ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari from Charleston County
Paul W. Garfinkel, Family Court Judge

Opinion Number 4769 (S.C.Ct. App. Filed 12/20/2010
2007-JU-10-2117, 2007-JU-10-1473, 2007-JU-10-1472
Appellate Case No. 2011-186286

IN THE INTEREST OF: TRACY B.,
A Minor Under The Age Of Seventeen,

Petitioner

BRIEF OF RESPONDENT

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1.

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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?

RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Tracy B., was charged by an initial juvenile petition with voluntary manslaughter involving the homicide of Larry Jenkins on August 11, 2007. He was also charged with unlawful possession of a handgun and unlawful possession of a handgun by a minor under the age of 21. 2007-JU-10-1472, 2007-JU-10-2117. On December 10, 2007, the charge was amended to be murder. ROA 304. The Appellant was represented by Charleston County Assistant Public Defender Megan S. Ehrlich. The prosecution was handled by Ninth Circuit Assistant Solicitor Anne B. Seymour.

On November 6, 2007, a hearing was held before the Honorable Jack A. Landis, Family Court Judge. R.p. 1-46, 11/6/07 Tr. p. 1-54. The hearing concerned the motion to suppress the statements of the Appellant. At the conclusion of the hearing, Judge Landis concluded that the statement was freely and voluntarily entered. R. 44-45, 11/6/07 Tr. p. 52, l. 13 - p. 53, l. 13.

An adjudicatory hearing was held on December 12-13, 2007 before the Honorable Paul W. Garfinkel, Family Court Judge. At the outset of the hearing, counsel moved to dismiss the murder charge asserting that it was based upon prosecutorial vindictiveness to force a plea of voluntary manslaughter. After a hearing, the motion was denied. R. 48-61, December Tr. p. 4-17, Juvenile Commitment Order to Coastal Evaluation Center, December 19, 2007, R. 310.

At the adjudicatory hearing, the Appellant was represented by prior counsel Ehrlich and Ted Smith. The prosecution was again represented by Assistant Solicitor Seymour. Testimony was received from eight (8) witnesses. Judge Garfinkel denied motions for directed verdicts of acquittal. R. 268-72, Tr. 226-230. After closing arguments, Judge Garfinkel concluded that the Appellant was guilty of murder, unlawful possession of a handgun and unlawful possession of a handgun by a

minor. R. 294, Tr. p. 252, ll. 6-10. Judge Garfinkel entered an order on December 19, 2007. R. 310-12. He was adjudicated delinquent and found in need of the care and supervisor of the State.

On February 13, 2008, a dispositional hearing was held. R. 295-300, 2/13/08 Tr. p. 1-34. Judge Garfinkel sentenced the Appellant to incarceration at the Department of Juvenile Justice for an indeterminate period not to exceed his twenty-first (21st) birthday. R. 299, 2/13/08 Tr. p. 33, ll. 6-10. A written Commitment Order was entered February 14, 2008. ROA __.

This appeal follows. On September 8, 2009, the Petitioner made a Final Brief ofAppeallnt asserting the following statement of issues on appeal:

1.

> Whether the family court judge erred by refusing to suppress the fourteen-year-old, eighth grade educated, appellant's statement where it was undisputed he invoked his right to counsel while not signing the written waiver form, where appellant was then arrested, where Detective Cumbee initiated contact with appellant again because his upset mother stated appellant "wanted to talk to ya'll" since appellant had invoked his right to counsel, and his inculpatory statement should have been suppressed under the totality of the circumstances?

2.

> Whether the family court judge, sitting as the trier of fact, erred and violated the mandate of In re Winship, 397 U.S. 358 (1970) by finding the state disproved self-defense beyond a reasonable doubt, and proved appellant's guilt to the charge of murder beyond a reasonable doubt, where it was undisputed the first shots came from the decedent's automobile, and that all of the young people on the porch with appellant were in fear and "scattered", and where there was evidence the car was coming at appellant and that he returned fire in this life threatening situation?

3.

> Whether the family court judge erred by denying appellant's motion for a new trial where his finding appellant guilty of murder violated the mandate of In re Winship, 397 U.S. 358 (1970) since the state did not disprove self-defense beyond a reasonable doubt, and did not prove appellant's guilt beyond a reasonable doubt, since it was undisputed the first shots came from the automobile, and that all of the young people on the porch with appellant were in fear and

scattered", and there was evidence the car was coming at appellant and that he returned fire in this life threatening situation?

Final Brief of Appellant, p. 1. The Respondent, through below-signed counsel made a Final Brief of Appellant. The South Carolina Court of Appeals affirmed the Petitioner's adjudication and disposition on December 20, 2010. In Re: Tracy B. , A Juvenile under the Age of Seventeen, 391 S.C. 51, 704 S.E.2d 71 (2010). App.p. 1-17. A timely petition for rehearing was made by Petitioner. On January 4, 2011. On January 26, 2011, the Court of Appeals denied the petition for rehearing.

The Petitioner next sought certiorari in a petition for writ of certiorari dated April 29, 2011. The Respondent made its Return to the Petition for Writ of Certiorari on May 31, 2011. On February 9, 2012, the Supreme Court of South Carolina issued its Order granting the petition and setting a briefing schedule. This briefing follows.

ARGUMENT

I. The Court of Appeals properly determined that after initially invoking his right to counsel, the Petitioner initiated contact with police seeking through his mother to discuss matters with them. Petitioner had asked to speak with his mother and after speaking to her, she related a message from Petitioner that he wanted to speak to law enforcement. The Family Court correctly concluded that subsequent statement was admissible after there was sufficient evidence that with an understanding of his rights, he freely and voluntary waived his right to counsel and made a statement.

The Petitioner's statement to police was freely and voluntarily entered after being advised of his constitutional rights and then knowingly waiving his rights after he re-initiated contact with law enforcement in a non-coercive situation. The evidence and findings of the lower court reveal that while the Petitioner had completed 8th grade and was 14 years old, the police did not act in either an intimidating or coercive nature, did not place undue pressure on Petitioner during the brief interrogations of Petitioner, that the length of the interrogations were limited and lasted a total of around an hour and 45 minutes, that Petitioner was advised of his constitutional rights prior to the interrogation, that law enforcement was aware that the Petitioner was 14 at the time of the interviews and allowed petitioner, upon his request to speak to his mother. All the factors in totality reveal that Petitioner waived his initially invoked right to counsel by re-initiating contact with the police by a request from Petitioner to his mother and entered a statement freely and voluntarily under the totality of the circumstances.

In his initial argument the Petitioner contends that his statement was not properly admitted for two reasons. First, he asserts error because he invoked his right to counsel his subsequent statement was admitted in violation of his Miranda rights and his mother could not initiate contact for him under Miranda. Second, he asserts under the totality of the

circumstances the statement was inadmissible. Contrary to the paraphrasing of Petitioner, the issue is not whether his mother had the authority to initiate contact with the police. The record reflects that the Petitioner asked his mother to tell the police he wanted to talk with them. The Court of Appeals correctly concluded that while Petitioner initially invoked his Fifth Amendment right to counsel which caused the immediate interrogation to cease, Petitioner subsequently initiated contact with police by asking his mother to advise police that he wanted to talk to them. Under the totality of the circumstances, including his age and education, the Court of Appeals reasonably concluded the subsequent statement made after he initiated contact to the police through his mother was held to be properly admissible by the family court.

What the Court of Appeals Ruled.

In accessing the admissibility of the statement, the Court of Appeals concluded that the statement was the product of the Petitioner reinitiating conversation with the police after he had earlier invoked his Fifth Amendment right to counsel. The Court of Appeals found:

> . . ., the record demonstrates Appellant reinitiated communication with police, and not vice-versa. After meeting with Appellant, Appellant's mother informed Lieutenant Cumbee that Appellant wanted to speak with authorities. Shortly thereafter, Lieutenant Cumbee asked Appellant whether he still wanted to speak with police, and Appellant answered in the affirmative. In making this limited inquiry, Lieutenant Cumbee was not reinitiating communication with Appellant; he was merely confirming that the information he received from Appellant's mother was accurate. Appellant then asked Lieutenant Cumbee about the length of his potential jail sentence - further proof that Appellant did in fact want to talk to police about the investigation. Cf. Oregon v. Bradshaw, 462 U.S. 1039, 1045–46, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983) (plurality opinion) (holding that the defendant evinced a desire for a generalized discussion about the investigation by asking, "Well, what is going to happen to me now?"). After informing Appellant that he did not know how long Appellant could be incarcerated, Lieutenant Cumbee asked Appellant what he wanted to talk about—a relatively innocuous question that could prompt any number of non-incriminating responses. At that point, Appellant admitted he had fired a

single shot at the car. Based upon these facts, we find Appellant reinitiated communication with police.

