F04122

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Cherokee County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JONATHAN KYLE BINNEY,

APPELLANT

FINAL BRIEF OF APPELLANT

JOSEPH L. SAVITZ, III
Acting Chief Attorney

South Carolina Office
of Appellate Defense
1205 Pendleton Street, Room 306
Columbia, S. C. 29201
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF FACTS

On December 9, 1999, twenty-five year old Jonathan Binney was arrested in Spartanburg County for first degree criminal sexual conduct with a minor. The victim was his three month old daughter, Mikayla. Binney was free on bail for this offense at the time of the incident underlying the present appeal. (In April 2001, a jury convicted Binney of first degree CSC with a minor and he received the maximum sentence of thirty years.)

On July 12, 2000, a Cherokee County grand jury indicted Binney for murder and first degree burglary. The victim was Judy Southern. The afternoon of the previous June 7, Southern was shot once in the abdomen when she surprised an intruder in the home where she lived with her husband, Allan, and their six year old son, Jacob, both of whom were elsewhere at the time. The State contended that Binney had murdered Southern so that he would be sent to jail as a killer, not a child molester. The defense countered with evidence that Binney had broken into the Southern residence to commit suicide, not murder or burglary.

The State sought the death penalty, ultimately relying on the single statutory aggravating circumstance of murder during the commission of burglary. S.C. Code Section 16-3-20(C)(a)(1)(c). The solicitor rejected Binney's offer to plead guilty to life without parole. ROA p. 45, line 23 – p. 46, line 6.

Judge J. Derham Cole presided at Binney's jury trial November 4 through 14, 2002. The jury found Binney guilty of murder and first degree burglary. At sentencing, the judge charged the jury on the three statutory mitigating circumstances provided by S.C. Code Section 16-3-20(C)(b)(2), (6) and (7):

> The murder was committed while the defendant was under the influence of mental or emotional disturbance.
>
> The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> The age or mentality of the defendant at the time of the crime.

These mitigators were based on evidence that Binney was intoxicated and suicidal when he shot Southern.

After deliberating for just over four hours, the jury recommended a death sentence. The judge then sentenced Binney accordingly.

ARGUMENT

The judge erred by admitting into evidence a statement Binney gave the police, in which he confessed that he was indeed guilty of murder and first degree burglary and requested "the death penalty" because "[t]he crime that I committed definitely warrants it," because this statement was the product of police-initiated custodial interrogation, undertaken after Binney had invoked his Fifth Amendment right to counsel, in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981).

Cherokee County police obtained an arrest warrant charging Jonathan Binney with assault and battery with intent to kill almost immediately after the shooting, when they discovered a handwritten suicide note outside the Southern residence apparently connecting Binney with the incident. ROA p. 2220, lines 16-21; ROA p. 2227, line 19 – p. 2228, line 22; ROA p. 3614. (Judy Southern died later that night, so the charge was eventually upgraded to murder. ROA p. 2374, line 23 – p. 2375, line 7; ROA p. 2663, lines 12-14.) The next day, the Cherokee officers discovered Binney hiding in the basement of his Spartanburg County home. ROA p. 2299, line 12 – p. 2301, line 25. They handcuffed Binney and brought him around to the front of the house. ROA p. 2302, lines 3-6. According to the officer who arrested Binney, at this point he asked, "She's dead, isn't she?" ROA p. 2309, lines 18-25. The officer responded, "Who?" ROA p. 2310, lines 5-7. Binney answered, "The woman I shot." ROA p. 2310, lines 14 and 15.

SLED Agent DeWitt "Spike" McCraw arrived at the Binney residence, served the warrant for assault and battery with intent to kill and provided the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966). ROA p. 1903, line 7 – p. 1904, line 20. A Cherokee County officer present at the scene later prepared an investigative report which

stated, "Binney asked for his attorney while still at the residence." ROA p. 1904, line 23 – p. 1905, line 2. During a suppression hearing held at the start of Binney's trial, this officer explained that Binney's wife, Melanie, had come out of the couple's house with a telephone in her hand and informed the arresting officers, within Binney's earshot and possibly even before Agent McCraw arrived and gave him Miranda warnings, that her husband would be represented by the attorney who was already handling the criminal sexual conduct charge. ROA p. 1905, line 4 – p. 1906, line 6. "It was my understanding," the officer testified, "at the time that we left the scene that Mr. Binney was represented by [counsel]." ROA p. 1906, lines 7-10. Agent McCraw testified during the suppression hearing that he had taken the phone from Melanie Binney and spoken directly with the attorney representing Binney on the CSC charge. ROA p. 1936, lines 3-14.

