. 444, 450 n.3, 513 S.E.2d 385, 388 n.3 (Ct. App. 1999) (finding "mug shots" that depicted "[o]nly the heads and necks of the individuals in the lineup" with "no identifying clothing or placards" did not suggest the defendant had a prior criminal record). Although the booking photo includes the side-view profile picture of Green, which is a feature commonly associated with police mug shots, this factor alone is insufficient to suggest he had a prior criminal record because the jury knew Green was arrested for the current armed robbery and likely assumed the picture was taken following his arrest. *See Robinson*, 274 S.C. at 200-01, 262 S.E.2d at 730 (finding a photo of the defendant did not suggest he had a criminal record when there was nothing on the face of the photo that would indicate that the defendant had a prior criminal record, and the jury could have inferred that the photograph was the result of the current investigation). Therefore, the booking photo did not suggest Green had a criminal record.

Further, the booking photo was not "introduced in such a way as to draw attention to its origin or implication." *Traylor*, 360 S.C. at 84, 600 S.E.2d at 528. The trial court enlarged the photo so that it was "in conformity with all the other paper page sizes" admitted into evidence, and it also cut the "top and bottom off" of the photo to remove any reference to the law enforcement agency. Importantly, the court admitted the photo during Detective Lawrence's testimony that the booking photo was a fair and accurate description of Green when he was arrested for the current armed robbery; therefore, the manner the photo was introduced implied that the booking photo was taken following Green's current arrest. Thus, this factor weighs in favor of the admissibility of the booking photo.

Finally, we note that Green suffered little prejudice, if any, from the admission of the booking photo because it did not suggest he had committed prior bad acts. *See Traylor*, 360 S.C. at 84 n.12, 600 S.E.2d at 528 n.12 (explaining the reason the

admission of a mug shot is reversible error unless the State satisfies the *Denson* test is that "such photos are prejudicial because they imply a defendant's prior bad acts"). As previously stated, there was nothing on the face of the booking photo or the manner in which it was introduced that suggested Green had a prior criminal record. In addition, the booking photo was cumulative to other evidence admitted at trial because the trial court admitted the line-up photo of Green that was shown to Victim, and Green has not challenged that ruling on appeal. Accordingly, the trial court did not err in admitting the booking photo because the probative value of the booking photo was not substantially outweighed by the danger of unfair prejudice, and the State satisfied the *Denson* test.

III. LWOP SENTENCE

Green argues his "sentence of LWOP, which was mandatory pursuant to the recidivist statute, violates the Eighth Amendment's ban on cruel and unusual punishment because [he] was under the age of eighteen at the time of the triggering offense." We disagree.

A. Propriety of Sentencing Enhancement

Subsection 17-25-45(A)(1)(a) of the South Carolina Code (2014) provides that, "[E]xcept in cases in which the death penalty is imposed, upon a conviction for a most serious offense[,] . . . a person must be sentenced to a term of imprisonment for [LWOP] if that person has . . . one or more prior convictions for . . . a most serious offense." Armed robbery is defined as a "most serious offense." S.C. Code Ann. § 17-25-45(C)(1) (2014).

Under the recidivist statute, a conviction "means any conviction, guilty plea, or plea of nolo contendere." S.C. Code Ann. § 17-25-45(C)(3) (2014). In *State v. Ellis*, our supreme court held a juvenile adjudication is not a conviction under the mandatory LWOP provisions of the recidivist statute. 345 S.C. 175, 179, 547 S.E.2d 490, 492 (2001). In *State v. Standard*, the supreme court distinguished *Ellis* and held that when a juvenile is tried and adjudicated as an adult, such that his guilty plea to armed robbery is in general sessions court, the guilty plea is a conviction for purposes of the recidivist statute. 351 S.C. 199, 203, 569 S.E.2d 325, 328 (2002).

The trial court did not err in sentencing Green to LWOP for armed robbery under the recidivist statute. At the time of sentencing for his current armed robbery conviction, Green had a prior conviction for armed robbery. Although Green was seventeen years old when he committed the prior armed robbery, he was tried and

convicted of that offense as an adult in general sessions court. Based on *Standard*, because Green was tried and adjudicated as an adult, his prior armed robbery conviction is a "conviction" for purposes of section 17-25-45. Moreover, armed robbery is a "most serious offense" under subsection 17-25-45(C)(1). Because Green had a prior conviction for a "most serious offense," the trial court was required to sentence him to LWOP once Green was convicted of the current armed robbery. *See* § 17-25-45(C)(1) (stating a person convicted of a "most serious offense" "*must* be sentenced to [LWOP] if that person has . . . one or more prior convictions for . . . a most serious offense" (emphasis added)). Thus, the trial court did not err in sentencing Green to LWOP for armed robbery under section 17-25-45.

B. Sentence Enhancement as Cruel and Unusual Punishment

We next address whether Green's sentence, though proper under the recidivist statute, nevertheless violated the Eighth Amendment's ban on cruel and unusual punishment.

"The Eighth Amendment only prohibits sentences which are grossly out of proportion to the severity of the crime." *Curtis v. State*, 345 S.C. 557, 575, 549 S.E.2d 591, 600 (2001).

In *Standard*, our supreme court held it is not cruel and unusual punishment to sentence a defendant to LWOP utilizing enhanced penalties for a burglary committed when the defendant was a juvenile so long as the defendant was tried and sentenced as an adult for the triggering offense. 351 S.C. at 204, 569 S.E.2d at 328. The court stated 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 (emphasis omitted). Likewise, in *State v. Williams*, this court held that a LWOP sentence under the recidivist statute for distribution of cocaine was not cruel and unusual punishment, although the defendant's prior conviction was for an offense committed when he was a juvenile because the sentence was not inconsistent with evolving standards of contemporary values, and was not grossly disproportionate to the committed offense. 380 S.C. 336, 345-46, 669 S.E.2d 640, 645 (Ct. App. 2008).

We find Green's sentence of LWOP for armed robbery does not constitute cruel and unusual punishment. Initially, we note that although Green was seventeen years old when he committed the offense that led to his prior conviction, he is considered a "juvenile" at the time of the prior offense for purposes of our analysis.

See Aiken v. Byars, 410 S.C. 534, 537 n.1, 765 S.E.2d 572, 573 n.1 (2014) (recognizing "*Miller*[4] extends to defendants under eighteen years of age and therefore for the purposes of this opinion we consider juveniles to be individuals under eighteen"). Thus, the trial court erred in finding Green was not a juvenile at the time of his prior conviction. Nevertheless, the trial court did not err in finding Green's sentence did not constitute cruel and unusual punishment because our appellate courts have rejected the argument that it is cruel and unusual punishment to use prior convictions for offenses committed as juveniles for sentencing enhancement under section 17-25-45. *See Standard*, 351 S.C. at 204, 569 S.E.2d at 328; *Williams*, 380 S.C. at 345-46, 669 S.E.2d at 645. We note that this case is somewhat different from *Standard* because there the defendant had finished serving the sentence for his first offense prior to committing the second offense that led to his LWOP sentence. 351 S.C. at 201, 569 S.E.2d at 326-27. Here, however, Green had not yet served his first sentence for armed robbery prior to committing the second armed robbery that led to his LWOP sentence. This is an important consideration because one theory of the recidivist statute is to punish "persons who continue to commit criminal, antisocial behavior *after incarceration* for an earlier offense." *State v. Benjamin*, 353 S.C. 441, 446, 579 S.E.2d 289, 291 (2003) (Waller, J., dissenting) (emphasis added). Nevertheless, our supreme court has never held that a defendant must finish serving his first sentence before he may be sentenced to LWOP under the recidivist statute based on a subsequent conviction for a most serious offense.

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

C. Discretion

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[4] *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (holding "mandatory [LWOP] sentences for juveniles violate the Eighth Amendment").

Green next argues that even if the Eighth Amendment's ban on cruel and unusual punishment does not forbid sentencing defendants to mandatory LWOP when the triggering offense occurred when the defendant was under eighteen years old, the Eighth Amendment requires trial courts to make individualized sentencing decisions. We disagree. Green's sentence was within the limits provided for by statute and the record does not reveal his sentence was the result of prejudice, oppression, or corrupt motive by the trial court. Therefore, we have no authority to review Green's sentence. *See State v. Franklin*, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) (stating "[an appellate court] has no jurisdiction to review a sentence, provided it is within the limits provided by statute for the discretion of the trial court, and is not the result of prejudice, oppression or corrupt motive").

CONCLUSION

Based on the foregoing, the trial court is

AFFIRMED.

FEW, C.J., and THOMAS, J., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

MARVIN BOWENS GREEN,

APPELLANT

Appellate Case No. 2012-212739

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5302

PETITION FOR REHEARING

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 Dhurval 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.[1] Using this analysis, the Court determined that "an enhanced sentenced based upon a prior most serious conviction for a crime

[1] 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

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

THE STATE,

RESPONDENT,

V.

MARVIN BOWENS GREEN,

APPELLANT

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.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

The South Carolina Court of Appeals

The State, Respondent,

v.

Marvin Bowens Green, Appellant.

Appellate Case No. 2012-212739

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

John Cannon Jr. C.J.

Paula H. Thomas J.

James E. Lockemy J.

Columbia, South Carolina

cc:
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April 21, 2015

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The Honorable Kristi Lea Harrington

20958

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARVIN BOWENS GREEN,

APPELLANT

APPELLATE CASE NO. 2012-212739

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State of South Carolina	)	In the Court of Common Pleas
County of Charleston	)	Ninth Judicial Circuit
State of South Carolina	)	Transcript of Record
V.	)	2011-GS-10-2338 & 2339
Marvin Bowens Green,	)	* Volume I *
Defendant.	)	

June 11 & 12, 2012

Charleston, South Carolina

B E F O R E:

The Honorable Kristi L. Harrington, Judge; and a Jury.

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

D. Bruce Durant, Chief Deputy Solicitor

Rutledge Durant, Assistant Solicitor

Attorneys for the State

Andrew Grimes, Assistant Public Defender

Cody Groeber, Assistant Public Defender

Attorneys for the Defendant

SHARON L. VIZER

CIRCUIT COURT REPORTER

That's not in case. This case is a who done it, and you're going to be asked to determine if who done it is Marvin Green.

There's no doubt that Mr. Patel, who is sitting in the courtroom over here, was robbed on December 24th, 2010. There's no doubt that a young black man came in, pointed a gun at him, pointed at him for more than a minute. The gun was cocked. It looked like a real gun.

That young black man had a hat on that covered his hair and his hairline. He had sunglasses on that covered his eyes, and he had a hoodie on that covered his ears. Mr. Patel was scared, and no one would blame him. He was looking down the barrel of a gun and his heart was racing.

Finally, the young man left and Mr. Patel, as Mr. Durant told you, has video cameras in his store, and he watched those video cameras and he gave it to the police. And we're here today because Mr. Patel, and the police officers, and the solicitor's office all think that the person on that video is Marvin Green. There's only one problem, Marvin Green says it's not.

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 case is to parade in front of you witnesses who will testify about what they believe, who they believe it

was on the video, and Mr. Patel will say he believes that it was him from his experience. But you will have no hard evidence to corroborate that.

They will have witnesses that will testify that he resembled the person on the video but they have no evidence that proves an identity of the person on the video. They will have no fingerprints, they will have no DNA. They will not have the gun that was used in the robbery. They will not have the clothes that were worn when the crime was committed. They will not have the hat, they will not have the hoodie, they will not have the sunglasses, and you'll find out the reason why, because they believed they knew who was on the video. They didn't want to do any more evidence -- any more search for evidence.

What they have are two faces, one on a video and one on my client. But you will hear expert testimony in this case by Dr. Jennifer Beaudry. She is a professor of psychology at the University of South Carolina in Beaufort. Dr. Beaudry's specialty is the study of human memory and of eyewitness identifications and how the two interact. She's a scientist. And what she will do is educate you about what science says about how her memory works, and especially how it works in the context of eyewitness identifications.

Mr. Patel will testify he's sure that it's Marvin Green, and Dr. Beaudry will give you the ability to understand what science says about confidence.

She'll also tell you how we can transfer familiar faces from one memory to the next. And she'll educate you about lineup procedures and the best practices that the police should use when they do them.

Now, she will not testify about her opinion on a certain witness's memory in this case. That is not her role. That is your role, to evaluate the witnesses, to evaluate their memories, to evaluate the factors that would affect their memories, and she will tell you what you need to be looking out for in evaluating those memories.

At the end of the day we're confident that after you hear all the evidence that you will find Marvin Green not guilty. Thank you.

THE COURT: Call your first witness.

MR. RUTLEDGE DURANT: Thank you, Your Honor. May it please the Court. The State calls Natubhai Patel.

(WHEREUPON, the interpreter, Vasandika Isadas, was duly sworn.)

THE CLERK: Please state your full name.

THE INTERPRETER: Vasandika Isadas.

NATUBHAI PATEL, after having been duly

sworn, testified as follows:

THE CLERK: Please state your full name and spell your name.

THE WITNESS: Natubhai Patel. Spelling, P-a-t-e-l.

THE CLERK: Please have a seat.

DIRECT EXAMINATION

BY MR. RUTLEDGE DURANT:

(Through the interpreter.)

Q. Mr. Patel, good afternoon.

A. Good afternoon.

Q. Will you please tell the jury how old you are.

A. Fifty-two years.

Q. Do you live in Charleston?

A. Yes, I live in Charleston.

Q. Where were you born?

A. India.

Q. When did you come to the United States?

A. October 11th, 2003.

Q. Why?

A. I came here to work and for my family.

Q. Are you married?

A. Yes, I'm married.

Q. Who is your wife?

A. Jagruti Patel.

Q. How long have you been married?

A. Seventeen years.
Q. Do you have any children?
A. Yes, I have children.
Q. How many?
A. Two.
Q. How old are they?
A. The older one is 14.
Q. What about the younger one?
A. The younger one is six.
Q. What do you do for a living?
A. I work behind a register at my store.
Q. What is the name of your store?
A. 5737 Savannah Highway, Ravenel town.
Q. Is it called the Quick Stop?
A. Quick Stop convenience store and gas station.
Q. And you manage the store?
A. I own the store.
Q. How many employees do you have?
A. Just me and my wife.
Q. And where is your wife right now?
A. She's at the store working.
Q. So both of you cannot be here at the same time?
A. No, we cannot.
Q. Because somebody needs to be at the store?
A. No.

THE INTERPRETER: I don't think he understood your question.

Q. Are you and your wife the only people who work at your store?

A. Yes, me and my wife.

Q. And if neither of you are at the store the store cannot be open; is that right?

A. Yes. If both of us are not there we have to close the store.

Q. Do you recall the morning of December 24th, 2010?

A. Yes. A man had entered with a gun.

Q. Was that at approximately 7:45 that morning?

A. Yes, 7:45 in the morning.

Q. What time did you open the store that morning?

A. I open my store Monday through Friday 6:30 in the morning.

Q. If you would, please describe to the jury what the man with the gun was wearing.

A. He was wearing sunglasses, a red hat, a black jacket, and khaki pants.

Q. Were you able to see the man's face?

A. Yes. I saw his complete face. There was only sunglasses there but the rest of the face was open.

Q. Had you ever seen that man before?

A. Yes. I know him since the past one year.

Q. And how do you know him for the past one year?
A. He used to come to my store to buy cigarettes, gas, and lottery tickets.
Q. How often would he come to your store?
A. He would come at least three times a week.
Q. Did you ever speak with the man?
A. We always spoke and he would joke around about an ID with President Obama's signature on it.
Q. Do you see the man who came into your store with the gun on December 24th, 2010, in the courtroom today?
MR. GROEBER: Objection, Your Honor.
THE COURT: Basis?
MR. GROEBER: Previously made.
THE COURT: Overruled. You may answer.
A. (Indicated). He's the one in the white.
Q. This man sitting over here (indicated)?
A. The one who's sitting by his lawyer.
Q. The man in the middle?
A. The man in the middle, yes.
Q. Are you certain that that's the man who had come to your store for approximately a year before this incident?
A. I'm a hundred percent sure.
Q. Are you certain that he is the man who came into your store and robbed you at gunpoint?
A. I'm completely certain.

MR. RUTLEDGE DURANT: Let the record reflect that the victim has identified the defendant.

THE COURT: It will.

Note your objection.

BY MR. RUTLEDGE DURANT:

(Through the interpreter.)

Q. What did the man do when he came into your store with a gun that morning?

A. He walked in and asked me to give the cash. I gave him $60. He asked me to give him my wallet. There was no money in the wallet, and then he asked for cigarettes. And before leaving he said, Don't call the police.

Q. And did he take money from you?

A. Yes, $60, he took from me.

Q. And did he take the cigarettes from you?

A. Yes, Newport cigarettes.

Q. What did you do when the man left?

A. I called the police right after he left.

Q. Did the police respond to your store?

A. The police responded to my call and they stayed at my store for two hours. I had closed the store at that time. We were checking the video.

Q. Is your store equipped with a video surveillance system?

A. Yes, it is.

Q. Was your video surveillance system able to capture the robbery on video?

A. Yes. It captured everything. He was standing by my register for a minute and a half.

(WHEREUPON, State's Exhibit Number 1, a Surveillance Video of the Robbery, was marked for identification only.)

BY MR. RUTLEDGE DURANT:

(Through the interpreter.)

Q. Mr. Patel, I'm showing you what the State has labeled State's Exhibit 1 for identification.

A. Yes. Okay.

Q. I ask you to take a look at it and let me know if you recognize it.

A. Yes, he will tell you.

That is my signature. That is my son's signature.

Q. And have you had an opportunity to view this disc?

A. Yes. Yes, I have seen it.

Q. And what does it depict?

A. It has the robbery on it, how the man came and how I gave him money. I've seen that.

Q. Does this disc fairly and accurately depict the robbery as it occurred in your store on December 24th, 2010?

A. Yes, very clearly.

MR. RUTLEDGE DURANT: Your Honor, at this time the State moves for the admission of State's 1.

THE COURT: Any objection?

MR. GROEBER: No, Your Honor.

THE COURT: State's 1 into evidence without objection.

(WHEREUPON, State's Exhibit Number 1, a Surveillance Video of the Robbery, was admitted into evidence.)

MR. RUTLEDGE DURANT: Your Honor, may we approach?

THE COURT: You may.

(WHEREUPON, the following bench conference was reported.)

MR. RUTLEDGE DURANT: I'd like just a second to set up the TV to play it for the jury.

THE COURT: All right.

(WHEREUPON, the bench conference was concluded.)

(PAUSE.)

MR. RUTLEDGE DURANT: Your Honor, if the witness could step down to explain what's on the video.

(The witness stepped down from the witness stand.)

THE COURT: Mr. Patel, you're going to have you speak very loudly because you're away from the microphone.

THE INTERPRETER: Yes, ma'am.

MR. RUTLEDGE DURANT: On second thought, maybe the witness should take the stand while we play the video.

(The witness returned to the witness stand.)

MR. RUTLEDGE DURANT: And, Your Honor, at this time the State requests to publish State's 1.

THE COURT: You have permission to publish State's 1.

MR. RUTLEDGE DURANT: Thank you.

(WHEREUPON, State's Exhibit Number 1, a Surveillance Video of the Robbery, was played for the jury.)

BY MR. RUTLEDGE DURANT:

(Through the interpreter)

Q. Mr. Patel, did you recognize the man with the gun as a regular customer in your store?

A. Yes. I completely recognized him as a regular customer.

Q. Did you know the man's name?

A. I never asked him his name, ever. He would always joke around with me.

Q. Did you tell the responding officers that you recognized him as a customer?

A. Yes, I did.

Q. After the robbery who did you call?

A. I called the police.

Q. Did you call anybody else?
A. Yes. I called my wife and my son.
Q. Which son?
A. Dhruval Patel.
Q. How old was Dhruval at the time?
A. He was 12 at that time.
Q. Who was the person in the store who knew how to operate the video surveillance system?
A. My son.
Q. Dhruval was the person who operated it?
A. Dhruval Patel, yes.
Q. Is that why you wanted Dhruval to come to the store?
A. Yes. That's why I had called my wife to bring my son with her when she came.
Q. And how long was the store closed that morning?
A. Around two hours.
Q. After you met with the police that day, December 24th, 2010, did you meet with them again on a later date?
A. December 29th, two cops came.
Q. You met with two police officers on December 29th?
MR. GROEBER: Objection.
THE COURT: Hold on one second. What's your objection?
MR. GROEBER: Prior. Previously raised.

THE COURT: Overruled. You may answer.

Mr. Durant, you may need to repeat your question.

BY MR. RUTLEDGE DURANT:

(Through the interpreter.)

Q. Did you meet with two police officers on December 29th 2010?

A. Yes. I met with two police officers on December 29th 2010, at Citadel Mall outside of Sears parking lot.

Q. Who were you with?

A. With my son.

Q. And do you know what the purpose in meeting with those officers was?

A. The officers had called my wife, and she called me to let me know that two officers were coming to meet me at the Citadel Mall outside in the parking lot.

(WHEREUPON, State's Exhibit Numbers 2 and 3, previously Court's Exhibit Numbers 5 and 6, were marked for identification only.)

Q. Mr. Patel, I'm showing you what the State has labeled State's Exhibit 2 for identification. I ask that you take a look at it.

A. Yes. I will look at it.

Q. And let me know if you recognize it.

A. I will see.

This is my signature.

Q. Do you recognize that document?
A. Yes, I do recognize.
Q. Where have you seen it before?
A. When I had seen it --
THE INTERPRETER: I'm sorry.
A. -- I had seen it outside of the parking lot at the Citadel Mall.
Q. Who presented this document to you?
A. Two police officers give it to me. My son read it, explained it to me and then I signed.
Q. Do your initials appear on this document?
A. Yes, they are mine.
Q. Are you able to read English well?
A. I don't read it well. That's why my son had to read it and explain it to me.
Q. This is obvious, but does your son read English well?
A. Yes, my son reads English.
Q. And was he able to help you understand what this document said?
A. Yes. I only signed after he clearly explained what is written in this document.
Q. And what happened after you went over this document with the police officer?
A. They showed me some pictures and I circled one.

Q. Mr. Patel, I'm showing you what the State has labeled State's Exhibit 3 for identification. I ask that you take a look at it.

A. I will see.

Q. And please let me know if you recognize it.

A. I will tell you.

Q. Do you recognize State's 3?

A. Yes, I recognize it.

Q. How do you recognize it?

A. I've seen this man at my store. I don't know anybody else.

Q. Were these the pictures that were presented to you by the officers?

A. Yes. This was the same thing and I signed it, too.

Q. Why did you circle the photograph that you circled?

A. Because he's my regular customer. I know for a fact. I am a hundred percent sure that that was the same man.

Q. Is that the same man that robbed you at the store on December 24th?

A. Yes, he's that same man.

Q. Are you positive?

A. I'm a hundred percent positive.

Q. Is there any doubt in your mind?

A. There is no doubt in my mind, and that was the only

one I saw.

Q. Did the police do anything -- did the police tell you to circle this picture?

A. The police didn't ask me to circle anything. They just gave me the paper and immediately I circled around that picture.

Q. Did the police do anything to influence you to circle anyone's picture?

A. The police officer did not say anything to me. He just handed me the sheet and as soon as I saw I circled it.

Q. How many officers actually went over the form and showed you the pictures?

A. Two had come.

Q. You met two police officers there that day; is that correct?

A. Yes, I met two.

Q. Did both of those officers administer this photographic identification procedure with you?

A. They were not together when they went over the document and the pictures with me.

Q. So was it just one person who did this with you?

A. The police officer explained it to me but I did not understand so my son helped me, and then as soon as I saw the picture I circled it. He did not say anything else

to me.

Q. After you circled the man's photograph did the police tell you that you had done a good job?

A. They did not say anything. After I was done I left to go to my store.

Q. Did the police tell you that you had picked the right guy?

A. They did not say anything to me. After the work was done I went to go -- I left to go to my store.

Q. How quickly were you able to identify the defendant when the photos were shown to you?

A. Within a half second. As soon as I saw it I recognized the face and I circled it.

MR. RUTLEDGE DURANT: Your Honor, permission to publish to the jury?

THE COURT: You may.

MR. GROEBER: Your Honor, I don't believe they've been admitted.

THE COURT: Oh, that's correct.

Mr. Durant, you need to admit them.

MR. RUTLEDGE DURANT: State moves for the admission of State's 2 and 3.

MR. GROEBER: Objection previously raised.

THE COURT: Let me see 2. Counsel, approach and bring 3.

(WHEREUPON, the following bench conference was reported.)

THE COURT: You object and don't think it's admissive. I need to know what the reason for your objection is. Are you admitting -- are you objecting to the foundation of this?

MR. GROEBER: No. I think the foundation has been laid.

THE COURT: Just as to the use and to how we got to the production of the lineup, correct?

MR. GROEBER: Yes. I mean, it's part of the lineup and it's part of the procedures.

THE COURT: Are you going to have the SLED guy?

MR. RUTLEDGE DURANT: I mean, we can but I don't think it's necessary to say who assembled the photographic lineup.

THE COURT: You're not challenging the lineup itself. You're challenging how he got there, right? I just want to make -- we need to put that on the record because I think if you're challenging the preparation of the lineup I may not have done it. All right.

(WHEREUPON, the bench conference was concluded.)

THE COURT: Two and 3 admitted over your objection. I'm going to allow you outside the presence of the jury to articulate your objection on the record, Mr. Groeber.

(WHEREUPON, State's Exhibit Numbers 2 and 3 were admitted into evidence.)

MR. RUTLEDGE DURANT: Thank you, Your Honor.

THE COURT: Mr. Durant, Mr. Groeber, just for scheduling.

(WHEREUPON, a bench conference was had, not on the record.)

BY MR. RUTLEDGE DURANT:

Q. Mr. Patel, how close were you to the gunman during the robbery?

A. Around two feet (indicated). He was very close to the register and I was standing behind the counter.

Q. Is it well lit inside your store?

A. Yes, it is well lit.

Q. What did the defendant say to you during the robbery?

MR. GROEBER: Objection, Your Honor. Assuming facts not in evidence.

THE COURT: I'm going to allow it. Thank you. Overruled.

A. He asked for money, then asked for my wallet, and asked for cigarettes, then said, Don't call the police, and then left.

Q. Were you able to recognize his voice?

A. Yes. I could completely recognize his voice. He

is a regular customer.

Q. Were you able to get a clear look at his face?

A. Yes. I could clearly see his face even if he was wearing sunglasses. I'm used to it. So many customers wear sunglasses in my store all the time.

Q. And were you able to get a look at his face even though he had a gun pointed at you for a minute and a half?

A. Yes. I could clearly see his face. He was standing very close to me and he was asking me to give him the money quickly.

Q. What percentage of your customers would you say are African Americans?

A. Eighty percent African Americans, 20 percent white people, and 2 or 3 percent Mexicans.

Q. So do you interact with African American people on a daily basis?

A. Yeah. The African Americans provide me with my business. There is a lot of African American customers I deal with every day.

Q. And again, are you positive that this is the man who robbed you?

MR. GROEBER: Objection, Your Honor. Asked and answered.

THE COURT: Sustained.

BY MR. RUTLEDGE DURANT:

Q. Do you have any problem recognizing your normal African American customers?

A. If it's the dead of the night and very dark and there are no lights then I may have a problem recognizing my African American customers but otherwise I don't.

Q. And is that because you are not able to see them well?

A. I can't see in the dark.

Q. So you would have the same problem recognizing an Indian customer?

A. If I see Indian people I recognize them instantly because of the hair and the way they have a mark on their forehead.

Q. And how about Caucasian people? Are you able to recognize your Caucasian customers?

MR. GROEBER: Objection, Your Honor, leading.

THE COURT: Overruled. You may answer.

A. Yes, I can recognize them.

Q. Do you know whether or not your store is located in Charleston County?

A. Yes, it is in Charleston County.

Q. Thank you, sir. Please answer any questions the defense may have.

A. Yes, I will.

Mr. Groeber, your witness.

MR. GROEBER: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. GROEBER:

(Through the interpreter.)

Q. Good afternoon, Mr. Patel.

A. Good afternoon.

Q. I will try to ask my questions so that you can give a yes or no answer for simplicity sake.

A. Does that mean you will only ask me questions that I don't need to explain?

Q. If you need to explain you will be allowed to.

A. Okay.

Q. But I will try to keep it simple.

A. All right.

Q. Mr. Patel, you opened the store that morning at 6:30?

A. Monday through Friday I open at 6:30.

Q. And around 7:45 a young black man came in the store?

A. Yes, with a gun.

Q. And he pointed that gun at you?

A. Yes, he pointed it at me.

Q. And you were scared?

A. Everybody will get scared when there is a gun.

Q. And you were very scared?
A. Yes. I was scared but I was standing right there and I gave him the money.
Q. The robber was wearing a hat?
A. Yes.
Q. And it covered his hair?
A. It was a small hat so I could see the hair, not a big hat. It stopped right here (indicated).
Q. You were not able to see his hairline in the front because of the hat?
A. I could see his face. The cap was pushed slightly back.
Q. He was wearing a black jacket?
A. Yes.
Q. And the jacket had a hood on it?
A. A gun was pointed at me for one and a half minutes. I don't remember the details about how the hood was, where it was. I just remember the color of the jacket and that he had worn a red hat.
Q. You could not see the robber's ears?
A. I could see his ears.
Q. The robber was wearing sunglasses?
A. Yes, he was wearing sunglasses.
Q. And they were big enough to cover all of his eyes?
A. That is why people war sunglasses, to cover their

eyes.

Q. And my question to you, Mr. Patel, and I'm not trying to be difficult, is did they cover all of his eyes?

A. His eyes were covered but he was looking at me from on top of the sunglasses so I could see his eyes from time to time (indicated).

Q. Now, the robber had a gun?

A. Yes.

Q. And you thought it was a real gun?

A. He didn't give it in my hand to inspect whether it was a real or a fake gun. I just saw the gun and that was it.

Q. And I'm asking if you thought it was a real gun?

A. Yes.

Q. It was black?

A. Yes, it was black.

Q. Was it a revolver?

A. I've never seen guns before in my life so I can't tell them apart. Whether it's a gun or a revolver, it's all same to me. I don't know what is a gun or a revolver.

Q. And when the gun was pointed at you, you were very scared?

A. Yes, I was scared. Everybody will be scared.

Q. All right. I would like to speak with you now about who you talked about the robbery with.

A. I've spoken to my wife and my son about the robbery.

Q. You talked with your wife the morning it happened?

A. Yes, I told her. She came to the store. We watched the video and I told her that this was the same man.

Q. And you talked with her the days between the robbery and the photo lineup?

A. Whenever anybody sees the gun they are bound to talk about it.

Q. And so you talked with your wife about this for several days?

A. For a week we talked about it and then we tried to forget it.

Q. You've watched the -- I'd like to talk to you about the video now. You've watched the video several times?

A. Yes.

Q. You watched it a few times the day it happened?

A. I even have the video on my cell phone. So I had seen it a number of times.

Q. I want to talk to you about the lineup procedure now. That happened at the mall?

A. All right. I'll answer you.

Q. Your wife -- it happened at the mall?

THE INTERPRETER: I'm sorry?

Q. The lineup happened at the mall?

A. Not inside the mall, outside the mall.

Q. And you knew that the police were coming because your wife called you to tell you?

A. I had no idea that the police were coming to speak to me. So my wife called and told me that they were looking for me, and she had informed them that I was at the Citadel Mall.

Q. And when they came they told you they had some pictures they wanted you look at?

A. They didn't say anything to me.

Q. They told you they wanted you to look at pictures, correct?

A. They told me about the pictures but they did not tell me to circle anyone. I saw them myself and I circled it on my own.

Q. Before you looked at the pictures they read you some instructions?

A. They showed me this document. My son read it, explained it to me and I signed it (indicated).

Q. You couldn't read it yourself, could you?

A. I could read it but I could not understand some of the words. They were difficult words.

Q. And when you looked at the photographs you felt it was your job to help the police catch the robber?
A. Yes. I wanted to work with the police to help catch the robber so I could put him in.
Q. And the photo lineup had six pictures on one page?
A. Yes.
MR. GROEBER: May I have one moment, Your Honor.
THE COURT: You may.
(PAUSE.)
MR. GROEBER: No further questions at this time. Thank you, Your Honor.
Thank you, Mr. Patel.
THE WITNESS: Okay.
THE COURT: Redirect?
MR. RUTLEDGE DURANT: The State has no more questions.
THE COURT: You may step down. Thank you.
Call your next witness.
MR. RUTLEDGE DURANT: The State calls Dhruval Patel.
DHRUVAL PATEL, after having been duly sworn, testified as follows:
THE CLERK: Say your full name and then spell your last name.
THE WITNESS: Dhruval Patel, P-a-t-e-l.

DIRECT EXAMINATION

BY MR. RUTLEDGE DURANT:

Q. Dhruval, good afternoon.

A. Good afternoon.

Q. Would you please tell the jury how old you are.

A. Fourteen.

Q. Are you in school?

A. Yes.

Q. How far have you gone in school?

A. Going to ninth.

Q. You just finished eighth grade?

A. Yes.

Q. So you're going to high school next year?

A. Yes.

Q. You make good grades?

A. Yes.

Q. What kind of grades do you make?

A. Ninety and above.

Q. Who's your father?

A. Natubhai Patel.

Q. What does he do for a living?

A. He owns a gas station.

Q. And who is your mother?

A. Jagruti Patel.

Q. Does she work?

A. Yes.
Q. What does she do?
A. She also owns a gas station.
Q. Do you ever help your father at the store?
A. Yes.
Q. What kind of things do you do?
A. Anything that they ask me to.
Q. What language is your father most comfortable speaking?
A. Gujarati.
Q. And is that a dialect of Hindi?
A. Yes.
Q. Do you speak Gujarati as well?
A. Yes.
Q. And do you speak Hindi?
A. No.
Q. What about your mother? What does she speak the best?
A. Gujarati.
Q. Does she speak English?
A. About the same level as my mother -- or my father.
Q. And I think you obviously speak English pretty good, right?
A. Yes.
Q. At the store, does the store have a video

surveillance system?

A. Yes.

Q. And who operates that system mostly?

A. I do.

Q. Did you help install it?

A. Yes.

Q. And what kind of things did you do to help get that system installed at the store?

A. I set the time, date, set the focuses on the camera.

Q. And does the system accurately capture what goes on in the store?

A. Yes.

Q. And you've had an opportunity to look at what it actually captures from the store --

A. Yes.

Q. -- and determine that?

Do you recall going to the store on the morning of December 24th, 2010?

A. Yes.

Q. What do you remember about that?

A. My dad called my mom and said that there was a robbery, so me and my mom rushed to the store.

Q. Why did you go?

A. The police needed to view the incident, and to help

my father communicate with the police.

Q. And did you go help your father communicate with the police that day?

A. Yes.

Q. Did you also help the officers to be able to view the video?

A. Yes.

Q. And after that day, did you interact with the police again after the day of the robbery?

A. Yes.

Q. And if you would, tell the jury where that took place.

A. Citadel Mall at Sears.

Q. Who were you with?

A. My father.

Q. And what do you recall about meeting with the police that day? How many police officers did you meet with?

A. Two.

Q. Do you know what they wanted to meet with you about?

A. They wanted to show my father a lineup.

Q. I'm showing you -- and it's already in evidence as State's Number 2. I'm going to ask you to take a look at that and let me know in you recognize that.

A. Yes.

Q. And why do you recognize State's Number 2?

A. I helped my father -- I interpreted this for my father so he could know what they wanted.

Q. And did you read these items to your father?

A. Yes.

Q. And did you interpret to him what is said there in English in Gujarati for your father?

A. Yes.

Q. And if you could, could you read those seven admonitions to the jury so they know what you helped your father understand.

A. I am going to show you a series of photographs or physical lineups of individuals or an array of six photographs of individuals. Circle the appropriate one. The photograph that I am about to show you are placed in no special order.

These photographs may or may not contain the person who committed the crime. It is just as important to clear innocent people as it is to identify the possible suspects. Whether or not you identify someone the police will not continue -- will continue the investigation.

After you are done I will not be able to provide you with any feedback or comment on the results of the process. Do not discuss this identification procedure or

the results with other witnesses in this case.

Focus on the event, the place, viewing, lighting, your frame of memory, etcetera. Take as much time as you need. People may not appear exactly as they did at the time of the event because features such as clothing style, hair color, hairstyle, etcetera may change even in a short period of time.

As you look at the photographs tell me if you recognize the person in -- if you recognize the person in them. If you do not, please tell me how you know the person -- or if you do, please tell me how you know the person, in your own words how sure are you of the identification.

Q. And did your father understand everything that you just read to the Court?

A. Yes.

Q. And how did he indicate that he understood that?

A. Usually he asked me a question if he does not understand or if he wants me to repeat, and we've had that for years since I interpret mostly everything.

Q. And did he initial beside each of those admonitions that you read?

A. Yes.

Q. Indicating that he understood?

A. Yes.

Q. And how many officers -- you testified that you met two out there at the mall, right?

A. Yes.

Q. How many officers actually went over this form with you and your father?

A. One of them.

Q. Just one?

A. Yes.

Q. And the other one was somewhere close by?

A. Yes.

Q. But he wasn't actually administering this --

A. Yes.

Q. -- is that right? And what happened after the officer went over this form with your father?

A. He showed my father the lineup.

Q. What was your father's reaction when he viewed the lineup?

A. He immediately circled one person.

Q. Did the officer tell your father who to circle?

A. No.

Q. Did he do anything to indicate that he should circle any of the pictures there?

A. No.

Q. Did your father just do it on his own?

A. Yes.

Q. And do you recall an officer, I think earlier that day, who had come out to the store, a female officer?
A. Yes.
Q. And that's December 29th?
A. Yes.
Q. Did you help that officer download the video from the system that day?
A. Yes.
Q. It was just one officer who came out there?
A. Yes.
Q. Did she bring her own equipment?
A. Yes.
Q. And did you help her get the video off of y'all's system and onto her system?
A. Yes.
Q. Were you able to do it on the first try?
A. No.
Q. What about the second try?
A. Yes.
Q. And in regard to your system, how long -- how long does your system keep video -- how long does it keep a video on it?
A. Ten days.
Q. And then what happens?
A. It tapes over it.

Q. So if you want to get it off of there you need to get it off within 10 days; is that right?

A. Yes.

Q. Did you suggest to your father which photo to pick out?

A. No.

Q. Or influence him in any way which photo to pick out?

A. No.

MR. RUTLEDGE DURANT: Thanks, Dhruval. Answer any questions defense may have.

THE COURT: Mr. Groeber?

CROSS-EXAMINATION

BY MR. GROEBER:

Q. Good afternoon, Dhruval.

A. Goods afternoon.

Q. You remember when the robbery happened?

A. Yes.

Q. You were 12 at the time?

A. Yes.

Q. And your parents called you that morning -- or your dad called?

A. Yes.

Q. And you went to the store?

A. Yes.

Q. And you watched the video that morning?
A. Yes.
Q. You were the one who actually booted it up?
A. Yes.
Q. And you spoke -- you watched the video that day with your father?
A. Yes.
Q. And a couple police officers?
A. Yes.
Q. And your mother?
A. She also watched it.
Q. And you watched it with your mom and your dad several times that day?
A. About two.
Q. You've watched the video with them after that day?
A. Yeah.
Q. And about five or six times you've seen it?
A. Yes.
Q. And every time that you've watched it you were watching it with your parents?
A. Yes.
Q. It's fair to say that your dad understands some English, right?
A. Yes.
Q. And enough to kind of deal with customers in his

store?

A. Yes.

Q. But he does struggle with more complicated English?

A. Yes.

Q. And the same is true for your mom?

A. Yes.

Q. And that's why you don't translate for them sometimes?

A. Yes.

Q. Dhruval, what is the Hindi word for array?

A. I don't speak Hindi.

Q. What is the -- I'm sorry. What's the language that you speak?

A. Gujarati.

Q. What is the Hindi word -- Gujarati, is that correct?

A. Gujarati.

Q. What is the Gujarati word for array?

A. I don't know.

Q. Okay.

MR. GROEBER: May I have one moment, Your Honor?

THE COURT: You may.

(PAUSE.)

MR. GROEBER: No further questions. Thank you, Your Honor.

THE COURT: Redirect?

MR. RUTLEDGE DURANT: Just briefly.

REDIRECT EXAMINATION

BY MR. RUTLEDGE DURANT:

Q. Dhruval, you've also watched the video with me, haven't you?

A. Yes.

Q. And I've come out to visit you and your mom and dad at the store; isn't that right?

A. Yes.

Q. And you've helped me in talking with your parents --

MR. GROEBER: Objection, Your Honor.

Q. -- is that correct?

THE COURT: Hold on one second. What's the basis?

MR. GROEBER: Outside the scope of redirect.

THE COURT: Overruled. You may answer.

BY MR. RUTLEDGE DURANT:

(Through the interpreter.)

Q. And you've helped me in talking with your parents; is that right?

MR. GROEBER: Objection, Your Honor.

THE COURT: Basis?

MR. GROEBER: Bolstering and the prosecutor is possibly making himself a witness.

THE COURT: Overruled. You may answer.

MR. RUTLEDGE DURANT: Thank you, Your Honor.

BY MR. RUTLEDGE DURANT:

(Through the interpreter.)

Q. Because we've gone over your testimony; is that right?

A. Yes.

Q. And in so doing it was important for us to watch that video, wasn't it?

A. Yes.

Q. All right. With this admonition, and this is State's 2 -- well, just for number one. If you would, read number one to the jury.

A. I am going to show you a series of photographs or physical lineups of individuals or an array of six photographs of individuals. Circle the appropriate one. The photographs that I am about to show you are placed in no special order.

Q. All right. And you just read the word array in that sentence, right?

A. Yes.

Q. So if you would, could you speak in Gujarati the same words that you were able to tell your father what number one meant.

A. (The witness complied).

Q. Now, is there an exact translation word for word for everything that there's a word for in English and everything that there is a word for in Gujarati?

A. No.

Q. But nevertheless, you can capture the essence of what is intended; is that correct?

A. Yes.

Q. And were you able to tell your father the essence of what number one said?

A. Yes.

MR. RUTLEDGE DURANT: Thank you.

THE COURT: Mr. Groeber?

MR. GROEBER: No, Your Honor. Thank you.

THE COURT: You may step down. Thank you.

Call your next witness.

MR. RUTLEDGE DURANT: Your Honor, can we ask that Mr. Patel and his son can be excused for the day?

THE COURT: Any objection?

MR. GROEBER: No, Your Honor.

THE COURT: They may be excused. Thank you.

MR. RUTLEDGE DURANT: The State calls Deputy Dustin Luckadoo.

DUSTIN LUCKADOO, after having been duly sworn, testified as follows:

THE CLERK: Be seated. Please state your full name

and spell your last name for the record.

THE WITNESS: My name is Dustin Luckadoo, L-u-c-k-a-d-o-o.

DIRECT EXAMINATION

BY MR. RUTLEDGE DURANT:

Q. Good afternoon, Deputy Luckadoo. Will you please tell the jury where you are employed.

A. Charleston County Sheriff's Office.

Q. And how long have you been employed with the Charleston County Sheriff's Office?

A. Eight years.

Q. What is your current position?

A. Patrol deputy in the South District.

Q. What are your duties and responsibilities as a patrol deputy in the South District?

A. Handle calls, patrol neighborhoods, and just general duties.

Q. And how long has that been your position?

A. Eight years.

Q. You write traffic tickets?

A. Yes, sir.

Q. Respond to 9-1-1 calls?

A. I do.

Q. And that was your position in December of 2010?

A. Yes, sir.

Q. And in that capacity did you become involved in the investigation of an armed robbery that occurred at the convenience store located at 5737 Savannah Highway in Ravenel?

A. Yes, sir.

Q. How did you become involved in this case?

A. The supervisors on duty sent me over there to assist.

Q. Do you recall approximately what time you arrived?

A. Shortly after eight o'clock in the morning.

Q. And what county is that convenience store located in?

A. Charleston County.

Q. What did you observe upon arrival?

A. Observed the victim who told us that, you know, he had been robbed and had a video surveillance that he was trying to get pulled up when I arrived.

Q. Was Mr. Patel able to tell you any details about the robbery?

A. Just that he --

MR. GROEBER: Objection, Your Honor, hearsay and bolstering.

THE COURT: Rephrase your question. Thank you.

BY MR. RUTLEDGE DURANT:

Q. What was Mr. Patel's demeanor when you arrived?

A. He had calmed down from the initial shock of the robbery.

Q. But nevertheless, did he still appear to be a little shocked?

MR. GROEBER: Objection, Your Honor, leading.

THE COURT: Rephrase your question. Sustained as to leading.

BY MR. RUTLEDGE DURANT:

Q. So his demeanor, what was his demeanor at that time?

A. Like I said, he was calm. He was able to give us a good description of the individual and let us know that he thought the individual to be a prior customer of his.

MR. GROEBER: Objection, Your Honor. He's beginning to testify as to hearsay.

THE COURT: All right. Counsel approach.

(WHEREUPON, the following bench conference was reported.)

MR. RUTLEDGE DURANT: This is all information that's pertinent to his investigation from the very get-go. It's a description, something the officers used to go on in their investigation and it takes place right after an initial excited event, initial excited event to an armed robbery that happened minutes before, and he said in that time, right after the robbery. And there's

no argument that that just happened, and that's when Mr. Patel said that it was a regular customer, and it is absolutely relevant.

MR. GROEBER: It's both hearsay and bolstering. Mr. Patel has already testified. The State has already gotten that fact out. Nobody challenged, you know, whether or not he said he was a regular customer so...

MR. RUTLEDGE DURANT: It is not.

MR. GRIMES: Sanchez vs. State --

MR. RUTLEDGE DURANT: It is the very essence of an excited utterance right after an armed robbery.

THE COURT: If you're going to do this you need to lay a foundation because you said he had calmed down by the time they had gotten there.

MR. RUTLEDGE DURANT: From the time frame was important right there.

THE COURT: All right. Well, you're going to need to lay -- because I can't -- I don't make a ruling on excited utterance if he said he had calmed down. All right?

MR. RUTLEDGE DURANT: He said he had initially calmed down but the truth of the matter is he needs to elaborate on --

THE COURT: If he can say that, otherwise then --

MR. RUTLEDGE DURANT: Okay.

THE COURT: What's the exception to hearsay?

MR. RUTLEDGE DURANT: State of mind, present sense impression.

MR. GROEBER: He's not talking about his state of mind or his present sense impression. He's trying to testify what he said.

MR. RUTLEDGE DURANT: And it's offered for the identity.

THE COURT: Offered for what?

MR. RUTLEDGE DURANT: Offered for his identity, and the description. It's relevant to the investigation.

THE COURT: See if you can lay a better foundation. Thank you.

(WHEREUPON, the bench conference was concluded.)

BY MR. RUTLEDGE DURANT:

Q. All right. Detective Luckadoo, you said that he appeared to have calmed down from the initial shock of being robbed?

A. Yes, sir.

Q. Was he completely calm as a cucumber?

A. No.

MR. GROEBER: Objection, Your Honor, leading.

THE COURT: Overruled.

Q. What was your understanding of the amount of time that took place between this robbery that was called in

and your arrival?

A. My arrival was probably 30 minutes afterwards.

(WHEREUPON, State's Exhibit Number 4, an Incident Report, was marked for identification only.)

BY MR. RUTLEDGE DURANT:

Q. Did you write a report in this case?

A. No, sir, I did not.

Q. Who did you respond to the store with?

A. Deputy Kjellman was already on the scene and Deputy Roberson was on the scene.

Q. Are you aware of whether either of those officers wrote an initial report in that case -- in this case?

A. Deputy Kjellman did.

Q. And so why did you not write a report in the case?

A. Because I was not responding -- the first responding deputy.

Q. If you viewed Deputy Kjellman's report would that refresh your recollection as to how quickly you responded to the scene after it was called in?

A. Sure.

Q. Showing you what the State has labeled State's 4 for identification only. Do you recognize it?

A. Yes, sir.

Q. And is that Deputy Kjellman's report?

A. Yes, sir, it is.

Q. If you would, I'd ask that you read that and let me know if you are sufficiently refreshed.

A. Read it out loud?

Q. No. Just read it to yourself.

(PAUSE.)

Q. All right. Now are you refreshed?

A. Yes, sir.

Q. All right. Now having looked over the initial responding report, can you now tell the jury approximately how long after the robbery was called in that you arrived?

A. Thirty minutes, I arrived.

Q. That you arrived?

A. Yes.

Q. All right. And you did speak to the victim at that time; is that correct?

A. Yes, sir.

Q. Did you have any trouble talking to him?

A. No, sir.

Q. Do you speak Hindi?

A. No, sir.

Q. Was he able to talk perfectly fluent English to you?

A. Not perfectly fluent.

Q. Were you able to understand the essence of what he

was saying?

A. Yes, sir.

Q. What did you do after talking to the victim?

A. Walked back into the back office to review the tape with him.

Q. And the tape of what?

A. Tape of the incident, the armed robbery.

Q. Do you recall who was around when you did that?

A. Myself, Deputy Kjellman and Mr. Patel.

Q. And did you view the tape?

A. Yes, sir, I did.

Q. And at that time, viewing that tape, was there anything about that tape that was helpful to you and the investigation of this case?

MR. GROEBER: Objection, Your Honor.

THE COURT: Basis?

MR. GROEBER: Prior made objections at pretrial.

THE COURT: Overruled. You may answer.

A. Upon looking at the videotape, seeing the suspect I recognized --

THE COURT: I need you to speak up again. Thank you.

A. After reviewing the tape I recognized the suspect.

Q. You recognized the man with a gun?

A. Man with a gun, yes.

Q. Who did you recognize him to be?
A. I recognized him to be Marvin Bowens.
Q. And how were you certain that it was Marvin Bowens?
A. Just through general dealings with Mr. Bowens.
Q. Had you ever had personal contact with him before?
A. Yes.
Q. Had you?
A. Yes, on a traffic stop.
Q. Did you let any of the other officers at the scene know that you had recognized the man in the video?
A. Yes, sir, I did.
Q. And did you let Deputy Kjellman know that?
A. Yes, sir, I did.
Q. And is that noted in his report?
A. Yes, sir, it is.
Q. And do you see Marvin Bowens or Marvin Bowens Green in this courtroom today?
MR. GROEBER: Objection, Your Honor.
THE COURT: Basis?
MR. GROEBER: Mischaracterization of the facts in evidence.
THE COURT: Overruled. You may answer.
A. Can you repeat the question?
Q. Do you see the man that you recognize in the video in this court today?

A. Yes, sir, I do.
Q. Where is he?
A. Sitting right there in the white shirt (indicated).
Q. If you would, point to him and identify him.
A. (Indicated) right there, Mr. Marvin Bowens Green.
Q. It's just a procedure we have to do.
MR. RUTLEDGE DURANT: Let the record reflect the witness has identified the defendant.
THE COURT: The record will reflect. Thank you.
BY MR. RUTLEDGE DURANT:
Q. How certain are you of this identification?
A. A hundred percent.
Q. And again, just so the jury knows, if you would just tell them again what area of the county you are assigned to.
A. I'm assigned to what they call District Eight, which was the South District; Ravenel, Hollywood, Edisto, those general areas.
Q. So the south end of the county?
A. South end of the county, yes, sir.
Q. Now, is that just primarily or is that all the time?
A. All the time.
Q. And the North District would be what, Mount Pleasant and above?

A. Mount Pleasant, North Charleston, Ladson, Lincolnville.

Q. And there's another area. Is West Ashley in your district?

A. That's known as District Seven.

Q. And that's not your district?

A. That's not where I work, no sir.

Q. What about James Island?

A. No, sir.

Q. Johns Island?

A. No, sir.

Q. So primarily the Ravenel, Edisto, that kind of area?

A. Yes, sir, that's the area I work.

Q. And you've worked that area for eight years?

A. Yes, sir.

MR. RUTLEDGE DURANT: Thank you, sir. Please answer any questions the defense may have.

THE COURT: Mr. Groeber?

MR. GROEBER: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. GROEBER:

Q. Good afternoon, Mr. -- Deputy Luckadoo. Excuse me. I want to talk to you first about when you watched the video and where you watched it. You arrived on the scene

and when you arrived was Mr. Patel watching the video?

A. He was trying to get it pulled up when I arrived.

Q. Okay. And he was successful at doing that?

A. Yes, sir.

Q. And you were in the room with him watching the video?

A. Yes, sir.

Q. And I believe you testified that a couple of deputies were at the scene. Were they in the room watching the video?

A. I can recall Deputy Kjellman being beside me watching the video.

Q. And was Dhruval Patel there watching the video with you?

A. Not at the time, no.

Q. And you watched it several times?

A. Yes.

Q. That day, that morning?

A. Yes, sir.

Q. And you say that you recognize Marvin Bowens as the person in the video?

A. Yes, sir.

Q. You also testified about the communication of Mr. Patel. You said that you had no problem communicating with him.

A. No, sir. He understood me, I understood him.
Q. So he understood the English that he spoke to you -- or that you spoke to him rather?
A. Yes.
Q. And you had no problems conversing with him?
A. No, sir.
Q. When you reviewed the tape did you say, Oh, look, I recognize that person?
A. To Deputy Kjellman, yes. That's why I walked him into the hallway and told him.
Q. So let's talk a little bit about the store. There's a cash register kind of in the middle of the store, right?
A. Right.
Q. And there's a hallway behind the cash register and it goes to an office?
A. Directly behind the cash register, yes.
Q. And y'all watched the videos in the office?
A. Yes.
Q. And fair to say it's probably -- the hallway is 15 to 20 feet long?
A. No, it's not very long at all. Probably from this over here to the desk (indicated). Probably six, seven feet, maybe.
Q. Six or seven feet?

A. Uh-huh.
Q. And the office is a small office?
A. Yes.
Q. And you were speaking with Deputy Kjellman telling him that you recognized the person in the video when you were in the hallway?
A. Yes.
Q. And Mr. Patel was in the office at that time?
A. Yes.
Q. Now, after you had identified Mr. Bowens you said -- you told other people that you recognized him, right? You told Deputy Kjellman?
A. Uh-huh.
Q. And you also told Detective Lawrence?
A. Yes.
Q. And you told him specifically who you recognized?
A. Yes, sir.
Q. Each -- well, Charleston County Sheriff's Office is a pretty big organization, you would agree?
A. Yes.
Q. And just like other big organizations they have a policy manual?
A. Right.
Q. And you all get training on that policy manual when you become deputies?

A. Yes.
Q. And you have to read the whole thing?
A. Yes.
Q. Do you have a test on it?
A. No.
Q. No, test, okay. And periodically you get updates about that?
A. Yes.
Q. And you read those?
A. Yes, sir.
Q. And part of being a good deputy is keeping up with the policy manual?
A. Yes.
Q. And you try to do that?
A. I try to do that, yes.
Q. And so you are familiar that the Charleston County Sheriff's Office has a policy on photo lineup identifications?
A. Yes, I am.
Q. And you're familiar that there's -- that the policy talks about the difference between simultaneous and sequential lineups?
A. Yes.
Q. Well, you had some hesitation. Are you familiar with that or not?

A. It's been a while since I've glanced at the lineup policy so...

Q. You know that in -- but you know that in identification cases it's important to do a photo lineup?

A. Sure.

Q. And that's part of good police work?

A. Right.

Q. And you didn't ask for Detective Lawrence to prepare a photo lineup with Mr. Bowens in the picture, did you?

A. That was his decision to do that.

Q. But you didn't ask him to, did you?

A. I don't have to ask him to do that.

Q. I'm sorry?

A. I don't have to ask him to do that.

Q. Okay.

MR. GROEBER: May I have one moment, Your Honor?

THE COURT: You may.

(PAUSE.)

MR. GROEBER: Thank you, Your Honor. No further questions.

Thank you, Deputy.

MR. RUTLEDGE DURANT: Briefly, Your Honor.

REDIRECT-EXAMINATION

BY MR. RUTLEDGE DURANT:

Q. At the store that day you said there were two other officers in there were you?

A. Yes.

Q. And, again, who were they?

A. Deputy Kjellman and Deputy Roberson.

Q. And I think your testimony is that you told both of those officers that you identified the man in the video?

A. Yes, I did.

Q. Did they also view the video?

A. Yes.

Q. Did they recognize the man?

MR. GROEBER: Objection, Your Honor.

THE COURT: Basis?

MR. GROEBER: Withdrawn.

A. No, sir.

Q. So you were the only one?

A. Yes, sir.

Q. And in talking about the organization of the sheriff's office there are different departments, right?

A. Right.

Q. You are a road deputy, right?

A. Yes.

Q. And there's also a detective division?

A. Yes, sir.

Q. And the detective division's job is to investigate

cases like this; is that right?

A. Yes, sir, it is.

Q. And even though often times is the case you may be a first responder on a scene like this; is that right?

A. That's correct.

Q. And then there are other divisions of the sheriff's office as well, right?

A. Yes.

Q. They have divisions that handle crime on the water?

A. Right.

Q. And there's a crime scene unit?

A. Yes.

Q. And even further inside the detectives division they operate on a particular kind of crime basis?

A. Right.

Q. There's a division for sex crimes?

A. Right.

Q. There's a division for violent crimes?

A. Right.

Q. There's a division for property crimes?

A. (There was no audible response).

THE COURT: Was that a response deputy?

A. Yes.

THE COURT: I'm sorry. I'm having a hard time hearing you which means to me that half the jurors can't.

So you're going to have to speak up.