In the Interest of Tracy B., supra. App.p. 9-10. The Court of Appeals further concluded that the Petitioner was not pressured or coerced into incriminating himself by law enforcement. App.p. 10-11.

The Court of Appeals considered the totality of the circumstances and found the family court correctly determined that Appellant's inculpatory statement was made voluntarily. "First, . . . the police did not act in an intimidating or coercive fashion in this case. . . " "Second, the length of Appellant's interrogation was relatively short. . ." "Third, Detective Gomes advised Appellant of his Miranda rights before he initially began questioning Appellant, and Appellant signed a form stating that he understood those rights." "Fourth, although Appellant was only fourteen years old at the time he made the inculpatory statement, this fact alone does not make his statement inadmissible." "Finally, the fact that police allowed Appellant to speak to his mother provided him with additional protection and put him on a "less unequal footing" with his interrogators." App.p. 12-13.

The findings and conclusions of the Court of Appeals are supported by the record. The appeal should be affirmed.

HOW THE ISSUE WAS RAISED BELOW

November 6, 2007 Motion to Suppress Hearing

On November 6, 2007, a motion hearing was held before Family Court Judge Landis. During the hearing the defense made a motion to suppress the Petitioner's statement. R. 2-3, 11/6/07 Tr. p. 10-11. The Petitioner initially only asserted that the statement was taken after he had invoked his right to counsel. R. 2, l. 24-3, l. 2.

Direct Testimony of Greg Gomes[1]

Detective Greg Gomes of the North Charleston Police Department testified that he was working a shooting death on August 14, 2007. He said he had interviewed witnesses and that several had implicated the Petitioner as the person who shot the victim. R. 3, 11/6/07 Tr. p. 11, ll. 23-25. He learned that the Petitioner was at football practice at that time and he was picked up and brought to the station. Id., R. 4, Tr. 12.

Det. Gomes stated that when the Petitioner arrived at the station, he was placed in an interview room. Gomes stated he went in at 8:35 and advised him of his constitutional rights through Miranda. Id. R. 4, Tr. p. 12, ll. 5-8. He also told the Petitioner that someone had been shot and Petitioner initially denied being in the area. Id., R. 4, Tr. p. 12, l. 19. When he was told several witnesses stated that he was there, he denied any knowledge of it. R. 4, Tr. p. 12, ll. 16-22.

Det. Gomes re-confirmed that before he spoke with Petitioner that he had Mirandized him and used the standard form. R. 4-5, Tr. 12-13. See Plaintiff's Exhibit One, Advice of Constitutional Rights form, ROA 301. See also R. 5-6, Tr. 13-14. Det. Gomes declared that Petitioner appeared to understand what he was reading to him and was not under the influence of anything. R. 6, Tr. 14. He described the Petitioner as a 14 year old who had completed the eighth grade, still wearing his football pants and was still sweating from practice. R. 6-7, Tr. 14-15.[2] He said the Petitioner had just arrived at the station when the Miranda rights were read. He

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[1]In the record on appeal, the record misspells his last name as "Gunnels." It is correctly spelled Gomes. See, ROA 145, l. 11-12.

[2]It should be noted the interview occurred on August 14, 2007 and Petitioner would be a rising 9th grader at the time.

said Tracy did not appear confused. The Petitioner signed the advice form at 8:35 p.m. R. 7-8, Tr. 15-16.[3]

Det. Gomes reiterated that after he signed the form, the Petitioner stated that he "wasn't even when this happened" in the area and denied knowledge of it. R. 8, l. 8-12. Det. Gomes stated he was with him for only 10 to 15 minutes at that time. R. 8, Tr. p. 16, ll. 14-16.

Det. Gomes stated he left to interview three or four other witnesses. R. 8, Tr. p. 16, ll. 20-21. Gomes stated he returned to talk with Petitioner at around 9:15 or 9:30. Det. Gomes left the room when Petitioner stated: "I think I want a lawyer," which Gomes interpreted as invoking his right to counsel. R. 9, Tr. p. 17, ll. 2-8.

Gomes stated he left then and advised the other investigator that Petitioner wanted a lawyer. About 15 minutes later, Petitioner was taken to the bathroom to allow him to change from his football pants to shorts.[4]

When Gomes took Petitioner back to the interview room, Petitioner initiated a conversation and asked Det. Gomes "how serious is this?" and Gomes responded "real serious, you know, somebody died." R. 9, Tr. p. 17, ll. 19-21. At that point, Petitioner asked to speak with his mother. R. 9, Tr. p. 17, ll. 20-23. Upon Petitioner's request, Det. Cumbee then went and got Petitioner's mother. R. 9, Tr. p. 17, ll. 22-23.

Gomes stated that Petitioner's mother was already at the station because she had been

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[3]In his Brief of Appellant, he states in the introduction to the argument that the Miranda form was not signed by Petitioner. *Brief of Appellant*, p. 5. Petitioner did sign the Miranda form at 2033 on August 14, 2007, but did not sign the portion addressing the waiver. ROA 301 (signed form), Also, ROA p. 7, l. 22- p. 8, l. 6, p. 17, l. 1-12.

[4] Gomes stated he took him to change clothes to get more comfortable. The Petitioner had shorts in his bookbag. R. 10, Tr. p. 18, ll. 10-17.

notified earlier about her son being taken to the station from football practice. R. 10, Tr. 18. Gomes stated that he also knew that Lt. Cumbee had already talked with her, so Det. Cumbee went and he got her. R. 10, Tr. 18.

Direct Testimony of Melvin Cumbee

Lt. Cumbee stated that he met with the Petitioner's mother after she arrived at headquarters. R. 11, Tr. 19. He stated he notified her when she arrived that her son had been implicated in a homicide. R. 12, Tr. p. 20, ll. 1-4. Lt. Cumbee stated at some point he became aware from Corporal Gomes that Petitioner had invoked his right to counsel. R. 12, Tr. p. 20, ll. 8-9. When advised that Petitioner wished to speak with his mother, Cumbee got her and escorted her back to the interview room where she was allowed to speak with him. R. 12, Tr. 20.

Lt. Cumbee stated that he just showed her the door and she opened it and his mother entered the room without him. R. 12-13, Tr. 20-21. Lt. Cumbee thought the Petitioner was with his mother five to ten minutes. R. 13, Tr. p. 21, ll. 9-10.

When his mother exited the interview room she was upset and stated to Cumbee that "he wanted to talk to y'all meaning – I took it as us the police." R. 13, Tr. p. 21, ll. 18-209.

Lt. Cumbee testified that he next entered the room and asked Petitioner if he wanted to talk to us and that Cumbee was told by his mother that he wanted to talk to us and Petitioner said "yes." R. 13, Tr. p. 21, ll. 11-15. Lt. Cumbee stated that Tracy next asked him how long could he get in jail and Cumbee responded that he did not know. R. 13, Tr. p. 21, ll. 20-25.

Lt. Cumbee then asked Petitioner what he wanted to talk about. At that point, the Petitioner stated he had shot the gun at the car, that he had just pointed the gun and shot it. The

Petitioner confirmed that he had been advised of his rights. Next, Lt. Cumbee asked him if he wanted to tell his side of the story and he said "yes." R. 14, Tr. p. 22, ll. 7-16.

Lt. Cumbee went to get something for the Petitioner to drink. After he exited, he advised Cpl. Gomes that he wanted to talk to them. Cpl. Gomes then entered the room and apparently received a statement also. R. 14, Tr. p. 22, ll. 14-21.

Lt. Cumbee stated he spoke with the Petitioner's mother before she left. He stated that she was visibly upset because her son was to be charged. She told him that she was somewhat [disgusted] with his behavior and had tried to do everything in her power to keep anything like this from happening. He noted that when the mother arrived he advised her that her son was a suspect in a homicide and several witnesses had indicated he was a suspect. R. 15, Tr. 23.

Re-Direct of Detective Gomes

Det. Gomes returned to the witness stand to address the taking of the written statement. He stated that Det. Cumbee had advised him that the Petitioner had confessed to the shooting and ask Gomes to go in the room and take a written statement. R. 16, Tr. 24. Det. Gomes re-entered the room at 10:15 p.m. (Which was one hour and forty minutes after he first saw him). Id. R. 17, Tr. 25.

