STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Cherokee County
The Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

Respondent,

vs.

JONATHAN KYLE BINNEY,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The Cherokee County Grand Jury indicted Jonathan Kyle Binney (Appellant) at the July, 2000 term of court for murder (2000-GS-11-526) and burglary in the first degree (2000-GS-11-525). These charges stemmed from the June 8, 2000 shooting of Judy L. Southern in her Cherokee County home. The State timely served a Notice of Intent to Seek the Death Penalty on Appellant pursuant to S.C. Code Ann. § 16-3-20(A)(Supp. 2003). On July 11, 2001, the Honorable J. Derham Cole held a pretrial hearing in the matter. Don Thompson, Esquire, represented Appellant at that hearing, while Deputy Seventh Circuit Solicitor Donnie Willingham represented the prosecution. Mr. Thompson was subsequently relieved as counsel, and Trent N. Pruett, Esquire, and Samuel "Mitch" Slade, Jr., Esquire, represented him in all subsequent proceedings in the trial court. Seventh Circuit Solicitor Trey Gowdy, III, and Mr. Willingham represented the State.

Judge Cole held pretrial hearings on March 25, and October 25, 2002. Appellant thereafter received a jury trial before Judge Cole on November 4-14, 2002. The jury convicted Appellant of murder and burglary in the first degree on November 11, 2002.

The sentencing phase was conducted following Appellant's exercise of the twenty-four hour waiting period in § 16-3-20(B). The State relied upon the statutory aggravating circumstance that the murder was committed while in commission of burglary. §16-3-20(C)(a)(1)(c). Judge Cole also charged the jury on the three statutory mitigating circumstances found in § 16-3-20(C)(b)(2), (6)-(7), that they were to consider any nonstatutory mitigating circumstance which had been shown to exist by the evidence presented and that they could recommend a life sentence even though they did not find the existence of a statutory or non statutory mitigating circumstance because the jury could

recommend a sentence of life imprisonment "for no reason at all, other than as an act of mercy." Finally, he instructed the jury that pursuant to § 16-3-20(A), a sentence of life imprisonment meant until the death of Appellant, without the possibility of parole. **R. pp. 3469-86.** The jury found the alleged statutory aggravating circumstance and recommended a sentence of death. Judge Cole sentenced Appellant to death for murder and to life without parole for burglary in the first degree. See S.C. Code Ann. § 17-25-45(Supp. 2003). **R. pp. 3491-94; 3499-3501.**

ARGUMENT

The trial judge properly ruled that Appellant's June 16, 2000 statement to law enforcement did not violate his Fifth Amendment right to counsel under *Edwards v. Arizona* because he initiated contact with law enforcement before giving the statement and because he never invoked his right to counsel at any point following his arrest.

Despite Appellant's contention that his June 16, 2000 statement to law enforcement **(State's Exhibit #3)** was taken in violation of *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981), the State submits that the trial judge properly ruled that there was no Fifth Amendment violation because Appellant initiated the contact with police which led to his June 16, 2000 statement; and, more importantly, because he never invoked either his right to counsel or his right to remain silent at any point following his June 8, 2000 arrest. Finally, Appellant cannot show any conceivable prejudice resulting from introduction of **State's Exhibit #3** because it was merely cumulative to (1) a handwritten suicide note addressed to his wife that was found at the scene **(State's Exhibit #34, R. p. 3614)**, (2) his June 19, 2000 letter to the victim's husband **(State's Exhibit #6)** and (3) oral admissions made to a fellow inmate.

The trial judge held a pretrial *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774 (1964), hearing to determine the admissibility of statements which Appellant made to law enforcement on June 8, 16, and 19, 2000, as well as a letter which he had written to the

victim's husband on June 19 **(State's Exhibit #6)**.[1] Nine witnesses testified at the hearing. **R. pp. 1835-2092.**

Deputy Steve Reynolds, of the Cherokee County Sheriff's Department, is a part of that agency's Special Emergency Response Team (S.E.R.T.). Before noon on June 8, 2000 - the day after the victim was killed - he went to Appellant's Spartanburg County home[2] with Detectives Mike Fowlkes, and David Oglesby, as well as Deputies Dean McAbee and Wes Foster, all with the Cherokee County Sheriff's Department. Although they had an arrest warrant charging Appellant with ABIK, they did not have a search warrant. Detectives Fowlkes and Oglesby knocked on the door and spoke briefly to Appellant's wife, who gave the officers permission to search the house for Appellant. Deputies Reynolds, Foster and McAbee searched a large crawl space or basement and found Appellant in it, along with his sleeping bag and a police scanner. Deputy Reynolds handcuffed Appellant and removed him from the basement. **R. pp. 1860-66; 1871-78.** ***See also*** **R. pp. 1899-1900.**

Deputy Reynolds remembered that Appellant had some nicotine patches on his chest. However, he was fairly alert and understood who Reynolds was and what he was doing at Appellant's residence. After removing Appellant from the basement, Deputy Reynolds escorted him to the edge of the front yard and they waited on SLED Agent Eldon Dewitt "Spike" McCraw, Jr., to come and serve the arrest warrant on Appellant, since the officers

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[1] Appellant only challenges the admissibility of the June 16 statement and has apparently abandoned the challenges to the admissibility of the other exhibits as well as his argument that **State's Exhibit 3** was taken in violation of his Sixth Amendment right to counsel. **R. pp. 2135-61.** *See State v. Sullivan*, 277 S.C. 35, 282 S.E.2d 838 (1981) (exceptions taken to trial court's rulings were abandoned where not briefed on appeal).