A. Yes, ma'am.

Q. And, you know, as part of your duties and responsibilities how often do you present photographic lineups?

A. Very little, if any.

Q. How many times have you done it in the past year?

A. None.

Q. Past two years?

A. None.

Q. Whose responsibility does that fall to to do something like that?

A. Usually the detective's office.

Q. And is your understanding that the detective's office was notified about this case?

A. Yes, sir.

Q. And so any identification procedure would be done by them; is that right?

A. Yes, sir, it would.

Q. And are you positive that this is the man that you recognized as the gunman?

A. A hundred percent positive.

Q. Look at the jury and tell them.

A. A hundred percent positive.

MR. GROEBER: Objection, Your Honor. Asked and

answered.

THE COURT: Sustained.

MR. RUTLEDGE DURANT: Thank you.

THE COURT: Recross?

MR. GROEBER: No, Your Honor.

THE COURT: You may step down. Thank you.

Call your next witness.

MR. RUTLEDGE DURANT: The State calls Detective Charles Lawrence.

CHARLES LAWRENCE, after having been duly sworn, testified as follows:

THE CLERK: State your full name and spell your last name for the record.

THE WITNESS: Yes, sir. Charles Lawrence, L-a-w-r-e-n-c-e.

DIRECT EXAMINATION

BY MR. RUTLEDGE DURANT:

Q. Good afternoon, Detective Lawrence.

A. Good afternoon.

Q. Will you please tell the jury where you are employed.

A. Yes, sir. Charleston County Sheriff's Office.

Q. And how long have you been employed at Charleston County Sheriff's Office?

A. A little over eight years. Since 2003.

Q. What is your current position?

A. Violent crimes detective in the South District, Hollywood to Edisto Island.

Q. How long has that been your position?

A. Since July 25th, 2007.

Q. Fairly specific date?

A. That's my birthday. That's the only reason I remember.

Q. Before you were a detective in the violent crimes unit at the Sheriff's Office --

A. Yes, sir.

Q. -- you were employed with the sheriff as well?

A. That's correct.

Q. And what was your position at that time?

A. I was a road deputy in the same district.

Q. And if you would, tell the jury what district that is.

A. Again, that's South District, the south end of Charleston County, which goes from Hollywood almost across Reynolds Ridge (verbatim), from Hollywood to Colleton County on 17, and at Colleton County on Highway 174.

Q. Does that include Edisto?

A. Edisto, Megget, Youngs Island, Adams Run, Hollywood, Ravenel, and anything else that I may have

missed, but I believe I got it all.

Q. And what are your duties and responsibilities as a detective in the violent crimes unit?

A. Initially, we get incident reports. We get assigned cases from our supervisor, which would be my sergeant. Once we get the case we review the incident report that we are assigned, at which time we ascertain a victim witness and possible suspect.

Q. What kind of crimes do you investigate?

A. Violent crimes of persons. All the violent crimes to include from stabbings to homicides.

Q. Murders?

A. Murders, yes, yes. Homicides, suicides, armed robberies. Anything that you can do to a person I investigate.

Q. And that was your position in December of 2010?

A. Yes, sir. That's correct.

Q. And in that capacity did you become involved in the investigation of an armed robbery that occurred at 5737 Savannah Highway in Ravenel?

A. I did.

Q. How were you brought into this case?

A. I was assigned the case by my sergeant. It was right around December -- right around Christmastime July -- I'm sorry, Christmas in 2010.

Q. Did you actually respond to the scene?
A. No, sir, I did not.
Q. And you said you were assigned the case.
A. That's correct.
Q. And what does that mean?
A. Okay. The crime occurred in Ravenel, South Carolina, which is in the area that I cover, in the South District. Again, when I was a road deputy I was from Hollywood to Edisto and now that I'm in detective division I'm still in that area. I'm still a detective in that same district, and Ravenel is included in my district. Since I'm familiar with the persons that are there, I built a rapport with them, I was assigned that case.
Q. And does that mean that you are the case agent?
A. That's correct.
Q. And what does it mean to be the case agent for a particular case?
A. The case agent means you are totally exclusively assigned that case from the moment you are assigned to it to the disposition of it.
Q. So you are the kind of manager for the case?
A. Yes, sir.
Q. And is that the situation even though other detectives may assist you on the case?

A. Yes, sir.
Q. And do you assist other detectives in your office when they are the case agent?
A. I do.
Q. It's just that one person is assigned to be the case agent on a case?
A. That is correct.
Q. And you are the case agent on this case?
A. Yes, sir, that's correct.
Q. So how did you begin to investigate this case?
A. Once it was assigned to me, again, it was around Christmastime in 2010, I think we were maybe off for Christmas and maybe the day after, I got assigned the case. I read the narrative from the responding officers with responding deputies which revealed that it was an armed robbery that occurred at 5737 Savannah Highway. In fact, we had a victim, which is Mr. Patel. The first name started with an N. Okay. And in the statement advised -- Mr. Patel advised the responding deputy --

MR. GRIMES: Objection. Hearsay. Confrontation clause.

THE COURT: Sustained.

BY MR. RUTLEDGE DURANT:
Q. Did you review the initial incident report?
A. I did.

Q. And was there anything about the case that you were waiting on?

A. Yes. There was in fact a video footage, video surveillance was -- it captured the armed robbery, however it wasn't available at that time.

Q. Did you want to see that?

A. I did.

Q. Did you eventually see it?

A. Yes, sir, I did.

Q. And do you recall when you saw it?

A. Yes, sir. It was December 29th, 2010.

Q. And how did that video come into your custody?

A. Investigator Kjellman from Forensic Service Unit was able to retrieve the video surveillance from 5737 Savannah Highway, and at which time she contacted me. And I met with her at the lab, and that's where all of our videos are kept in evidence and reviewed first, then put in evidence for cases.

Q. And you testified that this was December 29th, 2010?

A. Yes, sir, December 29th, 2010.

Q. And so that's five days after this armed robbery?

A. That's correct.

Q. And did you view the video surveillance tape at that time?

A. I did.

Q. And was that video helpful to you in the investigation of this case?

A. Absolutely.

Q. Why?

MR. GRIMES: I apologize, Your Honor. Per the pretrial motions we made, and Mr. Groeber's brief we renew our objections.

THE COURT: Overruled.

Q. Why was that video helpful to you in investigation of this case?

A. The video was helpful because it allowed me to see the subject that was committing the armed robbery. As I reviewed the video I saw him and knew him to be Marvin Bowens Green.

Q. And now why do you know that the man in the video was Marvin Bowens Green?

A. Well, I know him and I've had the opportunity to talk with him for hours at a time while patrolling the South District area when I was on patrol. I've had interactions with him, not because he was in trouble or anything. He was a young juvenile then. So I've known him for quite sometime, I'd say from 2004 to the present.

Q. And so you've had a lot of opportunity to have personal time with him one on one?

A. Yes, sir, that's correct.
Q. And in those encounters have you had the opportunity to view his face?
A. Yes, sir, I have.
Q. Have you had the opportunity to not only hear him talk but to watch him talk?
A. Yes, sir, all of his mannerisms. I'm very, very, very familiar with him.
Q. Have you had the opportunity to watch him walk?
A. Yes, sir, I have.
Q. How would you characterize how well you knew him?
A. I know him very well. Again, I've had the opportunity to sit down and talk with him for hours at a time, okay, and during that discussion I observed his behavior, his walks, the way he talks, the way he acts, all of his mannerisms, for what all of that's worth.
Q. Now, you are aware that the man on the video has a hoodie pulled up over his head?
A. Yes, sir.
Q. Has on sunglasses?
A. That's correct.
Q. So what about that video were you able to look at and make your determination that you knew who that man was?
A. Okay. After viewing the video I observed the walk,

his walk. He has a distinctive walk which confirmed -- while looking at the video when he was pointing the handgun at the victim, Mr. Patel, he glanced to the right a couple of occasions at which time displayed his face.

He has a distinctive nose as well as his height and weight. Watching him come in the -- watching him come in it's a match for his height. However, once he turned to the right he looked at the mirror and that just confirmed the identity of him.

So the totality of the circumstance between his walk, height, weight and the structure of his face concluded that I knew him and I was positive. And I've talked to him on, like again, many times, and we talked for hours at time so I've known him and know him and I'm one hundred percent positive that that was him.

Q. Was there any one thing or was it just everything?

A. It's a total of everything.

Q. How quickly were you able to look at this video and recognize that the man you were seeing was Marvin Bowens Green?

A. Once I saw him, the up close at the register pointing the handgun, I could see his face then, but once he turned and looked to the right that confirmed his identity. And once he walked in and out of the convenience store located in Ravenel that confirmed his

walk as well.

Q. Is there any doubt in your mind that the man you saw on that video is that man (indicated)?

A. None whatsoever. I am absolutely positive --

MR. GRIMES: Objection.

THE COURT: When there's an objection I need you to stop.

THE WITNESS: I'm sorry. I didn't hear.

THE COURT: What's the basis?

MR. GRIMES: Asked and answered.

THE COURT: Overruled. You may answer.

BY MR. RUTLEDGE DURANT:

Q. Is there any doubt in your mind that you can tell this jury that you have a doubt that that is the man that you saw on the video?

A. There is no doubt in my mind. I'm one hundred percent absolutely, positively sure that that's the man that committed this crime, Marvin Bowens Green.

Q. And is that because you knew him?

A. Yes, sir, that's correct.

Q. After you viewed that video that morning what did you do?

A. After reviewing the video I generated a six-person photo lineup. I did that through SLED, State Law Enforcement Division. I sent them an email with his

pertinent information and they responded back with a photo of him with five other similar persons.

Q. Why did you request that photo ID through SLED?

A. It's to confirm the identity of him. That's a tool that we use at the sheriff's office to confirm the identity of a subject. Not me seeing him alone isn't going to do, so I wanted to further my investigation at which time I requested the photo lineup. And once SLED sent it back, once I got it back from State law enforcement I then contacted the victim and arranged to meet with him at the Citadel Mall to show him the photo lineup.

Q. Is it because you wanted to see if the victim could pick him out of the lineup?

A. That's correct.

Q. Did you, yourself, administer this photo lineup?

A. No, sir, I did not.

Q. Did anybody go with you?

A. Detective Perkins from the investigations division went with me.

Q. And what was his job?

A. His job was to provide the photo lineup to Mr. Patel, which is what he did.

Q. Now, why didn't you do it?

A. Because I knew the victim -- correction. I knew

who the suspect was and the policy prohibits us from -- law enforcement officer knowing who the suspect is to administer the six-person photo lineup, whether it be an array or six individuals.

Q. Did you tell Detective Perkins who the suspect was?

A. No, sir never.

Q. Did you talk to Detective Perkins about this case?

A. No, sir, not about the case.

Q. What did you tell him you wanted him to do?

A. That I needed him to show a six-person photo lineup to a victim of a crime.

Q. And was that done?

A. Yes, sir, it was done.

Q. What day was that done?

A. The same day. It was December 29th, 2010.

Q. Where was it done?

A. It was conducted at the Citadel Mall, Charleston, South Carolina, in the parking lot outside of the Sears.

Q. Did you arrive with Detective Perkins out there?

A. As a matter of fact, I drove and he rode with me.

Q. Who did you meet?

A. I met Mr. Patel and his son, the younger Mr. Patel.

Q. Where did you meet them?

A. Initially met on the inside of the store. To conduct business we walked outside of the store and the

photo lineup was showed by Detective Perkins in the parking lot area.

Q. And we're talking about the Sears?

A. The Sears, yes, sir, outside of the Sears.

Q. And so you said you went outside to the parking lot to conduct the photo lineup?

A. Yes, sir, that's correct.

Q. Who conducted the photographic lineup?

A. Detective James Perkins.

Q. And where were you when it was administered?

A. I was within proximity but I was away from the procedure that was going on.

Q. So you, yourself, did not conduct the lineup procedure?

A. That is correct.

Q. And is it your understanding that the procedure was conducted?

A. Yes, sir.

Q. Are you aware of whether Mr. Patel was able to make an identification?

A. At the time, no.

Q. Did there come a time when you became aware of whether or not he was able to make an identification?

A. Once I gathered the paperwork from Detective Perkins I did.

Q. And did he in fact make an identification?

A. He did.

Q. And based on his identification what did you do?

A. Okay. Based on the totality of circumstances being positive identification from Mr. Patel from the six-person photo lineup and my positive recognition of Mr. Bowens Green I generated an arrest warrant for his arrest.

MR. RUTLEDGE DURANT: Your Honor, may we approach?

THE COURT: You may.

(WHEREUPON, the following bench conference was reported.)

MR. RUTLEDGE DURANT: 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?

MR. RUTLEDGE DURANT: 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?

MR. GRIMES: The booking photo. I was researching

lineups last night --

THE COURT: Which is different --

MR. GRIMES: I understand, and I was going through some South Carolina cases on booking photos --

THE COURT: You can't use booking photos if it looks like a booking photo. Is that what this is?

MR. RUTLEDGE DURANT: No, that is not the one from the lineup. That is when he was arrested for this incident.

MR. GRIMES: I think it's a reversible error. I think it's an error to admit a booking photo.

THE COURT: You think it's an error to admit a booking photo?

MR. GRIMES: Yes, ma'am.

THE COURT: All right. Do you have a case for me on this?

MR. GRIMES: If I get five or ten minutes I'll have Cody look through Lexis real fast.

THE COURT: Okay.

MR. RUTLEDGE: I don't have a problem if you want me to cut those photos, cut the top half off.

MR. GRIMES: Yeah, but, I mean, it still shows it's a booking photo.

THE COURT: Let's just mark it for identification.

MR. RUTLEDGE DURANT: That's fine.

THE COURT: We can do this later.

Let's move it on, Mr. Durant.

(WHEREUPON, State's Exhibit Number 5, a Photograph of the Defendant, was marked for identification only.)

BY MR. RUTLEDGE DURANT:

Q. Detective, you said based on Mr. Patel's identification of the defendant you prepared an arrest warrant?

A. That's correct.

Q. And was the defendant arrested?

A. Yes, sir.

Q. And were you, yourself, involved in that arrest?

A. Yes, sir.

Q. I'm showing you what the State has labeled State's Exhibit 5 for identification and ask you to take a look at it. Do you recognize it?

A. I do.

Q. Does that picture fairly and accurately depict the defendant on the day that he was arrested?

A. Yes, sir, it does.

Q. At this time, the State moves for the admission of State's 5?

MR. GRIMES: We object under Rule 404(b).

THE COURT: Overruled. You may not publish at this time though, Mr. Durant.

Five into evidence over defense objection.

MR. RUTLEDGE DURANT: Thank you.

(WHEREUPON, State's Exhibit Number 5, a Photograph of the Defendant, was admitted into evidence.)

BY MR. RUTLEDGE DURANT:

Q. Detective, please answer any questions the defense may have for you.

A. Yes, sir.

THE COURT: This would be an appropriate time for us to stop if you all need another break, just let me know.

(WHEREUPON, the jurors discussed taking a break among themselves.)

THE FOREMAN: Keep going, Judge.

THE COURT: All right. Mr. Grimes?

CROSS-EXAMINATION

BY MR. GRIMES:

Q. Good afternoon. Good afternoon, Detective Lawrence.

A. Good afternoon, Mr. Grimes.

Q. I imagine there's a few things we can agree on today, correct?

A. Yes, sir.

Q. One of those things we can agree on is that Deputy Luckadoo described Mr. Green, said his name was Marvin

Bowens when he said he viewed the video of the person who robbed the store on December 24th, 2010, correct?

A. That's correct.

Q. And this is Marvin Bowens Green, the gentleman here, correct?

A. That's correct.

MR. RUTLEDGE DURANT: Objection, Your Honor. May we approach?

THE COURT: You may.

(WHEREUPON, the following bench conference was reported.)

MR. RUTLEDGE DURANT: I don't want to use too strong of a language but this defendant has commonly and people knew him as Marvin Bowens Green, Marvin Bowens, and Marvin Green. So I don't want a fraud to be perpetrated on this Court in that somebody doesn't know somebody because of their name, and that is common and I think you know that.

THE COURT: Okay. So what's your objection?

MR. RUTLEDGE DURANT: That there's a mischaracterization about Deputy Luckadoo and that he didn't know him as the same person, and that's just false. That is not accurate.

THE COURT: What do you want me to do? What's the basis of your objection?

MR. RUTLEDGE DURANT: Well, I think he's pursuing him and created it as fraudulent.

MR. GRIMES: He's definitely testified as Marvin Bowens.

THE COURT: Okay.

MR. GRIMES: I don't appreciate your calling it a fraud.

MR. RUTLEDGE DURANT: I'm not saying --

THE COURT: The both of you can go outside of the courtroom and take care of this issue, but right now I need you to address the Court.

MR. GRIMES: Well, he hasn't stated a ground for an objection, as far as I know.

THE COURT: I listen with a grain of salt, all right, and if I felt there was an issue with fraud I would have directly addressed it, all right. Now, let me hear from you, as to the issue.

MR. GRIMES: The issue? I'm not sure what the issue is.

THE COURT: What I assume the issue is going to be is that you are going to twist it and make it seem because he didn't know his full name that he didn't know who this individual was.

Is that what you're saying?

MR. GRIMES: I mean, the question is ID.

THE COURT: I think you need to be careful --

MR. GRIMES: I'm sorry.

THE COURT: All right. As of now I don't even know what the objection is.

MR. RUTLEDGE DURANT: And I don't want to accuse. I just want to bring to the Court's attention that if he didn't know then that is very common that people know him as both. You can ask this detective as well, and if it was an overreaction -- I'll say this, maybe it was an overreaction for me to come up here but I felt strong about it.

THE COURT: All right. Thank you.

(WHEREUPON, the bench conference was concluded.)

THE COURT: Mr. Grimes, your witness.

MR. GRIMES: Thank you, Your Honor.

BY MR. GRIMES:

Q. And this is Marvin Bowens Green, correct?

A. That's correct.

Q. And he has a brother named Marvin Bowens, doesn't he?

A. I'm not correct on the name. Something similar, yes, sir.

Q. Okay. You say you've known Marvin since 2004?

A. Correct.

Q. Approximately eight years, correct?

A. Correct.
Q. Know him well?
A. Yes, sir.
Q. You know Marvin's father?
A. I do.
Q. In fact, he's -- some may describe him as a community leader in Ravenel, Jacksonboro area?
A. Yes, sir.
Q. Sometimes when you are investigating crimes you talk to him, Mr. Bowens, Marvin's father?
A. That's correct.
Q. In the past he's given you some helpful information?
A. That's correct.
Q. In the past he's given you information that would help clear people?
A. That's correct.
Q. And you know the family well, don't you?
A. I do.
Q. But you're not certain Marvin Green has a brother named Marvin Bowens?
A. All their names are similar, like Marvin, Melvin. All of them are similar. As far as Marvin Bowens Green, I'm certain of him.
Q. All right. I understand. And being brothers they

look similar, too, don't they?

A. Which one you referring to now?

Q. The brothers that you know.

A. Yeah, the younger brother looks taller and bigger.

Q. Okay. And he apparently has 12 brothers and sisters, correct?

A. I'm sorry?

Q. He has 12 brothers and sisters, correct?

A. I don't know about that many.

Q. But if I could show you Court's Exhibit 8 would that help you refresh your memory as to what Marvin Bowens looks like?

A. Marvin Bowens Green or Marvin --

Q. Marvin Bowens.

A. Sure.

MR. RUTLEDGE DURANT: Objection, Your Honor. The witness has no idea what Court's Exhibit whatever it was is called.

THE COURT: Could you clarify that for him.

MR. GRIMES: Yes, ma'am.

THE COURT: State's Exhibit; is that correct? State's Exhibit 1.

MR. GRIMES: I believe it's Court's Exhibit 8, at this point.

THE COURT: No, no, no, no. Counsel, approach.

(WHEREUPON, the following bench conference was reported.)

THE COURT: You moved on to a different hearing so everything is renumbered.

MR. GRIMES: Okay.

THE COURT: So if you need to refer to it those are all marked from a previous hearing, and we're going to keep them marked. And the Court's Exhibits, I reserve them for different things. So that's a Court's Exhibit.

MR. GRIMES: Would it be okay if I make it a defense exhibit.

THE COURT: You can do that if that's what you choose to do, Mr. Grimes, but unless you can lay a better foundation you're going to get the same result.

MR. GRIMES: May I at least see if I can ask him while he's under oath in front of the jury?

THE COURT: Don't start flashing it around.

MR. GRIMES: I'm not flashing it around.

THE COURT: All right. Thank you.

(WHEREUPON, the bench conference was concluded.)

MR. GRIMES: I'd like to mark this as a defense exhibit.

(WHEREUPON, Defendant's Exhibit Number 7, a Photograph, was marked for identification only.)

BY MR. GRIMES:

Q. I'll show you what's been marked Defendant's Exhibit 7. So if you could review that and see if that refreshes your memory as to what Marvin Bowens, Marvin Green's brother looks like?

MR. RUTLEDGE DURANT: Objection, Your Honor.

THE COURT: Basis?

MR. RUTLEDGE DURANT: You want me to state it right here or approach?

THE COURT: Can you just give me the foundation without any speaking objection?

MR. RUTLEDGE DURANT: No foundation.

THE COURT: All right, Counsel. Counsel.

(WHEREUPON, a bench conference was had, not on the record.)

BY MR. GRIMES:

Q. Let me see if I can rephrase my question, Detective Lawrence.

THE COURT: Thank you, Mr. Grimes.

MR. GRIMES: Thank you, Your Honor.

BY MR. GRIMES:

Q. Do you recognize who's in the picture, Number 7 -- or Defense Exhibit Number 7?

A. Well, this picture is a blur, Attorney Grimes, so it's hard to recognize because it's a big blur. No, sir, I can't.

Q. Okay. Thank you.

THE COURT: Thank you.

Q. I'm going to ask you a few questions about eyewitnesses, okay?

A. Yes, sir.

Q. Eyewitnesses do make mistakes, correct?

A. Yes, sir.

Q. And you investigated cases where you've had an eyewitness and it turns out that person had an alibi or the person who was identified was being cleared, correct?

A. Yes, sir.

Q. Now, I want to ask you a few questions about some of your training -- well, a lot of questions about your training, okay?

A. Yes, sir.

Q. To become a certified sheriff, deputy sheriff with arrest powers you have to go through the South Carolina Criminal Justice Academy?

A. Yes, sir. That's correct.

Q. And I know the elective courses have changed but it used to be eight weeks?

A. Yes, sir.

Q. When you went through was it eight weeks or 12 weeks?

A. It was eight weeks when I went through, yes, sir.

Q. And at the Criminal Justice Academy they kind of teach you the basics of being a police officer or a deputy?

A. That's correct.

Q. They teach you some of the summaries of law, like probable causes, how to get a search warrant?

A. Yes, sir.

Q. How to make arrests, how to conduct proper interviews?

A. Yes, sir.

Q. And then when you become -- when you pass the Criminal Justice Academy you work with some deputies in the field, field training officers?

A. That's correct.

Q. And they teach you sort of more hands-on experience?

A. Yes, sir.

Q. And then you get training -- you go to training every year, correct?

A. That's correct.

Q. To become a better police officer?

A. To keep your certification.

Q. And you also want to become better, correct?

A. That's correct.

Q. Solve more crimes?

A. Yes, sir.
Q. Protect the public?
A. Yes, sir.
Q. And I'm going to ask you a few questions about report writing. Is that an important part of being a police officer?
A. Report writing?
Q. Yes, sir.
A. Yes, sir.
Q. And one reason it's important is because it may take a while for a case to come to court?
A. That's correct.
Q. For example, this case happened December 2010?
A. That's correct.
Q. And you probably investigated a lot of cases since December 2010, haven't you?
A. I have.
Q. And you probably assisted other deputies in investigating cases?
A. That's correct.
Q. And names and stuff can run together over time, correct?
A. Yes, sir.
Q. And if you write a good report then you can refresh your memory, like you've done today?

A. Yes, sir.

Q. And you want the reports to be written fairly, correct?

A. That's correct.

Q. You want to make sure that the guilty go to jail and the innocent go free?

A. That is correct.

Q. Wouldn't want an innocent man to go to jail?

A. Correct.

Q. As Mr. Groeber said, you have an innocent man in jail and a guilty person still out there doing whatever he was doing, correct?

A. That's what he said.

Q. And you wouldn't want that, would you?

A. I wouldn't want it, no, sir.

Q. And you want the reports to be accurate?

A. Correct.

Q. So if someone was an eyewitness and someone had a scar on their face you would want to include the scar in your report?

A. Can you say that again.

Q. If an eyewitness gave you a description of a robber and a robber -- he said the robber had a scar over his eye you would put that in your report, correct?

A. Are you referring to this case or any case?

Q. Any case.
A. Yes, sir.
Q. Speaking generally right now.
A. Yes, sir.
Q. Because that would help you identify the robber?
A. That's correct.
Q. And if someone didn't have a scar then he wouldn't be the robber, correct?
A. Now, are you looking at current picture or -- help me out, Mr. Grimes.
Q. I'll move on.
A. Okay.
Q. And now you are a case agent, correct?
A. Yes, sir.
Q. So report writing would also apply to Deputy Luckadoo or Deputy Kjellman, correct?
A. Yes, sir, that's correct.
Q. So the initial responding officers try to get as much detail as they can from the victims of the crime?
A. That's correct.
Q. And that also applies to 9-1-1 operators, correct?
A. Correct.
Q. That's when people have first contact with the police at that point, right?
A. Are you talking about the initial responders or --

Q. The 9-1-1 call.

A. 9-1-1, yes, sir.

Q. And at that point if the suspect is unknown you want to get as good a description of the suspect as you can?

A. That's common practice, yes, sir.

Q. So you know where -- who you are looking for, correct?

A. Correct.

Q. And you don't waste time on leads that aren't fruitful?

A. Correct.

Q. Now, I'm going to ask you a few questions about this case. As the case agent on this case part of your job is to review, like, all reports and everything that comes to -- has been done in the case, correct?

A. Yes, sir, that's correct.

Q. And did you review the 9-1-1 tape?

A. I'm sure I did, yes, sir.

Q. Okay. And when Mr. Patel called 9-1-1 what description of the robber did he give?

A. I haven't heard the tape since maybe 2010. I can't answer that right now.

Q. Well, you've had plenty of notice this case was coming up for trial, haven't you?

A. I did.
Q. Did you listen to it with Mr. Durant or anyone else getting ready for the trial?
A. I did not.
Q. Did you listen to it in helping you prepare the photographic lineup?
A. In reference to the 9-1-1 tape?
Q. Yes, sir.
A. No, sir. I hadn't heard the 9-1-1 tape since it was requested.
Q. Okay. Do you have a copy of it in your case file?
A. It should be there, yes, sir.
Q. You mind showing me where it is so we could review it and see what's on there?
A. If I have it, it will be in the case file. That's what I'm saying, Mr. Grimes. I haven't heard the 9-1-1 tape. That's what I'm saying to you merely.
Q. Okay. Well, what I'd like to know is what description Mr. Patel gave of the robber on the 9-1-1 tape.
A. I can't answer that. I can't answer that right now because I haven't heard the tape, Mr. Grimes.
Q. Okay. Well, if we call you back tomorrow and give you overnight to listen to it would that be fair?
A. I can, yes, sir.

Q. Now, we've gone over the incident report, initial incident report, that was prepared by Deputy Kjellman?
A. Yes, sir.
Q. And I think Deputy Luckadoo responded out there?
A. That's his testimony. Yes, sir.
Q. And Deputy Roberson?
A. That's Deputy Luckadoo's testimony, yes, sir. Again, I didn't respond to the scene. I didn't get this until days later.
Q. I understand.
A. Okay.
Q. And when you -- and that day of the robbery you got a call from Deputy Luckadoo saying Mr. Marvin Bowens is who committed the robbery, correct?
A. Yes, sir.
Q. And at that point you didn't take out an arrest warrant for Marvin Bowens?
A. No, sir.
Q. And at that point that was on December 24th?
A. Yes, sir.
Q. And you didn't go out to the store to watch the video there, did you?
A. I did not.
Q. So December 25th, did you take out a warrant then?
A. I did not.

Q. Go to the store to watch the video?
A. I did not.
Q. You waited several days to do that, correct?
A. Not so much as wait. The tape wasn't available until December 29th. That was the first availability for the tape, and that's when I was first informed that it was ready at which date and time I did go and review the tape then.
Q. I'm a little confused. Obviously it was available at the store.
A. Okay.
Q. Deputy Luckadoo watched it there, correct?
A. That's his testimony, yes, sir.
Q. All right. And I guess you didn't get assigned to the case that day but you got assigned a couple days later?
A. Correct. Normally Christmas and the day after Christmas are considered holidays, so days off. So I didn't probably get the case until the 27th, 28th.
Q. All right. And then by the 27th had the tape been taken into evidence?
A. Had not.
Q. So it was still at the store?
A. That's correct.
Q. On the December 27th when you had the case and you

were working did you go out to the store to watch the tape?

A. I inquired about the tape and it was not available yet.

Q. Was it at the store or was it in evidence?

A. It was at the store, sir.

Q. And why wasn't it available?

A. You have to ask the technician from forensic service, sir.

Q. Well, now I'm a little confused again. If it's at the store why would forensic services have the tape?

A. Okay. Let me explain this for the record. I did not respond to the scene.

Q. I understand.

A. Okay. Therefore, I wasn't aware of this case until I got assigned the case. Okay. I got a call from Luckadoo but I had no knowledge of the case, from Deputy Luckadoo, okay, but I had no further knowledge of the case. When I got assigned the case I read the incident report and I went from there.

The first time that the tape was available for Detective Lawrence to review was December 29th, early that morning, and that's when I reviewed it, and it was at 3505 Pine Haven Drive, North Charleston, South Carolina, not on 5737 Savannah Highway, Ravenel.

Q. Okay.
A. Okay.
Q. And so you talked to Deputy Luckadoo and he told you it was Marvin Bowens who robbed the store?
A. Yes, sir.
Q. And you got a copy of the incident report?
A. Yes, sir.
Q. And on there it had Mr. Bowens' name?
A. That's correct.
Q. And on there it was actually Marvin Bowens Green, correct?
A. Marvin Bowens Green, correct.
Q. And then I think you did your own report on January 11th, 2012?
A. Yes, sir.
Q. And in doing your report you would sort of investigate the case when you got it on the 27th, watching the video, interviewing any witnesses, then do your report?
A. On the 29th.
Q. Yes, sir.
A. Yes, sir.
Q. And then you requested the case to be closed on December 11th, correct?
A. Yes, sir.

Q. January 11th.

A. January 11th, yes, sir.

Q. Because you had finished your investigation?

A. Yes, sir.

Q. All right. And your investigation was being done fairly, accurately, completely on January 11th?

A. Yes, sir.

Q. Now, I'm going to ask you a few questions about that. I believe you testified before you like to go the extra step?

A. That is correct.

Q. And in this case you went the extra step, correct?

A. Yes, sir.

Q. You got a search warrant from Mr. Green's house?

A. That's not correct.

Q. You didn't get a search warrant to try to find a black hooded sweatshirt?

A. No, sir.

Q. You didn't get a search warrant to try to find khaki cargo pants?

A. No, sir.

Q. You didn't get a search warrant to look for dark sunglasses?

A. No, sir.

Q. Or a red-billed baseball cap?

A. No, sir.
Q. Didn't get any -- did you talk to his father?
A. I did.
Q. All right. And when did you talk to his father?
A. Maybe the 30th of December -- or 29th of December or the 30th.
Q. And you made arrangements for him to turn his son in?
A. That's correct.
Q. And he turned his son in?
A. He did.
Q. Cooperatively?
A. Without incident.
Q. No problems?
A. None.
Q. He didn't try to run or anything, or hide?
A. No, sir.
Q. And so you probably didn't need a search warrant. His father probably would let you search the house when he turned him in, correct?
A. That's speculation.
Q. Did you talk to his mother?
A. I don't recall.
Q. Okay. Do you remember talking to his girlfriend?
A. I don't recall that either.

Q. In your incident report you didn't make any mention of talking to Ms. Patel, did you?

A. I did not. I believe I dealt solely with the husband, the victim.

Q. Okay. Because he was basically the eyewitness in the case?

A. That's correct.

Q. And as far as you know Ms. Patel had no knowledge of the case?

A. Correct.

Q. And if she had knowledge of the case you would have wanted to talk to her, correct?

A. That is correct.

Q. And you never got a statement from her?

A. No, sir.

Q. Have you ever talked to Ms. Patel?

A. On the phone when I was inquiring the whereabouts of her husband.

Q. Okay. And that was on December 29th, 2010?

A. Yes, sir, that's correct.

Q. In the approximately a year and a half since then have you talked to her?

A. No, sir.

Q. Now, you were in here for Mr. Patel's testimony, correct?

A. I'm sorry.
Q. You were in here for Mr. Patel's testimony, correct?
A. Yes, sir.
Q. I want to ask you a few questions about that and your report.
A. Okay.
Q. We heard Mr. Patel testify that Mr. Green was a regular customer?
A. He did.
Q. And in your report you stated that Mr. Patel told deputies that he had been robbed by an unknown assailant?
A. That's correct.
Q. And Mr. Patel testified that Mr. Green would joke around about having a license signed by President Obama?
A. That is correct.
Q. I think we can probably agree that's probably not a very common joke. It's probably something unique, isn't it?
A. I guess we can agree to that, Mr. Grimes.
Q. And there's no mention of that in your report, is there?
A. Not at the time, no, sir.
Q. Not on January 11th, 2011?
A. No, sir. I had the facts of my case. Once I

closed my case upon arrest I had all of the facts met.

Q. You had all the facts met?

A. That is correct.

Q. Okay. You made up your mind then?

A. The totality of the circumstances, yes, sir.

Q. Case closed, ready to move on?

A. Yes, sir.

Q. You've done all the extra steps in the case?

A. If you will, yes, sir.

Q. And we heard Mr. Patel today testify I think on cross-examination, not on direct examination, that he was able to see Mr. Green's eyes when he kind of, like, looked down or looked over the glasses?

A. That's correct.

Q. That's not in your report, is it?

A. No, sir.

Q. I think we also heard him testify he was able to recognize Mr. Green's voice?

A. That's correct.

Q. And there's nothing of that in your report, is there?

A. It's not.

Q. And I believe you testified you were able to sort of pick out Mr. Green because of the way he walked?

A. That's one of the features, yes, sir.

Q. Okay. One of the features, part of the totality of the circumstances?

A. The walk, the nose, all of the above, yes, sir.

Q. Okay. And there's nothing about his walk in your report, is there?

A. No, sir.

Q. And when you see him in sort of the second view at the cash register on the video you can just basically see waist up, correct?

A. That is correct.

Q. And you see him kind of walking very briefly at the beginning, very briefly walking out?

A. Yes, sir, that's correct.

Q. And based upon that you're, I think you said a hundred percent, absolutely, positively --

A. One hundred percent. Yes, sir. One hundred percent.

Q. And you testified you can tell from his nose it was Mr. Green?

A. Yes, sir.

Q. Did he have a piercing in his nose?

A. No, sir, no piercing. It's somewhat pointed. Again, I've had the opportunity to sit down with him for hours at a time. He and I have talked, I've seen his demeanor, I've seen the way he moves, all of those. You

know, I observed that in the video, okay. All the times that we spent together I observed all of those motions in the video surveillance.

Q. You said he had a pointy nose?

A. Somewhat.

Q. And you were able to observe all his motions --

A. Yes, sir.

Q. So the video shows someone walking into the store, correct?

A. Yes, sir, that's correct.

Q. And kind of leaning over with a gun and looked back and look around?

A. Yes, sir.

Q. All right. Now I'm going to change topics a little bit and ask you about some training on some crime scene investigation.

A. Yes, sir.

Q. Was crime scene called out to the store?

A. Crime scene did respond.

Q. And they took fingerprints?

A. Yes, they did.

Q. And no fingerprints matched up with Mr. Green?

A. None matched up to Mr. Green, that's correct.

Q. And I take it there was no DNA found?

A. None.

Q. And part of the duty of crime scene is when crime scene is called out you want to prevent the crime scene from being tampered with, correct?

A. Yes, sir, that's correct.

Q. You wouldn't want fingerprints to get smudged?

A. That's correct.

Q. DNA to get lost?

A. Right, to preserve the scene as much as possible. Yes.

Q. And as part of preserving the scene you also like to keep witnesses separated from each other, correct?

A. Yes, sir.

Q. Because if witnesses start talking they contaminate each other's memories, correct?

A. That's correct.

Q. Now, in this case the witnesses weren't kept separate from each other, were they?

A. There was only one witness.

Q. Okay. So who was the one witness?

A. Mr. Patel, the older Mr. Patel.

Q. Seemed like they called Deputy Luckadoo as a witness.

A. He was categorized as a witness; however, he and Mr. Patel -- his findings of the video surveillance he never discussed with Mr. Patel.

Q. He did testify to that, they were -- they watched the video together, correct?

A. According to his testimony, yes.

Q. And then they went -- and Deputy Luckadoo went in the hallway and talked to Deputy Kjellman?

A. Yes, sir.

Q. And then Mr. Patel was in office, correct?

A. Yes, sir.

Q. And then Mr. Patel watched the video with his wife, correct?

A. According to his -- yes, sir.

Q. And my understanding, they are calling his wife as a witness?

A. I'm sorry?

Q. It's your understanding they were going to call his wife as a witness?

A. Is it my understanding that they will call his wife as a witness?

Q. As a witness.

A. Not to my knowledge.

Q. But she's not testifying in this case?

A. I'm uncertain.

MR. RUTLEDGE DURANT: Objection, Your Honor.

THE COURT: Basis?

MR. RUTLEDGE DURANT: We've gone down this road of

lack of personal knowledge, it seems like long enough.

THE COURT: All right. So your objection is lack of personal knowledge?

MR. RUTLEDGE DURANT: That's correct.

THE COURT: All right. Sustained.

BY MR. GRIMES:

Q. And you are the case agent in this case?

A. I am.

Q. And you're supposed to know all the witnesses?

A. Directly?

Q. You told Mr. Durant you are managing sort of this case, correct?

A. That is correct. I don't issue out subpoenas. We receive them.

Q. I understand.

A. They come from the solicitor.

Q. And from us sometimes?

A. Yes, sir.

Q. So you don't know if -- well, I'll move on. And Mr. Patel has also watched the video with his son, correct?

A. That's his testimony, yes, sir.

Q. And I want to ask you some questions about lineup procedures.

A. Yes, sir.

Q. The sheriff's office has procedures for conducting lineups, correct?

A. We do.

Q. And something you want to follow?

A. Yes, sir.

Q. Because if a lineup is done improperly it could lead to an innocent person going to jail?

A. That's very correct.

Q. And I think these guidelines or policies were revised in December of 2009?

A. You're more current with it than I am. It's in front of you, sir.

Q. Yes, sir.

MR. GRIMES: May I approach, Your Honor?

THE COURT: You may.

BY MR. GRIMES:

Q. I'm going to hand you what's been marked as Defense Exhibit 2.

A. All right.

Q. Do you recognize what that document is?

A. I do.

Q. Are those procedures we are talking about?

A. Yes, sir.

Q. And they were revived in December of 2009?

A. 12-8-2009, that is correct.

Q. Now, are you familiar with the Eyewitness Evidence, the Guide to Law Enforcement published by the Department of Justice?

A. The eyewitness? No, sir, I'm not familiar with it.

Q. So you don't know if your guidelines are based upon what the Department of Justice wants?

A. This is our Bible here. The standard operating procedures. This is what we go by.

Q. And do you know what the difference is between a sequential lineup and simultaneous lineup?

A. I do.

Q. And sequential lineup is when you show one picture at a time and flip it over?

A. That's correct.

Q. Simultaneous lineup is the one we have here where you have six pictures shown?

A. Yes, sir, that's correct.

Q. And are you aware of any studies or anything from your training on what produces bad results, sequential lineups or simultaneous lineups?

A. Not as far as studies. SLED is considered non biased. That's why I did my photo lineup through them. I could have gotten a six-person photo through Charleston County Detention Center based on his archives, however, I don't know who knows him and I wanted to be non biased,

and that's the reason why I took the extra step to go through SLED. They are located in Columbia and they have no knowledge of this case.

Q. All right. Now, I'll ask you a few questions about the procedures there, okay?

A. Yes, sir.

Q. The reason I was asking you before about the 9-1-1 tape, reviewing that, I believe the procedures require or ask you to put in people who fit the description given by the victim at the time of the crime, correct?

A. Yes, sir, that's correct.

Q. As opposed to finding six people who look -- maybe closely resemble the suspect?

A. Again, we just -- we request it, and SLED assembles it and they send it back to us.

Q. But there's a role for the initial description of the -- it's a factor in making out the lineup, is the initial description of the suspect, correct?

A. That's not always so. I didn't see who the -- I didn't confirm the identity until the 29th of December and that's why I'm here standing in front of you guys today, this jury of 13 people and the defense now because once I confirm the identity of Mr. Bowens Green I then requested a six-person photographic lineup, and once it was confirmed and sent back to me I then arranged to meet

with the victim, Mr. Patel, the older Mr. Patel --

Q. I understand that but I was asking you something different.

A. Okay.

Q. Now, direct your attention to page three.

A. Okay.

Q. Subsection -- paragraph five, procedure 83.

A. Eighty-three, okay.

Q. Is it fair to say as part of that policy the deputy sheriff will select fillers that can only fit the witness's description of the perpetrator?

A. They say when there's limited or inadequate description of the perpetrator provided by the witness or when the perpetrator differs significantly from the appearance of the suspect fillers should resemble the suspect and significant features. And the photo, the six-person photo lineup there is consistent with this.

Q. Well, I understand but what I'm asking you is a little more precise than that.

A. Okay. Can you dumb it down a little bit for me then, Attorney Grimes, so I can understand the answer.

Q. I'll try to.

A. Thank you.

Q. It says the deputy sheriff, which would be you.

A. Correct.

Q. Will select fillers. Those would be five people who we know could have committed the crime, correct?

A. That's correct.

Q. Who generally fit the witness's description of the perpetrator, and that would be the witness who called 9-1-1 and said he's a five-eight, white male with brown hair. You would try to find white males who are about five-eight with brown hair?

A. That's correct. That's correct what you are saying there.

Q. And then you don't get a good description of the person or -- and then as soon as you pick up a fingerprint then you may use what you do here, correct?

A. So, so.

Q. But you didn't get the -- the witness never gave a description of the initial suspect, correct?

A. That is correct.

Q. So he never said the person who robbed me was five-six, or five-eight, six-foot, did he?

A. Well, he gave -- he provided information that he knew as to his relationship with the defendant, okay. That's what he gave. It wasn't confirmed until the video was actually -- the video surveillance actually was seen, and, you know, we can go all day with what you are asking.

The fact is, we don't request the photo lineups. It's either done through SLED, which I did because they are non biased, or if I really wanted it that quick I could have sent it off to Charleston County Detention Center, and again, I don't know who he knows at the Detention Center and I didn't want to risk that coming up in court. That's the reason why I went to the non biased agency, based on particulars.

Q. All right. Well, let me just ask you one thing sort of about height.

A. Yes, sir.

Q. Mr. Patel is five-four, correct?

A. He's rather short.

Q. If I showed you a copy of the incident report would that refresh your memory?

A. Yes, sir.

(A document was handed to the witness.)

Q. He's about five-four?

A. Yes, sir. According to the incident report, yes, sir.

Q. And according to the incident report Mr. Green is about five-six?

A. According to that, yes, sir.

Q. So, for example, if he robed him he'd say, Yeah, this guy is a regular customer, he's just a couple inches

taller than me; he could have easily figured out he was five-six, correct?

A. In Mr. Patel's testimony he says that 80 percent of his clients are African Americans, you see? So we will be going at this all day long trying to reach your point, Attorney Grimes.

Q. Well, I don't mean to be disrespectful but I asked you about height. I didn't ask you about 80 percent of his customers?

A. Right. If we were to go into that bank that you are asking we would -- I mean, my thing is we don't know what suspect we're looking for. I can put it in the bank with all the fillers that you are asking but I don't know who the defendant is so I don't know who I'm looking for. That's why I'm merely saying to you based on the description that the victim gave, Mr. Patel, I don't know who I'm looking for.

Once I confirm the person that he was talking about, now I know who I'm looking for and that's when I requested it through SLED. But I can go by the fillers that you're saying but I'll be beating a dead horse because I honestly don't know who I'm looking for.

Q. Well, so when Deputy Luckadoo told you he saw the person, and called you and told you that, you put it in the incident report?

A. Yes, sir.
Q. You just discounted that totally?
A. I did because he's a road deputy. I appreciate that information but once I confirm who he was that's when I move forward because I knew that I was going to be on the stand. Deputy Luckadoo is going to be here for what he said but I ultimately have the responsibility of this case.
Q. All right. So just to be clear, you discount what Deputy Luckadoo testified to?
A. Until it was confirmed, yes, sir, by myself.
Q. And then you testified earlier that your word alone is enough, that's why you elected to go do the lineup, correct?
A. Yes, sir. That's correct.
Q. And then we heard Mr. Patel testify that the person in the picture was a regular customer?
A. Yes, sir.
Q. And there was no one else who was a regular customer in the lineup, correct?
A. Yes, sir, according to his testimony.
Q. And there's nothing in your incident report about Mr. Patel giving a description saying his nose stood out to him?
A. No, sir. Mr. Patel never mentioned that. That was

my observation of talking to him and that's one of his mannerisms that I discovered.

Q. There's nothing in there about him saying he got a great look at his face, is there?

A. According to the statement I believe it says that he recognized him to be a customer, has been a customer on prior occasions, yes, sir.

Q. Recognized him to be a customer because of through his voice or face?

A. Sir? I'm sorry?

Q. He also testified he recognized his voice, correct? Testifying, not in the incident report.

A. Yes, sir. Yes, sir. He did testify to his voice, correct, as well as seeing his eyes over -- as he was looking down, over the shades, and him getting the same type of cigarettes.

Q. And yet in your incident report you said, Victim advised deputies he had been robbed by unknown assailant.

A. Yes, sir, and --

Q. Thank you.

A. Yes, sir.

MR. RUTLEDGE DURANT: Your Honor, I think the witness wanted to explain that answer. He was cut off.

THE COURT: All right. You may explain your answer.

A. Thank you, Your Honor.

An unknown meaning not knowing by name.

Q. And in the incident report it says stranger, correct?

A. If he doesn't know him by name he would be considered a stranger, yes.

Q. That's what's in the incident report as categorized as, correct?

A. That's correct. He doesn't know him by name so he wouldn't be considered -- he's not an acquaintance if he doesn't know him.

MR. RUTLEDGE DURANT: May we approach?

THE COURT: All right. Counsel, you may approach.

(WHEREUPON, the following bench conference was reported.)

MR. RUTLEDGE DURANT: I thought we covered this in our pretrial hearing, that there is no way that --

MR. BRUCE DURANT: And for him to pick out the word stranger that's twice he's mischaracterized what's out.

MR. GRIMES: May I?

THE COURT: You may.

(WHEREUPON, the bench conference was concluded.)

BY MR. GRIMES:

Q. For clarification.

A. Yes, sir.

Q. On the first page of the incident report do you guys see the place where it has the box for Marvin Bowens Green?

A. Yes, sir.

THE COURT REPORTER: I'm sorry, Your Honor. I can't understand him.

THE COURT: Mr. Grimes, when you are looking down it's hard for the court reporter because you are talking straight into that podium.

Q. In the box you see where it says Marvin Bowens Green?

A. Yes, sir, I do.

Q. And there's, like, relationship to the subject?

A. Yes, sir.

Q. And under that it says stranger?

A. That's correct.

Q. Thank you. Sorry for jumping around a little bit too much. To go back to the lineup procedures, part of the admonition form is not to discuss your identification procedure or what happened afterwards, correct?

A. That is correct.

Q. And you did the identification on December 29th?

A. Yes, sir.

Q. And you heard Mr. Patel, the robbery proceeded on December 24th?

A. Yes, sir.
Q. And you heard Mr. Patel testify he discussed it with his wife about a week?
A. I think he said they reviewed the video for about a week then they left it alone because --
Q. Tried to forget about it?
A. Yes, sir, they tried to forget about it.
Q. Then they discussed it with Mr. Durant and his investigators?
A. Yes, sir. That was after apprehension was made, yes, sir.
Q. Okay. And then the lineup procedures -- or admonition form, it also asked the witness to state how certain he is on the form, correct?
A. Yes, sir, that's correct.
Q. And this was explained thoroughly to Mr. Patel?
A. According to his testimony, yes.
Q. And according to his son?
A. Yes, sir.
Q. And there's a place on the lineup -- or identification form for him to make comments, correct?
A. Yes, sir, that is correct.
Q. And he didn't state anything as certainty on there, did he?
A. He didn't, but according to his testimony as well

-- according to his testimony is once he was showed -- as soon as he was showed it he automatically pointed at (indicated) and circled Mr. Marvin Bowens Green.

Q. All right.

A. Without hesitation.

Q. But he didn't say I'm a hundred percent sure this is Marvin Bowens Green?

A. He didn't say, however, he implied that as soon as he saw the lineup he knew Mr. Marvin Bowens Green was the subject who had him at gunpoint and robbed him of $60 and a pack of cigarettes.

Q. And the policies also give you the option of sort of recording these -- how these procedures are done, correct?

A. I'm sorry, sir?

Q. Your policies also give you the option about recording of the lineup procedures, correct?

A. Recording this incident in the parking lot?

Q. Yes, sir, or wherever you wanted to do it at?

A. Well, if it's at the station it's reasonable to do but this is 2010 and I don't know what kind of phone I had back then. I don't know what kind of phone Detective Perkins had back then. He was the person actually administering the admonition.

Q. I understand you may not have had a phone out there

to do it with.

A. Right.

Q. That's probably not the best way to record it but Mr. Patel was cooperative with you, correct?

A. Yes, sir, he was.

Q. And it's, what, a 10, 15-minute ride from Citadel Mall to Pine Haven?

A. Yes, sir, it's safe to say.

Q. So you could have easily taken him back to Pine Haven where you had facilities to do that?

A. We could have, yes, sir.

Q. Then there would be really no question about translation whether he understood what arraignment or this was accurately translated to him?

A. That's very well true, but once we got a positive identification for him and the nature of the crime we were -- it was essential to obtain an arrest warrant.

Q. It may be like taking an extra step to take him back to Pine Haven and record it, correct?

A. In your words, Mr. Grimes, yes, sir.

Q. I believe you testified you took all the extra steps, correct?

A. Yes, sir. I obtained the six-person photo lineup and he positively identified him, and that certainly qualifies for taking the extra step.

Q. And your policy gives you the options of recording it, correct?

A. He could have merely refused to go.

Q. He could have but you really think he would have?

A. I don't know. He was trying to get back to his wife.

Q. Okay. And in the past when you've had opportunities to record stuff you have -- you've said the solicitor's office has directed you not to, correct?

A. Wow. That was the past but we did rectify that.

Q. Okay.

MR. GRIMES: May I have one moment, Your Honor?

THE COURT: You may.

(PAUSE.)

BY MR. GRIMES:

Q. Let me ask you one final comment.

A. Yes, sir, Mr. Grimes.

Q. Were you aware Mr. Green lived in Jacksonboro at the time of this incident?

A. Mr. Green has multiple addresses, and that's the reason why a search warrant wasn't done on him.

Q. And the address you had in your arrest warrant was for Jacksonboro, correct?

A. That is correct.

Q. And that address is about 14 miles from the Sunoco?

A. Safe to say that, yes, sir, approximately.
Q. There's a fair amount of stores between his address and that Sunoco?
A. Yes, sir.
MR. GRIMES: Thank you, Your Honor. No further questions.
THE COURT: Redirect?
MR. RUTLEDGE DURANT: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. RUTLEDGE DURANT:
Q. Detective, you testified that he lived at an address in Jacksonboro, is one of the addresses that was listed for him?
A. Yes, sir, that's correct.
Q. And you testified that there were more addresses listed for him?
A. Yes, sir.
Q. Did you have a firm understanding of where he lived?
A. I did not.
Q. Would you have liked to have executed a search warrant on this case?
A. Yes, sir. I sure would have.
Q. And would you have done that if you had a firm address?

A. Yes, I would have.
Q. Do you know whether or not he lived with his father?
A. He was back and forth with his mother and father.
Q. And do you know -- well, where did his father live?
A. His father stayed in Adams Run. His father stayed in Adams Run or his mother stayed in Colleton County, or vice versa, but I know one of them resided in Colleton County and the other one stayed -- resided in Adams Run, which is located in Charleston County.
Q. And were there other addresses as well?
A. Yes, sir. I've met his father off of Old Orangeburg -- I mean, Orangegrove, located in the City of Charleston right over the north bridge. I met him at a residence over there. So Mr. Bowens has numerous addresses. That's just some of the few that I know of.
Q. Did you ever have any hard information on where he may stay at this time?
A. No, sir, not at this time I did not.
Q. And if you did what would you have done?
A. I would have executed a search warrant for the hat that he had, the sunglasses that he was wearing, as well as the hoodie and any other clothing, to include the handgun.
Q. And you testified about the results of the

fingerprints in this case?

A. Yes, sir.

Q. And you are aware of those results, right?

A. I am.

Q. And you are aware that the only fingerprints that ever came back came back to a white man?

A. That's correct, yes, sir.

Q. Was a white man ever a suspect in this case?

A. No, sir, never.

Q. And in regard to the report that Mr. Grimes had you look at, and you told the Court that stranger was listed beside --

A. Yes, sir.

Q. -- Marvin Bowens Green's name?

A. Yes, sir.

Q. Was that the only way he was identified in that report?

A. There's not many options that you list in this block. If he's not an acquaintance or he's not a family member he's considered a stranger, and that's just one of the few options that we have, and that's the reason for stranger being in there.

MR. DURANT RUTLEDGE: And, Your Honor, at this time the State would move to enter the report under Rule 106?

MR. GRIMES: We would object.

THE COURT: All right. We'll take that up outside the presence of jury. You may continue.

MR. RUTLEDGE DURANT: And, Your Honor, may we approach briefly?

THE COURT: You may.

(WHEREUPON, the following bench conference was reported.)

THE COURT: Do you have any witnesses after this one?

MR. RUTLEDGE DURANT: We do.

THE COURT: All right, who?

MR. RUTLEDGE DURANT: We've got Perkins, we've got Milz, we've got Kjellman, and we've got Joe West. They are all here but, you know, they can come tomorrow as well.

If it's all right, I'd like for him to be able to read just parts of it and we'll leave some out, and I'll have to introduce it as long as we can get -- you know, in fairness, he's not identified in this thing as just a stranger. He's identified as a regular customer, but the problem is it also mentions that he had been identified from a prior robbery, and I will instruct the witness not to read that part. But in fairness it would not be right to have this jury understand that he was only a stranger identified by the victim.

THE COURT: I think that stranger meant in relation to identifying him.

MR. RUTLEDGE DURANT: That was in his report. He had a different report about unknown assailant and he said that that was because he didn't have a name, but to let stranger fall dead in this Court is not accurate, and this would make it fair to have the jury understand this and that at the same time through this report.

THE COURT: Why can't you just ask him if he was a stranger to the victim?

MR. RUTLEDGE DURANT: I'll do that and I'll also ask him that he had told him that it was noted in this report that he was a customer on prior occasions.

THE COURT: You're objecting to that report going in, correct?

MR. GRIMES: Yes, I am.

THE COURT: All right.

MR. BRUCE DURANT: The whole report, we don't want the whole report but I think that part is fair rebuttal under what he brought out under 106 because he's trying to present -- portray to this jury that the person was a stranger to the victim. Well, the fact of the matter is the victim told the person that he was a regular customer in the store so I think it's fair.

He also made a big deal about how there was no

description of the suspect but on the first page he gives the same description of the suspect that he gave to the Court.

THE COURT: Any response?

MR. GRIMES: Basically it's impeachment of their witness, Mr. Patel, when he says regular customer.

THE COURT: All right. Is that a copy?

MR. BRUCE DURANT: Yeah.

MR. GRIMES: And I think Mr. Patel's testimony covers that --

THE COURT: Why can't you just cross out the first statement to the person and just have him read that one sentence, if that's what you want? All right.

MR. RUTLEDGE DURANT: Where the description was given, all of that; baseball cap, red-billed cap, all of that? Suspect was wearing dark sunglasses. And that was all from Mr. Patel, his description.

THE COURT: And again, I understand you have an issue to the stranger issue. How is that --

MR. RUTLEDGE DURANT: He made a big deal about the victim didn't give a description.

MR. BRUCE DURANT: That there was no description in the incident report from which to compose a photographic lineup was the point he was making except he ignores the fact that they knew who the suspect was.

MR. RUTLEDGE DURANT: I promise not to read the danger part.

MR. GRIMES: I think this is improper bolstering.

THE COURT: I deny it and I will allow you to put in on the record. That statement we'll not have. Let me think about the other statement. Thank you.

MR. RUTLEDGE DURANT: Thank you.

(WHEREUPON, the bench conference was concluded.)

THE COURT: As to the second statement, Mr. Durant, make sure you lay a foundation for me. Thank you.

BY MR. RUTLEDGE DURANT:

Q. I think we talked about -- Mr. Grimes had elicited from you that Marvin Bowens Green was listed on the record, initial report, as a stranger as well, right?

