

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

**APPEAL FROM CHARLESTON COUNTY
Trial Court Case Nos. 2004-GS-12-00571
and 2004-GS-12-00572
The Honorable Daniel F. Pieper**

The State of South Carolina, Respondent

v.

Christopher Frank Pittman, Appellant

APPELLANT'S AMENDED INITIAL BRIEF

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STATEMENT OF THE FACTS

Chris Pittman's mother deserted him and his sister Danielle, shortly after Chris was born. Their dad, who was by all accounts a loving father, but a strict disciplinarian, struggled to raise them. Various changes in his own life, including several marriages and other strained or failed relationships and an overseas stint in the Army during the Persian Gulf War, led to Chris and Danielle spending a lot of time living with their grandparents; particularly their paternal grandparents, Joe Frank and Joy Pittman. The elder Pittmans lived near their son and his children in Florida, from before the time Chris and Danielle were born, until early 1997 when they moved to Chester, South Carolina.

In spite of the difficulties of their parental relationships, the kids seemed to enjoy a reasonably normal childhood, especially when they were with "Nana and Pop Pop" Pittman. The older Pittmans loved the children dearly; and the feelings were reciprocated. Indeed, from the first witness to the last, every person who actually knew these people described Chris's relationship with his grandparents, particularly his grandfather, as extremely close, loving, and devoted. The prosecution's first witness, family friend and Chester Fire Department Chief Red Weir described Chris as a "normal kid" who liked to "fish in my pond" with his grandfather. January 31 through February 11, 2005 Trial Transcript [hereinafter "1/31 Tr."] at R. p. 1283, line 19, p. 1280, lines 13-14. Chris's sister Danielle testified that Chris "absolutely worshiped the ground my grandfather walked on." 1/31 Tr. R. p. 2421, lines 24-25. Chris and his Pop Pop were like "two peas in a pod" and they were "glued" together. 1/31 Tr. at R. p. 2371, lines 22-23, p. 2372, lines 1-6 (testimony of Melinda Rector). Chris was even given the nickname "shadow" because of the close association he had with his grandfather. 1/31 Tr. at R. p. 2372, lines 7-14 (testimony of Melinda Rector) and R. p. 2416, lines 3-8 (testimony of Danielle Pittman).

Those who knew Chris Pittman described him as shy, gentle, and loving. 1/31 Tr. at R. p. 1979, lines 8-14, p. 1981, line 22-p. 1982, line 2, p. 1988, lines 3-9, p. 1989, lines 21-25 (testimony of Pastor Chris Snelgrove), 1/31 Tr. at R. p. 3116, line 21-p. 3117, line 1 (testimony of Shirley Carter). Prior to late November 2001, he had harmed neither man nor beast.¹

Things went downhill - dramatically downhill - for Chris Pittman in the summer of his twelfth year. Suddenly, out of seemingly nowhere, his mother returned to his life. Chris and Danielle spent a lot of time with her at a home she occupied near theirs in Florida. Moreover, there were even hints about a reunion between his mother and father. The boy who had been abandoned by his mother at birth was elated because he had always dreamed about being part of a perfect family. 1/31 Tr. at R. p. 2462, lines 9-11 (testimony of Danielle Pittman).

But just as suddenly as she had come, she left. One day, when Chris and Danielle went to their mother's house, she met them outside, told them that she was getting back together with her old boyfriend/husband, and cast them aside for the second time in their lives. This was late summer, 2001. 1/31 Tr. at R. p. 2462, lines 9-20 (testimony of Danielle Pittman).

¹ The prosecution tried hard to slime Chris Pittman, throughout the pendency of this case. At the *Jackson v. Denno* hearing in December 2004, they suggested that he had thrown a dart into a bull. Ultimately, at the trial, the officer who gave this testimony, based solely on police records from Florida, had to confess that Chris was simply with another boy who had done this, and that the other boy had apologized to the animal's owner. 1/31 Tr. at R. p. 1569, line 1-p. 1573, line 22 (testimony of Agent Lucinda McKellar).

The only other incident that the prosecution raised was an encounter that Chris had with his Aunt Mendy's white dog and a magic marker, when he was approximately 7 or 8 years old. 1/31 Tr. at R. p. 2381, lines 12-24 (testimony of Melinda Rector). As Dr. Lanette Atkins later testified, this sort of behavior is not "unusual" for a 7 year old. 1/31 Tr. at R. p. 2562, line 13-p. 2564, line 12.

This second abandonment thrust this struggling adolescent into emotional turmoil. He lashed out verbally at his father, tried to run away from home, and even threatened to harm himself with a knife if he was forced to continue to live with his father. Although his sister had told him that he could use her money for his runaway/getaway, when Chris was caught, and not wanting to get in trouble with her father, she refused to back him up. He was distraught. 1/31 Tr. at R. p. 2429, line 20-p. 2430, line 2 (testimony of Danielle Pittman).

Interestingly, however, the one place where he wanted to be – the place that he tried to run away to – was to his Nana and Pop Pop’s house in Chester. 1/31 Tr. at R. p. 2428, lines 6-10 (testimony of Danielle Pittman).

When Chris threatened to harm himself, his father hospitalized him. Not surprisingly, his father recounted a history of disobedience and disrespect in order to effectuate the hospitalization. 1/31 Tr. at R. p. 3337, lines 19-25 (testimony of Dr. Pam Crawford). Sadly, this resulted in Chris’s being branded as having a “history of violent behaviors” and contributed to him being diagnosed by a State expert with “conduct disorder” *Id.* at R. p. 3344, lines 7-12.

Even more tragic is the fact that, at LifeStream, Chris was given psychoactive medications, *i.e.*, the SSRI drug “Paxil.” As former FDA psychiatrist Dr. Richard Kapit observed in his testimony, one can map the deterioration of Chris’s condition, day by day, throughout his stay at LifeStream beginning with his ingestion of Paxil. 1/31 Tr. at R. p. 3146, line 22-p. 3151, line 20 (testimony of Dr. Richard Kapit).

When his father realized his mistake in hospitalizing Chris, he demanded his release. However, the truth of the matter is that Chris was rescued from LifeStream by the very people that he wanted to live with in the first place, *i.e.*, his Pittman grandparents. They

drove to Florida, persuaded their son that Chris would be better off staying with them, and took him home to South Carolina. Tellingly, his Pop Pop Pittman took the wood paddle that Chris' father had fashioned – ostensibly to scare Chris – away with them - - not to use, but so that Chris' father would not have access to it. 1/31 Tr. at R. p. 2423, lines 18-23 (testimony of Danielle Pittman).²

When they arrived home in Chester, Chris was enrolled in school, and began again to attend the New Hope Methodist Church regularly with his grandparents. Indeed, a picture of Chris and his grandparents taken on “Senior’s Night,” November 3, 2001, at the church, speaks volumes about the relationship between Chris and his grandparents, as do other photos in the record. *See* R. pp. 4696-4697, 4702-4709, 4718-4723, Defense Exhibits 71, 74-77, and 82-86. Joy Pittman fixed up a permanent room for Chris, so that he would feel at home. 1/31 Tr. at R. p. 1281, line 21-p. 1282, line 16 (testimony of James Weir). She also took him to a local general practitioner, Dr. Eric Naumann, to refill the Paxil prescription. Dr. Naumann wanted to help the Pittmans out by giving them free samples, but he did not have any Paxil. So he gave them a different SSRI drug, Zoloft, instead. 1/31 Tr. at R. p. 1735, line 22-p. 1737, line 6 (testimony of Dr. Eric Naumann).

Both Paxil and Zoloft are members of the antidepressant family of drugs called Selective Serotonin Reuptake Inhibitors, or SSRI’s. Neither is approved for pediatric depression in this country. Thus, Dr. Naumann’s prescription of Zoloft was “off label.” More importantly, Dr. Naumann was not aware of the association in children between this

² During the prosecution’s case in chief, South Carolina Law Enforcement Agent Scott Williams, brought the paddle forward for the jury to see. That piece of tangible evidence, coupled with the “confession,” obtained from this 12 year old without parental supervision or legal representation, and written in the hand of a law enforcement agent, provided the prosecution with its only possible motive, *i.e.*, “they deserved it; they hit me with the paddle.” 1/31 Tr. at R. p. 1662, lines 1-12 (testimony of Agent Scott Williams).

powerful psychoactive medication and violent behavior, towards both self and others. 1/31 Tr. at R. p. 1784, lines 18-24, p. 1785, line 11-p. 1786, line 17 (testimony of Dr. Eric Naumann); p. 2110, line 10-p. 2111, line 17, p. 2113, lines 6-18 (testimony of Dr. James C. Ballenger); p. 3138, line 16-p. 3139, line 20 (testimony of Dr. Richard Kapit). Nor could he have been fully aware at that time, of all that is known now.

In 2003, long after the tragic events giving rise to this case, the British government banned or “contraindicated” Zoloft for children in the UK, in large part because of the risk of violence towards self or others. R. pp. 4510-4520, Defendant Trial Exhibit 16 (UK’s ban of Zoloft); 1/31 Tr. at R. p. 2268, lines 7-15, p. 2293, line 17-p. 2294, line 20 (testimony of Dr. David Healy).

In 2004, after a series of advisory committee hearings, the FDA mandated a **BLACK BOX WARNING** about Zoloft. R. p. 4487, Defendant Trial Exhibit 10 (FDA Public Health Advisory, October 15, 2004). In that same year, Pfizer, the maker of Zoloft, issued a warning in Canada in which it cautioned about the drug triggering “harm to others.” R. pp. 4506-4609, Defendant Trial Exhibit 15 (May 15, 2004 Pfizer Canadian Health Care Professional Warning).³

³ Most recently – in two developments which occurred after the verdict in this case – the European Union also banned Zoloft for kids, again, in part because “suicidal behavior (suicide attempts and suicidal thoughts), and hostility (predominantly aggression, oppositional behaviour and anger) were more frequently observed in clinical trials among children and adolescents treated with [SSRI’s and SNRI’s] compared to those treated with placebo,” and, in May 2005, the FDA issued a “Public Health Alert” about Zoloft and pediatric suicidality, in which it stated that 1 out of 50 kids become suicidal “DUE TO DRUG.” See, Defendant’s forthcoming Request for Judicial Notice and Motion for New Trial Based on Newly Discovered Evidence.

Even the prosecution's own rebuttal witness, Dr. James Ballenger, conceded that Zoloft can trigger acts of violence towards self or others.⁴ He also concurred that the three most common pathways, or "antecedent" conditions, by which the drug triggers such violence are (i) akathisia, (ii) mania and/or hypomania, or, in the worst case, (iii) outright psychosis. 1/31 Tr. at R. p. 2051, line 14-p. 2056, line 1, p. 2109, lines 2-21 (testimony of Dr. James Ballenger). The chief defense expert witness, Dr. Lanette Atkins, a board certified child psychiatrist who is employed by the State of South Carolina, believes, from her numerous interviews with Chris, that he was hearing "command hallucinations" at the time of the incident. 1/31 Tr. at R. p. 2583, line 11-p. 2584, line 2 (testimony of Dr. Lanette Atkins).

Chris's emotional condition continued to deteriorate on the Zoloft. He went home to Florida on Thanksgiving, and, according to his sister, he was acting totally "weird." 1/31 Tr. at R. p. 2470, lines 7-14 (testimony of Danielle Pittman). The following Monday, November 26, 2001, in a telephone call with his Aunt Mendy, he described feeling like "his skin was crawling," "burning underneath," and he couldn't "put it out." 1/31 Tr. at R. p. 2367, lines 18-23 (testimony of Melinda Rector). This is a classic lay description of drug-induced akathisia. 1/31 Tr. at R. p. 2271, line 8-p. 2272, line 2 (testimony of Dr. David Healy), p. 2273, lines 12-22, p. 3152, line 9-p. 3153, line 10 (testimony of Dr. Richard Kapit).

