ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Paul W. Garfinkel, Family Court Judge

RECEIVED
JUN - 8 2012
S.C. Supreme Court

IN THE INTEREST OF: TRACY B.,
A MINOR UNDER THE AGE
OF SEVENTEEN,

APPELLANT

BRIEF OF PETITIONER

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

INDEX

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

ISSUES PRESENTED

1.

Whether the Court of Appeals erred by holding a third party, petitioner's mother, could reinitiate contact for petitioner with the police, and that would be considered petitioner reinitiating contact with the police where it was undisputed the fourteen-year-old petitioner had invoked his right to counsel, and where Detective Cumbee initiated contact with petitioner again, since his inculpatory statement should have been suppressed under the totality of the circumstances?

2.

Whether the Court of Appeals erred by holding the family court judge did not violate the mandate of In re Winship, 397 U.S. 358 (1970) by finding the state disproved self-defense beyond a reasonable doubt, and proved petitioner's guilt to the charge of murder beyond a reasonable doubt, and by denying a new trial on that basis, where it was undisputed the first shots came from the decedent's automobile, and that all of the young people on the porch with petitioner were in fear and "scattered," and where there was evidence the car was coming at petitioner and that he returned fire in this life threatening situation?

STATEMENT OF THE CASE

Procedural history

The original juvenile petition charged petitioner with voluntary manslaughter. R. 304. Those charges were later upgraded to murder on December 10, 2007, five days before petitioner's adjudicatory hearing occurred. R. 47.

Defense counsel moved to dismiss the murder charge on the grounds of prosecutorial vindictiveness claiming the petition filed on Monday, December 9, 2007 "was an attempt on the part of the state to force the juvenile to enter a plea to the charge of manslaughter." See Juvenile Commitment Order to Coastal Evaluation Center filed December 19, 2007. R. 310. R. 48 - 61.

On November 6, 2007 a hearing was held on petitioner's motion to suppress his statement to the police. The hearing was held before the Honorable Jack Alan Landis in Charleston County Family Court. Megan Ehrlich represented petitioner. Anne B. Seymour was the assistant solicitor. R. 1. At the conclusion of the hearing the judge ruled petitioner's statement was voluntarily tendered. R. 44, l. 13 – 45, l. 13.

Subsequently, an adjudicatory hearing was held before the Honorable Paul W. Garfinkel on December 12 – 13, 2007. R. 47. Megan Ehrlich and Ted Smith represented petitioner. Anne B. Seymour was the assistant solicitor. At the conclusion of the hearing the judge found petitioner guilty of murder, and guilty of unlawful possession of a handgun by a minor. R. 294, ll. 6 – 15.

A dispositional hearing was held on February 13, 2008. R. 295. Megan Ehrlich again represented petitioner. Anne B. Seymour was again the Assistant Solicitor. R. 295.

At the conclusion of the dispositional hearing Judge Garfinkel committed petitioner to the Department of Juvenile Justice for an indeterminate period not to exceed his twenty-first birthday. R. 299, ll. 6 – 10. The Court of Appeals affirmed petitioner's conviction. See In the Interest of

Tracy B., A Juvenile under the Age of Seventeen, 391 S.C. 51, 704 S.E.2d 71 (2010). App. 1-17. Petitioner sought rehearing which was denied. Rehearing was denied App. 18-24.

Petitioner sought certiorari from this Court. This Court granted petitioner's writ of certiorari. This brief of petitioner is filed pursuant to that order.

ARGUMENT

1.

The Court of Appeals erred by holding a third party, petitioner's mother, could reinitiate contact with the police for petitioner, and that would be considered petitioner reinitiating contact with the police where it was undisputed the fourteen-year-old petitioner had invoked his right to counsel, and where Detective Cumbee initiated contact with petitioner again, since his inculpatory statement should have been suppressed under the totality of the circumstances.

Relevant Facts

At the Jackson v. Denno[1] hearing held before the Honorable Jack Alan Landis on November 6, 2007, Detective Greg Gunnels of the North Charleston Police Department remembered working an early morning shooting death on August 11, 2007 on Constitution Avenue in which petitioner became a suspect. It later became apparent that three shots were fired from a passing car, and one shot was fired in return killing the decedent who was in the back seat preparing a marijuana "blunt." R. 2, l. 23 – 3, l. 17.