A. Yes, sir, that's correct.

Q. And that was not the only characterization of Mr. Bowens Green in the initial responding report, was it?

A. That is correct.

Q. Because in the narrative it states the suspect had also been a customer on prior occasions?

A. That is correct.

Q. And that was written in the initial responding report?

A. It's on page two, yes, sir, in the narrative.

Q. Eyewitness identifications, procedures, they occur in a variety of ways; isn't that right?
A. Yes, sir.
Q. Sometimes a person who's asked to view a photo has never seen the person before; is that correct?
A. That is correct.
Q. Sometimes the person has seen the person before?
A. Correct.
Q. And sometimes they even know them?
A. That is correct.
Q. And in all those situations have you had the opportunity to administer lineup identifications?
A. Yes, sir.
Q. And I believe you testified that you have had cases where you have had people mistaken on their identifications?
A. Yes, sir.
Q. And in what situations -- what do you do, first of all, when there is a mistaken identification?
A. Well, wasn't so much as a mistaken it was prior to the case going to trial they -- the terminology is they retracted their statement, okay, and that's what happened. I've had cases like that. They retracted their statement prior to going to court, said, Well, that wasn't the right person or the information they gave

wasn't correct. And in an event that someone does that, if they admit that they lied on a document then we charge them for filing a false report, okay.

On other hand, if we have someone who's known -- in some cases I get they've known them for life, and if you know someone for a lifetime there's no need to waste time to show you a six-person photo lineup if you are 40 years old and you've known this person 40 years. It's a waste of time to show it. So in that capacity we show them a single person lineup, okay. Does that help?

Q. And a single person lineup is different than a six pack --

A. Yes, sir. That's one person, photo of one person, and who do you know this person to be, and we see what they state.

Q. But Mr. Patel was shown six photos; is that right?

A. Yes, sir, he was shown a six person.

Q. Detective, concerning Mr. Marvin Bowens Green's name.

A. Yes, sir.

Q. Does he always go by that exact name, Marvin Bowens Green?

A. No, sir.

Q. Are you aware of any other names that he goes by?

A. Yes, sir, I am.

Q. And what are those?

A. Chuckie, he's called himself Charles, he would go by Marvin Green, or Marvin Bowens. The correct name is Marvin Bowens Green. Those are all the names I've known him to associate himself and they are also in his rap --

MR. GRIMES: Objection.

THE COURT: What's -- I'm sorry.

MR. GRIMES: 404(b), relevant.

THE COURT: All right. Counsel, approach.

(WHEREUPON, the following bench conference was reported.)

THE COURT: What was he going to say?

MR. RUTLEDGE DURANT: I thought he was about to go somewhere bad so I'd like for him to just stop right there with that inquiry.

THE COURT: I am just concerned --

MR. RUTLEDGE DURANT: Yeah, we're not going any further.

THE COURT: All right.

MR. RUTLEDGE DURANT: Thank you.

(WHEREUPON, the bench conference was concluded.)

THE COURT: All right. Mr. Durant, ask your next question. Thank you.

MR. RUTLEDGE DURANT: Your Honor, I think that's all the questions I have for the detective. Thank you.

put me -- is going to yell at me. So please, please, please just go home and have a restful evening.

We will begin -- if you will be in your jury room at 9:15 we'll begin promptly once all of you are here. Please have a wonderful evening. Thank you.

Please rise for the jury.

(WHEREUPON, the jury leaves the courtroom at approximately 5:22 p.m.)

THE COURT: Thank you. Be seated.

MR. RUTLEDGE DURANT: Your Honor?

THE COURT: Yes.

MR. RUTLEDGE DURANT: I just want to bring it to the Court's attention that we might have that in-camera hearing with Ms. Patel that might last a little bit tomorrow just in case you want to bring the jury back a little later.

THE COURT: It's too late now, Counsel. You got to remind me of these things. I'm not going go -- we're on the record. How long do you think it will take?

MR. BRUCE DURANT: Hopefully not as long since we worked out the kinks on the last one.

THE COURT: All right. Why don't we be -- we'll just do this one at 8:45 then.

MR. RUTLEDGE DURANT: That sounds good, Your Honor.

THE COURT: All right. You all need to redact

State's 5. So go ahead. Here's my scissors.

Anything else?

MR. GRIMES: Your Honor, I was just referring to Mr. Durant about some information we received from Walterboro that may help lay the foundation for Defendant's Exhibit 7 for identification. So I imagine they are going to have some objections about that.

MR. RUTLEDGE DURANT: I have no idea what I'm going to have.

THE COURT: Okay. We'll deal with that when it comes up.

All right. Anything further from the State? Anything further?

MR. RUTLEDGE DURANT: Nothing from the State, Your Honor.

THE COURT: Mr. Grimes, anything further?

MR. GRIMES: No, ma'am.

THE COURT: That's State's 5. If you can just let her mark it.

MR. GRIMES: That just seems so obvious.

MR. BRUCE DURANT: I mean, we could probably do something a little better overnight.

THE COURT: If you all don't object to it, but that's what needs to go back, just those two photos. All right.

Please the Court. The State calls Joe West.

JOSEPH L. WEST, after having been duly sworn, testified as follows:

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: Joseph L. West, W-e-s-t.

DIRECT EXAMINATION

BY MR. RUTLEDGE DURANT:

Q. Mr. West, good morning.

A. Morning.

Q. Would you please tell the jury where you are employed.

A. I am an investigator at the South Carolina Law Enforcement Division. I've been there approximately 21 years. I've worked in narcotics in the past five, has been specifically related to technical investigations, that is things that deal with audio, video and pictures.

Q. And what are some of your responsibilities and duties in your position right now?

A. Well, frequently agencies bring in videos that were obtained during crime scene and during the robbery. If there was a store video, a lot of times we see stolen credit cards are used in different stores and they'll bring the video in. So what we do essentially is try to -- if they have a suspect in the video we try to capture

the best image possible, a still shot, if you will, of the subject they're looking for. So basically what we're doing is freezing the video through our software, capturing a picture and providing this picture to law enforcement or prosecution.

Q. And in that capacity did you become involved in the investigation of this case?

A. Yes, sir.

Q. And I believe you were brought the video in this case?

A. That's correct.

Q. From investigator Matt Cayce?

A. Yes, sir.

Q. On April 24th of this year?

A. Yes, sir.

Q. What, if anything, did you do with the video in this case?

A. Again, you know, part of my responsibility as an agent is to process videos, and this video related to an armed robbery that occurred at a convenience store. It was a pretty good video. There was a length of time that the robbery did occur. It was probably a minute and a half, couple minutes. It wasn't very long.

So what they wanted to obtain through our services that day was to get still photos of the subject who was

in the store, who came to rob the store, and then basically that becomes the evidence, that becomes something you can look at versus watching it on TV.

So on that day we produced many photographs. I'd say there were 20 or 30 pages of photographs with two pictures per page on there. So many photographs of the subject as he walked in the door and as he conducted the robbery and as he left.

We like to get, obviously, the best shot we can for prosecution, but sometimes as the nature of the video is it's not like your home video camera where you have this great resolution and when you freeze the frame it looks like a picture you took with a digital camera.

The nature, again, of surveillance store videos is that they want a store often more content on there than they do high quality for different reasons. They'd rather have five days of content versus two days of really good stuff.

So what we did with this video was simply, we call it ripping the pictures from there. You freeze the frame, you create an image of the still picture on the screen and then you save that to a DVD or CD-ROM and print off the pictures.

Q. Now, is your job to enhance a photograph?

A. You know, that is a term, enhancement, that is used

often but essentially what we are doing is this. The software is not this thing that -- like you see on TV when they say the tag across the street or here is a picture of a person in somebody's sunglasses. So it's not this really cool magical software where you can bring out these photographs in people's pictures that really aren't there.

So what we do, I guess forensically, is just like your TV has a brightness setting and a contrast setting, so we are going to adjust those images with bright, more brighter, darker and the contrast again making it brighter or darker.

But as far as enhancing, you can't really put anything that's not there. So another step we do as you may see in the pictures is that you can zoom in onto the picture if you capture it on the screen. And the problem there is that a still picture has so many pixels or dots on the page or on the screen so when you zoom in the small dots become big dots.

So again, when you see on TV when they enhance these things they zoom in and they press this button and the picture becomes clear, that just doesn't happen in real life. So more or less we just capture the screen shots versus enhance the photographs.

Q. So do you do actually anything to manipulate the

picture to show something that would not otherwise naturally be there?

A. No, sir. Again, it's just really an issue of, you know, brightness settings and contrast settings and zooming in to get a better picture, but we do not add nor subtract anything to the photograph.

Q. And were you able to produce still photos from the video in this case?

A. Yes, sir.

Q. And on those photos did you pay any particular attention to areas within a particular photograph?

A. You know, we like to go for the faces because that's the most identifiable thing and sometimes it's just not going to happen if you have someone who is trying to conceal themselves. You're not going to get that nice driver's license photograph like you want to.

So then we focus on other things, as we'll see in the photographs, the build of the person, their stature, you know, what kind of shoes they have on. If they have a weapon what kind of weapon was it? Was it a pistol, was it a shotgun, was it a rifle, was is a revolver?

So we will see in the photographs that there's not only pictures of the suspects whole body but we try to go for the head, sometimes the hands, sometimes the feet, just trying to add all these things together to get the

best identity possible.

Q. And if you would, explain to the jury what a particular circle type area in a photograph that you pulled off this video indicates?

A. Well, the software that we use allows us to, you know, if you have a little picture of a screen and we want to say that my interest here on this particular shot is on this hand, you can actually have -- it's a circle around the portion of the screen we're looking at.

Perhaps you've seen this on TV when you have four people in a picture and they want to show one of them there will be, you know, the rest of the screen is kind of black or darker and the person of interest has a white circle around them. It's a clear shot.

So that's what we do with the pictures, again. We may go for the hands, the face, the weapon that was used and just add the circle on there to say, Hey, this is what we're looking at in this picture.

(WHEREUPON, State's Exhibit Number 6, Photographs, were marked for identification only.)

MR. RUTLEDGE DURANT: Thank you.

BY MR. RUTLEDGE DURANT:

Q. Mr. West, I'm handing you what the State has labeled State's Exhibit 6 for identification, and I ask you to take a look at it. And let me know when you are

finished doing that.

(PAUSE.)

A. Yes, sir.

Q. Do you recognize State's Exhibit 6?

A. Yes, sir.

Q. And what is it?

A. These are essentially a group of photographs we took of the incident.

MR. GROEBER: Objection.

MR. RUTLEDGE DURANT: We're not going to show it to the jury yet.

MR. GROEBER: He's publishing to the jury and describing the contents.

THE COURT: All right. Continue, Mr. Durant. Please do not publish to the jury. It's not been admitted. Thank you.

MR. RUTLEDGE DURANT: Yes, ma'am.

BY MR. RUTLEDGE DURANT:

Q. Are those the photographs that you were able to take from the video in this case?

A. Yes, sir.

Q. And I believe that there were 31 pages in your hand and 62 photographs?

A. Yes, sir.

Q. Do these photographs accurately reflect what was

taken from the video?

A. Yes, sir.

Q. And fairly reflect that as well?

A. Yes, sir.

Q. Are any of these photographs a misrepresentation of anything that was on that video?

A. No, sir.

Q. And those are your photographs?

A. Yes, sir.

MR. RUTLEDGE DURANT: Your Honor, at this time the State moves for the introduction of State's 6.

MR. GROEBER: We would object, Your Honor.

THE COURT: And subject to your previous objections?

MR. GROEBER: No.

THE COURT: I'm sorry?

MR. GROEBER: New objection.

THE COURT: All right. Come forward.

(WHEREUPON, a bench conference was had, not on the record.)

THE COURT: We'll take the objection as to State's 6 up outside of the presence of the jury, but my understanding is you may continue, Mr. Durant.

MR. RUTLEDGE DURANT: Thank you, Your Honor.

BY MR. RUTLEDGE DURANT:

Q. And, Mr. West, have you testified in this regard before?

A. Related to this case or other cases?

Q. Other cases.

A. Yes, sir.

Q. Have you had that opportunity to create still photographs from crime scene videos?

A. Yes, sir.

Q. And have you performed the same analysis on those videos as you did in this case?

A. Yes, sir.

Q. And did you testify in court about those photographs?

A. Yes, sir.

Q. And did those photographs also include areas with particular concentration that we could observe a circle on?

A. Yes, sir.

Q. And was that testimony allowed into evidence?

A. Yes, sir.

MR. RUTLEDGE DURANT: Your Honor, I think that would be the extent of the State's direct examination of Mr. West.

THE COURT: All right. Reserving the matter of State's 6, Mr. Groeber?

MR. GROEBER: May I have one moment, Your Honor?

(PAUSE.)

MR. GROEBER: I have no questions for this witness. Thank you.

THE COURT: Sir, you may step down. I ask that you remain with us for just a few moments.

THE WITNESS: Yes, ma'am.

THE COURT: Thank you. You may stay in the courtroom if you wish.

THE WITNESS: Yes, ma'am.

THE COURT: Mr. Durant, call your next witness.

MR. RUTLEDGE DURANT: The State calls Jim Milz.

JAMES T. MILZ, after having been duly sworn, testified as follows:

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: My full name is James Thomas Milz, M-i-l-z.

THE COURT: Mr. Durant.

DIRECT EXAMINATION

BY MR. RUTLEDGE DURANT:

Q. Mr. Milz, will you please tell the jury where you are employed.

A. Sir, Charleston County Sheriff's Office, sir.

Q. And what is your position with the Charleston

Mr. Groeber.

MR. GROEBER: I'm trying to remember them all. I know that one was the pictures that the State introduced.

THE COURT: All right. I'm going to do those last. So whatever else you need to place on the record.

MR. GROEBER: And you are speaking only about --

THE COURT: As to State's 6, which is what Mr. West testified to.

MR. GROEBER: Okay. Thank you, Your Honor. We would argue that the introduction of those photographs --

THE COURT: So that's the only remaining issue, Mr. Groeber?

MR. GROEBER: I believe that is.

THE COURT: All right. Thank you. Seems like you all were approaching so many times I thought we had something else to put on the record.

MR. GROEBER: It did. I mean, maybe --

THE COURT: Oh, and then Mr. Grimes does have a proffer. That's what I was thinking of.

MR. GROEBER: The proffer of my expert witness, is that what you're talking about?

THE COURT: Yes. Yes.

MR. GROEBER: When it comes to Mrs. Patel?

THE COURT: Yes.

MR. GROEBER: Yes, Your Honor, we're ready.

THE COURT: So we have that one, too. But let's address the pictures so that Mr. West can go.

MR. GROEBER: Thank you, Your Honor. As to the pictures in their entirety we would have two objections. First would be that they were not -- none of them are relevant because the State has introduced testimony from witnesses that they watched the video and then made an identification based on that video. There's been no testimony or evidence that they looked at these individual photographs.

We believe that also the introduction of these photographs would be cumulative, and I would point Your Honor to State V. Stokes, which is 339 S.C. 154, which it was a child abuse case, and in that case the Court found that the introduction of the child when photographs of the child had already been introduced into evidence was cumulative.

Now, the Court of Appeals did a harmless error analysis after that. That of course is not for Your Honor to consider. So we think this case is similar to State V. Stokes and that introduction of the photographs, 60 something of them, would be cumulative.

Our third objection would be that in particular some of those photographs have been lightened or there's a circle that's been lightened to focus the looker's

attention on certain areas. We think that that is -- first of all, that really does not go -- it kind of attacks whether or not it's a fair and accurate picture because it has been altered. And we've heard no testimony about -- from the witness about the software used to do that, its reliability. So we think there is some foundational issues as well with those particular ones that have highlighted circles.

And if I may have one moment?

THE COURT: You may.

(PAUSE.)

MR. GROEBER: And as far as cumulative goes, there's a lineup photo that's supposedly been entered into evidence --

THE COURT: I'm sorry. What was the last thing?

MR. GROEBER: There's been a lineup photo that's been entered into evidence of the defendant, the video obviously is in. Now there are pictures of the scene that are in that accurately depict the scene and the lighting and all that, and we think it would be cumulative. Thank you, Your Honor.

THE COURT: Mr. Durant, why are these pictures not cumulative?

MR. RUTLEDGE DURANT: Your Honor, if there were more eyewitnesses to this scene we would have called

them, too. The fact of the matter is cumulative evidence has nothing to do with what's relevant and what's needed to be before this jury.

The defense has made a big attempt to trying to undermine the State's case that they failed to go the extra mile. They elicited that through cross-examination of several witnesses, especially including Detective Lawrence on his perceived failure to execute a search warrant and do other things. And this is another way to show that we are going the extra mile.

We've taken this video up to SLED. We've given it to a professional at South Carolina Law Enforcement Division who commonly does exactly what he did in this case, has testified the exact same way in other courts and that was relevant from taking photographs from a crime scene video.

It's relevant, it's necessary for the jury to understand that this case is taken serious. They can also use these photographs when they consider all the evidence in this case. It's not overly cumulative.

And in regard to the software used, there was testimony about what was done, and the defense had an opportunity to cross-examine for any perceived deficiency for a lack of foundation. But Mr. West testified exactly about what he did, what the result of what he did was,

and essentially it was lighting conditions.

And he testified that what he did and what he's showing to this jury and what's involved in these pictures does not manipulate the picture to show something that was not ordinarily there, that was directly there as a result of the video taking what actually happened in the robbery. And it's relevant and it needs to be admitted.

THE COURT: Mr. Groeber?

MR. GROEBER: Thank you, Your Honor. I think the State has shown, at least in this particular instance, that they did go the extra mile. They sent them off and they got the pictures taken.

Whether or not the pictures come into evidence doesn't address whether or not they did that and went the extra mile. So it would be foolish for me to argue that they didn't go the extra mile when it comes to the video and having someone from SLED look at it.

Secondly, whether or not he's testified before on this is completely different. We don't know what those cases were about, and it's really for the Court to determine whether or not his testimony -- or these pictures should be admitted.

Finally, that I had an opportunity to cross on his foundational arguments. It's not my job to lay the

foundation for him and I don't need to cross-examine in order to prove that he hasn't laid the foundation. Thank you, Your Honor.

THE COURT: All right. I believe the arguments have been thoroughly articulated. I have viewed the photographs, listened to the testimony of Mr. West, and State's 6 will be admitted over the defendant's objection. I do find the testimony was that they were still photos taken in order to assist in the investigation, which is State's Number 1, which was admitted without an objection.

I do not find that they are a waste of time, misleading, prejudicial or confusing even given the consideration that there are a few that have the circle, and the testimony from the officer indicated why that was. I note your exception for the record.

(WHEREUPON, State's Exhibit Number 6, Photographs, were admitted into evidence.)

THE COURT: And let's go ahead and do your profer.

MR. GROEBER: Okay. Thank you.

THE COURT: How many more witnesses do you have?

MR. RUTLEDGE DURANT: Thank you, Your Honor. The State has two witnesses, Your Honor, Detective Perkins and Mrs. Patel.

THE COURT: All right. Let's do Perkins and then

approximately 11:00 a.m.)

THE BAILIFF: The jury is presence, Your Honor.

THE COURT: Thank you. Please be seated.

Call your next witness.

MR. RUTLEDGE DURANT: Thank you, Your Honor. The State calls Detective James Perkins.

JAMES PERKINS, after having been duly sworn, testified as follows:

THE CLERK: If you'll please state your full name then spell your last name for the record.

THE WITNESS: James Perkins, P-e-r-k-i-n-s.

THE COURT: Mr. Durant.

MR. RUTLEDGE DURANT: Thank you, Your Honor. Please the Court.

DIRECT EXAMINATION

BY MR. RUTLEDGE DURANT:

Q. Good morning.

A. Good morning, sir.

Q. Will you please tell the jury where you are employed.

A. Charleston County Sheriff's Office.

Q. And what is your position at the Charleston County Sheriff's Office?

A. I'm a violent crimes detective.

Q. And how long has that been your position?

A. For approximately six years.
Q. And what kind of crimes do you investigate as a violent crimes detective?
A. Usually violent or major crimes like shootings, armed robberies, homicides, things of that nature.
Q. And was that -- I guess that was your position in December of 2010?
A. Yes, sir.
Q. And in that capacity did you become involved in the investigation of a robbery that occurred at 5737 Savannah Highway in Ravenel?
A. It was a case that Detective Lawrence, who was the case agent, was investigating, basically, and he asked me to assist him.
THE COURT: Detective Perkins, could I have you speak up just a little bit louder.
THE WITNESS: Yes, ma'am.
THE COURT: Thank you.
BY MR. RUTLEDGE DURANT:
Q. So this was not your case as the case agent; is that correct?
A. No, sir.
Q. Do you handle your own cases?
A. Yes, sir.
Q. And are you the case agent on different kinds of

cases?

A. Yes, sir.

Q. Different armed robberies?

A. Yes, sir.

Q. And commonly you assist other detectives and they assist you?

A. Yes, sir, that's correct.

Q. Do you recall when you were brought into this case?

A. Yes, sir. It was on the 29th of December. We was in the office, myself and Detective Lawrence, and of course we don't sit directly beside each other in the office, and he was yelling on the side of the office, Perkins, I need you to come with me.

And I said, Okay.

And he said, I need you to do a lineup.

And of course, I mean, that's a normal practice. So I said, Okay.

We got in the car and I got in the vehicle with him and we rode to the Citadel Mall.

Q. Now, why were you asked to conduct a photo lineup?

A. Well, I had no knowledge about the incident or the case.

Q. And is that important?

A. Yes.

Q. And why?

A. Well, because I'm just a neutral party. I don't know anything about the case, the subjects, suspects or anything. I actually have my own cases, so I'm deeply involved with my cases not with Detective Lawrence's case. So for him to ask me I'm a neutral person.

Q. What is a six pack photo array?

A. A six pack photo array is six pictures, one of the six pictures include the subject or suspected suspect that we show the victims or witnesses during the investigation.

Q. And have you had the opportunity to administer a six-pack photo array previous to this day?

A. Numerous times.

Q. And if you would, tell the jury how you go about doing that.

A. We pretty much have a form that's somewhat like an incident report for the sheriff's office. At the very top it has the case number, it will have the case agent, which in this case would be Detective Lawrence. It would have the location where you're administering the photo. It will also have the time that you are administering it.

And after you read each line, you have to read each line, and after you've read each line they have to initial advising that they understand. When you complete that you show them the six pictures.

After they advise if they notice or do not notice anyone on the photograph they would acknowledge that and you would just check if a photo identification has been made or if it has not been made.

Q. So it's important for you to let the witness that you are about to give this photo lineup, to have them read these admonishments and understand them; is that right?

A. Yes.

Q. Now, did you actually conduct a photo array lineup procedure that day?

A. Yes.

Q. Did you know who the suspect was in the photo array when you presented that lineup?

A. No.

Q. And why not?

A. Well, we are broken down into districts. Charleston is a very big county. So I'm assigned more so to the north area, which is North Charleston, Mount Pleasant, Awendaw. So I usually don't go into some of the other areas like James Island, areas like that. So I don't have a vast knowledge of the guys in that area, and that was one of the reasons I think Detective Lawrence used me, because I don't normally go into that area.

Q. Did you know anything about this armed robbery he

was investigating?

A. No.

Q. And you didn't know the suspect?

A. No.

Q. And for those reasons you were chosen to conduct this procedure?

A. Yes.

Q. Is that right?

A. Uh-huh.

Q. And where did you go to conduct it?

A. We went to the Citadel Mall, Sears in West Ashley.

Q. And who did you go with?

A. I went with Detective Lawrence. He was actually driving. I was in the passenger seat.

Q. Who did you meet with there?

A. We met with Mr. Patel and his son.

Q. And what did you do? If you would, just tell the jury how you interacted with them and then began to get into the procedure of showing the lineup.

A. When we got there Detective Lawrence approached them and greeted them, explained that I -- you know, who I am, explained that I will be showing a photo because of course Mr. Patel didn't know me. After he did that I went and shook his hand and told him who I was, explained to him that I was showing the photo. He understood.

His son was there, his 12-year-old son who spoke English very well. Mr. Patel did but you could tell that there was somewhat of a language barrier, but he could understand what I was saying to him. Do you want me to go on procedurally what I done?

Q. We're interested in the exact way it was carried out.

A. Okay. I pretty much -- like I initially stated, I pretty much read line for line the purpose of me being there, that the photographs that I'm about to show you may or may not have the person or persons that committed the crime.

I told him -- of course, reading it it would say to view -- when you view the photographs it may not appear exactly as it would appear when the incident happened because of the lighting, because of time frame, different things likes that, etcetera.

After I explained all that to him, each line that I explained to him, he verbalized that he understood by saying yes. That's a requirement. Everybody that I read that to I make -- every line, I read line one and say, Do you understand. And I don't take nodding. You have to verbalize yes. You have to say yes. And he said that to each number. And when we finished I signed and initialled it and he was shown the lineup.

When I showed him the lineup he immediately pointed to number four. At that time I didn't know if it was the suspect or not. I told him, I said, Well, thank you, Mr. Patel. Someone from the sheriff's office will be in contact with you, and I left. I handed it over to Detective Lawrence and went back to the car. I was trying to get back to the office because I had some cases pending.

Q. All right. Now, let me ask you just a little bit more and with some specificity. Where exactly at the Citadel Mall did this take place?

A. It was in the parking lot area.

Q. And where was Detective Lawrence when you administered this lineup procedure?

A. He was standing -- he was standing a distance away from me while I was administering it. He wasn't right there. To my knowledge, I don't think that he could tell what I was saying or what Mr. Patel was saying either.

Q. Did he participate in any way in conducting this lineup procedure?

A. No. He just introduced him. He introduced me. He just -- that was pretty much all he did.

Q. And I'm showing you what's already in evidence as State's Number 2 and ask you to take a look at that. And do you recognize State's Number 2?

A. Yes, sir.
Q. And what is State's Number 2?
A. It is the photo lineup report that I completed.
Q. Is it the admonition?
A. Yes.
Q. Is that the exact document you used to admonish Mr. Patel?
A. Yes.
Q. Before showing him the photos?
A. Yes, sir.
Q. And you went over all these admonishments with him?
A. Yes.
Q. Did you let him know that he was free to not choose anybody?
A. Yes.
Q. Did you tell him the suspect may or may not be in the photos you were going to present to him?
A. Yes.
Q. Did you tell him he had to circle somebody?
A. No.
Q. And is it your testimony that his son was able to help him understand?
A. Yes.
Q. And acknowledge that?
A. Uh-huh.

THE COURT: Is that a yes?

A. Yes.

THE COURT: Thank you.

Q. And did you feel comfortable that he understood?

MR. GROEBER: Objection, Your Honor, leading.

THE COURT: Just rephrase it. Thank you.

BY MR. RUTLEDGE DURANT:

Q. Did you feel comfortable that the witness understood what you were telling him?

A. Yes.

Q. And did he indicate that?

A. Yes.

Q. And how did he indicate that?

A. By initialling and verbalizing yes.

Q. And after you went over this form with him what did you do?

A. I then showed him that picture of the -- the six-picture array of photographs.

Q. What was his reaction when you showed him the six pictures?

A. He immediately pointed (indicated) and said, That's him, that's him. And he was pointing like repeatedly (indicated). And I was like, Okay. I said, Well circle it and put your initials and put the time on there.

So you time that it starts. If you look at the

form here it has the time that you start reading everything that he had to initial and then at the end there's a time that it's conducted. So it's a four-minute time span from the time that I began this to the time that he was shown the photograph and circled and initialled it.

Q. Now, did the fact that he had circled somebody's photograph confirm or deny anything to you?

A. No.

Q. And if Mr. Patel had not chosen anybody what would you have done?

A. Went back to the office, work on my cases.

Q. Would it have been noted?

A. That he didn't? I'm sorry.

Q. Would it have been noted that he didn't choose anybody?

A. On here?

Q. Yes.

A. Yes.

Q. And, in fact, have you administered procedures where people have not chosen people?

A. Numerous times.

Q. And do you note that on that form?

A. Yes.

Q. On a form just like that?

A. Yes.
Q. And I'm showing you what's already in evidence as State's 3. Do you recognize State's 3?
A. Yes, sir.
Q. And what do you recognize that as?
A. This is the photo lineup that he was shown and the one he circled, initialed, dated and put the time on.
Q. And is that the exact photo array that he was shown?
A. Yes, sir.
Q. And does it contain the picture that Mr. Patel circled?
A. Yes.
Q. Did you or Detective Lawrence say anything to him such as, Good job, you chose the right person?
A. No. I didn't know if it was the right person or not, sir.
Q. Did you or Detective Lawrence give any kind of assurance to Mr. Patel that he had chosen correctly?
A. No, sir.
Q. Would you have done that?
A. No.
Q. Do you do that --
A. No.
Q. -- when you administer procedures?

And why do you not do that?

A. Well, as far as me being an independent administrator the first thing is I don't know -- he could have picked the wrong person with me not even knowing because I didn't know who the person was. So I didn't have a dog in the fight so-to-speak.

Q. And what, if anything, was told to Mr. Patel after he circled photo number four?

A. I advised him that someone would be contacting him.

Q. Did you influence him in any way to pick out photo number four?

A. No, sir.

Q. Did you tell him to pick out photo number four?

A. No, sir.

Q. Did anyone involved in this process or right there when you administered the procedure tell him to pick photo number four?

A. No, sir.

Q. Is it your testimony that Mr. Patel chose photo number four on his own free will?

A. Yes, sir, it is.

MR. RUTLEDGE DURANT: Thank you.

THE COURT: Thank you.

Mr. Groeber?

MR. GROEBER: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. GROEBER:

Q. Good morning, Detective.

A. Morning.

Q. I'd like to ask you a few questions. You've been a detective for about six years?

A. Seven.

Q. Seven years. Okay. And part of being a police officer is being familiar with the policies of the office?

A. Yes.

Q. And Charleston County Sheriff's Office has a policy manual?

A. Yes.

Q. And that's pretty much true of most big organizations, right?

A. I'm -- yes.

Q. You work hard at your job?

A. I'm sorry?

Q. You work hard at your job, right?

A. Yes, uh-huh.

Q. And you studied the policy manual?

A. Yes.

Q. Part of probably your training in becoming a deputy at the very first time you are hired or even a detective

would be to study the manual, correct?

A. Yes.

Q. And you're probably given updates about changes in the policy?

A. Yes.

Q. And you have to pay attention to all of that, right?

A. Yes.

Q. Because it's important?

A. Yes.

Q. Because it's basically your boss telling you how you need to do your job?

A. Yes.

Q. And you do that, right? You pay attention to the policies and the updates?

A. For the most part, yes, sir.

Q. Are you familiar with your office's policy 8-06 on show-ups, photo identifications and lineups?

A. Yes.

Q. And the reason that you all have that policy is because it's important to ensure reliable accurate identifications?

A. Yes.

Q. And the policy itself says that, right?

A. Yes.

Q. And it's important to -- it's also important to prepare a lineup in a non suggestive manner, right?
A. Yes.
Q. And the policy says that's so that a suspect does not unduly stand out from the other people in the lineup?
A. Yes.
Q. And you know the difference between a sequential and a simultaneous photo lineup, right?
A. Of course.
Q. A sequential one is where you present witnesses with six photographs one at a time?
A. Yes.
Q. And I guess you can do more than six?
A. Uh-huh.
Q. A simultaneous one is where you present the witness with what we call a six pack?
A. Yes.
Q. Right? And that's what you did in this case?
A. Yes, sir.
Q. It was a simultaneous, a six pack?
A. Uh-huh.
Q. Now, there is actually as part of your policy it tells you how to go about conducting the photo lineup, right?
A. Yes.

Q. And first the policy says that in either kind of lineup, simultaneous or a sequential one, that it's got to be done in a fair, reliable and objective way, right?
A. Yes.
Q. And you tried to do that?
A. Yes.
Q. And you --
A. I do that.
Q. And you tried to do it in this case, too?
A. I did it in this case.
Q. Okay. You served as what's called an independent administrator in this --
A. That's correct.
Q. So you don't know who the person is --
A. Suspect --
THE COURT: Please don't speak over each other. Thank you.
BY MR. GROEBER:
Q. Part of your job as the independent administrator is to read some instructions --
A. Yes.
Q. -- correct?
MR. GROEBER: May I approach the witness?
THE COURT: You may.
BY MR. GROEBER:

Q. I can't remember if it's State's 2 or 3, which one is which.

A. You talking about 6?

Q. State's 2 is identification, right, the identification form?

A. Yes.

Q. Okay. And State's 3 would be the six pack, photo lineup?

A. Yes.

Q. Okay. And you testified about how you did that in this case, right?

A. Yes.

Q. What you do is that you read the information to the witness?

A. Yes.

Q. And you make sure they understand each single sentence?

A. Yes.

Q. And the way you document that is if after you think they understand the sentence and they tell you verbally that they understand the sentence --

A. After he or she --

Q. He or she. Thank you.

A. -- understands it.

Q. Then --

A. He or she will initial it.
Q. Okay. And they'll initial and that says I understand?
A. Yes.
Q. And that's after they verbally told you that?
A. Yes.
Q. And they are asked after you read them all the instructions to sign the form?
A. They are --
Q. He or she?
A. Yes, signs this form after the lineup has been shown.
Q. And he prints his full name on it, too, right?
A. Yes.
Q. And there's a space for her or him to write comments?
A. Yes. Uh-huh.
Q. And this case was a little unique, wasn't it, because you had a translator?
A. I wouldn't -- I mean, he assisted him but he was not a translator.
Q. Okay. And this was Dhruval Patel?
A. Yes, the son. Uh-huh.
Q. You asked him to help you to help his father understand?

A. Yeah. I said, Would you assist your dad in case I come across something that he has difficulty understanding, and he did that.

Q. Okay. So you would read each paragraph or sentence to Dhruval or to the dad?

A. To the dad.

Q. Okay. And then Dhruval would translate?

A. No, not necessarily.

Q. Okay. So he didn't translate every single one of the seven?

A. No.

Q. But he did translate some of them to his dad?

A. I can't -- I know that there was communication but I don't know at what point or which one he translated or assisted him.

Q. You didn't do a report in the case, right?

A. Well, this is the report.

Q. Okay. You didn't do another report other than that?

A. Well, this is the only involvement I had with it.

Q. Okay. And, I mean, you know how to write a report, correct?

A. Well, of course.

Q. You write reports all the time?

A. Of course.

Q. That's probably -- you spend most of your time writing reports?

A. Yes.

Q. So you know how to do one, right?

A. Yes. Uh-huh.

Q. And you didn't document on that piece of paper anywhere saying which ones Dhruval helped and which ones he didn't help on?

A. Well, he was communicating. I don't speak that language.

Q. Hindi.

A. So I don't know exactly what was being said to him.

Q. Okay.

A. So it's hard for me -- I mean, throughout the process he was communicating with him. I don't know if it was relating to this or relating to something else. So I think it would be --

Q. But you didn't make any notes about when Dhruval was talking about a particular sentence or not --

A. No.

Q. -- did you?

A. No, I didn't.

Q. And you started the procedure at 3:01, correct?

A. Yes.

Q. And that's on the form with the questions that says

when you started and it's written right on there, 3:01?

A. Yes.

Q. And you wrote that?

A. Yes. That's my handwriting.

Q. And then Mr. Patel, you read all the instructions, correct?

A. Yes.

Q. He indicated that he understood them all?

A. Yes.

Q. And Dhruval was talking to him during this sometimes?

A. Yes.

Q. And he circled -- he looks at the photo lineup?

A. Yes.

Q. He circles number four?

A. Yes.

Q. And then he writes the time?

A. Yes.

Q. And that was 3:05?

A. Yes.

Q. Okay. Now, the policy also instructs you not to provide any feedback to the witness, correct?

A. Yes.

Q. And you didn't give any feedback in this case?

A. No.

Q. It also instructs you to ask the witness to provide a level of confidence, correct?

A. Yes. Uh-huh.

Q. And you didn't ask for a level of confidence in this case?

A. He was adamant, but I did not. If your question is -- I did not.

Q. You didn't ask him that question?

A. No.

Q. Your policy also says that you are to instruct them not to discuss the case with other witnesses.

A. Uh-huh.

Q. Including the media, right?

A. Yes.

Q. And that's important because you don't want people to influence each other?

A. Yes.

Q. Witnesses to influence each other?

A. Yes.

Q. Or some other outside person influencing the witness?

A. You are correct.

Q. And you told him that in this case?

A. Uh-huh.

Q. Both Dhruval and Mr. Patel?

A. Yes.
Q. Now, finally, your policy has a paragraph about documenting procedures, right?
A. I'm sorry?
Q. Your policy has a paragraph about how to document a lineup procedure?
A. Yes.
Q. And you were supposed to document it by saying the source of the photos used?
A. What do you mean?
Q. You're supposed to document where the photos came from, right?
A. Yeah, not me, the case agent.
Q. Okay.
A. Yeah. The only thing that I'm here to do was administer the lineup. Outside of that, you would have to discuss that with Detective Lawrence?
Q. Okay. Do you have a copy of your -- the policies for Charleston County?
A. No, I do not.
Q. If you took a look -- if I showed you a copy would that refresh your recollection on whether -- how you're supposed to document your procedures?
A. It may be helpful.
MR. GROEBER: Okay. Your Honor, may I approach the

witness?

THE COURT: You may.

BY MR. GROEBER:

Q. I'm handing you what's been marked as Defense Exhibit 2. Do you recognize that?

A. It looks familiar.

Q. What is it?

A. I'm sorry?

Q. What is it?

A. It's the policy.

Q. Okay. The Charleston County Sheriff's Office policy?

A. Yes.

Q. And specifically the policy on show-ups, photo identification and lineups?

A. Yes.

Q. And I think you testified earlier that you were the independent administrator in this lineup, right?

A. Uh-huh.

Q. I refer you to page six of 11.

A. Okay.

Q. Paragraph 16, and I'd ask you to read that and look up when you are finished, please.

A. The independent administrator will document all lineup procedures including the source and photos used,

the date and time the lineup was conducted and the names of all persons present when the lineup was shown.

Any lineup that an independent administrator shows to a witness regardless of whether the witness makes identification of the suspect will become part of the investigative file.

And in the case of the sequential lineup, will include documentations as to the order of which photos were shown to the witness.

Q. Okay. So your policy contemplates that you document all the procedures used in the lineup, right?

A. Yes. Uh-huh.

Q. And what you did, you thought to fulfill that that you just filled out -- helped Mr. Patel fill out the form, right, with the instructions?

A. Yes. Yes. Uh-huh.

Q. The sheriff's office has access to a video camera, right?

A. Yes.

Q. And recording devices like audio recording, tape recorders?

A. Of course, yeah.

Q. And you did not use any video or audio to record this particular lineup?

A. No.

MR. GROEBER: May I have one moment, Your Honor?

THE COURT: You may.

MR. GROEBER: No further questions. Thank you, Your Honor.

BY MR. GROEBER:

Q. Thank you, Detective.

A. Yes.

THE COURT: Mr. Durant?

MR. RUTLEDGE DURANT: Briefly.

REDIRECT EXAMINATION

BY MR. RUTLEDGE DURANT:

Q. The six-pack photo array, that's one identification procedure; is that correct?

A. That's correct.

Q. There are other procedures?

A. That's correct.

Q. What are some of the other procedures that you've ever conducted or that you are aware of?

A. You mean as far as the photos being shown?

Q. As far as just a witness identifying somebody.

A. We've done numerous different kinds; physical, we've done sequential. I mean, it's numerous lineups that we've done. Just in this one we did a six-picture lineup.

Q. Ever had the opportunity to just show one single

picture to a witness?

A. Oh, of course.

Q. And in what situation would that more commonly be done?

A. That would be done if, for instance, they've known them for an extended period of time, that would be done.

Q. And that they've told you their name?

A. Yes.

Q. Maybe commonly a wife saying my husband did this?

A. Yes.

Q. But there are a lot of different ways to go about doing it, right?

A. That's correct.

Q. Did you think that you had suggested in any way that Mr. Patel needed to pick out number four?

A. No.

MR. RUTLEDGE DURANT: Thank you.

MR. GROEBER: No further questions, Your Honor.

THE COURT: You may step down. Thank you.

THE WITNESS: Thank you.

THE COURT: Call your next witness.

MR. RUTLEDGE DURANT: The State calls Jagruti Patel.

THE COURT: Madam Interpreter, if you'd come forward. I remind you that you are still under oath.

MR. GROEBER: Your Honor, at this time I'd renew my pretrial objections.

THE COURT: Thank you. They are so noted.

Ma'am, please come forward and take the oath.

JAGRUTI PATEL, after having been duly sworn, testified as follows:

THE CLERK: Please be seated. Speak into the mic and please say your full name and spell your last name.

THE WITNESS: Jagruti Patel, P-a-t-e-l.

THE COURT: Mr. Durant.

MR. RUTLEDGE DURANT: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. RUTLEDGE DURANT:

(Through the interpreter.)

Q. Mrs. Patel, how old are you?

A. Thirty-nine.

Q. Do you live in Charleston?

A. Yes.

Q. Where were you born?

A. India.

Q. When did you come to the United States?

A. October 11th, 2003.

Q. Why?

A. For job and family.

Q. Are you married?

A. Yes.
Q. Who is your husband?
A. Natubhai Patel.
Q. How long have you been married?
A. Seventeen years.
Q. Do you have any children?
A. Yes, two children.
Q. How old are they?
A. One of them is 14 and the other is six.
Q. What do you do for a living?
A. Behind the register at a store.
Q. Where is that store located?
A. 5737 Savannah Highway, Ravenel.
Q. Do you and your husband own that store?
A. Yes.
Q. How long have you owned it?
A. Four years.
Q. Do you also work at the store?
A. Yes.
Q. And what do you do when you work at the store?
A. Behind the register.
Q. Do you interact with customers?
A. Yes.
Q. Do you sell things to customers?
A. Yes.

Q. I want to take you back to December 24th, 2010.
A. Okay.
Q. Do you recall going to the store that morning?
A. I was at home.
Q. Did you go to the store that morning?
A. After my husband called I went there.
Q. What was going on at the store when you got there that morning?
A. My husband called to tell me about a robbery that had taken place, so I just went there, to the store.
Q. Who did you go with?
A. With my older son, Dhruval.
Q. Why did Dhruval go to the store?
A. He was the only one knowledgeable about the video processes.
Q. And your store has a video surveillance system?
A. Yes.
Q. Did this video surveillance system capture the robbery at the store?
A. Yes.
Q. Did you view this video?
A. Yes.
Q. When did you view it?
A. When I went to the store.
Q. Who all was around when you viewed it the first

time?

A. My husband, myself, my son, and the police.

Q. Did you recognize the man in the video?

A. Yes.

Q. What was the man doing in the video that you recognized?

A. He walked into the store with a gun and asked my husband for money.

Q. Had you seen that man before?

A. Yes. I've seen him before. He used to come.

Q. Where had you seen him?

A. At my store. He used to come.

Q. How often did he come to your store?

A. At least once a day.

Q. For how long?

A. I don't remember very well but around six months.

Q. So to be clear, your testimony is that you remember the man in the video coming to your store every day for approximately six months?

A. Yes, he would come regularly.

Q. What would he do when he would come to the store?

A. He would come buy Newport cigarettes, ten-dollar lottery tickets, and sometimes gas.

Q. Would you sell these items to him?

A. Yes.

Q. Would you ever speak with him?
A. Yes, I would talk to him because it is my job to check the identification of the person who buys cigarettes and I would ask him for his ID, and he would joke about Obama having signed his ID.
Q. Are you certain that you recognized the man in the video as the man who would buy all of these items from you at your store?
A. Yes.
Q. And when he would purchase these items from you at the store would you see his face?
A. Yes.
Q. Would you not only hear him talk but see him talk?
A. Yes.
Q. Did you have an opportunity at those times to see the man walk?
A. Yes.
Q. And is it your testimony that the man in that video was someone that you had seen often?
A. Yes.
Q. Did you recognize the man in the video as a regular customer?
A. Yes.
Q. How quickly did you recognize that fact when you saw the video the first time?

A. We watched the video about four or five times, me and my husband, and talked about it and then we were very sure that this was the man.

Q. Are you certain that the man that you saw in that video is your regular customer?

A. Yes.

Q. Is there any doubt in your mind that he was a regular customer in your store?

MR. GROEBER: Objection, Your Honor. Asked and answered.

THE COURT: I'm going to allow this question. Thank you.

You may answer.

A. He is that man.

Q. Is there any doubt in your mind the man that you saw on that video was the man who had joked with you about Obama having signed his license?

A. He is that man.

Q. Do you know that because your husband told you it was that man or do you know that because of your previous experience with that man?

MR. GROEBER: Objection, leading.

MR. RUTLEDGE DURANT: It's not.

THE COURT: Counsel. Overruled.

You may answer.

MR. RUTLEDGE DURANT: Let me repeat it.

BY MR. RUTLEDGE DURANT:

(Through the interpreter.)

Q. Do you know that the man in that video was your regular customer because your husband told you it was your regular customer or because of your previous experience with that man?

A. I realized it myself.

Q. Do you see your regular customer, the man that you saw in that video in this courtroom today?

MR. GROEBER: Objection, Your Honor, previously made.

THE COURT: You may answer.

Overruled, subject to our previous rulings.

THE INTERPRETER: Could you ask it again, please?

BY MR. RUTLEDGE DURANT:

(Through the interpreter.)

Q. Do you see the man that you recognized as your regular customer who is the same man in that video in this courtroom today?

A. Yes, he's here.

Q. Please point to him and describe what he is wearing.

A. (Indicated). That's him in the white shirt and tie.

MR. RUTLEDGE DURANT: Let the record reflect that the witness has identified the defendant.

THE COURT: It will.

I'll note your exception. Thank you.

BY MR. RUTLEDGE DURANT:

(Through the interpreter.)

Q. Mrs. Patel, are you certain that this man was your regular customer who bought Newport cigarettes from you, lottery tickets from you, sometimes gasoline, and joked with you that Obama had signed his license?

A. Yes.

Q. Is there any doubt in your mind?

A. No.

Q. And is that the same man that you recognize as being in that video?

A. Yes.

Q. And do you know that because your husband told you that or do you know that based on your previous experience with him?

MR. GROEBER: Objection, leading.

THE COURT: Overruled, as to leading.

A. I know he's my regular customer.

MR. RUTLEDGE DURANT: Thank you.

THE COURT: Mr. Groeber?

MR. GROEBER: Thank you, Your Honor. May it please

the Court.

CROSS-EXAMINATION

BY MR. GROEBER:

(By the interpreter.)

Q. Good morning, Mrs. Patel.

A. Good morning.

Q. I'd like to ask you a few questions about your testimony today.

A. Okay.

Q. You were not at the scene at the time of the robbery?

A. I wasn't there.

Q. You received a phone call from your husband that morning?

A. Yes.

Q. And he told you that there had been a robbery?

A. Yes.

Q. And he told you on the phone that he recognized the man that had robbed him?

A. He didn't tell me that on the phone.

Q. You watched the video when you got to the gas station?

A. Yes.

Q. And you were in the office in the gas station?

A. Yes.

Q. And your son, Dhruval, was there?
A. Yes.
Q. And your husband was there?
A. Yes.
Q. And there were two police officers there?
A. Yes.
Q. You all watched the video that morning?
A. Yes.
Q. Several times?
A. Yes.
Q. And you and your husband spoke about the video?
A. Yes. We watched it and I was sure that that was that man.
Q. But you all discussed it together?
A. We have a business so we had to work.
Q. And my question is, you and your husband talked -- I think you testified earlier that you and your husband looked at the video together and talked about it together?
A. We did not have a very long discussion about it because we have a business and we had to go back to it.
Q. But you did talk about it?
A. Yes, we did talk but not for too long.
Q. And it's your testimony that on that day you recognized who the robber was?

A. Yes, I knew him.
Q. And you told the police that?
A. Yes.
Q. You watched the video several times that day, you've already said.
A. Yes.
Q. And you watched it several times after that day?
A. I didn't watch it more than four or five times because I have a business and I have housework to do.
Q. Okay. And I'm not asking about the day of the robbery. I'm asking the days after the robbery if you watched it anymore.
A. I don't remember very well how many times I watched it after that day.
Q. Now, you testified that you recognized my client as the customer and the person in the video, correct?
A. Yes.
Q. And the video that you watched you saw only the front door?
A. Yes.
Q. You didn't see any video other than one that showed the front door?
A. There was no need for me to watch any of the video because as soon as I saw this video I recognized the man.
Q. How did you recognize him from that video?

A. By his walk.
Q. Anything else?
A. His walk, his mannerisms and his body language.
Q. You testified about this matter under oath before, correct?
A. Yes.
Q. And I asked you that same question.
A. Yes.
Q. And you said in that testimony that you recognized him by his voice.
A. He used to come almost every day to my store and I could make out the way he walked and talked, based on that.
Q. And my question to you is I asked you this -- I have asked you before about this, correct?
A. Yes.
Q. And you were under oath?
A. Yes.
Q. And you said that you recognized his voice?
A. Yes. I said that I recognized his voice and the way he walked.
Q. When you watched the video on the day of the robbery was there any sound?
A. I did not say that I recognized the voice from the video. I was referring to the fact that I knew how he

talked and how he walked when I saw the video based on my previous experience with the man.

Q. Okay. My question was when you watched the video on the day of the robbery did you hear any sound?

A. No.

MR. GROEBER: May I have one moment, Your Honor?

THE COURT: You may.

(PAUSE.)

BY MR. GROEBER:

(Through the interpreter.)

Q. Do you remember when I asked you that question before?

A. Yes.

Q. And you were under oath?

A. Yes.

Q. And you said that you could not remember if there was sound?

A. But now I'm saying that I am recollecting that he used to come to my store all the time and I was familiar with his voice and the way he talked. That's why I'm telling you now.

Q. Okay. But you did not remember the previous time that you did testify?

A. I did say I knew that I was familiar with the way he talked and walked based on my previous experience with

him.

Q. And you said -- and I'd like to talk a little bit about your previous experience. Do you remember what kind of shoes your regular customer who joked about Obama wore?

A. There are too many customers who come to my store and I don't look at all of their shoes.

Q. When you --

MR. GROEBER: May I have one moment, Your Honor?

THE COURT: Take all the time you need.

BY MR. GROEBER:

(Through the interpreter.)

Q. You testified earlier that the person who came in your store frequently, who you think is my client, would buy cigarettes?

A. Yes.

Q. And you always identified -- you asked for his ID?

A. Yes.

Q. Mrs. Patel, you testified that you recognized my client from the video?

A. Yes.

Q. And in the video the robber was wearing a hat, sunglasses, and a hoodie jacket?

A. Yes.

Q. Do you believe that you could look at a photograph

of a young black man wearing sunglasses and a hoodie over his head and tell if it is my client?

MR. RUTLEDGE DURANT: Objection.

THE COURT: She may answer that question.

A. Why would I want to see another photograph?

Q. Do you believe that you can look at another photograph of a young black man wearing sunglasses and a hoodie over his head and tell if it is my client?

A. When we are talking about this man why would I want to look at a picture of another man?

MR. GROEBER: One moment, Your Honor.

THE COURT: Yes, sir.

(PAUSE.)

BY MR. GROEBER:

(Through the interpreter.)

Q. Mrs. Patel, today you've identified my client, Marvin Green, as the person who robbed you in the store, correct?

A. Yes.

Q. And you never -- the police never gave you a set of pictures to look at, did they?

A. No.

Q. Now, I'd like you to look around in the courtroom and other than the jury box how many young black men are in the courtroom right now?

A. Why should I look?

MR. GROEBER: Your Honor, I'd ask that you instruct the witness to answer the question, please.

THE COURT: Mrs. Patel, I need you to answer the question.

A. Why are they asking me this?

THE COURT: Mrs. Patel, I need you to answer that question.

A. I do not know why you are asking me this question. If you tell me why you are asking me this question maybe I will answer it.

Q. It's true that there is only one young black male in the courtroom right now?

A. I never said that.

Q. You pointed out Mr. Green who's sitting at this table, correct?

A. Yes.

Q. And he's not sitting at this table where the solicitors are sitting at, is he?

A. No.

MR. GROEBER: One moment, Your Honor?

THE COURT: Yes, sir.

MR. GROEBER: No further questions.

Thank you, Mrs. Patel.

THE COURT: Mr. Durant?

REDIRECT EXAMINATION

BY MR. RUTLEDGE DURANT:

(Through the interpreter.)

Q. Do you want to be tricked?

A. No, I never want that.

Q. Why are you here saying what you are saying?

A. I don't understand you very well.

Q. Are you here to tell the truth?

A. Yes.

Q. Are you here to tell the jury that you are certain that this is the man you recognized on the video?

A. Yes.

Q. If you were not certain would you tell that to the jury?

A. But I have not doubts. He is that man.

Q. But if you did only merely think it was your regular customer would you tell that to the jury?

A. I don't even have the slightest doubt.

MR. RUTLEDGE DURANT: Thank you.

THE COURT: Mr. Groeber?

MR. GROEBER: Nothing further, Your Honor.

THE COURT: You may step down. Thank you.

Call your next witness.

MR. RUTLEDGE DURANT: Your Honor, at this time the State rests its case.

MR. GRIMES: I just need one point of clarification on some exhibits.

THE COURT: Yes.

MR. GRIMES: I know there was an issue on the booking photo.

THE COURT: I have your case. I had requested a case. Based upon my understanding of the admissibility of why it was asked to be requested -- that's State's Number 5, Madam Court Reporter?

I thought you all were going to give me a better --

MR. GRIMES: Well, I believe they have rested now, Your Honor.

THE COURT: I'm sorry?

MR. GRIMES: I believe that they have rested.

THE COURT: No. We had talked about it yesterday that they were going to get one that was in conformity with the size. Not a different picture but in conformity with the size, after redacted pursuant to my understanding of the case, prior to giving it to me.

MR. GRIMES: I don't recall. Was it admitted, not allowed to be published or --

THE COURT: It was admitted, not published until it was redacted and --

MR. GRIMES: Well, at the State's case we did object to the photo coming in but do understand the

Court's ruled.

THE COURT: Do you have an objection to that photograph?

MR. GRIMES: Yes, ma'am.

THE COURT: I understand you have an objection to all of it but, Mr. Grimes, a black and white was shown yesterday now this is a color.

MR. GRIMES: I mean, the State's exhibit -- I forget which number it was.

THE COURT: Five.

MR. GRIMES: Five was shown to the jury.

THE COURT: It was not shown to the jury.

MR. GRIMES: 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.

MR. GRIMES: Yes, Your Honor. Basically, when you

look at the three factors in the case we don't believe the evidence need 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.

MR. GRIMES: 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.

MR. GRIMES: 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?

MR. GRIMES: 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?

MR. GRIMES: 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 remain as 5. The one 5-A will go back.

MR. GRIMES: Thank you.

(WHEREUPON, State's Exhibit Number 5-A, a Photograph, was marked and admitted into evidence.)

THE COURT: Thank you. Anything further before we break for lunch?

MR. RUTLEDGE DURANT: Nothing from the State.

MR. GROEBER: Nothing from the defense.

THE COURT: All right. Mr. Green, please stand.

Sir, I remind you that you are still under oath. Do you remember me placing you under oath yesterday?

THE DEFENDANT: Yes, ma'am.

MR. GRIMES: I have no questions.

THE COURT: You may step down. Thank you.

THE WITNESS: Thank you, Your Honor.

THE COURT: Call your next witness.

MR. GROEBER: Thank you, Your Honor. The defense would call Dr. Jennifer Beaudry.

THE COURT: Come forward and be sworn. Is it Dr. Beaudry?

THE WITNESS: It is.

DR. JENNIFER BEAUDRY, after having been duly sworn, testified as follows:

THE CLERK: If you'll please speak into the mic and state your full name and spell your last name for the record.

THE WITNESS: Jennifer Beaudry, B-e-a-u-d-r-y.

DIRECT EXAMINATION

BY MR. GROEBER:

Q. Good afternoon, Dr. Beaudry.

A. Good afternoon.

Q. How are you?

A. I'm good.

Q. Good. Please tell the jury what your occupation is.

A. I'm an assistant professor of psychology.

Q. Where do you Teach?

A. At the University of South Carolina Beaufort.
Q. Which campuses, are there one or two campuses?
A. There are two my campuses. My office is on the Bluffton Campus but I teach at both campuses.
Q. All right. How long you been at USC Beaufort?
A. Since 2008.
Q. Please describe for the jury your educational background.
A. I have my Bachelor of Arts in Psychology, and I earned that in 2000 from the Laurentian University which is in Sudbury, Ontario, Canada. Then in 2002 I started my graduate studies and I earned my Master's in Social Psychology from Queens University in 2004, and then in 2008 I earned my Ph.D. in Social Psychology as well, also from Queens University.
Q. What did you write your dissertation about in order get your Ph.D.?
A. I wrote my dissertation about eyewitness identification procedures and people's perceptions of those procedures, whether they believe them or not.
Q. What classes do you teach at the University of South Carolina Beaufort?
A. I teach a number of different classes, introduction to psychology, I teach social psychology, I teach research methods, then I also teach a special topics

course on psychology in the law.

Q. What type of topics or issues do you deal with in your courses on -- well, that you deal with in your courses?

A. I deal with so many different topics but relevant to this issue I focus on eyewitness identifications, the different procedures police use with eyewitnesses, different tricks that our memories can play on us and also people's belief of that evidence.

Q. Do you supervise any students?

A. I do. I have a research laboratory at the University of South Carolina Beaufort and I supervise about two students every semester who conduct research with me.

Q. Do you have any areas of specialization in the general area of psychology?

A. I do. Social psychology is my general area, then specifically my research is eyewitness identifications and eyewitness memory.

Q. When you speak of eyewitness identification tell the jury what you mean.

A. Eyewitness identification refers to somebody's ability to remember somebody that they had previously seen, recall information about an event, and also recognize somebody that they may have previously seen.