> I told him we had just served an arrest warrant on Mr. Binney for assault and battery with intent to kill. He said that he was representing him on another charge and he didn't know if he was going to be his attorney or not.

ROA p. 1936, lines 15-20. Since the Cherokee police officers and Agent McCraw believed Binney was invoking his right to counsel, they did not attempt to interrogate him. ROA p. 1906, lines 11-14.

The arresting officers observed that Binney had stuck a number of nicotine patches to his bare chest. ROA p. 1866, line 1 – p. 1867, line 5; ROA p. 2312, line 21 – p. 2313, line 1; ROA p. 2314, line 6 – p. 2316, line 12. He was transported to the hospital complaining of nausea and from there to the Spartanburg County jail, where he was placed on suicide watch. ROA p. 1923, line 13 – p. 1924, line 21.

The day after Binney's arrest, the lawyer who was representing Binney on the CSC charge advised Agent McCraw that he would not be handling the murder charge. ROA p. 1937, lines 19-25. McCraw then learned that Melanie Binney was hiring a prominent lawyer/legislator from Greenville to represent her husband. ROA p. 1938, lines 1-3. This attorney met with McCraw in Cherokee County and also declined to represent Binney. ROA p. 1938, lines 4-7. Finally, McCraw learned that Binney would be represented by the Cherokee County public defender. ROA p. 1938, lines 8-10.

Every day for the next week, Agent McCraw telephoned Binney's attorney and told him "I would like to talk to his client." ROA p. 1938, lines 14-23. Counsel told McCraw that he could not speak with Binney "unless I could get some kind of a guarantee that the State would not seek the death penalty." ROA p. 1959, lines 19-22; ROA p. 2029, line 15 – p. 2030, line 1. The solicitor informed McCraw that it was "way too early" in the case to commit to a plea agreement. ROA p. 1960, lines 7-9. McCraw communicated the solicitor's response to defense counsel, but stated that he still wanted to talk to Binney about the case. ROA p. 1960, lines 10-15; ROA p. 2033, lines 8-12.

At the suppression hearing, Agent McCraw claimed that defense counsel never told him not to talk to Binney. ROA p. 1962, line 23 – p. 1963, line 4. He testified that counsel told him that Binney was "wanting to talk, but he hadn't had time to sit down and fully talk to him." ROA p. 1960, lines 19-23. Neither defense counsel nor (as will be seen) events subsequent to the interrogation support McCraw on this point, nor did the judge find him to be credible concerning this matter. Compare State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982). The public defender, who had since been relieved as Binney's counsel for obvious reasons, testified at the suppression hearing that "[McCraw] called me again and wanted to

know if I had changed my mind and would allow him to question Mr. Binney, and I told him no." ROA p. 2033, lines 13-18. Counsel then went home for the weekend. ROA p. 2033, lines 19 and 20.

At this point, Agent McCraw decided to take matters into his own hands:

> [N]ot hearing back from any attorney, I called the jail and asked the jailer that answered the phone... when he saw Jonathan Binney, to tell him that if he would like to talk to detectives, to put it in written request then to see detectives.

ROA p. 1939, line 9 – p. 1940, line 2. His purpose for proceeding in this manner, McCraw added, was "to make sure that Mr. Binney's rights to an attorney were protected, so I wanted him to do the request to see me... [I]f he would like to speak to detectives without an attorney, I need that in writing." ROA p. 1940, lines 3-12. McCraw had to admit, though, that Binney had not initiated contact with the police before he called the jail. ROA p. 1961, lines 15-17.

The jailer then "went and found [Binney] a little while after and gave him that message." ROA p. 1981, line 9 – p. 1982, line 4. He testified, "I told him that if he would like to talk to a detective, just to... put it in writing, if he wants to talk to him." ROA p. 1982, lines 5-9. Binney wrote by hand the following note and gave it to the jailer:

> I request to see a Detective without the presence of my attorny (sic). This is my request that this only be valid [today and tomorrow] & any further contact is not initiated on my part, unless further indicated by me.

