

**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 INITIAL REPLY BRIEF

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In reply to the arguments and authorities made by the State of South Carolina in its 75-page brief, Appellant would show the Court the following:

I. PRESUMPTION OF INCAPACITY

A. The Court's Review Should be Limited to the Prosecution's Case-in-Chief.

Citing a case in which there was no motion for instructed verdict whatsoever,¹ the State argues that, because defense counsel did not cite *State v. Blanden*, 177 S.C. 1, 180 S.E. 681 (1935), or otherwise mention the presumption of incapacity during their broad-form motion for instructed verdict, the Court should review the **defense** case to see whether the State carried its burden to rebut this presumption. This is misleading. A motion for instructed verdict based on the inadequacy of the evidence to prove the State's case preserves any error related to such inadequacy. *See, e.g., State v. James*, 362 S.C. 557, 562, 608 S.E.2d 455, 457-458 (S.C.App. 2004); *State v. Russell*, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct.App. 2001).²

B. This Court Should Hold that Expert Testimony is Required to Rebut the Presumption. This Court has never written about either the quantum or quality of evidence that is necessary to rebut the presumption of incapacity. The State argues that lay testimony and circumstantial evidence are appropriate, relying on a string of cases in which such testimony was found sufficient to overcome a **defense** of insanity. Although this Court could adopt this reasoning, why should it do so? There is a material difference between the evidence that rebuts a defense – a defense which the State will not know for sure will be asserted at trial until the defense rests – and evidence which is sufficient to establish an

¹ *State v. Bailey*, 298 S.C. 1, 377 S.W.2d 581 (1989).

² Moreover, this Court has consistently analyzed issues on their merits, even when it has found that they have not been properly preserved. *See e.g., State v. Curtis*, 356 S.C. 622, 591 S.E.2d 600 (2004) and cases cited therein.

essential element of the State's case-in-chief. If South Carolina is going to continue to try 12 year olds as adults,³ then the State should be required to rebut the presumption of their incapacity via some evidentiary mechanism, *i.e.*, expert proof. If the Court adopts such as the rule of law, then reversal is obviously appropriate in this case.

C. There is No Lay Testimony or Circumstantial Evidence to Rebut the Presumption. But even if the Court adopts the same reasoning as the line of cases pertaining to insanity, holding that the State may rely on lay opinions or circumstantial evidence to rebut the presumption, where is that evidence? South Carolina's first witness testified that Christopher Pittman was 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, lines 18-19, p. 1280, lines 13-14 (testimony of Chief Red Weir) and their police officers testified that they had to "babysit" him. 1/31 Tr. at R. p. 1439, lines 4-10 (testimony of Detective Darrell Duncan) and R. p. 1507, lines 4-10 (testimony of Agent Lucinda McKellar).

The State interprets the circumstances which it chronicles at page 26 of its Brief through the prism of adult behavior, knowledge, expectations, and capacities. None of these circumstances prove that this particular 12-year-old child had the capacity to appreciate the wrongfulness and consequences of his actions.

Moreover, the single piece of evidence that provides the greatest insight into Christopher's mental capacity totally belies the State's argument. During his "confession," penned by Officer McKellar, Christopher states, "I made up the story about the black man

³ As noted in section VI, *supra*, we believe strongly that, in light of the State's admissions regarding the waiver statute, this Court should overrule *Corey D.*

because if I get in trouble **you are going to send me back to my dad**. I'm just going to run away again.” (emphasis added) 1/31 Tr. at R. p. 1549, line 24-p. 1550, line 2 (testimony of Lucinda McKellar), R. pp. 4452-4454, State Exhibit 163.

Florida! Not 30 years in a South Carolina prison. Christopher’s level of sophistication and capacity was such that, even when he admitted the shootings, he thought that the consequences of his behavior were that he would probably be sent back to Florida to live with his father. This is not a boy who had the mental capacity to form *mens rea* for murder.

Because there is not one shred of competent evidence to rebut the presumption of incapacity, this Court should reverse and render.

II. SPEEDY TRIAL

A. The State of South Carolina Bears the Burden of Justifying Its Presumptively Prejudicial Delay. Citing a case decided the year after *Barker v. Wingo*, the State argues that Pittman bears the burden to prove that “the delay resulted from the neglect and wilfulness of the State.”⁴ It ignores the teachings, and direct holding of *Barker*: “A defendant has no duty to bring himself to trial . . . the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.” *Barker v. Wingo*, 407 U.S. 514, 531 (1972). The Constitution requires that the State bear the burden in this case.⁵

⁴ State’s Brief at p. 30, citing *State v. Dukes*, 256 S.C. 218, 182 S.E.2d 286 (1971).

⁵ This Court has not written specifically about the burden of proof regarding the *Barker* factors since *Barker* was handed down. We do note that the South Carolina Court of Appeals held, in 1999, that the burden is on the defendant. *State v. Robinson*, 335 S.C. 620, 518 S.E.2d 269 (S.C.App. 1999). However, we submit that this standard is constitutionally deficient.

B. The Pre-Waiver Delays are Unjustified. The State goes to great lengths to take the public defender to task for not demanding a speedy trial and for cooperating with their efforts to complete a thorough pre-waiver hearing evaluation. However, as we point out in our principal Brief, during this period of time, the probable prejudice was not blatantly apparent, because Pittman was still in the *parens patriae* custody of the Family Court. Moreover, the State wholly failed to comply with the requirements of state law regarding Christopher's continued detention.