[2] The victim's residence, on Cowpens-Pacolet Road, is only a couple of miles away from Appellant's residence.

were outside of their jurisdiction. Deputy Reynolds did not read Appellant's *Miranda*[3] rights to him and did not question him. Nevertheless, Appellant looked up and asked Reynolds "she's dead, isn't she?" Deputy Reynolds asked "who?" Appellant's response was, "the woman I shot." Agent McCraw thereafter arrived, and someone eventually transported Appellant to the detention center. **R. pp. 1866-70; 1878-79.**

Detective Mike Fowlkes, a captain with the Criminal Investigation Division of the Cherokee County Sheriff's Department, was the chief investigator in this case. He went to Appellant's Spartanburg County residence on June 8, 2000, with Detective Oglesby and Deputies Foster, McAbee, and Reynolds. He spoke to Appellant's wife, and she gave them permission to search for Appellant. The other deputies found Appellant and Deputy Reynolds arrested him. The officers had an ABIK arrest warrant for Appellant, which had been signed by a Cherokee County magistrate and countersigned by a Spartanburg County magistrate, but they lacked jurisdiction in Spartanburg County. **R. pp. 1898-1903.**

Therefore, they waited on Agent McCraw to serve the arrest warrant on Appellant because he had statewide jurisdiction. After Agent McCraw read Appellant's *Miranda* rights to him, Appellant did not make any response and did not ever request an attorney. **R. pp. 1903-04.**

While they were waiting Agent McCraw to arrive, Appellant's wife walked onto the front porch with a cordless phone and advised Detective Fowlkes that she was on the phone with a Greenville County attorney, Bill Bannister. She also yelled at Appellant and twice told him "not to say anything." Mrs. Binney informed Detective Fowlkes that she was

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[3]*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

holding on the phone for Mr. Bannister. Agent McCraw arrived as they were talking and served the warrant. He then joined their conversation and eventually spoke to Mr. Bannister, who represented Appellant on a prior charge of criminal sexual conduct. Detective Fowlkes' understanding when they left the residence was that Mr. Bannister represented Appellant. **R. pp. 1904-06; 1923.**

Detective Fowlkes was conducting field interviews in the case on June 16, 2000, when a member of his agency directed him to contact Agent McCraw and he did so. Agent MrCraw told him that the officers had received a handwritten note from Appellant **(State's Exhibit #1, R. p. 3615)** indicating that he wished to speak to an investigator. At 3:16 p.m. on June 16, Detective Fowlkes and Agent McCraw began an interview with Appellant at the law enforcement center.[4] They were the only ones present. Before they began, Agent McCraw read Appellant's *Miranda* rights to him using a pre-interrogation waiver form **(State's Exhibit #2, R. p. 3616).** Appellant initialed each paragraph of his rights to indicate that he understood the rights, and he appeared to understand what the officers were explaining to him. Although he was quiet and distant, Detective Fowlkes described him as "real talkative. He really wanted conversation." Also, he was "clear headed" and "seemed to be very coherent." Appellant signed the **State's Exhibit #2** indicating that he understood his rights and Detective Fowlkes witnessed his signature. **R. pp. 1906-11; 1924-26; State's Exhibit #2, R. p. 3616).**

Appellant also signed a waiver of these rights on **State's Exhibit #2** and Detective Fowlkes witnessed his signature. The subsequent interview lasted until 6:19 p.m. During

[4]They were in a 12 x 12 office belonging to Captain Broome.

the three hour interview, Appellant never appeared to be under the influence of drugs, alcohol or any other substance; he appeared to understand the rights as they were explained to him; and he was able to communicate with the officers. When advised of his right to a lawyer, he said that he had previously had little or no contact with his attorney, and he did not wish for his attorney to be present. He was also warned of his right to remain silent but agreed to continue talking. He was not promised anything, threatened or coerced in any manner to waive his rights. **R. pp. 1910-12.**

The waiver of rights specifically provides that:

> Fully understanding my rights as they have been explained to me, I wish to waive, give up, my rights to talk to Officer McCraw and Mike Fowlkes in reference to a homicide. I have waived my rights freely and voluntarily, without being threatened or coerced, without being promised any leniency or reward.

After waiving his rights, Appellant discussed his family and he brought up the subject of the death penalty because he seemed to be very interested in receiving the death penalty. However, the officers told him that they were not there to discuss either the death penalty or his criminal sexual conduct case from Spartanburg, and they continued talking about the facts of this case. He thereafter discussed the facts of the case. **R. pp. 1912-14; 1926-30; State's Exhibit 2, R. p. 3616.**

The officers spoke with Appellant for approximately an hour before he made a written statement. He then hand wrote a five page statement concerning the facts of the murder and burglary. **State's Exhibit #3, R. pp. 3617-21.** He initialed the top and bottom of each page and any changes that he made to the statement. He then signed the statement when he finished it, and both officers witnessed his signature. Following the statement,

Appellant took the officers to a wooded area near the victim's residence and showed them where he had hidden the murder weapon. He also showed them a well in which he had slept on the night before the murder. He was later returned to the detention center, and Detective Fowlkes did not have any further contact with him.[5] **R. pp. 1914-18; 1930.**

Detective Fowlkes indicated on cross-examination that he was aware that Appellant had been transported to the hospital roughly an hour or so after he was arrested because he was nauseated. However, Detective Fowlkes did not know how long he remained in the hospital. Appellant was placed on suicide watch when he was returned to the jail and was not allowed to have any clothes while in the cell. Yet he was clothed when he gave a statement to the officers. Detective Fowlkes did not recall Appellant asking the officers about how he could get off of suicide watch. **R. pp. 1924-29.**

Lt. Eldon DeWitt McCraw is a SLED agent who works the Piedmont region of South Carolina and was assigned to assist in the investigation of the present murder. Appellant was already being detained in his front yard by the time he arrived at Appellant's residence on the morning of June 8, 2000. Agent McCraw served the AWIK arrest warrant on Appellant and immediately read Appellant's *Miranda* rights to him from a card. Appellant did not respond in any way after the rights were read to him and he did not ask for an attorney. Appellant's wife was standing on the front porch on a cordless phone during this process, screaming to Appellant, "don't say nothing. Don't say nothing." **R. pp. 1931-36.**

Agent McCraw approached her and ascertained that she was speaking to Mr. Bannister, whom she identified as Appellant's counsel. Agent McCraw identified himself

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[5]Detective Fowlkes testified that Appellant did not tell the officers anything different from the information which he provided in the statement. **R. p. 1931.**

to her and spoke to Mr. Bannister at his request. Agent McCraw explained that they had arrested Appellant for ABIK. Mr. Bannister stated that he was representing Appellant on another charge but did not know if he was going to represent Appellant on this charge or not. Appellant was subsequently transported to the detention center, and Agent McCraw did not have any further contact with him on June 8. **R. pp. 1936-37.**

On June 9, Mr. Bannister and his son advised Agent McCraw that they were not going to represent Appellant. Agent McCraw then learned from Appellant's wife that Appellant had supposed hired Senator David Thomas, of Greenville. However, when Agent McCraw contacted Senator Thomas, Senator Thomas said he was not going to represent him. Captain Fowlkes then told Agent McCraw that Cherokee County Public Defender Don Thompson was going to represent Appellant. Agent McCraw contacted Mr. Thompson.