⁴ Indeed, Dr. Ballenger has previously, in the guise of court-appointed expert, recommended leniency for Bruce Orr, a Charleston police sergeant who was charged with felony assault because Dr. Ballenger opined that the SSRI drug Paxil-induced a state of mania which, in turn, led to the criminal behavior. 1/31 Tr. at R. p. 2060, line 22-p. 2061, line 9 (testimony of Dr. James Ballenger)

Mr. Orr gave compelling testimony to illustrate the degree to which these powerful psychoactive drugs can override the right/wrong switch, even for a grown man and sworn peace officer. 1/31 Tr. at R. p. 2835, line 22-p. 2838, line 10 (testimony of Bruce Orr).

On Tuesday, November 27, 2001, this shy, gentle 6th grade boy, who had never threatened or harmed another human being, choked a 2nd grader on the school bus. On November 28th, *i.e.*, the day after the incident on the bus, Chris's grandparents were summoned to the assistant principal's office. As they left, Joe Frank Pittman lagged behind, and urged the principal to "pray for [Chris]" because "he's had three mothers in the last year." 1/31 Tr. at R. p. 1715, line 20-p. 1716, line 2 (testimony of assistant principal John Rodgers).

Later that night the Pittmans went to church. Chris was, again, demonstrating classic signs of Zolofit-induced akathisia. 1/31 Tr. at R. p. 2325, lines 2-25 (testimony of church pianist Vicky Phillips). On the way to, or home from, church, the Pittmans stopped to photograph a beautiful sunset. *See* R. pp. 4696-4697, 4702-4709, 4718-4723, Defendant Trial Exhibits 71, 74-77, and 82-86. Later that night, Chris Pittman took out a .410 gauge shotgun, shot both of his grandparents to death and then, allegedly, set their house on fire and fled the scene in a pickup truck with a dog and a cache of weapons. 1/31 Tr. at R. p. 1353, line 8-p. 1355, line 11 (Stipulation).⁵

The next morning two hunters found 12-year old Chris Pittman wandering around the woods. He was acting hysterical, "hollering and screaming some stuff," and waiving a fully cocked and loaded gun around. 1/31 Tr. at R. p. 1367, lines 24-25, p. 1370, lines 10-15. (testimony of Roland Penington). He concocted a story that was so irrational and full of holes that no one could be expected to believe it, or not for long. 1/31 Tr. at R. p. 1392, lines 17-20 (testimony of Roland Penington), p. 1409, lines 2-10 (testimony of Terry Robinson),

⁵ There was never any real dispute about the fact that Chris pulled the trigger of the shotgun. Therefore, he stipulated to this fact, early in the trial. *Id.* Notwithstanding this stipulation, and over defense objection, the trial judge admitted a lot of gory testimony, ostensibly on the notion that it went to prove "malice." January 31, 2005 Tr. at R. p. 1287, lines 11-20 (Deputy Solicitor Meadors), p. 1317, lines 4-11 (testimony of Andy Weir), p. 1623, lines 6-16 (testimony of Agent Scott Williams).

p. 1426, line 22-p. 1427, line 10 (testimony of Detective Darrell Duncan). He was detained until the police came.

During the next few hours Agent Lucinda McKellar of the South Carolina Law Enforcement Division maintained custody of Chris. She told him to “call me Lucy,” she played “Go Fish” and generally baby-sat him. 1/31 Tr. at R. p. 1507, lines 4-10, p. 1480, lines 18-22, (testimony of Agent Lucinda McKellar). But as the silly threads of his amazing story unraveled, she did an about face. Suddenly, Officer McKellar told Chris that they needed to have an “adult conversation.” 1/31 Tr. at R. p. 1526, lines 8-9 (testimony of Agent Lucinda McKellar). She then *Mirandized* him, and, amazingly, asked this boy, who is not old enough to drive, to marry, or, indeed, to even sign a binding legal contract in the State of South Carolina, to waive his most basic constitutional rights and to sign a confession, supposedly dictated by him, but written entirely in her own hand using an adult vocabulary. 1/31 Tr. at R. p. 1526, line 20-p. 1527, line 5 (testimony of Agent Lucinda McKellar).

Even today, Chris Pittman does not begin to understand the events of November 28, 2001; but from the moment of his “adult conversation” with Agent McKellar to the present, he has not denied the shootings. Indeed, on the second day of trial, the young man who had no previous criminal record nor had harmed anyone before he began taking Zoloft, stipulated that he shot his grandparents to death.

STATEMENT OF THE CASE

Sixth Circuit Solicitor John Justice wasted no time in charging Chris with murder and arson, and in promptly asking the Family Court to “waive” its jurisdiction over him. As required by law, the Solicitor’s motion was filed on December 28, 2001. But after that point, time wasting became the watchword of the day.

Chris's waiver hearing was not held until June 27, 2003, more than 18 months after the elder Pittman's death and Chris's arrest. During that time, he was not provided with the mandatory periodic hearings required by S.C. ST. 20-7-7215. Nor did the Family Court, which supposedly functioned *in parens patriae*, issue the periodic orders required by Rule 31, South Carolina Rules of Family Court (SCRFC) to justify his continued detention.

Once his waiver hearing finally arrived, Chris's court appointed, public defender called no witnesses on his behalf, and adduced precious little evidence via cross examination.⁶ The Court, which is mandated by law to function more as a parent than as an adjudicator, did not conduct the kind of "thorough investigation" that is specified by South Carolina law, and required by federal due process. At the conclusion of that hearing, the professionals all agreed. Judge, Solicitor, Public Defender, and even Attorney *Ad Litem*, all sat idly by as this 12-year old was "waived up" to adult court – not only on the murder charges, which current precedent from this Court permits⁷ but also on the arson charge which may not be "waived up."⁸

During the additional 21+ months from the time of the waiver hearing until his trial in January-February 2005, this previously trouble-free young man remained incarcerated in juvenile detention. His living arrangements remained static. His body did not. In all, from

⁶ Obviously, in addition to the substantive and procedural due process concerns, which are briefed herein, these shortcomings in representation also give rise to a potential claim of ineffective assistance. Although counsel sincerely hopes that it will not be necessary, when the time is ripe, the defense will, if necessary, raise that issue by proper motion for post-conviction relief.

⁷ As noted below, one of the appellate points in this case is a request to revisit and revise this Court's opinion in *State v. Corey D*, 529 S.E.2d 20 (S.C. 2000). If, as a matter of statutory construction, the Court reinterprets the South Carolina waiver statute so as to not permit a waiver of jurisdiction, even in a murder case, for a 12-year old, then several of the other key legal arguments, including the substantial Eighth Amendment challenge to the mandatory sentence, become moot.

⁸ After Solicitor Justice disqualified himself, Solicitor Giese agreed that the arson charge was to be remanded. See R. p. 89, State's Motion and Memorandum in Opposition to Defendant's Motion to Remand to Family Court, pp. 188-193 at p. 2 of 5.

the time of his arrest on November 29, 2001, until the start of his trial on January 31, 2005, Chris Pittman grew from the 5'2", 96 pound child that pulled the trigger of the shotgun, into a 6'1" young man. 1/31 Tr. at R. p. 1440, lines 12-17 (testimony of Officer Darrell Duncan), p. 1672, line 18-p. 1673, line 22 (testimony of Agent Scott Williams) Thus, when he was ultimately tried as an adult, and subjected to adult punishment (including the mandatory, minimum, non-probationable 30 year term for murder), he **looked** like a young adult.⁹

The undersigned lead counsel signed on to the defense team in May 2004. By several pretrial motions, as well as one made at the conclusion of the State's case, we urged the trial court to remand the case to Family Court, to dismiss because of the obvious denial of a speedy trial, and to suppress the written confession. All motions were denied. R. pp. 270-296, Defendant's Notice of Unconstitutionality of Statute, filed December 2, 2004; December 2, 2004 Transcript [hereinafter "12/2 Tr."] Tr. at R. p. 583, lines 16-21; (Motion to Remand), pp. 175-183; (Speedy Trial Motion), pp. 243-256; (Motion to Suppress) pp. 184-187; and 1/31 Tr. at p. 1971, line 14-1973, line 5 (Motion to Remand).

The Solicitor was hard pressed to ascribe a motive to Chris Pittman. Why would a young man, who had a completely clean record, kill the very people that he loved most in the world? His theory, from opening statement to closing arguments, was that Chris was railing against "discipline." His only evidence was the "confession" in Agent McKellar's

⁹ The change in Chris's appearance becomes more acutely important when considered in juxtaposition with his constitutional right to remain silent. Because the jury would not hear from him, the only information they received directly from Chris was their observations of him. At least one juror, in post-trial interviews, suggested he had been coached to cry. See R. pp. 297-334, Defendant's Second Motion for New Trial, at pp. 313-327, Exhibit A (Affidavit of defense counsel, Andy Vickery).

Defense counsel tried to counter this change in appearance by providing a 5'2" cut-out, photo of the 12 year old Chris. However, prosecution witnesses fudged on their testimony about it, e.g., 1/31 Tr. at R. p. 1672, line 18-p. 1673, line 22 (testimony of Agent Scott Williams), and the Deputy Solicitor himself even tossed it aside during one of his numerous in-court tirades. 1/31 Tr. at R. p. 1437, line 20-p. 1438, line 1.

handwriting, which plainly states that they “beat me.” 1/31 Tr. at R. p. 1550, line 3 (testimony of Agent McKellar); pp. 4452-4454, State’s Exhibit 163. However, in spite of this evidence, the trial judge refused, over defense request and objection, to submit lesser included offenses and thereby to give the jury some choice other than “all or nothing” murder. February 14, 2005 Transcript [hereinafter “2/14 Tr.”] at R. p. 3815, lines 6-11, p. 3816, line 20-p. 3817, line 4.

At trial, the first line of defense was the presumption against capacity for a 12-year old to form criminal intent. The second line was “involuntary intoxication.” The trial judge did permit the defense to adduce significant evidence on this defense¹⁰ and ultimately charged it to the jury as a “complete defense.” 2/14 Tr. at R. p. 3804, line 10-p. 3807, line 11. However, because South Carolina follows the antiquated *McNaghten* rule on insanity, the judge’s instruction required the defense to show that, because of Chris’s involuntary intoxication with the prescription medication Zoloft, he was unable to distinguish right from wrong. 2/14 Tr. at R. p. 3806, line 1-p. 3807, line 11.¹¹

On February 15, 2005, Christopher Frank Pittman was convicted of two counts of first degree murder. Later that day, the trial judge imposed the mandatory, minimum prison sentence of 30 years. February 15, 2005 Transcript [hereinafter “2/15 Tr.”] at R. p. 3866 , line 14-p. 3867, line 3.

On the day after the verdict defense counsel was made aware of the fact that, before the verdict, one of the jurors had discussed the case with a friend in a Charleston bar or

¹⁰ The able trial judge did not make many evidentiary errors. However, there are a few which, taken in context and in toto, do, in and of themselves, warrant a retrial. Section XI, *infra*.