C. The Post-Waiver Delays are Unjustified. The State's argument regarding the post-waiver period seems to be that, because defense counsel were working hard on the case, instead of twiddling their thumbs, that the delay should not count. This is a constitutionally defective argument. Of course defense counsel worked on the case. That does not justify the government's delay.

D. The Prejudice is Apparent. Although prejudice to the defense is not constitutionally required, it is apparent. The State argues that "non-testimonial demeanor is hardly a valid consideration," but totally ignores *Deck v. Missouri*, 544 U.S. 622, 632-33 (2005) which held that "through control of a defendant's appearance, the State can exert a 'powerful influence on the outcome of the trial'" . . . even to the point of being "thumbs" on the "scales" of justice. *Accord Riggins v. Nevada*, 504 U.S. 127, 142 (1992)(Kennedy, J., concurring).⁶

⁶ "At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial."

Certainly the defense tried to defuse Christopher's actual trial appearance by use of a life-sized cut-out of the 12-year-old Christopher. But this was too little, too late.

Finally, we note that the State's argument that the defense was actually aided by being able to call witnesses to testify to the good behavior of Christopher during his three years of incarceration is absolutely laughable. What lawyer in his right mind would deliberately choose to have to call such witnesses, especially where, as here, it opened the door for the State to call others who testified to Christopher's inappropriate, albeit understandable, behavior, *i.e.*, making "shivs" for his self-defense? This, "let's try to make lemonade out of lemons" tactic was necessitated by the state's delay in bringing Christopher to trial.⁷

III. THE NON-UNANIMOUS VERDICT

A. A Non-Unanimous Verdict is *Ipso Facto* Prejudicial. The South Carolina Constitution unequivocally requires a unanimous verdict in a criminal case. S.C. Const. Art. V, § 22. And, yet, the State argues that there is no prejudice! IF, as the record – developed by the trial judge himself – clearly shows, two jurors did not really believe that Christopher was guilty, then the prejudice is obvious.

B. This Court Must Conduct a *de novo* Review to Satisfy the Requirements of Due Process. The bulk of the State's argument consists of challenges to the competency of the jurors' testimony to impeach their verdict. Then, in its last passing comment, the State argues that Judge Pieper's decision not to grant a new trial on the basis of the non-unanimous

⁷ Given the choice, defense counsel would much rather have had a 5'2", 96 lb., 12-year old client, and have witnesses to testify about his behavior in Sunday School, while he was out on bail, rather than in juvenile detention!

verdict was not an “abuse of discretion.” However, it cites no decision in support of that deferential standard of review.

Evidence which tends to show that a verdict was not achieved via “fundamental fairness” is legally competent and constitutionally compelling. In this case, as in *State v. Hunter*, 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995), this Court should consider the evidence itself. Additionally, as discussed in section V, *infra*, the Court should not employ an abuse of discretion standard when issues of constitutional magnitude are involved. *See, e.g., McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 493 (1991).

Unquestionably the record shows that two jurors (a) had a fundamental misunderstanding of the law, and (b) thought Christopher was “not guilty.”

As both parties have said quite clearly in their briefing, the issue confronting this Court is truly one of fairness vs. finality. Because he believes that a verdict which results directly from a misunderstanding of the law is constitutionally defective, Pittman submits, most respectfully, that, in this case, fairness must trump finality.

IV. JUROR MISCONDUCT

Most of the State’s argument on this issue echoes its complaints about the evidence discussed in section III, *supra*, and pounds the “finality” podium. In *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (S.C.,1999), this Court noted that “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.” It held that such premature deliberations resulted in a constitutionally defective verdict.

Juror P's declarations, to his wife and to his friend, are no less infective than the juror's in *Aldret*. Consequently, the demonstrable juror misconduct in this case necessitates a new trial.

V. REMAND TO FAMILY COURT

A. The State Ignores the Constitution. The most glaring deficiency in the State's 9½ page briefing on this issue is its total avoidance of any citation to, or mention of, *Patton v. Toy*, 867 F.Supp. 356 (D.S.C.,1994) and the constitutional limitations which the due process clause places on Family Court waiver hearings. In this federal *habeas corpus* case, decided almost a decade before Christopher Pittman's June 2003 waiver, Judge Blatt cautioned South Carolina Family Court judges about their constitutional obligations:

This court encourages Family Court Judges in South Carolina to apply the principles of the *Kent* case when making the decision of whether to transfer a child to adult court. With the increased participation of juveniles in more serious crimes, the Family Court Judges will be called upon to make even more transfer decisions, and the *Kent* case will provide excellent guidance in assisting the Family Court Judges to present records which a reviewing court can consider in a meaningful manner. With the onset of more of these cases, the burden on Family Court judges will be even greater, but it must be remembered that the objective of the Family Court is to provide measures of guidance and rehabilitation for the child and to protect society, not to fix criminal responsibility, guilt or punishment. **Each child** is entitled to **due process** before a transfer to adult court, and **any** reviewing court must ensure that each child receives such process. (emphasis added).

Id. at FN 12. As our principal brief illustrates, when the record in this case is juxtaposed with that in *Toy*, it is clear that the waiver of Christopher Pittman was done in violation, not only of his substantive rights under South Carolina law, but also of his due process rights.

B. No Review by the Circuit Court, and an “Abuse of Discretion” Review by this Court Would Violate Due Process. The State spends much of its briefing trying to justify Judge Pieper’s jurisdictional decision to limit the scope of his review on the waiver issue to one that it describes as a “highly deferential standard of review.” State’s Brief at p.53. In light of the teachings of *Toy*, we submit that the Circuit Court was in error. However, what’s done in that regard is done. The Circuit Court clearly felt like its hands were tied.