Mr. Thompson was interested in getting a deal on Appellant's behalf. Therefore, Agent McCraw contacted then-Deputy Solicitor Anthony Mabry to see if the State was interested in making a deal, but Mr. Mabry said it was too early in the case to "be talking deal." Agent McCraw then reinitiated contact with Mr. Thompson to see if Mr. Thompson would allow him to speak with Appellant. He denied that Mr. Thompson informed him that he could not speak to Appellant. Instead, he said that Mr. Thompson told him that Appellant wanted to talk, but that counsel had not had time to sit down and fully discuss the case with him. **R. pp. 1937-38; 1957-60.**[6]

Because he had not heard anything from counsel, on June 16, 2000, Agent McCraw contacted the jail. McCraw asked the jailer, Travis Alexander, to tell Appellant when

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[6] Agent McCraw said that her tried to contact Thompson at least once a day on the week days between June 8 and June 16.

Alexander saw him that if Appellant wished to speak to the detectives, he should make a written request. Agent McCraw did not advise Alexander that Alexander had to obtain something in writing from Appellant and he was not told to interrogate Appellant. Likewise, he was not told to promise, threaten or coerce Appellant in any manner. Rather, Agent McCraw's purpose in contacting Alexander was to make sure that Appellant's right to counsel was protected by making sure that any requests for an interview came from Appellant. **R. pp. 1939-40; 1960-62.**

In response to this conversation, Agent McCraw received **State's Exhibit #2**, Appellant's written request to speak with a detective without the presence of counsel.[7] Appellant was then brought to the detective's division of the Sheriff's Department, and the interview began at 3:16 p.m. Agent McCraw corroborated that he advised Appellant of his *Miranda* rights from the pre-interrogation waiver form. **(State's Exhibit #2).** And Appellant initialed each right as it was read to him by Agent McCraw. Appellant signed a waiver form indicating that he understood his rights and his signature was witnessed by both officers. **R. pp. 1940-43; 1960-63.**[8]

Agent McCraw was aware that Appellant had been taken to the hospital shortly after his arrest, was placed on suicide watch upon his return to the jail, and had remained there

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[7]**State's Exhibit #1** read as follows: "Friday, June 16, 2000. I request to see a detective without the presence of my attorney. This is my request. May this only be valid for the dates of June 16 and 17 only and any further contact is not initiated on my part, unless further indicated by me. The undersigned Jonathan Binney." See **R. p. 3615.**

[8]On cross-examination, Agent McCraw repeatedly denied that Mr. Thompson had told him in their last conversation that he should not talk to Appellant because Appellant was suicidal and would say anything. **R. pp. 1962-63.**

through June 16, 2000.[9] However, Appellant appeared to be normal. Also, he did not appear to be under the influence of either drugs or alcohol at the time he had his statement; he appeared to understand the questions of him and was able to respond intelligently; and his speech was coherent. When advised of his right to counsel, Appellant did not request an attorney; and he indicated that he wished to talk when advised of his right to remain silent. He was not threatened or coerced in any manner or promised anything in exchange for his subsequent statement. **R. pp. 1943-45; 1957-58.**

Appellant had brought a Bible with him to the interview, and the officers discussed his family, faith and background with him before discussing the details of the crime. Appellant told Agent McCraw that he had just spoken to Mr. Bannister several days before the murder. Counsel had advised him that the very least he could receive was ten years imprisonment even if he pled guilty and he did not wish to go to prison and be known as a child molester. He explained that this was his motive for the murder. Appellant then went into the details of the crime. After a discussion concerning the facts of the case, Appellant made the handwritten, signed statement **(State's Exhibit #3)**, which was initialed and signed as noted. After this interview was completed, Appellant led the officers to where he had hidden the murder weapon. He was subsequently transported back to the jail. **R. pp. 1943; 1945-47; 1963-67.**[10]

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[9] Agent McCraw denied that Appellant was interested in getting off of suicide watch on June 16 or telling Appellant tat he had to get back in touch with McCraw if he was interested in getting off of suicide watch. Instead, Appellant was interested in getting the death penalty. **R. pp 1969-71.**

[10] Agent McCraw confirmed that Appellant had been interested in getting the death penalty but denied that Appellant had asked the officers what they could do to help him receive it. Also, Agent McCraw did not remember pulling out a copy of the Code and looking up the statutory provision concerning the death penalty. McCraw felt Appellant had done enough

On June 19, 2000, Agent McCraw received a telephone call from the jail informing him that Appellant had made a written request to see him. **(State's Exhibit #4).** Agent McCraw had not made any additional calls to the detention center before he received this request, and he had not asked anyone else to talk to Appellant or request that Appellant make another request to speak. Later that same day, he spoke to Appellant in the conference room of the Sheriff's Department. Appellant, McCraw and SLED Agent Mike Prodan (a behavioral scientist working on another case in the county) were the only people present. The interview began at 3:05 p.m. **R. pp. 1947-49.**

Using a SLED advice of rights form **(State's Exhibit #5, R. p. 3623)**, Agent McCraw advised Appellant of his rights on June 19. Again, Appellant initialed each right as it was read to him by Agent McCraw, and Agent Prodan explained each of these rights in even simpler terms. Appellant was not under the influence of drugs or alcohol at the time; he was not promised anything, threatened, or coerced in any fashion; and he appeared to understand his rights. He signed the statement of rights form, and his signature was witnessed by the officers. Appellant did not invoke his right to counsel or his right to remain silent. Agent Prodan conducted the subsequent interview in which Appellant provided "[b]asically the same thing from the first statement, except with a little more of the little things we missed from the first interview." **R. pp. 1949-51.**

Approximately ten to fifteen minutes into their interview, Mr. Thompson burst into the room and advised Appellant not to talk to the officers any further because he was Appellant's attorney. Appellant looked at Agent McCraw, who told him that "he [Mr.