Q. Now, does that include voice recognition by witnesses as well?

A. It does.

Q. Have you written any articles or book chapters on these topics?

A. I have.

Q. What are some of the articles that you've written?

A. One recent article looked at disguise and how that affects your ability to recognize somebody. Another article -- two articles, actually, looked at the difference between simultaneous and sequential lineup procedures and how they affect witnesses, and another article looked at the police procedures that were used by Ontario police and whether or not they were practicing current best standards.

Q. Have all of your articles been peer reviewed?

A. They have.

Q. Can you explain to the jury what peer review means.

A. Yeah. Basically peer reviewed means that before the manuscript is accepted for publication, right before the paper you've written is accepted for publication it's sent out to a panel of experts in your area so they can evaluate it, and they evaluate how the study was conducted, they evaluate the statistical tasks that you used in that study to make sure that was appropriate and

they also evaluate the conclusions that you've drawn based on that study, whether or not what you conclude is actually valid based on what the study found.

Q. What are some examples of original research that you've done?

A. I've done over two dozen studies in this area of psychology in the law looking at the effect of disguise, looking at distinguishing characteristics and how that will affect eyewitnesses.

I've looked at trying to determine or trying to create new ways of conducting police procedures to see if we can get even better than what we already have. I've also looked at different methodological issues regarding lineup fairness and things like that.

Q. Have any of your studies been funded by national agencies?

A. They have. My dissertation was funded -- it was conducted in Canada and it was funded by the Social Sciences and Humanities Research Counsel of Canada, and then I've also done a study funded by The National Science Foundation looking at attorneys' perceptions of eyewitness evidence and how that affects their plea bargaining decisions.

Q. How do you stay current in your field?

A. I talk with colleagues, I publish my own research,

I read other people's research, and I also attend conferences every year.

Q. Have you ever testified in court before?

A. I have not. This is my first time.

MR. GROEBER: May I approach the witness, Your Honor?

THE COURT: You may.

MR. GROEBER: May I approach, Your Honor?

THE COURT: You may.

BY MR. GROEBER:

Q. I'm going to hand you what's been marked as Defendant's Exhibit Number 1. Tell me if you recognize that.

A. I do.

Q. What is it?

A. It is my CV, which is my academic resumé.

Q. Does it fairly and accurately portray your educational work experience, articles you published, and the training that you described for the jury?

A. It does.

MR. GROEBER: Your Honor, I'd move to admit Dr. Beaudry's CV into evidence.

MR. RUTLEDGE DURANT: There is no objection, and the State would actually consent to Dr. Beaudry being an expert in this field.

MR. GROEBER: And that was my next question, to have her admitted as an expert in human memory and eyewitness identification.

THE COURT: Defense 1 into evidence without objection.

(WHEREUPON, Defendant's Exhibit Number 1, the CV of Dr. Beaudry, was admitted into evidence.)

THE COURT: And the specific area, Mr. Groeber, that you wish --

MR. GROEBER: Human memory and eyewitness identification.

THE COURT: And, Mr. Durant, you have no objection?

MR. RUTLEDGE DURANT: My colleague thinks that I might should but I'm going to go ahead and consent. Thank you.

THE COURT: All right. This witness will be qualified in those areas as an expert and is simply evidence for you to use in any way that you see fit.

You may continue. Thank you.

MR. GROEBER: Thank you, Your Honor.

BY MR. GROEBER:

Q. Dr. Beaudry, this case is about an armed robbery that took place on Christmas Eve in 2010.

A. It is.

Q. Were you present at the time?

A. I was not.
Q. Have you spoken with any of the eyewitnesses?
A. No, I haven't.
Q. Are you being paid for your testimony?
A. I am.
Q. And what is your hourly rate?
A. I'm paid $150 an hour.
Q. How does that hourly rate compare to other experts in your field?
A. It's a little less than other experts in the field because you base your hourly wage on experience, and this is my first time testifying so I can't charge as much as somebody who's testified in 50 different cases.
Q. Okay. Does the fact that my office pays you for your opinion in any way influence your expert opinion or the findings that you'll have or anything that you'll discuss today?
A. No, it doesn't. My opinion is based on the research.
Q. Doctor, you going to give any opinions about the accuracy of any of the witnesses today?
A. No, I won't.
Q. Is that your role?
A. No, it's not.
Q. Why not?

A. My role is to educate the Court on the research in this area not to comment on any of the specific witnesses.

Q. All right. Could you give the jury -- let's kind of get into memory.

A. Okay.

Q. Could you give the jury a general overview of how human memory works in the context of eyewitness identification?

A. Sure. So what we need to recognize is that memory doesn't work like a video recorder, all right. There are basically three general stages in the memory process.

So the first stage is acquisition. This is when you first encounter information and it's first being written into your brain. If you can think of the last time you took a test, studying for that test would be the acquisition phase.

The second phase would be the retention phase, it's called, and so that refers to the period between when you studied that information and -- or when you were exposed to that information and when you actually have to recall or remember that information. Okay. So thinking back to studying for a test, it's the time between when you studied that material and when you actually have to write the test. That would be your retention phase.

And then the third stage is the retrieval phase, when you actually try to recall or remember that information to use that information. So when you're actually writing the test, that's your retrieval stage.

Q. Does your research indicate, are there any common misconceptions about how our memory works?

A. Yes, it does.

Q. And what are some of those common misconceptions?

A. A common misconception is that your memory does work like a video camera, that you can just record something and then play it back at a later date whenever you want and have it play to the exact same thing that you saw originally.

Another common misconception is that a traumatic event would be more memorable to you, and it's true that you would remember that event happened. All right. You're not going to forget that somebody raped you or that you witnessed a crime but you're not necessarily going to be able to remember the details of that event as well as you would if it was a nontraumatic episode.

Q. What groups of people do the studies show suffer from these misconceptions?

A. Everybody who doesn't study this has these misconceptions in general. So that includes lawyers, that includes police officers who haven't taken any

training in memory, that includes judges, and that includes juries as well.

Q. Doctor, has there ever been any scientific research on eyewitness accuracy and the factors that affect the accuracy of memory?

A. There has been.

Q. And before we discuss those I want to kind of talk about how you go about doing your studies and your research and how you as scientists study this area, okay?

A. Okay.

Q. What are kind of the ways that you go about studying this?

A. There are three major ways that we approach the study of eyewitness identification and eyewitness memory.

Q. All right. What's the first one?

A. The first one are laboratory studies. So in laboratory studies we have generally college students. We have them act as our participants. And in those laboratory studies we try to control everything except what we are interested in.

So, for example, if we're interested in the effect of a weapon on your memory then we would have half of our students watch a crime video in which there's a weapon present and then half the students would watch a crime video without a weapon, and then we would compare your

identification rates.

And so if we see a difference between the identifications of somebody who watched a video without a weapon and somebody who watched a video with a weapon then because of the level of control that we have we can generally conclude that the difference is the result of the presence of a weapon.

Q. Why are college students used?

A. College students are used because the majority of researchers in this area are university professors and so college students are readily available to us.

Q. Does that in any way limit or affect the accuracy of the tests and the research?

A. It doesn't. Memory is memory. So my memory is going to be the same as your memory, or going to be the same as a college student's memory. The only time it would be an issue is if we are interested in a specific group. Like if we are interested in children's memory then we wouldn't look to college students.

Q. Is there another way that you kind of go about -- the science goes about studying this area?

A. There is. So the second general category looks at archival studies. There's always a question as to whether or not research done with college students would actually apply to the real world and so then we go out

into the real world and do archival studies.

Q. When you say archival studies what do you mean?

A. So archival studies are studies that are done by looking at existing data or existing records. So an eyewitness -- an eyewitness research, the researcher would go and look at police reports and police files, and they would look at the identification patterns in those files.

Q. And then what would they try to do with that information?

A. They would try to see if we see the same general patterns in real police files with real police witnesses that we see in the lab, and in general they find that we do.

Q. And those are real cases, right?

A. Those are real cases.

Q. And sometimes that includes wrongful convictions?

A. Sometimes that includes wrongful convictions.

Q. All right. What's the third way that you go about studying this science?

A. The third way that we go about studying the science is a statistical technique called a meta-analysis. So in a meta-analysis if you are interested in, say, weapon presence, again, let's just continue with that one, then you would take all of the studies that have looked at

weapon presence and do an overall analysis and that way you can get a sense of the general patterns that are there in the data. So rather than dealing with the specific manipulation in each study you get an idea of how robust this finding actually is.

Q. So when you read -- and how broad are these meta-analyses?

A. They include every study that's been done on that issue. So it doesn't matter what country it was done in, it doesn't matter what year it was done in it's going to be incorporated into a meta-analysis.

Q. And when you read an article, or a book, or a report, something that's studying human memory and eyewitness identification one of these three methods would be used?

A. Yes, that's right, as long as it's an empirical study.

Q. Okay. Doctor, could you tell us why it is that scientists are interested in studying eyewitness identification and human memory?

A. Different scientists have different reasons for studying it. Some people are just simply fascinated by the process and just really want to understand how your brain works. Other scientists are interested in the more applied nature and so how this research can affect the

procedures that police actually use. But in general regardless of whether you're looking to just understand or whether you're looking to apply the general idea is to educate people on what's actually going on.

Q. And what do scientists do with this information?

A. Scientists publish articles, of course. They also educate juries. Some scientists teach prosecutors, and defense attorneys, and judges about these issues. I also teach all of my students in my classes about these issues.

Q. Has the government published any reports on -- that have used these laboratory results?

A. They have.

Q. And what's one of those?

A. One of the publications would be a publication by the National Institute of Justice looking at the best -- the current best practice for how to conduct police procedures with eyewitnesses.

Q. And when you say the National Institute of Justice, who runs that?

A. The Department of Justice.

Q. The U. S. Department of Justice?

A. That's right.

Q. Why did the National Institute of Justice publish this report?

A. Well, in 1998 Attorney General Janet Reno was in charge and at that point I think about 28 DNA exoneration cases had come forward where people were in jail for crimes that they had not committed and that DNA evidence demonstrated that they did not commit. And in the vast majority of those cases there was a mistaken eyewitness identification. So she was concerned about eyewitness error and wanted to ensure that all of the science that had been done for the last nearly 30 years was incorporated into police procedures.

Q. Who did she invite to be participants in that study?

A. She had prosecutors, she had defense attorneys, and she had law enforcement officials, and she also had researchers from Canada and the United States.

Q. Did they make any suggestions about the best practices?

A. They did. They published an entire report on the best practices.

Q. And you are familiar with that report?

A. I am.

Q. And they issued it based on the science, right?

A. That's right. They incorporated the science into procedures that the police could actually conduct, so they wanted to make sure that it was -- that it wasn't

putting an undue burden on the police officers but that they could still do their job and still investigate crimes.

Q. Let's try to get kind of into the nitty-gritty of the three factors that you mentioned.

A. Okay.

Q. Acquisition, retention, and retrieval, right?

A. Yes.

Q. Let's talk about the first one, acquisition. Please remind the jury what acquisition is.

A. So acquisition is that first stage when you are first exposed to somebody or you're first studying for that test.

Q. Are there certain factors that affect our ability to acquire memories?

A. There are.

Q. What are some of those factors?

A. So the level of attention, how much attention you're paying to something affects your ability to encode that information. All right. If you're not listening to me speak, you're not paying attention to me speaking then you're not going to remember that information later because you never brought it into your brain to begin with.

The presence of a weapon affects your ability to

encode information. Whether or not somebody is wearing a disguise affects your ability to encode information because if my face is covered and you've never seen my face then you're not going to be able the encode that information into your brain.

How long you're exposed to something affects your ability to encode that information. Whether or not the perpetrator and the witness are of the same race affects your ability to encode that information.

Q. How about the lighting?

A. Lighting affects your ability to encode, distance affects your ability to encode.

Q. How about stress?

A. Stress affects your ability to encode. There are a number of factors. The police have no control over whether this happens. All right. This is just what happens when the crime occurs, but all of these factors play a role in your ability to acquire that information.

Q. What is exposure time?

A. Exposure time refers to how long you saw that information for. So remember studying for a test? If you studied for a test for half hour then your exposure time or your duration would be 30 minutes.

Q. And when we talk about exposure time in the context of eyewitness identification what are we talking about?

A. We're talking about how long they saw that perpetrator's face for.

Q. Or heard their voice?

A. Or heard their voice.

Q. And how does exposure time affect accuracy?

A. Exposure time affects accuracy in that the longer you are exposed to something the more likely you are to remember it.

Q. How much -- you've watched the video in this case?

A. I have.

Q. How much exposure time did Mr. Patel have?

A. I know that the perpetrator was in the store for about a minute 30 seconds but you can't see Mr. Patel on the video the entire time, so I don't know if Mr. Patel was looking at the perpetrator for the whole time. So I can't tell how long his exposure time was.

Q. Let's talk about weapon focus now. Does it matter if the perpetrator has a weapon?

A. It does.

Q. Okay, and how?

A. Some remember you have to pay attention to something to encode that information. Well, it turns out that a weapon draws your attention and so you focus your attention on the weapon rather than focussing your attention on the perpetrator's face, and so the presence

of a weapon actually reduces your ability to then identify somebody.

Q. Does weapon focus affect only the person at the scene of the crime?

A. It doesn't. So in our studies we can't put a -- we can't put a weapon in our students' faces. We can't threaten our students with a gun so we just show them videos of people who have guns, and even in that situation, even when there's no personal threat to you whatsoever that weapon still draws your attention.

Q. All right. Let's talk about stress. I think most people would think that when we're stressed we have stronger memories. What does the science say about that?

A. The science says that that's not right.

Q. Okay.

A. So that is a general belief but it's an erroneous belief. It's not supported by the science. So just like the presence of a weapon reduces your identification accuracy your ability to later recognize somebody's face, stress has the same effect.

Q. Do you know of any particular studies of stress?

A. I do.

Q. Okay. What study was that?

A. There was a study -- well, stress is difficult to study in the laboratory because we can't put our students

under these really stressful situations that would mimic the type of stress that you would feel if somebody was threatening you with a weapon, or raping you, or something to that effect. All right. We just can't recreate that in the lab.

But what we can do is partner up with people who do put people under that level of stress. And so one of those partners was the Army and the researchers got involved in prisoner of war simulations where military personnel were going through these training simulations to make sure that they wouldn't crack during a prisoner war interrogation.

And so in this Morgan 2004 study what they did is they had military personnel undergo two types of interrogations. One was a low stress interrogation, and one was a high stress interrogation in which there was even a physical confrontation between the interrogator and the prisoner of war. And in this 40-minute interrogation they were obviously exposed to their interrogator for a long period of time.

A day later researchers presented them with a lineup and asked them to pick out their interrogator and in the low stress conditions people were pretty good at that. Seven out of 10 of the prisoners of war were able to recognize their interrogator.

But under those high stress conditions when there was a lot of physiological arousal their ability to later recognize their interrogator actually decreased quite a bit to 37 percent. So less than 4 out of 10 of those people were able to recognize somebody that was in their face interrogating them, involved in a physical confrontation with them for 40 minutes.

Q. And even when it was low stress only 7 out of 10 picked out their interrogator?

A. That's right, 7 out of 10.

Q. So that's a 40-minute interrogation?

A. That's right.

Q. All right. Let's talk about cross-racial issues. You said that cross-racial identification affects accuracy. What do you mean when you talk -- when you say cross-racial identifications?

A. So the research shows that we're much better at identifying someone of our own race than identifying somebody of a different race, and this has been repeatedly shown regardless of what races we're taking about, so it's been shown with white witnesses to black perpetrators, black witnesses to white perpetrators. It's been shown with whites and Asians, and it's also shown with whites and Hispanics.

Q. Have there ever been any specific studies about the

situation we have in this case where there's an Indian and an African American?

A. There haven't been any specific studies looking at the ability of an Indian witness to pick out a black witness.

Q. But it's fair to say that in all the studies where they have had some kind of cross-racial identification that it has affected accuracy?

A. That's right. And more than that, it's not just that it affects your ability to recognize somebody, it also increases your chances of falsely identifying somebody else.

Q. All right. Let's talk about disguises and how they might affect your acquisition of memory. Are you familiar with any studies about that?

A. I am. I've done one.

Q. All right. How did you do the study?

A. So in this study that we did, again, it was a laboratory study so we were able to create the crime videos and we had four different. We had the no-disguise conditions, so you could see the person's face perfectly. We had a condition in which they wore a toque. I'm from Canada. So hat or beanie. All right. Something covering their full -- forehead then also their hairline, or they were wearing sunglasses. So that was a third

condition. So you could see their hair but you couldn't see their eyes. Or the fourth condition was they had the hat on and they were also wearing sunglasses. And so we looked at all those four conditions in one study.

We also did a second study looking at the effect of a stocking. So a woman's nylon pulled over your head to varying degrees, and we looked to see whether participants exposed to various videos could later recognize the person from a lineup.

Q. All right. How did people do?

A. Well, they had a good exposure to our targets. They saw a head-on shot. They were exposed to them for about 30 seconds, clear perfect shot, and immediately after that video they were asked to make their lineup identification. So in the no-disguise condition they did great. About 87 percent were able to recognize the person that they saw.

Q. How about wearing the beanie?

A. With the beanie the -- sorry. Beanie just -- toque sounds much more reasonable to me, but with the beanie when they could not see their hairline their identification accuracy dropped to 78 percent, so still pretty good.

Q. How about when they were wearing glasses? And what kind of glasses were they wearing? You say glasses?

A. Wearing sunglasses, so glasses that hid their eyes.
Q. All right.
A. When they were wearing glasses their identification accuracy dropped even more, now to 69 percent.
Q. All right. How about when they are wearing glasses and the toque or beanie?
A. When they wore the glasses and the hat their identification accuracy dropped to the lowest rate which was 55 percent.
Q. And you published that study?
A. We did.
Q. Okay. Where did you publish it?
A. We published it in Law and Human Behavior, which was the journal for the American Psychology Law Society.
Q. And that you say was peer reviewed?
A. It was.
Q. Now, you studied you said with the hat and the hairline. Tell the jury why that's important.
A. Well, those are important cues that we rely on when we're trying to recognize somebody. All right. So in general we find that you look to the outside of the face then to the interior of the face. Specifically, you spend a lot of time looking at somebody's eyes and you use that information to then recognize them.
So the hat and sunglasses was actually more

effective as a disguise than simply pulling the stocking over your face, and that we think is a really effective disguise. All right. Our common sense belief is that if you cover your face with a stocking and totally smush up your face and obscure the cues that that would be more effective. In fact it's not. The hat and sunglasses were more effective.

Q. Okay. We talked a lot about factors that affect the ability to kind of grab the memory. Let's talk about some factors that affect our ability to hold onto it. What's the second phase called again, of memory?

A. The second phase was our retention stage.

Q. And what's that again?

A. So that's the time between when you're exposed to that event or that information and when you later try to remember that information.

Q. Does the length of interval between the event and the identification affect accuracy?

A. It does.

Q. How?

A. Basically we have what's called our forgetting curve, and this applies to any type of memory that you are thinking of. So we're pretty accurate immediately after the event but then our accuracy drops off very sharply and you see this huge decline, and that's called

the forgetting curve.

Q. How fast is this decline?

A. In a meta-analysis on identification accuracy specifically Steve Penrod and his colleagues actually found that it drops off after about two hours?

Q. How about the length of time -- or the length of time between the event and the court case?

A. The same forgetting curve applies.

Q. Now, it makes sense that our memories get weaker over time. I think probably everybody would agree with that. Can they change over time?

A. They can change over time.

Q. How does that happen?

A. Basically any information that your are exposed to during that retention interval can be incorporated into your memory. So not only does your memory get weaker over time but if you accept other information that's been presented to you then you can actually change what you think or what you remember.

Q. Is there a term that you use when you talk about this other information?

A. There is. Post-event information is a general term. So it's information that you've experienced after the event.

Q. What are some sources of post-event information?

A. Post-event information can really come from anywhere. It can come from discussions that you've had with other people, it can come from reading something, it can come from watching something on TV, it can even come from questions that are being asked of you.

Q. What kind of effect does it have on memory?

A. It can change your memory. You can incorporate somebody else's piece of information into your own memory, and if that information is inaccurate, or wrong, or misleading then it can change what was originally an accurate memory and change it into an inaccurate memory or a memory that contains inaccurate details.

Q. Do people realize that that's happened?

A. No. We have no idea. Our mind plays so many tricks on us and we are never even aware that this is happening.

Q. Can people recognize where the information even comes from?

A. No, they can't. So in one famous study participants looked at different scenes, and in one scene there was a car pulled up to a stop sign. Later on participants were asked -- some participants, about half, were asked, Did you see the car at the yield sign?

All right. So we've changed one detail of the event from a stop sign to a yield sign. And then later

on they are asked, Did you see a stop sign or did you see a yield sign? And the participants who were exposed to information asking about the yield sign reported the wrong information about -- I think about 60 percent of the time. So to further figure out if they realized that their information -- or if they realized that their memory has changed they asked, Did you actually see that stop sign in the crime -- or in the slide? Did you see it in the questionnaire or see it in both, and people would report that they saw it in both.

So they actually believed. Not only did they just incorporate that information but they believed that that's what they had originally seen in the first place.

Q. Okay. I think I'm going to ask you to give us an everyday example.

A. Okay.

Q. If you can.

A. I can. So I'm sitting back here trying to think about what everyday event I would give because some of this is esoteric and isn't necessarily real world or isn't necessarily common sense, and so thinking about my family, and my parents got divorced when I was very young and my brother went and lived with my father. And so I was two years old when this happened but this is a story that my mother has told over, and over, and over again,

all right, but I am two.

The science says I could never remember what happened at that time. But I picture myself sitting in this orange rocking chair that we had, my blue shag rug carpet because it's the 1970's, and my brother is walking out dragging this garbage bag of his belongings. There's no way I could remember that but because she has told it so many times this is now the image I have in my head.

Q. When you think about that you picture yourself --

A. I picture myself sitting in this chair, exactly, but there's no way that that's my memory.

Q. This post event information, it can affect the reliability of eyewitness identifications?

A. It can.

Q. Could you give an example -- well, let's move on to recalling the memory, and what's that called again?

A. Okay. That would be our retrieval phase, when we're trying to remember something or use that information.

Q. All right. And when does the retrieval stage happen?

A. The retrieval stage happens in an eyewitness case when they are trying to report that information, when you are up on the stand testifying about that information or when the police are presenting you with an identification

procedure, with a lineup.

Q. How about if you look at pictures from the event or watch video from the event?

A. Yep, sure. That would be part of their -- well, that's not necessarily the retrieval phase unless you are being asked to make a decision about that.

Q. Okay. In psychological terms how do you retrieve memory?

A. Basically every time you try to remember something you're reconstructing that memory. You're bringing all of information that you have about it, whether you actually experienced it or whether it was presented to you at some other point you're bringing that all in and you are kind of reconstructing that event.

Q. All right. What are some of the factors that affect retrieval?

A. So all of these factors that we've talked about, anything that affects acquisition, all right, anything that affects your ability to encode that information affects your ability to then use that information.

Retention interval also affects your retrieval as well. But additional factors play a role in that. So the types of questions that you are being asked, that can affect your retrieval. The types of pictures that are being presented to you in a lineup can affect your

retrieval. How those pictures are presented to you can affect your retrieval.

Q. All right. Now, has there been any studies about the confidence of witnesses?

A. There have been.

Q. Okay. Is there any relationship between how confident a witness is and how accurate they are?

A. There is a relationship but it's a week relationship. So there's a weak correlation or a weak association between how confident somebody is and how accurate they are. You can be very confident and be wrong. You could also be right but not be very confident.

Q. Are there any factors that can affect the relationship between confidence and accuracy?

A. There are.

Q. Okay. What are those?

A. Simply being asked questions about your memory can influence your confidence. You can become more confident the more times you say something. That's part of why we rehearse speeches before we have to give them. You can also become more confident by receiving conformation. By realizing that somebody else thinks you're right you can become more confident in your decision.

Q. Can you tell the jury about any real life cases

you've studied in which confirmation played a role?

A. Sure. There is the well known case of Jennifer Thompson and Ronald Cotton. Jennifer Thompson --

MR. RUTLEDGE DURANT: Objection. May we approach?

THE COURT: You may.

(WHEREUPON, the following bench conference was reported.)

THE COURT: What's your objection?

MR. RUTLEDGE DURANT: Is this a criminal case? I think the case law is pretty clear we don't get into specific cases or wrongful convictions.

MR. GROEBER: There's what?

MR. RUTLEDGE DURANT: The case law is pretty specific we don't get into wrongful convictions on a specific case. Is that where this is going?

MR. GROEBER: Yeah. So what's the case law?

MR. RUTLEDGE DURANT: I'll go get it so we're all on the same page.

MR. GROEBER: And just for scheduling, I'm about halfway through if you want to take a break now.

THE COURT: I'm sorry? What did you say?

MR. GROEBER: I said I don't know if you wanted to see if the jury wanted to take a break now or --

THE COURT: Okay. Do you have the case?

MR. RUTLEDGE DURANT: I don't have it right now

but, I mean, maybe that shuts me down because I really thought we were all on the same page with that.

THE COURT: It's going to take Mr. Durant a minute to look for that then.

(WHEREUPON, the bench conference was concluded.)

THE COURT: Do you all need a break?

THE FOREMAN: Yes, ma'am.

THE COURT: I could see that note. Please remember all of my admonitions. We are going to take about 15 minutes. My chambers is on the fourth floor so it takes me a long time to get up and down, up and down. So we're going to take 15 minutes this time. Please remember all my admonitions.

Please rise for the jury. Thank you.

(WHEREUPON, the jury leaves the courtroom at approximately 3:25 p.m.)

THE COURT: Thank you. Be seated.

You may not discuss your testimony with anyone. That includes anyone on defense or with the State; you understand?

THE WITNESS: I do.

THE COURT: All right. Thank you. You may step down.

Fifteen minutes.

MR. RUTLEDGE DURANT: Thank you, Your Honor.

(WHEREUPON, a brief recess was taken.)

THE COURT: Mr. Durant, do you have case law for me?

MR. RUTLEDGE DURANT: Your Honor, I do not. I went back over to the office. I don't have the law in front of me. We would simply contend that real life examples, unless the doctor would be able to link it up to some type of empirical research that would be used by not only herself but others like her in that profession, as she indicates, I believe that she could.

If she could lay that foundation I think it might be proper at that point, but simply just to let die in the courtroom that people are wrongfully convicted based on eyewitness identifications and give examples of people and how long they've been in prison because of it, it really goes to sentencing, which is not a proper consideration for the jury.

And we do have a case that's similar in vein, it's State V. Myers, 359 S.C. 40, which essentially discusses limiting the expert in the realm of false confession expert testimony, which the Court viewed there and limited specifics about specific cases because there was no need, it wasn't relevant, didn't talk about sentencing and the repercussions of a conviction, or a false conviction, wrongful conviction, if you will; simply the

expert, I believe, is called upon to educate the Court, felt what is reliable, what seems to be more accurate and what is not in the realm of eyewitness identifications and not give any anecdotal accounts unless they are factually similar to our case.

THE COURT: All right. Anything? I don't need anything because there's not an objection before me but I think I just needed to know. My actual question to Mr. Durant was do you have any case law. So there is no case law so --

MR. BRUCE DURANT: Your Honor, we would ask you to read the Myers case dealing with that issue.

THE COURT: We're pulling it up. Thank you.

Please feel free to object at the appropriate time that she has testified to that you feel is inappropriate.

All right. Let's bring in the jury.

(WHEREUPON, the jury enters the courtroom at approximately 3:45 p.m.)

THE COURT: Thank you. Be seated.

Yes. You may continue.

MR. GROEBER: Thank you, Your Honor.

BY MR. GROEBER:

Q. All right, Dr. Beaudry. We were talking about the factors that affect the relationship between confidence and accuracy, right?

A. We were.
Q. Part of your study includes studying real life cases, right?
A. It does.
Q. And a lot of the articles and studies take real life cases and draw conclusions from studying them; is that correct?
A. They do. They take real life cases and then often try to study those in the lab so that we can take from one example and see if this pattern holds.
Q. Are there any examples that you studied and other people have studied about the effect of the relationship between confidence and accuracy?
A. Yeah. Basically every study done with eyewitness identification takes a measure of confidence. So that relationship is studied in every study.
Q. Is there a specific case example that you could discuss that would help the jury understand that better?
A. I could.
Q. Okay. What would that be?
A. That would be the case of Jennifer Thompson and Ronald Cotton. So Jennifer Thompson was a college student in North Carolina, and in 1984 she was raped. Somebody had broken into her apartment and raped her, and while she was being raped she studied his face. She

wanted to study his face in case she had the chance to later identify him she wanted to be able to do it.

So at a certain point, after about an hour and a half, she convinced him to let her go and get him a glass of water or something to drink, and then she ran out of the house, and that's how she got away from him.

They created a composite so -- like a sketch of the perpetrator's face, and they put that out. And based on that composite somebody said, Oh, Ronald, Ronald Cotton, that looks like you. You should go clear your name. You should go see the police and let them know that wasn't you.

And the investigation continued. Jennifer Thompson was shown a lineup, a six-person lineup, simultaneous, like you saw in this case, and from that lineup she identified Ronald Cotton. And then the police brought her to do a live lineup where everybody was in person, and when she picked Ronald Cotton from that photo the police said, You got him. That's the same guy that you picked out of the photo lineup.

And based on that she said, I knew it. That's when I knew I got the guy.

So Ronald Cotton immediately went to jail and at a certain point another person was convicted of rapes. His name was Bobby Pool, and he was brought into the same

prison as Ronald Cotton. People were confusing them. People would call Ronald Cotton Pool or Bobby and based on that --

MR. RUTLEDGE DURANT: Objection, Your Honor.

THE COURT: Sustained. Let's move on.

BY MR. GROEBER:

Q. All right. Let's talk about expectancy. Can you tell the jury what that means.

A. Sure. Perceptual expectancy just has to do with the fact that if you expect something to happen you actually believe that it is happening. So if you expect your phone to be ringing, sometimes you might be in the other room and you hear the phone ring. Then you rush to the phone and it's not ringing at all. So that's expectancy or expectation.

Q. And how does that affect accuracy for identifications?

A. Well, that can affect identifications in that if you are looking at something and you expect to see something there it can actually change your perception of it.

Q. Okay. How about have you ever heard the term unconscious transference?

A. I have.

Q. All right. What does that mean?

A. Unconscious transference is just a fancy term to say you that you can transfer somebody's face from one event to another event. So you could have encountered somebody in one situation and then later you believe that you had actually seen them at some other point.

Q. And so we can transfer familiar faces from one memory to the next?

A. That's right.

Q. Can we do that without knowing it?

A. We can. That's why it's called unconscious transference. So we're not actually conscious of it or aware that this is happening.

Q. All right. You've talked to us about different factors that can affect the accuracy of eyewitness identifications and our memory. Are there certain guidelines that you are aware of for law enforcement as to how to get eyewitness identification info and how to avoid some of these problems?

A. There are. There's that National Institute of Justice Eyewitness Evidence Guide for Law Enforcement that we talked about.

Q. And when was that published?

A. That was published in 1999.

Q. And how did they disseminate that study. Did they just put it online or...

A. It's online but they also mailed a hardcopy to every police agency in the United States.

Q. Let's talk about some of those best practices for lineups specifically.

A. Okay.

Q. What's the whole point of doing a lineup?

A. The whole point of doing a lineup is to gather evidence. It's basically a test of the witness's memory to see if the person that they saw, all right, the person that they have a memory of, to see if whether that is the actual suspect that the police have in mind. All right. So the police have a suspect and it's a test of whether or not that person is actually the perpetrator that the witness viewed originally.

Q. Are there any studies about photo lineups?

A. There are.

Q. Are you familiar with those?

A. I am.

Q. What do the studies suggest about how photo lineups relate to the accuracy of eyewitness identification?

A. Basically the way the lineup was presented, the instructions that are given with that lineup and who is in that lineup can affect your accuracy.

Q. What is the difference between a simultaneous lineup and sequential lineup?

A. Okay. So a simultaneous lineup is the lineup that you traditionally see. So if you picture a lineup you might picture six people presented on one sheet of paper presented to the witness all at once.

A sequential lineup is a different technique completely. In a sequential lineup each lineup photo is presented to the witness one at a time. The witness doesn't know how many lineup photos they are going to see and that way they don't feel any pressure to choose, they don't know that they are coming to the end and have to make a choice.

So for each photo that's presented the witness has to make a yes or no decision. Yes, that is the guy I saw, or no, it's not. And they can't see the photos again, and the sequential lineup is presented by an independent investigator, somebody separate from the case who has no idea who the suspect is.

Q. Which one is better?

A. The sequential lineup has been found to be better.

Q. Why?

A. Because it reduces false identifications. In a simultaneous lineup basically what the witness tends to do is they tend to compare all of the lineup members to each other and see who best matches their memory, and then if that person is a good enough match, if they

closely resemble them enough then think they'll choose that person.

In a sequential lineup rather than comparing the lineup members to each other people compare each face that's being presented to their memory of the perpetrator. And so it's a better test of their -- or it's a better indicator of reliability.

Q. Are you familiar with the Steblay, Dysart and Wells Study?

A. I am.

Q. Did I pronounce those right?

A. Steblay, Dysart and Wells.

Q. Who were they?

A. So Nancy Steblay is an eyewitness researcher in Minnesota. She is an eyewitness expert but also an expert in meta-analysis, that statistical technique that I told you about.

Jennifer Dysart went to graduate school with me, and she is now at the John Jay College of Criminal Justice in New York and she is also an eyewitness identification researcher.

And Gary Wells is perhaps the best known eyewitness researcher, and he is at Iowa State.

Q. All right. And what is their study?

A. In 2011, they published meta-analysis. So again,

it's that statistical summary that's showing us the general pattern of the results. And in that meta-analysis they compared 72 different tests of the difference between simultaneous lineups and sequential lineups.

Q. And where are those tests from?

A. From any journal article that examined simultaneous and sequential lineups.

Q. In the U. S., Canada?

A. Around the world.

Q. What did they find in their meta-analysis of simultaneous versus sequential lineups.

A. In their meta-analysis they found that the sequential lineup is superior, that there are similar correct identification rates for the simultaneous and sequential lineup; meaning, if that perpetrator is in the lineup then people are going to generally pick him out at the same rate. But if that perpetrator is not in the lineup, if the lineup is made up of completely innocent people who were not in that crime video then the simultaneous lineup produces a higher false identification rate than the sequential lineup.

Q. Okay. I'm going to try to slow it down a little. What do you mean when you say that the perpetrator is not in the lineup?

A. Okay. So one of the benefits of doing these laboratory studies is that we can control who's in that lineup. We can control if the perpetrator is in that lineup or if the perpetrator is replaced with an innocent person, somebody that looks like him but isn't actually him. And that way we can look at accurate decisions, correct identifications. All right. So you saw the guy in the video and he's in the lineup and you picked him out. That's a correct identification.

But we can also look at false identifications. You saw this guy in the lineup, we put this other guy -- or sorry. You saw this guy in the video and we put this other guy in the lineup. Are you still going to pick somebody from that lineup even though the perpetrator isn't there? If you do that's a false positive or a false identification.

Q. So when the perpetrator is not in the lineup --

A. Right.

Q. -- what's an accurate answer?

A. To say that he's not there, to reject that lineup.

Q. And when the perpetrator is not there people got it correct how much of the time?

A. So in a sequential procedure people rejected that lineup 68 percent of the time.

Q. Okay. So in a sequential lineup with the best

practice when only innocent people were in the lineup people still got it wrong three out of ten times?

A. That is right. So three out of ten people still chose an innocent person even when it was presented sequentially.

Q. And when it was a simultaneous lineup five out of those times they picked out a totally innocent person?

A. That's right. They did. So the false identification rates were higher with the simultaneous lineup.

Q. Okay. Let's move on to the instructions in the lineups. We've discussed the factors that affect accuracy and retrieval. Let's talk about those and how they affect the instructions of an identification. Okay?

A. Okay.

Q. How important are the instructions that are given to the witness before they look at the lineup?

A. Those instructions are extremely important.

Q. Okay. How can they affect accuracy?

A. They can affect accuracy because they can affect whether or not you're going to choose from that lineup. If you feel pressured in some way to choose from that lineup and the perpetrator isn't there then you are going to be more likely to make a false identification.

Q. Okay. How about whether or not there's an

independent administrator?

A. That can also have an effect.

Q. Tell the jury what an independent person or administrator is?

A. So an independent administrator would be somebody who is uninvolved in the case in that they have no idea who that police suspect is, and that's important because you don't want people to have intentional or unintentional influence on that witness. You want that witness to make that decision based on only their memory, not based on any outside factors.

Q. Okay. Let's talk a little bit about documenting the procedure itself, the lineup procedure itself. Are there any recommendations from the publications that we discussed before or from the studies about how police should document the lineup?

A. There are. In those National Institute of Justice guidelines they recommend that at the very least that procedure be audio recorded but ideally that the procedure be video recorded.

Q. Why?

A. Basically we want a record of what happened during that event. We want to know who was there. We want to know not only what was said to the witness but also what the witness said, and we want to have an idea of how

quickly the witness made their decision and whether they received any feedback or any confirmation of their identification.

Q. Okay. What is the difference between an out-of-court identification and an in-court identification?

A. So an out-of-court identification would be these lineup procedures that we are talking about, when police have a suspect and they bring the witness a lineup and ask them if they can recognize anybody in that lineup. That would be an out-of-court identification.

An in-court identification would be when a witness sits here in court and makes an identification, makes a determination that they recognize somebody.

Q. Which of the two is preferred?

A. The out-of-court identification is preferred.

Q. Why?

A. Because that out-of-court identification if done properly is actually a test investigating the witness's memory, all right, whether or not that police suspect matches the witness's memory. And so that's preferred because that's less suggestive. It's going to be more reliable than an in-court identification in which the suspect is obvious.

Q. When you say suggestive what do you mean by that?

A. Suggestive refers to the fact that it's obvious to the witness who the police the suspect is -- who the police believe committed that crime.

Q. Are you aware of any studies about our ability to recognize people from pictures or videos?

A. I am.

Q. What do those studies suggest about our ability to do that?

A. The studies generally suggest that we are not very good at picking out people who are unfamiliar to us.

Q. Okay. And what about studies with people that are familiar to us?

A. When we are familiar with somebody we are pretty good at recognizing them.

Q. Okay. When you say familiar, how do they define familiar in those studies?

A. Generally what they do is they would show people that the witnesses really know or the participants really know. So in one study I'm thinking of they used their professors. So these were college students and they showed them videos of their professors walking into the building and the video was, like, the security footage of them walking through the building.

Q. Okay. Are there any studies about -- are there any studies that would -- about the effect of a disguise on

our ability to recognize someone familiar with us?

A. There are no studies looking at our ability to recognize somebody that we know but is wearing a disguise.

Q. Okay. What about any studies where a face would be hidden?

A. There are.

Q. Okay.

A. So in one study the researchers used familiar people and they showed them under a variety of conditions. So they either showed them with nothing affected whatsoever, it was just that video of them walking through, or they disguised their body and showed just their face. All right.

So they put this big black box around their body and showed just their face walking through or they covered their face and showed just their body walking through. And they found that accuracy was very good when you could see the entire person, when nothing was blocked whatsoever. People were performing about the 80 or 90 percent when their body was covered but they could still see their face, they were again about 80 or 90 percent.

But when their face was covered and they could only see their body and they could only see them walking through this hallway accuracy dropped to 30 percent. So

they were much less accurate when they could not view a person's face.

Q. Has there been any research done that looks at people's ability to recognize voices?

A. There has been.

Q. And has the research studied people's ability to recognize voices of people that they are familiar with?

A. There has been.

Q. Please tell the jury about that research.

A. Okay. So a study was done with four different levels of familiarity. So people that you were completely unfamiliar with, a strangers voice talking and there's low familiarity. Moderate and high familiarity they defined as either your neighbor or an associate of yours. Moderate familiarity was a friend of the participant or a teammate of the participant, and then high familiarity was a family member.

And so they played varying clips, various clips of these people talking and asked people to identify who they were. And they found that with the moderate familiarity, so a friend, and also the high familiarity with a family member people were pretty good at this. About eight out of ten of the participants could identify who that was that the speaking to them.

But with the low familiarity, a neighbor or an

associate, people were performing at the same level as a total stranger. So they were about five out of ten people who got their choices right.

And then even more concerning was what they did when they were wrong. All right. So they could say, I have no idea who this person is, or they could say, Yeah, I know that voice. It's John. But, in fact, it was Joe. All right. So they said that they recognized them but they got the source wrong, and they did that -- I believe with the low familiarity condition they did that about four out of ten times.

Q. Okay. I'm going try break that up a little bit.

A. Okay.

Q. People who could recognize the voice of people that they were very familiar with, and what is very familiar defined as in the study?

A. The high familiarity was a family member.

Q. Okay. And eight of ten people could identify the voice?

A. That's right.

Q. But two times they got it wrong?

A. Two times got it wrong. Twenty percent of the time they got it wrong.

Q. And then some people with some familiarity, what was the number on that?

A. So people that they knew, the low familiarity, they knew them but they hadn't had a lot of experience with them, they were able to correctly identify their voice five times out of ten.

Q. And so five times they got it wrong?

A. So five times they got it wrong.

Q. Did this study examine the confidence and accuracy relationship that we talked about when we were talking about eyewitness identification?

A. They did, and they found the same weak correlation, that you could be very confident but still be wrong.

Q. And this study was published in the applied cognitive -- I'm sorry. Did they study whispering voices?

A. Oh, they did study whispering voices. So that was another study that they did and they manipulated now whether people were talking normally or whether they were whispering, and people performed generally worse when they were whispering. But the figures that I reported have to do with the normal tone voices.

Q. Where was this study published?

A. It was published in Applied Cognitive Technology, I believe, or Applied Cognitive Psychology.

Q. Okay. And is that a peer review journal?

A. That is.

Q. And you relied on it in your testimony?
A. I have.
Q. Would you say that it's reliable authority in your field?
A. I would.
MR. GROEBER: Okay. May I have a moment, Your Honor?
THE COURT: You may.
BY MR. GROEBER:
Q. Who wrote that study? Yarmey, Yarmey and Yarmey?
A. Oh, yeah. Daniel Yarmey and his two daughters, and then a coauthor or parliament.
(WHEREUPON, Defendant's Exhibit Number 12, a Document, was marked for identification only.)
Q. I'm going to hand you what's been marked --
MR. RUTLEDGE DURANT: Your Honor, may we approach?
THE COURT: You may.
(WHEREUPON, the following bench conference was reported.)
MR. GROEBER: I intend to ask her to read one paragraph from this.
THE COURT: State your objections.
MR. RUTLEDGE DURANT: This is irrelevant and has nothing to do with this case. It's on a whisper and it's merely one person on what they did on a specific incident

in time. It's not --

MR. BRUCE DURANT: Actually, it's not --

THE COURT: One at a time. One at a time.

MR. GROEBER: It comes in under rule --

THE COURT: That's not my issue, whether it comes in or not --

MR. GROEBER: Sure.

THE COURT: -- because I'm sure she's going to say her view on this as an expert. I got that. It's the testimony about whispering, whispering and --

MR. GROEBER: Well, I'm fine -- okay. I'm fine taking out the sentence on whispering. I understand that objection. I would ask that she read, Another participant listening to an identical twin normal --

THE COURT: This is talking about whispering.

MR. GROEBER: Not in that sentence.

THE COURT: Okay.

MR. RUTLEDGE DURANT: So you're talking about something different now than you have highlighted.

MR. GROEBER: I'll redact the part about whispering.

THE COURT: What is whispering in relation to?

MR. GROEBER: They've presented evidence that he recognized voices, and I presented expert testimony through her about voice identification. This is a study

specifically on that and people's ability to do so and I believe I'm entitled to have her read from this, and it's Rule 803-18.

MR. RUTLEDGE DURANT: I mean it's laughable, actually. Actually it's hearsay --

THE COURT: Well, that's not the -- she's been qualified as an expert so she says relying on everything. This is a study and I haven't read it but it's a study that is about -- during whispering.

MR. GROEBER: Yeah, it's a study and it has two separate witnesses. One it's about whispering. It's about voice recognition. One of the studies focused on whispering and one focused on normal tones.

THE COURT: All right. But it's about a high familiarity and a known familiarity, right?

MR. GROEBER: Yes.

THE COURT: And what you want to say is -- you want to say -- we don't have a high familiar here, right? So why are you getting into high familiar?

MR. GROEBER: Well, I think it shows that even high familiar people make mistakes.

THE COURT: I understand that but has she described for me the difference here, and I've given you extreme latitude.

MR. GROEBER: Even people that were highly familiar

make mistakes and that is what this --

THE COURT: I don't care about high familiar people because we don't have high familiar people here. All right. I haven't heard her tell me that high familiar people make the same amount of mistakes as non familiar people.

MR. GROEBER: No. She testified that higher familiar people make mistakes 20 percent of the time, two out of 10 times.

THE COURT: All right. Well, what's -- I'm sorry?

MR. RUTLEDGE DURANT: And that's the basis of what she's allowed to get into. She's testified to that. Now it's basically getting into what this doctor, what this research said happened. One time here on earth has nothing to do with anything and it is hearsay.

THE COURT: It may be hearsay but it's in this courtroom because she's going to rely on it as an expert, over that hump. My hump is further than that because now we are beyond -- we are comparing things that are not in this case.

MR. GROEBER: And that would be great for them to argue in closing.

THE COURT: I'm sorry?

MR. GROEBER: And that's great for them to argue in closing. I think that would be a perfect time for them

to do that.

THE COURT: No. I'm the gatekeeper.

MR. GROEBER: I understand that, Your Honor.

THE COURT: And so we can sit here for the next 20 weeks and have her come up with hypotheticals, but if they are not pertinent to this case I'm not letting them in. I've given you extreme latitude to lay it out. I haven't heard, and maybe I missed it because my retention isn't so good right now, but let me just tell you, I haven't heard it.

If you want to lay a foundation as to how low and high are similar, if you want to make a record for me that's fine, or if you want to tell me what we had here was a high frequency then that's fine. All right?

MR. GROEBER: Okay.

THE COURT: But I think you're trying to get in something, have her say something that is not in this case. All right. You cannot compare apples and oranges and try and convince the jury that you have an apple when it's truly an orange.

MR. GROEBER: I understand your ruling.

(WHEREUPON, the bench conference was concluded.)

THE COURT: Thank you.

BY MR. GROEBER:

Q. Okay. Just a few more questions, Dr. Beaudry.

A. Okay.
Q. Are you against the use of photo lineups in police procedures?
A. No. I'm not against the use of properly conducted photo lineups.
Q. Why not?
A. Because they can offer us some evidence.
Q. Okay. Are you against eyewitness identifications being allowed in the justice system?
A. No, I'm not.
Q. Why not?
A. We have to rely on eyewitnesses. It's a major piece of evidence. The issue is whether that's the only piece of evidence, and so we would argue that that evidence needs some corroboration.
Q. Why have you sought out to study and testify in this area?
A. I think this is a fascinating area. Any dad is a police officer so I've been brought up in the law enforcement tradition all my life, and also because many of these findings are so counter intuitive I think that --
MR. RUTLEDGE DURANT: Objection. This is not relevant.
THE COURT: Overruled. I'll give her a little

leeway. Thank you.

A. I think that it's important to educate people on these issues.

MR. GROEBER: No further questions.

Q. Thank you, Dr. Beaudry.

A. Thank you.

Q. Please answer any questions that the State may have.

THE COURT: Mr. Durant?

MR. RUTLEDGE DURANT: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. RUTLEDGE DURANT:

Q. Good evening, Doctor.

A. Good evening.

Q. All right. I want to start with -- well, I guess start with the premise for you being here.

A. Okay.

Q. And that is not to tell the Court whether any of the witnesses who testified in this trial knew this man before the crime that we are here to talk about on December 24th, right?

A. Right.

Q. Because you can't say anything about that?

A. No, I can't.

Q. And you don't know.

A. No, I don't.
Q. And I think it's been well gone over but you were contacted by the defense and you've been assisting them in this trial, right?
A. I was contacted by the defense, yes.
Q. And you've been here all week?
A. I have.
Q. And, of course, you're being paid. You're a professional, right?
A. Right.
Q. And this is your first time as an expert witness?
A. This is my first time.
Q. On the stand?
A. That's right.
Q. Congratulations.
A. Thank you.
Q. And you've never met the victim in this case?
A. No, I haven't.
Q. Or had a conversation with him?
A. No, I haven't.
Q. And you've never met the witnesses in this case or had conversations with them?
A. No.
Q. And I think you would agree with me that despite all the research in this area for just eyewitness

identification that there is no way you can predict how accurate any specific eyewitness is?

A. I would agree with that.

Q. And I want to talk about ecological validity.

A. Okay.

Q. I don't think that's a term you've addressed yet, is it?

A. No, it's not.

Q. But that is a term that is relevant in your field?

A. It is.

Q. And if you would, could you tell the jury what ecological validity means.

A. I can. So ecological validity basically refers to whether or not those studies in the laboratory actually generalize or apply to the real world settings.

Q. And it's that degree of studying this research in, like a lab, and how that situation is accurately --

A. Yes.

Q. -- in the real world?

A. Right. So, like I mentioned, we couldn't recreate these really stressful experiences for our participants. That is an issue for ecological validity.

Q. And so obviously to you and your colleagues in this area it's important to really avoid big sweeping generalities. Would you say that's correct?

A. To a certain extent I would.
Q. And most of the studies in this area are conducted or they involve simulation research?
A. Most of those studies do involve simulation research which is why we also rely on archival studies to demonstrate that the same patterns hold.
Q. And you've said this but, of course, you aren't actually able to create an event where you can determine the accuracy of someone who has had a gun in their face?
A. Right.
Q. And made to feel like they could die?
A. That's true.
Q. And then able to determine whether the person who was two and a half feet away from them was a person that they saw in a lineup?
A. That's right.
Q. That cannot be done?
A. Ethically it cannot be done.
Q. And so your studies often times are with college students, right?
A. That's right.
Q. And they occur in a classroom, usually?
A. Or a lab, yep.
Q. Or a lab. And it would be common in some of these studies that say somebody runs into a room of psychology

students and takes the teacher's purse and runs out?

A. Right.

Q. And so the classroom is unsuspected of when this event is going to happen, right?

A. That's right.

Q. And then they are asked later, at a later time, either immediately after or another day, if they could identify that person?

A. That's one of the ways that we do those studies. That's right.

Q. And that's one of the ways it's relied upon for this type of research?

A. Uh-huh.

Q. And, I mean, usually in that situation the teacher is not in on it; is that correct?

A. No. Often the teacher is in on it.

Q. The teacher is in on it. So the teacher know's what's going to happen?

A. Right.

Q. So you are measuring the witness's ability to be accurate?

A. You are measuring the witnesses, not the teacher's ability but the witness's.

Q. The witnesses. And these are witnesses who are not victims?

A. That's right.
Q. That the event didn't happen to them?
A. That's right.
Q. That they had no stress of actually thinking their life could end?
A. In some of the cases that's right.
Q. In some of the cases?
A. Well, I would say that in that Morgan study I described.
Q. The Morgan study?
A. With the prisoner of war simulation.
Q. Yeah, what was going on with that? Let's talk about that.
A. Okay.
Q. What did that involve again?
A. It's military personnel, and those were the participants. All right. So they are going through training and they underwent a prisoner of war simulation where they were being interrogated for 40 minutes to see if they would crack under that pressure.
Q. And so those participants knew that this was part of their training?
A. They knew it was part of their training but it still is a stressful interrogation with physical confrontation between the interrogator and the prisoners.

Q. Sure. But they didn't think that they were undergoing a crime, did they?

A. They didn't.

Q. And a person, you would agree with me, I believe, who is actually being robbed at gunpoint at a convenience store, let's say, they might actually be under the impression that they are living through a crime?

A. Definitely.

Q. And so that is a different situation than a prisoner of war and the stress at the prisoner of war training -- prison; is that correct?

A. Yes. It would be a different situation.

Q. So these are different factors, right?

A. Uh-huh.

Q. And you do your best to control your factors when you study this type of ability to identify someone, right?

A. Right.

Q. But you just can't -- I think we keep coming back to just can't recreate what it is actually like to be looking down the other end of a gun and being robbed.

A. That's right. So probably our studies underestimate the impact that the presence of that gun has on the witness's ability to remember.

Q. That they may underestimate it?

A. Underestimate the impact. That's right.
Q. That's possible?
A. Uh-huh.
Q. And so it's possible that a real life event might actually cause someone to be more accurate in their identification?
A. I guess it's possible.
Q. It's possible because you aren't able to study that, are you?
A. That's right. We're not.
Q. Are there any studies that take into account individual characteristics of the witness, and specifically look into that, like level of education?
A. Not that I'm aware of, no.
Q. There's no research that indicates that somebody who's got more of an education would be more accurate or less accurate?
A. Not that I'm aware of, no study that's specifically designed to test how a level of education affects eyewitness accuracy.
Q. What about race?
A. The cross-race situation that we talked about.
Q. Well, are there any racial groups of people that are better than others at picking people out?
A. No.

Q. No. Has that ever been studied?
A. It's compared. So what matters is the race of the witness and the race of perpetrator in that interaction.
Q. And you're talking about cross-racial identification?
A. I am.
Q. And isn't it true that the less often someone has to interact with a member of another race lowered their accuracy, maybe, on identifying someone?
A. With relation to the cross-race scenario specifically?
Q. Right. Right.
A. That has been put forth. It's called the contact hypothesis, that basically the more contact you have with somebody of another race the more accurate you should be, but that hasn't actually held up.
Q. Have there been professionals in your field who have written about that?
A. Yeah. That was one explanation for why the cross-race effect occurs.
Q. And so I believe that there is literature by professionals in your field also that indicates that the more contact a particular person from a particular racial group has with an individual from a different racial group or people from the other racial group the higher

their ability to be accurate becomes?

A. There have been, I think, one of two studies that I have found that, but in the general meta-analysis that was done, again, analyzing all of the studies in the area the contact hypothesis could not explain the data. So familiarity with another race didn't remove the cross-race effect from occurring.

Q. So you are just saying that members of different races are not good at picking out members of another race?

A. That's right.

Q. Can't be done?

A. No. Not that it can't be done. That we're worse at it than picking out somebody of our own race.

Q. But very well can be done, right?

A. Yeah. Some people can do it.

Q. And, in fact, I think research has shown that some people are actually very good at picking out members of a different racial group?

A. Compared to picking out people of their own racial group?

Q. No, just in general, just picking out somebody of a different racial group. Some people are really pretty good at that?

A. Yeah, it can be done.

Q. It can be done. And some people are not so good?
A. And some people are not so good. On average we're worse if somebody is of a different race than us.
Q. Because I think the fact of the matter is some people do quite well in making identifications; is that right?
A. Nobody has been found to be a super identifier but we can be -- we can be out there.
Q. So are you saying that there are not studies that show and people involved in these studies who weren't a lot better than other people involved in the studies at making identifications?
A. Generally in identification research people make one decision. So some people are accurate and some people are inaccurate. Do you know what I mean? It's not that one person who is consistently accurate and really good at doing this.
Q. But nevertheless, some people are very good at making identification, right?
A. Some people can make an accurate identification.
Q. In the experiments or studies conducted by you or others would you agree that accuracy rates depend heavily on the conditions of the experiment?
A. They depend on things like exposure, duration, retention interval, yep.

Q. Lighting conditions?
A. Lighting conditions, certainly.
Q. And exposure to the person they are trying to identify?
A. That's right.
Q. The length of viewing?
A. That's right.
Q. A lot of different factors go into --
A. That's right.
Q. -- these conditions, right, the conditions of the experiment?
A. Uh-huh.
Q. And these experiments are all different?
A. Right.
Q. And isn't it also true that these conditions are generally deliberately arranged so that accuracy is low?
A. No, that's not true.
Q. No?
A. No.
Q. And there are conditions when people are given the opportunity to see people for a good length of time, say a minute and half, see their total face and then asked to see if they can identify them later --
A. Sure.
Q. -- in good lighting conditions? And those people

do generally pretty well?

A. Pretty well.

Q. And isn't it true that many subjects make accurate identifications even under difficult situations such as --

A. Can you define difficult situations?

Q. Well, such as poor lighting conditions or a low exposure rate, like maybe just a split second?

A. The worse the exposure the worse your identification accuracy in general.

Q. And nevertheless, in some of those what we would call difficult situations where the lighting is low and the exposure is low some people are able to make accurate identifications?

A. That's right.

Q. Can be done?

A. Can be done.

Q. You talked about weapon focus, and that's an area of study by you and others?

A. That's right.

Q. But you are not telling the jury that a person who has a gun pointed at them would not be able to identify the person who pointed it at them, are you?

A. No. What I'm telling you is are less accurate than if there was no gun there.

Q. But I thought that you said that you couldn't actually recreate the actual event of a victim being under that kind of situation when they thought they were going to die?

A. The gun is present, is what -- I'm sorry. I misspoke. You're right because I don't know. That study has not been done if a gun is pointed directly at you and your life is being threatened.

Q. So it's possible, and I think you testified earlier, that because that study hadn't been done it's entirely possible that accuracy could be even better in that situation?

A. We don't know.

Q. So it's possible?

A. It's possible.

Q. Because I believe you testified that the situations that you are describing of gun presence, and correct me if I'm wrong, but I thought you said that there was a classroom where half were able to watch a video where there was a gun present and the other half were able to watch a video where there was no gun present?

A. That's right.

Q. And that was the example that you gave to this jury?

A. That's right.

Q. And from that you said that accuracy got lower in that situation of people just watching a video with gun presence?

A. That's right.

Q. And that is an entirely different situation than actual real life crime, right?

A. Yes.

Q. And you would agree that a person who knows somebody would be more likely to make an accurate identification of that person than someone who does not know the person who is pointing a gun at them?