More problematic is the State’s argument for an “abuse of discretion” standard of review by this Court. It is problematic for two reasons. The first is that this Court clearly stated in *State v. Avery*, 333 S.C. 284, 289, 509 S.E.2d 476, 489 (S.C. 1998) that this was, indeed, the standard of review. Moreover, in *State v. Corey D*, 339 S.C. 107, 529 S.E.2d 20 (S.C. 2000) this Court went so far as to find such an abuse in a failure to transfer. However, neither of these decisions address *Patton v. Toy*, nor the constitutional implications of such a standard of review.

This gives rise to the second, more critical problem. According to *Toy*, due process requires a “meaningful review” and suggests, quite strongly, that a decision rubber stamping a waiver on an inadequate record, with insufficient reasoning by the Family Court judge would simply not pass constitutional muster. And, yet, the only reported South Carolina decision to even discuss *Patton v. Toy* is Judge Pieper’s decision in the court below. *State v. Pittman*, 2005 WL 433206 (S.C.Gen.Sess., January 14, 2005)(“However, this court notes that *Patton* is a *habeas* case in which the constitutional due process question was properly before the court and within the scope of its review. The scope of federal review in a *habeas* case is not dispositive of this court's scope of review as to the matter herein.”)

The United States Supreme Court has held that, when issues of constitutional magnitude are involved, an “abuse of discretion” standard simply does not cut the mustard. *See, e.g., McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 493 (1991).

With respect, we submit that Pittman should not have to go to federal court to receive a “meaningful review” of his constitutional claims.

C. The Transfer in this Case Violates Due Process. Appellant need not belabor the Court with repetitive brief. For the reasons set forth in our principal brief, in this case, as in *Patton v. Toy, supra*, and *Kent v. United States*, 383 U.S. 541 (1966), the Family Court’s waiver of jurisdiction in this case violates due process.

VI. *Corey D* SHOULD BE OVERRULED

The State’s response to Pittman’s argument that this Court should overrule *State v. Corey D*, 529 S.E.2d 20 (S.C. 2000) actually make it even clearer that S.C. Code Ann. § 20-7-7605(6) does not apply to children under age fourteen. The State is correct that the Court should determine legislative intent from the plain language of the statute and that “[a] particular clause should be construed in conjunction with the purpose of the whole statute and the policy of the law.” State’s Amended Brief at 54. Frankly, Pittman’s only reservation in his belief that § 20-7-7605(6) was plain and complete was the apparent existence of a possible “gap” in the statute with respect to 16-year-olds.⁸ Out of candor to the Court, Christopher included footnote 30, which appears on page 32 of his Initial Brief, to disclose the potential gap in the statute with respect to 16-year-olds charged with major felonies.

⁸ Even though this case involves a 12-year-old, not a 16-year-old, the overall integrity of the statute is relevant to an issue of statutory construction.

The State’s response makes clear that there is no gap, and that § 20-7-7605 is plain and complete after all. A 16-year-old charged with a major felony is not a child for purposes of the statute. S.C. Code Ann. § 20-7-6605(1)(Supp. 2005). A 16-year-old charged with a lesser felony is still a “child” under § 20-7-6605(1), but can be “waived up” under the provisions of S.C. Code Ann. § 20-7-7605(4). Because § 20-7-6605(1) expressly provides that “[c]hild’ means a person less than seventeen years of age,” with an exception that applies only to “a person sixteen years of age,” however, there is no question that Christopher Pittman is a “child” for the purposes of the transfer statute. *See* § 20-7-7605(1)(“If . . . it is ascertained that the child was under the age of seventeen years **at the time of committing the alleged offense . . .**”)[emphasis added].

As Pittman explained in his Initial Brief, subsection (5) applies to “a child fourteen or fifteen years of age” charged with a major felony. Subsection (6) applies to “the child,” if the major felony charged is “murder or criminal sexual conduct,” and is plainly a subset of subsection (5). The legislature’s judicious use of the articles “a” and “the” render the statute “complete, plain and unambiguous.” This Court has written:

Under our general rules of construction, the words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. [citation omitted]. Further, we are bound to construe a penal statute strictly against the State and in favor of the defendant. [citation omitted].

State v. Muldrow, 348 S.C. 264, 268, 559 S.E.2d 847, 849 (2002). The only way that this Court could continue to affirm *Corey D* under its well-established rules of construction is by finding a clear reference for the use of “the child” in subsection (6) that makes it clear that

“the child” can be younger than 14.⁹ Because there is no mention of any age below 14 anywhere in the statute, the only logical referent is the identification of the child at issue in subsection (5).

The rule that the Court should construe subsection (6) “in conjunction with the purpose of the whole statute and the policy of the law” also points unanimously to an overruling of *Corey D*:

- No provision of S.C. Code Ann. § 20-7-7605 mentions an age lower than fourteen;
- “The” child as used in subsection (6) has no referent, if not the child previously identified in subsection (5);
- Applying subsection (6) only to children fourteen and older harmonizes the law with South Carolina’s long-standing presumption of incapacity for children less than fourteen;
- Applying subsection (6) only to children fourteen and older harmonizes this Court’s interpretation *vis-a-vis* murder charges with its interpretation *vis-a-vis* charges of “criminal sexual conduct.” See *Slocumb v. State*, 337 S.C. 46, 522 S.E.2d 809 (1999); and