¹¹ Another issue on appeal is whether this Court will continue to utilize a right/wrong standard for common law “involuntary intoxication” defenses, or, conversely, whether it will join the American Law Institute and the modern trend to include an alternative “irresistible impulse” test. Section X, *infra*. See, e.g., Michigan M.C.L.A. § 768.21a.

restaurant. To his great credit, the trial judge promptly investigated the matter. He summoned the particular juror back and questioned him under oath. Although the juror in question gave extremely equivocal testimony about his extraneous conversations, the man with whom he spoke later plainly testified that, on the night before the verdict, this juror had discussed the deliberations and had committed himself to a guilty verdict. March 1, 2005 Sealed Transcript [hereinafter “3/1 S. Tr.”] at R. p. 4030, line 24-p. 4032, line 13 (testimony of friend).

Even more troubling, however, was another fact which was unearthed by the court’s own investigation. Two of the jurors who had voted to convict, and confirmed that vote on exit polling by the court, had, in fact, not believed that Chris Pittman was guilty. 3/1 S. Tr. at R. p. 3984, lines 12-24 (testimony of Juror A); p. 4002, line 8-p. 4003, line 16 (testimony of Juror B). Exasperated, the trial judge asked them why, if they did not believe him to be guilty, they voted guilty. One explained that she was “coerced” by some members of the majority into this vote, and another, more fully,¹² that her vote was prompted by a fundamental misunderstanding of the applicable law. 3/1 S. Tr. at R. p. 3985, line 11-p. 3986, line 20 (testimony of Juror A); p. 4005, lines 9-23 (testimony of Juror B). Although she knew that the verdict had to be unanimous, Juror B was also told that the “majority rules.” Thus, this juror mistakenly believed that the **law required** her to vote guilty, along with the rest of the majority. 3/1 S. Tr. at R. p. 4013, lines 3-9 (testimony of Juror B).¹³

¹² As noted above, although they were allowed to be present and to suggest lines of inquiry to the court, counsel were not permitted to question these jurors.

¹³ The defense does not believe that portion of the transcript that identifies the jurors by name needs to be a matter of public information. However, we do object vehemently to the shroud of secrecy which has been cast over the substance of their testimony by the State’s insistence on a sealing order, and ask this Court to redact, but unseal, this transcript.

Unfortunately, Pittman's Amended Second Motion for New Trial, on grounds of juror misconduct and lack of unanimity, was denied. *See* R. pp. 54-66, Court of General Sessions Order Dated May 13, 2005. So, too, was a post-trial motion, premised on recent United States Supreme Court authority, to reduce the sentence so as to comport with the limitations of the Eighth Amendment. *See* R. pp. 43-53, Court of General Sessions Order Dated April 11, 2005.

ISSUES ON APPEAL

This case raises numerous legal and constitutional issues about the South Carolina Criminal Justice system's treatment of a 12 year old child who had never before committed a crime. Several lie at the very heart of our system of justice and the core of our most basic human and family values. The proper sequencing of these issues in an appellate brief is difficult at best. What we have decided to do, however, is to prioritize them by remedy, starting with two issues that should result in outright dismissal of charges, and ending with those that necessitate a modified sentence, or a new trial and the conduct of same.

Whether the conviction must be reversed because of the Solicitor's failure to adduce any evidence whatsoever to rebut the presumption of incapacity?

Whether Chris Pittman has been deprived of constitutional right to a speedy trial?

Whether the absence of a unanimous verdict violates due process and demands a new trial?

Whether demonstrable jury misconduct warrants a new trial?

Whether the waiver of the Family Court's jurisdiction comports with South Carolina substantive law and with federal due process?

Whether the *Corey D* decision should be overruled?

Whether, considering the "totality of circumstances" the purported waiver of Fifth Amendment rights by this unaccompanied 12-year old under the influence of psychoactive medications was "knowing" and "voluntary"?

Whether it violates the “evolving notions of common decency” that are the touchstone of the Eighth Amendment for the State of South Carolina to subject a 12-year old to a mandatory, minimum prison term of 30 years without probation?

Whether the trial court erred in failing to charge the jury on lesser included offense(s) of voluntary and/or involuntary manslaughter?

Whether, on retrial, the standard of proof for an involuntary intoxication defense should be either (a) inability to differentiate right from wrong, OR (b) inability to conform one’s conduct to the requirements of the law?

Whether the court erred in excluding proffered defense evidence which is clearly relevant to the “involuntary intoxication” defense?

Whether the “newly discovered evidence,” *i.e.*, subsequent FDA proclamations about Zoloft, warrant a new trial? [To be raised by separate motion.]

ARGUMENT

I. BECAUSE THERE WAS NO EVIDENCE WHATSOEVER TO REBUT THE PRESUMPTION OF INCAPACITY, THE CONVICTION MUST BE REVERSED

South Carolina courts have long held that there is a graduated scheme of presumptions regarding a criminal¹⁴ defendant’s capacity to form criminal intent and that it is based purely on chronological age. *State v. Blanden*, 177 S.C. 1, 180 S.E. 681 (1935) summarizes the law succinctly:

[U]nder our law, where a person is under seven years of age, he is conclusively presumed not to be capable, mentally capable, of committing a crime. Where a person is **between seven and fourteen** years of age, he is **presumed not to have the mental capacity** of committing a crime, but that is a

¹⁴ Civil cases have historically affirmed the same principle. *E.g.*, *Ghaner v. Leaphart Lumber Co.*, 85 S.C. 90, 67 S.E. 242 (1910). Under the current standard in civil cases, “[a] child under fourteen therefore may be, but is not necessarily, negligent for failure to obey an adult standard of care.” *Jones v. Carter*, 336 S.C. 110, 518 S.E.2d 619, 623 (1999). Moreover, in civil cases, “[a] child under the age of fourteen years is not required to conform to an adult standard of care.” Rather, his “conduct should be judged by the standard of behavior to be expected of a child of like age, intelligence, and experience under like circumstances.” *Brown v. Smalls*, 325 S.C. 547, 481 S.E.2d 444 (S.C.Ct.App. 1997). *Accord Jones ex rel. Castor v. Carter*, 336 SC 110, 518 S.E.2d 619 (S.C.App. 1999). As with the presumption of incapacity, the trial judge also granted the defense request for an instruction on these basic principles of South Carolina law. 2/14 Tr. at R. p. 3800, lines 3-8.

rebuttable presumption, and it may be shown that he was mentally capable of committing a crime, although he was between the age of seven and fourteen years.

180 S.E. at 689-90 (emphasis added).¹⁵

None of the writing courts have defined the kind or quantum of evidence that would be necessary to rebut the presumption, and, on the record before it, this Court need not do so. The reason is simple. There is **no evidence**, absolutely **none**, to rebut the presumption in this case.¹⁶ The prosecution adduced no evidence to show that Chris Pittman was any different, mentally, from any other 12 year old boy. It had witnesses, but it chose not to call them. One mental health professional had examined Chris at the behest of the State and testified at his waiver hearing. But she was not called. Two prosecution psychiatrists had examined him and, ultimately, testified during the prosecution's **rebuttal** case.¹⁷

But during its case in chief, the only evidence that the prosecution adduced was to the effect that he was "just a normal kid." 1/31 Tr. at R. p. 1283, line 19 (testimony of James L. Weir, Chief of the Westchester Fire Department). A second State witness, Detective

¹⁵ *Accord State v. Fuller*, 229 S.C. 439, 93 S.E.2d 463, 466 (1956); *State v. Gardner*, 219 S.C. 97, 64 S.E.2d 130, 135 (1951).

¹⁶ There was evidence produced by the defense, however, that *supported* the presumption. Dr. Lanette Atkins, a board-certified child psychiatrist, testified at great length about the underdeveloped 12 year old brain, the physiological and psychological differences between that developing brain and that of an adult, and especially, how those differences related to behavior and judgment. 1/31 Tr. at R. p. 2732, lines 1-23, p. 2733, lines 4-15, p. 2742, lines 2-16 (testimony of Dr. Lanette Atkins). Neither the presumption *nor* Dr. Atkins' testimony were ever rebutted.

¹⁷ Because it came during the rebuttal phase, the Court need not analyze it to determine whether it would suffice to rebut the presumption. However, even if the Court did so, it would see that neither psychiatrist focused on the question of whether Chris was any different from any other 12-year old. Indeed, another prosecution rebuttal witness, Dr. Julian Sharman, describes the Chris Pittman he interviewed on November 29, 2001 as a "normal 12 year old boy." 1/31 Tr. at R. p. 3483, lines 1-2, 7-8 (testimony of Dr. Julian Sharman).

The evidence before the trial court from the *Jackson v. Denno* hearing indicated that, in fact, Chris was academically behind other 12-year olds. 12/2 Tr. at R. p. 634, lines 12-25 (testimony of child psychiatrist, Dr. Lanette Atkins).

Darrell Duncan, testified that Chris was “a little scrawny little boy,” “just a young boy,” “a young juvenile,” and that he (Duncan) acted as Chris’ “baby-sitter” while in law enforcement custody. 1/31 Tr. at R. p. 1425, line 23, p. 1426, lines 7-12, p. 1434, lines 7-8, p. 1439, lines 8-20 (testimony of Detective Darrell Duncan).

Although the trial court ultimately charged this presumption to the jury (without objection from the Solicitor), if legal presumptions have any meaning whatsoever, it must be that, in the absence of **any** evidence to rebut them, they control. Thus, in these unique circumstances, the presumption governs and the conviction must be reversed and rendered.

II. PITTMAN HAS BEEN DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL

A. The Facts. From the day of his initial arrest until June 27, 2003, a period of more than a year and a half, this 12-year old child, would had never before committed a crime, was in the exclusive, ostensibly *parens patriae* jurisdiction of the Family Court. This is important for speedy trial purposes because, if he was to be treated as a child in “protective” custody, then, obviously, the need for an immediate, speedy trial was less acute, and the public defender assigned to the case may have been less likely to demand a speedy trial.¹⁸ However, even after he was “waived up” to Circuit Court, it still took the State of South Carolina more than a year and a half to bring him to trial.

¹⁸ Although neither his public defender nor his guardian *ad litem* formally demanded an immediate or speedy trial until late August 2004, with two very short exceptions, they did not seek a postponement of the trial. The first exception was a request to postpone the trial from its April 2004 trial setting to the next term of Court, *i.e.*, in June 2004. This postponement was necessitated by the fact that one of the prosecution’s expert witnesses asked for a second, eleventh-hour interview with the Defendant. As a practical matter, this forced the defense to ask for sufficient time for their experts to digest the results of this interview. The second exception was a request to postpone the start of the trial for one week so that his new counsel could attend. When that trial setting was canceled, counsel then suggested a setting in July. However, the trial did not start until the next January.

During the three year delay, Chris Pittman grew from a 5'2" boy into a 6'1" young man with facial hair. At his trial, his lawyers attempted to counteract the appearance factor by showing the jury a 5'2" cut-out photo of 12-year old Chris. But it was too little, too late.

B. The Law. The right to a speedy trial is guaranteed by both the United States Constitution and the South Carolina Constitution. U.S. CONST. amend. XI; S.C. CONST. art. I, § 14. *Klopfer v. North Carolina*, 386 U.S. 213 (1967); *State v. Foster*, 260 S.C. 511, 513, 197 S.E.2d 280, 281 (1973); *Wheeler v. State*, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966).

The seminal United States Supreme Court case dealing with the right is *Barker v. Wingo*, 407 U.S. 514 (1972) in which the High Court articulated four factors that should be taken into account when evaluating speedy trial claims. They are:

1. Length of the delay;
2. Government's excuse for the delay;
3. Defendant's assertion of his right to a speedy trial; and
4. Prejudice to the defendant, defined in terms of the following specific "interests" that the constitutional right was meant to safeguard.

