

# **APPENDIX 17**

**Excerpt from Amended Initial Brief in the South Carolina Supreme Court  
Regarding the Eighth Amendment Argument**

**THE STATE OF SOUTH CAROLINA  
In the Supreme Court**

**APPEAL FROM CHARLESTON COUNTY  
Trial Court Case Nos. 2004-GS-12-00571  
and 2004-GS-12-00572  
The Honorable Daniel F. Pieper**

**The State of South Carolina, Respondent**

**v.**

**Christopher Frank Pittman, Appellant**

**APPELLANT'S AMENDED INITIAL BRIEF**

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year-old could be tried for murder as an adult. Given the obvious constitutional problems with this plain result of *Corey D*, it becomes even more apparent that the Legislature did not intend such a result.

Because the correct interpretation of S.C. Code Ann. § 20-7-7605(6) is that it applies only to children fourteen and older, twelve year-old Chris Pittman was improperly transferred to the court of general sessions to be tried as an adult. This Court should reverse his conviction, overrule *Corey D*, and, at a minimum, order a new trial in juvenile court. Because any new trial, even in juvenile court, would have to encounter the other important issues, *e.g.*, speedy trial, the *Miranda* issue, etc., however, Defendant urges the Court to address those issues as well and to provide guidance for their resolution.

**VII. WHETHER IT VIOLATES THE “EVOLVING NOTIONS OF COMMON DECENCY” THAT ARE THE TOUCHSTONE OF THE EIGHTH AMENDMENT FOR THE STATE OF SOUTH CAROLINA TO SUBJECT A TWELVE YEAR OLD TO A MANDATORY, MINIMUM PRISON TERM OF 30 YEARS WITHOUT PROBATION**

The defense made a vigorous pretrial argument about the specter of possible punishment. R. pp. 270-296, Defendant’s Notice of Unconstitutionality of Statute, filed December 2, 2004. The circuit judge rejected the argument at that time on the basis that it was premature. Citing *Ingraham v. Wright*, 430 U.S. 651 (1977), he wrote that the Eighth Amendment argument becomes ripe if, and only if, a sentence which violates that Amendment is imposed. (R. pp. 26-42, Court of General Sessions Order dated January 14, 2005 at p. 16 of 17.).

On the day that he was convicted, Chris Pittman was sentenced to thirty years, without parole, which is the mandatory, minimum sentence for a person convicted of murder in South Carolina. Believing that this inflexible sentencing requirement constitutes

“excessive punishment” for a 12-year old, the defense reurged its point. 2/15 Tr. at R. p. 3851, line 11-p. 3855, line 2.

Because of space limitations, we will not belabor the Court with all of the arguments and authorities which were made in conjunction with that motion. They are in the record. *Id.* But we would like to point out that there is a symbiotic and synergistic relationship between developing science and the “evolving notions of common decency” that are the touchstone of the Eighth Amendment analysis. On the day after Pittman was sentenced, USA Today carried a story about whether 16 year olds are too young to drive. It contained a graphic illustration about the developmental shortcomings of the typical<sup>33</sup> adolescent. R. pp. 483-498, Defendant’s Post-Argument Brief About “Evolving Standards” in Law, Science & Society, at p. 1 of 11.

As best we can tell, Chris Pittman is the *second youngest person in American history to be prosecuted in an adult court*. The youngest is an 11-year old boy who was prosecuted for murder in 1999 in a Michigan court<sup>34</sup>

The common denominator of law and society is **science**. The color picture from the cover of *USA Today*, depicts graphically what Dr. Atkins described in her testimony before the Circuit Court at the December 2004 hearing on the defense’s Motion to Remand. 12/2 Tr. at R. p. 658, line 8-p. 659, line 20. It shows, in living color, that there is a dramatic, physical difference between Chris Pittman’s 12 year old, pre-teen brain, a “younger teen” brain, and an “older teen” brain. And these are not simply pretty color pictures that have no relevance to the issues at hand. Dr. Giedd, the NIH researcher who has analyzed 4000 brain

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<sup>33</sup> As noted above, Chris Pittman was not typical. The only testimony in the record about his developmental status as of the time of the incident was that of Dr. Atkins, who found him to be “pretty limited” in terms of intellectual abilities. 12/2 Tr. at R. p. 634, lines 10-25.