Detective Gunnels recalled the fourteen-year-old petitioner was taken from football practice eight days later on August 14, 2007 for questioning. R. 3, l. 18 – 6, l. 25. Gunnels knew petitioner was only fourteen-years-old when he arrived at the police station without his mother. R. 6, ll. 22 – 25. Gunnels said he advised petitioner of his Miranda[2] warnings at 8:35 p.m. R. 5, l. 9 – 9, l. 17. Gunnels also knew that the "eighth grade was the last grade he [petitioner] had completed."

---

[1] 378 U.S. 68 (1964).

Gunnels told petitioner the police had witnesses' statements that "put him out there as a shooter and he [petitioner] just basically denied any knowledge of it. He said he wasn't even in the area when this happened." R. 8, l. 6 – 9, l. 4. Gunnels said he left the interviewing room and "went to see what the other witnesses were saying and [I came] back in and talked with him." R. 8, l. 13 – 9, l. 1. Gunnels remembered: "I probably, I went back in there about 9:30 . . ." And 9:15 (sic) is when I went back in there and talked to him some more and he ended up invoking his right to a lawyer." R. 9, ll. 1 – 4. Gunnels left the room after that invocation "and didn't speak with him again about it. I just went back out and told the other investigator that he wanted a lawyer." R. 9, ll. 9 – 12.

Gunnels admitted that petitioner never signed any Miranda form stating he was waiving his rights. R. 25, ll. 9 – 20. See Advice of Constitutional Rights Form, States Exhibit 1; R. 301. However, based on "the witness' statement, we were going to charge him." Gunnels and another detective took petitioner to the bathroom and allowed him to change out of his football pants after his arrest. Gunnels said petitioner asked him "how serious is this I said, this is real serious, you know, somebody died." R. 9, ll. 16 – 21. Petitioner then asked him if he could speak with his mother. R. 9, ll. 21 – 23.

Gunnels recalled petitioner's mother was notified when he was picked up by the police from football practice and "she arrived shortly after he got there." R. 9, l. 9 – 10, l. 17.

The following occurred on direct examination of Gunnels:

---

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

Q. And, what did you do after he asked for his mother?

A. I went outside and told the Lieutenant that he wanted to talk with his mom because I knew Lieutenant Cumbee had talked with her. And so he went up there and got her and brought her in to talk - - I don't know about transpired. I told him and went and got the momma.

R. 10, ll. 18 – 23.

The solicitor then called Lieutenant Melvin Cumbee with the right of cross-examination of Detective Gunnels reserved for a later time. R. 10, l. 23 – 11, l. 9. Cumbee remembered his contact with petitioner's mother that August 14, 2007 night at the police station. R. 11, ll. 12 – 19. Cumbee admitted *he was aware* petitioner had invoked his right to an attorney at the time. R. 12, ll. 1 – 9.

Cumbee testified that petitioner's mother was notified "that her son had been implicated by several witnesses in a homicide." Cumbee said he learned that petitioner wished to speak with his mother. Cumbee testified the police allowed the mother to speak with petitioner. R. 12, l. 13 – 13, l. 6.

Cumbee recalled petitioner and his mother were alone in the interview room and after five to ten minutes the mother came out of the interview room upset, and stated "that he wanted to talk to ya'll meaning - - I took it as the police." R. 13, ll. 4 – 15.

Cumbee testified that he then reentered the interview room and sat down with petitioner. Cumbee said he "asked him if he wanted to talk to us? I was told by his mother that he wanted to talk to us and he stated, yes." Cumbee recalled petitioner then asked him: "How long could he get in jail? I, at that point, *advised him* that I did not know." R. 13, l. 16 – 14, l. 4. (emphasis added). Cumbee then asked petitioner "what he wanted to talk about? At that point and time, he stated that he had shot the gun at the car and then further stated right after that, that and I am

saying as he told me, he just pointed the gun and shot it. I asked him then if he had been advised of his rights, he said, yes. And, at that point and time, I asked him if he wanted to tell us his side of the story and he said, yes. . ." R. 14, ll. 7 – 14.