He noted that the Petitioner signed his written statement on August 14, 2007 at 2210 [10:10 p.m.]. R. 17, Tr. p. 25, ll. 13-19. Plaintiff's Exhibit 2. R. 302-03.[5]

Det. Gomes stated he wrote out the statement because he typically did it because it is more legible, although he asked the Petitioner if he wanted to write his own statement. He said

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[5]The written and signed advice of rights form was signed on August 14 at 8:35 PM. R. 17, l. 1-12. R. 301.

that Tracy was not threaten at any time during the statement.

Importantly, Tracy did not reinitiate his request for either counsel or for his mother. R. 18-19, Tr. 26, l. 24 - p. 27, l. 5. He stated it only took about 10 to 15 minutes to take the written statement. He thought the Petitioner's mother was still present at the station during this interview.

Det. Gomes stated that night Det. Cumbee told him that the Petitioner wanted to make a statement. He said he went into the room and asked Petitioner that he understood that he wanted to talk with them and Tracy said: "yeah, I am going to tell you what happened." He asked Tracy if he wanted to write it and he said he wanted Gomes to write it. He included this at the top of the written statement.[6] He said Petitioner signed the statement after Gomes wrote the statement. R. 19-20, Tr. 27-28. Gomes stated he exited the room after the statement was given. He was

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[6]The statement read:

We were on Constitution near the fork. It was me and there was some other people standing in the yard. I saw a car coming down Constitution from Dorchester. I saw an arm come out from the passenger window of the car and start shooting. I heard the shots and the car was coming toward 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.

Q. What kind of gun did you have?
A. I don't know. I threw it down.
Q. Where?
A. I don't know.
Q. What kind of car was it?
A. I think it was a old school Cadillac.
Q. Why did you shoot at the car?
A. Because I thought they were shooting at me.
Q. Where is the gun [now]?
A. I don't know.

Plaintiff Exhibit 2. R. 154-55, 303-304, Tr.p. 110-111.

unaware if other officers spoke to the Petitioner after that. R. 20-21, Tr. 28-29.

Cross Examination of Det. Gomes

On cross-examination of Det. Gomes, the defense developed that Gomes was not involved in the decision to pick Petitioner up at the football game. R. 22, Tr. 30. Gomes said when he met him in the interrogation room that he just said hello and then read him his rights. R. 23, Tr. 31. He stated that he had told him that he was investigating a homicide. R. 23, l. 6-13. He said he always reads a suspect Miranda warnings, then has the suspect read them, and then have them sign the form once they understand it. R. 23, Tr. 31. He said he did not put the charge. He said Tracy knew what was going on and had heard what happened. (the shooting). R. 24, Tr. 32.

Det. Gomes stated that Tracy had not signed the bottom of the advice form where it states waiving rights. R. 25, Tr. 33. He said Petitioner told him he wanted a lawyer around 9:15 p.m. R. 25, Tr. 33.

Gomes described what occurred between the time 8:35 when he signed the advice of rights form and 9:15 when he stated that he stated"I think I want a lawyer." He said in the first 10-15 minute conversation it was whether he was there and Petitioner just kept saying that he was not in the area. Gomes stated he had spoken with him briefly and then left the room at one time to find out what the other witnesses were saying and then returned. Gomes stated he kept confronting Petitioner that everyone else was saying that he was there and he kept saying he was not. R. 26-27.

He stated that once he said he wanted a lawyer, Gomes did not let him go home and told him he was under arrest and that he would be charged with the crime. R. 27, Tr. 35. He stated

he did not re-Mirandize him then. However, he escorted him to the bathroom to change clothes and get more comfortable by getting him out of his football clothes. R. 27-28, Tr. 35-36.

He confirmed that after he took him back to the room, Tracy initially asked him how serious was it and he told him it was serious, someone had died, and then Petitioner asked to speak with his mother. R. 28, Tr. 36.

He described the interview room as 6x6 with a table and a couple of chairs with an observation window. R. 28, Tr. p. 36, ll. 23-25.

Gomes confirmed that after Lt. Cumbee had told him Tracy wanted to talk, that he did not ask Tracy if he wanted an attorney again nor to sign a waiver form. He also said he did not read him his rights again. R. 29, Tr. 37.

Gomes stated he was not aware that Tracy had an individual educational plan [IEP], but did ask him what was the last grade he completed (8th grade). R. 30, Tr. p. 38, ll. 1-6. He stated the Petitioner did not have difficulty reading. He again concurred that the Petitioner had not signed the portion stating he waived his rights on the advice form. R. 30, Tr. 38.

Det. Gomes denied that he had threatened the Petitioner, denied that he (Gomes) ever told Petitioner that he knew there had been an accident, and denied that he ever knew he might get charged with something less than murder. He also denied that he ever told him he was on video, that his football career was over, or that he would tell the judge that he cooperated. R. 30, Tr. 38-39.

Cross-Examination of Lt. Cumbee

On cross-examination of Lt. Cumbee, he acknowledged that he had become involved in the matter and was the first person that the Petitioner had confessed to on that date. R. 34, Tr.

42. He noted this happened after he had gotten the Petitioner's mother at Petitioner's request and let her go in. He denied that he was either in the room or the observation room when she was talking to him. R. 34, Tr. 42.

Lt. Cumbee said he had previously learned that Petitioner had asked for an attorney shortly after Cpl. Gomes exited the interview room and that Petitioner asked for his mother. R. 35, Tr. 43. Cumbee felt he was under arrest when he spoke with him, but did not think he was handcuffed at the time. R. 35, Tr. p. 43, ll. 11-15.

He stated that his mother told them he wanted to talk to us (as the police). R. 35, m l. 18-20. He denied that he ever told him mother what his rights were or that he had asked for a lawyer. R. 35, Tr. 43. He also stated he had not advised Petitioner what his rights were. However, he confirmed with the Petitioner that he had been advised of his rights. R. 35-36, Tr. 43-44.

He stated that when he went into the interview room after he was advised by the mother, he did not initially ask him what happened. Instead, he advised Petitioner that his mother had told him he wanted to talk to them and asked him if he still wanted to. When he stated "yes", he then asked how long he could get in jail. Cumbee stated he told him he did not know. R. 37, Tr. 45. He confirmed that he made no promises and did not take a written statement. R. 37-38, Tr. 45-46. He stated Petitioner told him that he shot at the car because he was being shot at, and that he just pointed the gun and shot. R. 38, Tr. p. 46, ll. 1-15. At that point, he exited and advised Cpl. Gomes to take a written statement. R. 38, Tr. 46.

He stated he did not re-Mirandize Petitioner because he confirmed that he had already been advised of his rights. "And, it was my feeling at the time and still is that he initiated

wanting to talk to us, so I did not." R. 38, Tr. p. 46, ll. 18-22. He stated he confirmed when he went into the room concerning what his mother said, that he still wanted to talk to them. R. 38-39, Tr. 46-47.

He described Tracy's mother as being upset about her son being charged, but was thinking clearly. R. 39, Tr. p. 47, ll. 10-23.

On re-direct, he confirmed that this was not the first time someone had initiated contact after they had invoked. R. 41, Tr. 49. He further did not think that it was his mother making him talk, but she was not in the room with them. Instead, once she left, he went in and the Petitioner stated he still wanted to talk with them. R. 41, Tr. 49.

Argument on the Motion

The defense then asserted under the totality of the circumstances that it was not voluntarily given. She asserted he was 14, had only one prior arrest, and an 8th grade education. She noted that he had not signed the portion of the form waiving his rights. She noted he had, in fact, invoked his right to counsel. He then asked to speak with his mother.

She contended that someone could have been in the observation room, although she did not know who. Counsel asserted that the mother could not initiate or waive someone's right for them. R. 43-44, Tr. 51-52. However, she complained that Petitioner was never re-Mirandized. She complained that no steps were taken to get an attorney. She opined under the totality of the circumstances that he did not voluntarily waive his rights.

What The Family Court Ruled.

Judge Landis stated he was fully cognizant of the juvenile's age and considers it. However, he concluded:

... But, I think it is clear that he understood his rights after being mirandized and that he did request so speak with an attorney. And I - - my belief is that he didn't sign the waiver at that time is because he invoked his rights to have an attorney. The officer would not have had him sign a waiver after he had requested an attorney. But, I also think he has a right to later waive that right and I don't find the fact that it was not written - - a written signed waiver that to be necessarily defective.