Id. at 432. Subsequently, these four criteria were adopted by this Court as "controlling considerations" for speedy trial analyses. *State v. Foster*, 260 S.C. 511, 513-514, 197 S.E.2d 280, 281 (1973); *State v. Waites*, 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978).

The *Barker* factors should be applied via "a balancing test, in which the conduct of both the prosecution and the defendant are weighed." *Foster*, 260 S.C. at 514 (quoting *Barker*). It is important to note that "[a] balancing test necessarily compels courts to approach speedy-trial cases on an *ad hoc* basis." *Id.* (quoting *Barker*). Therefore, the ultimate issue of whether "a person accused of a crime has been denied his constitutional

right to a speedy trial is a question to be answered in the light of the circumstances of each case.” *State v. Brazell*, 325 S.C. 65, 75, 480 S.E.2d 64, 70 (1997).

Moreover, *Barker* also teaches that:

None of the four factors identified above [is] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. 407 U.S. at 533.

C. The Presumptively Prejudicial Delay in this Case Violated Pittman’s Constitutional Rights. The first - and most important - of the *Barker* factors is the length of the delay. *Foster*, 260 S.C. at 514. It is only necessary for the court to analyze the remaining factors if there was “some delay which is *presumptively prejudicial*.” When such a delay is found, it will “trigger” an inquiry into the other factors. *Barker*, 407 U.S. at 530 (emphasis added).

This Court has previously ruled that a delay of two years and four months was long enough to trigger a review of the other factors. *Waites*, 270 S.C. at 108. The period of time from his initial arrest on November 29, 2001, until April 2004, when Pittman’s public defender made his first request for a short postponement of the trial was already in excess of this period. Therefore, the period of delay is “presumptively prejudicial.”

The second *Barker* factor is the government’s reason for the delay. *Barker*, 407 U.S. at 531. To date, the State of South Carolina has offered no plausible explanation whatsoever for the three plus year delay. This is especially significant in light of the fact that “the ultimate responsibility for such circumstances **must rest with the government** rather than with the defendant.” *Id.* (emphasis added).¹⁹

¹⁹ In this case, not only did the Solicitor offer no plausible explanation for the lengthy delay, but the record also shows that he flagrantly disregarded parallel provisions of South Carolina law that are designed to complement and safe-guard the right to a speedy trial. Specifically, S.C. ST. 20-7-7215

From November 29, 2001, to June 23, 2003, a period of more than a year and a half, Chris Pittman remained in detention, and in the *parens patriae* custody of the Family Court. Throughout this period there was not even one instance of a hearing, evidence, testimony, finding, and order, much less one every seven days

The third consideration in a speedy trial balancing test is “when and how the defendant asserted his right to speedy trial.” *Waites*, 270 S.C. at 108 (citing *Barker*). As noted above, for the first year and nearly eight months, both defense counsel and the ad litem had a client who was in the “protective” custody of the juvenile court system. During this time period, “[t]he Juvenile Court [was] theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct,” and the State was “parens patriae rather than prosecuting attorney and judge.” *Kent v. United States*, 383 U.S. 541, 554-55 (1966). The defense’s action must be judged with this background in mind.

Moreover, even an outright failure to explicitly demand a speedy trial does not mean that the defendant waives his right; rather, it is merely “one of the factors to be considered” when conducting the balancing test. *Barker*, 407 U.S. at 528. A defendant – particularly an indigent minor – should not forfeit his constitutional rights just because his appointed counsel did not make a timely request for speedy trial.

The fourth factor that must be considered is the prejudice caused to the defendant as a result of the delay. *Barker*, 407 U.S. at 532. This “should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect.” *Barker*, 407

requires a detention hearing within 48 hours of a juvenile’s arrest. The statute is complemented by Rule 31 of the Rules of Practice for the Family Courts of the State of South Carolina, which also prevents a “pre-adjudicatory detention” of a youthful offender for more than 48 hours, unless the judge specifically finds “that detention is necessary for protection of the community or to serve the best interest of a child.” This finding must be made on the basis of “adequate evidence and testimony.” If there is such evidence, testimony, and finding, then the Family Court Judge “may by appropriate order, extend such detention for a period not to exceed 7 days.”

U.S. at 528. There, the Supreme Court noted “three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.” *Id.*²⁰

In the case at bar, consideration of two “primary” interests weighs very heavily in favor of the defendant. Incarcerating a child from the age of 12 until almost his 16th birthday is certainly “oppressive.” Moreover, spending almost three years incarcerated would cause “anxiety and concern” in a full grown adult; one can only imagine the terrible effect that it must have on a young and impressionable child.

Finally, although the case law does not require a showing of actual “prejudice” in the preparation and presentation of his defense at trial, there is ample evidence of same. In the three plus years that he was awaiting trial, Pittman grew from a 5'2" boy to a 6'1" young man. This obviously prejudiced him at trial. “Through control of a defendant's appearance, the State can exert a ‘powerful influence on the outcome of the trial.’” *Deck v. Missouri*, 544 U.S. 622, 125 S.Ct. 2007, 2014 (2005), quoting *Riggins v. Nevada*, 504 U.S. 127, 142 (1992)(Kennedy, J., concurring). In *Deck*, the Court held that the use of shackles can be a “thumb [on] death's side of the scale” in a death penalty case. Although Chris was not shackled during this trial, he was, as a result of the delay, “shackled” in the body of a sixteen year old.

²⁰ Subsequently, in *United States v. McDonald*, 456 U.S. 1, 8 (1982), the Supreme Court diminished the “impairment” of the defense interest, explaining that:

“The Sixth Amendment right to a speedy trial is thus **not** primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is designed to **minimize the possibility of lengthy incarceration prior to trial**, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and **to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.**” (emphasis added.)

The defense tried its best to defuse the prejudice by preparing a 5'2" "cut-out" from a photo of 12 year old Chris Pittman. But this was certainly too little, too late. Even one of the prosecution's own witnesses raised questions as to whether they remembered Chris Pittman as being "slightly smaller" than the cut-out. 1/31 Tr. at R. p. 1673, lines 18-22 (testimony of Agent Scott Williams). At one point, the Deputy Solicitor even threw the cut-out on the floor, and had to be admonished by the Court. 1/31 Tr. at R. p. 1437, line 20-p. 1438, line 1.

The physical appearance of a criminal defendant is constitutionally significant. Thus, a court may not constitutionally compel a defendant to be tried while wearing prison garb. *Estelle v. Williams*, 425 U.S. 501, 505-06, 96 S.Ct. 1691, 1693-94, 48 L.Ed.2d 126 (1976). Obviously, the physical appearance of the defendant is even more critical in a case, like the one at bar, in which the defendant exercises his Fifth Amendment right to remain silent. The Supreme Court of the United States explains the significance as follows:

"The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice...To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process." *Id.*

The jury in this case was obviously confused about whether or not Pittman was a child or an adult. Indeed, Court's Exhibit 3, jury question, sent shortly before the verdict itself, specifically asked about this. 2/14 Tr. at R. p. 3823, lines 3-19; Court's Exhibit 3.

The prejudice is obvious. On November 28, 2001, Chris Pittman was a 12 year old boy who had never before been accused, much less convicted, of a crime. By law he is presumed to be innocent of the crime of murder. By law he is presumed to be incapable of forming criminal intent. By law his conduct was to be judged *viz. a viz.* the expectations of 12-year old boys. And, yet, throughout the two week trial, the jury watched a nearly 16 year

old young man. In the absence of testimony from this young man, they imputed motives to what they saw. Indeed, immediately after the verdict one of the jurors rushed to the media cameras and stated that he believed that Chris was “coached” to “turn the tears on and off like a faucet.” R. pp. 297-334, Defendant’s Second Motion for New Trial, at pp. 313-327, Exhibit A (Affidavit of defense counsel, Andy Vickery).²¹

Because the speedy trial bell cannot be unrung, “dismissal of the indictment ... is the only possible remedy.” *Barker v. Wingo*, 407 U.S. 514, 522 (1972).

III. THE NON-UNANIMOUS VERDICT VIOLATES DUE PROCESS AND DEPRIVES THE DEFENDANT OF HIS RIGHT TO JURY TRIAL

A. The Facts: Two Jurors Real Verdict was “Not Guilty”, but Voted “Guilty” Because of a Mistatement of Law by a Fellow Juror. On March 1, 2005, the Court conducted an *in camera* hearing. The Court itself questioned each of the 12 members of the jury. Out of that questioning came a startling revelation. Two jurors, whom we shall call “Juror A” and “Juror B” were both of the firm view that Chris Pittman was not guilty. Both stated that “not guilty” was their true verdict. The Court asked each of these jurors if they thought that their verdict had been “coerced” and both replied in the affirmative. 3/1 S. Tr. at R. p. 3984, lines 12-24, p. 3987, lines 1-7, p. 3990, lines 13-17 (testimony of Juror A); p. 4002, line 8-p. 4004, line 9 (testimony of Juror B).

Justifiably perplexed, the Court inquired further as to why, when the jury was polled, each of the jurors had stated that “guilty” was their verdict. What each of them said, independently, was that their votes were based on a belief, garnered from a fellow juror, that

²¹ Additionally, the lengthy delay gave the prosecution several witnesses that they would not otherwise have had. Specifically, the Solicitor called at least five different law enforcement officials to testify regarding Chris’ behavior and demeanor while he was incarcerated. *E.g.*, 1/31 Tr. at p. 3523, lines 15-23, p. 3525, lines 16-20 (testimony of George E. Blackwell); p. 3530, lines 10-18, p. 3534, lines 7-19 (testimony of Frederica Lawson-Prince); p. 3540, lines 8-11 (testimony of Billy Ray Warren); p. 3549, lines 2-4 (testimony of Clinton Gantt, Jr.); p. 3572, lines 11-19 (testimony of Steven Snyder).

the “law required it” and that the “majority rules.” Upon further inquiry, the Court learned that these jurors were told two things about the law: (1) that the law required a unanimous jury verdict, but (2) that the “majority rules.” 3/1 S. Tr. at R. p. 3985, lines 4-18 (testimony of Juror A); p. 4002, line 8-p. 4003, line 16 (testimony of Juror B). The latter statement is, of course, blatantly wrong.

The Court probed even further, asking each of the jurors, at least once, whether this was simply a case of them holding one opinion on the facts and the evidence, and then having their minds changed by virtue of their dialogue with their fellow jurors. Each adamantly maintained that their view of the evidence never changed, and insisted that their votes were based on the “law,” as given to them by their fellow juror. 3/1 S. Tr. at R. p. 3985, lines 4-18 (testimony of Juror A); p. 4002, line 8-p. 4003, line 16, p. 4005, line 18-p. 4006, line 2 (testimony of Juror B).²²

B. The Law: A Misunderstanding of the Law, Garnered from a Fellow Juror under Coercive Conditions, Undermines the “Fundamental Fairness” that is the Touchstone of Due Process. *Fairness vs. Finality*. It is an age-old problem.

Rule 606(b) S.C.R.Ev. is designed to foster **finality**. Its focus is on the facts/evidence, and, by its terms, it precludes compelled testimony from a juror that “impeaches” the juror’s own verdict, unless the evidence relates to either “extraneous prejudicial information” or “outside influences” which intrude into the jury’s deliberation.

²² As noted at footnote 13, *supra*, the defense requests that this transcript itself be unsealed. However, out of respect for the current sealing, we have inserted into this publically available brief only those portions of testimony that the lower court itself made public.