After petitioner gave his full statement, Cumbee spoke with petitioner's mother again and he said "she was visibly upset that her son was going to be charged, indicated to me that she was somewhat discussed (sic) with his behavior and she had tried to do anything in her power to keep anything like this from happening." R. 14, l. 25 – 15, l. 4.

Detective Gunnels was then recalled to the witness stand, and the following occurred on redirect examination by the solicitor:

> Q. Detective Gunnels, once Travis invoked his right to an attorney, what was your involvement with Tracy after that?
>
> A. Detective Cumbee came back out and told me that, that he had talked with Mr. Baker and he had confessed to the shooting, and he asked me to go in there and get a statement from him which I did.
>
> Q. And what time was that?
>
> A. Approximately 10:15.

R. 16, ll. 4 – 16.

Gunnels admitted when petitioner told him he wanted an attorney he had no intention of releasing petitioner, and he acknowledged he told petitioner "he was going to be charged with the crime." R. 27, ll. 1 – 14. Gunnels said he did not tell petitioner how to obtain an attorney, and that he took petitioner to the bathroom after he was arrested to change out of his football pants. R. 27, ll. 1 – 23. When Gunnels took petitioner back to the interview room after his arrest, Gunnels said petitioner asked about the seriousness of the charge: "I told him it was serious, someone had died. So, he said he wanted to speak with his mother." R. 28, ll. 8 – 18.

Gunnels acknowledged he did not read petitioner his rights again after petitioner's mother advised the detectives, as seen above, that petitioner would like to talk to them. R. 29, l. 22 – 30, l. 6. He admitted petitioner's mother was not with petitioner when he made the statement, and his mother was visibly upset about the entire situation. R. 39, ll. 3 – 23.

Melvin Cumbee was then recalled as a witness and he acknowledged *he did not think he ever told petitioner's mother that petitioner had asked for an attorney.* R. 35, ll. 21 – 22. Cumbee said he was aware petitioner had invoked his right to counsel and that "when I went into the room, I advised him that his mother had told me that he wanted to talk to us. And I asked him if he still wanted to talk to us and he stated to me, yes. . ." Cumbee claimed he didn't know what "talk to us meant." R. 36, l. 8 – 38, l. 5.

As stated, Cumbee admitted he did not read petitioner his Miranda warnings after his mother "told me that he wanted to talk to us," and after petitioner had already invoked his right to counsel. R. 38, l. 14 – 39, l. 12. Cumbee acknowledged petitioner's mother was very upset that night and was crying but Cumbee maintained "she seemed to be thinking clearly. She was upset and I felt for her." R. 39, ll. 10 – 23; R. 41, ll. 21 – 25.

Arguments on suppression motion

Defense counsel Ehrlich argued that petitioner's statement should be suppressed "given the totality of the circumstances . . ." She noted petitioner was only fourteen-years-old at the time and had only completed the eighth grade in school. It was undisputed petitioner never "signed the form waiving his rights." See Waiver form; R. 301. Petitioner then "invoked his right to have an attorney." R. 43, ll. 6 – 20. Counsel argued: "I'm not sure that the mother is capable of actually waiving somebody else's right for him. And in any case when the detectives went in there, he was never re-mirandized." R. 43, l. 7 – 45, l. 16.

The judge stated that is was clear petitioner was read his Miranda warnings and that he requested an attorney - - he invoked his right to counsel. "The officer would not have had him sign a waiver after he had requested an attorney." The judge stated that petitioner's mother "advised the officer that he desired to speak with him." The judge found that petitioner then "voluntarily made statements to the police and I believe knowingly waived his right to an attorney at this point." The judge therefore ruled that he would not suppress petitioner's confession. R. 44, l. 13 – 45, l. 16.