⁹ South Carolina cases have recognized the significance of the use of the definite article, and its need for a referent, since the beginning of its jurisprudence. *E.g.*, *Holman v. Bulldog Trucking Co.*, 311 S.C. 341, 346, 428 S.E.2d 889, 892 (S.C.App. 1993)(“On its face, Section 42-15-10 shows the legislative intent was to enact the “base of operation” rule in South Carolina. The use of the definite article “the” and the singular noun “state” shows that the Legislature intended the word “located” to refer to one state, not many.”); *State v. Hunt*, 20 S.C.L. (2 Hill) 1, 179 (S.C. App. 1834)(“It is that of the act of 1785-(P. L. 363) that an attorney, at the time of his admission to practice, shall “take the oath of allegiance and fidelity to the State.” What oath? Why, necessarily the oath prescribed by that Constitution; by the use of the definite article *the*, some known oath is necessarily referred to, and we know of no other than that prescribed in the Constitution.”); *State v. Antonio*, 7 S.C.L. (3 Brev.) 562, 1816 WL 430 (S.C. Const. 1816)(“As to the fifth ground, it is certainly a perversion of language to say the definite article *the* may refer to any dollars. This objection might have been made if the jury had said *a* dollar. But when the record is read, it proves that the prisoner was indicted for passing a Spanish milled dollar, and the verdict says he was guilty of passing *the* dollar, that is, the dollar charged in the indictment.”)

- Because there are so few states that allow children under age fourteen to be tried as adults, the legislature would have certainly announced its intention to join this minority in explicit terms.¹⁰ This Court’s admonition to “construe a penal statute strictly against the State and in favor of the defendant” underscores this necessity.

With all due respect for this Court and for judicial precedent, *Corey D* is simply wrong and should be overruled. This simple recognition eliminates any need to engage in the much more complex constitutional analysis of whether trying a 12-year-old with no prior criminal history as an adult constitutes excessive punishment under the Eighth Amendment. This Court can and should reverse *Corey D*, and with it, Christopher Pittman’s conviction and/or sentence.¹¹

VII. EIGHTH AMENDMENT – EXCESSIVE PUNISHMENT

The State emphasizes that death penalty jurisprudence is different – which is certainly true. The jump from “different” to “irrelevant,” however, is not tenable. Many of the principles that the U.S. Supreme Court discussed in *Roper v. Simmons*, 543 U.S. 551 (2005) apply to the Eighth Amendment issues in the case at bar. Of particular importance is the fact that Christopher Simmons was 17 years old – at the interface between adolescence and adulthood - at the time he committed his crime. Christopher Pittman, in contrast, was 12 years old – not yet at the interface of childhood and adolescence. The vast developmental difference in these five years more than bridges the difference between a death penalty case and a non-capital case for purposes of the Eighth Amendment analysis.

¹⁰ Pittman of course asserts that the legislature did make its intention explicit by using “**the** child” in subsection (6).

¹¹ Depending on the Court’s rulings on the other points of error, this one error might be remedied by modifying the sentence to the maximum permitted in Family Court.

The State takes a clever tack by avoiding the fact that only four state legislatures – Colorado, Indiana, New Hampshire and Vermont – expressly allow a minor less than fourteen years old to be tried as an adult for murder. *Juvenile Offenders and Victims: 2006 National Report*, Chapter 4, p. 112 (U.S. DOJ Office of Juvenile Justice and Delinquency Programs). It attempts to add the 23 jurisdictions that do not specify a minimum age for such a transfer, allowing it to conclude that “in some 27 jurisdictions it is statutorily possible for 12 year olds to face adult disposition of their charges.”¹² State’s Amended Brief at 63.

Using the State’s logic it is “statutorily possible” for a five-year-old to be tried as an adult for murder in these 23 jurisdictions. While it might be “statutorily possible,” it does not follow that it is constitutionally permissible.¹³

When making the constitutional determination, therefore, the Court must recognize that there is some age at which the Eighth Amendment must prohibit the trial of a child as an adult. *Cf. Roper*, 543 U.S. at 600 (O’Connor, J., dissenting)(“Surely there is an age below which no offender, no matter what his crime, can be deemed to have the cognitive or emotional maturity necessary to warrant the death penalty.”) Thus, the issue is not whether there is a line between a constitutional and an unconstitutional age for trial as an adult for murder, but where to draw it. *Accord, Roper*, 543 U.S. at 574 (“Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The

¹² One of these 23 jurisdictions is of course South Carolina. As Pittman has demonstrated in the “*Corey D*” section of his briefing, the South Carolina statute does specify a minimum age, and that minimum age is fourteen. *See* arguments in section V, *supra*.

¹³ There is also the issue of what is permitted under the language of the statute versus how many children under the age of fourteen are actually tried as adults for murder, even when it is “statutorily possible.” *See Roper*, 543 U.S. at 564 (“In the present case, too, even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent.”).

qualities that distinguish juveniles from adults do not disappear when an individual turns 18.
. . . For the reasons we have discussed, however, a line must be drawn.)

In seeking the proper place to draw the constitutional line, Pittman and the State can probably agree, for instance, that a 17-year-old charged with murder for which the State does not seek the death penalty can be tried as an adult with no constitutional ramifications. Hopefully, we could also agree that it would be unconstitutional to try a nine-year-old as an adult for murder in a non-capital case.¹⁴

Given the recent advances in brain imaging of adolescents, and the wealth of neurodevelopmental information now available to doctors and courts, Pittman asserts that no age younger than 14 could pass constitutional scrutiny under the current state of scientific knowledge (although continuing research seems likely to push the age higher). As Dr. Abigail Baird, one of the preeminent researchers in the field, writes:

While estimates vary, pubertal onset generally occurs between the ages of 10 and 12 for girls, and between 13 and 15 for boys. Once a child is of reproductive age, they have entered adolescence, but are still far from adulthood.