A. I would.

Q. That's something we can agree to?

A. It is.

Q. And you would agree that the more opportunities someone has to interact with someone the more likely they would be to make an accurate identification?

A. I would.

Q. So there is a correlation between the amount of time someone has to interact with someone and the accuracy of their ability to identify that person?

A. Yes.

Q. So it is entirely possible that a victim who is robbed at gunpoint would be able to identify the person who robbed him?

A. It is possible.
Q. And that's possible even if that person had never seen the robber previous to the robbery?
A. That's right.
Q. But if the victim had known the gunman previously the reliability of that identification would go up accordingly?
A. Yes. We would imagine. The study hasn't been done.
Q. And identifications made by people who know people, there has been some research in this area. But I think you did say there have been no studies on the ability to recognize someone we know wearing a disguise?
A. That's right. I haven't read anything. I haven't been able to find anything.
Q. You're married, right?
A. I'm sorry?
Q. You're married, right?
A. I was married.
Q. And not to put you in a different position, I'm married, too. If I guess the person you had been married to was standing two and a half feet away from you with a hood up over their head and with sunglasses for a minute and a half --
MR. GROEBER: Objection, Your Honor.

THE COURT: Sustained.

BY MR. RUTLEDGE DURANT:

Q. Is it possible -- you're not telling this jury they wouldn't be able to recognize their child or their loved one or somebody if they are standing --

MR. GROEBER: Objection, Your Honor.

Q. -- two and a half feet in front of them wearing --

MR. GROEBER: Objection. Objection.

Q. -- a hood over their head and sunglasses over their head --

THE COURT: Counsel. Approach.

(WHEREUPON, the following bench conference was reported.)

THE COURT: Just like I had them wait until Mr. Grimes finished his I need him to finish it so I have a proper diagnosis of hearing it the first time. All right. Now, it's getting very late. I understand that, but I think we are all under the same spoon method. And so every time you objected and it wasn't exactly as to the occasion or the case you gave me I interjected. And it totally applies to why I did what I did, all right?

MR. GROEBER: Okay.

THE COURT: What are your objections to this? There was so much going on you're going to need to tell me again.

MR. GROEBER: I mean, she's not supposed to testify about particular facts of this case and that's exactly what he's trying to do, put her in the facts of this case.

MR. RUTLEDGE DURANT: Absolutely not. It is her opinion which is exactly why she's been called to testify. She's been more than qualified to say this.

MR. BRUCE DURANT: It's a hypothetical question, Judge. That's what you use with experts.

THE COURT: All right. I was very careful in my ruling when you objected as to outside and didn't give the specifics, okay? Then I sustained your objection and told him to move on. Okay. All right?

MR. RUTLEDGE DURANT: Right, but he covered this disguise stuff.

THE COURT: I haven't ruled on that one yet. Just making sure because it's not just as to hypothetical because if it's any hypothetical we need to let him go back and have another crack at it.

MR. BRUCE DURANT: Your Honor, he gets another crack anyway.

THE COURT: He gets another crack at redirect, which is different.

All right, Counsel. What was your question --

MR. RUTLEDGE DURANT: I was saying --

THE COURT: -- that he objected to three times.

MR. GROEBER: I'll try not to do that again.

MR. RUTLEDGE DURANT: Well, I was saying you're not telling this jury that they wouldn't be able to recognize someone that they know who are two and a half feet in front of them in light talking to them for a minute and a half with only sunglasses on and a hood over their head.

MR. GROEBER: That's asking her something personal as to her.

MR. RUTLEDGE: I'm asking a hypothetical question.

THE COURT: All right. I'm going to allow it because she said -- testified and that's what she said, in a nutshell. So you may object. I'm going to sustain your objection. Thank you.

(WHEREUPON, the bench conference was concluded.)

THE COURT: Mr. Groeber, I'm going to sustain -- overrule your objection one time. Thank you. You may -- you probably need to ask your question again.

MR. RUTLEDGE DURANT: Thank you, Your Honor.

THE COURT: Thank you.

BY MR. RUTLEDGE DURANT:

Q. I'm going to rephrase it slightly.

A. Okay.

Q. Would you expect someone who had been married 20 years with all their faculties that are registered

right -- I mean, there's nothing wrong with their hearing, there's nothing wrong with their sight, just a regular person, would you expect a person married 20 years to their spouse to be able to make an accurate identification regarding whether it was their spouse they were talking to for a minute and a half standing approximately two and a half feet from each other, looking at each other if the spouse was wearing a hoodie up over the top of their head, sunglasses over their eyes and you could see the bottom of their face from under their eyes, including their nose?

A. I would imagine that they could.

Q. You would expect that they could make that identification. I would, too.

The sequential -- I want to talk about the photo lineup procedures now.

A. Okay.

Q. There are a lot of different ones that have been studied by you and others in the field?

A. Yes.

Q. If terms of what's reliable and what seems to produce more accurate results?

A. Right.

Q. And again, I believe it's in the very end of your testimony on direct examination that I think you said --

I think you said exactly, Not against the use of photo identifications, not against the use of eyewitnesses?

A. Right.

Q. But you said that you would argue for corroboration?

A. Corroboration of that evidence, yeah.

Q. Corroboration of that eyewitness?

A. That's right.

Q. And corroboration of one eyewitness could be another eyewitness?

A. An independent eyewitness.

Q. An independent eyewitness. Certainly one eyewitness is corroborated by someone else who's an eyewitness, that's corroborative evidence; isn't that right?

A. If it's independent.

Q. If it's independent. And the more eyewitnesses you have the more corroboration you have of one eyewitness; isn't that right?

A. The more independent witnesses you have.

Q. The more independent witnesses.

A. As long as they haven't influenced one another, that's right.

Q. But nevertheless, the more eyewitnesses you have after one eyewitness independently --

A. Independently.
Q. -- that's corroboration, that's just the essence of corroboration, right?
A. Correct.
Q. And so in regard to the different ways that procedures can be given you say that accuracy goes up and it is desirable when the procedure is administered by somebody who knows nothing about the case?
A. Right.
Q. Who knows that the suspect -- who does not know the identity of the suspect?
A. Right.
Q. Which is the situation in this case with Mr. Patel. You've been in the courtroom this whole week, right?
A. I have.
Q. And you said that it's good, it's a better thing, it's more ideal in terms of the accuracy increasing when officers don't comment or make any comments after a witness has made or not made an identification?
A. It doesn't affect the accuracy because they've already made that decision. All right. They've already made the identification or not, but it can affect their confidence.
Q. And that's in terms of being able to come to court and make the in-court identification?

A. That's in terms of their testimony, certainly. Yes.

Q. And you argue that the sequential photo lineup, you say it's better?

A. Right.

Q. But really, that's an unsettled kind of opinion in the field; isn't that correct?

A. Some argue against it, that's right.

Q. I mean, equally educated experts in the field such as yourself have an opposite opinion about this; isn't that correct?

A. They have a slightly different opinion.

Q. Well, they argue, do they not, that sequential lineups are not just the best procedure available?

A. They argue that they want to know why. So I explained the sequential lineup and that there were multiple components to it, all right, not feeling that pressure to choose, having to make a decision for each picture. So there are several different factors that might affect identification accuracy different than the simultaneous lineup. And so Roy Malpass, if that's who you are referring to, I assume it is --

Q. That might be the guy.

A. -- he argues that we need to understand what it is that works before we recommend this as an ideal

procedure.

Q. Yes. Roy Malpass?

A. Yes. Okay.

Q. Does he critique your work?

A. Yes, he has.

Q. And actually wrote a response to your sequential lineup presentation fact and policy?

A. Yeah. We both wrote two articles against one another over it, discussing this issue.

Q. And so the opinion in the field is mixed?

A. It's mixed.

Q. And there are opinions in the field by experts such as yourself that a six-pack photo array is a legitimate means and procedure for determining whether a witness make be accurate?

A. There are some that believe that.

Q. And you don't argue that it's not accurate?

A. I don't argue that it's not accurate. I argue that the sequential lineup is more reliable.

Q. Just superior because we're working in a society where we're trying to do better and better?

A. That's right.

Q. Always. And so the work in this field is not going to stop after today?

A. No, it's not.

Q. Keep looking into it?
A. That's right.
Q. Because it's unsettled?
A. Because we want to get even better than the sequential.
Q. We want to get better.
A. So three out of ten is still three out of ten making a wrongful or a mistaken identification. So we're trying to get even better than that.
Q. I think I understood what you said.
A. The sequential lineup isn't the best that's out there. We need to design something that's even better than that, but the sequential lineup is the best we've got right now.
Q. Okay. And you've studied memory and you've testified about how memory works and the three phases; the acquisition phase, the retention phase, and the retrieval phase?
A. Yes.
Q. And certainly we've all experienced a situation where we've forgotten something?
A. Right.
Q. We wish we could remember?
A. Right.
Q. And certainly we've all experienced memories that

are actually very true and very real, and actually very well did happen --

A. Sure.

Q. -- and we remember them accurately?

A. Right.

Q. And it is entirely possible and indeed likely that we would remember an event that for whatever reason is more memorable, such as a wedding day; you would agree?

A. Sure. Compared to an everyday event?

Q. Compared to walking in the hall at 2:30 yesterday?

A. Yes. Yes.

Q. And because we are stimulated by certain events as humans?

A. Yes.

Q. And certainly a stimulating event would be being robbed by a man who's pointing a gun at your face two and a half feet away?

A. It would be.

Q. And with regard to memory, and regarding specific events, sometimes you may remember one thing about a specific event much more than something different from that event. An example -- I guess you need an example?

A. I do need an example.

Q. Like we've agreed that a wedding day would be a memorable event.

A. Sure.
Q. You might remember getting married but you might not necessarily remember who made the shoes you wore?
A. Sure.
Q. Or you know different smaller things like that; is that right?
A. That's right.
Q. Or what kind of belt you wore?
A. Right.
Q. Or exactly who made the jewelry -- I don't know, maybe a woman would remember that.
A. They probably would.
Q. I mean no offense by that. But there are things about memorable events that are more memorable than others?
A. Yes.
Q. Such as it's entirely possible for somebody who's a victim of an armed robbery, entirely possible to remember a face rather than to remember if a hood was up over their head or not; possible?
A. Possible.
Q. All right. Doctor, I'm about done.
A. Okay.
Q. Just a few more. Would the fact that the victim in this case knew or said he knew the person who robbed them

for approximately a year increase his ability to accurately identify the man?

A. I would expect that it would.

Q. And would the fact that he not only knew him for a year but possibly for two to three times per week he came to his store and had face-to-face conversations with him each and every week increase the ability of him to accurately identify him?

A. I would expect that it would.

Q. Would the fact that for over a year and two to three times a week that all of these conversations that the victim said he had with the defendant occurred in a well lit environment increase his ability to accurately identify the man who robbed him?

A. I would agree.

Q. And that all of that occurred at close range?

A. Yes.

Q. And the fact if he could identify his voice, would that increase, under all those other circumstances, his ability to accurately identify him?

A. Well, according to that study I would think that he would still fall under that low familiarity, and so we performed -- participants in that study performed at the same level as somebody who they were unfamiliar with.

Q. And the fact of the matter is, like we said in the

beginning, you can't say whether or not the identifications in this case were accurate or not?

A. No, I can't. That's not my role.

MR. RUTLEDGE DURANT: Thank you.

THE COURT: Mr. Groeber, Redirect?

MR. GROEBER: Thank you.

REDIRECT EXAMINATION

BY MR. GROEBER:

Q. Just a few short questions. I know you're tired. I know the jury is tired. When is it important to document the confidence of the witness?

A. It's important to document the confidence of the witness right after that identification decision.

Q. Okay.

A. So they make an identification and then you are supposed to ask them how confident they are in that identification.

Q. And how important is it to show someone a photo lineup quickly after the event?

A. Yep. As soon as you can show that photo lineup you should show that photo lineup. All right. So we had our forgetting curve, so you want to stop that forgetting curve as soon as possible.

Q. So if you could show the same day that would be better than five days later?

A. That would be.
Q. The prosecutor also asked you about corroborative evidence and how separate witnesses could be -- could corroborate other witnesses, correct?
A. Right, separate and independent witnesses.
Q. And when you say independent what do you mean?
A. I mean that the memories of each witness are their own. They haven't be influenced by discussion with other witnesses or discussion with the police or seeing something in the newspaper. All right. It's their uncontaminated memory of what happened.
Q. How about watching the video together, could that contaminate it?
A. That could contaminate your memory.
Q. The prosecutor also asked you about how difficult it was to recreate stress and that you can't -- you really can't do that in the real word, right?
A. Right.
Q. And that's why scientists like yourself do these archival studies, right?
A. Right.
Q. And remind the jury again what archival studies do.
A. Archival studies allow researchers to look at real police cases, real police files with real witnesses and to look at how the witnesses behaved in those cases.

Q. Would those cases include armed robberies?
A. They would.
Q. Would they include murders?
A. They would.
Q. Would they include rape?
A. They would.
Q. Stressful cases.
A. Yes.
Q. And the archival studies, how do they match up to the lab studies?
A. They match up pretty well to the lab studies. The problem with archival studies is we don't know if that suspect is the guilty. All right. They are a police suspect whereas in the lab we can control whether or not the perpetrator is actually in that lineup so we can look at accuracy.

With archival studies what we have to rely on are people's identifications of other people in the lineup, so you have one suspect who may or may not be the actual perpetrator then you have usually five other people who are innocent, and the police know they are innocent and that's why they put them in the lineup.

And so what they can do in archival studies is look at identification rates of those known innocent people, and we see very similar identification rates. In the lab

about 20 percent of people choose these fillers, choose these known innocents, and in archival studies about 20 percent also choose the fillers. And so that's how we can compare lab studies to archival studies.

MR. GROEBER: Thank you. No further questions.

THE COURT: Mr. Durant?

RECROSS-EXAMINATION

BY MR. RUTLEDGE DURANT:

Q. Doctor, isn't it true that none of your research in this area applies to facts of this case because the witnesses in this case know the defendant?

MR. GROEBER: Objection, commenting on the facts.

THE COURT: Overruled. You may answer.

A. That's right. My research is not with the people who are familiar with perpetrators.

MR. RUTLEDGE DURANT: Thank you very much.

THE COURT: You may step down. Thank you.

Just for scheduling approach.

(WHEREUPON, a bench conference was had, not on the record.)

THE COURT: Mr. Foreman, we've got just a quick matter of law that I need to take up outside of your presence. I'd like to go until six tonight. So I'm going to excuse you. If there's anybody that cannot stay until six if you'll immediately alert the bailiff and

it in.

Anything else that you are requesting? Any other lesser includes? I cannot think on the possession of a firearm if it's of a lesser included.

MR. GRIMES: No. No lesser includeds. The charges that I emailed Your Honor and copied Mr. Durant on from Utah and identification we would like to have. I'm not sure if every factor applies but a large degree of those factors charged, and I would think -- I was thinking allowing it would sort of be like a self defense case where you look at various factors. It's case specific as to whatever is testified to by an expert or by witnesses should be included in the Utah --

THE COURT: Are you saying Utah?

MR. GRIMES: Yes, ma'am.

THE COURT: All right. Thank you. Anything further?

MR. RUTLEDGE DURANT: I just haven't had a chance to look over the email that Mr. Grimes sent this morning.

THE COURT: All right. I'm charging my standard identification charge which lists all of those elements, Mr. Grimes, that those are factors that may be considered among others. All right.

MR. GRIMES: Yes, ma'am.

THE COURT: Thank you. Anything else?

MR. RUTLEDGE DURANT: Not from the State.

THE COURT: I think the only issue at this point is the strong armed. We're at ease. So 9:45 to be here then we'll begin at 10:00, unless there are some other issues. Please just come look at the verdict form. We're at ease.

(WHEREUPON, the trial of this case was recessed for the day.)

Thursday, June 14, 2012

THE COURT: Mr. Grimes, I have received your email this morning. You have requested jury charges. I'm going to mark it as Court's Number 9, just for the record. They are printed out. So that will be Court's 9. I have reviewed them and I will again be charging the standard charges that we discussed. Thank you.

MR. GRIMES: Thank you Your Honor.

(WHEREUPON, Court's Exhibit Number 9, Defense's Request for Charges, was marked and made a part of the record.)

THE COURT: And my understanding is, Mr. Grimes, that you have withdrawn your request for --

MR. GRIMES: Strong armed robbery.

THE COURT: Yes.

MR. GRIMES: Yes, ma'am.

THE COURT: So you are no longer requesting a

There's nothing worse than a guilty man going free, except an innocent man taking his place.

Now, it's been a long slog through a lot of facts and I know that as you deliberate that you'll keep that, the serious weight of your decision in your mind.

Now, this case is really about memory testing. Now, there is a video and the video does not lie but it does not tell the whole truth. What are some things that would help you find the whole truth in this case? Fingerprints. Now, Investigator Milz told you that he did take fingerprints. He told you that he took some at the register and he said that they didn't come back to my client.

Now, he also said that he watched the video and he watched as the robber came in the door, that his hand appeared to be in his sleeve, and I think that's what that shows. I agree with him. But he didn't take the extra step to watch the end of the video because when the robber leaves you can't see where his hand is and what he touches as he leaves the shot.

He could have taken an extra step to dust that area. They also could have taken an extra step to dust or to set up crime scene tape around the door or at least around the register to prevent contamination, contamination from customers who could have come in and

out of the store and from the police officers who were in the store.

They could have taken an extra step when they found the gun. One of the steps they could have taken was to fingerprint it. Another step they could have taken would have been to run it to see who maybe owned it. Perhaps they could have taken the extra step to look at the bank videos from where that gun was found.

The prosecutor told you, Well, it might be the gun, might not be. We don't know. Don't you want to know? Wouldn't you think that was important?

They could have taken an extra step to get a search warrant from my client's mom's house once he was the suspect. Detective Lawrence knew where he was. He decided not to take that step.

They could have taken an extra step to get a search warrant at his dad's house, where Detective Lawrence knew where he lived. They didn't take that step. In fact, Detective Lawrence even told you his dad would have let him probably searched without a warrant, and he didn't take that step.

They didn't take an extra step by getting a photo lineup as soon as possible. They waited five days to do one. They didn't take an extra step to show a photo lineup to Mrs. Patel.

Now, don't you want to see how she would have performed with a six-pack photo lineup, at the very least, perhaps a simultaneous one. They failed to take those extra steps.

Now, the prosecutor might say that he wishes the officers had done a better job. No one wishes that more than Marvin Green, but we don't have that evidence. So we have to deal with memories. We have to deal with memories of people that we have left; Mr. Patel, Mrs. Patel, Detective Lawrence, and Deputy Luckadoo.

Now, how do we test -- how do we test the memories? In a trial we test it by what people say here in the witness stand, compare it to what people said before, what they didn't say before. We compare what one person in the witness stand says against what another person in the witness stand says. That's your whole job, is to test the witnesses, and in this case it's about testing their memories. Now, that is a hard job because you've got to get inside people's minds and that is difficult.

Let's talk about Mr. Patel's memory. And let's test his memory with the video that doesn't lie. Mr. Patel said in his testimony that the robber did not have a hoodie on top of the hat. The video shows that he did. Mr. Patel said in his testimony that he was wearing a small hat, the robber was. That's not what the video

shows. It's a pretty big hat.

Mr. Patel said that he could see the ears of the robber, and when you watch that video you see the hood pulled up on top of the hat. You'll see he couldn't have seen his ears. Mr. Patel said that he saw the robber's eyes because at one point the glasses slipped and he could see down and see his eyes. Watch that video. It is not there.

Now, why would he make those mistakes and why would he make them despite the fact that he has watched that video who knows how many times? It is because his memory remembers what he thinks it is.

Science gives us an answer as to why he remembers things that way. Weapon focus. Mr. Patel gave you the very same answer that science does. He said, and I'll quote it, A gun was pointed at me. I could not remember the details. And who could blame him?

Now, there are other ways that we can evaluate memory, his memory. What was documented that he said when the initial report was made? Did you hear anything in the initial report about lottery tickets, about an Obama joke, about Newports, about recognizing the voice? No. What you have in the incident report is he was a customer. These later details come out after he's had an opportunity and he's been talking with his wife and they

are trying to figure out who it was.

Now, if he had said to the responding officer, Man, I think it's that customer who joked about Obama, that is such a unique thing to remember. Okay. And that is why the prosecutor is going to point that out to you a lot and why he did so. All right. Don't you think if he had told the officers that that day that fact would have made it in a report? It is so unique, but it's not there.

The truth is that Mr. Patel wanted and he needed to find out who it was and after watching the video four, five times with his wife that morning he needed it, he needed to know who it was, and so his mind shows a familiar face to put behind those sunglasses and underneath that hat.

Now, how does the lineup fit in all this? We know that lineups are important and we know that not only because Dr. Beaudry came here and testified about it but we know because the Charleston County Sheriff's Office has an entire policy dedicated to it, dedicated to the proper way of doing a lineup.

We also know it's important because the U. S. Department of justice issued a study that Dr. Beaudry told you about. And that study, as she told you, was issued because people had been exonerated through DNA and many of those cases were based on faulty eyewitness

identifications. That's why it's important.

Now, in this case they did some things right, okay, with the lineup. The main thing they did right was get the Detective Perkins, who didn't know who the suspect was, to do the lineup procedure. Okay. I'll give them credit for that, but there are some problems.

First of all, translation. Now, when Mr. Patel and Mrs. Patel sat on this witness stand and testified they had a translator behind them to make sure that what they said was accurately interpreted to you. That was not done with the photo lineup. Now, the police tried. They had Dhruval there, a 12-year-old boy who tried his best to interpret the instructions.

Now, let's talk a little bit about those instructions and how it went. They read the right instructions. They read some good instructions but they were poorly given. Now, how do we know that?

Detective Perkins testified that it took four minutes from the time that he began to read those instructions, and that included what happened was he would read a paragraph, stop, Dhruval would interpret it. He would ask Mr. Patel if he understood, Mr. Patel would initial it. They would go to the next one. He would read the paragraph, it would have to be interpreted, he would ask him if he understood it and would go to the

next one. There's seven of those. Okay.

When they finished that Mr. Patel would get the paper, he had to print his name, he had to sign it. Detective Perkins had to print his name and he had to sign it. After that he looked at the photo lineup. He circled one. He circled number four. He had to circle, initial, date, time. Do you really think that that took four minutes? And if it did what does that tell you about the quality of the understanding of the translation of the instructions themselves?

Another problem. Why do they wait five days? Dr. Beaudry testified that our memories drastically deteriorate after only two hours. They waited five days. That was five days that Mr. Patel had to sit around and talk with his wife about what happened, to watch the video again and again over the phone and to try to figure out who it was.

Dr. Beaudry also told you that the preference would be for sequential, not simultaneous. That's because when you get a simultaneous one you try to pick out the one who looks the most likely.

One of the biggest problems with that lineup is that there's only one person in the whole lineup that's a customer, and that's my client. So of course he's going to pick out the only one regular customer he has.

Finally, what detective told Mr. Patel after he had finished, Detective Lawrence testified that he said, I will let you know when an arrest is made.

What does that communicate to Mr. Patel? It means you did right, you did good and I'll let you know when we go arrest him. That kind of confirmation, as Dr. Beaudry testified to, affects confidence. That's part of the reason that he says he's so confident that it was Marvin Green.

How about Mrs. Patel? How about her memory? Now, she testified that my client came in every day for six months. Now, Mr. Patel said something different. He said two or three times a week.

You heard from Detective Lawrence that my client lived in Jacksonboro with his mom. That's 14 miles away from the gas station. You heard that he lived in Adams Run with his dad. Now, if he lives 14 miles away why in the world would he be a daily customer at that particular gas station?

Now, Detective Lawrence also said, Well, he jumps around a lot. Okay. Let's take that one. If he jumps around a lot and lives at different places why would he be going into the same store every single day? What that tells us is that her memory about how frequent he was there is probably incorrect because, first of all,

Mr. Patel says it's different. So we don't know for sure how frequent of a customer my client was.

What else did she say to you about when he came in the store? One of the things I thought was very interesting was that she came into court and she testified that she recognized him in the video. She's sure of that. She's a hundred percent sure.

If she's so sure that she can recognize him why would she card him for cigarettes every single time he came in? Maybe it's because she couldn't recognize him that well, and maybe it's because that store has about 80 percent customers who are African American, maybe it's because a lot of black men come in wearing a hoodie or sunglasses?

She also testified that the only video that she saw was the one that showed the door. That means that she saw only the person coming in and the person coming out. And if that's all she saw how can she testify that she remembers the way he talked? There's a snippet of some words said by the robber but it's a little bit. She did not watch the video where the robber is at the cash register, and she couldn't have seen him talk.

I want to talk a little bit about what Dr. Beaudry testified about. And what struck me about some of the figures is not necessarily how bad people were when the

certain factor was present, when a weapon was present, or when stress was present, or when it was cross-racial. What affected me is that even in those studies when a weapon wasn't present, for example, she said, Well, people did pretty good. Then she said like 80 percent. Well, that means two people got it wrong.

So what's the margin of error? What's the margin of error in a criminal case when you have to believe that someone is guilty beyond a reasonable doubt? Two of 10 people getting it wrong might be enough for a non conviction.

I want to talk a little bit about stress and the Morgan study that she discussed. Okay. Now, the solicitor will argue, and he did argue with her a little bit, that there's no way that you can recreate a stressful event, at least this particular stressful event that Mr. Patel went through, and that is absolutely true. But we can study how stress affects our memory.

And the Morgan study that took two groups of people, half of them had a high stress interrogation for 40 minutes and they were shown a photographic lineup right after, the other half had a low stress interrogation for 40 minutes, face-to-face, and then they were shown a photo lineup.

And what were the results? For the low stress 3

out of 10 people still picked the wrong person. And for the high stress 6 out of 10 people got the wrong person. Now, that confirms that stress affects our memory. It affects our ability to grab data and to accurately acquire.

Now, there was some critique, there was a critique by this, by the prosecutor, but what the studies show when they do a meta-analysis, where they look at all the studies and average them out, is that this is a problem, and it's a problem that you should consider in your deliberations.

Now, let's talk a little bit about what really happened in this case. Mr. Patel was robbed. He was terrified. He saw a weapon. He was stressed but he can't remember the details that well. He said that.

He called his wife. She came to the store. They watched the video and they tried to figure out who it was. They decided together that it was a customer. Their minds place that customer's face behind the sunglasses and underneath the hat.

In the days after the robbery and before the lineup they kept talking about which customer it was, which customer. It must be the one, the Obama joker. It must be the one who buys the Newport cigarettes all the time. And they spoke to each other, and that speaking is called

contamination. It is a source that affects our memory.

Now, when Mr. Patel was shown the lineup there was not a pure translation and he probably struggled to understand it. He picked out the only person in that lineup that he has seen as a customer before and he did that because, as he told you, he thought it was his job to pick that out and to help the police.

Now, Deputy Luckadoo also took a look at that video and he made a guess that it was Marvin Bowens. That's what he said. And Lawrence discredited what he said. How do we know that? First of all, Lawrence told you. Second of all, they didn't do a search warrant that day. Deputy Lawrence or Detective Lawrence did not do it the day he was assigned the case.

They didn't look to see if there were fingerprints on the gun that was found. They didn't make an arrest warrant that day. And when Detective Lawrence looked at the video he'd already had planted in his mind who it was because he read the incident report and it said Marvin Bowens Green. So he had an expectation of who he was going to see and that was it. That was all they needed. They were satisfied with what they had done. Detective Lawrence said, I closed my case, and when I do that I have all the facts I need.

What facts didn't they have? The fingerprints, the

door on the inside or outside, no attempt to get DNA.

They found a gun that matched, looked like the gun in the robbery. They didn't do fingerprints, they didn't run it to see who owned it, didn't do a search warrant at the mom's house. Lawrence knew where that was. They didn't do a search warrant at the dad's house. Lawrence knew where that was.

They waited five days to do a photographic lineup, and they didn't do a photo lineup for Mrs. Patel. And don't you want to see how she would have done? Wouldn't you like to see if she can accurately identify my client from a photo of a young black man in sunglasses and with a hoodie on?

That was not a trick question. There's nothing tricky about that question. That question asks her if she could do in court what she has already done, look at photograph or a video and say if it's Marvin Green. She would not even look at the photograph. What does that say about her belief about her own memory? It shows that she doubts it.

Ladies and gentlemen, these memories are too prone to error, too prone to manipulation, too prone to contamination to trust them to convict in this case.

The State wants you to believe that you should convict because the witnesses corroborated each other.

They have no hard evidence to corroborate but they want you to believe because they've got a parade of witnesses coming up here to testify that you should convict. The problem is that there is so much contamination of memories in this case that you cannot believe which memory came from where.

And as Dr. Beaudry said, we are not all that good at recognizing people on a video, and when a face is obscured we are not even good at recognizing familiar people. In the study she talked about when the face was obscured of a familiar person walking into a room shown from a surveillance video only 3 out of 10 people could identify the familiar person. That means 7 out of 10 could not.

This doubt that is raised is reasonable and it's significant and Mr. Green deserves the benefit of it, just like anyone else who would be sitting in his place. We ask you to send this innocent man home. Thank you.

THE COURT: Mr. Durant?

MR. RUTLEDGE DURANT: Thank you, Your Honor. May it please the Court.

Ladies and gentlemen, this didn't take much planning. It wasn't intricately planned out. It's just a gun, a hood pulled up over a ball cap on a head, a man wearing sunglasses. It's pretty easy to commit a crime

and who cares that someone is terrified? Who cares if someone thinks they will die, never see their family again? Just a simple act of terror.

And that's not all this case is about. It's certainly about what Mr. Patel went through that morning from a man that wore a thin disguise, and he doesn't get the benefit of that thin disguise.

But maybe the thinking was who would believe this immigrant anyway. Who would believe this man who couldn't even come into this courtroom and couldn't speak English. I don't know if that's what was thought but if that was he is dead wrong.

He was a customer at my store. He was a customer at my store. Mr. Patel told the first officers at the scene that morning, that very morning, He was a customer at my store. He did not mince his words, and those words were not lost in translation to officers who did not speak Hindi.

He did not say he thought the man had been a customer that morning. He did not say the man may have been a customer that morning. He was my customer. That is all Mr. Patel knew that morning. And he was specific and he was certain about that.

And, ladies and gentlemen, as much as the defense has tried to cast doubt on anything and everything in

this case to make you think you cannot trust memories, to make you think people don't know people, when you go back there and you think about all this you will find you will reach the right decision and it really will be easy because you will think about all of it, everything you've been told from that witness stand from every witness.

You will take into conversation defense counsel's words and I think you'll take into consideration my words. I'm confident you'll reach the right decision here. I'm confident you'll think about all that, and I have a lot more to say.

The essence of this case is not about people identifying strangers, about people identifying people they don't know. This case is about people who do know this man and they know him for a variety of reasons in a whole lot of ways, unlike you because you don't know him.

You haven't interacted with him, you haven't had conversations with him. These witnesses have. All of them have. Not one and not two. You heard them all. There were four. Four people who knew him. They told you they knew him.

And this case is about people who knew this man, and because they knew this man they were able to tell you that it was this man who came into the store at 7:45 on December 24th and for a minute and 32 seconds held a gun

at Mr. Patel, a citizen of Charleston, husband and a father, a man who speaks Hindi, a recent immigrant to the Country, just a simple citizen doing a simple job making money at his store that he owns with his wife.

And he's here in the courtroom right now. He's anxious about this case. His wife would like to be here as well but they both can't be here because one of them has to be at the store, but they are anxious to know if you will believe them. These identifications are only possible because these people knew this man. They are not based on anything else.

So let's talk about what we know in this case. I'm going to start with the video. We know from the video that Mr. Patel was there alone at the register. There wasn't anybody else in there. We know from the video obviously that the store is equipped with a video surveillance system and captured the incident on video.

We know that the man walked in with a cap over his head, with a hood over that cap and he was wearing sunglasses. The man was not wearing a hockey mask, or a gas mask, or a Halloween mask, nothing that covered his entire face.

It is clear that the only thing covering any part of his face is a simple pair of sunglasses. Other than that his entire face is exposed. His lips are exposed,

his cheeks are exposed, his chin is exposed, his mouth is exposed. His face is entirely exposed except for a simple pair of sunglasses. It was exposed from the second he walked in that door.

Now, as defense counsel said, it is very clear on that video that that man never touched that door on the way in, and that he wiggled his hand out of his left sleeve as soon as he got in that door. He was careful about that. So that door wasn't dusted.

And on the way out you'll see that you can't tell. You cannot tell whether he touched the door or not. You know he was careful getting in but all you have to do is push it to get out.

Would we have liked to done more in this case? You bet. You can always do more. There's always another step. There is no end to trying to take another step, to trying to make things better and it should be done in every single case. And just because everything that you can think of that we would like to do in all the cases that we have doesn't mean that he is any less guilty.

After the man entered the store for the next minute and 32 seconds there was a gun pointed directly at Mr. Patel. It is right up in his face, two and a half feet away from him. The hammer is back. It's a revolver. It was careless, it was reckless.

For those of you that don't know, I'm sure some do, a revolver is a lot easier to fire when the hammer is back because it pulls the trigger back even more and makes it easier to shoot. And that hammer was back and it was pointed right at him, right at Dhruval's dad. That's very real. It's a very real matter.

You can see him move. This isn't just still photos, but you have still photos of this video. The man is moving on this video. He's moving his face, he's moving his body. He's walking. His mouth is moving. People who have seen it before have seen him move his mouth before. People who have talked to him have seen him talk before. Not only have they seen him talk but they've heard him talk.

And I want you to see this video. I'm going play it for you now. You're going to have it with you back in the jury room. I don't know if you will initially have this TV back in the jury room. Request it, ask for it, get it and take it back there.

Before I show it to you though I don't think all of you are going to be able to identify this man, obviously. I don't think that can be done, and that is just what Dr. Beaudry was telling you about. Strangers have a lower level of being able to identify somebody. So just because all of you can't, and some of you may, does not

mean you have reasonable doubt. This case is based on the witnesses who knew him, not on your ability to look at this video and determine if it is him.

I'm going to start when he comes in. Maybe you can see it now, maybe you can't. Maybe when you see it later you'll see that the hammer is back on this gun. You can clearly see the man has the hood pulled up over his head.

The defense counsel made a big deal that Mr. Patel couldn't tell you whether that hat was on his head or not. Dr. Beaudry said between big events you may not remember all the other details. You remember being involved, you remember seeing that man's face that's clearly exposed.

And you know what? Just because defense counsel says that Mr. Patel didn't say it it wasn't on that video, and that is ridiculous. That is about two and a half feet from Mr. Patel.

Watch it as much as you want. It's a conscious deliberation. That's what people do when they are seeking the truth. They don't just watch it once. Mrs. Patel didn't just watch it once, Mr. Patel didn't just watch it once.

Why would you do that? If you'd been robbed you'd watch this. You'd watch it as many times as you wanted to because you own this, because you put a video

surveillance camera in your store for this reason, not because you would never use it.

And there are a lot of things I've got written down that I want to cover with you, but defense counsel got up here and he's parading numbers and he's parading this defense expert and he threw out a number of 80 percent were able to accurately identify somebody, 20 weren't. So 20 percent means some people couldn't do it and therefore you should have reasonable doubt.

So if 10 people came in here and were telling you that this was the man you would have eight people who actually knew it was him and two people who didn't, according to just that statistic. And statistics can tell you anything you want them to, but there would be eight people, even according to that doctor, who knew, if you want to use that statistic.

There are four people in this case who told you they know. If you want to take off 20 percent take one and a half people. They are all telling you they know. They are not all mistaken. They are actually all correct.

And that statistic that she was telling you was based on people who don't know the person they are trying to identify. They are trying to identify a person they've never seen before, a stranger. Those were her

statistics. Dr. Beaudry told you throughout her whole examination that her research is based on strangers. The fact that people know somebody does not apply to anything she was telling you. Listen to her testimony again, if you need to, you can request that.

She's a perfectly nice lady. It was good enough to have a good psychological discussion with her but it does not apply in this case. Nothing she said about identifications apply in this case.

She can possibly tell you about what she knows about procedures for a lineup. And as defense counsel told you there were plenty of things about this procedure with Mr. Patel five days later that were very good, in her opinion. One of them was that there was an independent administrator, Detective Perkins, who didn't know the suspect. It's an extra precaution. He administered the lineup, and it was told to him.

Dhruval told you he told his dad exactly what was on this form. Dhruval testified for you. Mr. Patel said I understood. They all testified about this procedure. And he picked him right out. And the interesting thing that defense counsel says is -- now, the one flaw defense counsel says is that the only person they put in this photograph that was a regular customer was my client.

The problem with that logic is that the police

didn't know he was a regular customer when they put him in that lineup. Only Mr. Patel could confirm that once he identified him. Think about that. That is logical.

The police recognized him as somebody they knew. They had no idea if he was the regular customer or not. They wanted to know if Mr. Patel could tell him that, and so they had an independent administrator come out and administrate the lineup.

And Mr. Patel is not an idiot, obviously. Of course he speaks Hindi but he understands and he was able to understand this and he pointed over and over, and over again, and he circled. This is my regular customer. And he told you details how he knows him. And he said from the very beginning this is my regular customer. This is my customer, to the first officers at the store that day. He didn't know his name, didn't know if he would ever be shown a photograph with this man's picture in it.

If Detective Lawrence or Deputy Luckadoo had not recognized the man as somebody they knew he may have never been in a lineup and Mr. Patel may never have had the opportunity to say that's my customer, that's the man. I told you the man that did this to me was my customer. This is my customer. This is the man.

And he is not mincing his words, and you do not just have Mr. Patel telling you that. You have three

other people telling you that with specificity and certainty and they look you in the eye and they told you what they know, and you can believe it. And they know they have the foundation for how they know it.

And just because they weren't able to take an exact translation there that day at the scene about this is the man who comes in and buys Newport cigarettes, usually a lottery ticket, sometimes gas and he jokes with us about Obama does not mean it didn't happen.

You judge their credibility and you determine if they are lying to you, and they are not. Why would they? Why would they go through a lie to frame somebody and say things they don't know? This isn't about their credibility. They are telling you the truth.

They want you to just think that they are mistaken, and they are not. There's a lot to think about, and when you sort it out you'll arrive at the right conclusion and you will know beyond a reasonable doubt.

You don't have to see all of somebody to know exactly who they are, people that you know well. If your mother or father was standing two and a half feet away from you with sunglasses on and a hood over their head and speaking to you for a minute and 32 seconds in a well lit area you would be under no false impression there. You would know exactly who it was, and it would be easy.

And this is ridiculous, too. Nobody is thinking this is anything other than the statute of liberty because you can't see her face. You don't have to see her face to know exactly what that is. It is not reasonable doubt that you cannot see all of this person.

Just because you don't see all of my pen doesn't mean you don't know exactly what this is. It is a pen even though you can't see the bottom. These aren't any tricks. These are just what we know. This is what we bring to the table as people. It's what you bring to the table with what you naturally have, your common sense. You're able to sort this through.

And I'm going to talk about all these eyewitnesses. Maybe I don't need to but I am. They are very important to the case because they know him. They've told you they know him. So we'll start with the first one, Deputy Dustin Luckadoo. He was a first responding officer along with Deputy Donald Kjellman.

He saw the video. He told you he knew the man in the video as the defendant and he told you he was certain. He based his identification on his knowing him, on personal interaction with him. And he is the entire reason that this man was ever listed in the reports in the very beginning. He knew it. He was certain. He identified him in this courtroom.

He is not lying to you. He's telling you about something he knows. Not because he recognized him from a fleeting moment, because he knows him. That's Deputy Luckadoo, the first responding officer, the first responding officer who understood from Mr. Patel that the man who robbed him was a customer.

Detective Lawrence, he's been in this trial every day, his case, detective with the sheriff's office. He tries to do the best job he can as we would expect, admits you can always do better. You can always do more. He told you he saw the video. He told you, I knew that man. No bones about it. I knew that man.

He said, I understood that Deputy Luckadoo said it was him in the report. It's not good enough for me. I need to see it. I know him, had personal experience with him, spent hours talking to him, knowing him for years, had plenty of opportunities in my life to know this man. He told you he was not mistaken. He was certain. And he didn't stop there. He wanted more. He called the South Carolina Law Enforcement Division and arranged for them to assemble a photographic lineup.

Detective Lawrence did not know that this man was a customer at the store. That is not something he knew. What he knew was this was the man he recognized in the store. He knew him as a man at that moment, as a man he

knew and a man who robbed the store, clearly not a customer. Only Mr. Patel could say if this was the customer or not. They admit he was a customer.

There's no suggestive intent to put a customer of Mr. Patel's in this lineup so that he can pick him out because the detective didn't know that.

And you judge for yourself, but I think that's a fairly good representation of people with similar characteristics, and they have intentionally taken the color off, it's a black and white photo, to give it even more of a bare bones generality.

So at that point Deputy Luckadoo knew him. That's in the report. Detective Lawrence who's known him for years sat with him for hours, seen his face for a significant amount of time, had the opportunity to see him walk, talk, move, move his lips, see his cheeks, see his nose, see all of that. He even knows his family, talked with his father, put him in the lineup to see if we get more, see what Mr. Patel does.

He had Detective Perkins come with him. I need you to help me. I need you to be an independent administrator, didn't know the person in the lineup. No other reason for Detective Perkins to be in this case, independent, didn't know, and Mr. Patel picked him right out with Dhruval right beside him.

So you have three people, and that case made its way to my office. Three people who knew him. But you heard from a fourth person. You heard from Mrs. Patel, and you'll decide to believe her or not. There's every reason in the world to believe her.

She told you she was certain. We know that. She told you she was sure. We know that. She told you why she knew him. We know all those reasons and they pretty much mirror Mr. Patel's except she says she thought it was about six months before the incident that she had known him; two, three times a week, sometimes every day. Mr. Patel said for about a year. She knew him as a customer. She came and she told you that.

There was no Hindi translator out there that day. There was no officer who spoke Hindi out there that day. You decide for yourself what happened. Does she know or is she lying? She is not.

It is the search for truth. She came in here and she was positive. She came in here and I pointed at this man. I wanted to know absolutely sure if she could look at you and say this with as much meaning and conviction as she could. Could she tell you that? Could she look at you and say that? And that's important. And she did.

You'll sort all that out. You'll go through that, confident of that. You can believe all those witnesses

and you can believe the truth in this case. And it's beyond a reasonable doubt, and that's my burden. My burden is not an absolute certainty. It's beyond a reasonable doubt, as it should be.

If you knew with certainty what happened in this case you wouldn't be sitting where you are. You would have taken the witness stand, told the jury what you knew. People who are certain have certain information. They know. And certain people take that stand.

Reasonable people listen to what the State's evidence is and they decide if that's reasonable, and that's what we want. And it should come with a meaningful deliberation where you think about all of it, and I know you will, and you go over all of it, and I know you will. And I'm confident you'll reach the right decision because you all took an oath at the beginning of this case, and raised your right hand, took an oath to find the truth.

And the truth in this case is simple. This man was known and because he was known people were able to see him and know who he was through his thin disguise, and sunglasses do not cut it. I ask you to return verdicts of guilty on armed robbery and possession of a pistol during a violent crime.

THE COURT: Mr. Durant, if you could move the

bottom of your cart. Fabulous. And then we can just wheel that whole cart in.

MR. GROEBER: Your Honor?

THE COURT: Yes.

MR. GROEBER: I'm still yet unable to find the exact copy of the Yarmey report, it's the highlighted portion we proffered. What I've done is I have another copy. I've highlighted and bracketed the same exact sections and I would ask that we mark it as 12-A, Defense 12-A, for the record.

(WHEREUPON, Defendant's Exhibit Number 12-A, the Yarmey Report, was marked and made a part of the record.)

THE COURT: Thank you. And, Mr. Groeber, those are the exhibits and you had no objection to the exhibits going back?

MR. GROEBER: Correct.

THE COURT: All right. Let's bring in the jury. Thank you.

(WHEREUPON, the jury enters the courtroom at approximately 11:20 a.m.)

THE BAILIFF: All seated, Your Honor.

THE COURT: Ladies and gentlemen, we have now reached the stage of the trial where I will instruct you on the law applicable to this case.

I remind you that during this trial you and I have

had certain duties to perform. As the trial judge it is my responsibility to preside over the trial of this case and I also have the duty to rule on the admissibility of the evidence that has been offered throughout this trial.

You are to consider only the confident evidence before you. If there was any testimony ordered stricken from the record you must disregard that testimony. You are to consider only the testimony which has been presented from the witness stand, as well as the exhibits that have been admitted, as well as any stipulations of counsel.

I have the additional duty to charge you the law applicable to this case. As the presiding judge, I am the sole judge of the law of this case. It is your duty as jurors to accept the law and apply the law as I state it to you now.

If you have any idea as to what the law is or what the law ought to be and it does not agree with what I tell you now you must abandon your own idea because you were sworn to accept the law and apply the law exactly as I state it to you now.

In every case tried in this Court before a jury the jury becomes the sole and exclusive judges of the facts. A trial judge may not make any comment regarding the facts in this case.

Do not think that anything that I have said or done throughout the progress of this trial or during the charge on the law that I have any opinion about the facts in this case. The law does not allow me to have an opinion about the facts in this case.

Ladies and gentlemen, that becomes a matter solely for you to determine. As jurors it is your duty to determine the effect, value and weight, and the truth of the evidence that is presented during this trial.

The indictments in this case charge the defendant with armed robbery and possession of a firearm during the commission of a violent crime. I remind you that the fact that the defendant was arrested, charged and indicted in this case is not evidence in this case and cannot be considered by you as evidence of guilt in this case, nor does it create any presumption or inference of guilt. An indictment is simply the formal written instrument which contains the charge made against the defendant. It is the formal document by which this case is brought into this Court.

Just as the indictments in this case are not evidence any terminology or labels used to refer to the individuals in this case cannot be considered as evidence. For example, the use of the words defendant and victim are merely formal labels and may not be

considered by you as evidence in this case.

The defendant has pled not guilty to each indictment. The burden is on the State to prove the defendant guilty. A person charged with committing a criminal offense in South Carolina is never required to prove himself innocent.

I charge you it is an important rule of the law that the defendant in a criminal trial no matter what the seriousness of the charge may be will always be presumed to be innocent of the crime for which the indictment was issued unless guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt.

This presumption of innocence does not end when you begin your deliberations but it accompanies the defendant throughout the trial until you reach a verdict of guilt based upon evidence satisfying you of that guilt beyond a reasonable doubt.

The presumption of innocence is like a robe of righteousness that is placed around the shoulders of the defendant which remains with the defendant until it has been stripped from the defendant by evidence satisfying you of the defendant's guilt beyond a reasonable doubt.

This presumption of innocence is not a mere legal theory, it is not just a legal phrase. It is a substantial right to which every defendant is entitled

unless you, the jury, are satisfied of the evidence from the defendant's guilt beyond a reasonable doubt.

The State has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors before in civil cases where you were told it was only necessary to prove that a fact is more likely true than not true, such as by a greater weight or preponderance of the evidence. In criminal cases the State's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty and in criminal cases the law does not require proof that overcomes every possible doubt.

If based upon your consideration of the evidence you are firmly convinced that the defendant is guilty of the crime charged you must find the defendant guilty. If, on the other hand, you think there is a real possibility that the defendant is not guilty you must give the defendant the benefit of the doubt and find him not guilty.

There are two types of evidence which are generally presented during a trial; direct evidence and circumstantial evidence.

Direct evidence is the testimony of a person who claims to have actual knowledge of a fact such as an eyewitness. It is evidence which immediately establishes the main fact to be proved.

Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation.

The law makes absolutely no distinction between the weight or value to be given either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than that of direct evidence.

You should weigh all of the evidence in this case and after weighing all of the evidence if you are not convinced of the guilt of the defendant beyond a reasonable doubt you must find the defendant not guilty.

Necessarily, you must determine the credibility of the witnesses who have testified in this case. Credibility simply means believability. It bottoms your duty as jurors to analyze and to evaluate the evidence and determine which evidence convinces you of its truth.

In determining the believability of the witnesses

who have testified in this case you may believe one witness over several witnesses or several witnesses over one witness. You may believe a part of the testimony of a witness and reject the remaining part of the testimony of that same witness.

You may believe the testimony of a witness in its entirety or reject the testimony of a witness in its entirety. You may consider whether the witness has exhibited to you any interest, bias, prejudice or other motive in this case. You may also consider the appearance and manner of a witness while on the witness stand.

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 that 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 decide 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.

I instruct you and emphasize, the fact that the defendant did not testify is not a factor to be considered by you in any way in your deliberation and in your consideration on the question of the guilt of the defendant. It must not be considered by you in any way whatever. A defendant has the constitutional right to remain silent and the assertion of this right must not be considered by you in your deliberations.

I repeat, under your oath you are to draw no conclusion whatsoever from the fact that the defendant in this case did not testify. The fact that this defendant did not testify should not even be discussed in the jury room. The burden of proof as I have stated to you is on the State. The defendant is not required to prove his innocence. The burden of proof remains on the State to prove guilt beyond a reasonable doubt.

In order to establish criminal liability criminal intent is required. For example, the mental state required to be proven by the State for a particular crime might be purpose, intent, knowledge, recklessness or criminal negligence.

Criminal intent must be proven by the State beyond a reasonable doubt. Criminal intent is always a matter that must be determined by the jury from the circumstances surrounding the situation.

There is no way to prove intent to a mathematical certainty. There is no way medical science can dissect a person's brain and determine what the person has in mind. So the law says that criminal intent may be inferred from the circumstances shown to have existed. This is how you make a determination of whether or not the element requiring intent was present.

It is not necessary to establish intent by direct and positive evidence but intent may be established by inference in the same way as any other fact by taking into consideration the acts of the parties and all the facts and circumstances of the case.

Criminal intent is a mental state, a conscious wrongdoing. It is up to you to determine what the defendant intended to do based upon the circumstances shown to have existed. Criminal intent can arise from

action or a failure to act. It may arise from negligence, recklessness or an indifference to duty or to consequences that is considered by law to be the equivalent of criminal intent.

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.

The indictments in this case allege two different offenses against the defendant. The charges are indictment number one, in no particular order, armed robbery; and indictment number two, possession of a firearm during the commission of a violent crime.

Each indictment charges a separate and distinct offense. You must decide each indictment separately on the evidence and the law applicable to it uninfluenced by your decision as to any other indictment. The defendant may be convicted or acquitted on any or all of the offenses charged.

You will be asked, Mr. Foreperson, to write a separate verdict of guilty or not guilty for each indictment.

The defendant is the charged with armed robbery. In order to prove this offense the State must first prove beyond a reasonable doubt that the defendant took personal property from the person or presence of another person.

Property is in the presence of a person if it is

within the person's reach, inspection, observation or control so that the person could if not overcome with violence or prevented by fear keep possession of the property.

The State must also prove beyond a reasonable doubt that the defendant carried the property away intending to permanently deprive the owner of the property and to keep the property for the defendant's own use.

The slightest removal of the property with the complete possession of the property even for an instant by the defendant is sufficient to show a taking and carrying away of the property. The taking and carrying away of the property must have been done with violence or by putting the owner of the property in the fear of the violence.

Finally, the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon during the robbery. A deadly weapon is any article, instrument or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case.

The following are examples of instruments which may be deadly weapons; a pistol, a shotgun, a rifle, a dirk, a dagger, a knife, a fire bomb or Molotov cocktail. A

gun may be a deadly weapon even if it is not operating.

The defendant is also charged with possession of a firearm during the commission of a violent crime. The State must prove beyond a reasonable doubt that the defendant was in possession of a firearm or visibly displayed what appeared to be a firearm during the commission of a violent crime.

A firearm means a machine gun, automatic rifle, revolver, pistol or any weapon which is designed to or may be readily converted to expel a projectile.

In order to find the defendant guilty of possession of a weapon during the commission of a violent crime you must first find the defendant guilty of either committing a violent crime or attempting to commit a violent crime. For purposes of this offense armed robbery is a violent crime.

Ladies and gentlemen, I'll now go over the verdict forms with you.

Mr. Foreman, it is your responsibility to sign and date the verdict form once you have -- once the jury has reached a unanimous decision, meaning all 12 of you must agree on the verdict.

As I indicated to you there are two indictments. Each must be considered separately of each other. Ladies and gentlemen, please also know that there's no

significance in the way I read either indictment first or how the decisions are placed on the paper. It's simply something must go on the paper first.

Ladies and gentlemen, in the Court of Common Pleas -- excuse me. In the Court of General Sessions, Ninth Judicial Circuit, 2011-GS-10-2338, State of South Carolina vs. Marvin Bowens Green. On the indictment for armed robbery we, the jury, find the defendant not guilty or we, the jury, find the defendant guilty.

Again, once you have reached a unanimous decision on that indictment you will sign the verdict form indicating all 12 of you have reached the verdict, and sign it and date it.

In the Court of General Sessions, Ninth Judicial Circuit, 2011-GS-10-2339. On the indictment for possession of a firearm during the commission of a violent crime we, the jury, find the defendant not guilty or we, the jury, find the defendant guilty.

Once again, once you have reached a unanimous decision you will sign and date that verdict form. Once you have completed both of the verdict forms you will alert the bailiff that you have reached a decision and we will receive you back into the courtroom.

Ladies and gentlemen, this will be the last time I say this to you; do not begin your deliberations, do not

discuss this case amongst yourselves. We will be gathering the verdict forms and the evidence to go back to you. We're going to send the television so that you may watch the video if you need to do so. Once all that has been gathered the bailiff will instruct you when you may begin your deliberations.

Madam alternate, this completes your service to this case but I ask until you are released do not discuss this case with anyone and do not begin thinking about anything in case that I would need you before -- at some point to put you in with the other jurors. But at this time please remember all the admonitions and I will release you at the appropriate time.

Please rise for the jury.

(WHEREUPON, the jury leaves the courtroom at approximately 11:38 a.m.)

THE COURT: Thank you. Be seated.

From the State, any objection to the charges read?

MR. RUTLEDGE DURANT: No, Your Honor.

THE COURT: Reserving all your previous objections that I have marked as a court's exhibit, your proposed jury charges, anything as read, Mr. Grimes?

MR. GRIMES: Yes, ma'am. I think I'm a little confused. I think for the record I need to state the grounds as to why we're requesting these charges. I'd

like to have a few minutes to be able to do that.

THE COURT: All right.

MR. GRIMES: Thank you, Your Honor. We did submit request to charge number one on identification. And on the second paragraph of that charge the Court erred in not charging that. Specifically the language, You don't have to believe that the identification witness was lying or not sincere to find the defendant not guilty. It's enough that --

THE COURT: You may need to come to the podium, Mr. Grimes.

MR. GRIMES: Thank you, Your Honor.

As highlighted by the closing arguments in this case Mr. Groeber testified -- well, argued that this was a tested memory, witness making an honest mistake. Mr. Durant basically implied that we said the witnesses were lying. And as Dr. Beaudry testified witnesses can make honest mistakes and just not realize that they are mistaken. They have an honest sincere belief that what they saw was accurate.

And given Dr. Beaudry's testimony and as issues were presented in this case I believe the admission of this charge provides Mr. Green a right to a fair trial and by a jury of his peers.

As to paragraph one on the bottom of that page, I

believe the Court charged the length of time the witness observed the person, the distance between the witness and the person. I do not recall the Court charging factor C to the extent that the person's features were visible and undisguised. Again, that given Dr. Beaudry's testimony, and the video, cross-examination of the witnesses I believe that charge is supported and should be given.

I believe the Court did charge lighting conditions. Paragraph E, whether there were any distractions occurring during observation. That would be some of what Dr. Beaudry testified about weapons focus.

And if you watch in the video when the robber asked for money out of the wallet he's looking down. Mr. Patel is looking down looking in the cash register. He is distracted, and I believe there's evidence in the record to support that charge. Again, the omission of those three deprived Mr. Green to the right to a fair trial, the Sixth Amendment right to a jury trial by his peers.

I don't believe the Court charged paragraph two. I do note that the fact they had listed and italicized C, D and E I don't think applied to this case. There's no testimony that Mr. Patel or any other witness had uncorrected visual defects, they were either fatigued or injured, or under the influence of any drug or alcohol.

However, there was testimony from Mr. Patel that he

was under stress or fright at the time of his observation. As Mr. Durant eloquently argued, he believed his life was in fear and, you know, went to the emotion of the case rather than so much the facts of the case. So we believe in personal motivations, biases or prejudices I believe when Mr. Patel testified his job was to help the police catch the person that showed personal motivation in this case and I believe that should be charged.

If the Court wanted to admit biases or prejudices or clarify that, and we're not arguing he was racially prejudiced or had any ongoing animist with Mr. Green or any motive bias, creating a bias of wanting to catch somebody that could be corrected.

Paragraph three on the cross-racial, that was elicited by both the State and through their questions of Mr. Patel talking about Mr. Patel's customer base 80 percent African Americans, where most of their clients come from. Dr. Beaudry testified that race is a factor, and we believe that charge is supported by the evidence in the record.

As to paragraph four, I don't recall that being charged. As Mr. Groeber argued and brought out during trial, on paragraph A there was at least five days that passed in this case, and Dr. Beaudry testified memory

loss happens rather quickly after an incident.

I don't believe there's any evidence on Mr. Patel's mental capacity as being -- perhaps that could be struck but the state of mind at the time of the identification I think may need to go in there, especially with sort of the translation issues and his wanting to help the police catch the robber.