After speaking with his mother, she didn't waive his rights, she simply advised the officer that he desired to speak with them. It is my understanding from the testimony that she was not in the room when the police officer returned. I will note also that after he requested the attorney, the police officers ended any interrogation or questioning of him regarding the incident. Upon their return to the room after the mother - - after the mother indicated he wish to speak to us or something in that general vain. At that time, Mr. B. voluntarily made statements to the police and I believe knowingly waived his right to an attorney at this point.

I am therefore going to deny the motion made by the Defense to suppress that statement made to the police on the evening in question....

R. 44-45, Tr. 52-53.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial judge's factual findings unless they are clearly erroneous. Id.; *State v. Preslar*, 364 S.C. 466, 472, 613 S.E.2d 381, 384 (Ct.App.2005). The appellate courts are "bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law." *Reed v. Becka*, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct.App.1999) (citing *State v. Amerson*, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993)).

When reviewing a trial judge's ruling concerning voluntariness, the appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply

determines whether the trial judge's ruling is supported by any evidence. *State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001). The trial judge must determine if under the totality of the circumstances a statement was knowingly, intelligibly, and voluntarily made. Id. Furthermore, the conclusion of the trial judge on issues of fact as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion. *State v. Kennedy,* 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998).

ANALYSIS

The Family Court and Court of Appeals Properly Held Petitioner Re-Initiated Contact With Police By Request His Mother To Tell The Police He Wanted To Talk To Them.

In *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), the United States Supreme Court elaborated on one's right to have an attorney present during a custodial police interrogation. In that case, the police reinitiated an interrogation and eventually elicited a confession sometime after the defendant requested an attorney and interrogation had ceased. The Supreme Court of Arizona upheld the conviction, holding that the defendant's confession was voluntarily given. The United States Supreme Court reversed, holding "waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege." *Id.* at 483, 101 S.Ct. 1880.

To invoke a Fifth Amendment right to counsel, one must give "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police." *McNeil v. Wisconsin,* 501 U.S. 171, 178, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991); *see also State v. Kennedy,* 333 S.C. 426, 430, 510 S.E.2d 714, 715 (1998) (holding that an unequivocal invocation of the Fifth Amendment right to

counsel must be presented in a manner that a reasonable police officer, under similar circumstances, would understand the statement to be a request for the presence of an attorney). Nevertheless, the Supreme Court has held that:

> [a] valid waiver of the right to counsel will not be presumed simply from the silence of the accused after *Miranda* warnings are given. The record must show an accused was offered counsel but intelligently and knowingly rejected the offer.

State v. McCray, 332 S.C. 536, 546, 506 S.E.2d 301, 306 (1998).

In addition, a criminal suspect's rights are not violated ***when the suspect***, not the police, ***"initiates further communication, exchanges, or conversations with the police***." *State v. Howard,* 296 S.C. 481, 489, 374 S.E.2d 284, 288 (1988) (citing *Edwards,* 451 U.S. at 485, 101 S.Ct. 1880). Stated another way, the Court stated in *State v. Aleksey,* 343 S.C. 20, 31, 538 S.E.2d 248, 253 (S.C.,2000) that "law enforcement officers may certainly speak with a suspect who reinitiates communication subsequent to an invocation of rights." citing *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) (once an accused requests counsel, police interrogation must cease unless the accused himself "initiates further communication, exchanges, or conversations with the police").

Finally, this Court has held that, after it has been determined that the waiver was valid, the analysis is over:

> [o]nce it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.

State v. Drayton, 293 S.C. 417, 426, 361 S.E.2d 329, 334-335 (1987) (citing *Moran v. Burbine,* 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)). *State v. Binney*, 362 S.C. 353, 359-360, 608 S.E.2d 418, 421 - 422 (2005).

Third Party Communication of Petitioner's Desire to Speak to Law Enforcement

A focus of the Petitioner's argument is that his mother had no authority to advise the police of his desire and request to speak with them. A survey of cases outside the jurisdiction support that the initiation by the defendant through his mother to seek the police to speak with him again, albeit after he initiated his 5th Amendment right to counsel during questioning was a sufficient waiver of the right. See *Final Brief of Respondent,* p. 19-21 (cases cited). Also *Lacy v. State*, 345 Ark. 63, 44 S.W.2d 296 (2001) (accused initiated contact after asking for attorney when he asked to mother to get a policeman to talk to him); *Holman v. Kemna*, 212 F.3d [413,] 416, 419-20 [(8th Cir.2000)] (defendant initiated contact with police by asking *stepfather* to have deputy come to prison to take his confession); *United States v. Gonzalez*, 183 F.3d 1315, 1323-24 (11th Cir.1999) (on direct appeal, holding that the suspect initiated discussions with police through his wife); *United States v. Gaddy*, 894 F.2d 1307, 1310-11 (11th Cir.1990) (on direct appeal, holding that the suspect initiated discussions with police through his aunt).

As the Court of Appeals noted, the Georgia Supreme Court faced an strikingly similar and analogous situation in *Harvell v. State*, 275 Ga. 129, 562 S.E.2d 180(Ga.), cert. denied, 537 U.S. 1052, 123 S.Ct. 606, 154 L.Ed.2d 528 (2002). In that case, the defendant's *mother* told a police officer that her son was willing to make a statement. Id. at 182. The officer asked the defendant if this was true, and the defendant confirmed that it was. Id. The defendant was later convicted based on statements he made during the subsequent questioning. Id. On appeal, the Georgia Supreme Court held that the officer did not improperly reinitiate questioning and affirmed the conviction. Id. at 182-83.

As these decisions illustrate, permitting a suspect to communicate a willingness and a

desire to talk through a third party is consistent with the interest protected by *Edwards*. "[T]he purpose behind ... Miranda and Edwards " is to "prevent[ ] government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." *Arizona v. Mauro*, 481 U.S. 520, 529-30, 107 S.Ct. 1931, 95 L.Ed.2d 458 (1987). It is the possibility of "badgering" and "overreaching" by police-i.e., government coercion-that Edwards is designed to guard against. *Colorado v. Connelly*, 479 U.S. 157, 170, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) ("The sole concern of the Fifth Amendment ... is governmental coercion." (emphasis added)); see also *Illinois v. Perkins*, 496 U.S. 292, 297, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990) ("[T]he danger of coercion results from the interaction of custody and official interrogation."); *Michigan v. Harvey*, 494 U.S. 344, 353, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990) ("Both Jackson and Edwards establish prophylactic rules that render some otherwise valid waivers of constitutional rights invalid when they result from police-initiated interrogation." (emphasis added)). The whole point of Edwards is to prevent officials from badgering defendants into waiving their asserted right to counsel through repeated questioning.

Here, the Petitioner continues to rely upon *State v. Anderson*, 357 S.C. 514, 593 S.E.2d 820 (S.C. App. 2003). *Brief of Appellant*, p. 14. This is misplaced. Unlike the instant case where the mother was delivering Tracy B.'s request for the police to talk with him, the aunt in *Anderson* was suggesting to the police to go talk with Anderson after Anderson had invoked his Sixth Amendment right to counsel by requesting the public defender at the arraignment.[7] Here,

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[7]The *Anderson* opinion was also based upon *Michigan v. Jackson*, 475 U.S. 625 (1986). Jackson was overruled by the United States Supreme Court in Montejo v. Louisiana, 556 U.S. 778, 129 S.Ct. 2079, 2091, 173 L.Ed.2d 955 (2009). In Montejo, the Supreme Court concluded that Jackson's expansion of the Edwards rule was not warranted in light of the "marginal benefits" and "substantial costs" of that expansion. Id. at 2091. The Montejo Court remanded to permit

however, Petitioner's mother was not suggesting to law enforcement to go talk with the Petitioner on her own. Instead Petitioner's mother was carrying a Petitioner's own message that he, not the mother, wanted to talk to them. This is a distinction with a great difference. The relayed communication was actually from the Petitioner in this setting, whereas in *Anderson*, the evidence was *only* that the aunt wanted the police to talk to the defendant - no request from that defendant.

This case is more akin to *State v. Binney*. There, Binney's request to meet with a detective and his later confession both were made out of his own free will, without coercion or deception. In fact, the record indicates that Binney was motivated to talk with police to get off of suicide watch. Nothing in the record suggested that Binney was not fully informed of his rights, did not understand his rights, or that the confession was not the product of his own free will.