* * *

Humans are not born with a moral sense. We are, however, given an innate capacity to develop one.

* * *

The next significant advance in development takes place during adolescence when abstract thought enables an individual to envision and anticipate situations that they have not directly experienced.

¹⁴ No State expressly provides for the trial of a child younger than ten as an adult for murder. Vermont and Indiana facially allow the trial of a ten-year old as an adult. *Juvenile Offenders and Victims: 2006 National Report*, Chapter 4, p. 112 (U.S. DOJ Office of Juvenile Justice and Delinquency Programs).

* * *

The third stage in this development heralds the emergence of abstract thought, and the recognition of internal visceral states in relation to thoughts and/or behaviors. . . . The fourth and final stage integrates self-perceptions with other perceptions permitting empathy for other individuals, both known and unknown. What awakens during this last stage is the sense of belonging to a larger society, an important requirement to engaging in socially-based moral reasoning. This sense of being a member of society will eventually enable the individual to act in accordance with their prescribed moral code. . . .

Baird, A.A., *Adolescent Moral Reasoning: The Integration of Emotion and Cognition* (publication manuscript).¹⁵

Moral judgment, which the criminal justice system evaluates, develops during the course of adolescence. Christopher Pittman had not started this development at the age of 12. Based on current scientific advances in understanding the adolescent brain, trying a 12-year-old – particularly one with no prior criminal history who is under the influence of a powerful, psychoactive drug – as an adult is simply beyond the bounds of acceptance in a civilized society.

Drawing a line at age 14 would also be consistent with South Carolina’s traditional presumption of incapacity, discussed in Section I, *supra*, and with what Pittman respectfully suggests is the South Carolina legislature’s intent in S.C. Code Ann. § 20-7-7605(6), discussed in Section V. Furthermore, as the Department of Justice has recognized, “Among states where statutes specify age limits for all transfer provisions, age 14 is the most common minimum age specified across provisions.” *Juvenile Offenders and Victims: 2006 National*

¹⁵ This manuscript is available at <http://www.theteenbrain.com/about/publications/pdfs/2006-Baird-Morality.pdf>. Dr. Baird researches extensively in the development of the teenage brain, and maintains www.theteenbrain.com.

Report, Chapter 4, p. 114.¹⁶ This is, of course, the common law “age of consent,” which has been adopted by courts and legislatures across the land for many purposes, including the right to marry, the right to contract, and the right to make a decision regarding abortion.

Pittman acknowledges that there have been cases that uphold the constitutionality of trying children younger than 14 as adults. None of these cases are informed by the recent advances in neuroscience, which are currently driving the “evolving standards of decency” with respect to understanding the development of the adolescent brain. *Roper*, 543 U.S. at 587 (Stevens, J., concurring)(“Perhaps even more important than our specific holding today is our reaffirmation of the basic principle that informs the Court's interpretation of the Eighth Amendment. If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of seven-year-old children today. [citation omitted]. The evolving standards of decency that have driven our construction of this critically important part of the Bill of Rights foreclose any such reading of the Amendment.”) Pittman reaffirms that trying a 12-year-old with no prior criminal history as

¹⁶ In addition to doing a simple count of jurisdictions, trends are important to an Eighth Amendment analysis. *Roper*, 543 U.S. at 565-66. Although states aggressively expanded their transfer laws during the 1980's and 1990's, that expansion slowed considerably in recent years. *Juvenile Offenders and Victims: 2006 National Report*, Chapter 4, p. 113. Furthermore, the number of cases waived to adult courts has steadily declined since the mid-1990's. *Id.*, Chapter 7, pp. 186-87. These trends are relevant to the analysis of “national consensus.” See *Roper*, 543 U.S. at 548 (O'Connor, J., dissenting)(“Although the Court finds support for its decision in the fact that a majority of the States now disallow capital punishment of 17-year-old offenders, it refrains from asserting that its holding is compelled by a genuine national consensus. Indeed, the evidence before us fails to demonstrate conclusively that any such consensus has emerged in the brief period since we upheld the constitutionality of this practice in *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989). **Instead, the rule decreed by the Court rests, ultimately, on its independent moral judgment that death is a disproportionately severe punishment for any 17-year-old offender.**”) (emphasis added).

an adult – even for murder – simply cannot pass constitutional muster based on what we, as a society, know today.

VIII. INVOLUNTARINESS OF CONFESSION

A. The Confession was Involuntary. The State argues that “there is no prohibition against a juvenile waiving his rights and giving a custodial statement.” As is well established by South Carolina authority, a more accurate statement would have been, “a custodial statement of a minor is not *per se* inadmissible due to the fact that it was obtained in absence of counsel, parent or other friendly adult.”

In its brief, the State cites *Jenkins v. State*, 265 S.C. 295 (1975). In that case, a custodial statement was taken from a 15-year-old without counsel, a parent or other friendly adult being present. The minor asked this Court to adopt a bright line rule that would make any inculpatory statement obtained from a minor without counsel, a parent or other friendly adult being present inadmissible *per se*, regardless of the circumstances surrounding the making of the statement. The Court declined to adopt such a rule. Instead, it recognized the “totality of circumstances” test set out in *Haley v. Ohio*, 332 U.S. 596 (1948). *See In re Gault*, 387 U.S. 1 (1967). In determining the voluntariness—and therefore the admissibility—of the statement, the age of the minor is indeed considered, along with his intelligence, education, experience and ability to comprehend the meaning and effect of his statement.