ROA p. 1982, lines 17-20; ROA p. 3615. The jailer gave this note to Agent McCraw. ROA p. 1982, line 25 – p. 1983, line 1. McCraw then contacted Cherokee County police and informed them that Binney was ready to talk. ROA p. 1906, line 15 – p. 1907, line 17.

Binney was transported from suicide watch at the jail to the law enforcement center. ROA p. 1907, line 21 – p. 1908, line 6; ROA p. 1941, lines 1-10. Agent McCraw and a Cherokee County officer conducted the interrogation. ROA p. 1908, lines 14-16; ROA p. 1943, lines 6-8. They again advised Binney of his Miranda rights. ROA p. 1908, lines 17-20; ROA p. 1941, lines 11-13. Binney agreed to talk without his attorney being present. ROA p. 1911, line 22 – p. 1912, line 4; ROA p. 3616 and 3623. McCraw and the Cherokee officer then began to question Binney about "the events that happened at the Southern home." ROA p. 1914, lines 9-13.

Binney eventually gave his interrogators a five-page statement. ROA p. 1914, lines 14-22; ROA p. 3617-3621. According to Agent McCraw, Binney revealed that his motive for committing the crimes was that "he didn't want to go to prison known as a child molester." ROA p. 1945, lines 8-22.

In this statement, Binney describes his preparation for, and commission of, the crimes in detail. He did not know the Southerns and had selected their residence at random. Binney wrote, "I wasn't sure if I just wanted to go in the house to commit suicide, or to rape someone, or to just shoot all of them, then kill myself." After the Southern family left that morning, Binney broke into their house, where he stayed for the next six hours, until Judy Southern returned home. When she startled him, "I closed my eyes & pulled the trigger on the gun," Binney recounted. His statement concludes:

> Being of sound mind & judgment, I would like to request that I be given the death penalty. The crime that I committed deffinately (sic) warrants it & I request it. I would ask that all proceedings, rights, etc., be waived & that I be given a quick hearing so that I may plea (sic) to Murder & Burglary in the first degree, with the penalty being death by lethal injection.

> I have & believe that I have the mental capacity to make this decision.

Next, in response to his interrogators' request, Binney accompanied Agent McCraw and at least two Cherokee County officers to a wooded area near the Southern residence and showed them where he had hidden his gun under fallen leaves at the base of a tree. ROA p. 1916, line 9 – p. 1917, line 7; ROA p. 1946, line 15 – p. 1947, line 25.

Two days later, after the weekend, Binney sent McCraw another handwritten note which stated, "I wish to talk with detective Spike McCraw without any attorny (sic) present, and until further notice, he is welcome to contact me." ROA p. 1947, line 17 – p. 1948, line 6; ROA p. 3622. McCraw and another SLED agent met with Binney that afternoon and again provided Miranda warnings. ROA p. 1948, line 20 – p. 1949, line 16. Binney wanted to talk to the Southern's husband "to tell him he was sorry for what he had done." ROA p. 1951, lines 6-19. McCraw told Binney that anything he wanted to say would have to be transmitted "in letter form." ROA p. 1951, lines 20-25. Binney then wrote a two-page letter and gave it to McCraw. ROA p. 1952, lines 1-22; ROA pp. 3624 and 3625.

Binney's attorney returned to work that same day to discover that Binney had confessed to the police three days earlier. ROA p. 2034, lines 4-19. He immediately telephoned Agent McCraw and, when the SLED agent confirmed what he had been told, lost his temper and "that was the end of that conversation." ROA p. 2034, lines 20-24. After unsuccessfully seeking redress at the solicitor's office, then learning that Binney had been removed from the jail, counsel drove to the law enforcement center, burst into the room where the two SLED agents were interrogating Binney and directed him to stop talking. ROA p. 1953, lines 1-13; ROA p. 2034, line 25 – p. 2035, line 22. The second

SLED agent present with McCraw described counsel as "very agitated." ROA p. 1993, lines 8-12. By all accounts, Binney rejected his attorney's advice and the letter to the victim's husband followed. ROA p. 1953, line 17 – p. 1954, line 25; ROA p. 1993, line 15 – p. 2000, line 24; ROA p. 2035, line 23 – p. 2036, line 14; ROA p. 2065, line 16 – p. 2066, line 2.