Simply put there is no evidence that the state used the mother as an agent of the state. Instead, it was the Petitioner who requested to speak to his mother. She was given no instructions or suggestions prior to their private conversation. Again, after the meeting, it was the Petitioner, not the mother who sought to speak with the police, the mother was merely carrying the message. Further, when Lt. Cumbee entered the room he confirmed that it was that the defendant wanted to talk with them and had been advised of his rights shortly before. The record is uncontradicted that the Petitioner initiated contact with the police after he had invoked his 5th Amendment right to counsel.

Montejo to argue whether or not he initiated the subsequent police interrogation in accordance with Edwards. Id. at 2091. Therefore, the additional protection afforded by Edwards is currently applicable in both Fifth Amendment and Sixth Amendment contexts.

At the time of oral argument, Respondent will, if appropriate, petition to argue against precedent.

The Court of Appeals Correctly Concluded that the Statement Was Voluntary.

The test of voluntariness is " 'whether a defendant's will was overborne' by the circumstances surrounding the given [statement]. The due process test takes into consideration 'the totality of all the surrounding circumstances-both the characteristics of the accused and the details of the interrogation.' " *Dickerson v. United States*, 530 U.S. 428, 434, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000); *State v. Aleksey*, 343 S.C. 20, 30, 538 S.E.2d 248, 253 (2000). The Supreme Court, in *Withrow v. Williams*, 507 U.S. 680, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993), set forth a non-exclusive list of factors which may be considered in the totality-of-the-circumstances analysis:

> Under the due process approach ... courts look to the totality of circumstances to determine whether a statement was voluntary. Those potential circumstances include not only **the crucial element of police coercion**, Colorado v. Connelly, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473(1986); **the length of the interrogation**, Ashcraft v. Tennessee, 322 U.S. 143, 153-154, 64 S.Ct. 921, 88 L.Ed. 1192(1944); **its location**, see Reck v. Pate, 367 U.S. 433, 441, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961); **its continuity**, Leyra v. Denno, 347 U.S. 556, 561, 74 S.Ct. 716, 98 L.Ed. 948 (1954); **the defendant's maturity**, Haley v. Ohio, 332 U.S. 596, 599-601, 68 S.Ct. 302, 92 L.Ed. 224 (1948) (opinion of Douglas, J.); **education**, Clewis v. Texas, 386 U.S. 707, 712, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967); **physical condition**, Greenwald v. Wisconsin, 390 U.S. 519, 520-521, 88 S.Ct. 1152, 20 L.Ed.2d 77 (1968) (per curiam); and **mental health**, Fikes v. Alabama, 352 U.S. 191, 196, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957). They also include the failure of police to advise the defendant of his rights to remain silent and to have counsel present during custodial interrogation. Haynes v. Washington, 373 U.S. 503, 516-517, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963)[.]

507 U.S. at 693-94, 113 S.Ct. 1745. Accord, *State v. Childs*, 299 S.C. at 475, 385 S.E.2d at 842 (background, experience, and conduct of the accused); *In re Williams*, 265 S.C. 295, 217 S.E.2d 719 (1975) (age); *State v. Jennings*, 280 S.C. 62, 309 S.E.2d 759 (1983) (length of custody); *State v. Rabon*, 275 S.C. 459, 461, 272 S.E.2d 634, 635 (1980) (police misrepresentations);

State v. Smith, 268 S.C. 349, 355, 234 S.E.2d 19, 21 (1977) (isolation of minor); *State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990) (threats of violence and promises of leniency).

A confession of a juvenile is not *per se* involuntary simply because it is obtained without the presence of counsel, a parent, or other interested adult. See In re Williams, 265 S.C. 295, 300, 217 S.E.2d 719, 721–22 (1975) (declining to adopt a rule in which any inculpatory statement made by a minor in the absence of counsel, parent, or other friendly adult is per se inadmissible). But cf. Gallegos v. Colorado, 370 U.S. 49, 54, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962) (noting the opportunity to receive adult advice in the form of a lawyer or an adult *67 relative or friend would afford a juvenile additional protection and put him on "a less unequal footing with his interrogators").

This Court has held that "[A]lthough courts have given confessions by juveniles special scrutiny, courts generally do not find a juvenile's confession involuntary where there is no evidence of extended, intimidating questioning or some other form of coercion." *State v. Pittman*, 373 S.C. 527,at 568, 647 S.E.2d 647, at 165 (2007). When the only evidence presented is the young age of the appellant, this alone is not probative of coercion. See id. at 569, 647 S.E.2d at 166; accord *Williams v. Peyton*, 404 F.2d 528, 530 (4th Cir.1968) ("Youth by itself is not a ground for holding a confession inadmissible.").

Judge Landis and the Court of Appeals properly used a "totality of the circumstances" analysis in determining the admissibility of the statements. First, he took account of the age of the Petitioner. Second, he took account of the defendant's ability to understand. ("But, I think it is clear that he understood his rights after being mirandized and that he did request so speak with

an attorney."). He took account of his initial understanding of the waiver form during the first interview. ("And I - - my belief is that he didn't sign the waiver at that time is because he invoked his rights to have an attorney. The officer would not have had him sign a waiver after he had requested an attorney.") The courts further concluded that he waived that right. (" But, I also think he has a right to later waive that right and I don't find the fact that it was not written - - a written signed waiver that to be necessarily defective."). As stated above, the Family Court concluded as a matter of fact that Petitioner, not his mother waived his previously invoked right to counsel by initiating and requesting further discussion. ("After speaking with his mother, she didn't waive his rights, she simply advised the officer that he desired to speak with them. It is my understanding from the testimony that she was not in the room when the police officer returned."). Further, this was after the police had scrupulously honored his request when they had ceased interrogation. (" I will note also that after he requested the attorney, the police officers ended any interrogation or questioning of him regarding the incident. Upon their return to the room after the mother - - after the mother indicated he wish to speak to us or something in that general vain. At that time, Mr. B. voluntarily made statements to the police and I believe knowingly waived his right to an attorney at this point.".)

Other salient factors support that the waiver was free and voluntary. As to the length of custody, it was very brief prior to the statement when he had arrived at 8:35 and the statements were given around 10:20. As to any evidence of police misrepresentations, there have been none shown because the police were relying upon witness statement actually implicating him in the shooting. As to isolation of a minor from his or her parent, this is defeated by this record. It appears that immediately upon his request, he was able to consult with his mother outside of

police presence. The record is further void of any threats of violence or promises of leniency. Further, the record indicates that he was not handcuffed during his interrogation. In addition, after the initial aborted interrogation of around 15 minutes, he was allowed to change clothes from his football outfit to something more comfortable and was provided a drink. As the courts have noted, there is no evidence in the record that Petitioner was pressured or threatened in any manner to implicate himself in the crime. There was no evidence of badgering, extended interrogation sessions, deprivation of food, sleep or water or that he was suffering under either mental or emotionally at the interrogation.

The Petitioner notes that the mother was not told by the police that her son had requested an attorney before she met with Petitioner upon Petitioner's request. While this may be a factor to be considered under a totality test, the Petitioner's rhetorical argument that the mother was taken advantage of by keeping her in the dark by police about their knowledge of his request for counsel and his unqualified assertion that "parents, ministers, and family members are *notorious* for thinking that *complete honesty and contrition* is the route to go with law enforcement"[8] undermines the test on whether Petitioner waived his rights. See *Brief of Appellant*, p. 15 (emphasis added).[9] First, there is no showing that the mother was intentionally kept in the dark,

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[8]This comment by Petitioner, without citation or support, is disturbing by its use of term "notorious" with concepts of complete honesty and contrition. "Notorious" means to be "known widely and regarded unfavorably ; infamous." The American Heritage Dictionary, New College Edition, 897 (1980). Surely, Petitioner is not contending that other than complete honesty or contrition should be presented or that either of these traits of parents or ministers should be considered either "infamous" or "unfavorable." Respondent would also note that under S.C. Code Ann., Section 16-17-725 it is unlawful in South Carolina to give false information to any law enforcement officer concerning the alleged commission of any crime by another.

[9]Other jurisdictions have not seen fit to deny admission of a statement when a family member or friend has encouraged the suspect to talk after the suspect has invoked his or her

only that she was not advised that he had asked for an attorney, in addition to his mother, before she met with the Petitioner. The record is silent whether Petitioner advised his mother that he had asked for counsel. Respondent could not locate any caselaw supporting a requirement that a parent be advised that counsel was requested prior to a parent meeting with a juvenile after arrest.