How “experienced” was Christopher Pittman when he gave his “voluntary” statement? He wasn’t even a teenager at the time of the offense and had no contact whatever with the criminal justice system. How intelligent was he? Dr. Lanette Atkins—who had spent more time with Christopher than any other professional who testified—stated that his academic work was below average (December 2, 2004 Transcript [hereinafter “12/2 Tr.” at

R. p. 634, lines 12-25 (testimony of Dr. Lanette Atkins). Did he comprehend the meaning and effect of his statement? There is absolutely no way any adult can reliably answer that question. The State says “. . . he appeared to understand,” but that’s nothing more than a subjective opinion totally unsupported by any objective evidence whatever. The “objective” evidence – if the State’s insistence that the “confession” is really written in Christopher Pittman’s own words is that “I made up the story about the black man because if I get in trouble you are going to send me back to my dad. I’m just going to run away again.” 1/31 Tr. at R. p. 1549, line 24-p. 1550, line 1 (testimony of Lucinda McKellar), pp. 4452-4454, State Exhibit 163. The only “consequence” that this 12-year-old anticipated when he signed the confession was that he would be sent back to Florida to live with his father.

What were the “totality of circumstances” that led up to Christopher giving his statement? He was a 12-year-old child, under the influence of psychotropic medication, who was sleep-deprived, had not spoken with an attorney, his father or other friendly adult, had been in the custody of police officers all day, had been manipulatively befriended by Lucinda “Just-call-me-Lucy” McKellar, had been confronted with Bible verses about lying and burning in the fires of hell, was told what his dead grandparents purportedly would have wanted him to do, and then he gave the statement.

B. The Error was Hardly Harmless. Incredibly, the State takes the position that even if the statement should have been excluded, “its admission was harmless.” Absent Christopher’s statement, the State was left with a weak, speculative and circumstantial case against him—and no witnesses to the killings. But when the trial court ruled that the statement was admissible, Christopher was left with no practical choice except to stipulate to the killings.

Moreover, as noted in our Initial brief, the confession provided the State with a critical component of its “malice” case, *i.e.*, motive. Without this statement, the State had absolutely no evidence whatsoever¹⁹ to explain why this shy, gentle boy, who was his “Pop Pop’s Shadow,” would kill the people that he most loved in the whole world.

IX. MANSLAUGHTER INSTRUCTION

A. Errors in Refusing Both Voluntary and Involuntary Instructions were Preserved. In this case, as in the instance of the presumption of incapacity, addressed in section I, *supra*, the State argues that the points of error are not fully preserved. This argument ignores both the record and the law.

The record before this Court clearly demonstrates the defense requesting an instruction from the trial judge for involuntary manslaughter as a lesser included offense. 1/31 Tr. at R. p. 3587, lines 15-19, p. 3589, lines 11-15 and February 14, 2005 Transcript [hereinafter “2/14 Tr.”] at R. p. 3815, line 6-p. 3817, line 4. In the alternative, if the trial judge did not charge the jury on involuntary manslaughter, the defense sought a voluntary manslaughter instruction. One was simply predicated on a denial of the other by the trial judge. Importantly, the trial judge expressly articulated that *both* requests were preserved for the record. 2/14 Tr. at R. p. 3817, lines 2-4. Such an argument ignores the record as well as the plain language of Appellant’s brief.

Both the record and the Initial brief document Appellant’s argument that evidence was presented at trial that tended to reduce the crime from murder to manslaughter; namely, the use of a mind-altering prescription medication in conjunction with reckless conduct on the one hand, and the “beatings” as sufficient legal provocation on the other. The key to Christopher’s Initial brief, and his argument on this point of error, is that sufficient evidence was presented at trial to warrant the trial judge charging the jury on the lesser included

offense of manslaughter, either involuntary and/or voluntary. While the record clearly reflects a defense preference for an involuntary manslaughter instruction, it also reflects a belief that a voluntary manslaughter instruction was appropriate in the event the judge declined an involuntary instruction.

The law in South Carolina is clear in this regard, “It is well settled that to warrant the court in eliminating the offense of manslaughter it should very clearly appear that there is no evidence whatever tending to reduce the crime from murder to manslaughter.” *State v. Gardner*, 219 S.C. 97, 64 S.E.2d 130 (1951). To not so instruct is reversible error. *State v. Burriss*, 334 S.C. 256, 262-263, 513 S.E.2d 104,108 (1999).

B. An Involuntary Manslaughter Instruction was Raised by the Evidence and Requested by the Defense. Involuntary manslaughter is defined in the State of South Carolina as either “(1) the killing of another without malice and unintentionally, but while one is engaged in the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) the killing of another without malice and unintentionally but while engaged in the doing of a lawful act with a reckless disregard of the safety of others.” *State v. Tucker*, 324 S.C. 155, 170, 478 S.E.2d 260, 268 (1996). Appellant submits that the second definition is most appropriate in this case.