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to receive the death penalty. **R. pp. 1963-64; pp. 1969-71.**

Thompson] works for you. You don't work for him." Appellant said, "well, I want to talk to ya'll." Thompson threatened to contact the Chief of SLED and have the agents fired. At that point, Appellant called counsel a disparaging name and directed him to leave the room. Counsel left and the interview continued. **R. pp. 1953-54.**

Once Appellant had completed the interview, he asked to speak to the victim's husband, Allan Southern, to apologize for what he had done. The officers told him this would not be possible and that if he wished to say something to Mr. Southern, he should put it in letter form. He then wrote a letter to Mr. Southern **(State's Exhibit #6, R. pp. 3624-25)** in their presence. At the conclusion of their interview, the officers took the letter from him. They later gave it to Sheriff Blanton because the sheriff and the victim's advocates were dealing with Mr. Southern. **R. pp. 1951-52; 1967-68; State's Exhibit #6, R. pp. 3624-25.**

Officer Travis Alexander, who was employed at the Cherokee County Detention Center at the time of Appellant's arrest, testified that he answered a telephone call from Agent McCraw at the jail on June 16, 2000. Agent McCraw told him that if he saw Appellant, "just to tell him that if he wants to talk to him, he is going to have to do it in writing." Shortly thereafter, he found Appellant and gave him the message. Alexander never asked Appellant any questions and did not tell him that he had to talk to the police. He also did not threaten or coerce Appellant in any manner. Appellant then wrote a letter in his presence and Alexander took it. He called Agent McCraw, told him that he had received a written request and asked what to do. He later gave the letter **(State's Exhibit #2)** to Agent

McCraw. He had never been asked to do this before and has not been asked to do this again. **R. pp. 1980-85.**[11]

Special Agent Michael Prodan, the lead agent in SLED's Behavioral Science Unit and Special Operations, was not working on the present case before his participation in the June 19, 2000 interview of Appellant. His testimony concerning that interview corroborated Agent McCraw's testimony concerning both the knowing and voluntary nature of Appellant's decision to waive his rights to speak with the officers, as well as Appellant's decision to continue talking even after his attorney advised him not to do so. **R. pp. 1990-94.**

He further explained that the officers were attempting to discover Appellant's motive for the crime. Appellant first said that he had selected the residence because it was secluded but then said he actually picked the house because it appeared to be more affluent when Agent Prodan noted that other houses in the area were equally secluded. Appellant also said that he knew there was a husband and wife living there because he had ascertained that two cars were in the garage. He had not previously had any contact with the victim and did not know her. However, he explained that he was anxious and angry on the day of the crimes and that he commenced "a burglary or does some snooping" when he has these types of feelings. **R. pp. 1994-95.**

Appellant provided several possible motives for the crimes. "He said that he had gone there to commit a burglary. And then he said that he had gone there to commit a sexual

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[11] Alexander specifically denied telling Appellant that he needed to put in writing that he wished to see the detective without the presence of his attorney. **R. p. 1985.** Officer Alexander could not remember where Appellant was housed at the time of the request and did not recall him being on suicide watch. **R. pp. 1986-87.**

assault and he had a fantasy involving the rape of his wife's brother's wife, which would result in a murder. And then he also said something about committing some mass murders and then a suicide, and then going into the residence to commit a suicide at that residence." **R. pp. 1995-96.** Agent Prodan also explained other details of the interview, such as Appellant's explanation that he had previously engaged in a purported suicide, but this was actually a ruse for him to get out of trouble; and that Appellant had only felt depressed after his conviction for criminal sexual conduct. **R. pp. 1996-99.**

Following the interview, Appellant also asked to speak with the victim's husband. Agent Prodan "explained that it would be very difficult, if not impossible, for that to happen under the circumstances, but if he wanted to write a letter or write a message of some type to the victim's husband, that we would see that the letter was available." Appellant then wrote **State's Exhibit #6** in his presence. The officers were quiet while he wrote the letter and did not suggest what he should put in it. Agent McCraw took the letter after Appellant had completed it and it was "ultimately put into evidence." Agent Prodan did not have any further contact with Appellant after June 19. **R. pp. 2000-01.**[12]

Cherokee County Chief Public Defender Donald Anthony Thompson, Esquire, testified for the defense at the suppression hearing.[13] Mr. Thompson testified that he had seen a report on the news of the crime as well as Appellant's arrest on June 8, 2000, and he felt that the State might end up seeking the death penalty in this case. So, he went to the

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[12]It was Agent Prodan's impression from speaking with Appellant that he was not in such hopeless despair that he could not understand the circumstances around him. **R. pp. 2009-10.**

[13]Mr. Thompson has been the chief public defender in Cherokee County since August, 1999, and has been practicing law since November, 1980.

detention center on June 9, 2000 and met with Appellant. Appellant was in what Thompson described as "the suicide cell," which is a small cell immediately adjacent to the booking room. While Appellant had not been clothed when he was in the cell, he was wearing a pair of "paper underwear and handcuffs" when they met. The first meeting only lasted approximately 30 minutes or so. **R. pp. 2022-27.**

In response to a query by defense counsel as to whether he had seen any signs of Appellant being suicidal, Mr. Thompson explained that he felt Appellant was suicidal because Appellant wanted to receive the death penalty in this case. He acknowledged on cross-examination that the fact Appellant was placed on suicide watch did not necessarily mean that he was suicidal because individuals were often placed on suicide watch even though they are not suicidal. Mr. Thompson asked Appellant whether he was going to retain counsel or wanted to use the services of the public defender, and Appellant said that he wanted to be represented by the public defender. Also, Appellant indicated that he had not yet given a statement to the police. Mr. Thompson told him to make sure that he did not give any statement in he future. **R. pp. 2028; 2039-45.**[14]

Mr. Thompson next met with Appellant on June 14, 2000. Between the first and second meetings, he was contacted by Inv. Eric Wright, of the Seventh Circuit Solicitor's Office and Agent McCraw. McCraw wanted to see if counsel would allow him to question Appellant. Mr. Thompson testified that:

> I told him no, that Mr. Binney was, in my opinion, suicidal and self-destructive and that he was seeking the death penalty. And that unless I could get some kind of a guarantee that the

[14]Mr. Thompson was also aware of Appellant's hospitalization on the day before he met Appellant because Appellant had placed nicotine strips "all over his body."

> State would not seek the death penalty, there is no way I was going to let him talk to him.