The Petitioner cites to Fare v. Michael C., 442 U.S. 707 (1979) and IN RE: Williams, supra, on page 15, in reference to the comment that there was no evidence that the mother knew petitioner had already invoked his right to counsel. Neither of these cases have any application. In Fare, the question was whether a request to see a probation officer was an invocation of the right to counsel. The Court stated that it was not. Similarly, in State v. Register, 323 S.C. 471, 475, 476 S.E.2d 153, 156 (1996), the court held that a request to speak with his mother was not a request for counsel. Neither of these vases provide any support for Petitioner's position that his mother had to be advised of the request for counsel prior to her own meeting with son at her

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right to counsel. *See, e.g., Arizona v. Mauro,* 481 U.S. 520, 107 S.Ct. 1931, 95 L.Ed.2d 458 (1987) (suspect invoked right to counsel in murder of his son and wife asked to speak to suspect with police present with a tape recorder; Court upheld admissibility of statements which were used to show suspect was sane on grounds this was not police-initiated interrogation and that suspect was not subjected to compelling influences, psychological ploys, or direct questioning by police officers); *Snethen v. Nix,* 885 F.2d 456 (8th Cir.1989) (suspect declined to speak to police without attorney present, but mother asked to speak to suspect who made incriminating statements in front of police; statement admissible since no evidence police questioned suspect; petition for writ of *habeas corpus* denied); *U.S. ex rel. Whitehead v. Page,* 2000 WL 343209 (N.D.Ill.2000) (friend convinced suspect to confess to murder after he requested counsel; no evidence this was police-initiated interrogation; petition for *habeas corpus* denied); *Lowe v. State,* 650 So.2d 969 (Fla.1995) (suspect confessed to girlfriend that he murdered victim after requesting counsel; police told girlfriend evidence against suspect; court affirmed admission of statement, holding no violation of *Rhode Island v. Innis, supra*); *Cook v. State,* 270 Ga. 820, 514 S.E.2d 657 (1999) (court upheld confession to murders given to suspect's father, an FBI agent, after suspect requested an attorney; court held father was not directed by law enforcement to obtain confession).

soin's request. The Petitioner implies that there was something nefarious in the acquiesce of law enforcement to accede to Petitioner's request to see his mother. As the Family Court essentially concluded, that was not the case.

Similarly, there is no evidence in the record or claim that his mother coerced him nor is anything about his discussions with his mother in that 5 to 10 minute period other than his request to his mother that he wanted to talk with law enforcement again. R. 41, l. 5-20.[10]

Under the totality of circumstances test, the lower courts correctly concluded that the Petitioner waived his Miranda rights and freely and voluntarily made to statements to the police after he had voluntarily re-initiated contact with the police. There is no additional requirement that Miranda warnings be re-initiated during the same session where it is clear under the totality of the circumstances that they were given at the outset of the questions in the first session at 8:35 which ended 9:15 and confirmed by Petitioner that he had been so advised shortly thereafter during the second session at 10:20 PM after his mother's intervening meeting. It is clear that the Petitioner was aware of his right to silence, his right to have counsel assist him and his right to cease questioning as set out in the earlier Miranda warnings. Rather than continuing to invoke his rights, Petitioner Tracy B. sought to speak again with the police, inquire about the seriousness of the offense and provide his version of the event. The Court of Appeals properly applied federal constitutional law in rejecting the Petitioner's claims.

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[10]At one point, mother had been advised that her son was a suspect in a homicide and that several witnesses had indicated that he was a suspect. R. 15, l. 5-9. After the meeting with her son, she was visibly upset, but thinking clearly, and indicated to Det. Cumbee that she was somewhat disgusted with his behavior and that she had tried to do everything within her power to keep anything like this from happening. R. p. 14-15, p. 39, l. 17-21.

II. The State met its burden in disproving two elements of Self-Defense - that the Petitioner was without fault in bringing on the difficulty and Petitioner had no other probable means of avoiding the danger when the car had already passed by when the Petitioner fired into the back of the vehicle. The Family Court Judge Properly Denied the Motion For Directed Verdict And Motion for a New Trial Where There Was Sufficient Evidence of the Elements of Murder By Which A Rational Trier of Fact, Taking the Evidence In The Light Most Favorable To The State Would Have Found The Petitioner Delinquent And Guilty of Murder.

Petitioner contends that he was entitled to a directed verdict on the crime of murder. In particular, he claims that self-defense existed as a matter of law and that he was therefore entitled to an acquittal, because the state had failed in its burden of disproving self-defense beyond a reasonable doubt. In his present argument, he simply asserts that because there was some evidence of the existence of the elements of self-defense that he was entitled to acquittal.[11] His argument fails to give appropriate deference to the family court judge's conclusion as to the existence of the elements of malice murder and the proper standard of review before this court. Since sufficient evidence of murder existed, his claim must be denied.[12]

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[11]At the hearing, the defense made a motion for a directed verdict as to all charges. R. 268, Tr.p. 226. Initially, counsel contended that the Appellant was immune from prosecution under the castle doctrine as set out in the Protection of Persons and Property Act, S.C. Code, Ann. §16-11-410 through 450. R. 268-70, Tr.p. 226 - 228. He abandoned this statutory assertion in his Final Brief of Appellant before the appellate court. During the hearing, counsel conceded that once he took the weapon, he was not engaged in lawful activity. R. 270, Tr.p. 228. However, she asserted that when he armed himself in self-defense, under *State v. Slater*, 373 S.C. 66, 644 S.E.2d 50 (2007).

[12] Alternately, in the Final Brief of Respondent, we argued that this issue may be procedurally barred since it is a different legal and factual claim for a directed verdict than the claim raised in the hearing court. See R. 268-273, Tr.p. 226-231. Issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review. A defendant cannot argue on appeal an issue in support of his directed verdict motion when the issue was not presented to the trial court below. Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997); State v. James, 362 S.C. 557, 608 S.E.2d 455 (Ct. App. 2004). A party must state a specific ground for a directed verdict motion in order to preserve the issue for appellate review. For this additional sustaining ground, evident in the

STANDARD OF REVIEW

A defendant is entitled to a directed verdict when the State fails to present evidence of the offense charged. *State v. McHoney*, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). In reviewing the denial of a motion for a directed verdict in a criminal case, an appellate court must view the evidence in the light most favorable to the State. *State v. Ballenger*, 322 S.C. 196, 198, 470 S.E.2d 851, 853 (1996). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the accused's guilt, it must find the trial court properly submitted the case . Id.

The grant or refusal of a motion for new trial is within the trial judge's discretion and will not be disturbed on appeal without a clear abuse of 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, 552 S.E.2d 35, 36 (S.C. App. 2001).

'Murder' is the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (1985). " 'Malice' is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). Malice may be implied by the use of brute force. State v. McLemore, 310 S.C. 91, 92, 425 S.E.2d 752, 753 (Ct.App.1992). It may also be implied by the use of a deadly weapon. Id. Under some circumstances, a fist or hand may be considered a deadly weapon. State v. Bennett, 328 S.C. at 262-63, 493 S.E.2d 845, 851 (1997); State v. Davis, 309

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record, this issue should be denied.

S.C. 326, 343, 422 S.E.2d 133, 144 (1992). Finally, " '[e]ven though malice must be aforethought,' " there is no requirement that it " 'must exist for any appreciable length of time before the commission of the act.' " State v. Fuller, 229 S.C. 439, 446, 93 S.E.2d 463, 467 (1956).

With reference to the word "aforethought," the Supreme Court stated in State v. Milam, 88 S.C. 127, 70 S.E. 447, 449: "...While there may be and probably is some distinction between 'malice' and 'malice aforethought,' the latter conveying more the idea of premeditation and design, and being, therefore, more intense in respect to the wickedness of heart involved than in the word 'malice' alone, still the word 'aforethought' is usually understood to refer rather to the time when the evil intent is conceived. The authorities agree that it need not exist for any appreciable period of time before the commission of the act,--indeed, it may be conceived at the very moment the fatal blow is given. It is sufficient in law if the combination of the evil intent and act produce the fatal result. 2 Bish.Cr.L. 677..."

