APPENDIX 18

Excerpt from Initial Reply 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 INITIAL REPLY BRIEF

Henry J. Mims, Esq.
THE MIMS FIRM
100 East Poinsett Street
Greer, SC 29651
Telephone: 864-877-0463
Facsimile: 864-877-6980
Lead Counsel for Appellant

Arnold Anderson (Andy) Vickery, Esq.
Paul F. Waldner, Esq.
Fred H. Shepherd, III, Esq.
VICKERY & WALDNER, LLP
One Riverway Drive, Suite 1150
Houston, TX 77056-1920
Telephone: 713-526-1100
Facsimile: 713-523-5939
Counsel for Appellant

S. Creighton Waters, Esq.
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
Telephone: 803-734-6305
Facsimile: 803-734-4035
Counsel for Respondent

Table of Contents

Table of Authorities iv

I. PRESUMPTION OF INCAPACITY 1

A. The Court's Review Should Be Limited to the Prosecution's Case-in-Chief 1

B. This Court Should Hold that Expert Testimony is Required to Rebut the Presumption 1

C. There is No Lay Testimony or Circumstantial Evidence to Rebut the Presumption 2

II. SPEEDY TRIAL 3

A. The State of South Carolina Bears the Burden of Justifying Its Presumptively Prejudicial Delay 3

B. The Pre-Waiver Delays Are Unjustified 4

C. The Post-Waiver Delays Are Unjustified 4

D. The Prejudice is Apparent 4

III. THE NON-UNANIMOUS VERDICT 5

A. A Non-Unanimous Verdict is *Ipso Facto* Prejudicial 5

B. This Court Must Conduct a *de novo* Review to Satisfy the Requirements of Due Process 5

IV. JUROR MISCONDUCT 6

V. REMAND TO FAMILY COURT 7

A. The State Ignores the Constitution 7

B. No Review by the Circuit Court, and an "Abuse of Discretion" Review by this Court Would Violate Due Process 8

C. The Transfer in this Case Violates Due Process 9

VI. *COREY D* SHOULD BE OVERRULED 9

VII. EIGHTH AMENDMENT–EXCESSIVE PUNISHMENT 12

VIII. INVOLUNTARINESS OF CONFESSION 17

A. The Confession was Involuntary 17

B. The Error was Hardly Harmless 18

IX. MANSLAUGHTER INSTRUCTION 19

A. Errors in Refusing Both Voluntary and Involuntary Instructions were Preserved 19

B. An Involuntary Manslaughter Instruction was Raised by the Evidence and Requested by the Defense 20

C. A Voluntary Manslaughter Instruction was Also Raised by the Evidence and Requested by the Defense 22

X. INVOLUNTARY INTOXICATION 24

XI. EXCLUDED EVIDENCE–HARDLY "HARMLESS" 26

A. Evidence Regarding Other People's Experiences on Zoloft is Relevant 26

XII. CONCLUSION 27

Certificate of Service 29

- Because there are so few states that allow children under age fourteen to be tried as adults, the legislature would have certainly announced its intention to join this minority in explicit terms.[10] This Court's admonition to "construe a penal statute strictly against the State and in favor of the defendant" underscores this necessity.

With all due respect for this Court and for judicial precedent, *Corey D* is simply wrong and should be overruled. This simple recognition eliminates any need to engage in the much more complex constitutional analysis of whether trying a 12-year-old with no prior criminal history as an adult constitutes excessive punishment under the Eighth Amendment. This Court can and should reverse *Corey D,* and with it, Christopher Pittman's conviction and/or sentence.[11]

VII. EIGHTH AMENDMENT – EXCESSIVE PUNISHMENT

The State emphasizes that death penalty jurisprudence is different – which is certainly true. The jump from "different" to "irrelevant," however, is not tenable. Many of the principles that the U.S. Supreme Court discussed in *Roper v. Simmons*, 543 U.S. 551 (2005) apply to the Eighth Amendment issues in the case at bar. Of particular importance is the fact that Christopher Simmons was 17 years old – at the interface between adolescence and adulthood - at the time he committed his crime. Christopher Pittman, in contrast, was 12 years old – not yet at the interface of childhood and adolescence. The vast developmental difference in these five years more than bridges the difference between a death penalty case and a non-capital case for purposes of the Eighth Amendment analysis.

---

[10] Pittman of course asserts that the legislature did make its intention explicit by using "**the** child" in subsection (6).