Court of Appeals

On appeal, petitioner argued the confession should have been suppressed and noted the similarly between this case and State v. Anderson, 357 S.C. 514, 593 S.E.2d 820 (Ct. App. 2004) where the Court of Appeals held that the trial judge erred by refusing to suppress a statement Anderson made to the police because it was taken in violation of the Sixth Amendment right to counsel. The defendant was arraigned in the morning for the murder in question, and he signed the form requesting the services of a public defender. Later that afternoon, the defendant's aunt visited with him at the police station. The aunt requested that the officer go talk to the defendant again. The officer then went in to talk with the defendant and he *read to him his Miranda warnings, and asked if "anything had change since the last time they talked."* The defendant then spoke with the officer, and he made an inculpatory statement. The Court of Appeals held that the officer's contact with the defendant violated the protection afforded him by the Sixth Amendment since his right to counsel had attached, and the Aunt could not reinitiate contact for Anderson.

The state argued Anderson was inapposite because it was a Sixth Amendment case. Petitioner argued in his reply brief and at oral argument that this was a Fifth Amendment case

where it was undisputed the Detectives were aware petitioner had invoked his right to counsel. This case presents a more compelling basis for suppression than Anderson where knowledge was imputed to the police. For example, in his reply brief petitioner noted petitioner's case was "more compelling, particularly in light of [the intervening case of] Montejo v. Louisiana, 129 S.Ct. 2079 (2009) which overruled Michigan v. Jackson, 475 U.S. 625 (1986), and the fact petitioner was only a young teenager who wished to speak with his mother after invoking his right to counsel. Anderson was an adult. Brief of Respondent at 24-25." Reply brief of petitioner at 3.

The Court of Appeals discussed State v. Anderson in its opinion but ultimately held that Anderson was applicable but distinguishable and that other jurisdictions had held a defendant could "reinitiate contact with the police via a third party." App. 6-9. Here, the Court was obviously referencing petitioner's mother as that third party.

Petitioner sought rehearing arguing:

> Detective Melvin Cumbee admitted *he did not think he ever told appellant's mother that appellant had asked for an attorney* when she told Cumbee the minor wanted to talk to "them" again. R. 35, ll. 21 – 22. The essence of the analysis is whether the police used coercive conduct to get around the undisputed invocation of counsel by appellant.
>
> Here, unlike State v. Anderson, 357 S.C. 514, 593 S.E.2d 820 (Ct. App. 2004), which involved the invocation of the right to counsel being imputed to law enforcement based on the now overruled Michigan v. Jackson, 475 U.S. 625 (1986), by Montejo v. Louisiana, 129 S.Ct. 2079 (2009), Cumbee was aware appellant had invoked his right to counsel. . . There was *no evidence* that the detectives informed appellant's mother that he had requested an attorney when they allowed him to talk to his mother after invoking his right to counsel.

App. 18-19.

Rehearing was denied.

Discussion

The Court of Appeals erred by distinguishing State v. Anderson, 357 S.C. 514, 593 S.E.2d 820 (Ct. App. 2004) and by finding that petitioner reinitiated contact with the Detectives through a third party, his mother. The police conduct towards this fourteen-year-old eighth grader was coercive. There was an extremely good chance if petitioner's mother had been informed petitioner had invoked his right to counsel that she would not have thought confessing to police without legal advice was a good idea. While the police can mislead and even lie to a suspect -- State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1995) -- this is a case of the coercive deliberate taking advantage of a young man barely a teenager with an eighth grade education. Further, the doctrine of reinitiating contact through a third party has never been recognized by this Court.

In State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007), this Court stated that the confession of a juvenile must be considered under the totality of the circumstances. C*iting* Schneckloth v. Bustamante, 412 U.S. 218 (1973). This Court in State v. Pittman noted that the United States Supreme Court had instructed that the totality of the circumstance must include "the youth of the accused, his lack of education or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention," and other factors. No one factor is determinative, but each case requires careful scrutiny of all of the surrounding circumstances. State v. Pittman, 373 S.C. at 566, 647 S.E.2d at 146 (2007); Arizona v. Fulminate, 499 U.S. 279 (1991).

Here, petitioner invoked his right to counsel, and did not sign the form waiving his rights. The intervention of petitioner's mother to "help him" deal with the police, is much worse

constitutionally than the Aunt's attempt to help in State v. Anderson because Anderson was an adult. Furthermore, in this case Detective Cumbee did not Mirandize petitioner after he had invoked his right to counsel. The was no evidence the mother knew petitioner had already invoked his right to counsel. See Fare v. Michael C., 442 U.S. 707 (1979); In Re Williams, 267 S.C. 295, 299, 217 S.E.2d 719, 722 (1975).