The state does not question that based upon the existence of evidence presented in his defense at trial that the Appellant would have been entitled to an instruction on the defense of self-defense with the evidence taken in the light most favorable to Appellant. If there is any evidence to support a jury charge, the trial judge should grant the requested charge. State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). Similarly, a Family Court judge must consider the existence of self-defense in the adjudicatory hearing. A self-defense charge is not required unless the evidence supports it. State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994). To establish self defense in South Carolina, four elements must be present: (1) the defendant was without fault in bringing on the difficulty; (2) the defendant actually believed he

was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonable, prudent person of ordinary fitness and courage would have entertained the same belief; and (4) the defendant had no other probable means of avoiding the danger of losing his life or sustaining serious bodily injury other than to act as he did. Jackson v. State, 355 S.C. 568, 570-71, 586 S.E.2d 562, 562 (2003); State v. Day, 341 S.C. 410, 416, 535 S.E.2d 431, 434 (2000). If there is any evidence of self-defense, the issue must be submitted to the jury. State v. Burkhart, 350 S.C. 252, 260, 565 S.E.2d 298, 302 (2002).

ANALYSIS

The Court of Appeals concluded that evidence of malice murder existed sufficient to overcome a directed verdict motion. The evidence presented at trial demonstrated Petitioner shot a gun in the direction of an occupied vehicle, thereby killing Victim. In his statement, petitioner admitted he saw "an arm come out the passenger window of the car and start shooting." Immediately thereafter, Petitioner ran ***towards*** the vehicle in the street and fired a single shot in the direction of the vehicle. "We believe this was sufficient evidence of reckless conduct and wanton disregard for human life from which the family court could infer malice." App.p. 14.

The Petitioner relies upon *State v. Burkhart*, 350 S.C. 252, 565 S.E.2d 298 (2002) and *State v. Hendrix*, 270 S.C. 653, 244 S.E.2d 503 (1978) to assert that he is entitled to a directed verdict based upon his claim of self-defense. The Court of Appeals concluded that the State had disproved the first and fourth elements of self-defense. App.p. 15-16.

Particularly, the Court of Appeals found that "we do not believe Appellant was without fault in bringing on the difficulty. . . The record reflects that the initial difficulty had passed by the time Appellant chose to fire the fatal shot. According to Ebony's estimate, the Town Car had

passed their house and was two houses beyond when Appellant ran out to the front gate and fired his gun. Appellant admitted in his statement to Detective Gomes that he shot at the car "[a]fter the car passed by me." In addition, the State presented evidence that Appellant was in unlawful possession of a pistol on the evening in question. Although this fact alone does not automatically bar a self-defense charge, it is evidence of an unlawful activity which can preclude the assertion of self-defense." citing State v. Slater, 373 S.C. 66, 70, 644 S.E.2d 50, 52–53 (2007).

The Court of Appeals concluded that the State disproved the fourth element of self-defense beyond a reasonable doubt where it found Petitioner plainly had other means of avoiding the danger. . . The other teenagers sitting on the front porch ran into the house when the first shots were fired from the Town Car. Appellant was the only teenager sitting on the front porch that evening who ran towards the departing car and fired a gun in its direction. Under these circumstances, Appellant could easily have avoided further confrontation."` App.p. 16.

His reliance on Hendrix is equally misplaced. See *State v. Long*, 325 S.C. 59, 480 S.E.2d 62 (1997). The differences between this case and Hendrix are evident. In Hendrix, the victim and Mr. Hendrix had a poor relationship. Early on the day of the shooting, the victim told Mr. Hendrix "they were going to have to fight to settle this thing." Later, the victim, while intoxicated, drove to Mr. Hendrix's property. While pointing a shotgun, Mr. Hendrix warned the victim to "back off." The victim returned to his truck, obtained a shotgun, and walked towards Mr. Hendrix. At this point, Mr. Hendrix shot and killed the victim.

Unlike *Hendrix,* there was no earlier prior confrontation with the victim. In fact, there had never been any confrontation with any of the victims. In *Long*, the Court stated that while

self-defense can be inferred even from the State's version of the evidence, the evidence of self-defense is not conclusive and whether Petitioner actually believed he was in imminent danger of losing his life or sustaining serious bodily injury and whether an ordinary person would have entertained the same belief were questions for the jury. There, the Supreme Court held that the trial judge properly refused to direct a verdict in Petitioner's favor based on self-defense, citing *State v. Starnes*, 213 S.C. 304, 49 S.E.2d 209 (1948) (in homicide prosecution of defendant who was in his own home when deceased was killed, where there was some testimony defendant was venting a grudge, defendant's claim of self-defense was for the jury). Here, the decision to deny the directed verdict motion is clearer.

The Petitioner claims that because there was evidence that before Tracy shot at the car there was evidence that others had scattered from the porch and entered into the house suggesting their fear and that Court of Appeals conclusion that the Petitioner was not without fault was in error. He suggests underlying the opinion is that the Court felt Petitioner could have entered into the house. He misreads the basis of the opinion. Instead the Court of Appeals basis was that the initial difficulty had already passed when the Petitioner created a new difficulty and fired into the back of the passed vehicle. App.p. 16. Similarly, it is not that Tracy failed to enter the house as to the fourth element, it was that fact that others did and he instead created another confrontation by moving out and firing into the back of the vehicle after it had passed the house. In other words, he did not need to fire at all. Also, his unlawful possession of the weapon prior to any claim of self-defense was a precluding factor in this setting, citing State v. Slater, supra. .

The Evidence Before the Court

The state's theory of the case was certainly not supportive of any claim of self-defense.

At approximately 2:17 am on August 11, 2007, a group of people were sitting on the porch at 2719 Constitution. R. 184-86, Tr.p. 140-142. They were Veronica Young, Carlton Scott (aka Twin), the Petitioner, Ebony _ and Edginee _, C.J., Jasmine, and Kayron Mitchell. R. 151, 230-31, 251, Tr.p. 107,188-189, 209.

Kayron has a gun with 5 bullets in it. R. 196, 233, Tr.p. 152, 191. Twin has a gun with a clip. Tr.p. 153-154. Twin's gun get passed to the Petitioner, a 14 year old. R. 199, Tr.p. 155. Ebony testifies that the Petitioner was the only one she saw with a gun. R. 252, Tr.p. 210.

At some point, a Lincoln car comes by with two to three people in it. The front passenger and driver get out and talk to some of the people on the porch "in polite conversation." They are friends with some of them. R. 201-02, 254-55, Tr.p. 157-158, 212-213. The front passenger in the car, G.A., gives a friendly handshake to Twin. R. 201-02, Tr.p. 157-158 . The conversation continues with them on the porch and they discuss that the people in the car are going to the store. R. 202, 255, Tr.p. 158, 213. They are asked to bring back some blunts and they leave, with the expectation that they will return. Edginee, however, did not think they would return. R. 252, Tr.p. 210.

Around 15 minutes later, two to three gunshots are heard coming from the right side. R. 200, 205, Tr.p. 156, 161. An arm is seen out of the front passenger window. The shots that are fired were "in the air" (R. 205, 220, 240, 258, 262-64, Tr.p. 161, 176, 198, 216, 220-222) out of the passenger window as the car comes down Constitution Avenue toward the people on the porch. The passenger side of the car was on the opposite side from the people at the porch. Evidence is that the shots were not directed at them and were shot prior to them reaching the house. and was not directed toward them and were shot prior to reaching the house where they

were on the porch. Kayron stated that he also saw the shots being fired and that they were going up in the air. R. 240, Tr.p. 198. He stated that people on the porch scattered when the shots were fired. R. 249, Tr.p. 207.

However, the Petitioner, already armed with a loaded gun before these events even started, runs off the porch away from the house and toward the gate at Gary and Constitution Avenue which is toward the car where the shots were fired. R. 200-01, Tr.p. 156-157.[13] Once the car passes him, the Petitioner then fires a shot into the back of the car. R. 256, 258-60, Tr.p. 214, 216-218. The rear windshield is broken and the passenger in the backseat, is killed by the gunshot to the back of his head. Edginee testified that the people scattered after Tracy fired his shot. R. 201, Tr.p. 157.

No other shots are fired by anyone in the area. Kayron who had five bullets in his clip did not fire. Edginee was not sure when she went into the house, but was outside when the first three shots were fired and saw the Petitioner run to the fence at Gary and Constitution and see the Petitioner shot the gun after the car had passed. She was not sure whether the Petitioner was inside or outside of the fence when he fired into the back of the passed vehicle. R. 212, 222, Tr.p. 168, 178. She did admit to being afraid when the shots were fired. R. 223-25, Tr.p. 179-180. She did not recall if she ran after the first shot or later. R. 217, Tr.p. 173. However, none of the shots from the car were done in front of her house. R. 219, Tr.p. 175. She stated that there was no commotion before Tracy shot. R. 225, Tr.p. 181.