Paragraph C, the exposure of witnesses to opinions; there's ample testimony in the record that Mr. Patel and Mrs. Patel talked about the case for a week after the incident and they watched the video at least four or five times for identification, and then evidence in the record that Mr. Durant was interviewing Mrs. Patel and talked with her about the case as his role as an investigator, and I believe that would go to that part of it.

I don't believe there's any information about the photographs, never shown any photograph of Mr. Green, so that could be stricken. And the part about any other information or influence that may have affected independence, that identification of the defendant by the witness could go to perhaps them overhearing the officers in the hallway talking. Again, goes to his talking to Mrs. Patel.

Paragraph D, I don't believe there weren't any instances where there would be misidentification.

Paragraph E, there's ample testimony that there was never a description of the person that was given and we have testimony that's sort of inconsistent. There was the pointy nose issue, the walk issue, mannerisms.

You know, there was a change of testimony throughout the trial, sort of the one witness like Mr. Patel, for example, during direct never said he could clearly see Mr. Green's face. He never said he could testify -- he never testified that he could see his eyes over the glasses. That came out in cross. So that shows an evolving just change of description, and the truth simply doesn't evolve. So we believe that should be charged.

And paragraph F, the circumstances under which the defendant was presented to the witness for identification. Given the translation issues and the child, the youngest Patel basically not being able to translate everything, for example, he didn't know what an array was, and sort of the other rights. And Officer Perkins testified he didn't know what was said. They could be talking about anything.

Then you have the four-minute issue, as Mr. Groeber pointed out with that, sufficient evidence for that to be charged.

I believe paragraph five should be charged.

Paragraph six should be charged, especially since three of the witnesses only saw this on the video recording.

Paragraph seven should be charged. Dr. Beaudry testified that a witness's level of confidence, it really isn't relevant to whether they observed accurately. You can be a hundred percent sure something happened and be wrong. I know I've had that happen to me several times.

That would complete my argument on the identification charges as our major argument.

THE COURT: All right. Mr. Grimes, I believe you have thoroughly articulated the basis and they are marked as a court's exhibit, and I believe that by doing so we have preserved any argument and objection to the Court's charge. Thank you.

MR. GRIMES: Thank you, Your Honor. We also requested charge number two.

THE COURT: I understand. They are all marked, Mr. Grimes. You've made your argument. I am not changing my charge. My charges are law. I have, again, marked your charges, your proposed charges as a court's exhibit. I understand that you have objected to the charge as given by the Court and these are the proposed charges. Thank you.

MR. GRIMES: I don't mean -- my concern is that if I don't state my grounds for the record the appellate

court is not going to know why I'm arguing. And if you say well, we've reviewed the charge, and they say well, Mr. Grimes never said, you know, what basis on the record supported this --

THE COURT: Mr. Grimes, you have thoroughly articulated and all of your charges are interrelated. So I believe that you have thoroughly articulated the grounds and the basis for your objection. Thank you.

MR. GRIMES: Thank you, Your Honor.

THE COURT: All right. Anything further from the State?

MR. RUTLEDGE DURANT: No, Your Honor.

THE COURT: All right. We're at ease.

(WHEREUPON, the jury was instructed to begin their deliberations at approximately 11:50, and court was in recess while awaiting a verdict from the jury.)

THE COURT: All right. Mr. Durant, you ready by yourself?

MR. DURANT: Yes, Your Honor.

THE COURT: All right. I received a note. Juror 95 has met Detective Lawrence before on another case. She didn't realize until he said what job he had. She met him in April 2012 and do you need to talk to her? Signed the foreperson.

MR. RUTLEDGE DURANT: I'm not requesting any

MR. RUTLEDGE DURANT: No, Your Honor.

THE COURT: Mr. Groeber?

MR. GROEBER: No, Your Honor.

THE COURT: And, Mr. Groeber, I understand there are some -- assuming, I don't know what the verdict is, but there may be a sentencing issue, we'll need to have a hearing?

MR. GROEBER: Yes, Your Honor. We may need to delay sentencing for the reasons that we would argue.

THE COURT: All right, thank you.

Please rise for the jury.

(WHEREUPON, the jury enters the courtroom at approximately 2:52 p.m.)

THE BAILIFF: All seated, Your Honor.

THE COURT: Thank you. Please be seated.

Mr. Foreman, I understand the jury has reached a verdict. If you'll hand the verdict forms to the bailiff. Thank you.

Mr. Green, please rise.

THE CLERK: The verdict in the matter of the State of South Carolina vs. Marvin Bowen Green, defendant, on the indictment for possession of a firearm during the commission of a violent crime we, the jury, find the defendant guilty. Signed by the foreperson of the jury on June 14, 2012.

Ladies and gentlemen of the jury, if this was your verdict please raise your right hand.

Thank you. Please let the record reflect that all 12 jurors raised their right hand.

On the indictment for armed robbery, we, the jury, find the defendant guilty. Signed by the foreperson of the jury on June 14, 2012.

Ladies and gentlemen of the jury, if this was your verdict please raise your right hand.

Thank you. Please let the record reflect that all 12 jurors raised their right hand.

THE COURT: Thank you. You may be seated, unless, Mr. Groeber, you have any further requests of the jury.

MR. GROEBER: We'd ask that the jury be polled, Your Honor, please.

(WHEREUPON, the jury was polled.)

THE CLERK: Your Honor, the jury has been polled and the verdicts stand.

THE COURT: Thank you.

Mr. Groeber, anything further required of this jury?

MR. GROEBER: No, Your Honor. Thank you.

THE COURT: Anything further required of this jury?

MR. RUTLEDGE DURANT: No, Your Honor.

THE COURT: Is the State prepared to go forward

with sentencing at this time?

MR. RUTLEDGE DURANT: Yes, Your Honor.

THE COURT: Is the defendant ready to go forward with sentencing at this time?

MR. GRIMES: No, ma'am.

THE COURT: And, Mr. Grimes, when will the defendant be ready for sentencing?

MR. GRIMES: It's my understanding that the United States Supreme Court is considering the Eighth Amendment Challenge to imposing a life sentence on juveniles. Given that impact of this case, we'd prefer to wait for that case to come out.

It's argued, I think, in February or January. Usually the court's term ends in June. I can't think when that would come out. The decision should come out in the next few weeks. That should provide guidance. As of now the United States Court has held that a juvenile can not get life without parole for a non murder offense.

THE COURT: All right. Mr. Durant, how old is the defendant?

MR. RUTLEDGE DURANT: Your Honor, he was born on June the 29th of 1991.

THE COURT: And so, Mr. Grimes, how old is the defendant currently?

MR. GRIMES: He's 20. And the basis of our

challenge, the prior conviction he has, which is serving as the mechanism for the State to give him life without parole, occurred when he was 17. And given that that's the juvenile aspect of it, and before that prior sentencing he'd only be looking at 10 to 30, we believe a life sentence would violate the Eighth Amendment under impartiality clause per se the Eighth Amendment, and we want some more time to see what that case says. As of now they are considering whether you can give a juvenile life without parole for a murder offense.

THE COURT: But your client is currently not a juvenile and was not a juvenile when this crime was committed; is that correct, Mr. Grimes?

MR. GRIMES: Yes, ma'am.

THE COURT: All right. We'll go forward with sentencing today. Do you have your sentencing sheets prepared?

MR. RUTLEDGE DURANT: We do, Your Honor.

THE COURT: Ladies and gentlemen of the jury, I am about to impose sentence on Mr. Green. You are released from service, if there's anyone who wishes to be released at this time. Sentencing, we will just go on to sentencing. Is there anyone that wishes to leave?

(There was no response.)

THE COURT: All right. Thank you.

All right. Mr. Durant, I have listened to the facts over the past four days. I do not need to hear the facts again. Does the victim wish to address the Court? Is there anything, victim impact statement or anything of that nature?

MR. BRUCE DURANT: Your Honor, the victim is at his store. We were not able to get him here in time. So we wish to proceed.

THE COURT: All right. As the record is clear, we've had a pretrial hearing and he testified, as did his wife and his son. I have an understanding of the impact of this crime on the victim.

Let me hear the prior history, the prior criminal convictions from Mr. Green.

MR. RUTLEDGE DURANT: Your Honor, he was convicted this same month last year of a different armed robbery in front of a different jury, and that is his only conviction. There is another pending armed robbery in our office. There is another pending armed robbery against this defendant in Colleton County as well.

THE COURT: Well, as we know, Mr. Durant, he is presumed innocent of those two. What did he receive on the conviction? What was the sentence?

MR. RUTLEDGE DURANT: He was sentenced to 20 years for the conviction last year, and as we've gone over, the

State had made an offer of concurrent time, that he would do absolutely no more time than what he had been sentenced to on the prior armed robbery, and in light of that he understood well that the State was serving a notice of life without parole.

THE COURT: And, Mr. Durant, it's your position that the possession of weapon during a crime is to be served consecutive to the life sentence or may I run them concurrent?

MR. RUTLEDGE DURANT: I think you can run them concurrent, Your Honor.

THE COURT: What are you requesting?

MR. RUTLEDGE DURANT: Concurrent is fine.

THE COURT: Anything further from the State?

MR. RUTLEDGE DURANT: No, Your Honor.

THE COURT: Mr. Groeber, I'll be happy to hear from you regarding sentencing. The jury has spoken. There is a notice for life without parole. Based upon my review of the previous conviction, which was most serious and this being a most serious as well, the imposition will be life without parole pursuant to the notice.

You indicated there was no challenge to the notice portion of that and my understanding is the only challenge that you have at this point is to the constitutionality of the prior conviction, and as such I

am continuing with sentence. So I'll be happy to hear from you.

MR. GROEBER: Okay. Could I have one moment, Your Honor, please?

THE COURT: You may. And, Mr. Groeber, I'll be happy to hear from you as to whether or not the possession -- at some point it becomes really a moot issue but whether or not the possession of a weapon must run consecutive or concurrent. Thank you.

MR. GROEBER: Thank you, Your Honor.

(PAUSE.)

MR. GRIMES: I apologize, Your Honor. I'm trying to find a research email on this.

THE COURT: Concerning?

MR. GRIMES: The Eighth Amendment Challenge. It should take about two minutes, at the most.

THE COURT: All right. Thank you.

(PAUSE.)

MR. GROEBER: Thank you, Your Honor. I think that you heard the Eighth Amendment argument. I want to preserve that. Grand V. Florida is the case, a United States Supreme Court case. He was 17 at the time he was convicted of a prior charge. He was 19 at the commission of this charge. He's 20 now.

You saw his mother and father were in the

courtroom, and his brothers. He's grown up in the area, grew up in Jacksonboro. He lived there most of his life, in Colleton County, in there and around Ravenel.

I don't know that Your Honor has discretion when it comes to sentencing but he's been a great client. He's always been easy to work with for me. And I think what we'll do is that we will try to draft a memo maybe as part of our motion to reconsider, to preserve that issue with the Court.

THE COURT: And, Mr. Groeber, am I correct in assuming that you have advised Mr. Green not to address the Court?

MR. GROEBER: That is correct, Your Honor. And I'm sorry. On the concurrent I do think that when a life sentence is imposed it should be run concurrent. That's my understanding.

THE COURT: It is within my discretion so I am going to, just for simplicity sake, run them concurrent.

Mr. Groeber, you have advised your client of his right to appeal and he must do so within ten days?

MR. GROEBER: Yes, Your Honor.

THE COURT: You advised him of that?

MR. GROEBER: Yes, Your Honor.

THE COURT: Have you advised also your client that the armed robbery is considered a violent and a most

serious offense?

MR. GROEBER: Yes, Your Honor.

THE COURT: Did your client appear to understand his appellate rights?

MR. GROEBER: Yes, Your Honor.

THE COURT: Thank you.

Mr. Green, please rise. I'm going to impose sentence. Mr. Green, at this time the State, as you know prior to entering into and beginning this trial the State has filed, based upon your prior record, a notice to seek life without the possibility of parole. The jury has spoken. They have listened to the facts and you have been convicted of both armed robbery and possession of a weapon during a crime.

It's the order of the Court on indictment 2011-GS-10-2339 that you be committed to the State Department of Corrections for a term of five years. I'll give you credit for any time that you have served. That is concurrent to the controlling indictment, 2011-GS-10-2338, that you be sentenced to the South Carolina Department of Corrections for a term of life without the possibility of parole. Good luck to you, sir.

THE DEFENDANT: Thank you.

THE COURT: Ladies and gentlemen, this completes

your matters. If you would please go to your jury room. I will be in there in just a few moments. Thank you.

(WHEREUPON, the jury leaves the courtroom at approximately 3:10 p.m.)

THE COURT: They took your client away before I addressed you about some things. That's fine, Mr. Groeber. I just wanted to take this opportunity to let you know and to express, Mr. Durant, Mr. Durant, Ms. McCoy, Mr. Groeber, and Mr. Grimes, I know that this was a very difficult and emotionally charged trial as well. All of you were extremely prepared and professional to the Court and I think you set a really good example for the multitude of 403s that have been in and out of this courtroom and for that I thank you.

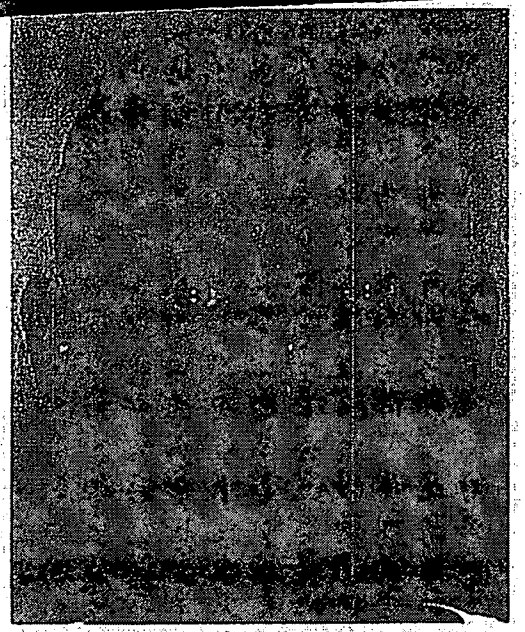
You both zealously represented your clients to the best of your ability, and I think that both sides did a wonderful job in your representation. So thank you for that. On behalf of the State of South Carolina and on behalf of my courtroom I appreciate everything that all five of you have done in representing the State of South Carolina.

So I appreciate that, and I just wanted to let you know in no way, either way the verdict had come out, neither one of you -- no one should walk out of here feeling that they did a poor job. Everyone has been

exceptionally prepared. I know that every time I've asked you, I've emailed you at nine or ten o'clock in the evening and there has been responses as well. So I appreciate your very, very hard work.

So I will await your motion to reconsider, and with that I'm going to excuse the jury. Thank you. Good luck to you all.

(WHEREUPON, trial of this case was concluded.)



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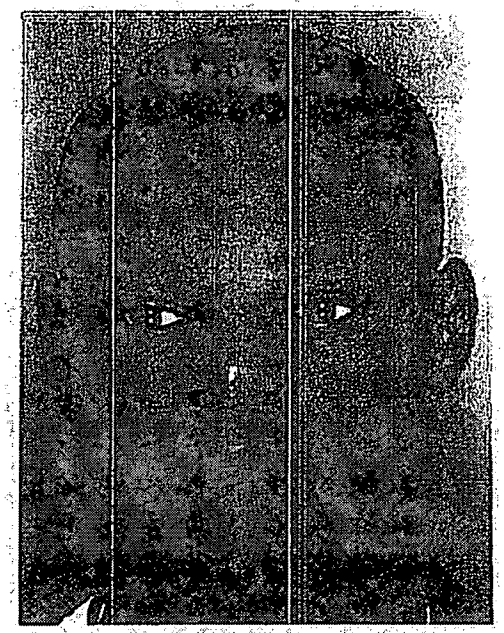

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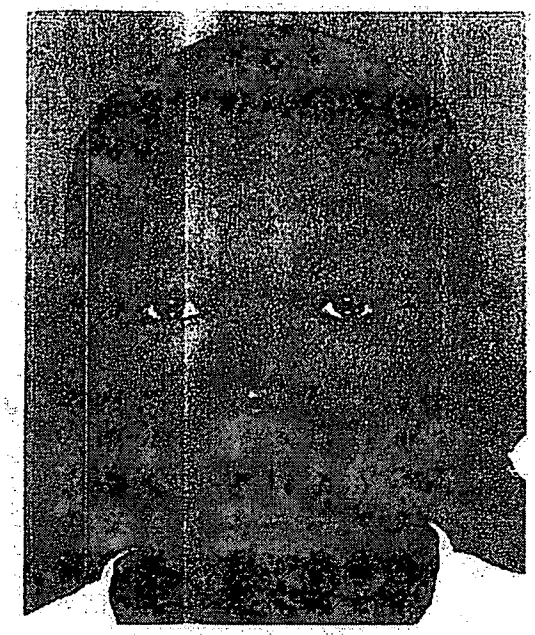

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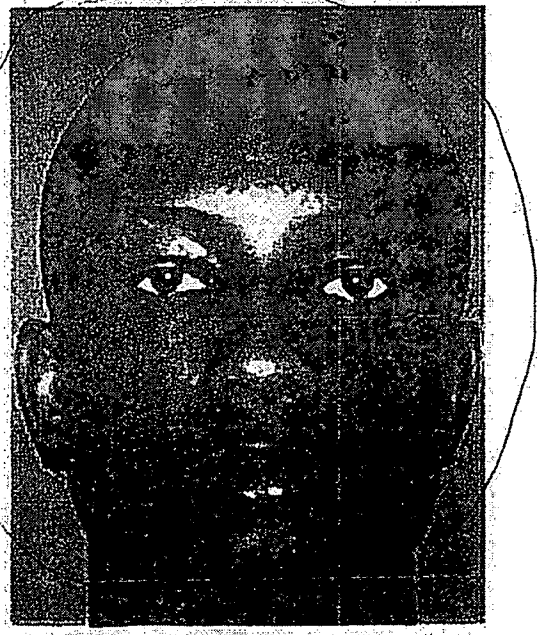

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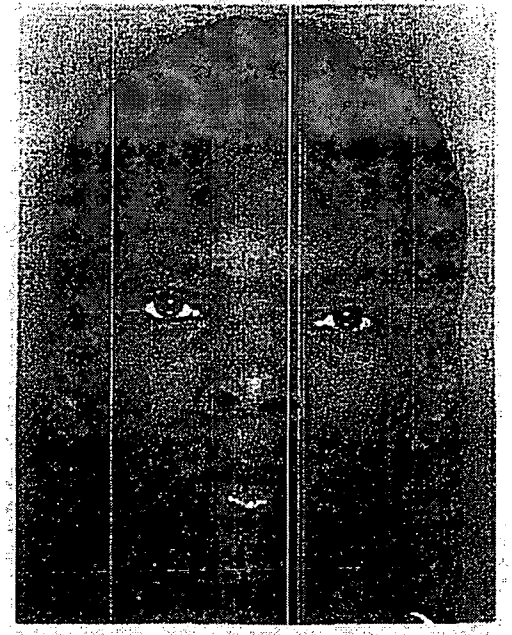

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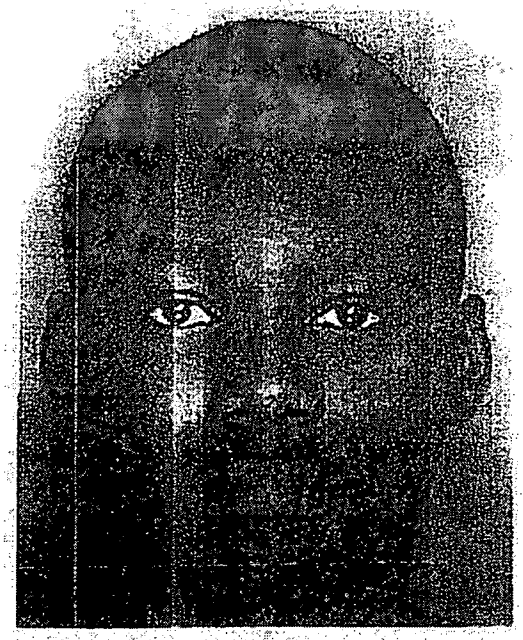

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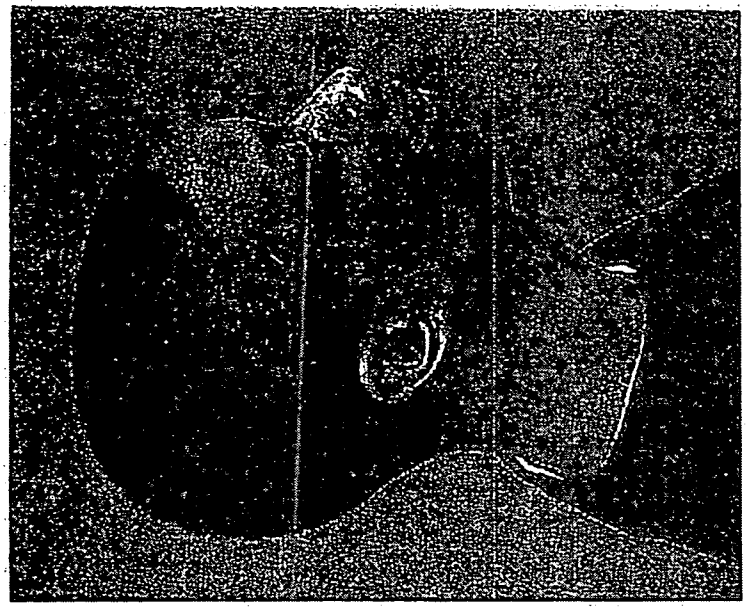

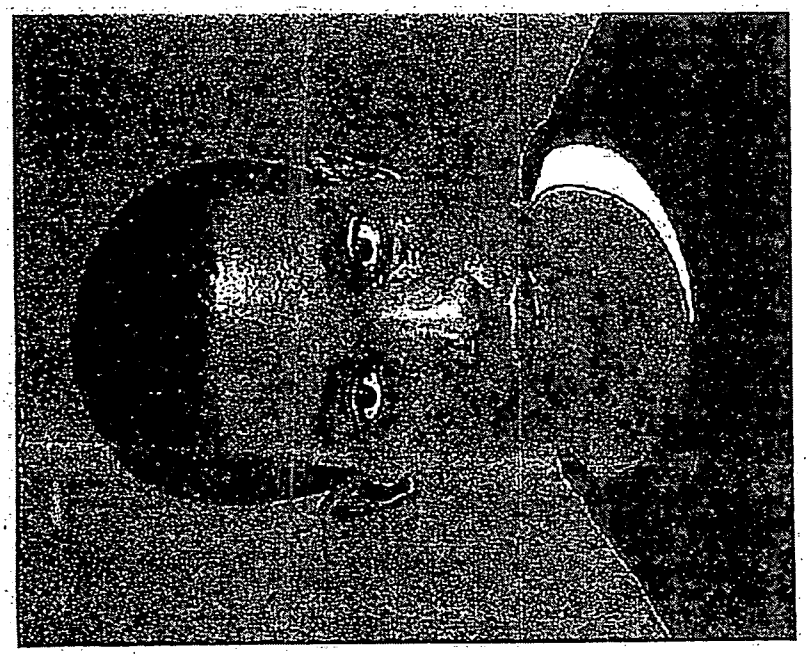

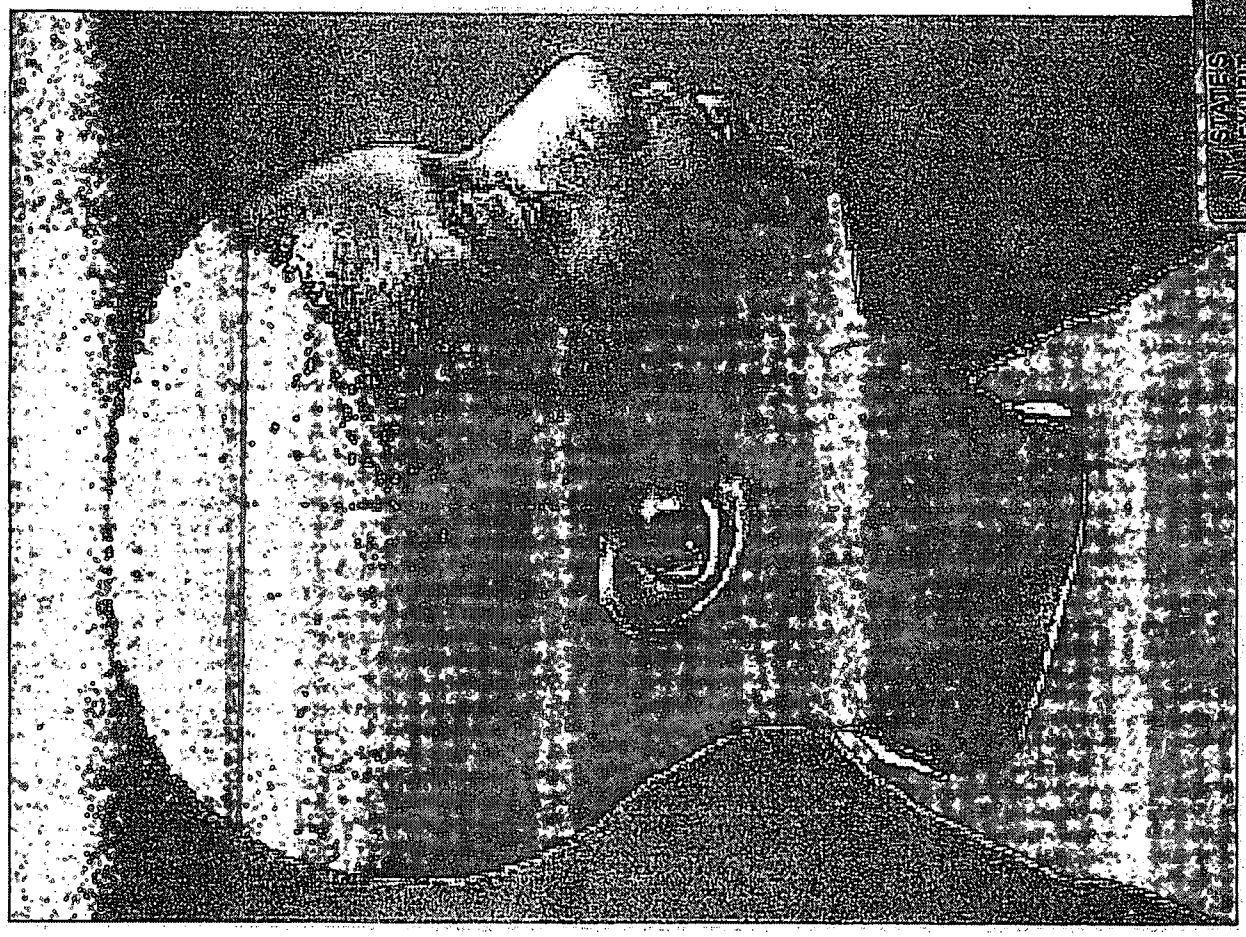
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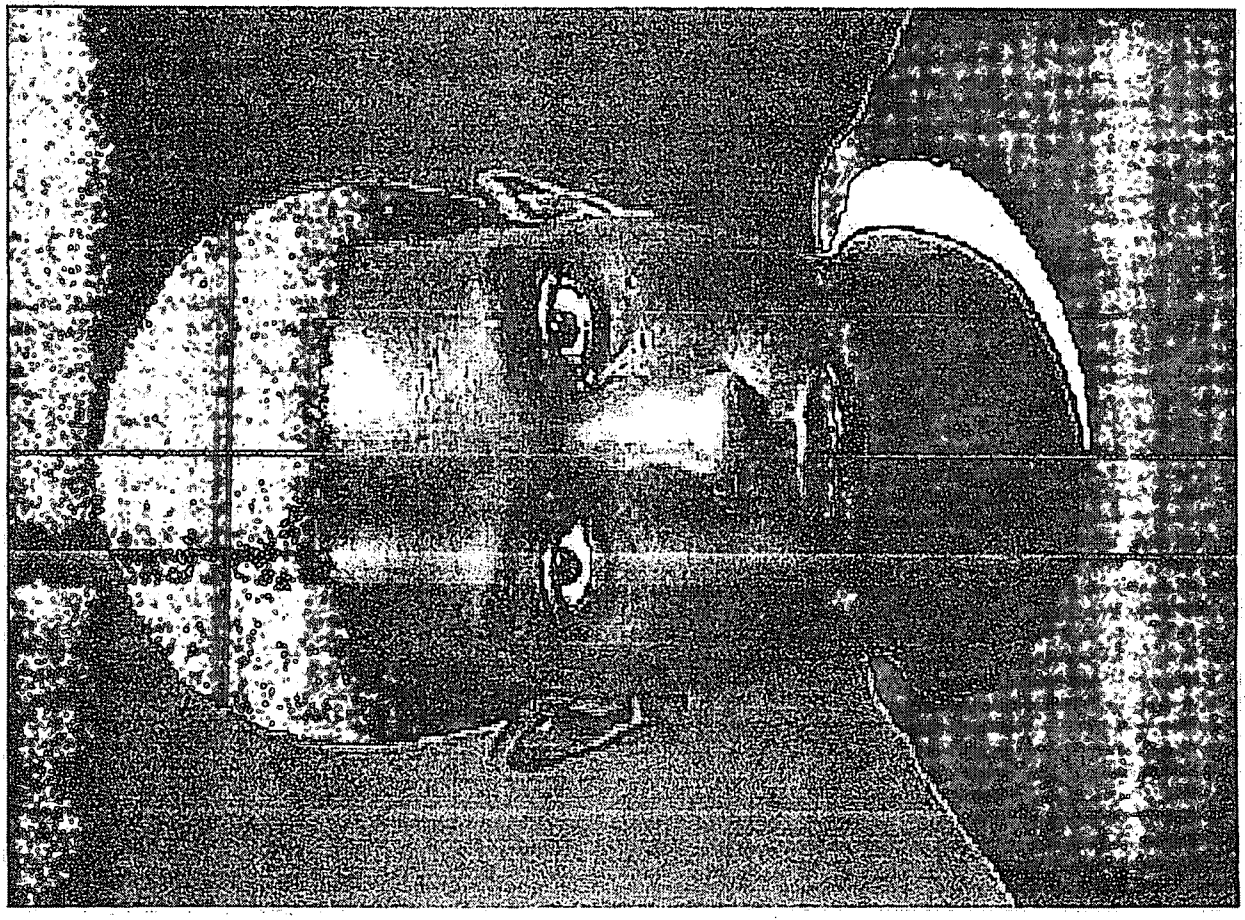

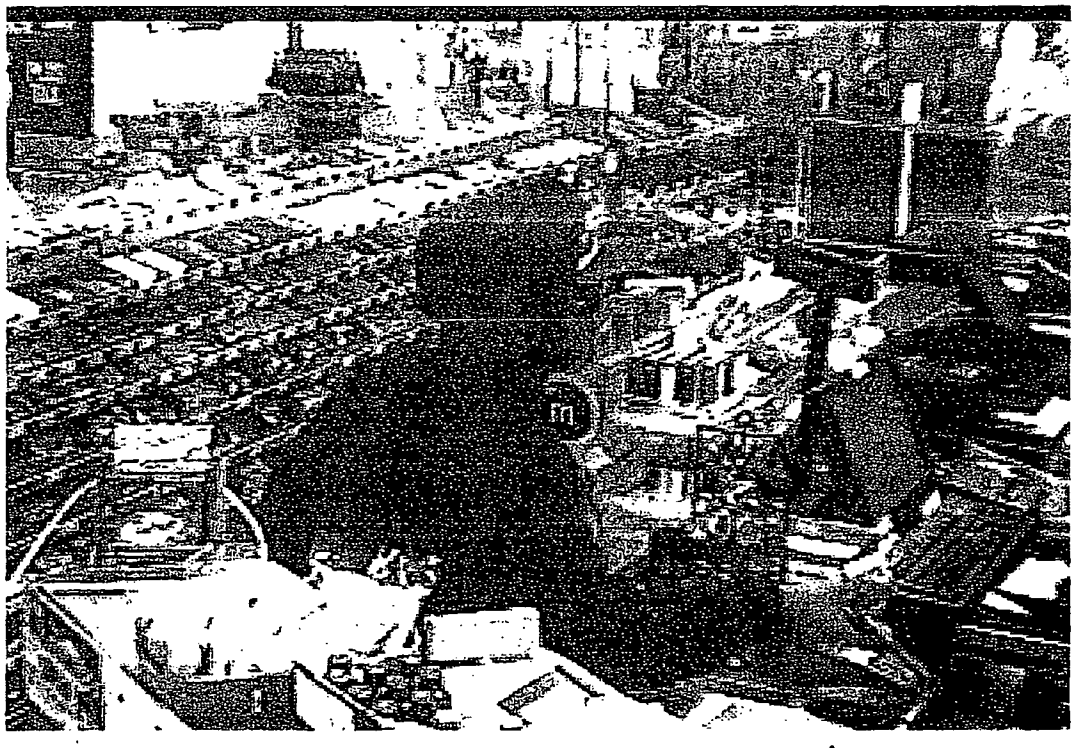

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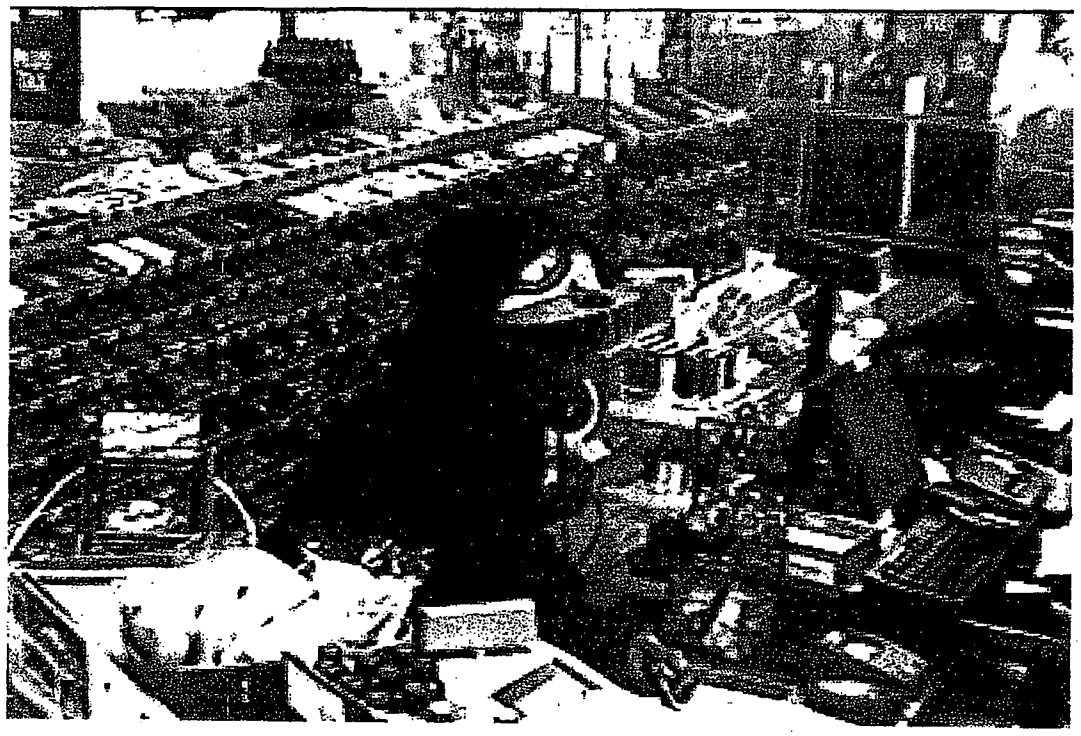