This is a case involving the police taking obvious advantage of a fourteen-year-old and keeping his mother in the dark about the fact he had requested the right to rely on counsel in his future dealings with the police. Parents, ministers, and family members are notorious for thinking that complete honesty and contrition is the route to go with law enforcement. When petitioner invoked his right to counsel it should have been respected, and his mother should not have been taken advantage of via this "third party reinitiating contact doctrine." Even if this Court were to adopt this doctrine petitioner respectfully submits it should not be deemed controlling given the facts of this case. Unlike State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007), petitioner's confession was coerced and it should have been suppressed. See Colorado v. Connelly, 479 U.S. 157 (1998). This Court takes a dim view of law enforcement playing fast and loose with a citizen's Miranda rights. See State v. Navy, 386 S.C. 294, 688 S.E.2d 838(2010), *cert. denied* October 4, 2010. The Court of Appeals erred by holding otherwise.

2.

The Court of Appeals erred by holding the family court judge did not violate the mandate of In re Winship, 397 U.S. 358 (1970) by finding the state disproved self-defense beyond a reasonable doubt, and proved petitioner's guilt to the charge of murder beyond a reasonable doubt, and by denying a new trial on that basis, where it was undisputed the first shots came from the decedent's automobile, and that all of the young people on the porch with petitioner were in fear and "scattered," and where there was evidence the car was coming at petitioner and that he returned fire in this life threatening situation.

As to the shooting itself Judge Garfinkel heard testimony regarding it at the December 12 – 13, 2007 adjudicatory hearing. North Charleston police officer Jonathan Lawrence testified that while working off duty at 2:15 a.m. on August 11, 2007, "I received a call at 2119 Constitution Avenue in reference to a black male slumped over the seat [of a car] at the address." R. 68, l. 13 – 69, l. 16.

There would be testimony later that petitioner and several other friends who were sitting on the porch of fifteen-year-old Edginee Ford's house at 2719 Constitution Avenue in North Charleston at about two o'clock on that summer morning. R. 184, l. 6 – 186, l. 20. Ford remembered her sister Ebony and her friend Jasmine were there on the porch along with petitioner "Kayron, CJ, and Twin if I remember." R. 193, l. 19 – 194, l. 8. Ford knew all of them "from the neighborhood." R. 194, l. 9 – 195, l. 6.

Ford testified that Kayron had a gun that evening. R. 196, ll. 10 – 17. She said Twin, whose real name she did not know, also had a gun. R. 197, l. 10 – 198, l. 24. Ford said she remembered Twin handing the gun to petitioner at some point. R. 199, ll. 15 – 18.

Ford recalled hearing gunshots coming from her right side, and she saw a car coming towards them -- three gun shots were fired from the vehicle. Ford ran after she heard the first gun shot. Ford said: "I saw Tracy run, I can't remember if it was in or out [of] the gate, and [he] shot one time. Ford said everyone scattered during this gunfire. R. 200, l. 25 – 201, l. 22.

Ford remembered this same automobile had stopped by her house about ten to fifteen minutes earlier. Twin talked to a person sitting in the front passenger side seat. R. 201, l. 20 – 202, l. 18. Ford said Twin shook hands with the man in the car, and there was no sign of trouble. R. 202, ll. 9 – 24. The men in the car saying they were going to get a blunt. Ford did not expect the men to come back by the house. R. 203, ll. 4 – 18.

Ford did not speak to petitioner after this shooting incident because "there was so much commotion going on." R. 204, ll. 10 – 13. Ford also opined, as a state's witness, that she "thought" shots from the car were being fired "up in the air." R. 205, ll. 12 – 13.

Ford also said after petitioner returned fire "the car backed up." R. 206, ll. 23 – 24. Ford said one man in the car asked who shot at his car and said "ya'll gonna pay for this . . . and nobody knew that the car got shot." R. 207, ll. 3 – 7. The photographs showing the bullet hole in the back window, and the DVD/Video showing how dark outside it was that night were on file with the Court of Appeals for viewing, and now are available to this Court. Ford said "words were exchanged" as the driver was trying to figure out who shot his car. Then the back door was opened and the man said: "Oh my homeboy is shot." R. 207, l. 11 – 208, l. 20.