R. pp. 2029-30.

Agent McCraw told Thompson that he would contact the Solicitor to see whether the State would guarantee that it would not seek the death penalty. Subsequently, Agent McCraw phoned Mr. Thompson and told him that he had been unable to contact Deputy Solicitor Mabry but that he would continue to do so. Also, Agent McCraw wanted to know whether he could meet with Appellant. Again, Thompson claimed that he told McCraw that McCraw could not meet with Appellant unless the State agreed not to seek the death penalty. Thompson further testified that he told Agent McCraw that they would consider, at that point, letting him speak with Appellant. Agent McCraw also wanted to know whether it was okay if McCraw directly approached Appellant and asked Appellant if he would waive his right to counsel and speak with McCraw. "And I think at that point and time my answer was not only no, but hell no." **R. pp. 2030-32.**

In Mr. Thompson's meeting with Appellant on June 14, Appellant was still on suicide watch and was still interested in receiving the death penalty. Counsel indicated that it was hard to get Appellant to talk about anything because he mainly wished just to talk about receiving the death penalty. Thompson did not have any further contact with Appellant on either June 15 or 16. However, he had one or possibly two telephone conversations with Agent McCraw. McCraw told him that he had contacted Deputy Solicitor Mabry and was told that it was too early in the case to make any decision not to seek the death penalty. On June 16, Agent McCraw phoned him "somewhere around noon" and asked if counsel had changed his mind and would allow Agent McCraw to question Appellant. Again, counsel

claimed that he told Agent McCraw told no. He then left work for the weekend. **R. pp. 2030-33.**

Mr. Thompson learned of Appellant's June 16th statement on Monday morning, June 19. He then called Agent McCraw and learned what had happened. This conversation ended after Thompson lost his temper. He then went to the Solicitor's Office and was told, sometime between 1:30 and 2:00 p.m., what had occurred. Counsel then went to jail to see Appellant, but Appellant had already been transported to the Sheriff's Department for questioning. **R. pp. 2034-35.**

Thompson then had one of the jailers take him to the Sheriff's Department and he went into the conference room, where he confronted Appellant. When asked why he was talking to law enforcement, Appellant said "because I want to." Counsel reminded him that this was against his advice, but said that he should go ahead and do so if that it what he wanted to do. Counsel then left the room. However, he returned to the conference room moments later to change his advice. This time, he told Appellant, as his attorney, "to be quiet and to quit answering their questions and to quit talking to him." After this exchange, counsel left. **R. pp. 2035-36.**

Counsel next met with Appellant on June 21 to ascertain what had occurred on June 16 and 19. Even though counsel recalled the conversations he had with Agent McCraw differently from McCraw, he admitted that he was not aware that Appellant had, at any time, told law enforcement that he had a lawyer, or that he wanted a lawyer present. To the contrary, the only time he was a witness to a conversation between Appellant and law enforcement, counsel advised Appellant not to speak but Appellant indicated his desire to do so. **R. pp. 2038-40.**

Appellant testified *in camera* that he was currently serving a thirty year sentence for criminal sexual conduct and that he was out on bond for that offense at the time of his June 8, 2000 arrest. Before June 8, 2000, he had been treated for "[s]evere depression, anxiety, panic attacks, and . . . A.D.D." He had last been hospitalized on May 5, 2000 at Patrick B. Harris hospital for depression. After he was released, he was given Remeron, an anti-depressant, and was told to take 15 milligrams a day. However, he quit taking the medication within a week to ten days because it caused him to oversleep. **R. pp. 2047-50.**

After his release from the psychiatric facility, he was living in a motel room.[15] It was his understanding that he was facing "quite a bit of time" on the CSC charge, which caused him to be depressed. He claimed that he had taken Lortabs and had placed fourteen nicotine patches on himself on June 7-8, 2000, in a purported effort to overdose. Also, he was taken to the Cherokee County Jail immediately following his arrest, and was placed on suicide watch when he was returned to the detention center the following day. Nevertheless, no one at the hospital or the jail spoke to him about treating his depression. **R. pp. 2053-54.**

Appellant further testified that the purpose of his June 9 meeting with Mr. Thompson was "[j]ust to touch base, [and] let me know that he was going to indeed represent me, . . . if I so desired." Additionally, counsel wanted to find out more about Appellant and to update him as far as where law enforcement was in the case. Appellant inquired about the possibility of receiving the death penalty during this meeting and counsel grudgingly spoke to him about the issue. Also, counsel told him not to speak to any detective in the case. He

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[15]He could not return home because of the pending CSC charge and DSS's intervention with his children. **R. p. 2050.**

still did not speak to any mental health professional nor was he taken to mental health in the days which followed. **R. pp. 2053-54.**

Thompson met with Appellant several days later to discover how Appellant was being treated. Appellant told him that he was unhappy about being on suicide watch, that the depression was getting worse and that he wanted to die. With respect to his meeting with Detective Fowlkes and Agent McCraw, Appellant claimed that he had been trying to get off of suicide watch. He had asked several people in the jail how he could do so and received different answers. Finally, someone told him that he would have to ask one of the detectives. When asked how the meeting with the officers took place, Appellant stated that he told the jailer after his other conversations about getting off suicide watch, that he wanted to talk with McCraw about getting off of suicide watch. **R. pp. 2053-56.**

He further claimed that during the June 16th meeting with Officers Fowlkes and McCraw, he initially asked them about the possibility of being removed from suicide watch. Agent McCraw told him that he would have to go to either the Sheriff of another member of the Sheriff's Department and that McCraw could not give him a definite answer but would take him around later to talk to someone who could. Appellant claimed that he then decided to find out what his possibilities were of receiving the death penalty. He entered a conversation with the officers during which they discussed the possibility of his receiving the death penalty. "That's when he said he couldn't go any further" without receiving a signed waiver. **R. pp. 2056-58.**

Appellant signed the waiver of rights form **(State's Exhibit #2)** and began a discussion with the officers. The officers made it clear that they did not have any control over whether he would receive the death penalty because the Solicitor had that authority.

Because Agent McCraw was supposedly unsure as to how the law applied to Appellant's case, McCraw asked Detective Fowlkes to retrieve the appropriate volume of the code, which he did. They then explained to Appellant that his case would "have to have certain situations in it in order to be eligible for the death penalty." **R. pp. 2057-59.**

This portion of the interview lasted for approximately 30 or 40 minutes. Afterward, Appellant discussed the facts of the case for roughly an hour. Then, he began writing his statement **(State's Exhibit #3)**. He claimed that he stopped on several occasions and asked if what he had written was in accordance with what they had read in "the book" because he was still confused.[16] Appellant also claimed that he wrote "almost verbatim" what Agent McCraw told him to on pages 4-5 of State's Exhibit #3 because McCraw felt that it would make him appear to be more credible. This was allegedly necessary because, according to Appellant, Agent McCraw told him that a lot of attorneys (including trial counsel, Mr. Thompson) would try to attack the statement and have it "dismissed." Appellant admitted that he signed the statement and initialed it as reflected thereon. **R. pp. 2059-62.**

After he had completed his statement, Appellant led the officers to where he had hidden the murder weapon. There were no further discussions between him and Agent McCraw about the facts of the case at that time. However, Appellant told him that he wanted to get some of his items from his moped and he asked if there was any possibility that he and his wife could meet, alone, "kind of a last rites type thing." Agent McCraw supposedly told him to write another letter several days later saying that he wanted to see McCraw. Appellant claimed this was the only reason he wrote the June 19, 2000 request **(State's**