<sup>34</sup> *Christian Science Monitor*, “Justice for Nathaniel,” January 18, 2000.

scans from 2000 volunteers, explains that the area in Chris’s brain “that’s slow to turn blue – which represents development over time – is the right side just over the temple. . . . The underdeveloped area is called the dorsal lateral prefrontal cortex. The underdeveloped blue area” is that part that controls “impulse and decisions.” It is the “executive function” area of the brain—where judgment is exercised and decisions are made.

Although *USA Today* reported the scientific findings, they are hardly the only source. Many academics have noted these developments. For example, an article in the record from the January 2004 publication by the Juvenile Justice Center of the ABA, on Adolescence, Brain Development and Legal Culpability explains that “[r]esearchers at Harvard Medical School, the National Institute of Mental Health, UCLA and others, are collaborating to ‘map’ the development of the brain from childhood to adulthood and examine its implications.” Similarly, the UCLA’s website, [www.loni.ucla.edu/%7Eethompson/DEVEL/dynamic.html](http://www.loni.ucla.edu/%7Eethompson/DEVEL/dynamic.html), actually contains a video sequence of the developing brain shots depicted on the previous page of this Brief. (R. pp. 483-498, Defendant’s Post-Argument Brief About “Evolving Standards” in Law, Science & Society, at p. 1 of 11). They, too, provide graphic illustration of the point.

That is the science of the matter. To transmute it to legal terms, the underdeveloped part of the 12-year old brain is that portion that gives one capacity (a) to form malice or other criminal intent, and (b) to waive one’s *Miranda* rights.

The fact is that kids are kids. They are not mini-adults. The legal system could and should have recognized this in one or more of three different ways. First and foremost, it should have recognized it by keeping him in Family Court where he belonged. Defense counsel in this case firmly believe that the decision to “waive” Pittman up to adult court was

a serious, fundamental error. But, the Circuit Court viewed the matter as a “question for appeal.”<sup>35</sup>

Second, this Court has acknowledged the difference via its long-standing “presumption of incapacity” which attaches to children under the age of 14. If, as we request in Section I, *supra*, the Court reverses the conviction because there is no evidence to rebut this presumption, then the constitutional issue is moot.

Third, there is the corrective sweep of the Eighth Amendment, which prohibits, not only “cruel and unusual punishments,” but also “excessive punishments.” It is, thus, to this argument that we now turn.

The United States Supreme Court has compared the criminal culpability of juveniles with that of persons suffering from mental retardation. Quoting its decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court wrote in *Roper* that “[m]ental retardation . . . diminishes personal culpability even if the offender can distinguish right from wrong.” *Roper v. Simmons*, 543 U.S. 551, 563 (2005).<sup>36</sup>

*Roper* is merely the latest in a long line of cases that evince a tendency, in law and in science, to treat children more like children. Although, on the one hand, the State may try to limit its scope because it is a death penalty case, on the other, *Roper* involved a defendant Christopher Simmons, who, at age 17, was on the far end of adolescence. Chris Pittman, by contrast, was only 12. In light of the fact that the Eighth Amendment, as applied in *Roper* as well as in prior decisions of this Court, *e.g.*, *State v. Standard*, 351 S.C. 199, 569 S.E.2d 325 (2002), requires an individualized, **proportionality** analysis, it is compelling precedent.

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<sup>35</sup> See Section V, *supra*.

<sup>36</sup> “It is beyond cavil that juveniles as a class are generally less mature, less responsible, and less fully formed than adults, and that these differences bear on juveniles’ comparative moral culpability.” *Roper*, 543 U.S. at 599 (O’Connor, J., dissenting).

Equally instructive is the opinion in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), in which the High Court held that children under the age of 16 could not be subjected to the death penalty. “All of this legislation is consistent with the experience of mankind, as well as the long history of our law, that the normal 15-year-old is not prepared to assume the full responsibilities of an adult.” 487 U.S. at 824-25. The bottom line of these cases is that: (1) children as a class are different than adults, and (2) as the age of the offender goes down (from 18), the level of constitutional scrutiny goes up. With the exception of the Michigan case mentioned earlier, Pittman has not found a case on point dealing with a child as young as 12.

The court below was extremely concerned about the impact of this Court’s opinion in *State v. Standard*, 351 S.C. 199, 569 S.E.2d 325 (2002) on the Eighth Amendment issue. *Standard* is not an impediment to reversal in this case. Two points should be borne in mind. First, there is an obvious difference in that the defendant in that case was sentenced to life without parole for a crime he committed when he was 20 years old, 569 S.E.2d at 327, whereas Chris Pittman had no prior criminal history and committed his first and only crime when he was 12.