Ford said once they realized the man in the backseat who was shot was dead that petitioner was already gone. "I just told my sister to call the police. She called the police, and that's when the front door was closed." R. 209, l. 15 – 210, l. 6.

On cross-examination, Ford tried to describe how the single return shot was fired as the car passed the house or just after it passed. R. 211, l. 10 – 214, l. 16. Ford said she remembered petitioner stating he thought they were shot at by a man inside the car. R. 218, ll. 20 – 24. Ford testified that she did not know if petitioner was still inside the gate to her house when he fired the single shot in return. R. 222, ll. 1 – 10. Ford said she was very afraid when the shots were fired out of the car. "Anyone would be scared with shots." R. 223, l. 6 – 224, l. 3. Ford also acknowledged "everything happened so quick." R. 224, ll. 4 – 20.

Petitioner's statement to the police -- which he continues to challenge above -- clearly indicated he thought he was in danger: "I saw an aim come out the passenger window of the car and start shooting. I heard the shots and the car was coming towards me. I ran down towards Gary Street. After the car passed by me I shot at the car one time. The car pulled over to the side of the road and I ran." See State's Exhibit1 (Advice of Right and Statement) R. 301.

In addition to Ford, seventeen-year-old Kayron Mitchell testified he was on Ford's porch on Constitution Avenue early that morning on August 11, 2007. Kayron remembered petitioner, Twin, Ebony, Yanni, and Veronica were also being present along with CJ, Jas, and Ford. R. 230, l. 25 – 231, l. 15.

Kayron acknowledged that he and Twin had guns that evening. R. 233, ll. 6 – 16. Kayron remembered the car approaching the house: "I could just see like fire coming from the car now. I ain't had that much time to really sit there and really pay attention. But like the first thing come in my eyes was when I see the car and I see the shots, I ain't been thinking about nothing." Kayron said he did not know what petitioner was doing while the shots were being fired from the car. R. 239, l. 17 – 240, l. 8.

When the solicitor asked Kayron if the shots were being fired towards him or in the air, Kayron essentially said the direction of the shots was unclear in this moment of panic: "It looked like it was going in the air. I could just see them coming out of the window; that's all." R. 240, ll. 3-5. Kayron testified that as people scattered some were trying "to get into the house . . . somebody fell and I tripped over them and that's how I know when I ran in the house." R. 249, ll. 6 – 19.

Ebony Anglin testified that she was on her porch that morning. Ebony lived in the house with her mother, her brother, and her sister, Edginee Anglin Ford. She remembered the same young people being present on her porch that early morning: "Me my sister Edginee, Jas, Tracy, Yanni, Kayron, C.J; and I think that's it." R. 251, l. 22 – 252, l. 20. Ebony said she thought only petitioner had a gun among the young people on the porch that morning. R. 252, ll. 19 – 20.

Ebony remembered that a little earlier petitioner, "Kayron, Jas, and Yanni talked to the two people inside the car. It was a "polite" conversation. R. 254, l. 2 – 255, l. 4. Ebony remembered the men in the car saying "they were going to the store." R. 255, ll. 4 – 14.

A little later that she saw gunshots being fired out of the passenger side window of the same vehicle. She thought the shots were being fired "in the air." Ebony remembered petitioner "went to the gate, stood inside, and pointed the gun and shot." She confirmed that petitioner "was still inside the gate when he shot. R. 264, ll. 17-19.

Ebony stated the car "had passed" the house when petitioner fired at the vehicle. R. 258, l. 9 – 260, l. 13. Ebony remembered that the car then backed up to her house because "it wasn't too far away." Ebony estimated the vehicle was about "two houses up" when it started to back up towards her house. R. 264, l. 8 – 265, l. 6.

Ebony acknowledged, on cross-examination by petitioner's attorney, that the statement she gave to the police was different than what she was saying now. Having to choose, she said: "the first statement was a lie." She further acknowledged that everything happened very quickly. R. 264, l. 1 – 267, l. 3.