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[16]Sometimes he would write a paragraph but more often would write an entire page and ask them if it was "okay." **R. p. 2061.**

Exhibit #4). He had not received any counseling or treatment for depression throughout his incarceration, but he had been evaluated by a mental health counselor. According to Appellant, Mr. Thompson entered the room during the interview on June 9 and told Appellant that he was making a mistake and should not say anything else. Appellant, however, told him that he wished to talk to the officers and that this was something that he needed to do.[17] Appellant was still on suicide watch at the time of the interview. At the conclusion of the interview on June 9, Agent McCraw took him to see the Sheriff and another officer in the Sheriff's Department. At that point, Appellant was removed from suicide watch; and he was subsequently prescribed 30 milligrams of Remeron each day. **R. pp. 2054-55; 2063-67.**

Appellant admitted on cross-examination that he was 28 years old; that he had obtained his GED while in prison; and that he had thereafter attended several months of college and had taken several correspondence courses in micro computer repair but had never completed his education. He also admitted that he was able to read and write; that he understood his conversations with his attorneys and the questions by the prosecution; that he did not have any trouble understanding or communicating with any of the officers with whom he had previously spoken or his prior trial attorneys. Moreover, he had had quite a few jobs; he and his wife had made a family together; he paid bills and functioned "[s]omewhat" normally. **R. pp. 2067-70.**

Appellant likewise admitted that he had previously given a number of statements to other officers in the past and that he had received his *Miranda* warnings in a number of those

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[17]Appellant stated that counsel did not know anything about his promise or his conversations with Agent McCraw. **R. p. 2065.**

instances.[18] Appellant admitted that he had previously lied about his educational background in one statement and had lied on a job questionnaire about his prior criminal background several years earlier. **R. pp. 2070-77.**

More importantly, Appellant admitted that he was not intoxicated and knew what he was doing when he gave his statements on June 16 and 19 and that he had not included information in State's Exhibit #3 that he was taking Lortab although he had included information that he had been drinking beer and mentioned the nicotine patches. Additionally, he claimed that Agent McCraw told him some of the information to put in **State's Exhibit #3** and that some of the information in there simply was untrue. Other portions, whether true or not, were not his words. Finally, in spite of his claim that **State's Exhibit #4** was given because he wanted to have "last rites with his wife" and receive items from his moped, there was no mention of that in **State's Exhibit #4**. Of greatest significance to the present issue, he admitted that **he never told law enforcement that he wanted a lawyer or that he didn't want to talk to law enforcement unless a lawyer was present.** To the contrary, when his lawyer arrived on June 16, he told his lawyer that he didn't want to have him in the room and counsel left the room because he wanted to talk to law enforcement.[19] **R. pp. 2076-88.**

The parties also presented conflicting expert testimony concerning the effect of Appellant's failure to continue taking Remeron at the time of his arrest, as well as the effects

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[18]Appellant had prior convictions for breaking and entering (in Ohio), larceny (in North Carolina), and CSC (in Spartanburg) in 2001.

[19]Again, however, he maintained this was the result of a prior arrangement with Agent McCraw.

of the nicotine patches on his chest. Appellant's expert, Dr. William Alexander Morton, Jr., was qualified as an expert in pharmacy practice, psychiatry, and behavioral sciences. Dr. Morton testified that Appellant had been treated at Patrick B. Harris Hospital for symptoms of depression and was prescribed 15 milligrams of Remeron each day. He discontinued taking it within two and a half or three weeks. When someone stops taking Remeron, one would expect to find a return of the original symptoms as well as some mild to moderate withdrawal symptoms.[20] **R. pp. 1836-43.**

Also, Dr. Morton explained that Appellant had been using nicotine patches to the point where he had to be hospitalized following his arrest for nicotine poisoning. He was briefly hospitalized until his condition was stabilized. Morton opined that nicotine poisoning of the type evidenced in Appellant's records could potentially cause some depressive symptoms; and that nicotine poisoning would aggravate or enhance previous depression symptoms. On cross-examination, Morton admitted that the only way to know whether or not Appellant was actually taking Remeron at the time of his arrest was based on his self-reporting. Also, Appellant provided varying accounts as to the number of nicotine patches he was wearing at the time of his arrest to the individuals at the hospital. Further, Morton admitted that the symptoms of depression caused from not taking previously prescribed Remeron would only last from several days up to one week. **R. pp. 1846-60.**

SLED Agent David Eagerton is the Chief Toxicologist at SLED's forensics toxicology lab. He was present when Dr. Morton testified and had reviewed Appellant's medical records. Although a few of the symptoms reflected in the medical records might be

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[20]The symptoms would include muscle cramps, insomnia, and anxiety symptoms that could include virtually every part of the body.

consistent with some of the effects of nicotine intoxication, they did not impress Agent Eagerton as being severe intoxication and clearly not an overdose of nicotine. Appellant had a pulse rate of 104, but he also had normal sinus rhythm which indicated to Agent Eagerton that his symptom was not that drastic.[21] Also none of the other factors one would expect in a case of severe nicotine overdose were present, such as an elevated potassium level; seizures; hypotension; or diaphragmatic paralysis. **R. pp. 1880-85.**

Agent McCraw was presented as a reply witness and testified that nothing was promised to Appellant in connection with the June 16, 2000 interview. Visiting his wife was mentioned when Agent McCraw was inventorying the items that she needed from Appellant's moped, but Appellant was never told that he would only be able to see his wife and get the inventory from his moped if he gave a statement. No conditions were placed upon seeing his wife or on getting the moped inventoried. Also, no promises were made to him about getting off the suicide watch in exchange for a statement, either on June 16 or 19. **R. pp. 2089-92.**

After listening to the arguments of the parties, **R. pp. 2135-61**, the trial judge ruled that each of Appellant's statements was admissible. **R. pp. 2161-78.** With respect to **State's Exhibit #3**, he specifically found that Appellant was in custody. He further found that on every occasion when the police questioned him, he was advised of his *Miranda* rights but never asserted his right to counsel. As a result, the trial judge found there was no Fifth Amendment violation. **R. pp. 2165-66.**

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[21]In fact, it could have been caused by one nicotine patch or other factors. **R. p. 1883.**