Less than one month later, defense counsel appeared before the judge who had been assigned Binney's trial to place his concerns about Agent McCraw's unauthorized interrogation on the record. His comments at that time are entirely consistent with his subsequent testimony at the suppression hearing. For example:

> [Agent McCraw] wanted to know if I would let him question Mr. Binney. And I told him I wouldn't let him question Mr. Binney without me being present. He really didn't want to do that.

Pretrial Hearing ROA p. 3, line 25 – p. 4, line 3. The solicitor was apparently oblivious to McCraw's machinations:

> I don't believe that Mr. McCraw approached Mr. Binney in order to get those letters written. I think he talked to Mr. Binney after receiving notice that Mr. Binney wanted to talk, and so that's why he went to talk to him... It's my understanding that the agents were working at the sheriff's department and received a letter from the jail from Mr. Binney indicating his willingness to talk to them, and they went over there to talk to him. They did not initiate contact with him.

Pretrial Hearing ROA p. 9, line 12 – p. 10, line 13.

At the start of Binney's trial, the defense attorneys who had replaced the public defender moved to suppress all of Binney's statements to the police. ROA p. 1835, lines 12-22. As to the statement and letter obtained by Agent McCraw at the law enforcement

center, counsel argued that they were the product of police-initiated custodial interrogation, undertaken after Binney had invoked his Fifth Amendment right to counsel, in violation of Edwards v. Arizona, 451 U.S. 477 (1981). ROA p. 2143, line 15 – p. 2149, line 17. The solicitor argued that Binney had never invoked his right to counsel. ROA p. 2150, line 5 – p. 2158, line 1. The judge agreed:

> With respect to the invocation of his right to counsel, I do not recall any testimony at any time where Mr. Binney invoked his right to counsel. At no time when he was advised did he say, "Well, I prefer to have a lawyer or talk to a lawyer before I answer any questions that you might pose to me." So, at no time during this process... did he invoke his right to counsel. And, therefore, there is no Fifth Amendment violation...

ROA p. 2165, line 17 – p. 2166, line 2. As to Agent McCraw's contact with Binney via the jailer, the judge found:

> Mr. McCraw did send word to Mr. Binney... inviting him to initiate contact if he wish to talk. I do not find that that invitation to initiate contact was in any way an interrogation... [W]hile Mr. McCraw may have been hoping that some questioning of Mr. Binney would result in some sort of incriminating response, to offer to discuss the case with Mr. Binney and the invitation from Mr. Binney (sic) to initiate contact with the police if he wanted to talk cannot in any way be interpreted as interrogation under the law. Therefore, I do find that while Agent McCraw did send a message to Mr. Binney after he was in fact represented by counsel, I do not find that that contact or that message sent was in any way, or can in any way, be described as interrogation... Mr. Binney, in response to receiving that message, did initiate contact with Agent McCraw. He did send a message to Agent McCraw reflecting that he did wish to talk with Agent McCraw. And, therefore, Agent McCraw responded to that initiation of contact by Mr. Binney. When Mr. Binney initiated that contact, he waived his right to counsel, as he has every right to do.

ROA p. 2169, lines 17 – p. 2171, line 11. He therefore denied the motion to suppress. ROA p. 2177, lines 16-18.

Binney's statement was the centerpiece of the State's case. The judge allowed its admission early in the guilt phase over the renewed objection of defense counsel. ROA p. 2335, lines 8-19; ROA p. 2343, line 23 – p. 2350, line 1. The State reintroduced the statement at the beginning of the sentencing phase, again over defense counsel's objection. ROA p. 3051, line 18 – p. 3052, line 1.

The judge erred by admitting this statement into evidence, as it was the result of police-initiated custodial interrogation, undertaken after Binney had invoked his Fifth Amendment right to counsel. The error could not have been harmless, particularly at sentencing.

In Miranda v. Arizona, 384 U.S. 479, the Supreme Court set forth the now-famous "Miranda warnings," which must be given to an accused prior to custodial interrogation by the police. They are:

> He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

As to the right to counsel, the Court continued:

> Once warnings have been given, the subsequent procedure is clear... If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.

Id. at 473-4.

In Edwards v. Arizona, the Court elaborated:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights... [A]n accused,... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

451 U.S. at 484-5 (footnote omitted). In McNeil v. Wisconsin, 501 U.S. 171 (1991), the Court explained that "[t]he purpose of the Miranda – Edwards guarantee... is to protect... the suspect's 'desire to deal with the police only through counsel'." 501 U.S. at 178, quoting Edwards, 451 U.S. at 484.