The standard for an involuntary manslaughter charge was clearly articulated by this Court in *State v. Crosby*, 355 S.C. 47, 53, 584 S.E.2d 110, 112 (2003). In that case, this Court overruled the court of appeals and held that *any* evidence which could allow a jury to infer that a defendant did not intentionally pull the trigger was sufficient to warrant an involuntary manslaughter instruction. *Id.* The Court stated, “The effect of the Court of Appeals' holding is that if there is any evidence a shooting was intentional, all evidence from which any other inference is may be drawn is negated. This is not the law of this state.” *Id.*

The evidence before the trial court clearly indicated a 12-year-old child, while taking a prescription, psychoactive medication, shot and killed his two grandparents. The medication was prescribed by his physician and Appellant's use of it was certainly legal, albeit "off-label." The extensive expert testimony from Drs. Ballenger, Healy, Maris, Atkins, and Kapit, as well as the evidence of the English ban of Zoloft in children, clearly provided *some* evidence that Appellant's actions may well have been without malice, unintentional, and a direct result of his legal use of Zoloft. 1/31 Tr. at R. p. 2051, line 14-p. 2056, line 1; p. 2109, lines 2-21 (testimony of Dr. James Ballenger); p. 2060, line 22-p. 2061, line 9; p. 2268, lines 7-15; p. 2271, lines 8-25; p. 2273, lines 12-22; p. 2293, line 17-p. 2294, line 20 (testimony of Dr. David Healy); p. 2487, lines 1-20; p. 2492, lines 12-24; p. 2493, line 24-p. 2495, line 9 (testimony of Dr. Ronald Maris); p. 2583, line 11-p. 2584, line 2 (testimony of Dr. Lanette Atkins); p. 3138, line 16-p. 3139, line 20; p. 3146, line 22-p. 3151, line 9; p. 3152, line 9-p. 3153, line 10 (testimony of Dr. Richard Kapit); and R. pp. 4510-4520, Defendant Trial Exhibit 16 (UK's ban of Zoloft). To say there was "absolutely no evidence this shooting was unintentional" flies in the face of this mountain of evidence.

The nature of Christopher's conduct after taking the medication now becomes important in the involuntary manslaughter analysis. There can be little question that the process of arming one's self with a shotgun while inside a dwelling, loading shells into the weapon's magazine, charging the chamber, pointing it at your grandparents, and then subsequently pulling the trigger is reckless disregard for the safety of others. As so concisely stated in *Crosby*, the law in South Carolina is very clear: it is reversible error for a trial court to fail to give a requested charge when the issue is raised by the evidence. Given the lengthy expert testimony and exhibits indicating Christopher Pittman's shooting of his grandparents may have been unintentional and without malice, and the undisputably reckless conduct he

exhibited after his ingestion of Zoloft on the night of the shootings, the trial court erred in not submitting an involuntary manslaughter instruction to the jury.

C. A Voluntary Manslaughter Instruction was Also Raised by the Evidence and Requested by the Defense. The State's one and only motive to explain Christopher's actions when he shot his grandparents was that he was seeking retribution against those who "hit" him. In fact, the centerpiece of the State's case was Appellant's inculpatory confession. R. pp. 4452-4454, State's Exhibit 163. The primary argument from the State in this regard is that a voluntary manslaughter instruction was inappropriate in that sufficient time passed between the "beating" and the shooting to allow Christopher to cool off. Yet, their argument completely ignores the totality of the circumstances of this case.

Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (S.C. 2000). Sufficient legal provocation must come from the victim. *Harris v. State*, 354 S.C. 382, 387, 581 S.E.2d 154, 156 (2003). "In determining whether the evidence requires a charge on voluntary manslaughter, this Court must view the facts in the light most favorable to the defendant." *State v. Byrd*, 323 S.C. 319, 474 S.E.2d 430 (1996). Additionally, this Court must consider all the surrounding circumstances and conditions, including previous relations and conditions connected with the events, as well as those existing at the time of the killing, in determining whether the act which caused death was impelled by heat of passion. *State v. Norris*, 253 S.C. 31, 35, 168 S.E.2d 564, 566 (1969)

The voluntary manslaughter charge was sought in the alternative because under the State's theory of the case, the punishment that was inflicted upon Christopher "triggered" his criminal behavior. Thus, if the trial judge did not agree with Appellant that the evidence indicated his actions were unintentional, then given the State's argument, case theme, and

evidence presented at trial, it was entirely appropriate to seek an instruction based on intentional actions that may have resulted from defense of one's self.

Accordingly, if we eliminate the issues surrounding mental capacity (*i.e.*, age and intoxication), we are left with a scenario where a young man perceives himself to be under a series of attacks and reacts in such a manner as to end them. Even viewing the facts through the State's prism, Christopher's statement (R. pp. 4452-4454, State Exhibit 163) indicated that the shootings were in close accompaniment to the last, of a series of "beatings" that occurred throughout the evening. Christopher was under constant physical pressure and pain leading up to the shootings. Under such an interpretation of the evidence, Christopher believed he was being beaten repeatedly by his grandparents with a wooden paddle, he had no idea when and if they would stop hitting him, and he acted to stop his beatings. This is clear evidence of provocation, and viewing the facts most favorable to Christopher Pittman, a voluntary manslaughter instruction for the jury to consider was warranted.¹⁷

Additionally, Christopher's inculpatory statement clearly states "they hit me." "They" being his grandparents. Thus, evidence of provocation exists as to both his grandmother and grandfather.

The evidence presented at trial unambiguously supported an instruction for involuntary and voluntary manslaughter. In failing to so charge the jury, and thereby allowing them to decide these critical questions, the trial court erred. Therefore, the case should be reversed and remanded for a new trial.

¹⁷ The State cites *Norris*, 253 S.C. 31 to question whether corporal punishment can ever be sufficient legal provocation for voluntary manslaughter. Yet, *Norris* does not involve or address corporal punishment or the defense of oneself, but rather the defense of another. It does, however, stand for the proposition that the Court must examine the entire context of the relationship between the accused and the deceased, both prior to the killing and at the time of, in order to determine sufficient legal provocation.