[11] Depending on the Court's rulings on the other points of error, this one error might be remedied by modifying the sentence to the maximum permitted in Family Court.

The State takes a clever tack by avoiding the fact that only four state legislatures – Colorado, Indiana, New Hampshire and Vermont – expressly allow a minor less than fourteen years old to be tried as an adult for murder. *Juvenile Offenders and Victims: 2006 National Report,* Chapter 4, p. 112 (U.S. DOJ Office of Juvenile Justice and Delinquency Programs). It attempts to add the 23 jurisdictions that do not specify a minimum age for such a transfer, allowing it to conclude that "in some 27 jurisdictions it is statutorily possible for 12 year olds to face adult disposition of their charges."[12] State's Amended Brief at 63.

Using the State's logic it is "statutorily possible" for a five-year-old to be tried as an adult for murder in these 23 jurisdictions. While it might be "statutorily possible," it does not follow that it is constitutionally permissible.[13]

When making the constitutional determination, therefore, the Court must recognize that there is some age at which the Eighth Amendment <u>must</u> prohibit the trial of a child as an adult. *Cf. Roper*, 543 U.S. at 600 (O'Connor, J., dissenting)("Surely there is an age below which no offender, no matter what his crime, can be deemed to have the cognitive or emotional maturity necessary to warrant the death penalty.") Thus, the issue is not <u>whether</u> there is a line between a constitutional and an unconstitutional age for trial as an adult for murder, but <u>where</u> to draw it. *Accord, Roper*, 543 U.S. at 574 ("Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The

---

[12] One of these 23 jurisdictions is of course South Carolina. As Pittman has demonstrated in the "*Corey D*" section of his briefing, the South Carolina statute does specify a minimum age, and that minimum age is fourteen. *See* arguments in section V, *supra.*

[13] There is also the issue of what is permitted under the language of the statute versus how many children under the age of fourteen are actually tried as adults for murder, even when it is "statutorily possible." *See Roper,* 543 U.S. at 564 ("In the present case, too, even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent.").

qualities that distinguish juveniles from adults do not disappear when an individual turns 18. . . . For the reasons we have discussed, however, a line must be drawn.)

In seeking the proper place to draw the constitutional line, Pittman and the State can probably agree, for instance, that a 17-year-old charged with murder for which the State does not seek the death penalty can be tried as an adult with no constitutional ramifications. Hopefully, we could also agree that it would be unconstitutional to try a nine-year-old as an adult for murder in a non-capital case.[14]

Given the recent advances in brain imaging of adolescents, and the wealth of neurodevelopmental information new available to doctors and courts, Pittman asserts that no age younger than 14 could pass constitutional scrutiny under the current state of scientific knowledge (although continuing research seems likely to push the age higher). As Dr. Abigail Baird, one of the preeminent researchers in the field, writes:

> While estimates vary, pubertal onset generally occurs between the ages of 10 and 12 for girls, and between 13 and 15 for boys. Once a child is of reproductive age, they have entered adolescence, but are still far from adulthood.
>
> * * *
>
> Humans are not born with a moral sense. We are, however, given an innate capacity to develop one.
>
> * * *
>
> The next significant advance in development takes place during adolescence when abstract thought enables an individual to envision and anticipate situations that they have not directly experienced.

---

[14] No State expressly provides for the trial of a child younger than ten as an adult for murder. Vermont and Indiana facially allow the trial of a ten-year old as an adult. *Juvenile Offenders and Victims: 2006 National Report,* Chapter 4, p. 112 (U.S. DOJ Office of Juvenile Justice and Delinquency Programs).

* * *

> The third stage in this development heralds the emergence of abstract thought, and the recognition of internal visceral states in relation to thoughts and/or behaviors. . . . The fourth and final stage integrates self-perceptions with other perceptions permitting empathy for other individuals, both known and unknown. What awakens during this last stage is the sense of belonging to a larger society, an important requirement to engaging in socially-based moral reasoning. This sense of being a member of society will eventually enable the individual to act in accordance with their prescribed moral code. . . .

Baird, A.A., *Adolescent Moral Reasoning: The Integration of Emotion and Cognition* (publication manuscript).[15]

Moral judgment, which the criminal justice system evaluates, develops during the course of adolescence. Christopher Pittman had not started this development at the age of 12. Based on current scientific advances in understanding the adolescent brain, trying a 12-year-old – particularly one with no prior criminal history who is under the influence of a powerful, psychoactive drug – as an adult is simply beyond the bounds of acceptance in a civilized society.