Additionally, in *Standard* this Court cited both *Hawkins v. Hargett*, 200 F.3d 1279 (10th Cir.1999), *cert. denied* 531 U.S. 830 (2000)<sup>37</sup> and *State v. Green*, 348 N.C. 588, 502 S.E.2d 819 (1998), *cert denied*, 525 U.S. 1111, 119 S.Ct. 883, 142 L.Ed.2d 783 (1999), both

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<sup>37</sup> With respect, we point out that in *Standard* this Court mistakenly recited that the *Hawkins* sentence was “100 years without parole.” In fact, the court there wrote, “It is also important to the analysis that Mr. Hawkins’ prison sentence, while lengthy, will be shortened considerably by the availability of parole and ‘good time’ credits. ... a proper assessment of Mr. Hawkins’ punishment cannot ignore the possibility that he will actually only serve roughly one-third of his sentence.” *Hawkins v. Hargett*, 200 F.3d 1279, 1284 (10<sup>th</sup> Cir. 1999).

of which adopt proportionality review<sup>38</sup> of sentencing in a non-capital case and both of which acknowledge the age of the defendant as part of the proportionality analysis. Although the courts in both cases found that there was no Eighth Amendment violation, the case at bar presents a different situation: (1) Pittman was only 12 at the time of his crimes, and even one year makes a huge developmental difference; (2) he was under the influence of a mind-altering drug at the time; (3) he had no prior criminal record whatsoever; (4) unlike Hawkins, he has no possibility of parole; and, (5) recent developments in science have further illuminated, not only the dangers of SSRI's in children and adolescents, but also just how underdeveloped a 12-year old's brain is, especially with respect to the capacity to form criminal intent.

On the day that the defense's Eighth Amendment motion was being argued, the United States Supreme Court handed down its landmark decision in *Roper v. Simmons*<sup>39</sup>, holding that 17 year olds are too young to be executed. During the arguments, the circuit court repeatedly asked counsel for examples, in the **case law**, of the evolving notions. With respect, we submitted to that court, and to this one, that one does not search prior precedents for evolving notions. As the Supreme Court itself demonstrates, in *Roper* and in the prior death penalty cases, evolving notions are discerned from scientific developments and numerous publications. The USA article and the *Roper* case are excellent examples.

If our society questions whether 16 year olds can drive an automobile, and if it forbids the execution of 17 year olds, then certainly it cannot condone treating 12 year olds exactly like full grown adults, for sentencing purposes!

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<sup>38</sup> *Roper* also emphasizes that Eighth Amendment jurisprudence involves a proportionality analysis, *i.e.*, whether the punishment is proportional to the crime. 543 U.S. at 568-576.

<sup>39</sup> *Roper, supra*.

The South Carolina statutes and jurisprudence are not devoid of guidance. In South Carolina, a child must be 18 years old to ratify a contract, 16 years old to marry, and 15 years old to drive an automobile. Moreover, as noted in section I, *supra*, for more than 50 years this Court has held that the law presumes that a child under the age of 14 does not have the requisite mental capacity to commit a crime.

Considering all of these factors, we submit that Chris Pittman's Eighth Amendment rights have been trampled. Again, however, there is a question of remedy. One remedy would be to simply reduce his sentence down to eight years, four months, and 12 days, so that it would expire on his 21<sup>st</sup> birthday. However, that remedy would still not treat him as the child that he was. Therefore, we submit that the most constitutionally appropriate remedy is for the Court to reverse his sentence and to remand him to the custody of the juvenile detention personnel, with instructions to treat him exactly as if he had originally been convicted in family court, rather than circuit court.

**VIII. WHETHER A CHILD WHO CANNOT EVEN SIGN A BINDING LEGAL CONTRACT CAN EFFECTIVELY WAIVE HIS CONSTITUTIONAL RIGHTS, AND, IF NOT, WHETHER THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS THE CONFESSION UNDER THE PARTICULAR FACTS OF THIS CASE**

*Jackson v. Denno*, 378 U.S. 368 (1964) and its progeny require demonstrable proof that a waiver of Fifth Amendment rights and subsequent custodial confession must satisfy the long-standing test of waiver, *i.e.*, a “voluntary relinquishment” of a “known right.” The voluntariness of a statement depends on the “totality of the circumstances” surrounding the character and situation of the accused, which in turn depends on the suspect's age, education, and intelligence, *see Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); as well as a suspect's prior experience with law enforcement, *see Lynumn v. Illinois*, 372 U.S. 528, 534