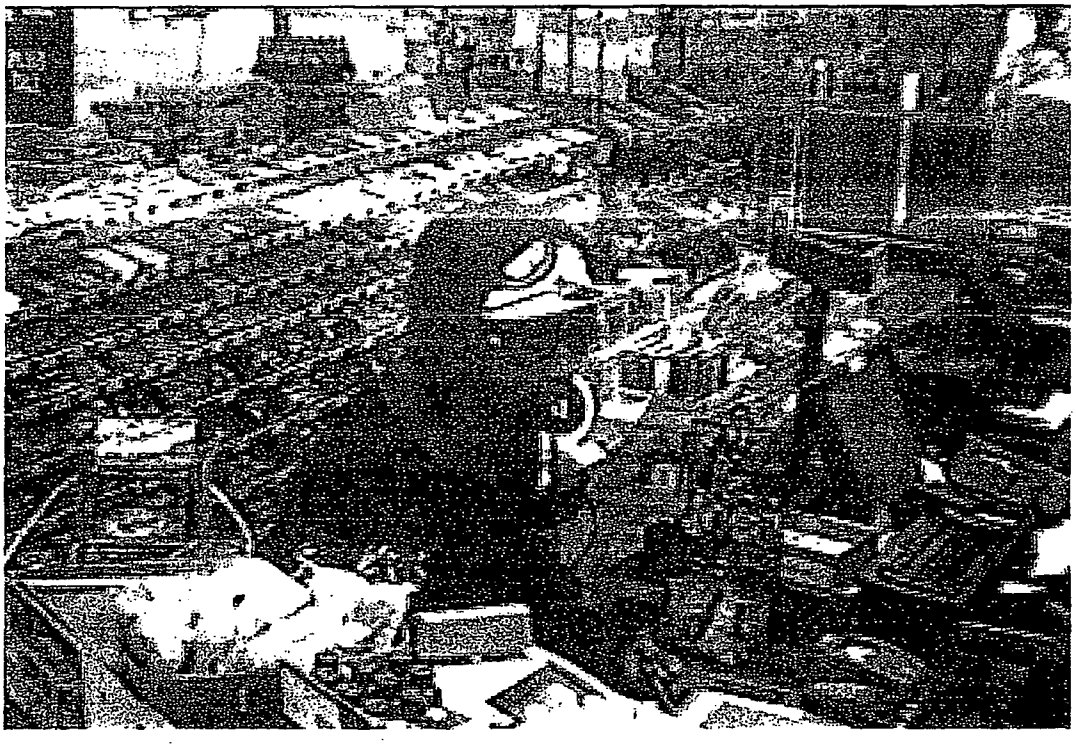

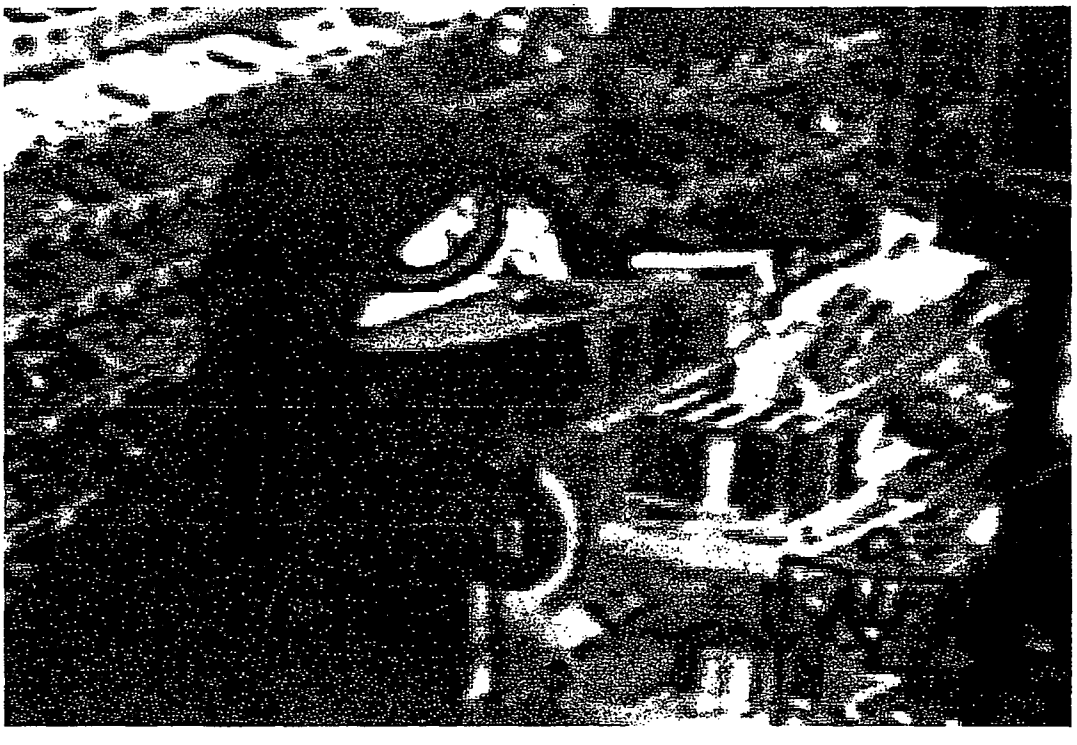

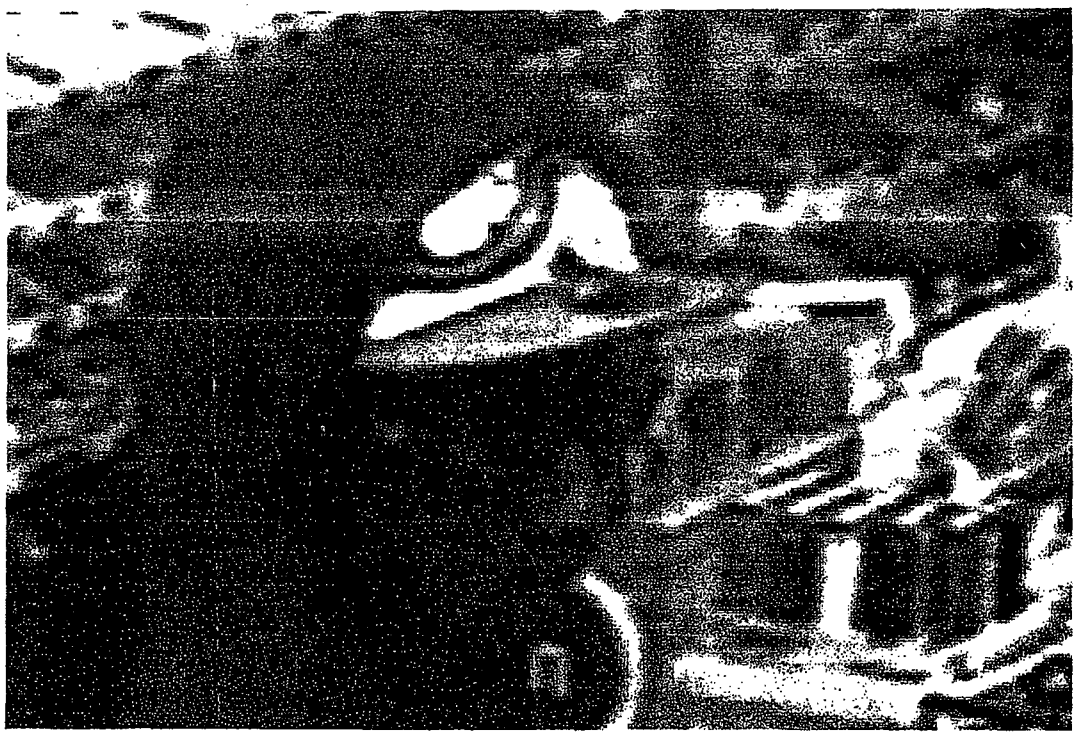

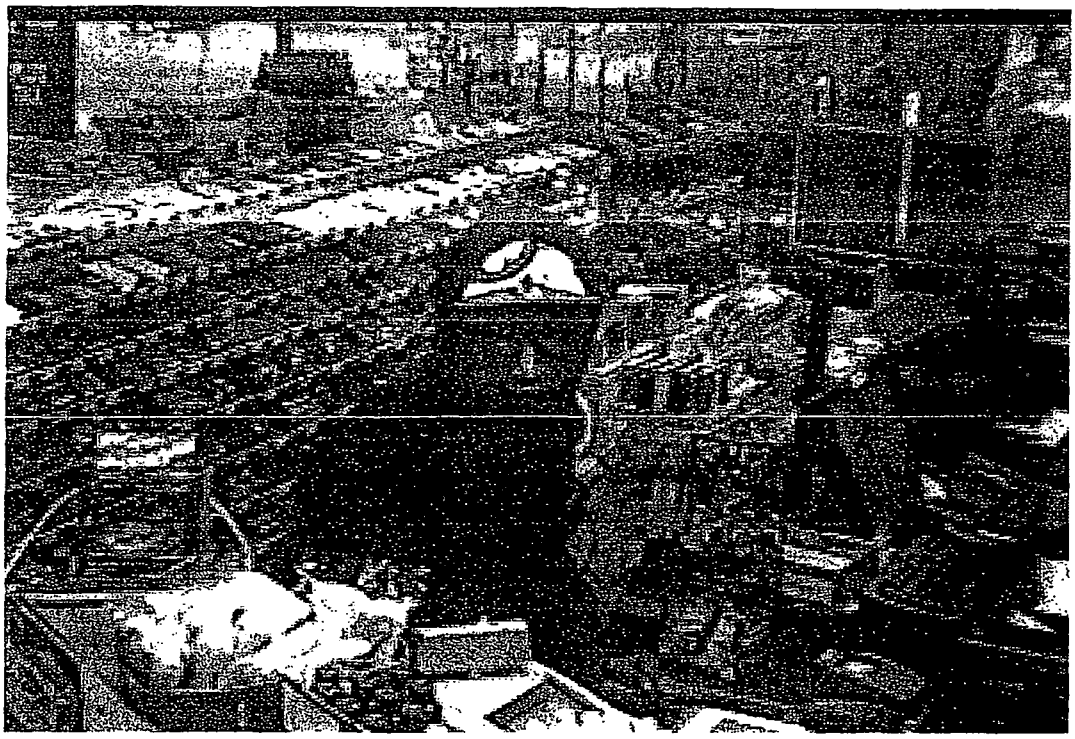

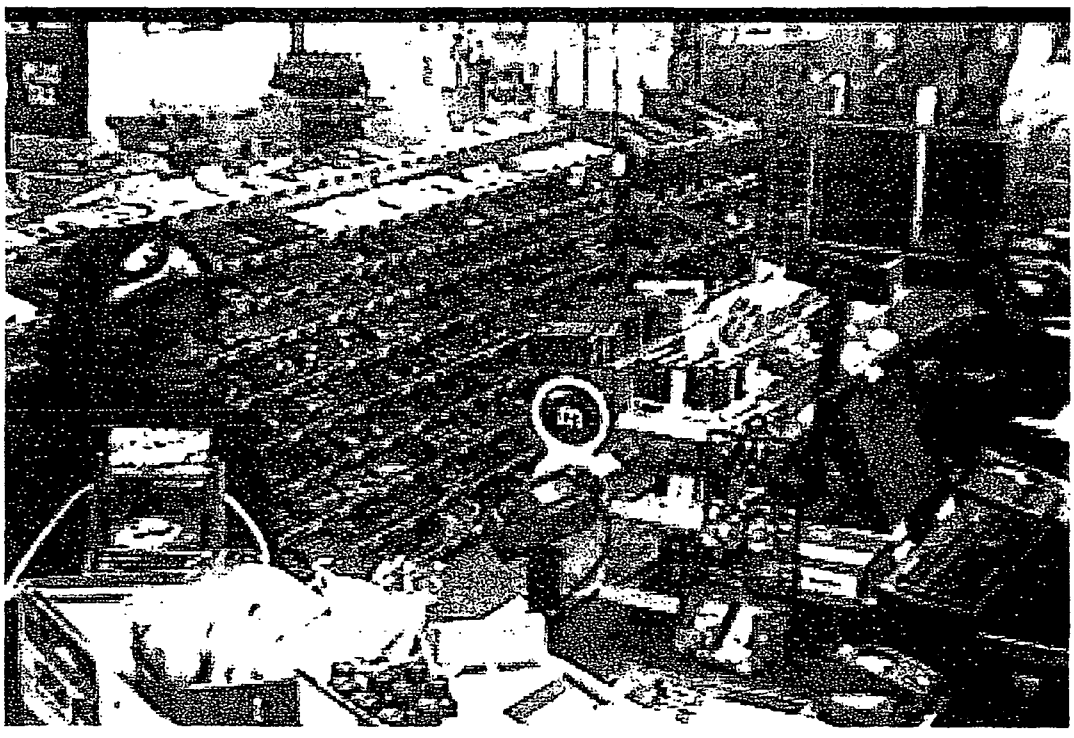

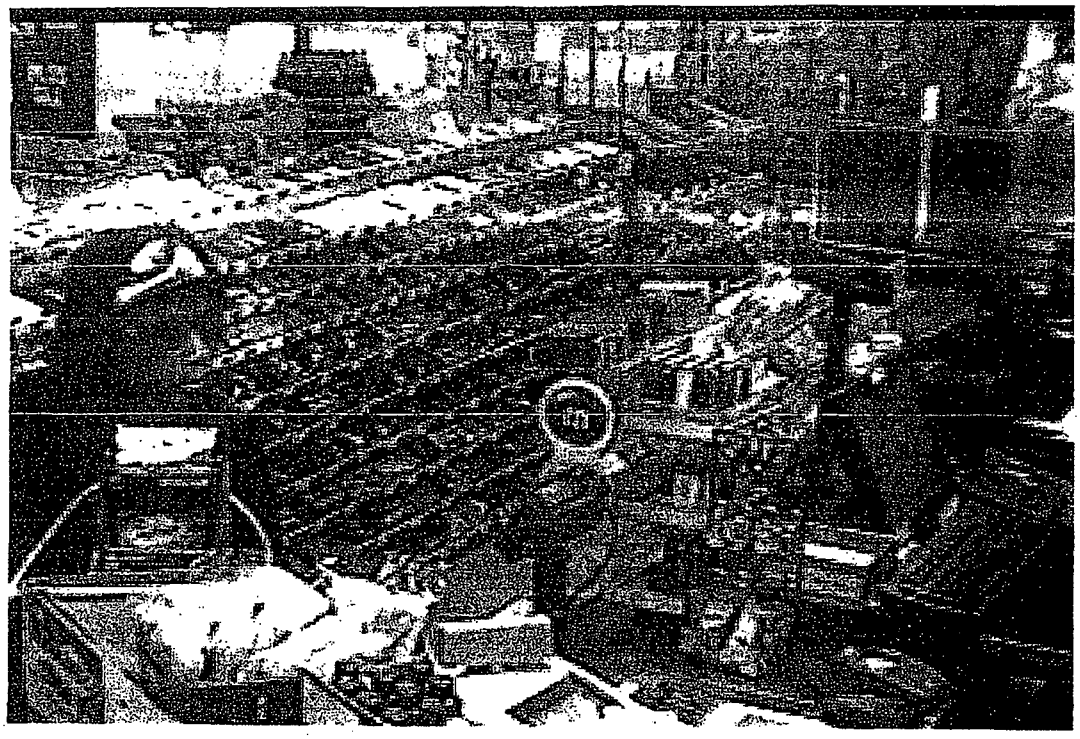

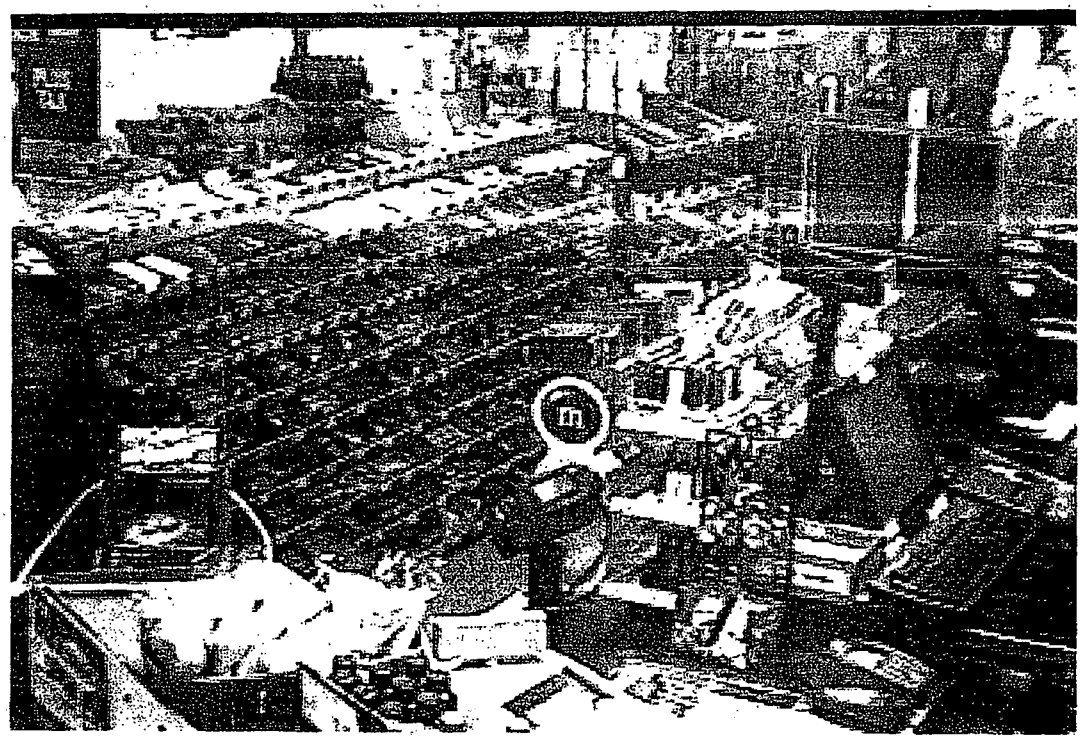

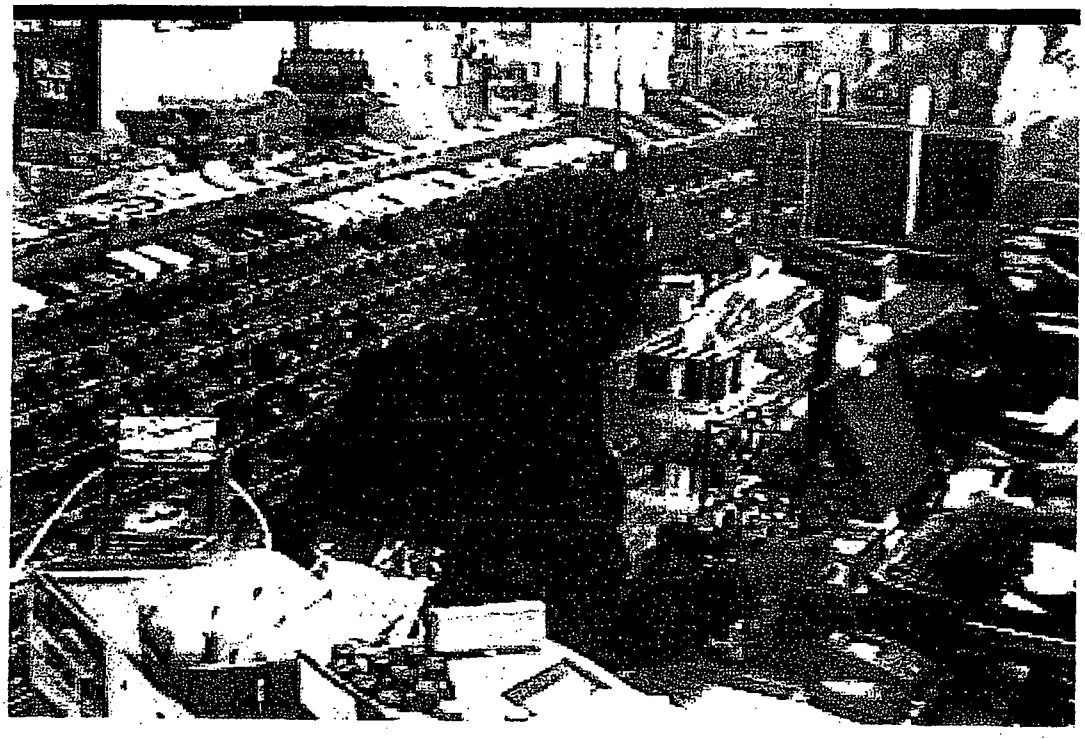

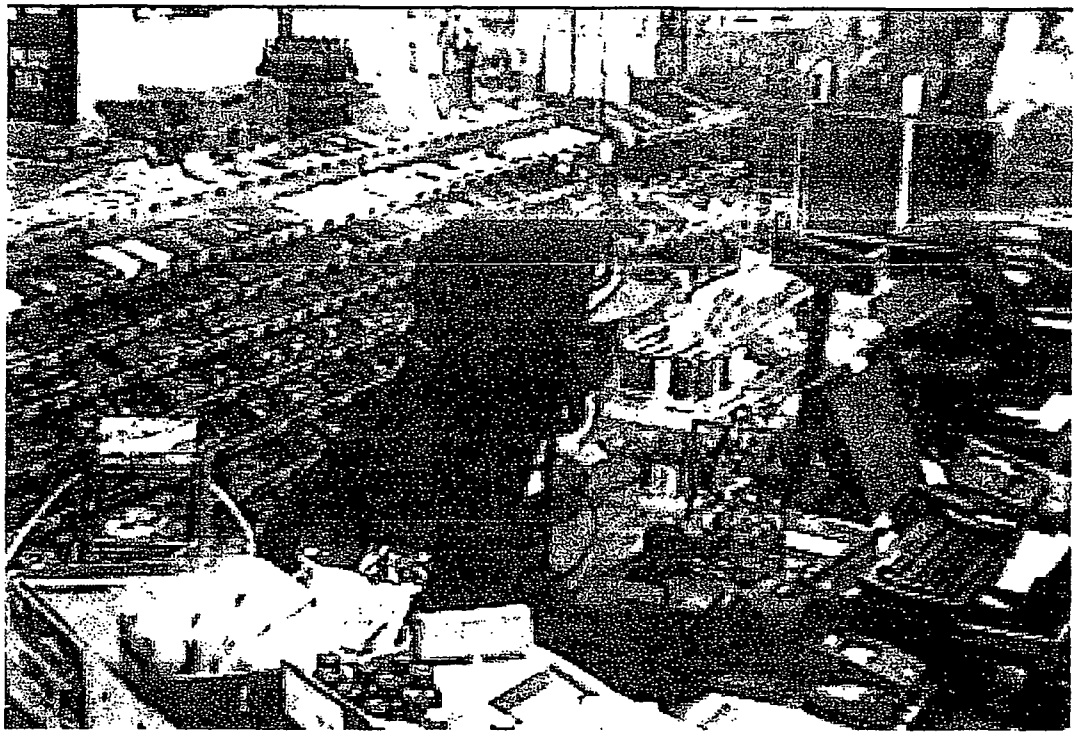

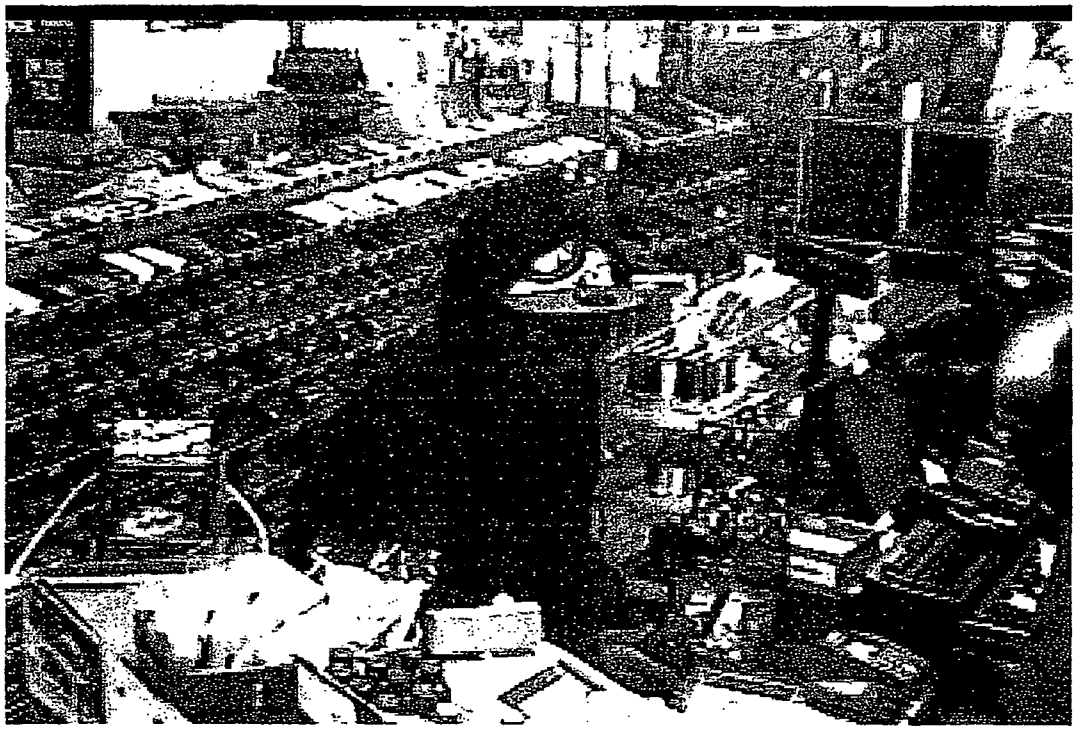

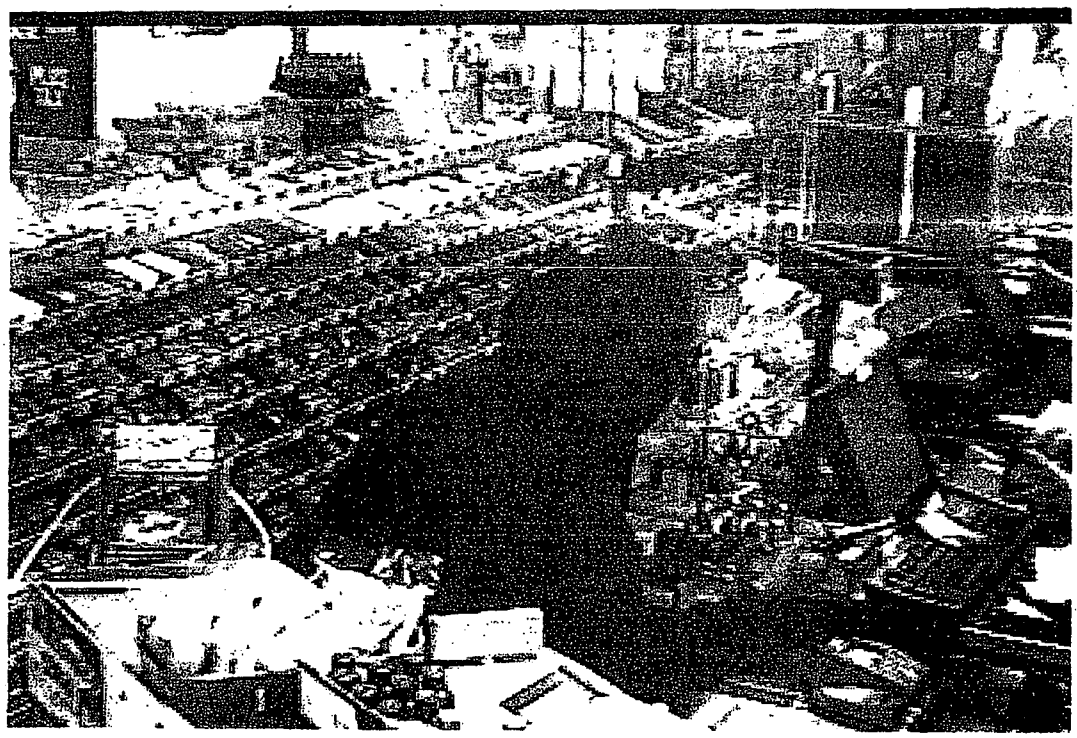

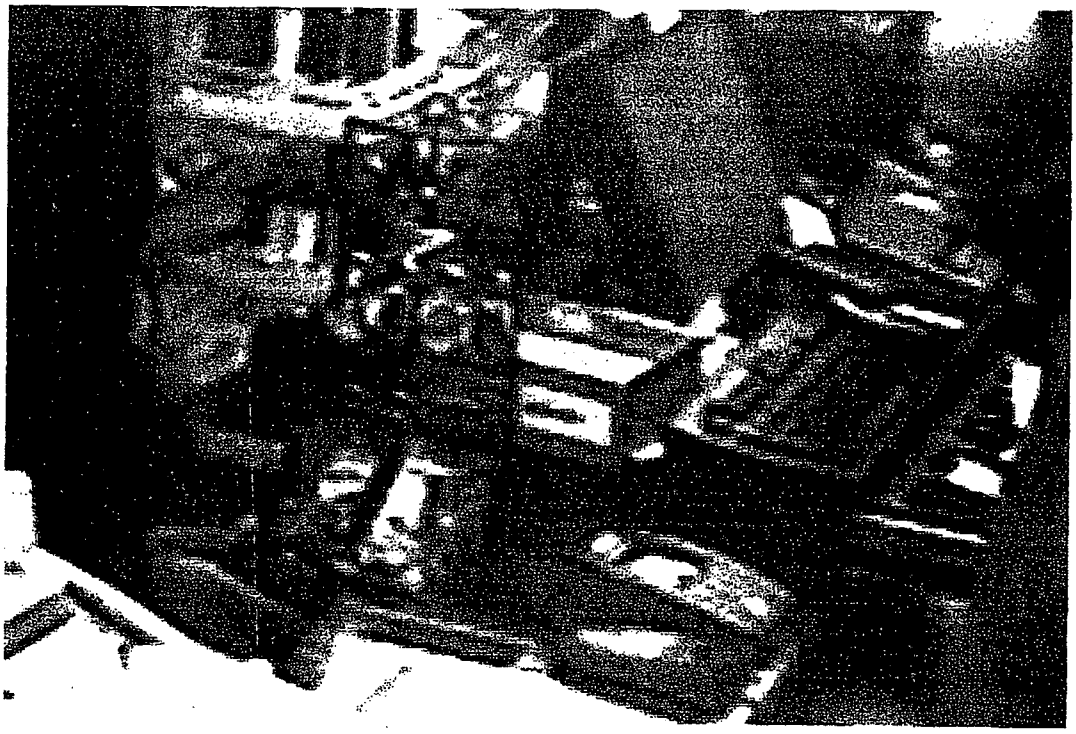

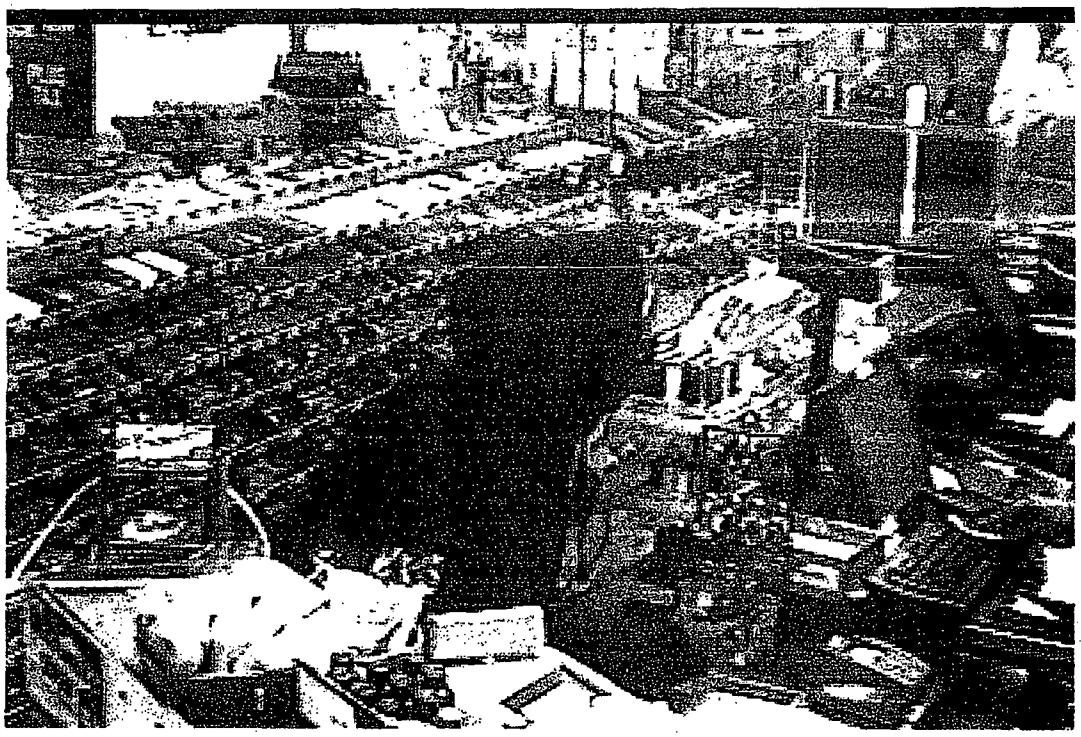

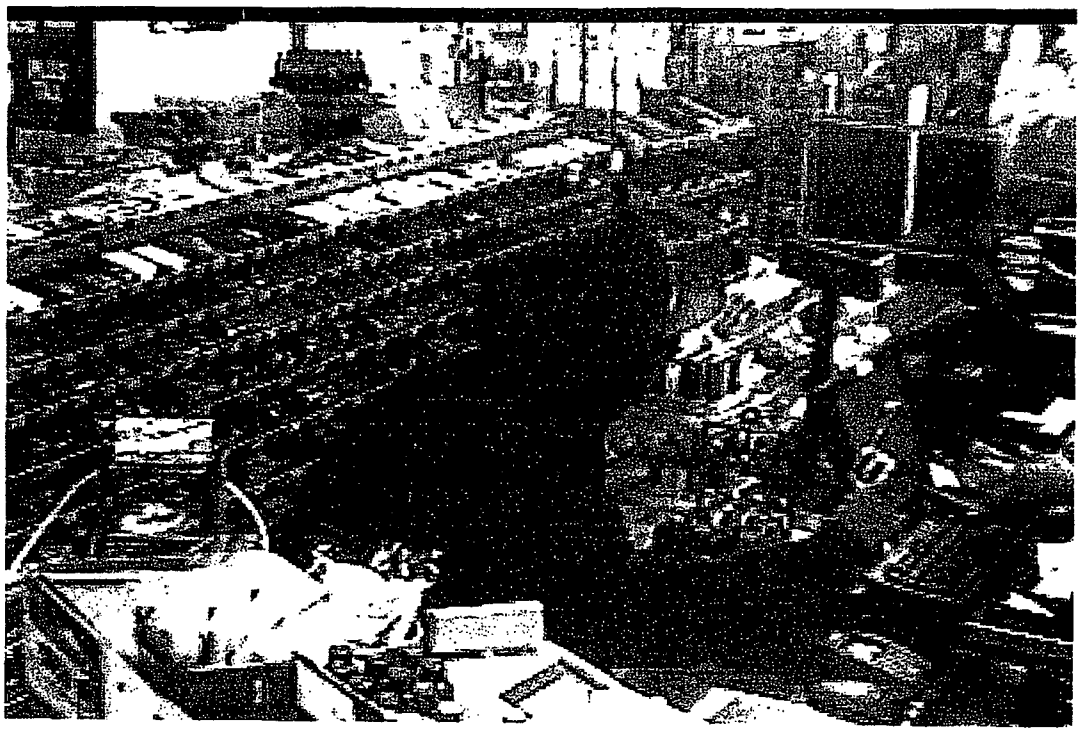

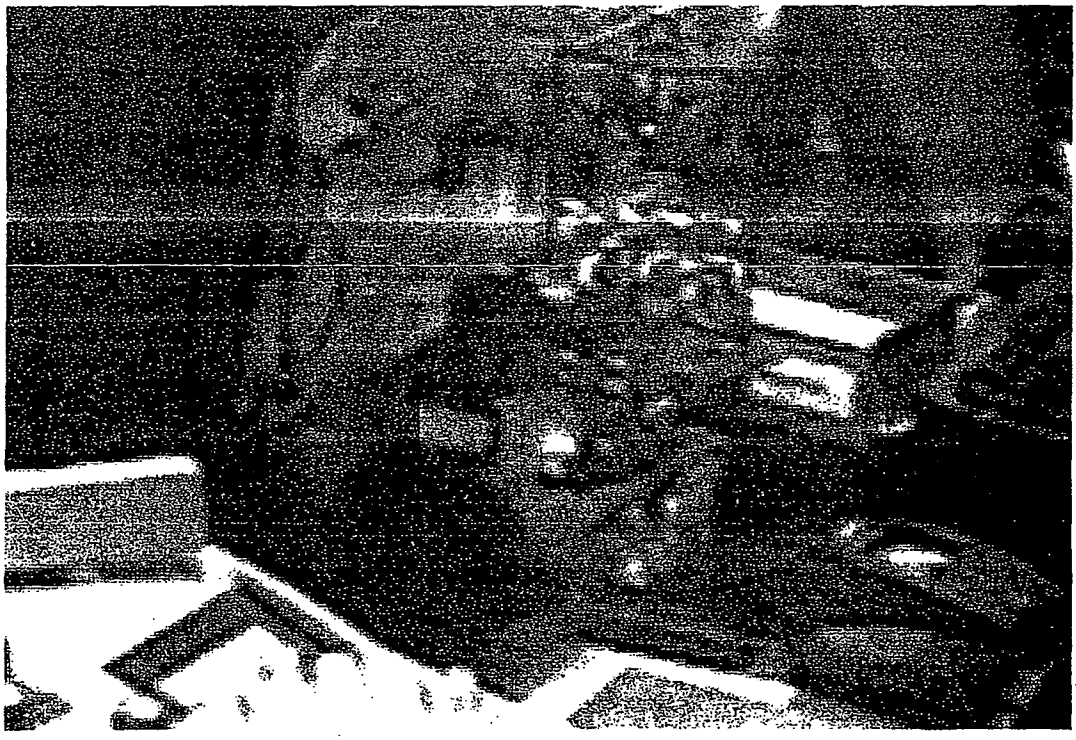

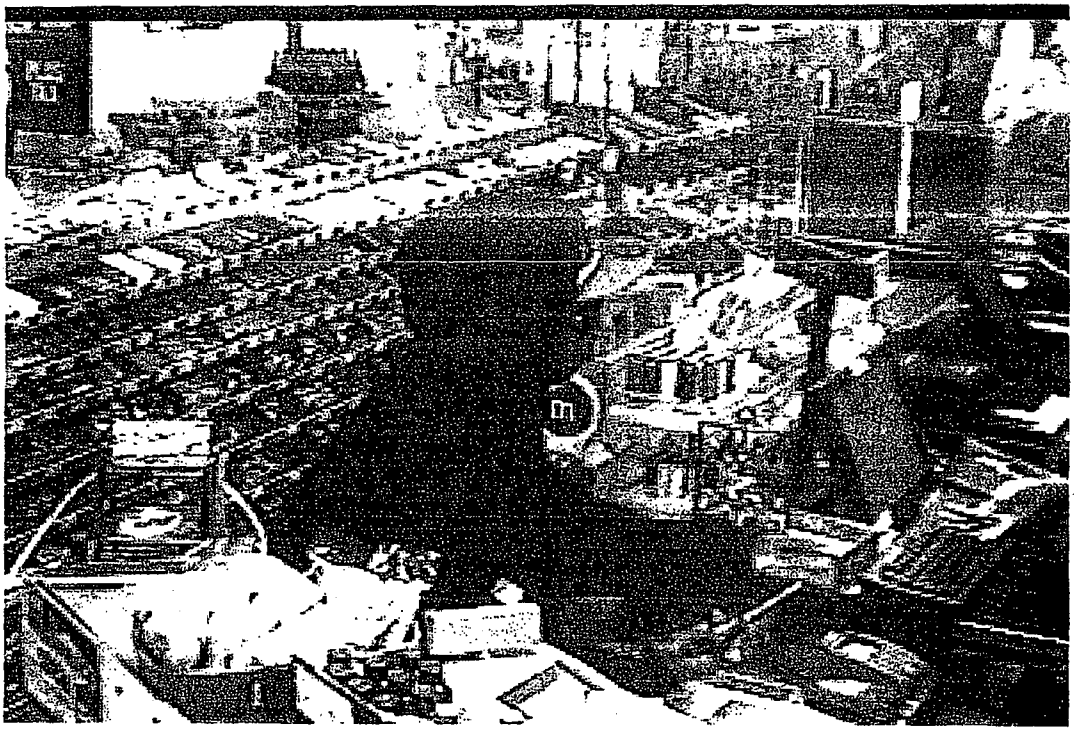

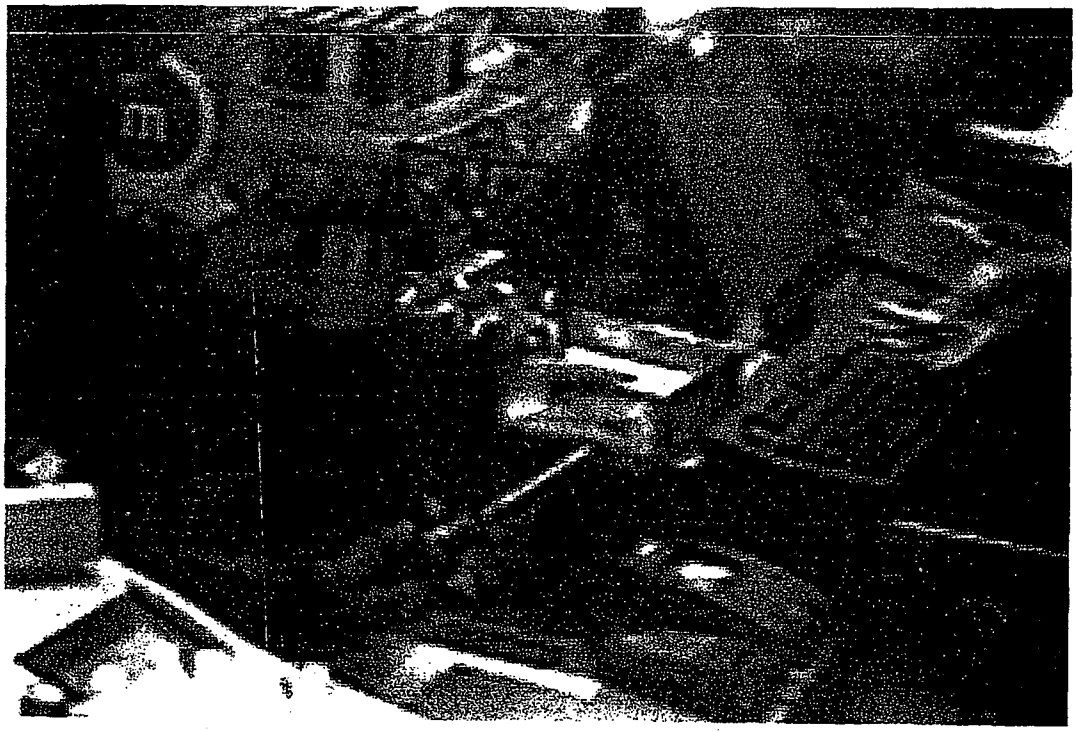

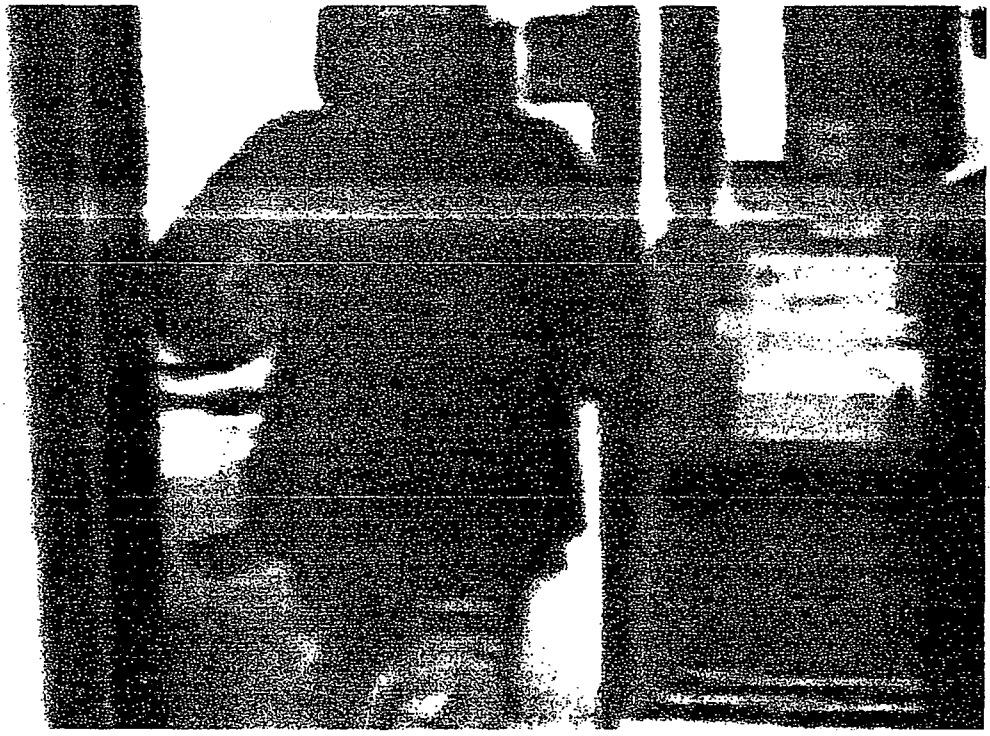

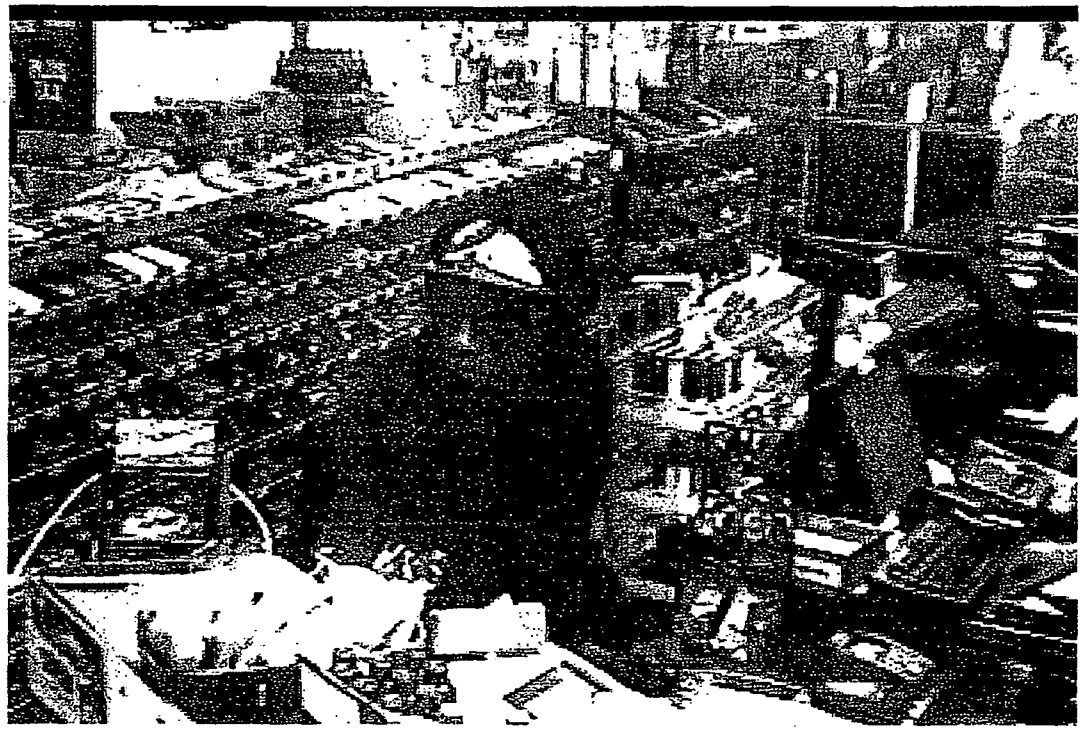

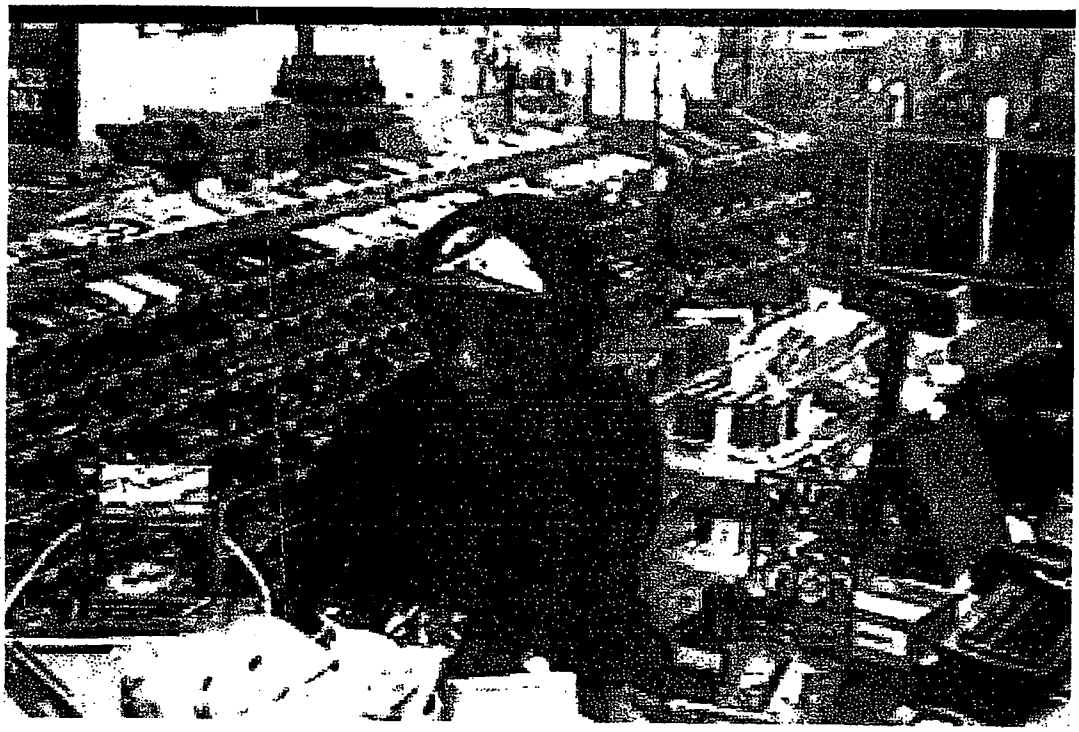

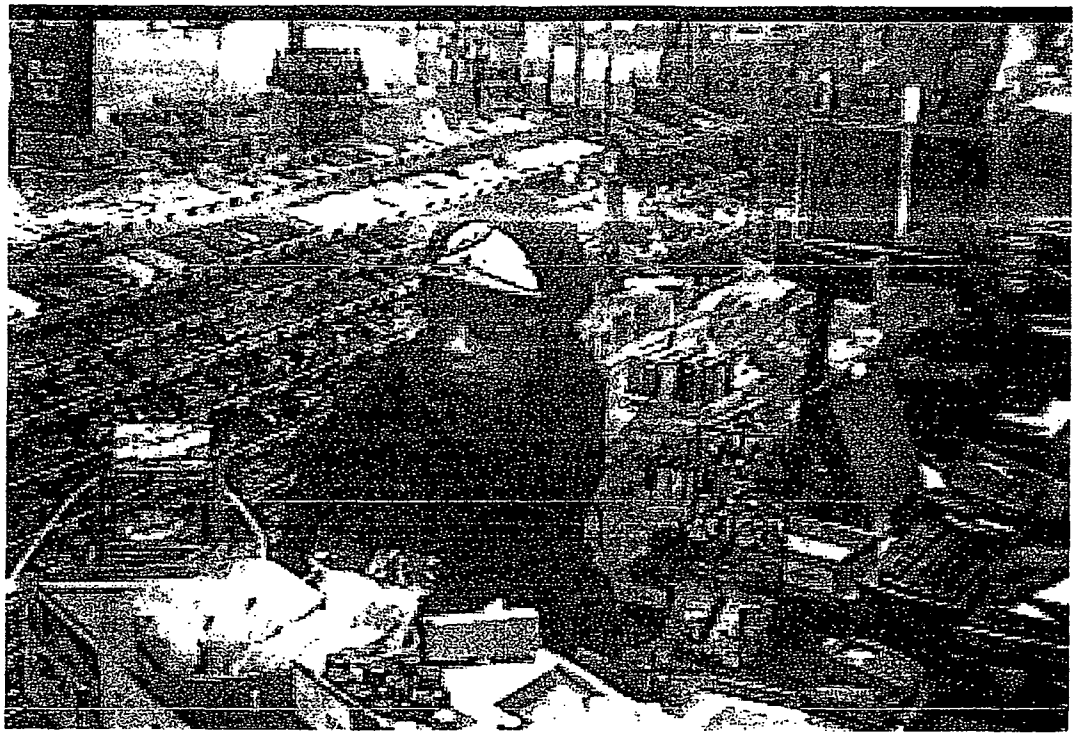

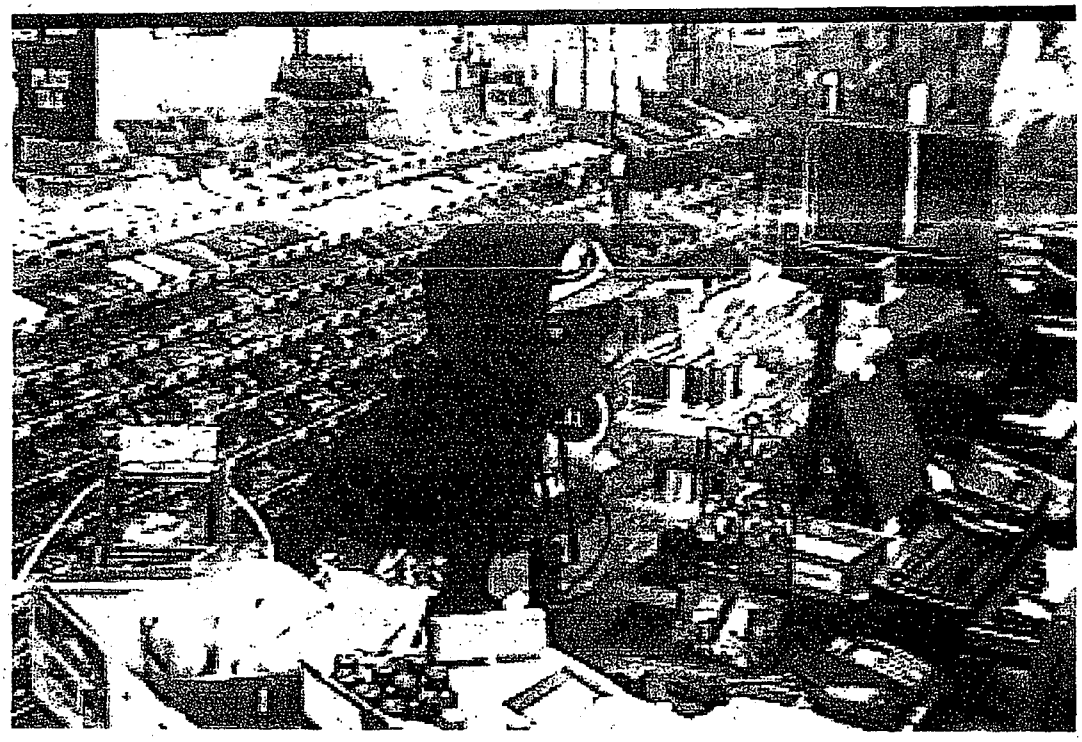

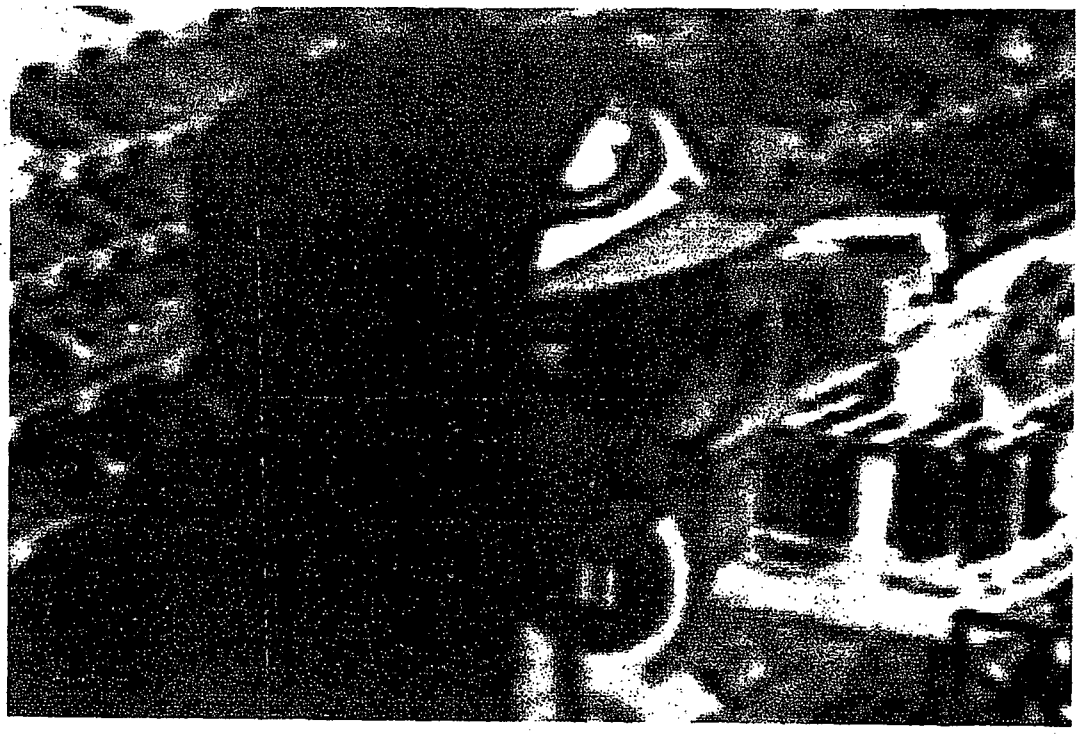

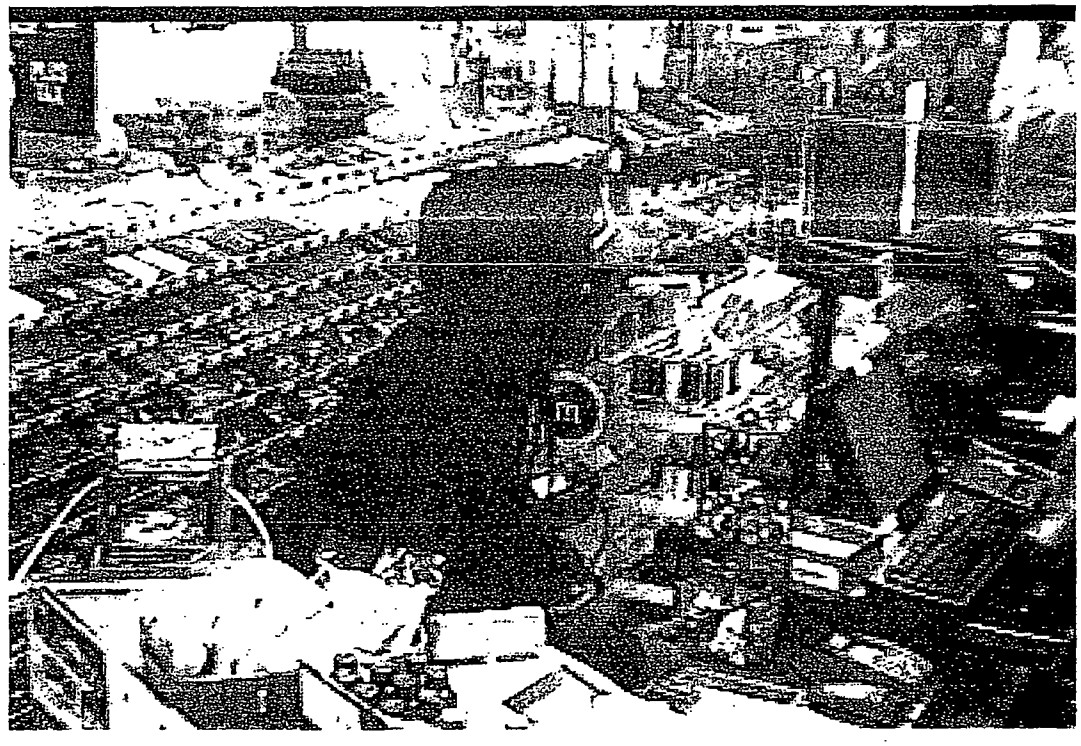

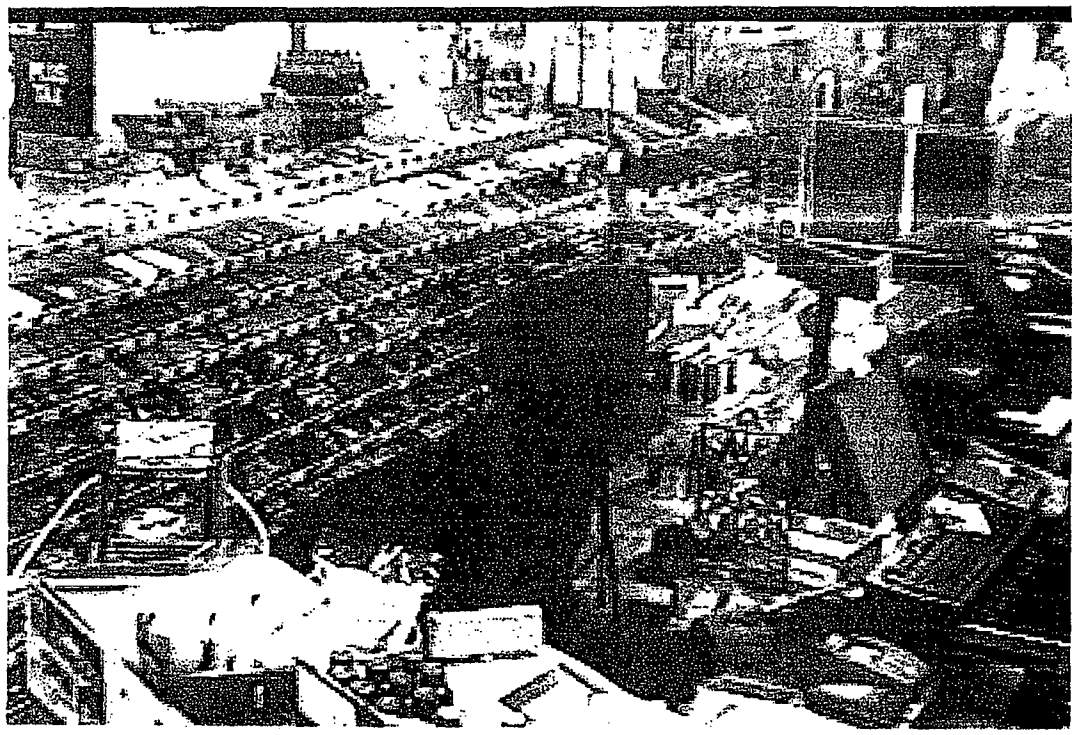

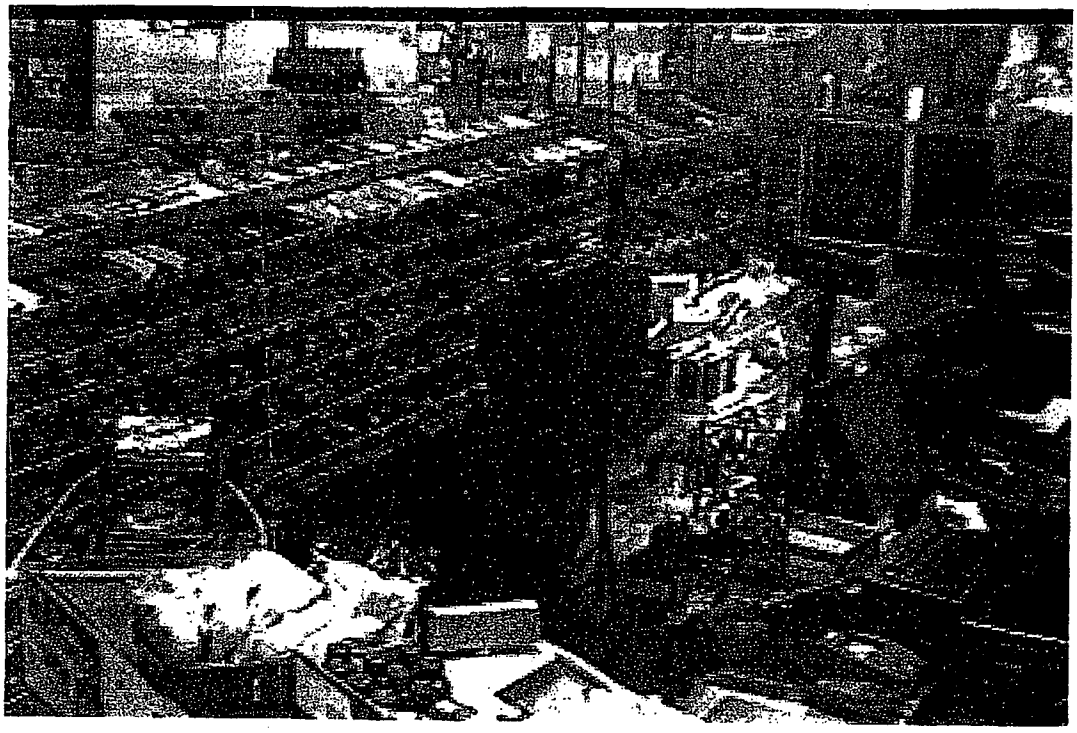

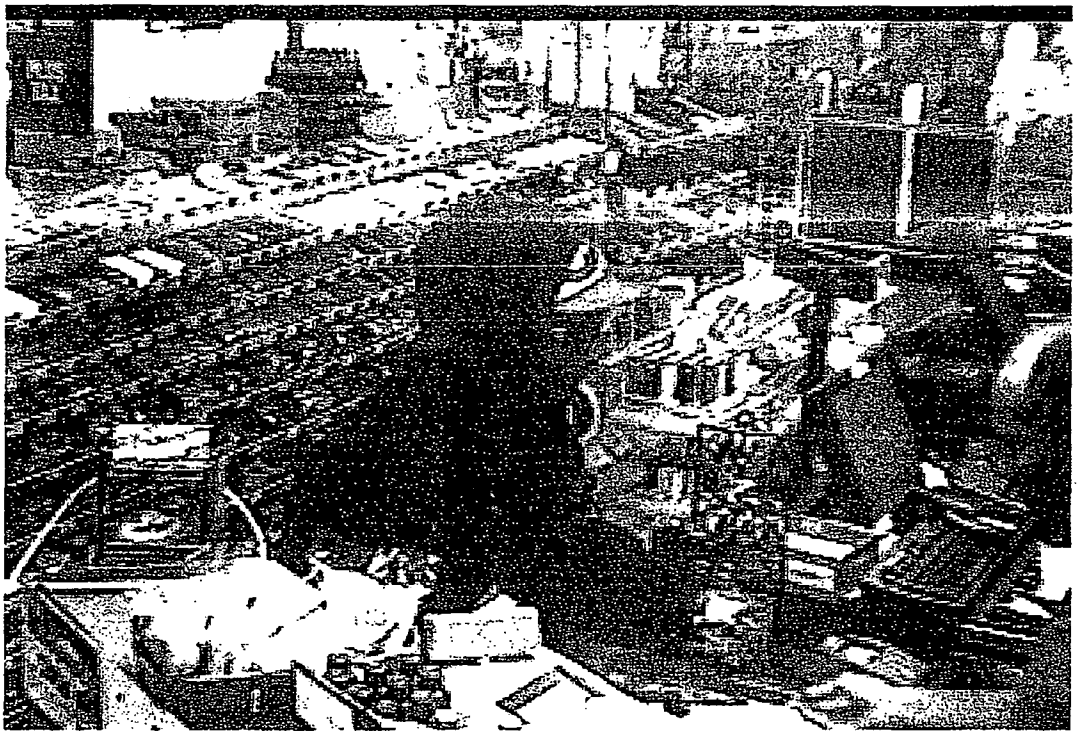

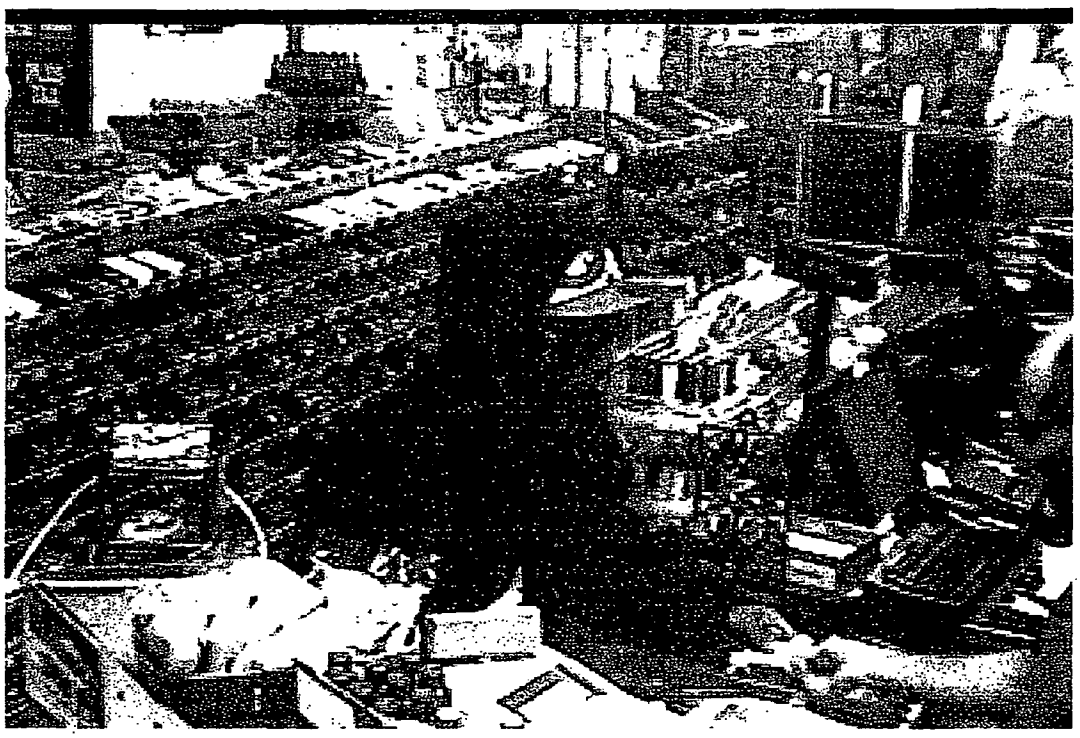

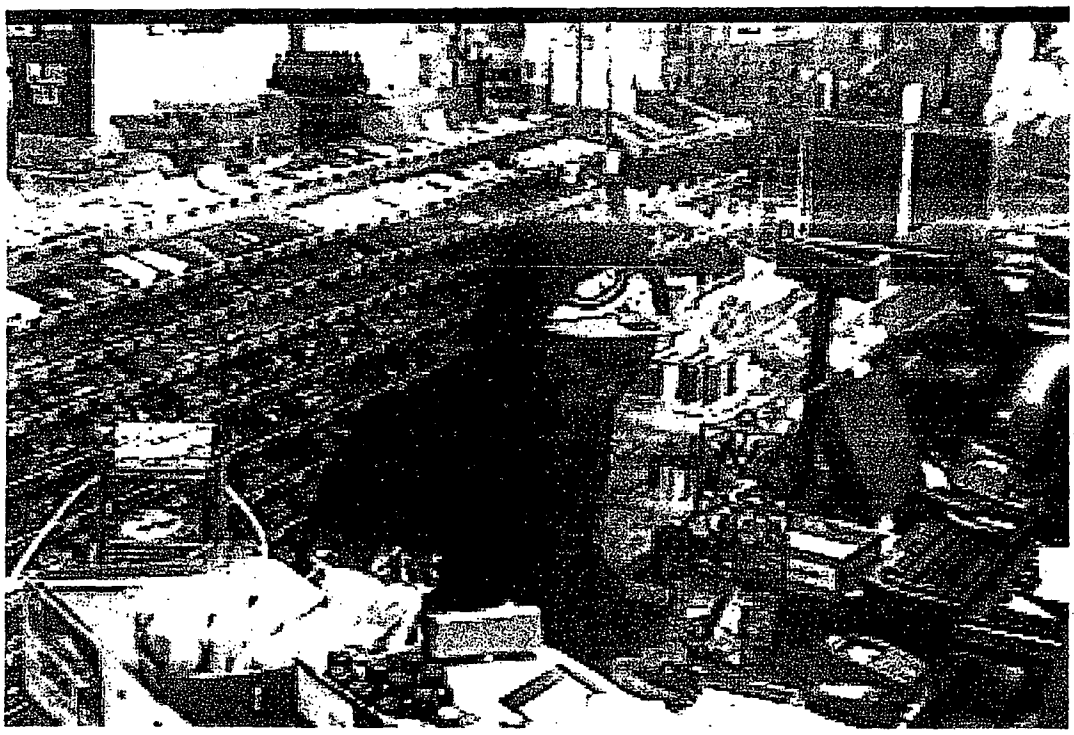

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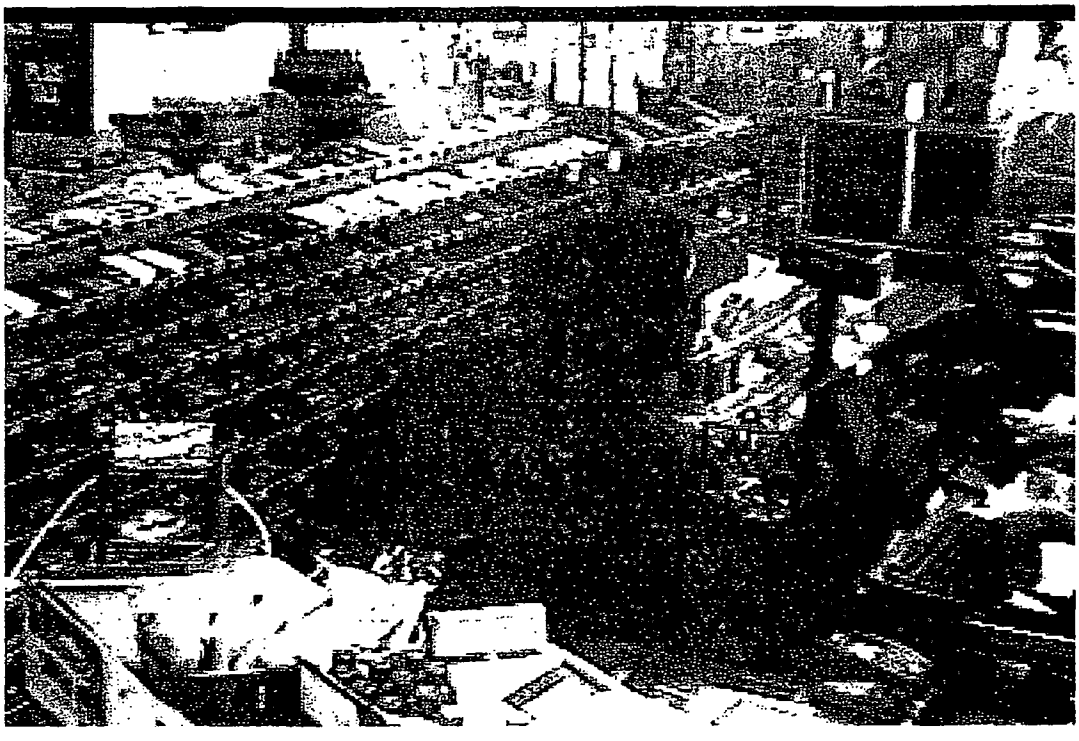

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA,	)	Indictment Nos.:
	)	
-vs-	)	
	)	
MARVIN BOWENS GREEN,	)	
	)	
Defendant.	)	

DEFENDANT'S REQUESTED JURY CHARGES

The Defendant, **Marvin Bowens Green**, by and through his undersigned attorneys, Cody Groeber and Andrew D. Grimes, respectfully moves the Court to charge the jury with the following instructions on the law based upon the testimony elicited during the trial and arguments of counsel.

Respectfully submitted,

Andrew Grimes

Cody Groeber
Andrew D. Grimes
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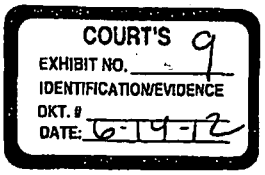
(843) 958-1850
ATTORNEYS FOR MARVIN BOWENS GREEN

Charleston, South Carolina

June 14, 2012



REQUEST TO CHARGE NUMBER ONE

An important question in this case is the identification of the defendant as the person who committed the crime. The prosecution has the burden of proving beyond a reasonable doubt that the crime was committed AND that the defendant was the person who committed the crime. If you are not convinced beyond a reasonable doubt that the defendant is the person who committed the crime, you must find the defendant not guilty.

The testimony you have heard concerning identification represents the witness's expression of (his) (her) belief or impression. You don't have to believe that the identification witness was lying or not sincere to find the defendant not guilty. It is enough that you conclude that the witness was mistaken in (his) (her) belief or impression.

Many factors affect the accuracy of identification. In considering whether the prosecution has proven beyond a reasonable doubt that the defendant is the person who committed the crime, you should consider the following:

(1) Did the witness have an adequate opportunity to observe the person who committed the crime? In answering this question, you should consider:

(a) the length of time the witness observed that person;

(b) the distance between the witness and that person;

(c) the extent to which that person's features were visible and undisguised;

(d) the lighting conditions at the time of observation;

(e) whether there were any distractions occurring during the observation;

(f) any other circumstance that affected the witness's opportunity to observe the person committing the crime.

(2) Did the witness have the capacity to observe the person committing the crime? In answering this question, you should consider whether the capacity of the witness was impaired by:

(a) stress or fright at the time of observation;

(b) personal motivations, biases or prejudices;

(c) uncorrected visual defects;

(d) fatigue or injury;

(e) *drugs or alcohol.*

3. You should also consider whether the witness is of a different race than the person identified. Identification by a person of a different race may be less reliable than identification by a person of the same race.

(4) Was the witness's identification of the defendant completely the product of the witness's own memory? In answering this question, you should consider:

(a) the length of time that passed between the witness's original observation and the time the witness identified the defendant;

(b) the witness's mental capacity and state of mind at the time of the identification;

(c) the exposure of the witness to opinions, to photographs, or to any other information or influence that may have affected the independence of the identification of the defendant by the witness;

(d) any instances when the witness either identified or failed to identify the defendant;

(e) any instances when the witness gave a description of the person that was either consistent or inconsistent with the defendant's appearance;

(f) the circumstances under which the defendant was presented to the witness for identification.

5. You may take into account that an identification made by picking the defendant from a group of similar individuals is generally more reliable than an identification made from the defendant being presented alone to the witness.

6. You may also take into account that identifications made from seeing the person are generally more reliable than identifications made from a photograph or a video recording.

7. A witness's level of confidence in (his) (her) identification of the perpetrator is one of many factors that you may consider in evaluating whether the witness correctly identified the perpetrator. However, a witness who is confident that (he) (she) correctly identified the perpetrator may be mistaken.