The Due Process Clause of the United States Constitution²³ fosters **fairness**. By contrast to Rule 606(b), its focus is on the **law**. Because of the Supremacy Clause, in the event that there is a conflict between Rule 606(b) -- or, indeed, with any other state law or rule -- and the Due Process Clause, the Constitution trumps. Accordingly, even if a juror's testimony concerns the jury's internal deliberations, this Court has held that it may consider that testimony if "necessary to ensure due process, *i.e.*, fundamental fairness." *State v. Hunter*, 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995). South Carolina courts have recognized several situations in which "fundamental fairness" is implicated.²⁴

The case at bar presents another situation involving fundamental fairness. Criminal defendants in South Carolina have a constitutional right to have a verdict returned against them only if it is unanimous. S.C. CONST. Art. V, § 22 ("All jurors in any trial court must agree to a verdict in order to render the same."). In this case, it is clear that the verdict against Chris Pittman was not, in fact, unanimous, but that apparent unanimity was coerced by foisting a misunderstanding on the minority jurors to the effect that "unanimity" meant that the majority decided, then all the jurors signed off on the majority decision. A verdict which does not represent the true assessment and true verdict of **each** individual member of

²³ The constitutional right to a jury trial has been "incorporated" into the Due Process Clause, and, thereby, made applicable to and binding on the states. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). South Carolina's Constitution also contains its own due process clause. S.C. CONST. Art. I, § 3. For convenience, the term "due process" as used herein relates primarily to the federal Constitution. However, for all practical purposes, Defendant submits that the constitutional guarantees of both state and federal government are in harmony.

²⁴ *E.g.*, (1) Racial Prejudice: *State v. Hunter*, 320 S.C. at 89, 463 S.E.2d at 319; (2) Gender Bias: *State v. Franklin*, 341 S.C. 555, 534 S.E.2d 716 (S.C. App. 2000); (3) Premature Deliberations: *State v. Aldret* 333 S.C. 307, 311, 509 S.E.2d 811, 813 (S.C. 1999); (4) An Allen Charge Directed at the Minority Jurors: *Dawson v. State*, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002); (5) Consideration of the Consequences of Sentencing (sometimes): *State v. Galbreath*, 359 S.C. 398, 407, 597 S.E.2d 845, 849 (S.C.App. 2004); (6) Empaneling a Juror Who Admits He Would "Go With the Majority": *State v. Bennett*, 328 S.C. 251, 493 S.E.2d 845 (1997); (7) Coercing Criminal Defendant to Testify: *Butler v. State*, 302 S.C. 466, 397 S.E.2d 87 (1990).

the jury is, by definition, a deprivation of due process and of the correlative right to a jury trial. The only remedy is a new trial.

IV. THE RECORD BEFORE THE COURT ESTABLISHES BOTH JUROR MISCONDUCT AND RESULTANT PREJUDICE

A. The Facts. The record of the March 1st hearing²⁵ confirmed the allegations of the Second Motion for New Trial, and, actually, added additional information about the juror misconduct issue. In his testimony before the Court, Juror P²⁶ confirmed that he had, indeed, discussed the case, outside of the jury room, with a friend on the evening of Monday, February 14, 2005. 3/1 S. Tr. at R. p. 4060, lines 21-24 (testimony of Juror P). He downplayed the conversation and insisted that he learned nothing from the friend and took nothing from this encounter with him into the jury room. Sadly, even after being recalled several times, his testimony differs in several material respects from that of his friend and from three of his fellow jurors.

Juror P states that he does not remember saying anything of substance to the friend about the case. 3/1 S. Tr. at R. p. 4048, lines 18-20 (testimony of Juror P). And, yet, the friend himself clearly recollects this Juror did share his views about the case with him, telling him, in fact, that he gave his opinion on how he intended to vote: “guilty.” 3/1 S. Tr. at R. p. 4032, lines 7-13 (testimony of friend).

²⁵ The trial judge was clearly within his rights to investigate this matter and to receive testimony from these jurors. *See, e.g., State v. Hunter*, 320 S.C. 85, 463 S.E.2d 314 (1995). Indeed, in *State v. Aldret* 333 S.C. 307, 315-316, 509 S.E.2d 811, 815 (S.C.,1999) this Court suggested that “if the trial court finds the affidavits credible, and indicative of premature deliberations, an evidentiary hearing should be held to assess whether such deliberations in fact occurred, and whether they affected the verdict. At such an evidentiary hearing, the trial court may, upon request of the moving party, reassemble the jurors and conduct voir dire to ascertain the nature and extent of the premature deliberations.”

²⁶ This is the same juror who rushed to the cameras in the wake of the verdict, deriding the defense by such comments as they were “grasping for straws” and impugning the integrity of defense counsel by suggesting that Chris had been “coached” to “turn the tears” on and off “like a faucet.” R. pp. 297-334, Defendant’s Second Motion for New Trial at pp. 313-327 Exhibit A (Affidavit of defense counsel, Andy Vickery, and attachments thereto).

Juror P's testimony also conflicts with three of his fellow jurors, Juror A, *supra* and two others whom we shall call Jurors C and D. The conflict concerns the issue of whether or not, in addition to the friend, Juror P had discussed the case with his wife. Juror C's recollection was fairly innocuous. She recalls that Juror P said that his wife mentioned something to him about the case, and that he "changed the subject." 3/1 S. Tr. at R. p. 3976, lines 8-9 (testimony of Juror C). This conversation happened "before deliberations." 3/1 S. Tr. at R. p. 3977, lines 12-13 (testimony of Juror C). Juror A's recollection was a bit more substantive. She recalls that Juror P said that he and his wife did not agree on the proper verdict in the case. 3/1 S. Tr. at R. p. 3983, lines 3-7 (testimony of Juror A). Juror D's testimony was the most explicit. She recalled that Juror P had told several of the jurors that he had discussed the case with his wife "during the trial." 3/1 S. Tr. at R. p. 4020, lines 8-10 (testimony of Juror D). She said that she and two of the other jurors "were astonished" that he had discussed it with his wife during the trial and that they nudged one another. 3/1 S. Tr. at R. p. 4019, lines 17-25 (testimony of Juror D). And, perhaps most troubling, her recollection is that Juror P coupled his disagreement about the verdict with his wife with his post-trial dash to the media cameras. *Id.*

Clearly, Juror P violated the court's instructions by discussing the case with his friend and his wife, and by prejudging and announcing his vote before the deliberations were completed. The question from a legal standpoint becomes, "is this acceptable behavior?" Will this Court send a 12-year old to prison for a minimum, mandatory period of 30 years, when it knows, without question, not only that two of the jurors thought the boy was innocent, but also that a third -- the very one who foisted the misunderstanding of the law on the other two -- had "declared himself" to a friend, and probably to his wife as well, before the verdict?

B. The Law. Although the unique facts of this case are *sui generis*, the Court is not without guidance in its precedents. It is, of course, axiomatic, that “in a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences.” *State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998).²⁷

The closest analogy in the case law to the case at bar is *State v. Aldret* 333 S.C. 307, 509 S.E.2d 811 (S.C.,1999) in which this Court grappled with the question of “premature deliberations.” While not granting a new trial, this Court ultimately held that premature jury deliberations raise questions of fundamental fairness because “the human mind is constituted such that when a juror declares himself, touching any controversy, he is apt to stand by his utterances to the other jurors in defiance of evidence.” *Id.* at 311. Unfortunately, Juror P “declared himself” to his friend, before the jury reached its verdict. His misconduct in this regard necessitates a new trial.²⁸

V. WHETHER THE WAIVER OF THE FAMILY COURT’S JURISDICTION COMPORTS WITH SOUTH CAROLINA SUBSTANTIVE LAW AND WITH FEDERAL DUE PROCESS

The United States Supreme Court has recognized that the point at which a juvenile court “waives” or considers waiving, its jurisdiction, so that a child is tried as an adult and

²⁷ South Carolina law regarding juror misconduct is reasonably clear. First, the law makes a critical distinction between internal and external misconduct, *i.e.*, that occurring inside the jury deliberation room vs. that occurring outside. *State v. Galbreath*, 359 S.C. 398, 597 S.E.2d 845 (Ct.App. 2004). For obvious reasons, courts are much more loathe to intrude into the sanctity of the jury room. Second, in order to obtain a new trial, the movant must establish both (a) misconduct, and (b) likely prejudice. *E.g.*, *State v. Grovenstein* 335 S.C. 347, 352, 517 S.E.2d 216, 218 (S.C.,1999).

²⁸ This is not a case like *State v. Kelly*, 331 S.C. 132, 141, 502 S.E.2d 99 (1998), in which the trial court became aware of the misconduct **before** verdict and took appropriate remedial action, *i.e.*, removing the tainted juror and sitting the first alternate. Rather, because neither the counsel nor the court learned of the misconduct until after the verdict, the only possible remedy is a new trial. In this case, if the first alternate had been seated for deliberations, the result would clearly have been different. She, like Jurors A and B, believed that Chris Pittman was not guilty. R. pp. 297-334, Defendant’s Second Motion for New Trial at pp. 330-332, Exhibit D (Affidavit of alternate Juror Roberta Diamond.) However, unlike those other two, because Ms. Diamond is a licensed South Carolina lawyer, she would not have been duped by Juror P’s misstatement of the law.

subjected to adult punishment, is a “critically important” juncture of the legal proceedings at which both the right to counsel and other emoluments of substantive and due process are essential. *Kent*, 383 U.S. 541, 556 (1966). Separate and apart from these constitutional requirements, South Carolina state law also mandates a “complete investigation.” *Patton v. Toy*, 867 F.Supp. 356, 362 (D.S.C.,1994).

The record in this case demonstrates that, sadly, everyone in the process, from appointed defense counsel, to guardian ad litem, to the Solicitor, and even to the judge, who sits in the capacity as *parens patriae*, failed both Chris Pittman and the South Carolina criminal justice system.

Twelve year old Christopher Frank Pittman was arrested in the early morning hours of November 29, 2001. Prior to his arrest, he had never been convicted of any crime nor spent time in any juvenile justice system. From that date until June 27, 2003, he was in the exclusive, ostensibly protective, *parens patriae* jurisdiction of the Family Court. On June 27th, the Family Court “waived” its exclusive jurisdiction in favor of a referral to Circuit Court, to try this 12 year old as an adult. Chris was allowed to languish in custody for almost eighteen months between his arrest and the waiver hearing. At no point did the juvenile judge issue the periodic detention orders that are required by Rule 31 (SCRFC).

The very reason that the United States Supreme Court and South Carolina require spelled out reasoning was so that any “reviewing court” could assure itself that the requirements of due process have been satisfied. *Patton v. Toy, supra*, 867 F.Supp. at 364. Moreover, as noted above, because the question of a juvenile court’s waiver of jurisdiction implicates due process rights, the issue is one of constitutional dimensions and “**any reviewing court** must ensure that each child receives such process.” *Id.* This Court is the critical “reviewing court.”

Under these cases, the courts are to consider the eight different factors set forth in the Addendum to the Supreme Court's *Kent* opinion in determining whether adjudication in adult court is proper or not. Significantly, however, the twin "touchstones" of the inquiry are whether the youth can be "rehabilitated" within the juvenile court system and whether he presents any continuing danger to society. *State v. Avery*, 333 S.C. 284, 289, 509 S.E.2d 476, 489 (S.C. 1998). The United States Supreme Court explained this in *Kent*, as follows:

The theory of the District's Juvenile Court Act, like that of other jurisdictions, is rooted in social welfare philosophy rather than in the *corpus juris*. Its proceedings are designated as civil rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. **The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment.** The State is *parens patriae* rather than prosecuting attorney and judge.