Similarly, Ebony saw the shots fired in the air before the car ever reached the house. She

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[13]Edginee testified that she thought the Petitioner told her that they had been shot at. R. 218, Tr.p. 174.

also saw Tracy run to the gate, point the gun and shoot after the car passed her house. R. 259, Tr.p. 217. She also stated that no other shots were fired. R. 260, Tr.p. 218.

The pathologist opined that the victim died from the wound to the neck which caused a transection injury to the cervical spinal cord. R. 131, Tr.p. 87. He opined after the wound, the victim could do no conscious acts at all. R. 137-38, Tr.p. 93- 94.

When the police arrived, the vehicle engine was still running. R. 100, Tr.p. 56. Deon L. Mouzon Holmes, the car owner, was coming back nervously to the car. R. 75-76, Tr.p. 31-32, 106. He was seen reaching under the front passenger seat (R. 80, Tr.p. 36), and had his hand in an empty gun box. R. 86-89, 90, Tr.p. 42-45, 46. Consistent with the other testimony, the front passenger window was down and the back passenger window was up. R. 104-05, 117, Tr.p. 60-61, 73.

The victim was described as appearing to be rolling a marijuana joint when he was shot. On the back floorboard there was an unopened box of Swisher Sweets, Philly blunts and unopened cans of sodas, appearing as if they had just been purchased. R. 98-99, 151-52, Tr.p. 54-55, 107-108. In addition there were a couple of bags of marijuana present. R. 152, Tr.p. 108.

After the car is shot at by the Petitioner, Deondre backs his car up to ask who shot out the window. Tr.p. 162-163. Then he realizes that someone has been shot in the back seat. R. 207-08, Tr.p. 163-164. Edginee testified that they did not know the car got shot until the car backed up and asked who had shot at the car. R. 207, Tr.p. 163. At that point, Yanni, Kayron, Twin and Tracy ran. R. 207, Tr.p. 163.

The State asserted below that the Petitioner may have claimed it was self-defense in his

statement,[14] but there was at least one element that the Petitioner could not meet - that he had no other probable means of avoiding the danger or losing his life or sustaining serious bodily injury other than act as he did. R. 278. Instead of avoiding injury, the record shows that he ran toward the danger. The evidence was that when the initial shots were fired, Kayron ran inside the house, when the Petitioner, instead, ran towards the car. Petitioner ran toward the alleged perceived danger and then fired his shot into the back of the vehicle after any perceived danger had left and was driving away from him.

Contrary to his present claims, in his statement, taken in the light most favorable to the State, he admitted that he saw an arm out of the passenger window, but that would have been shooting on the opposite direction from their location. R. 156, Tr.p. 112. Further, he admitted that he shot into the car after it had passed him. R. 157, Tr.p. 113. The testimony is only

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[14]The statement read:

We were on Constitution near the fork. It was me and there was some other people standing in the yard. I saw a car coming down Constitution from Dorchester. I saw an arm come out from the passenger window of the car and start shooting. I heard the shots and the car was coming toward 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.

Q. What kind of gun did you have?
A. I don't know. I threw it down.
Q. Where?
A. I don't know.
Q. What kind of car was it?
A. I think it was a old school Cadillac.
Q. Why did you shoot at the car?
A. Because I thought they were shooting at me.
Q. Where is the gun [now]?
A. I don't know.

Plaintiff Exhibit 2. R.154-55, Tr.p. 110-111.

consistent that the Petitioner shot at the car after it had passed by him and the house without any shots ever being aimed at the house.

The Petitioner makes a number of speculative claims on appeal - mostly new - as to why these elements apply. Without any support he claims that had he retreated, rather than charging toward the vehicle, Tracy would have place 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." Brief of Petitioner, p. 23. This is a frivolous and unsupported comment, yet suggests that the greater danger he was facing was falling over people to justify shooting a person in the back of the head. Edginee testified that the people scattered *after* Tracy fired his shot. R. 201, Tr.p. 157. She stated that there was no commotion before Tracy shot. R. 225, Tr.p. 181. No further comment need be made.

Respondent submits that the Family Court was correct in concluding that murder was proven. The evidence presented at trial demonstrated Tracy shot a gun in the direction of an occupied vehicle, thereby killing Victim. In his statement, he admitted he saw "an arm come out the passenger window of the car and start shooting." Immediately thereafter, he ran towards the vehicle in the street and fired a single shot in the direction of the vehicle. There was sufficient evidence of reckless conduct and wanton disregard for human life from which the family court could infer malice. Accordingly, the family court did not err in finding the State proved Appellant guilty of murder beyond a reasonable doubt.

Similarly, the Family Court had a basis to reject a suggestion of self-defense which was disproven by the facts. Specifically, Petitioner was not without fault in bringing on the difficulty at the time he shot where the record reflects that the initial difficulty had passed. According to

Ebony's estimate, the Town Car had passed their house and was two houses beyond when Petitioner ran out to the front gate and fired his gun. Petitioner admitted in his statement to Detective Gomes that he shot at the car "[a]fter the car passed by me." In addition, the State presented evidence that Petitioner was in unlawful possession of a pistol on the evening in question.

The State disproved the fourth element of self-defense beyond a reasonable doubt. Appellant plainly had other means of avoiding the danger.[15] Instead, Petitioner created the danger by hi charging while armed toward a vehicle and shooting it after The Petitioner argues that he was guest on the property and had no duty to retreat, thus allowing him to fire at the dangerous vehicle even though the danger had removed itself from the area. The problem is the facts are that Petitioner was not standing in common ground with the decedent. Rather the decedent's vehicle at the time had already passed beyond the home which he was an alleged guest. The other teenagers sitting on the front porch ran into the house when the first shots were fired from the Town Car. Petitioner was the only teenager sitting on the front porch that evening who ran towards the departed car and fired a gun in its direction. Under these circumstances, Petitioner could easily have avoided further confrontation because the alleged threat had already passed. Based upon the foregoing, the State disproved self-defense beyond a reasonable doubt.

There is sufficient evidence to support that the Petitioner, previously armed with a weapon, maliciously shot into the back of the vehicle after it had passed by the house. At the

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[15]Under the law of self-defense, one who is attacked on his own premises is immune from the duty to retreat. State v. Merriman, 287 S.C. 74, 337 S.E.2d 218 (1985); State v. Sales, 285 S.C. 113, 328 S.E.2d 619 (1985). Likewise, a lawful guest attacked in the owner's home has no duty to retreat where the attacker is an intruder. State v. Osborne, 202 S.C. 473, 25 S.E.2d 561 (1943); State v. Osborne, 200 S.C. 504, 21 S.E.2d 178 (1942).

time of his shot, there was no present danger to the Petitioner. There was no prior confrontation between the Petitioner or any others on the porch, only polite conversation. The unwarranted cold blooded act of shooting into the vehicle for no reason was correctly assessed by the hearing judge as intentional and with malice. This is not the situation in State v. Osborne where a defendant was attacked in the owner's home by an intruder. Rather, the alleged "intruder" had already passed and the threat had removed itself at the time. Since there is sufficient evidence to support this conclusion, the judge correctly denied the directed verdict motion. R. 271, Tr.p. 229. Similarly, the motion for new trial was properly denied. R. 294, Tr.p. 252.

CONCLUSION

For all the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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By: _____
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ATTORNEYS FOR RESPONDENT

August 8, 2012.

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the ***Brief of Respondent*** in the foregoing action by depositing copies in the United States mail, postage prepaid to the following:

Robert M. Dudek
Chief Appellate Defender
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This 8th day of August, 2012.

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

ALAN WILSON
ATTORNEY GENERAL

August 8, 2012

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211

Re: The State v. Interest of Tracy B.
Appellate Case No. 2011-186286

Dear Mr. Shearouse:

Enclosed please find the original and nine (9) copies of the ***Brief of Respondent*** in the above-referenced case for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Donald J. Zelenka
Senior Assistant Deputy Attorney General

DJZ/lbb
Enclosures

cc: Robert M. Dudek, Esquire
Megan Ehrlich, Esquire
Scarlett A. Wilson, Solicitor
S.C. Court of Appeals
Sandi Wofford, Victims Assistance