> It requires, at a minimum, 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.

Id. (emphasis omitted). Conversely, "when a reasonable inference may be drawn from the conduct or statements of the accused that he does not wish to be represented by an attorney prior to discussing the matters under investigation, questioning may be initiated." State v. Drayton, 293 S.C. 417, 361 S.E.2d 329, 335 (1987).

The State bears the burden of proving that a defendant has voluntarily waived his right to counsel. State v. Franklin, 299 S.C. 133, 382 S.E.2d 911 (1989). However, "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." Miranda, 384 U.S. at 475.

Binney invoked his Fifth Amendment right to counsel by obtaining counsel to represent him on the murder and burglary charges. Compare State v. McCray, 332 S.C.

536, 506 S.E.2d 301 (1998). Agent McCraw was well aware that Binney was represented by counsel at the time he initiated contact with Binney by telephoning his jailer. McCraw also conceded that Binney had not contacted the police before he called the jail. ROA p. 1961, lines 15-17.

The judge found that Agent McCraw's "invitation to initiate contact" was not the functional equivalent of interrogation. However, Rhode Island v. Innis, 446 U.S. 291 (1980), holds:

> [T]he term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect... A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.

446 U.S. at 300-1 (footnotes omitted). McCraw's unauthorized contact with Binney plainly falls within this definition. Compare State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991). Even the judge recognized that McCraw's ultimate objective was to elicit "some sort of incriminating response." Moreover:

> [A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.

Miranda, 384 U.S. at 476. McCraw's ploy was designed for no other purpose than to circumvent Binney's right to counsel and the protection afforded by Miranda and Edwards.

The erroneous admission of Binney's statement was particularly harmful at sentencing. In that statement, as previously noted, Binney admits that he is guilty of murder

and burglary and asks for "death by lethal injection" as soon as possible because "[t]he crime that I committed definitely warrants it."

As the Court observed in State v. McClure, 342 S.C. 403, 537 S.E.2d 273, 275 (2000):

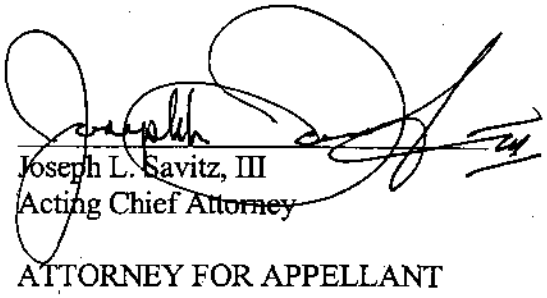
> [T]he evaluation of the consequences of an error in the sentencing phase of a capital trial [is] more difficult because of the discretion that is given to the sentencing jury. A capital jury can recommend a life sentence for any reason or no reason at all.

In State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981), a Fifth Amendment violation led to a capital defendant's admission during the guilt phase of trial that "[a]nybody that would do something like this" should die. 283 S.E.2d at 584. The Court reversed both the murder conviction and death sentence, holding that "[t]he effect of having the [defendant] unwittingly state that he deserved the death sentence prior to the jury having even considered the matter created an 'arbitrary factor' intolerable to this Court." Id. at 585, citing S.C. Code Section 16-3-25(C).

To summarize: The judge erred by allowing Binney's statement into evidence at the guilt phase and at sentencing. Agent McCraw violated Edwards v. Arizona by contacting Binney after he had invoked his right to counsel. Neither Miranda, Edwards nor Innis permit (in the judge's words) an "invitation to initiate" interrogation once an accused has invoked his Fifth Amendment right to counsel. The error was especially harmful at sentencing, since the statement contains not only an admission of guilt, but the request for a speedy execution.

Because of this error, the Court should reverse Jonathan Binney's convictions for murder and first degree burglary, as well as his death sentence.

Respectfully submitted,



Joseph L. Savitz, III
Acting Chief Attorney

ATTORNEY FOR APPELLANT

This 28th day of May, 2004.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

May 28, 2004

Joseph L. Savitz, III
1205 Pendleton Street, Room 306
Columbia, SC 29201
803) 734-1330
Attorney for Appellant

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, this 28th day of May, 2004.

Joseph L. Savitz, III
Acting Chief Attorney

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 28th day of May, 2004.

Karen D. Elliott (L.S.)
Notary Public for South Carolina

My Commission Expires: March 13, 2007.