Drawing a line at age 14 would also be consistent with South Carolina's traditional presumption of incapacity, discussed in Section I, *supra*, and with what Pittman respectfully suggests is the South Carolina legislature's intent in S.C. Code Ann. § 20-7-7605(6), discussed in Section V. Furthermore, as the Department of Justice has recognized, "Among states where statutes specify age limits for all transfer provisions, age 14 is the most common minimum age specified across provisions." *Juvenile Offenders and Victims: 2006 National*

---

[15] This manuscript is available at http://www.theteenbrain.com/about/publications /pdfs/2006-Baird-Morality.pdf. Dr. Baird researches extensively in the development of the teenage brain, and maintains www.theteenbrain.com.

Report, Chapter 4, p. 114.[16] This is, of course, the common law "age of consent," which has been adopted by courts and legislatures across the land for many purposes, including the right to marry, the right to contract, and the right to make a decision regarding abortion.

Pittman acknowledges that there have been cases that uphold the constitutionality of trying children younger than 14 as adults. None of these cases are informed by the recent advances in neuroscience, which are currently driving the "evolving standards of decency" with respect to understanding the development of the adolescent brain. *Roper*, 543 U.S. at 587 (Stevens, J., concurring)("Perhaps even more important than our specific holding today is our reaffirmation of the basic principle that informs the Court's interpretation of the Eighth Amendment. If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of seven-year-old children today. [citation omitted]. The evolving standards of decency that have driven our construction of this critically important part of the Bill of Rights foreclose any such reading of the Amendment.") Pittman reaffirms that trying a 12-year-old with no prior criminal history as

[16] In addition to doing a simple count of jurisdictions, trends are important to an Eighth Amendment analysis. *Roper*, 543 U.S. at 565-66. Although states aggressively expanded their transfer laws during the 1980's and 1990's, that expansion slowed considerably in recent years. *Juvenile Offenders and Victims: 2006 National Report,* Chapter 4, p. 113. Furthermore, the number of cases waived to adult courts has steadily declined since the mid-1990's. *Id.*, Chapter 7, pp. 186-87. These trends are relevant to the analysis of "national consensus." *See Roper*, 543 U.S. at 548 (O'Connor, J., dissenting)("Although the Court finds support for its decision in the fact that a majority of the States now disallow capital punishment of 17-year-old offenders, it refrains from asserting that its holding is compelled by a genuine national consensus. Indeed, the evidence before us fails to demonstrate conclusively that any such consensus has emerged in the brief period since we upheld the constitutionality of this practice in *Stanford v. Kentucky,* 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989). **Instead, the rule decreed by the Court rests, ultimately, on its independent moral judgment that death is a disproportionately severe punishment for any 17-year-old offender.") (emphasis added).**

an adult – even for murder – simply cannot pass constitutional muster based on what we, as a society, know today.

VIII. INVOLUNTARINESS OF CONFESSION

A. The Confession was Involuntary. The State argues that "there is no prohibition against a juvenile waiving his rights and giving a custodial statement." As is well established by South Carolina authority, a more accurate statement would have been, "a custodial statement of a minor is not *per se* inadmissible due to the fact that it was obtained in absence of counsel, parent or other friendly adult."

In its brief, the State cites *Jenkins v. State*, 265 S.C. 295 (1975). In that case, a custodial statement was taken from a 15-year-old without counsel, a parent or other friendly adult being present. The minor asked this Court to adopt a bright line rule that would make any inculpatory statement obtained from a minor without counsel, a parent or other friendly adult being present inadmissible *per se*, regardless of the circumstances surrounding the making of the statement. The Court declined to adopt such a rule. Instead, it recognized the "totality of circumstances" test set out in *Haley v. Ohio,* 332 U.S. 596 (1948). *See In re Gault*, 387 U.S. 1 (1967). In determining the voluntariness—and therefore the admissibility—of the statement, the age of the minor is indeed considered, along with his intelligence, education, experience and ability to comprehend the meaning and effect of his statement.

How "experienced" was Christopher Pittman when he gave his "voluntary" statement? He wasn't even a teenager at the time of the offense and had no contact whatever with the criminal justice system. How intelligent was he? Dr. Lanette Atkins—who had spent more time with Christopher than any other professional who testified—stated that his academic work was below average (December 2, 2004 Transcript [hereinafter "12/2 Tr." at