In her closing argument, defense counsel Ehrlich argued to the judge, as the trier of fact, that the state had failed to prove petitioner was not acting in self-defense. Counsel noted that the state had to disprove self-defense beyond a reasonable doubt. R. 282, l. 21 – 283, l. 11.

Counsel argued that the state had failed to prove that petitioner was at fault since gunshots from the car came first. The police also confirmed the driver of the car was acting suspiciously after the shooting. R. 286, l. 19 – 284, l. 9.

Counsel argued it was also clear that petitioner was in imminent danger of losing his life or sustaining great bodily injury. Petitioner thought the people in the car were coming after him when the shots were fired. R. 284, l. 21 – 285, l. 15.

Counsel further noted that it was unclear exactly where the car was when petitioner returned fire, and that "the car had the advantage on Tracy, he's on foot . . . under the law of self-preservation Tracy doesn't have to wait until someone gets the drop on him."[3] R. 288, l. 22 – 289, l. 22. Counsel also reminded the judge that "Kayron said it happened very fast, that anything could have happened and he tripped over people trying to take cover." R. 289, ll. 17 – 20. As to the duty to retreat defense counsel argued:

> Even Detective Gomes, once again, testified as to the quickness of the incident. Nobody really knows exactly where shots were being fired because it happened so quickly. The last element of self-defense is that the defendant is to show no other reasonable, safe, or obvious means of escape or a way of avoiding danger of losing

[3] A long recognized doctrine. See State v. Rash, 182 S.C. 42, 50, 188 S.E. 2d 435, 438 (1936).

> his life except act as he did. There would no duty to retreat for Tracy given the circumstances, the amount of time, the darkness, the fact that people were in a panic trying to get into the house failing all over each other; can't get in the house.

R. 289, l. 22 - 290, l. 6.

The judge found petitioner guilty of murder. R. 294, ll. 6 – 10.

Defense counsel then moved for a new trial based on the "lack of evidence in this case, and all previous motions." That motion for a new trial was denied. R. 294, ll. 16 – 21.

The Court of Appeals held the state disproved beyond a reasonable doubt the first element of self-defense – that petitioner was without fault in bringing on the difficulty. The Court reasoned petitioner "chose to fire" after the car had passed. The Court also reasoned petitioner could have retreated – presumably safely – noting the other teenagers "ran into the house" when the shots were fired. App. 14-17. The Court therefore held the family court judge did not err by finding petitioner guilty of murder, and denying his new trial motion. Petitioner was not successful in challenging that ruling on rehearing. App. 20-24.

Discussion

The family court judge obviously sits as the trier of fact and the state has the burden of proving his guilt to the family court judge beyond a reasonable doubt. This is a constitutional mandate required by In Re Gault, 387 U.S. 1 (1967) and In Re Winship, 397 U.S. 358 (1970). In this case, as the Court of Appeals recognized, the state not only had the burden of proving petitioner's guilt beyond a reasonable doubt, the state had the burden of disproving self-defense beyond a reasonable doubt. State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002); State v. Addison, 343 S.C. 290, 540 S.E.2d 449 (2001); State v. Wiggins, 330 S.C. 538, 544, 500 S.E.2d 489, 492-493 (1998).

The right to self-defense is comprised of four elements:

1. That he was without fault in bringing on the difficulty;

2. That he actually believed he was in imminent danger of losing his life or of sustaining serious bodily injury, or he actually was in imminent danger of losing his life or of sustaining serious bodily injury;

3. If his defense is based on his actual belief of imminent danger, that a reasonable prudent man of ordinary firmness and courage would have entertained the same belief, or if his defense is based on his being in actual and imminent danger, that the circumstances were such as would warrant a man of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm, or losing his own life;

4. That he had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance.

Here, the Court of Appeals erred by holding petitioner was not without fault in bringing on the difficulty. Respectfully, the finding that petitioner was at fault ignores undisputed evidence that when the shots were fired from the automobile *first* and that the young people on the porch on Constitution Avenue "scattered." There was also evidence the young people even tripped over one another trying to get inside of the house. It was also clear without contrary evidence that the young people were scared and in fear of their lives as they scattered as they tried to escape in a panic. The Court of Appeals finding that petitioner was not without fault also ignores the fact the state bore the burden of disproving self-defense beyond a reasonable doubt even though the Court of Appeals wrote it recognized that fact.