383 U.S. at 554-55 (emphasis added). South Carolina employs the same basic standards for making and sustaining a waiver. *Toy, supra*.

Justice must be based on the whole truth, and nothing but the truth. And waivers may be sustained only after a "full investigation," due process, and reasoned consideration of all eight *Kent* factors. Shortly after the undersigned counsel came into the case, he moved the circuit court for a remand to juvenile court. *See R.* pp. 175-183, Defendant's Motion to Remand, June 14, 2004. The motion was repeatedly urged and denied. 12/2 Tr. at R. p. 583, line 16-p. 672, line 23 and 1/31 Tr. at R. p. 1971, line 14-p. 1973, line 5.

In the intervening time between the Family Court's waiver order and his trial, Chris was examined on a regular basis by a competent mental health professional employed by the State of South Carolina. This professional, Dr. Lanette Atkins, was in the best position to determine whether, in fact, Christopher benefitted from the rehabilitative goals of the

juvenile system. On December 3, 2004, more than three years after Chris's arrest, the circuit judge held a hearing. At that hearing, he received evidence, including the testimony of Dr. Atkins, a board certified child psychiatrist. Dr. Atkins testified that at the time of the incident Chris was, if anything, developmentally and educationally behind his schoolmates, but since being removed from the SSRI medication had made tremendous educational and developmental strides during his juvenile stay. 12/2 Tr. at R. p. 634, line 12-p. 635, line 8 (testimony of Dr. Lanette Atkins). Moreover, she relayed that he had been a model prisoner, was completely rehabilitatable, and that he represented no danger to society. 12/2 Tr. at R. p. 635, line 14-p. 637, line 7 (testimony of Dr. Lanette Atkins). No evidence rebuts this testimony. Indeed, at the very end of the trial, a prosecution rebuttal witness testified that in the last year of his pre-trial confinement, Chris had been "perfect" and "great." 1/31 Tr. at R. p. 3507, lines 17-18 (testimony of Dr. Julian Sharman).

Nevertheless, the defense motion was denied each and every time raised. The court of general session's written opinion on this matter is not unsympathetic to the defense position. And, yet, the judge clearly felt like (a) his hands were tied by a very limited scope of review, and (b) it was appointed defense counsel who had dropped the ball. With respect, we submit that the court was in error on both counts.

Although counsel do not defend the lack of vigor with which Pittman was represented at the waiver hearing,²⁹ appointed defense counsel was not the only one with duties to the defendant and duties to the system. The Solicitor, and even the family court judge himself, also had obligations which were not fulfilled.

²⁹ Indeed, as noted *supra*, we know that, if for any reason Pittman's conviction is not reversed, that it is very likely that there will be a PCR petition in state and/or federal court to receive such evidence as is necessary to adjudicate an ineffective assistance claim.

The first of the two foci within the law on this issue is the question of rehabilitation. In affirming the waiver of murder charges against a 16 year old, this Court in *State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998), reasoned that “Kelsey would have less of a chance of rehabilitation in the juvenile justice system because his sentence under that system would be brief.” *Id.* The case of Christopher Pittman is dramatically distinguishable from *Kelsey*. As Dr. Atkins testified, Chris has made, not only demonstrable progress, but rather **significant** gains while under the care of the South Carolina juvenile justice system. The prosecution’s own Dr. Sharman confirmed this. 1/31 Tr. at R. p. 3507, lines 17-18 (testimony of Dr. Julian Sharman). He is clearly rehabilitatable in the juvenile system.

The second major factor to be considered is the potential danger to the community. *Avery*, 333 S.C. at 289. Indeed, other than the rehabilitative prospects for the accused, it is the most essential factor which can justify a waiver. In this case, the crime with which Pittman was charged was a uniquely intra-family crime. There is nothing about that charge, and certainly no other facts of record, which indicate that Chris Pittman would pose a danger to his community. The only evidence is that Chris poses no danger to society. 12/2 Tr. at R. p. 636, line 13-p. 637, line 7 (testimony of Dr. Lanette Atkins).

None of the other factors listed in *Kent* or considered by South Carolina courts justified a waiver in Chris’ case. For example, unlike the 16 year old defendant in *State v. Hamilton*, 285 S.C. 133, 328 S.E. 2d 633 (1985), 12 year old Christopher Pittman did not have an extensive prior juvenile court record. Similarly, unlike the “almost 15 year old” in *Avery, supra*, 12 year old Chris Pittman did not have a significant problem of alcohol abuse. Nor does Christopher exhibit Avery’s “unwillingness to participate in the rehabilitative process.” To the contrary, he is remorseful, cooperative, and anxious to be fully rehabilitated.

The question at this juncture becomes one of remedy. It is clear that, at the absolute minimum, the conviction must be reversed. But the existing case law does not permit a definitive answer as to whether it should be accompanied by a remand for trial in the family court, or an outright dismissal of charges. Consequently, the defendant simply puts himself in the hands of this Court, to fashion a remedy that the Court believes to be appropriate, all things considered.

VI. COREY D SHOULD BE OVERRULED

In 2000, this Court construed S.C. Code Ann. § 20-7-7605(6) to permit a Family Court to “waive” its exclusive jurisdiction over murder charges against a twelve year-old up to the court of general sessions. *State v. Corey D*, 529 S.E.2d 20 (S.C. 2000). Although this opinion is relatively recent, Defendant urges the Court to reconsider its decision for three critical reasons.

The first reason is that, with all due respect, this Court misinterpreted the Legislature’s intent in *Corey D*. No section of S.C. Code Ann. § 20-7-7605 mentions an age lower than fourteen. Subsection 6, which deals with minors charged with murder or criminal sexual conduct, does not specifically mention any age, but tellingly does not refer to “a child, regardless of age,” or “a child of any age.” An analysis of the entire statute demonstrates why the Legislature did not include any such language in Subsection 6.

Subsection 6 does not mention “a child” at all. It refers to “the child.” This is of utmost importance because, whenever the Legislature uses “the child” throughout S.C. Code Ann. § 20-7-7605, the term refers back to a definition already given. In other words, when the Legislature refers to “the child,” it has already, previously identified the child of which it speaks. In light of this fact, it is clear that the Legislature intended to limit the transfer statute to children 14 years and older. Subsection 6 employs the term “the child” because

the child to which it refers has been identified in subsection 5. Subsection 5 addresses “a child fourteen or fifteen years of age [who] is charged with . . . a felony which provides for a maximum term of imprisonment of fifteen years or more” – which clearly includes murder – and allows the family court to abstain from exercising jurisdiction.³⁰ Subsection 6 then makes additional provisions if “the child” is charged with murder or criminal sexual conduct. “The child” plainly refers to “a child fourteen or fifteen years of age,” as defined in subsection 5. Subsection 5 addresses children charged with felonies punishable by maximum prison terms of 15 years or more, including murder. Subsection 6 makes additional provisions for children within this definition who are charged with murder or criminal sexual conduct.³¹

South Carolina, under *Corey D*, is only one of approximately seven states in the Union which currently allow twelve year-olds to be tried as adults. If this were the South Carolina Legislature’s true intent, it would have made this intention unambiguous by adding

³⁰ S.C. Code Ann. § 20-7-7605 does contain some apparent gaps. Subsection 4 applies to children at least sixteen years old who commit misdemeanors or Class E or F felonies. Subsection 5 applies expressly to “a child fourteen or fifteen years of age.” So what happens if a sixteen year-old commits a Class A felony? There is no provision that expressly applies to such a situation. Nonetheless, it is eminently logical to conclude that the sixteen year-olds covered by Subsection 4 are also subject to Subsection 5, and that Subsection 6 applies to all children identified in Subsections 4 and 5 (*i.e.*, who are older than fourteen) charged with murder or criminal sexual conduct.

³¹ Recognizing that Subsection 6 applies only to children fourteen and older also harmonizes this Court’s holding in *Slocumb v. State*, 337 S.C. 46, 522 S.E.2d 809 (1999). If *Corey D* is correct that Subsection 6 is subject to no age limitation, the Court’s holding in *Slocumb* that only fourteen-and-older children may be tried as adults on criminal sexual conduct charges directly contradicts Subsection 6’s express application to “the offense of murder or criminal sexual conduct.” [Underlining added.] Holding that Subsection 6 applies only to “the child” identified in Subsection 5 recognizes the Legislature’s true intent, and makes South Carolina law consistent in its application of felony waiver provisions only to children who are at least fourteen years of age.

language such as “a child, regardless of age” to S.C. Code Ann. § 20-7-7605(6), as the legislatures of other states have done.³²

The second reason is that, as a result of recent developments in hard neuroscience, *i.e.*, magnetic resonance imaging, it is abundantly clear that a twelve year old’s brain is nowhere near full developmental capacity, and that the undeveloped parts of those portions relate to “executive” decision-making. *See* arguments and authorities in section VII, *infra*, especially including the United States Supreme Court’s discussion of these developments in *Roper v. Simmons*, 543 U.S. 551 (2005). This scientific fact, coupled with the long-standing presumption against criminal capacity for children under the age of fourteen, further bolsters the Legislature’s intent to draw the line at age fourteen.

The third is that, by construing the statute in this manner, the Court avoids numerous, serious constitutional issues, like those briefed in section V and VII. This Court has recognized that it must construe statutes in a manner that avoids confrontation with the Constitution. *E.g.*, *Brown v. County of Horry*, 308 S.C. 180, 183, 417 S.E.2d 565, 567 (1992). *See also United Student Aid Funds, Inc. v. South Carolina Dept. of Health and Environmental Control*, 349 S.C. 162, 168, 561 S.E.2d 650, 653 (S.C.App.,2002)(“[W]e also consider the doctrine of constitutional doubt, which provides that when a statute is susceptible of two constructions, courts interpret the statute to avoid ‘grave and doubtful constitutional questions.’”)(*citing Pennsylvania Dep’t of Corrections v. Yeskey*, 524 U.S. 206, 212, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998)). If *Corey D* were correct that subsection 6 is not subject to any age limitation, it would necessarily mean that, for example, an eight

³² A clear example of this is from the State of Vermont. The statute provides, “the juvenile court may transfer jurisdiction of the proceeding to a court of criminal jurisdiction, if the child had attained the age of 10 but not the age of 14 at the time the [murder] was alleged to have occurred...” VT ST T. 33 § 5506 (a).

year-old could be tried for murder as an adult. Given the obvious constitutional problems with this plain result of *Corey D*, it becomes even more apparent that the Legislature did not intend such a result.

Because the correct interpretation of S.C. Code Ann. § 20-7-7605(6) is that it applies only to children fourteen and older, twelve year-old Chris Pittman was improperly transferred to the court of general sessions to be tried as an adult. This Court should reverse his conviction, overrule *Corey D*, and, at a minimum, order a new trial in juvenile court. Because any new trial, even in juvenile court, would have to encounter the other important issues, *e.g.*, speedy trial, the *Miranda* issue, etc., however, Defendant urges the Court to address those issues as well and to provide guidance for their resolution.

VII. WHETHER IT VIOLATES THE “EVOLVING NOTIONS OF COMMON DECENCY” THAT ARE THE TOUCHSTONE OF THE EIGHTH AMENDMENT FOR THE STATE OF SOUTH CAROLINA TO SUBJECT A TWELVE YEAR OLD TO A MANDATORY, MINIMUM PRISON TERM OF 30 YEARS WITHOUT PROBATION

The defense made a vigorous pretrial argument about the specter of possible punishment. R. pp. 270-296, Defendant’s Notice of Unconstitutionality of Statute, filed December 2, 2004. The circuit judge rejected the argument at that time on the basis that it was premature. Citing *Ingraham v. Wright*, 430 U.S. 651 (1977), he wrote that the Eighth Amendment argument becomes ripe if, and only if, a sentence which violates that Amendment is imposed. (R. pp. 26-42, Court of General Sessions Order dated January 14, 2005 at p. 16 of 17.).