In connection with finding that there was no Sixth Amendment violation, the trial judge found that there was no credible evidence that Appellant had any mental condition or medication that he may have taken which affected his ability to fully understand the circumstances that he was in, to fully understand the circumstances of any statements that he may make, to understand his rights or any questions that law enforcement asked. Moreover, the trial judge found that Agent McCraw's invitation to Appellant to make contact was not interrogation despite Agent McCraw's hope that some questioning may result. Rather, the judge found that Appellant initiated contact with law enforcement. The trial judge specifically found that Appellant's statement was freely and voluntarily given after he made a knowing and intelligent waiver of his *Miranda* rights.[22] **R. pp. 2165-77.**

Additionally, the trial judge found that Appellant may have had reasons why he wished to talk to law enforcement, but that this was not unconstitutional and that he could initiate contact for whatever reason he wished. The trial judge further found there was no credible evidence which tended to show that law enforcement ever promised Appellant anything in return for his cooperation, or that he was tricked, threatened or coerced in any fashion. Also, the trial judge found there was no credible evidence that Appellant did not fully understand what he was doing and the importance of his decision. Therefore, he denied Appellant's motion to suppress. **R. pp. 2165-77.**

In *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 486 (1990), the United States Supreme Court held that the holding in *Edwards v. Arizona*, *supra*, prevented officers from

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[22]The trial judge also noted that Appellant had a vast experience in the criminal law based upon his prior convictions. **R. p. 2173.**

re-initiating interrogation after a suspect's invocation of his right to counsel, without counsel present. In doing so, the Court explained the *Edwards* rule as follows:

> In *Miranda v. Arizona*, *supra*, 384 U.S. at 474, 86 S.Ct. at 1627, we indicated that once an individual in custody invokes his right to counsel, interrogation "must seize until an attorney is present;" at that point, "the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." *Edwards* gave force to these admonitions finding it "inconsistent with *Miranda* and its progeny for the authorities, at their insistence, to re-interrogate an accused in custody **if he has clearly asserted his right to counsel.**" 451 U.S. at 485, 101 S.Ct. at 1885. We held that "when 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." *Id.* at 484, 101 S.Ct. at 1884-85. Further, **an accused who requests an attorney, "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. *Id.* at 484-85, 101 S.Ct. at 1885.

Minnick, 498 U.S. at 150, 111 S.Ct. at 489 (*emphasis added).*

The Court subsequently explained that "[t]he purpose of the *Miranda-Edwards* guarantee . . . – and hence the purpose of invoking it – is to protect . . . the suspect's 'desire to deal with the police only through counsel.'" *McNeil v. Wisconsin*, 501 U.S. 171, 178, 111 S.Ct. 2204, 2209 (1991). "The rule of [*Edwards*] applies only when the suspect 'ha[s] expressed' his wish for the particular sort of lawyerly assistance that is the subject of *Miranda*. *Edwards, supra.* 451 U.S. at 484, 101 S.Ct. at 1884. . . . 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." *McNeil*, 501

U.S. at 178, 111 S.Ct. at 2209. See also *State v. Kennedy*, 333 S.C. 426, 430, 510 S.E.2d 714, 715 (1998) (To be unequivocal invocation of right to counsel, the desire must be "presented 'sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney'") (citation omitted).

Applying this criteria to the case at bar, it is clear that Appellant's argument must be rejected for two reasons. First, and despite his claim that he invoked his right to counsel, the record clearly reflects that he never invoked either his right to remain silent or his right to counsel at any point from the time of his June 8 arrest through the time he gave the June 16 (or June 19), 2000 statement. The record clearly reflects that by the time the Appellant discussed the facts of the case with Agent McCraw and Detective Fowlkes on June 16, he had previously been advised of his *Miranda* rights on two separate occasions and expressly waived those rights. The waiver on June 16 **(State's Exhibit #2, R. p. 3616)** was written. While it is true that Mr. Thompson represented Appellant, Appellant never "expressed his desire to deal with the police only through counsel." *Edwards*, 451 U.S. at 484-85, 101 S.Ct. at 1885. See also, *McNeil*, 501 U.S. at 178, 111 S.Ct. at 2209; *State v. Owens*, 346 S.C. 637, 659, 552 S.E.2d 745, 756-57 (2001) (holding that there was no evidence that the accused declined to speak with police without the presence of counsel in connection with the "Speedway matter;" rather, he waived his right to counsel); *United States v. Jordan*, 38 M.J. 346 (U.S. Ct. Mil. App. 1993) (despite numerous advisements of his *Miranda* rights, defendant never invoked the right to counsel until after giving statements in issue despite fact that defense counsel was assigned to defendant while he was still under Naval control). Indeed, both Mr. Thompson, **(R. pp. 2039-40)** and Appellant **(R. pp. 2077; 2088)** testified that Appellant never invoked his right to counsel at any point and, when counsel appeared

on June 19, 2000, Appellant directed him to leave because Appellant wished to speak with the officers. Thus, the present case is unlike *State v. Kennedy*, *supra*.

Nor is there any merit to Appellant's contention that Agent McCraw and the members of the Cherokee County Sheriff's Department believed that Appellant was invoking his right to counsel at the time of his arrest and therefore did not attempt to interrogate him. In support of his proposition, he relies upon Detective Fowlkes' testimony that he was under the impression Mr. Bannister was representing Appellant when the officers left the scene. **R. p. 1906, l. 11-14.** However, it is clear from Agent McCraw's testimony that Bannister was uncertain as to whether or not he would be representing Appellant on the present charge. **R. p. 1936, l. 9-20.** Also, even though Appellant may have secured an attorney to represent him, it is clear that he never indicated, in any fashion, that he wished to deal with police only through counsel. See, *McNeil v. Wisconsin*, *supra*; *State v. Owens*, *supra*; *United States v. Jordan*, *supra*.