X. INVOLUNTARY INTOXICATION

As noted in our Initial brief, although this Court has never written on the defense of involuntary intoxication with a prescription drug, the Circuit Court accepted it as a “complete” common law defense and instructed the jury accordingly. Unfortunately, however, the court below formulated the test for this defense as being the single prong “right/wrong” standard. It did this to make it in parity with the insanity defense.

Admittedly, there is some logic in having the same test for insanity and involuntary intoxication. However, there is logic for a contrary rule as well. The involuntary nature of the intoxication, and the transitory nature of the drug’s effects both militate in favor of a standard which permits the defense whenever competent evidence demonstrates that an otherwise capable person, who knows right from wrong, is incapacitated by the toxic effects of a prescription medication, to the point that he or she cannot comport their conduct with the requirements of the law.

Another murder case, with a “Zoloft Defense,” decided by the Illinois Supreme Court on January 20, 2006, provides guidance. *People v. Hari*, 843 N.E.2d 349 (Ill. 2006). Like Christopher Pittman, the adult “defendant David A. Hari admitted to shooting” the decedents. Thus, the major issue for trial was “whether defendant was relieved of culpability due to purported involuntary intoxication from his prescription Zoloft medication in combination with other factors.” Like Pittman, “defendant also displayed some symptoms of akathisia – which is a kind of agitation ‘like an itch that can’t be scratched’ – which is indicated by tremulousness, restlessness, jaw clenching, pacing or general nervousness. Akathisia has a mental component which intensifies worry and is very distracting to an individual.” But the most haunting factual similarity between the two cases is the

descriptions which both defendants gave to the examining psychiatrists concerning the recollections of the events giving rise to the charges:

Hari

“Mitrione testified that defendant told him he developed a sense of things seeming strange and not being real, ‘like watching himself go through’ things but not being a part of it – ‘like it wasn’t him.’”

Pittman

“He described to me everything happening feeling as if he was being in a television show or watching television shows and being part of it, but he couldn't stop it.”
1/31 Tr. at R. p. 2593, line 23-p. 2594, line 1 (testimony of Dr. Lanette Atkins).

The key legal issue in *Hari* was whether the statutory defense of involuntary intoxication required proof that the intoxicated condition was caused by “trick, artifice, or force.” Using the plain wording of the statute, and common sense, the Illinois Supreme Court held that “An unexpected and unwarned adverse effect of a drug taken on doctor’s orders falls within the ordinary and popularly understood definition of ‘involuntary.’” Thus, it held that the defendant was entitled to a jury instruction under the following, two pronged, either/or standard:

A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produce and deprive him of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

Id. at 361, quoting 720 ILCS §5/6-3 (West 2002).

Because there is no statute codifying the defense in this case, it is up to this Court, sitting in its traditional common law role, to define the parameters of this long recognized common law defense. With respect, we submit that, because of the differences between this defense and insanity, the Court should adopt the same either/or standard that has been employed via statute in a number of states, including both Illinois and Michigan.

XI. EXCLUDED EVIDENCE – HARDLY “HARMLESS”

A. Evidence Regarding Other People’s Experiences on Zoloft is Relevant. As discussed at some length in Appellant’s Initial brief, adverse event reports are the mechanisms by which the FDA acquires information regarding the side effects of drugs it has approved. These reports can result in changes in labeling, warning letters to prescribing physicians and, in some cases, removal of the drug from the market.

But the State feels that adverse event reports regarding other Zoloft patients becoming psychotic and/or violent should be kept from the jury. If the jury were to know about other citizens who had taken Zoloft—like Christopher—and become psychotic—like Christopher—and had become violent—like Christopher, they might get confused or become inflamed.

POPPYCOCK.

Probably the first question the jurors would want to know when the “Zoloft defense” was made known to them was, “Has this happened before? Has it happened to other people—or is this just something the defense has cooked up for this case?”

The fact is that taking Zoloft and becoming psychotic and/or violent *has* happened before. It has, on several occasions, been reported to the FDA. And in this case where two of the jurors and the alternate juror felt that it had happened to Christopher, these reports were kept from the jury.

South Carolina courts have consistently held that the threshold test of admissibility is *relevance*. *State v. Beck*, 342 S.C. 129 (2000). Rule 401 SCRE defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

Would Zoloft having a similar effect on other people tend to establish that it was responsible for Christopher's behavior? Of course it would. Would Zoloft as the *suspected* cause of psychosis and violence resulting in the prescribing doctors reporting it to the FDA tend to support Christopher's defense? Of course it would. For fact-finders who wanted to know if there had been similar cases reported, would the admission into evidence of such reports be helpful and informative in deciding whether Zoloft played a role in what happened to Christopher? Of course it would. Christopher Pittman had a constitutional right to defend himself—by any and all means permissible under South Carolina law. For the State to take the position that the adverse event reports should have been kept from the jury because they were “. . . merely cumulative to other evidence” is to argue that there should be some sort of artificial limitation on one's defense. While the State dismissed these reports as mere “anecdotal hearsay situations,” it should again be mentioned that these reports—and the information contained in them—are the exact information used by the FDA to determine the safety of the drug. If they are that important to the FDA, would it not follow that they would have been that important to the jury?

XII. CONCLUSION

Numerous issues – many of constitutional magnitude – are raised by this landmark case. The life of a 12-year-old, indigent child, hangs in the balance. On the foregoing points and authorities, we respectfully request this Court dismiss the charges against Christopher Pittman, or in the alternative, order a new trial.

Respectfully submitted,

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