On the day that he was convicted, Chris Pittman was sentenced to thirty years, without parol, which is the mandatory, minimum sentence for a person convicted of murder in South Carolina. Believing that this inflexible sentencing requirement constitutes

“excessive punishment” for a 12-year old, the defense reurged its point. 2/15 Tr. at R. p. 3851, line 11-p. 3855, line 2.

Because of space limitations, we will not belabor the Court with all of the arguments and authorities which were made in conjunction with that motion. They are in the record. *Id.* But we would like to point out that there is a symbiotic and synergistic relationship between developing science and the “evolving notions of common decency” that are the touchstone of the Eighth Amendment analysis. On the day after Pittman was sentenced, USA Today carried a story about whether 16 year olds are too young to drive. It contained a graphic illustration about the developmental shortcomings of the typical³³ adolescent. R. pp. 483-498, Defendant’s Post-Argument Brief About “Evolving Standards” in Law, Science & Society, at p. 1 of 11.

As best we can tell, Chris Pittman is the *second youngest person in American history to be prosecuted in an adult court*. The youngest is an 11-year old boy who was prosecuted for murder in 1999 in a Michigan court³⁴

The common denominator of law and society is **science**. The color picture from the cover of *USA Today*, depicts graphically what Dr. Atkins described in her testimony before the Circuit Court at the December 2004 hearing on the defense’s Motion to Remand. 12/2 Tr. at R. p. 658, line 8-p. 659, line 20. It shows, in living color, that there is a dramatic, physical difference between Chris Pittman’s 12 year old, pre-teen brain, a “younger teen” brain, and an “older teen” brain. And these are not simply pretty color pictures that have no relevance to the issues at hand. Dr. Giedd, the NIH researcher who has analyzed 4000 brain

³³ As noted above, Chris Pittman was not typical. The only testimony in the record about his developmental status as of the time of the incident was that of Dr. Atkins, who found him to be “pretty limited” in terms of intellectual abilities. 12/2 Tr. at R. p. 634, lines 10-25.

³⁴ *Christian Science Monitor*, “Justice for Nathaniel,” January 18, 2000.

scans from 2000 volunteers, explains that the area in Chris's brain "that's slow to turn blue – which represents development over time – is the right side just over the temple. . . . The underdeveloped area is called the dorsal lateral prefrontal cortex. The underdeveloped blue area" is that part that controls "impulse and decisions." It is the "executive function" area of the brain—where judgment is exercised and decisions are made.

Although *USA Today* reported the scientific findings, they are hardly the only source. Many academics have noted these developments. For example, an article in the record from the January 2004 publication by the Juvenile Justice Center of the ABA, on Adolescence, Brain Development and Legal Culpability explains that "[r]esearchers at Harvard Medical School, the National Institute of Mental Health, UCLA and others, are collaborating to 'map' the development of the brain from childhood to adulthood and examine its implications." Similarly, the UCLA's website, www.loni.ucla.edu/%7Eethompson/DEVEL/dynamic.html, actually contains a video sequence of the developing brain shots depicted on the previous page of this Brief. (R. pp. 483-498, Defendant's Post-Argument Brief About "Evolving Standards" in Law, Science & Society, at p. 1 of 11). They, too, provide graphic illustration of the point.

That is the science of the matter. To transmute it to legal terms, the underdeveloped part of the 12-year old brain is that portion that gives one capacity (a) to form malice or other criminal intent, and (b) to waive one's *Miranda* rights.

The fact is that kids are kids. They are not mini-adults. The legal system could and should have recognized this in one or more of three different ways. First and foremost, it should have recognized it by keeping him in Family Court where he belonged. Defense counsel in this case firmly believe that the decision to "waive" Pittman up to adult court was

a serious, fundamental error. But, the Circuit Court viewed the matter as a “question for appeal.”³⁵

Second, this Court has acknowledged the difference via its long-standing “presumption of incapacity” which attaches to children under the age of 14. If, as we request in Section I, *supra*, the Court reverses the conviction because there is no evidence to rebut this presumption, then the constitutional issue is moot.

Third, there is the corrective sweep of the Eighth Amendment, which prohibits, not only “cruel and unusual punishments,” but also “excessive punishments.” It is, thus, to this argument that we now turn.

The United States Supreme Court has compared the criminal culpability of juveniles with that of persons suffering from mental retardation. Quoting its decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court wrote in *Roper* that “[m]ental retardation . . . diminishes personal culpability even if the offender can distinguish right from wrong.” *Roper v. Simmons*, 543 U.S. 551, 563 (2005).³⁶

Roper is merely the latest in a long line of cases that evince a tendency, in law and in science, to treat children more like children. Although, on the one hand, the State may try to limit its scope because it is a death penalty case, on the other, *Roper* involved a defendant Christopher Simmons, who, at age 17, was on the far end of adolescence. Chris Pittman, by contrast, was only 12. In light of the fact that the Eighth Amendment, as applied in *Roper* as well as in prior decisions of this Court, *e.g.*, *State v. Standard*, 351 S.C. 199, 569 S.E.2d 325 (2002), requires an individualized, **proportionality** analysis, it is compelling precedent.

³⁵ See Section V, *supra*.

³⁶ “It is beyond cavil that juveniles as a class are generally less mature, less responsible, and less fully formed than adults, and that these differences bear on juveniles’ comparative moral culpability.” *Roper*, 543 U.S. at 599 (O’Connor, J., dissenting).

Equally instructive is the opinion in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), in which the High Court held that children under the age of 16 could not be subjected to the death penalty. “All of this legislation is consistent with the experience of mankind, as well as the long history of our law, that the normal 15-year-old is not prepared to assume the full responsibilities of an adult.” 487 U.S. at 824-25. The bottom line of these cases is that: (1) children as a class are different than adults, and (2) as the age of the offender goes down (from 18), the level of constitutional scrutiny goes up. With the exception of the Michigan case mentioned earlier, Pittman has not found a case on point dealing with a child as young as 12.

The court below was extremely concerned about the impact of this Court’s opinion in *State v. Standard*, 351 S.C. 199, 569 S.E.2d 325 (2002) on the Eighth Amendment issue. *Standard* is not an impediment to reversal in this case. Two points should be borne in mind. First, there is an obvious difference in that the defendant in that case was sentenced to life without parole for a crime he committed when he was 20 years old, 569 S.E.2d at 327, whereas Chris Pittman had no prior criminal history and committed his first and only crime when he was 12.

Additionally, in *Standard* this Court cited both *Hawkins v. Hargett*, 200 F.3d 1279 (10th Cir.1999), *cert. denied* 531 U.S. 830 (2000)³⁷ and *State v. Green*, 348 N.C. 588, 502 S.E.2d 819 (1998), *cert denied*, 525 U.S. 1111, 119 S.Ct. 883, 142 L.Ed.2d 783 (1999), both

³⁷ With respect, we point out that in *Standard* this Court mistakenly recited that the *Hawkins* sentence was “100 years without parole.” In fact, the court there wrote, “It is also important to the analysis that Mr. Hawkins' prison sentence, while lengthy, will be shortened considerably by the availability of parole and ‘good time’ credits. ... a proper assessment of Mr. Hawkins' punishment cannot ignore the possibility that he will actually only serve roughly one-third of his sentence.” *Hawkins v. Hargett*, 200 F.3d 1279, 1284 (10th Cir. 1999).

of which adopt proportionality review³⁸ of sentencing in a non-capital case and both of which acknowledge the age of the defendant as part of the proportionality analysis. Although the courts in both cases found that there was no Eighth Amendment violation, the case at bar presents a different situation: (1) Pittman was only 12 at the time of his crimes, and even one year makes a huge developmental difference; (2) he was under the influence of a mind-altering drug at the time; (3) he had no prior criminal record whatsoever; (4) unlike Hawkins, he has no possibility of parole; and, (5) recent developments in science have further illuminated, not only the dangers of SSRI's in children and adolescents, but also just how underdeveloped a 12-year old's brain is, especially with respect to the capacity to form criminal intent.

On the day that the defense's Eighth Amendment motion was being argued, the United States Supreme Court handed down its landmark decision in *Roper v. Simmons*³⁹, holding that 17 year olds are too young to be executed. During the arguments, the circuit court repeatedly asked counsel for examples, in the **case law**, of the evolving notions. With respect, we submitted to that court, and to this one, that one does not search prior precedents for evolving notions. As the Supreme Court itself demonstrates, in *Roper* and in the prior death penalty cases, evolving notions are discerned from scientific developments and numerous publications. The USA article and the *Roper* case are excellent examples.

If our society questions whether 16 year olds can drive an automobile, and if it forbids the execution of 17 year olds, then certainly it cannot condone treating 12 year olds exactly like full grown adults, for sentencing purposes!

³⁸ *Roper* also emphasizes that Eighth Amendment jurisprudence involves a proportionality analysis, *i.e.*, whether the punishment is proportional to the crime. 543 U.S. at 568-576.

³⁹ *Roper, supra*.

The South Carolina statutes and jurisprudence are not devoid of guidance. In South Carolina, a child must be 18 years old to ratify a contract, 16 years old to marry, and 15 years old to drive an automobile. Moreover, as noted in section I, *supra*, for more than 50 years this Court has held that the law presumes that a child under the age of 14 does not have the requisite mental capacity to commit a crime.

Considering all of these factors, we submit that Chris Pittman's Eighth Amendment rights have been trampled. Again, however, there is a question of remedy. One remedy would be to simply reduce his sentence down to eight years, four months, and 12 days, so that it would expire on his 21st birthday. However, that remedy would still not treat him as the child that he was. Therefore, we submit that the most constitutionally appropriate remedy is for the Court to reverse his sentence and to remand him to the custody of the juvenile detention personnel, with instructions to treat him exactly as if he had originally been convicted in family court, rather than circuit court.

VIII. WHETHER A CHILD WHO CANNOT EVEN SIGN A BINDING LEGAL CONTRACT CAN EFFECTIVELY WAIVE HIS CONSTITUTIONAL RIGHTS, AND, IF NOT, WHETHER THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS THE CONFESSION UNDER THE PARTICULAR FACTS OF THIS CASE

Jackson v. Denno, 378 U.S. 368 (1964) and its progeny require demonstrable proof that a waiver of Fifth Amendment rights and subsequent custodial confession must satisfy the long-standing test of waiver, *i.e.*, a "voluntary relinquishment" of a "known right." The voluntariness of a statement depends on the "totality of the circumstances" surrounding the character and situation of the accused, which in turn depends on the suspect's age, education, and intelligence, *see Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); as well as a suspect's prior experience with law enforcement, *see Lynumn v. Illinois*, 372 U.S. 528, 534

(1963). Thus, “Confessions by juveniles require special scrutiny by the courts.” *Vance v. Bordenkircher*, 692 F.2d 978, 980 (4th Cir. 1980).

In this case, the agents extracted two signed statements from a 12-year old boy of below-average intelligence, with no prior experience with law enforcement, who was under the influence of a psychoactive drug that was prescribed “off label” to him by a general practitioner.