The Court of Appeals implicitly held the second and third elements of self-defense were met. Common sense dictates a person is going to fear for his life or fear suffering great bodily injury when he is being shot at, or thinks he is being shot at.

As to the final element, the Court of Appeals noted that the other teenagers were able to make it into the house and it apparently assumes petitioner could have done likewise. A person has no duty to retreat if to do so may increase the danger he is already in at the time. State v. McGee, 185 S.C. 184, 190, 193 S.E.2d 303, 306 (1937); State v. Fuller, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989). Petitioner, unlike the teenagers on the porch, was *out in open* when the shots were fired. Further, there was evidence of a stampede like atmosphere as the other teenagers fled inside the house.

Moreover, it needs to be noted that petitioner had no duty to retreat in this case anyway. He was a guest at the home of another while he was on the Constitution Avenue porch with his friends. See State v. Osborne, 202 S.C. 473, 25 S.E.2d 561 (1943); State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978). Here, petitioner was unquestionably a guest with his friends on the property.

The evidence shows that petitioner had no duty to retreat whatsoever, and there was also evidence that even assuming *arguendo* such a duty had existed, petitioner would have placed himself in greater danger by attempting to run into the house where the stampede to escape caused the young people to fall over one another.

As stated, the state had burden of disproving self-defense in this case. State v. Burkhart, supra, and the Court of Appeals erred by holding that the state disproved petitioner was acting in self-defense beyond a reasonable doubt in this case. See Jackson v. Virginia, 443 U.S. 307, 318 (1979); In Re Winship, supra. Since the state failed to disprove self-defense beyond a reasonable doubt petitioner is entitled to a verdict of acquittal since self-defense is a complete defense. See State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978). This Court somewhat recently held the same as to a directed verdict in State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011), despite

evidence the defendant may have followed the decedent whereas here it is clear petitioner was outside and vulnerable at the time the gunshot rang out and he shot in self-defense.

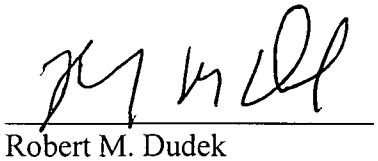
Finally, the Court of Appeals held that the family court judge did not abuse his discretion by refusing to grant a new trial reasoning that the state presented evidence of malice, and presented evidence disproving self-defense beyond a reasonable doubt. Petitioner recognizes the grant or refusal of a new trial is within the trial judge's discretion and will not be disturbed on appeal without a clear abuse of that discretion. State v. Smith, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. State v. Hughes, 346 S.C. 339, 342, 552 S.E.2d 35, 36 (Ct. App. 2001).

Petitioner submits the finding by the family court judge that the state disproved self-defense beyond a reasonable doubt was wholly unsupported by the evidence and therefore the Court of Appeals erred by finding no abuse of discretion in his refusal to grant a new trial. See, State v. Anderson, 386 S.C. 120, 126, 687 S.E.2d 35, 38 (2009); State v. Hughes, 346 S.C. 339, 342, 552 S.E.2d 35, 36 (Ct. App. 2001). The finding by the Court of Appeals that the state disproved beyond a reasonable doubt that petitioner was not without fault in bringing on the difficulty, and that he could have safely retreated – particularly where he had no duty to retreat – should not be allowed to evade this Court's review given this novel application of State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002).

CONCLUSION

By reason of the foregoing arguments, as to issue one a new juvenile adjudication hearing should be ordered, and, as to issue two a directed verdict of acquittal should be issued.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

Megan S. Ehrlich, Esquire
Charleston County Public Defender
101 Meeting Street, 5th Floor
Charleston, SC 29401

ATTORNEYS FOR PETITIONER.

This 8th day of June, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Paul W. Garfinkel, Family Court Judge

IN THE INTEREST OF: TRACY B.,
A MINOR UNDER THE AGE
OF SEVENTEEN,

APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Donald J. Zelenka, Esquire, this 8th day of June, 2012.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day
of June, 2012.

(L.S.)
Notary Public for South Carolina
My Commission Expires: May 16, 2021