Additionally, even if Appellant had invoked his right to counsel at some point before the June 16, 2000 statement, it is clear that his statement was nevertheless admissible because he initiated the contact resulting in the statement by making a written request to speak to the detectives without counsel being present. See **State's Exhibit #2.** See *Minnick*, *supra*; *Edwards*, *supra*. Agent McCraw's testimony supports the trial judge's finding in this regard. McCraw testified that in his communications with Mr. Thompson, Thompson indicated that Appellant wished to give a statement but Thompson had not had an opportunity to adequately sit down and discuss the case with him. McCraw specifically

denied that Thompson told him he could not speak with Appellant because Appellant was suicidal and would say anything. **R. pp. 1938-39; 1959-63.**[23]

In light of this information, Agent McCraw then sent word to Appellant, through a jailer, that if Appellant wished to talk to law enforcement, he had to make a written request to do so. Appellant refers to this as a "ploy [which] was designed for no other purpose than to circumvent [Appellant]'s right to counsel and the protection afforded by *Miranda* and *Edwards*." **FBOA, at p. 16.** However, Agent McCraw did not initiate contact by merely telling Appellant that he would have to make a request to speak to the officers. *State v. Smith*, 494 M.W.2d 558, 562-64 (Neb. 1993) ("there can be no doubt" that defendant initiated further conversation in the ordinary "dictionary sense of the word" when he asked to speak to the officer; and the fact the officer "had told defendant that she would be around for a little while prior to defendant's request does not negate the fact that defendant initiated the dialogue." The officer's statement "was not intended to start a conversation but merely inform defendant that she would be available if he wished to initiate a dialogue." And the prosecution met its burden of proving that defendant waived his right to counsel). Rather, Agent McCraw was avoiding direct contact with Appellant and any questioning unless and until Appellant desired to initiate contact. Because Appellant initiated the contact with the officers, there can be no *Edwards* violation. *Id.* See also *State v. Franklin*, 299 S.C. 133, 382 S.E.2d 911 (1989).

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[23]Appellant further asserts that Mr. Thompson's testimony that he told McCraw that he could not speak to Appellant was credible, based in large measure upon Thompson's representations at a July 11, 2001 pretrial hearing. **R. pp. 3505-06.** However, this ignores that the trial judge's findings are supported by competent evidence. Moreover, the Fifth Amendment right to counsel was Appellant's right to invoke, and he never did so.

Finally, an *Edwards* violation is subject to harmless error analysis. See, *Shea v. Louisiana*, 470 U.S. 51, 59 n. 4, 105 S.Ct. 1065, 1070 n. 4 (1985); *Cooper v. Taylor*, 103 F.3d 366 (4th Cir. 1996) (*en banc*). Here, any admission in **State's Exhibit #3** must be deemed as harmless in both the guilt and penalty phases of Appellant's trial because it was merely cumulative to other statements made by Appellant and other evidence presented by the State. First, Appellant left a handwritten suicide note with his fingerprint on it **(State's Exhibit #34, R. p. 3614)** at the crime scene. **R. pp. 2200; 2322; 2541-43; 2652-54**. This note stated where he had hidden the "scooter" which he used for transportation as well as a sketch with where he had hidden it. More importantly, Appellant stated in the note that "Honey, I did this first of all because I will not let them send me to prison. Second, they think I was a horrible person. Well, I decided to prove them right." This note also provides a motive for the murder, *i.e.*, that he was facing ten years imprisonment. See **R. pp. 2227-28; 3614**.

State's Exhibit #3 is also cumulative to statements Appellant made to fellow inmate, Danny Edwards, and a map which he provided to Edwards while both men were housed at the Cherokee County Detention Center.[24] In the course of a conversation with Edwards, Appellant told Edwards that:

> He told me that he had scoped the house out a few days prior, and that he went there on a moped, and that he went in the house, burglarizing the house. He said that he was in the bathroom and using the bathroom. This was in the evening time, and . . . that a lady came in and seen him. They saw each other about the same time that he was in the bathroom using the bathroom. He said that he pulled a 9-millimeter and

[24]Edwards was being housed there pending his transportation to a federal facility to serve a sixty-three months sentence for interstate transportation of stolen property.

> shot . . . at the lady, and said she went to run and he ran behind her and he shot her again, I guess in the living room area. And then he ran out and went behind the house and went into the woods. And he said that the helicopters were hovering over him and after him, but they never [caught] him and he made it to his home. And he said that when he got to his home, he hid down in the basement of the house. When the agent or officers got to him, they found him [hidden] behind some boxes and all down in the basement of his house.

R. pp. 2618-19.[25]

Edwards told Appellant that he would have to have some proof to show the agent if Appellant wanted to become more involved. Appellant then drew Edwards a map of the house, the driveway and the area around the residence. **(State's Exhibit #107). R. pp. 2620; 2648-54.** Rather than keep the drawing, however, Edward gave it to Inmate Jerry Johnson, Jr. Johnson came forward because he felt that Appellant did not "need to be back out on the streets."[26] Appellant never mentioned suicide as a possible motive for the burglary and murder to Edwards. Instead, he had intended to find whatever he could steal in the Southern's residence. **R. pp. 2620-22; 2628-35.**

The State was able to corroborate most details of **State's Exhibits #3** and the information he provided to Edwards. For instance, Appellant's DNA was found on cigarette butts in the victim's residence, as well as on a marital device found in a trash can in the victim's master bathroom. His DNA was also found on cigarette butts located in the woods

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[25]Appellant had told Edwards about the crime because he had heard that it was easier to do time in a federal facility, and he wanted Edwards to talk to an FBI agent to see if the Feds would take his case. **R. pp. 2619-20.**

[26]Johnson was facing charges of manufacturing methamphetamines and was facing between 0 to 15 years but had not received any preferential treatment in exchange for his testimony. **R. p. 2635.**

along the fence line of the victim's residence. A pair of gloves and a flashlight were found in one of these locations. **R. pp. 2478-90; 2599-2602.** Law enforcement was likewise able to tie the murder weapon to Appellant; and shell casings and projectiles that were found in the areas of residence described by Appellant to Edwards (and in **State's Exhibit #3)** were also positively determined to have been fired by the murder weapon. **R. pp. 2332-33; 2468-75; 2491; 2552-64.**[27] Finally, **State's Exhibit #3** was cumulative to the June 19 statement, which was introduced in the penalty phase. Therefore, any error in its introduction must be viewed as harmless beyond a reasonable doubt.

[27]Also, magazine chips and ammunition, consistent with the murder weapon, were discovered in a consensual search of a motel room in which Appellant had been living. Even if law enforcement could not have discovered the weapon without Appellant's assistance, which is not altogether clear in light of **State's Exhibit 34**, a weapon consistent with that used would have been traced to him, through ballistics testimony and the testimony of the gun's former owner, who had loaned it to him to shoot chickens.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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June 1, 2004.

WES

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IN THE SUPREME COURT

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The Honorable J. Derham Cole, Circuit Court Judge

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Respondent,

vs.

JONATHAN KYLE BINNEY,

Appellant.

CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appellant by depositing three (3) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Joseph L. Savitz, III, Esquire, South Carolina Office of Appellate Defense, 1205 Pendleton Street, Room 306, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

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