Again, I emphasize that it is the prosecution's burden to prove beyond a reasonable doubt that the defendant is the person who committed the crime.

Authority

State v. Guzman, 2006 UT 12, ¶¶15-23, 133 P.3d 363.
State v. Long, 721 P.2d 483, 487-95 (Utah 1986).
R. Sanders, Helping the Jury Evaluate Eyewitness Testimony: The Need for Additional Safeguards, 12 Am. J. Crim. L. 189, 222-24 (1984).

Request to Charge Number 2

In deciding this case you will need to decide how believable each witness was. Use your judgment and common sense. Let me suggest a few things to think about as you weigh each witness's testimony:

- ☐ How good was the witness's opportunity to see, hear, or otherwise observe what the witness testified about?
- ☐ Does the witness have something to gain or lose from this case?
- ☐ Does the witness have any connection to the people involved in this case?
- ☐ Does the witness have any reason to lie or slant the testimony?
- ☐ Was the witness's testimony consistent over time? If not, is there a good reason for the inconsistency? If the witness was inconsistent, was it about something important or unimportant?
- ☐ How believable was the witness's testimony in light of other evidence presented at trial?
- ☐ How believable was the witness's testimony in light of human experience?
- ☐ Was there anything about the way the witness testified that made the testimony more or less believable?

In deciding whether or not to believe a witness, you may also consider anything else you think is important.

You do not have to believe everything that a witness said. You may believe part and disbelieve the rest. On the other hand, if you are convinced that a witness lied, you may disbelieve anything the witness said. In other words, you may believe all, part, or none of a witness's testimony. You may believe many witnesses against one or one witness against many.

In deciding whether a witness testified truthfully, remember that no one's memory is perfect. Anyone can make an honest mistake. Honest people may remember the same event differently.

Authority

Utah Code Ann. § 78B-1-128.
United States v. McKissick, 204 F.3d 1282, 1289 (10th Cir. 2000).
Toma v. Utah Power & Light Co., 365 P.2d 788, 792-793 (Utah 1961).
State v. Shockley, 80 P. 865, 879 (1905).
75 Am. Jur.2d Trial § 819.

Request to Charge Number 3

You have heard the testimony of a law enforcement officer. The fact that a witness is employed in law enforcement does not mean that (his) (her) testimony deserves more or less consideration than that of any other witness. It is up to you to give any witness's testimony whatever weight you think it deserves.

Authority

Utah Code Ann. § 78B-1-128.
United States v. McKissick, 204 F.3d 1282, 1289 (10th Cir. 2000).
Toma v. Utah Power & Light Co., 365 P.2d 788, 792-793 (Utah 1961).
State v. Shockley, 80 P. 865, 879 (1905).
75 Am. Jur.2d Trial § 819.

Request to Charge No. 4

You may find from the evidence that a witness is interested in the outcome of this case because of his involvement in the arrest and his treatment of the Defendant. "If so, you should examine his testimony with care and caution in light of that interest. If, after doing so, you believe his testimony in whole or in part, you should treat what you believe the same as any other believable evidence."

North Carolina v. Black, 239 S.E.2d 276 (N.C. Ct. App. 1977) (reversing the trial court for failing to give North Carolina's standard charge on "scrutiniz[ing] the evidence of a paid detective and make proper allowances for the bias likely to exist in one having such an interest in the outcome of the prosecution.").

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA,	)	Indictment Nos.: 2011-GS-10-02338
	)	2011-GS-10-02339
-vs-	)	
	)	
MARVIN BOWENS GREEN,	)	
	)	
Defendant.	)	

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JULIE J. ARMSTRONG
CLERK OF COURT
BY MH

DEFENDANT'S MOTION TO VACATE SENTENCE

The Eighth Amendment forbids the imposition of "mandatory life without parole for those under the age of 18 at the time of their crimes." *Miller v. Alabama*, No. 10-9646 at 2 (June 25, 2012). *See also Graham v. Florida*, 130 S. Ct. 2011 (2010). In this case, the Court of General Sessions sentenced Marvin Green to a sentence of mandatory life without parole based solely upon his having been convicted of two most serious offenses under South Carolina law. *See* S.C. Code § 17-25-45. The court violated the Eighth Amendment when it imposed this sentence because Marvin was a 17 year old child at the time of his first strike.[1] Accordingly, the circuit court should vacate the sentence of mandatory life without parole and hold a hearing to resentence Marvin.

I. EIGHTH AMENDMENT

The Supreme Court has held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." *Miller v. Alabama*, No. 10-9646 at 16. Under South Carolina law at the time of the sentencing, South Carolina law mandated that Marvin "die in prison even if a judge or jury would have thought that

[1]For purposes of the Eighth Amendment and Equal Protection Clause discussion, the undersigned will assume that Marvin has a prior conviction for armed robbery.

his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life with the possibility of parole) more appropriate." *Id.* at 1. The sentencing scheme that was used by the circuit court in this case violated the Eighth Amendment because it does not allow the circuit court to consider any mitigating factor on Marvin's behalf, *see Miller v. Alabama*, and forbids the circuit court from following the established tradition of fashioning a sentence that fits the individual defendant. *See Peppers v. United States*, 131 S. Ct. 1229 (2011).

A. Categorical Challenge

A sentence of mandatory life without parole that is imposed on a twenty year old based upon his having a prior conviction for armed robbery is contrary to and is an unreasonable application of the Eighth Amendment. The sentence violates the established principles of penological policy based on the Eighth Amendment values recently outlined by the Supreme Court in *Miller v. Alabama* and *Graham v. Florida*, for the following reasons:

1. The circuit court failed to consider that Marvin Green "has a twice diminished moral culpability" because of his age and because he did not intend to kill Mr. Patel, *Graham*, 130 S. Ct. at 2027.
2. The circuit court ignored the reality of imposing a life sentence upon Marvin for an actions he committed while 17 and 19 years old, *Id.* at 2028 ("Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.").

3. The circuit court ignored well established law that there is no legitimate penological justification for sentencing a juvenile to prison until the juvenile dies, *Id.* at 2028 ("With respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate--retribution, deterrence, incapacitation, and rehabilitation provides an adequate justification.") (citation omitted).
4. The circuit court's reliance on Marvin's prior juvenile conviction to justify sending him to prison until he dies violates the Eighth Amendment because it allows the Court to do indirectly what it cannot do directly.

For these reasons, along with the reasoning in *Miller v. Alabama*, the circuit court should grant the motion to vacate the sentence and hold a resentencing hearing.

B. Proportional Challenge

The sentence of mandatory life without parole violates the Eighth Amendment because this extreme sentence is grossly disproportionate to the crime of armed robbery. A mandatory life sentence imposed upon a 20 year old for committing an armed robbery because of a crime that was convicted of that occurred when he was 17 is grossly disproportionate to his crime for the following reasons:

1. The normal sentencing range for armed robbery is 10-30 years;
2. Absent the prior conviction, Marvin's maximum exposure would have been 30 years;
3. Marvin would not die in prison but for the prior conviction that arose out of an incident that occurred when he was 17;
4. There was no battery during the incident
5. No one was physically injured during the instant incident;

6. There is no allegation that the gun was actually fired or discharged in any way;
7. The State never charged Marvin with any type of assault;
8. There is no evidence that Marvin ever actually intended to shoot Mr. Patel;
9. No one was physically hurt;
10. Marvin was not able to present any evidence that his father may have physically abused him;
11. Marvin was not able to offer evidence about his family background;
12. Marvin was not able to put forward other meaningful evidence to mitigate his conduct or to show why he did not deserve a life sentence.

II. EQUAL PROTECTION

The sentence of mandatory life without parole also violates the Equal Protection Clause of the Fourteenth Amendment because South Carolina treats 17 year old offenders differently than other states. The Eighth Amendment's prohibition on cruel and unusual punishment should not be influenced on diverse state laws. Thus, Marvin should not be treated differently because he lives in a state that treats 17 year olds as an adult rather than a state that may treat a 17 year old as a juvenile in family court.

Under our federal system, states may differ in their assessments of when crimes should be treated as having been committed by juveniles or adults. States generally make the distinction based on the perpetrator's age, with the distinction being made anywhere from age sixteen to age nineteen. *See* Samuel M. Davis, *Rights of Juveniles* § 2.1 (2d ed. 1980 & Supp. 1990). Decisions are made, however, to try some persons of juvenile age as adults, and persons of adult age as juveniles, in specified situations. *Id.* at §§ 2.8-2.10. These situations range from mandatory adult trials when juveniles are charged with certain offenses, *see* IND. CODE § 316-2-1.1(d) (1992)

(requiring adult trials for murder, kidnapping, rape, and aggravated robbery), to the exercise of guided discretion by a prosecutor. *See Wyo. Stat.* §§ 14-6-203(c) – (f), 14-6-237(b) (1986) (granting discretion for a prosecutor to try seventeen- to nineteen year-olds as either adults or juveniles).

On the other hand, our federal system does not allow the individual states to decide what is cruel and unusual punishment under the Eighth Amendment. Thus, the circuit court violated the Equal Protection Clause when it imposed a life sentence upon Marvin because Marvin's prior conviction may not have counted as a strike if he had lived in another state that kept his prior offense in family court.

III. Green Does Not Have a Prior Strike

The circuit court erred in concluding that Marvin had a prior, valid conviction for armed robbery. Under Supreme Court precedent, a criminal conviction becomes final when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *United States v. Johnson*, 457 U.S. 537, 542 n.8 (1982). *See also McDowell v. South Carolina Dep't of Social Services*, 300 S.C. 24, 386 S.E.2d 280 (Ct. App. 1989) (noting that the final disposition of a case occurs when the clerk of the appellate court returns the remittitur to the lower court for filing). In this case, there is no evidence that Green has exhausted his appeals or that the appellate court has returned the remitter to the clerk of court. Thus, the prior conviction relied upon by the court to impose a life sentence is not final. Accordingly, the sentence of mandatory life without parole should be vacated.

IV. Conclusion

For all of the foregoing reasons, the circuit court should grant the Defendant's motion, vacate the sentence, and hold a resentencing hearing.

Respectfully submitted,

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ATTORNEYS FOR MARVIN BOWENS GREEN

Charleston, South Carolina

June 25, 2012

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CLERK OF COURT
BY

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JULIE J. ARMSTRONG
CLERK OF COURT
BY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	Indictment No(s): 2011-GS-10-2338
STATE OF SOUTH CAROLINA	)	2011-GS-10-2339
	)	
v.	)	
	)	**ORDER REGARDING ALL POST-TRIAL MOTIONS**
	)	
MARVIN BOWENS GREEN	)	
	)	
Defendant.	)	
	)	

THIS MATTER IS BEFORE THE COURT upon the Defendant's Motion to Vacate Sentence and Motion for a Mistrial, both filed on June 25, 2012. For the reasons below, the Defendant's Motions are DENIED.

RELEVANT FACTS

Marvin Bowens Green (hereinafter "the Defendant") was born on June 29, 1991. He was indicted at the April 2011 term of the Charleston County Grand Jury for Armed Robbery (2011-GS-10-2338) and Possession of a Firearm During the Commission of a Violent Crime (2011-GS-10-2339). The incident took place on or about December 24, 2010, at the Sunoco convenience store located at 5737 Savannah Highway, Ravenel, South Carolina when the Defendant was nineteen years old. On June 14, 2012, the jury found the Defendant guilty on both charges, and he was sentenced to a mandatory sentence of life without parole pursuant to S.C. Code Ann. § 17-25-45 for armed robbery and five years for Possession of a Firearm During to Commission of a Violent Crime, to run concurrent to 2011-GS-10-2338.

The Defendant was previously indicted at the July 2009 term of the Charleston County Grand Jury for Armed Robbery (2009-GS-10-5376) that occurred at the Road Runner Gas Station located at 5221 Highway 165 in Hollywood, South Carolina on or about December 20,

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2008. At that time, the Defendant was seventeen years old. A jury found the Defendant guilty as indicted, and he was sentenced to a term of twenty years for this offense on June 24, 2011.

I. Motion to Vacate Sentence

ANALYSIS

A. Eighth Amendment

S.C. Code Ann. § 17-25-45(A)(1)(a) states that:

> [n]otwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a most serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has [ ] one or more prior convictions for a most serious offense. . . .

Pursuant S.C. Code Ann. § 17-25-45(C)(1), armed robbery, defined under S.C. Code Ann. § 16-11-330(A), is classified as a "most serious" offense. On June 14, 2012, this Court sentenced the Defendant to life without parole for armed robbery because he was convicted of two "most serious" offenses.[1]

In light of the United States Supreme Court's ruling in Miller v. Alabama, No. 10-9646 (U.S. June 25, 2012) (opinion written together with Jackson v. Hobbs, No. 10-9647 (U.S. June 25, 2012)), the Defendant argues that his mandatory sentence of life without parole violates the Eighth Amendment of the United States Constitution because he was seventeen, and therefore a juvenile, at the time of the first armed robbery. In both instances addressed in the Supreme Court's opinion in Miller, a fourteen-year-old was convicted of murder and sentenced to a mandatory term of life imprisonment without the possibility of parole. Id. at 1. In its ruling, the Court analyzed two "strands of precedent." Id. The first line resulted in Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183 (2005), holding that the Eighth Amendment bars capital punishment for

[1] As required by S.C. Code § 17-25-45(H), the Solicitor provided the Defendant and Defense Counsel with Notice of Intention to Seek a Sentence of Life Without Parole dated and filed on April 10, 2012.

7/31/12

children, and Graham v. Florida, 560 U.S. ___, 130 S.Ct. 2011 (2010), holding that the Eighth Amendment prohibits a sentence of life without parole for a juvenile convicted of a non-homicide offense. After Graham, which compared life without parole for juveniles to the death penalty, a second line of cases requiring sentencing authorities to consider the characteristics of a defendant and the details of his offense before sentencing him to death resulted. Miller, No. 10-9646 at 1. From its analysis, the Miller Court held that "the confluence of these two lines of precedent leads to the conclusion that mandatory life without parole for juveniles violates the Eighth Amendment." Id.

S.C. Code Ann. § 63-19-20(1) defines a child or juvenile as "a person less than seventeen years of age." The statute further limits the definition of a juvenile to someone under sixteen for certain felony charges, including a Class A, B, C, or D felony as defined in S.C. Code Ann. § 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more. S.C. Code Ann. § 63-19-20(1). The Defendant was seventeen years old on the date of the armed robbery that led to his first conviction, and thus, was not a juvenile by statutory definition. On June 24, 2011, the Defendant was found guilty of armed robbery, which resulted in his first "most serious" conviction for purposes of S.C. Code Ann. § 17-25-45.

On December 24, 2012, the date of the second armed robbery, the Defendant was nineteen years old. At the age of nineteen, he is not considered a juvenile under Miller. Although the Defendant's first armed robbery occurred when he was seventeen, he was tried as an adult and was convicted of this "most serious" offense. When applying Miller, this Court finds no alternative than to look to the Defendant's age at the time of the crime of his second armed robbery. Because the Defendant was not a juvenile at the time of his second armed robbery and received a prior "most serious" conviction, the Court has no other alternative but to

3 of 7

7/31/12

sentence the Defendant to mandatory life without parole pursuant to S.C. Code Ann. § 17-25-45. This Court finds that sentencing the Defendant under the mandatory life without parole sentence is not a violation of the Eighth Amendment. See Harmelin v. Michigan, 501 U.S. 957, 965, 996, 111 S.Ct. 2680, 2686, 2702 (1991) (holding that, "[t]he Eighth Amendment contains no proportionality guarantee" and "[w]e have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further").

B. Equal Protection Clause

Next, the Defendant argues that the mandatory life without parole sentence violates the Equal Protection Clause of the Fourteenth Amendment because South Carolina treats seventeen-year-old offenders differently than other states. More specifically, the Defendant states that the Eighth Amendment's prohibition on cruel and unusual punishment should not be influenced on diverse state laws, and the Defendant should not be treated differently because he lives in a state that treats seventeen-year-olds as an adult rather than a state that treats seventeen-year-olds as a juvenile in family court.

There is no legal basis to support the Defendant's argument of an Equal Protection Clause violation on the grounds that the Defendant's first offense may not have resulted in a "strike" if he had lived in another state. The Constitution does not require criminal punishments to be identical for the same crimes from state to state. States have the ability to make and carry out criminal laws that are in conformity with the United States Constitution. The Defendant does not and would not be able to claim that the laws of South Carolina applied to him do not apply evenly to all persons, regardless of race, gender, or age. Therefore, his argument under the Equal Protection Clause fails.

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C. Prior Strike

Lastly, the Defendant argues that this Court erred in finding that the Defendant has a prior, valid conviction for armed robbery because there is no evidence that the Defendant exhausted his appeal or that the appellate court has returned the remitter to the Clerk of Court. Quoting United States v. Johnson, 457 U.S. 537, 542 n.8, 102 S.Ct. 2579, 2583 (1982), the Defendant urges the Court to adopt the rule that for purposes of S.C. Code Ann. § 17-25-45, a criminal conviction becomes final when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." In Johnson, the Court applied the definition quoted above to determine whether the Defendant's state court conviction was final in the context of retroactive application of a Supreme Court decision construing the Fourth Amendment. Id. at 548, 102 S.Ct. at 2586. The Johnson Court held that the decision was to be retroactively applied to "all convictions that were not yet final at the time the decision was rendered." Id. at 562, 102 S.Ct. at 2594.

Under S.C. Code Ann. § 17-25-45(C)(3), "conviction" is defined as "any conviction, guilty plea, or plea of nolo contendere." In addition, in S.C. Code Ann. § 17-25-45(F), the legislature clarifies its intent by stating:

> For the purpose of determining a prior or previous conviction under this section and Section 17-25-50, a prior or previous conviction shall mean the defendant has been convicted of a most serious or serious offense, as may be applicable, on a separate occasion, prior to the instant adjudication. There is no requirement that the sentence for the prior or previous conviction must have been served or completed before a sentence of life without parole can be imposed under this section.

When applying S.C. Code Ann. § 17-25-45 to this case, this Court finds the Defendant was "convicted" of his first armed robbery charge on June 24, 2011. Furthermore, this Court finds that this conviction is entirely separate and distinct from the adjudication currently before it. Based upon the plain reading of the statute, the Defendant had a prior conviction of a "most

7/31/12

serious" offense. A sentence of life without parole for the Defendant's second "most serious" offense of armed robbery is therefore mandatory.

II. Motion for a Mistrial

At the close of the State's case and after the Defense rested, the Defendant made a Motion for Mistrial on the following grounds: the Court erred (1) when it found Vasantika Isadas was qualified to interpret during the trial; (2) in not suppressing the in court identifications made by Mr. Patel, Mrs. Patel, Deputy Luckadoo, and Detective Lawrence; (3) in not admitting a photograph of a young black male wearing dark sunglasses and a hat (Defense Exhibit # 7); (4) in not declaring a mistrial after a juror notified the Court after deliberations had begun that she has previously known the lead detective in the case; and (5) in not charging the Defendant's requested jury charges.

On June 25, 2012, the Defendant filed a Motion for Mistrial on each of the grounds stated above and on the additional ground that the assistant solicitor appealed to the emotions of the jurors in his closing arguments by highlighting the fact that the victim in the case was an immigrant and misrepresented a fact in evidence when he stated Detective Lawrence did not know that the Defendant was a customer in the store when he placed him in the lineup. The State filed a Reply to the Defendant's Motion for a Mistrial on June 28, 2012.

The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) (citing State v. Council, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999)). A mistrial should only be granted when absolutely necessary, and in order to receive a mistrial, the defendant must show error and resulting prejudice. Id.

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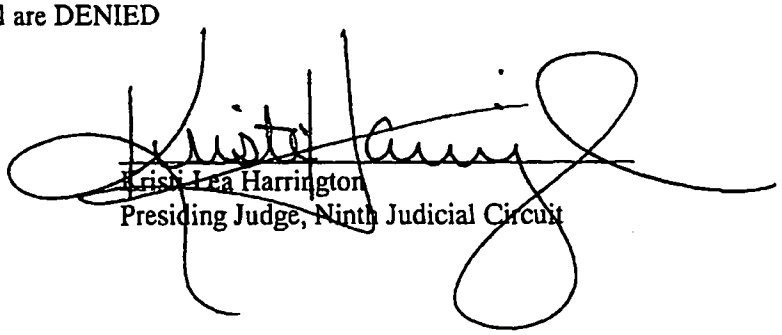
Each of the Defendant's grounds for a mistrial were addressed by the Court at the close of the State's case and after the Defense rested except for the ground that the assistant solicitor appealed to the emotions of the jurors in his closing argument. The Court finds that this argument was not properly raised contemporaneously with the statement made during the State's closing argument. Regarding the grounds for a mistrial made at the close of the State's case and after the Defense rested, the Court stands by its ruling for not granting a mistrial placed on the record. For all six grounds raised by the Defendant, the Court finds that no prejudicial error resulted.

CONCLUSION

For the reasons set forth above, this Court finds that the Defendant's Motion to Vacate Sentence and Motion for a Mistrial are DENIED

IT IS SO ORDERED.



Kristi Lea Harrington
Presiding Judge, Ninth Judicial Circuit

July 31, 2012
Charleston, South Carolina

FILED
2012 JUL 31 PM 3:11
JULIE J. ARMSTRONG
CLERK OF COURT
BY_____

410

FILED

2012 APR 10 AM 10:09

JULIE J. ARMSTRONG
CLERK OF COURT

BY _____

STATE OF SOUTH CAROLINA)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON)	INDICTMENT NO(S). 2011-GS-10-2338, 2339
STATE OF SOUTH CAROLINA)	
-versus-)	***NOTICE OF INTENTION TO SEEK A SENTENCE OF LIFE WITHOUT PAROLE***
MARVIN BOWENS GREEN)	Warrant No(s): K684608, K684609
Defendant.)	Charge(s): Armed Robbery, Possession of a Pistol During a Violent Crime

TO: MARVIN BOWENS GREEN, DEFENDANT, AND CODY GROEBER, ATTORNEY FOR THE DEFENDANT:

PLEASE TAKE NOTICE that the trial of the above-entitled action, to be scheduled on a date at least ten (10) days hence, of which you will be timely notified, the State will seek the Defendant to be sentenced to a term of imprisonment for life without the possibility of parole, pursuant to the South Carolina Code of Laws Section 17-25-45 (1995) as amended.

Rutledge DuRant – SC BAR 73944
Assistant Solicitor

Charleston, South Carolina

DATE: 3/27, 2012

FILED
2012 APR 10
JULIE J. ARMSTRONG
CLERK OF COURT
BY

STATE OF SOUTH CAROLINA	IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON	INDICTMENT NO(S). 2011-GS-10-2338, 2339
STATE OF SOUTH CAROLINA	***ACKNOWLEDGEMENT OF SERVICE***
-versus-	***NOTICE OF INTENTION TO SEEK A SENTENCE OF LIFE WITHOUT PAROLE***
MARVIN BOWENS GREEN	Warrant No(s): K684608, K684609
Defendant.	Charge(s): Armed Robbery, Possession of a Pistol During a Violent Crime

SERVICE OF THE Notice of Intention to Seek a Sentence of Imprisonment for Life without the Possibility of Parole acknowledged, and copies retained this 10th day of April, 2012.

Cody Greeber
Assistant Public Defender

Charleston, South Carolina

DATE: 4-10, 2012.

STATE OF SOUTH CAROLINA	IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON	INDICTMENT NO(S). 2011-GS-10-2338, 2339
STATE OF SOUTH CAROLINA	***ACKNOWLEDGEMENT OF SERVICE***
-versus-	***NOTICE OF INTENTION TO SEEK A SENTENCE OF LIFE WITHOUT PAROLE***
MARVIN BOWENS GREEN	Warrant No(s): K684608, K684609
Defendant.	Charge(s): Armed Robbery, Possession of a Pistol During a Violent Crime

FILED
2012 APR 10 AM 10:59
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

SERVICE OF THE Notice of Intention to Seek a Sentence of Imprisonment for Life without the Possibility of Parole acknowledged, and copies retained this 10th day of April, 2012.

Marvin Bowens Green
Defendant

Charleston, South Carolina

DATE: 4-10, 2012.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF
	)	GENERAL SESSIONS
COUNTY OF CHARLESTON	)	INDICTMENT NO(S). 2011-GS-10-2338,
	)	FILED
	)	2012 APR 10 AM 10:59
STATE OF SOUTH CAROLINA	)	JULIE J. ARMSTRONG
	)	CLERK OF COURT
	)	BY _____
-versus-	)	*AFFIDAVIT of SERVICE*
	)	
	)	
MARVIN BOWENS GREEN	)	Warrant No(s): K684608, K684609
	)	
	)	
	)	Charge(s): Armed Robbery, Possession of a
	)	Pistol During a Violent Crime
Defendant.	)	

MATT CASEY, being duly sworn, states that on April 10th, 2012, he delivered a Notice of Intention to Seek a Sentence of Life without Parole to one **MARVIN BOWENS GREEN, c/o Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010** as well as a copy to the attorney for the defendant, **CODY GROEBER, Assistant Public Defender, 101 Meeting Street, Suite 500, Charleston, South Carolina 29401.**

MATT CASEY
Chief Deputy Investigator, Charleston County Solicitor's Office

SWORN to and subscribed before me
this date of April 10, 2012
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: September 23, 2014

GRD20110100053

414

WITNESSES

LAWRENCE

Charleston County Sheriff

AGENCY CASE NUMBER

2010021305B

ARREST WARRANT NUMBER

K684608

DATE OF ARREST

December 30, 2010

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: APR 04 2011

VERDICT

Foreperson of Petit Jury *Date:*

INDICT.DOT

DOCKET NO. **2011GS1002338**

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

vs.

MARVIN BOWENS GREEN

[redacted]

B/M

Indictment for

Armed Robbery

FILED

4/15/2011 3:37:29 PM

JULIE J. ARMSTRONG

CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT

At a Court of General Sessions, convened on April 4, 2011 the Grand Jurors of Charleston County present upon their oath:

Armed Robbery

That on or about December 24, 2010, in Charleston County, South Carolina, at 5737 Savannah Highway, Charleston, South Carolina, by use of force, threats or intimidation and while armed with a deadly weapon, to wit: a .38 Colt revolver, serial #82846, the Defendant, MARVIN BOWENS GREEN, did take and carry away goods and/or monies from the person or immediate presence of Natubbai Patel with the intent to permanently deprive him of possession thereof, in violation of Section 16-11-330(A) of the South Carolina Code of Laws (1976) as amended.

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

G. RUTLEDGE DURANT
ASSISTANT SOLICITOR

416

STATE OF SOUTH CAROLINA)
COUNTY OF Charleston)
STATE VS.)
MARVIN BOWENS GREEN)
AKA:)
Race: BLACK Sex: M Age: 20)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
City,State,Zip: JACKSONBORO, SC 294520000)
DL#: [redacted] SID#: [redacted])
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS1002338
A/W#: K684608
Date of Offense: 12/30/2010
S.C. Code § : 16-11-0330(A)
CDR Code #: 0139

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☑ CONVICTED OF or ☐ PLEADS
TO: ARMED ROBBERY

in violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☒ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☑ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

DuRant G. Rutledge	73944			
	SC Bar#	Defendant	Attorney for Defendant	SC Bar#

WHEREFORE, the Defendant is commited to the ☑ State Department of Corrections, ☐ **County Detention Center,**
for a determinate term of Life Without the Possibility of Parole ~~days/months/years or~~ ☐ under the **Youthful Offender Act** not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☑ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2011-GS-10-2339
☑ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered**
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$ 5.00
3% to County (if paid in installments)		$ 3.90
TOTAL		$ 133.90

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

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

Clerk of Court/ Deputy Clerk Callah
Court Reporter: Sharon Vizzo-Hanks
Presiding Judge
Judge Code: 2151
Sentence Date: 6/14/12

SCCA/217 (03/2011)

GRD20110100053

WITNESSES

LAWRENCE
Charleston County Sheriff

AGENCY CASE NUMBER

2010021305B

ARREST WARRANT NUMBER

K684609

DATE OF ARREST

December 30, 2010

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: APR 04 2011

VERDICT

Foreperson of Petit Jury *Date:*

INDICT.DOT

DOCKET NO. **2011GS1002339**

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

vs.

MARVIN BOWENS GREEN
[redacted]
B/M

Indictment for

Possession Of A Firearm During The Commission Of A Violent Crime

FILED
4/15/2011 3:37:29 PM
JULIE J. ARMSTRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT

At a Court of General Sessions, convened on April 4, 2011 the Grand Jurors of Charleston County present upon their oath:

Possession Of A Firearm During The Commission Of A Violent Crime

That in Charleston County, South Carolina, on or about December 24, 2010, the Defendant, MARVIN BOWENS GREEN, did possess a .38 Colt revolver, serial #82846 or visibly display what appeared to be a firearm during the commission, or attempted commission, of Armed Robbery, a violent crime. This is in violation of 16-23-490 of the South Carolina Code of Laws, (1976) as amended.

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

G. RUTLEDGE DURANT
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF Charleston)
STATE VS.)
MARVIN BOWENS GREEN)
AKA:)
Race: BLACK Sex: M Age: 20)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
City,State,Zip: JACKSONBORO, SC 294520000)
DL#: [redacted] SID#: [redacted])
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS1002339
A/W#: K684609
Date of Offense: 12/30/2010
S.C. Code § : 16-23-0490
CDR Code #: 0549

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☑ CONVICTED OF or ☒ PLEADS
TO: POSS OF WEAPON DURING CRIME

in violation of § 16-23-0490 of the S.C. Code of Laws, bearing CDR Code # 0549
☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

DuRant, G. Rutledge	73944	Defendant	Attorney for Defendant	SC Bar#

WHEREFORE, the Defendant is commited to the ☑ **State Department of Corrections,** ☐ **County Detention Center,**
for a determinate term of 5 ~~days/months~~/years or ☐ under the **Youthful Offender Act** not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☑ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2011-GS-10-2338
☑ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
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§ 56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$ 5.00
3% to County (if paid in installments)		$ 3.90
TOTAL		$ 133.90

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

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

Clerk of Court/ Deputy Clerk Called
Court Reporter: Sharon Vizek-Henk
Presiding Judge
Judge Code 215
Sentence Date: 6/14/12

SCCA/217 (03/2011)

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 12th, 2014

Susan B Hackett

Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARVIN BOWENS GREEN,

APPELLANT

APPELLATE CASE NO. 2012-212739

SUPPLEMENTAL RECORD ON APPEAL

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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(803) 734-3727

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

101 Meeting Street
Charleston, SC 29401
(843) 958-1900

ATTORNEYS FOR RESPONDENT

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PAGE 441 FROM TRIAL TRANSCRIPT DATED JUNE 11 & 12, 2012 4

CERTIFICATE OF COUNSEL 5

regular customers at your store?

A. Yes.

Q. I want to take you back to December 24th, 2010. Do you recall going to the store that morning?

A. Yes. After my husband had called I had gone there.

Q. Why did you go to the store that morning?

A. My husband had called to tell us about a robbery taking place at the store, so me and my older son went to the store.

Q. Is that Dhruval?

A. Yes.

Q. Did you go to the store?

A. Yes.

Q. Is your store equipped with video surveillance?

A. Yes.

Q. Was there a video of the incident that your husband told you about?

A. Yes.

Q. Did you view the video?

A. Yes.

Q. Who were you with when you viewed the video?

A. My son and the police.

Q. Did you recognize the man in the video?

A. Yes.

Q. How did you recognize the man in the video?

A. He used to come regularly at my store. That's why I recognized him.

Q. Before this date, December 24th, how regularly did he come to the store?

A. About a month ago I had seen him.

Q. About a month ago before this incident was the last time you saw him?

A. Something like that.

Q. How long before this incident had he been coming to the store?

A. At least once a day.

Q. For how long, months or years?

A. I don't remember very clearly but around six months or so.

Q. So just to be clear, do you remember the man as having come to your store for approximately six months before December 24th, 2010?

A. Yes.

Q. And during that six months approximately how many times a week would he come to the store?

A. Almost on a daily basis. I don't remember very clearly but he would be very regular.

Q. Do you recall if he would purchase anything at the store?

A. Newport cigarettes, ten-dollar tickets, and gas.

A. Yes.
Q. Did your husband tell you to tell the Court that this was y'all's regular customer?
A. He didn't tell me anything like that.
Q. Did your husband influence you in any way to make you think that this was your regular customer?
A. I know this on my own.
Q. And that is even though you watched the video with your husband?
A. Me and my husband both knew that he was a regular customer.
Q. Did you and your husband both know that he was a regular customer independently of each other?
A. When we saw the video we talked and we finally realized that this is that same regular customer.
Q. So did it take you any length of time to come to that understanding?
A. As soon as I saw the video I knew it.
Q. Do you see the man who was your regular customer in this courtroom today?
A. Yes.
Q. Do you see the same man who was your regular customer and who you recognized on the video in this courtroom today?
A. Yes.

Q. If you would, point to him and describe what he is wearing.

A. (Indicated) a white shirt and tie.

MR. RUTLEDGE DURANT: Let the record reflect that the witness has identified the defendant.

THE COURT: It will for the purposes of this hearing.

MR. RUTLEDGE DURANT: Thank you, Your Honor.

BY MR. RUTLEDGE DURANT:

(Through the interpreter.)

Q. Is there any doubt in your mind that this man sitting right here was your regular customer?

A. He is the man.

Q. Is there any doubt in your mind that this is the man that you saw on the video?

A. He the man.

Q. Are you certain?

A. Yes.

MR. RUTLEDGE DURANT: Thank you.

THE COURT: Mr. Groeber?

MR. GROEBER: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. GROEBER:

(Through the interpreter.)

Q. Morning, Mrs. Patel.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 25, 2014

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARVIN BOWENS GREEN,

APPELLANT

Appellate Case No. 2012-212739

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Violating Appellant's Sixth Amendment right to a fair trial, the trial judge erred in failing to provide the jury with specific instructions concerning how to analyze the evidence presented concerning the identification of Appellant as the perpetrator, including expert testimony on the subject, significant language barriers between the police officers and the eyewitness who participated in the photographic line-up, and the use of surveillance video to make an identification.

II. The trial judge erred in allowing the prosecution to introduce Appellant's mug shot where no demonstrable need of the mug shot was established, the mug shot was unnecessary and cumulative to the prosecution's case, and the mug shot prejudiced Appellant by suggesting to the jury that Appellant had a prior criminal record.

III. Violating the Eighth Amendment's ban on cruel and unusual punishment, the trial court erred in sentencing Appellant to life imprisonment without the possibility of parole pursuant to the state's recidivist statute because Appellant's prior conviction was committed when he was seventeen-years old.

STATEMENT OF THE CASE

On April 4, 2011, a Charleston County grand jury indicated Appellant for armed robbery (2011-GS-10-2338) and possession of a firearm during the commission of a violent crime (2011-GS-10-2339). R. 414 (Indictments). The state, represented by Bruce Durant and Rutledge Durant, called the case for trial before the Honorable Kristi L. Harrington and a jury on June 11, 2012. Andrew Grimes and Cody Groeber represented Appellant. R. 1. The jury found Appellant guilty as charged. R. 343, line 20 – R. 344, line 9. Judge Harrington sentenced Appellant to life imprisonment without the possibility of parole (LWOP) pursuant to the recidivist statute concerning the armed robbery conviction and to five years' imprisonment concerning the firearm charge. R. 351, lines 15-23; R. 416 (sentence sheet).

After the trial, on June 25, 2012, Appellant filed a motion to vacate his sentence. R. 397 (motion to vacate). By order filed July 31, 2012, Judge Harrington denied Appellant's motion. R. 403 (Order).

Appellant filed a timely notice of appeal. This brief follows.

ARGUMENT

I. Violating Appellant's Sixth Amendment right to a fair trial, the trial judge erred in failing to provide the jury with specific instructions concerning how to analyze the evidence presented concerning the identification of Appellant as the perpetrator, including expert testimony on the subject, significant language barriers between the police officers and the eyewitness who participated in the photographic line-up, and the use of surveillance video to make an identification.

Relevant facts

The state's entire case rested upon identifications of Appellant as the robber of a gas station made by one eyewitness and three witnesses of a surveillance video. Natubhai Patel, the owner of the gas station, testified that at 7:45 a.m. on December 24, 2010, a man, wearing sunglasses and a hat, entered the store with a gun. R. 7, lines 10-20. The man robbed the store of a small amount of money and a pack of cigarettes. R. 9, lines 7-16. Natubhai identified Appellant as the robber. He claimed he knew Appellant as a customer of the store. In fact, he claimed Appellant was in the store three times per week over the previous year. R. 7, line 24 – R. 8, line 25. While Appellant was his customer, Natubhai engaged in some small talk with him – primarily consisting of a shared joke regarding President Barack Obama having signed Appellant's identification. R. 8, lines 6-8. After the robbery, Natubhai contacted law enforcement, and then his wife. R. 9, lines 17-18; R. 13, lines 1-2. Natubhai, along with his wife and son, watched the surveillance video with police. R. 9, lines 19-25.

On December 29, 2010, Natubhai 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.[1] Natubhai identified Appellant's photograph from the line-up. R. 15, lines 23 – 25; R. 75, lines 1-8.

Natubhai was approximately two feet from the individual in the well-lit store. R. 20, lines 9-14. Despite the individual's wearing of sunglasses, Natubhai claimed he could see the individual's face clearly. R. 21, lines 2-5. Natubhai also claimed that 80% of his customers were African-American. R. 21, lines 12 – 14. He admitted that he was scared when the gun was pointed at him. R. 23, line 22 – R. 24, line 3; R. 25, lines 23 – 25. Additionally, he admitted the robber was wearing a hat but claimed it was pushed slightly back. Although he recalled the jacket having a hood attached, he could not recall whether the perpetrator wore the attached hood as well. R. 24, lines 4 – 19. Natubhai admitted 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.

Dustin Luckadoo, a Charleston County Sheriff's Office employee, responded to the scene of the alleged armed robbery shortly after 8 o'clock in the morning. R. 43, lines 6 – 13; R. 44, lines 1 – 10. Luckadoo then reviewed the surveillance video. At trial, Luckadoo claimed he recognized the suspect. R. 50, lines 10 -25. Luckadoo claimed the suspect was "Marvin Bowens." R. 51, lines 1 -2. Luckadoo then identified the perpetrator in the video as Appellant. R. 51, line 24 – R. 52, line 5. Similarly, Charles

[1] 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 Dhurval 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.

Lawrence, the investigator assigned to the case, testified that he identified the perpetrator in the videos Appellant. R. 67, line 24 – R. 68, line 15. Finally, Jagruti Patel, the wife of Natubhai, testified that she also worked at the store regularly and identified Appellant as the perpetrator in the videotape. Supp. R. 1, line 16 – Supp. R. 2, line 1; Supp. R. 3, line 22 – Supp. R. 4, line 5.

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 (Court's Exhibit #9). The instruction entitled "Request to Charge Number One" concerned eyewitness identification. Specifically, the proposed instruction 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 (Court's exhibit # 9).

Despite these relevant and informative requests, the judge refused to charge the jury as Appellant sought. Instead, the judge issued her "standard identification charge." R. 290, lines 20-23.

Specifically, the judge instructed the jury in very limited boiler-plate fashion as follows concerning how to evaluate identifications made by eyewitnesses and other witnesses:

> An issue in this case is the identification of the defendant as the person who committed the crime charged. The state had 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 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.

R. 330, lines 5-22.

At the conclusion of the instructions, Appellant renewed his requests to charge. Appellant explained how the proposed charges guided the jury's evaluation of the identifications made in the case, particularly in light of the multiple identifications having been made, only one of which was by an eyewitness, and a disguise hiding key features. The proposed charges also related to the jury its ability to consider whether the witness was distracted and experienced "weapon focus." The charge allowed the jury to consider whether the witnesses had the requisite ability to identify a member of a different race. The charges allowed the jury to consider the length of time between exposure and identification and the exposure of the witnesses to opinions of others during the interval. R. 335, line 23 – R. 342, line 9.

Discussion

Due Process requires the prosecution prove every element of the charged offense beyond a reasonable doubt – including the element that the defendant is the actual perpetrator. In re Winship, 397 U.S. 358 (1970); Todd v. State, 355 S.C. 396, 400, 585 S.E.2d 305, 307 (2003); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); State v. Lane, 406 S.C. 118, 749 S.E.2d 165 (Ct. App. 2013). Therefore, a trial court must instruct the jury to ensure the jury's verdict is based upon the evidence presented. 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).

"The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "If there is any evidence to support a jury charge, the trial judge should grant the requested charge. The

refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006). The South Carolina Supreme Court addressed jury instructions concerning witness identifications in State v. Motes, 264 S.C. 317, 215 S.E.2d 190 (1975). The Court held that the trial judge's failure to provide the model instruction[2] concerning identification was not error where two witnesses identified the defendant as the perpetrator of the crime. Id. at 326, 215 S.E.2d at 194. Nevertheless, the Court explained its holding was based upon the fact that the trial court's instructions adequately focused the attention of the jury on the necessity of finding that the testimony identified the defendant as the perpetrator beyond a reasonable doubt in order to convict. Additionally, the Court noted the identification presented "no peculiar problem." Id.

Although the Supreme Court found no error in a trial court's instructions to the jury on the issue of identification where the judge instructed the jury that the defendant had asserted an alibi claiming she was not at the scene of the crime, the court "admonish[ed] the trial bench that in single witness identification cases the court should instruct the jury that the burden of proving the identity of the defendant rests with the state." State v. Simmons, 308 S.C. 80, 83-84, 417 S.E.2d 92, 94 (1992).

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[2] In the United States v. Telfaire, 469 F.2d 552, 555 (D.C. Cir.1972), the Court of Appeals for the District of Columbia explained that the presumption of innocence "must be a premise that is realized in instruction and not merely a promise." Thus, the judicial system required "special instruction on the key issue of identification, which emphasize[d] to the jury the need for finding that the circumstances of the identification are convincing beyond a reasonable doubt." Id. As a result of the concerns attendant to criminal prosecutions based upon witness identifications, the Court issued a model jury instruction. Id. at 558-559.

In State v. Whaley, 305 S.C. 138, 142, 406 S.E.2d 369, 371 – 372 (1991), the South Carolina Supreme Court held that expert testimony concerning eyewitness identification was admissible where the witness was a qualified psychologist who explained how certain aspects of everyday experience affect human perception and memory and therefore affects the accuracy of eyewitness identification. The Court further explained that the expert's testimony was particularly relevant where the witness testified that her assailant's features were partially obscured during the entire incident, the identification involved cross race, and each witness had been exposed to the assailant for a short length of time. Id. at 143, 406 S.E.2d at 372.

The trial judge erred in failing to instruct the jury with the specific requests made by Appellant concerning evaluating witness identifications. Appellant's proposed instructions encompassed the evidence presented to the jurors and allowed them to synthesize the matter in evaluating the evidence. Not only did the judge refuse to give the proposed charge, but she used her "standard charge," which omitted certain items and failed to include any type of catch-all provision. 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.

As the South Carolina Supreme Court explained in State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989) "standard charges" or "approved charges" do not prohibit a trial judge from crafting charges designed to address the specific case. In Fuller, 297 S.C. at 443, 377 S.E.2d at 331, the Court explained that "[i]n charging self-defense, we instruct the trial court to consider the facts and circumstances of the case at bar in order to fashion

an appropriate charge." The trial courts are required to "specifically tailor the self-defense instruction to adequately reflect the facts and theories presented by the defendant." State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000). In Day, the Court further stated that "[a] self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant." Id. As with jury instructions on self-defense, there is no logical reason to refrain from charging the jury on facts and theories presented by the defendant in an eyewitness identification case. See Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005); State v. Long, 721 P.2d 483 (Utah 1986) (discussing the importance and need for tailoring jury instructions on eyewitness identifications to the facts and circumstances of each individual case).

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. 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.

II. The trial judge erred in allowing the prosecution to introduce Appellant's mug shot where no demonstrable need of the mug shot was established, the mug shot was unnecessary and cumulative to the prosecution's case, and the mug shot prejudiced Appellant by suggesting to the jury that Appellant had a prior criminal record.

Relevant facts

During the testimony of Lawrence, the prosecution introduced Appellant's mug shot over Appellant's objection. Specifically, the prosecution sought to introduce the photograph of Appellant taken when he was arrested for the incident on which he was on trial; however, the fact that the mug shot was from Appellant's arrest concerning this charge was never conveyed to the jury. Appellant objected to the introduction of the mug shot. R. 75, line 13 – R. 76, line 23. Lawrence testified that the mug shot fairly and accurately depicted how Appellant looked on the day he was arrested; however, Lawrence did not inform the jury that the mug shot was from Appellant's arrest on the present charge. R. 77, lines 3 – 25.

The trial court ordered portions of the mug shot be removed so that it would not appear as a mug shot. R. 132, line 25 – R. 133, line 1. When Appellant explained his objection remained the same because even with the redaction, "any reasonable juror [could] infer that's a booking photo," the judge cryptically responded "[t]hat's not what I'm concerned with." The trial judge ruled the mug shot was admissible because it "was the actual booking photo." She remarked that everyone knew Appellant was arrested and booked. The case relied upon by Appellant for exclusion of the mug shot apparently involved a photograph showing a defendant with a "date ... around his neck ..., which was prior to the arrest that he was being tried for." R. 196, lines 16-24. The judge also

explained that the prosecution indicated the photograph was needed because it showed Appellant's side profile. R. 197, lines 3-8. However, the photographs were obviously a mug shot as they were front and side profile shots of Appellant's face. R. 133, lines 18 – 25.

In addition to the testimony of Lawrence concerning the mug shot, Lawrence and Luckadoo testified to their prior relationships with Appellant, which were acquired as part of their jobs in law enforcement. Luckadoo testified that when he watched the surveillance video, he recognized the assailant as Appellant. He testified that he had "general dealings" with Appellant, including personal contact through a traffic stop. R. 50, line 23 – R. 51, line 8. Lawrence testified that he believed the person in the surveillance video was Appellant as well. 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, Lawrence claimed he knew Appellant "very well." R. 68, line 10 – R. 69, line 16.

Discussion

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. State v. Traylor, 360 S.C. 74, 84, 600 S.E.2d 523, 528 (2004)(citing State v. Denson, 269 S.C. 407, 237 S.E.2d 761

(1977)). In Traylor, the Court found that the prosecution failed to demonstrate a need to include the photographic lineup, which included the defendant's mug shot, where other evidence showed that the defendant had been involved. However, the photograph was taken upon the defendant's arrest for the offense being tried, as opposed to some prior bad act. Although the Court found no prejudice to Traylor as a result of the photograph, the Court strongly admonished the prosecution against utilization of such photos except in the rarest of cases. Id.

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. First, Appellant was present in the courtroom for identification purposes. Second, the prosecution presented no evidence indicating that Appellant's physical appearance had changed since the date of the video recording, which was presented to the jury, or the photograph contained in the line-up, which also was presented to the jury. Third, 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). Fourth, the mug shot was obviously a mug shot despite the alterations required by the trial judge prior to its admission. 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. Fifth, the mug shot gave the jury the impression that Appellant had been arrested and/or convicted of prior crimes by its very nature of being a mug shot.

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

Lawrence and Luckadoo 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.

III. Violating the Eighth Amendment's ban on cruel and unusual punishment, the trial court erred in sentencing Appellant to life imprisonment without the possibility of parole pursuant to the state's recidivist statute because Appellant's prior conviction was committed when he was seventeen-years old.

Relevant facts

The jury found Appellant guilty of armed robbery and possession of a firearm during the commission of a violent crime. R. 343, line 20 – R. 344, line 7. Although Appellant asked the trial judge to delay sentencing pending a decision from the United States Supreme Court concerning a challenge to life sentences imposed on juvenile offenders, the judge determined a delay was unnecessary. R. 345, line 8 – R. 346, line 16. Appellant explained that he was twenty-years old at the time of sentencing, and nineteen-years old at the time of the offense for which he was facing sentencing. However, he was seventeen-years old at the time of a prior offense, which served as the triggering offense for application of the recidivist statute. R. 345, line 25 – R. 346, line 10. Specifically, Appellant challenged the imposition of life without parole (LWOP) as a sentence because it violated the Eighth Amendment's ban on cruel and unusual punishment. R. 349, lines 19-20. Nevertheless, the judge sentenced Appellant to LWOP. R. 351, lines 18-22; R. 416 (sentence sheet).

After the trial, Appellant filed a motion to vacate his sentence of LWOP. Appellant argued, as he did at trial, that his sentence violated the Eighth Amendment's prohibition of cruel and unusual punishment because he was under the age of eighteen at the time of the triggering offense. R. 397 (motion to vacate). Denying Appellant's motion, the trial judge's order explained that Appellant was indicted in July 2009 by a

Charleston County grand jury for an armed robbery of a gas station in Hollywood on December 20, 2008. At the time of that armed robbery, Appellant was seventeen-years old. A jury found Appellant guilty of the Hollywood armed robbery, and he was sentenced to twenty years' imprisonment on June 24, 2011. After establishing the relevant facts in support of Appellant's motion, the judge first determined that because Appellant was seventeen-years old at the time of the first offense, he was not a "juvenile" as defined by South Carolina's statutory scheme. She pretermitted the fact that Appellant was under the age of eighteen at the time. Next, the judge found dispositive only the age of Appellant at the time at the second offense with no consideration of Appellant's age at the time of the triggering offence. Thus, the Court refused to vacate Appellant's LWOP sentence. R. 403 (order).

Discussion

As an initial matter, Appellant recognizes 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. State v. Standard, 351 S.C. 199, 205, 569 S.E.2d 325, 329 (2002). 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.[3] Using this analysis, the Court determined that "an enhanced sentenced 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.

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[4] comport with contemporary standards of decency has been overruled by recent decisions of the United States Supreme Court.

"[C]hildren are constitutionally different from adults for purpose of sentencing." Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2455, 2464 (2012). On June 25, 2012, the United States Supreme Court held mandatory sentences of life without parole (LWOP) imposed upon juveniles violate the Eighth Amendment to the United States Constitution. Id. Beginning in 2005 with its decision in Roper v. Simmons, 543 U.S. 551 (2005), the Supreme Court recognized society's evolving standards of decency concerning juvenile justice jurisprudence. In Roper, the Court held death sentences for juveniles were cruel

[3] 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.

[4] The recent United States Supreme Court cases concerning this issue address individuals under the age of eighteen even if such individuals do not meet a state's statutory definition of juvenile.

and unusual punishment. Four years later, the Court held that a LWOP sentence imposed upon a juvenile for a non-homicide offense violated the Eighth Amendment's ban on cruel and unusual punishment. Graham v. Florida, 560 U.S. 48 (2010). Not surprisingly, when presented with the question of whether mandatory LWOP sentences for juveniles, even in homicide cases, violated the Eighth Amendment, the Supreme Court held they did. Miller, 132 S.Ct. at 2464.

The Miller Court reserved ruling on whether individuals under age eighteen could ever be sentenced to LWOP. Id. at 2469. Nevertheless, 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. Although the Miller Court did not address the precise issue presented here, the same constitutional reasoning applies. The Court's decision was based not only on upon the mandatory nature of the penalty, but on the character of children in general. The Miller Court repeatedly focused on the notion that the character traits of children are "more transitory and less fixed." Id. at 2464. Children by definition lack maturity and responsibility; thus, they are more likely to act with "recklessness, impulsivity, and needless risk-taking." Id. The Court eloquently explained that due to the innate characteristics of children at large, there is a "great difficulty ... 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." In fact, the Court stated "incorrigibility is inconsistent with youth." Id. at 2469. The Court emphasized the potential for reform present in all juveniles and the mitigating qualities of youth, noting "[i]t is a time of

immaturity, irresponsibility, 'impetuousness[,] and recklessness.'" Id. at 2467(quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

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, ___ U.S. ___, 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.

CONCLUSION

Concerning Issues I and II, Appellant respectfully requests this Court reverse his convictions and remand for a new trial. Concerning Issue III, Appellant respectfully requests this Court vacate his sentence and remand for new a sentencing proceeding in which LWOP was not a sentencing option.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of March, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARVIN BOWENS GREEN,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Jennifer Ellis Roberts, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 25th day of March, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of March, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

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.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

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 to 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.

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.p.414-419) 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. (R.p.343.) 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. (R.p.351.)

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. (R.p.7, lines 10-13.) Victim called the police immediately, and the police arrived and viewed the surveillance video with Victim. (R.p.9, lines 17-22.) Victim told the police he recognized the robber as a regular customer but did not know his name. (R.p.12, 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. (R. p.14, line 5-R. p.18, 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. (R. p.75, lines 4-8; R.p.414-419.)

At trial, the State called Victim, who described what happened the day of the robbery. (R. p.4, line 19-R. p.9, 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. (R. p.7, lines 10-25.) The man came into the store approximately three times a week to buy cigarettes, gas, and lottery tickets. (R. p.8, lines 1-5.) Victim explained he and the man had a running joke about Obama's signature being on the man's identification. (R. p.8, lines 6-8.) Victim identified the robber in court as Appellant. (R. p.8, line-R. p.9, 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. (R. p.20, line 24-R. p.21, line 11.) Victim testified regarding his selection of Appellant out of a six-person lineup. (R. p.14, line 5-R. p.18, line 13.) He explained that he does not read English well, so his son read and explained the lineup procedure. (R. p.15, 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. (R. p.16, lines 16-25; R. p.18, 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. (R. p.42, line 21-R. p.43, line 8; R. p.48, line 8-R. p.50, 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. (R. p.50, line 23-R. p.52, line 12; R. p.61, 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. (R. p.62, line 8-R. p.65, 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. (R. p.67, line 1-R. p.68, line 23.) Lawrence testified he had the opportunity to observe Appellant's face, mannerisms, voice, and gait for hours at a time. (R. p.68, line 24-R. p.69, 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. (R. p.69, line 25-R. p.70, line 9.) Lawrence testified he was 100% positive the man pointing the gun at Victim in the video was Appellant. (R. p.70, lines 10-R. p.71, line 20.)

Once Detective Lawrence identified Appellant in the video, he generated a six-person photo lineup through SLED. (R. p.71, lines 22-25.) He then arranged to meet with Victim to see if he could pick out the man who robbed him. (R. p.72, 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. (R. p.72, line 16-R. p.73, 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. (R. p.73, line 10-R. p.74, line 18.) Lawrence testified that Victim made an identification and that Lawrence then generated an arrest warrant for Appellant based on that identification. (R. p.75, 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.

(R. p.75, line 13-R. p.76, 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). (R. p.77, lines 21-23.) The trial court overruled the objection but did not allow the State to publish the exhibit at that time. (R. p.77, lines 24-25.)

Joseph L. West, a SLED investigator, testified regarding his role in obtaining still photographs from the video captured at the scene. (R. p.134, line 1-R. p.136, line 23.) Appellant objected to the still photos, State's Exhibit #6, being admitted. (R. p.140, line 4-R. p.141, line 23.) After hearing arguments, the trial court admitted State's #6 over Appellant's objection. (R. p.145, lines 1-R. p.149, 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. (R. p.178, line 5-R. p.181, line 25.) She recounted him joking about Obama signing his identification when she would ask for it. (R. p.182, lines 1-5.) Patel positively identified Appellant in court as the man in the video. (R. p.184, lines 9-25; R. p.185, lines 1-16.)

Next, the trial court addressed the booking photo again. (R. p.195, 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. (R. p.195, line 6-R. p.196, 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 remain 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.)

(R. p.196, line 13-R. p.198, 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. (R. p.199, line 5-R. p.200, line 1.) Dr. Beaudry testified she wrote her dissertation about eyewitness identification procedures and people's perceptions of those procedures. (R. p.200, lines 16-20.) The trial court admitted her as an expert in human memory and eyewitness identification without objection. (R. p.205, 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. (R. p.215, line 25-R. p.216, line 9.) She admitted there are no studies regarding one's ability to recognize somebody one already knows but who is wearing a disguise. (R. p.248, 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). (R. p.290, lines 5-13; R. p.291, 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. (R. p.290, lines 20-23; R. p.291, 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.

(R. p.330, line 5-R. p.331, 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 decide 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.

(R. p.327, line 13-R. p.328, 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. (R. p.335, 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. (R. p.336, line 3-R. p.341, line 9.) The trial court recognized the preservation of his argument and objection and ruled that it would not change the charge given. (R. p.341, lines 10-23.)

Ultimately, the jury found Appellant guilty of both charges. (R. p.343.) 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. (R. p.351.) 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." (R. p.330, 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.

(R. p.330, line 5-R. p.331, 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. (R. pp.355-56). 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." (R. p.2, line 22-R. p.3, 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. (R. p.70, 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. (R. p.197, 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. (R. p.75, line 9-R. p.77, line 25.) Furthermore, the trial court cut the top and bottom off the photo in response to 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. (R. p.197, 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. (R. p.51, lines 2-8.) Lawrence testified specifically, "I've had interactions with him, not because he was in trouble or anything." (R. p.68, 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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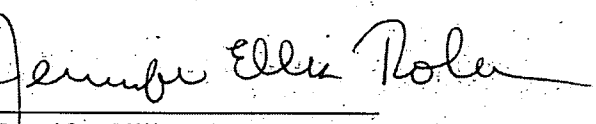
BY: 
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March 25, 2014

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.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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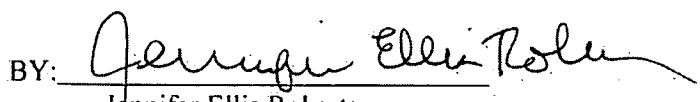
BY: 
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PROOF OF SERVICE

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

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I further certify that all parties required by Rule to be served have been served. This 25th day of March, 2014.

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