At the *Jackson v. Denno* hearing, one of the agents who took Chris’s statements agreed with what the law requires, *i.e.*, the younger the defendant, the greater the care and constitutional scrutiny. 12/2 Tr. at R. p. 834, line 25-p. 835, line 8 (testimony of Agent Lucinda McKellar). And, yet, even though they knew he was only 12 years old, knew that his bizarre behavior had made one of the hunters “nervous and stuff,” and knew that his father was on the way, if not actually outside of the room, Agents McKellar and Williams proceeded to take, not one, but two different statements from Chris. Only after the second, incriminating statement, written entirely by Agent McKellar in her own hand, did they stop. 1/31 Tr. at R. p. 1562, lines 5-7 (testimony of Agent Lucinda McKellar). The record in this case shows considerable application of both “carrot” and “stick.” Agent McKellar began her relationship with Chris by feeding him, telling him to “call me Lucy” and “playing Go Fish.” Subsequently, she did a 180-degree turn, told him to sit down, and said that they needed to have an “adult conversation.” 1/31 Tr. at R. p. 1526, lines 8-9 (testimony of Agent Lucinda McKellar). At one point, right before the actual “interrogation” that resulted in the confession began, she even reminded this obviously distraught, but fundamentally religious boy, about scripture and “burning in the fires of hell.” 1/31 Tr. at R. p. 1542, lines 10-14, p. 1588, lines 9-16 (testimony of Agent Lucinda McKellar).

Unfortunately, the Record before the Court is limited to the statements themselves, the recollections of the agents, and the other evidence offered at the *Jackson v. Denno* hearing. Although both agents admit that they could have videotaped the “confession” so that there would be no question about Chris’s behavior, demeanor, and choice of words, they chose not to do so. With nothing except the unrecorded testimony of the agents to support the decision, the trial court allowed Chris Pittman’s statements to come into evidence. The confession was critical for the Solicitor. While it established that Chris pulled the trigger – a fact that is undisputed – it gave him something much more important, something that he did not have without it: a colorable motive.

The case is analogous to the Supreme Court’s reversal of the murder conviction of a boy two years older than Chris Pittman who was not under the influence of psychoactive drugs:

The prosecution says that the youth and immaturity of the petitioner and the five-day detention are irrelevant, because the basic ingredients of the confession came tumbling out as soon as he was arrested. But if we took that position, it would, with all deference, be in callous disregard of this boy's constitutional rights. He cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights-from someone concerned with securing him those rights-and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had. To allow this conviction to stand would, in effect, be to treat him as if he had no constitutional rights.

Gallegos v. Colorado, 370 U.S. 49, 54-55 (1962).⁴⁰

Counsel have located only two reported cases involving confessions by twelve year olds – undoubtedly because only a handful of states permit them to be tried as adults. In *Melton v. Patterson*, 313 F.Supp. 1287, 1289-90 (D.Colo. 1970) the court found that the “tender age” and absence of “mature counsel” invalidated a twelve year old’s confession, although the error was harmless under the circumstances. In *Commonwealth v. Philip S.*, 611 N.E.2d 226 (Mass. 1993) the court found the confession valid under the Massachusetts’s “interested adult rule,” because, and only because, the minor’s mother was with him throughout the process.

Considering the “totality of the circumstances,” Chris Pittman’s confession should not have been admitted into evidence, and its admission rose to the level of constitutional deprivation. Defendant urges the Court to reverse the conviction and to remand for a new trial, with instructions not to admit the custodial statements.

IX. WHETHER THE TRIAL COURT ERRED IN FAILING TO CHARGE THE JURY ON LESSER INCLUDED OFFENSE(S) OF VOLUNTARY AND/OR INVOLUNTARY MANSLAUGHTER

A trial court is obligated to instruct on all lesser included offenses which are raised by the evidence, and, thereby, to give the jury some choices other than the “all or nothing” of guilty or not guilty for murder. “It is well-settled the law to be charged is determined from the evidence presented at trial, and if any evidence exists to support a charge, it should be

⁴⁰ In *In re Williams*, 265 S.C. 295, 300, 217 S.E.2d 719, 722 (1975), this Court recognized that the age of the suspect is part of the “totality of circumstances” test set forth in *Gallegos*. The Court reversed the trial court’s admission of the fifteen year-old minor’s confession in that case because the trial court had not conducted a sufficient inquiry into the totality of the circumstances. The case that the Court cited for the proposition that a trial court in such a circumstance must consider the defendant’s age, along with his “intelligence, education, experience, and ability to comprehend the meaning and effect of his statement” is *People v. Lara*, 67 Cal.2d 365, 62 Cal.Rptr. 586, 432 P.2d 202, 215 (1967).

given. The trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence.” *State v. Burriss*, 334 S.C. 256, 262-63, 513 S.E.2d 104, 108 (1999). “[T]o warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is *no evidence whatsoever* tending to reduce the crime from murder to manslaughter .” 513 S.E.2d at 109 (italics in original) [quoting *Casey v. State*, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991)].).

The centerpiece of the prosecution’s case in chief was Chris’s “confession.” As noted, *supra*, it provided the Solicitor with the one thing that he otherwise did not have, *i.e.*, an arguable motive or rationale for why this shy, non-aggressive young man would suddenly kill the two people whom he loved the most in the world. The “confession,” as written by Agent McKellar, clearly stated that “they deserved it,” they “beat me.” R. pp. 4452-4454, State Trial Exhibit 163.

IF it is true that Joe Frank Pittman, the man who earlier in the day had asked the assistant principal to “pray for” his grandson, really beat him with the large wooden paddle which was introduced into evidence as State Trial Exhibit 141, then it necessarily follows that the subsequent shooting of this child beater could have been manslaughter. An instruction on voluntary manslaughter is appropriate if “the jury could find that [the defendant] accomplished an unlawful killing of a human being in sudden heat of passion upon a sufficient legal provocation.” *State v. Linder*, 276 S.C. 304, 307, 278 S.E.2d 335, 337 (1981). The defense asked the court for an instruction and verdict choice for lesser included. The court refused. 2/14 Tr. at R. p. 3815, lines 6-11, p. 3816, line 20-p. 3817, line 4. Because there was some evidence supporting the submission of manslaughter, the trial court erred when it refused to submit it to the jury. *State v. Gilliam*, 296 S.C. 395, 397,

373 S.E.2d 596, 597 (1988). As this Court has held in *Linder*, *Gilliam*, *Burriss* and many other cases, the trial court's error mandates reversal and a remand for a new trial.

X. WHETHER, ON RETRIAL, THE STANDARD OF PROOF FOR AN INVOLUNTARY INTOXICATION DEFENSE SHOULD BE EITHER (A) INABILITY TO DIFFERENTIATE RIGHT FROM WRONG, OR (B) INABILITY TO CONFORM ONE'S CONDUCT TO THE REQUIREMENTS OF THE LAW

"Involuntary intoxication" by prescription drugs is a recognized common law and/or statutory defense in numerous jurisdictions.⁴¹ Although there are no reported appellate opinions in South Carolina, the standard criminal law treatise⁴² in this state treats it as a defense, and the trial judge readily accepted the proposition that it should be a "complete defense" if established by the evidence and so instructed the jury.

The defense's one complaint with the court's charge was the fact that the judge instructed that one of the elements of the defense is to prove that, as a result of the intoxication, the defendant did not know "right from wrong." This is, of course, the standard for an insanity defense in South Carolina, and, although it is contrary to the ALI's position as expressed in the Model Penal Code, we do not ask the Court to abandon that standard for **insanity** cases.⁴³

At first blush, one might argue that, as a matter of simple expediency, the test for involuntary intoxication should be the same as that for insanity. However, courts exist to

⁴¹ Florida is a good example of the common law defense. *Branaccio v. Florida*, 698 So.2d 597, (Fla.App. 4 Dist., 1997) (error to refuse defense instruction where testimony indicated that defendant was intoxicated on Zolof). Michigan is a good example of the defense being codified into a statute. M.C.L.A. § 768.21a(2).

⁴² William Shepherd McAninch, *The Criminal Law of South Carolina* 4th Edition.

⁴³ Under the Model Penal Code, intoxication is an affirmative defense when it is not self-induced and renders the actor incapable of appreciating the criminality of his or her conduct, or unable to conform his or her conduct to the law. See MODEL PENAL CODE § 2.08(4) (1962). See *United States v. Freeman*, 357 F.2d 606 (2nd Cir. 1966).

foster justice, not expediency. Justice in this instance requires the Court examine the unique circumstances of this case.

The testimony of former police sergeant Bruce Orr vividly describes how even a highly trained police officer, lost control while under the effects of an SSRI drug. 1/31 Tr. at R. p. 2862, line 22-p. 2863, line 8. It is not difficult to understand how this effect could be exacerbated in a young child such as Chris. However, given this state's antiquated standard for involuntary intoxication, a young, developing brain that may understand right from wrong, but be unable to control his conduct, or urges, has no chance. If a trained police officer, who has spent a large portion of his life *enforcing* right and wrong, is unable to conform his conduct, how much more so a 12 year old boy?

We respectfully submit to this Court that prescription drugs are a unique consideration in the context of criminal culpability. The situation is only compounded more so when we are faced with a situation that involves a child. Chris had no other option but to rely upon his father and the health care professionals at LifeStream (who ultimately prescribed him the SSRI) for his mental health well-being. He was completely helpless in his ability to determine whether these drugs were beneficial or harmful to him. In fact, unlike an adult, he could not even refuse their use. This is a significant factor that should weigh heavily on this Court's determination of the proper standard of proof on remand.

XI. WHETHER THE COURT ERRED IN EXCLUDING EVIDENCE WHICH IS CLEARLY RELEVANT TO THE "INVOLUNTARY INTOXICATION" DEFENSE

The circuit court found Dr. David Healy qualified as an expert in both psychiatry and psychopharmacology. 1/31 Tr. at R. p. 2255, lines 14-21. Mr. Keith Altman was found to be qualified as an expert in the review and analysis of adverse event data concerning prescription medication. 1/31 Tr. at R. p. 2778, line 22-35, p. 2780, lines 7-8.

Yet despite their expertise, the lower court prohibited them from testifying about specific adverse event reports, and limited testimony to data that was specific to drug manufacturers only. 1/31 Tr. at R. p. 2822, lines 18-19, p. 2810, lines 14-17. The precluded evidence is scientifically accepted evidence utilized by the FDA in making safety determinations as to drug related adverse events. This is clearly relevant to any determination of a criminal defendants' ability to distinguish right and wrong while under the influence of a prescription medication. The court's limitation on the defense experts' testimony handcuffed Chris' ability to put forth all evidence tending to prove his innocence and, as a consequence, the case should be remanded.

XII. CONCLUSION

From the onset, the case of Christopher Pittman has been troublesome. Troublesome not only because of the horrific nature of the facts, but because of the way this case has been handled by the South Carolina criminal justice system. Beginning with the egregious trial delays, problematic jurisdictional findings, and ultimate punishment and jury related issues, this case is rife with issues for this Court's consideration. This cascade of errors has subjected a young child to unconstitutional punishment and anything but due process. This Court has the ability to rectify these errors and, ultimately, prevent the same sorts of miscarriages of justice in the future. This sort of corrective action, in protecting the Constitutional rights of a 12-year old child who fell victim to a nightmarish combination of the "system" and an FDA recognized adverse drug event, would certainly be in keeping with the highest traditions of the South Carolina bench and bar.

On the foregoing points and authorities, we respectfully request this Court to dismiss the charges against Christopher Pittman, or in the alternative, order a new trial.

Respectfully submitted,

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Certificate of Service

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