STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Oconee County

J. Cordell Maddox, Circuit Court Judge

Opinion No. 2017-UP-237 (S.C. Ct. App. filed June 7, 2017)

2013-GS-37-01039

THE STATE,

RESPONDENT,

V.

SHANE ADAM BURDETTE,

PETITIONER

APPELLATE CASE NO 2017-001990

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on August 28, 2017. App. 27.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in affirming the trial judge's ruling to permit the state to introduce multiple statements made by Petitioner during custodial interrogation where the Court's conclusion that a subsequent reading of Miranda warnings cured the taint of the initial officer's advisement that the rights "did not mean anything" contravenes federal and state law?

II. Did the Court of Appeals err in affirming the trial judge's ruling concerning the admissibility of Petitioner's statements to law enforcement by parsing the circumstances in order to consider them individually, instead of in totality, in contravention of federal and state law, and proper consideration of the totality of the circumstances requires suppression?

III. Did the Court of Appeals err in affirming the trial judge's decision to allow the introduction of statements given by Petitioner during custodial interrogation where the police requested Appellant sign his statement after he requested counsel in violation of the Fifth and Fourteenth Amendments to the Constitution?

IV. Did the Court of Appeals err in concluding Petitioner "suffered no prejudice" from the undisputed erroneous jury charge regarding inference of malice from the use of a deadly weapon based upon the charge as a whole, the erroneous language being charged twice, the evidence supporting the defense of accident, and the heightened risk of a compromise verdict based upon the erroneous charge?

STATEMENT OF THE CASE

On the morning of July 9, 2013, Officer John Towery arrived at the scene of a shooting in rural Oconee County. R. 2, ll. 17-20. Towery encountered Petitioner and advised him of his rights pursuant to Miranda v. Arizona, 384 U.S. 426 (1966). R. 3, ll. 8-11. To do so, Towery used a form provided by the Sheriff's Office. R. 3, ll. 12-19; R. 478. Towery "put [Petitioner] in the back [of his] patrol car." R. 4, l. 14.

Custodial interrogation

While advising Petitioner of his rights, Towery said, "**This does not mean anything, it's just somethin' the law [says] we gotta do.**" R. 9, ll. 8-11 (emphasis added). When asked if he "took away all the meaning of the rights advisements" by saying "it doesn't mean anything," Towery responded, "It coulda been." R. 9, ll. 12-15.

When Towery and Petitioner interacted around 7:30 a.m. on July 9, 2013, Towery noticed Petitioner appeared to be under the influence of drugs and alcohol. R. 6, ll. 8-10; R. 8, l. 23. Petitioner was shouting, his speech was "very rushed," and he appeared to be having a "very high-type [of] experience." R. 6, ll. 10-12. Also, Petitioner was slurring his words. R. 6, ll. 19-20. Towery said Petitioner "didn't really understand what he was talkin' [about]." R. 6, l. 13. Towery recalled Petitioner was "just runnin' on and on about, you know, he didn't mean to do it that that, you know, that that he did not mean to do [it]." R. 6, ll. 22-24. Sergeant Justin Ward arrived on the scene around 8:20 a.m. R. 47, ll. 5-7. He described Petitioner as appearing "very, uh excited, and uh, uh, outta sorts." R. 48, ll. 1-2.

Written statement #1

Investigator Amanda Tinsley arrived on the scene around 8:30 a.m. while Petitioner was in Towery's patrol car. R. 11, ll. 17-22. Tinsley advised Petitioner of his rights, beginning at 9:46

a.m. and ending at 9:48 a.m. R. 12, ll. 1-13; R. 479. Tinsley then interrogated Petitioner regarding his involvement in the shooting death of the deceased. R. 14, l. 18 – R. 18, l. 18. Thereafter, Tinsley asked Petitioner to provide a written statement. R. 18, ll. 19-21; R. 482. This statement was concluded at 1:47 p.m. with Petitioner having been transported to the Sheriff's Department and placed in a locked interrogation room. R. 23, ll. 1-2; R. 59, l. 21 – R. 60, l. 4.

Invocation of right to counsel

Near the end of the interrogation culminating in Petitioner's first written statement, the police asked Petitioner to take a polygraph. R. 49, l. 24 – R. 50, l. 1; R. 482-483. Petitioner responded that he wanted a lawyer. R. 24, ll. 8-15. Despite Tinsley's claim that the police stopped talking to Petitioner "[a]t that point in time," Ward was clear that *after* Petitioner requested an attorney, Ward asked him to sign the statement he had prepared and swear to it. R. 24, ll. 16-18; R. 50, ll. 2-7. Only when the police had the signed statement did the interrogation cease per Petitioner's request for the presence of counsel. R. 50, ll. 8-10.

Written statement #2

Tinsley claimed Petitioner re-initiated the interrogation at approximately 5:45 p.m. by turning off the light and banging on the table or wall in the locked interrogation room. R. 25, ll. 4-6. Tinsley further claimed Petitioner said he wanted to add information to his statement. R. 25, ll. 7-9. Tinsley advised Petitioner of his rights again. R. 25, ll. 14-25; R. 480. Petitioner then provided oral and written statements to law enforcement. R. 25, l. 22 – R. 27, l. 21; R. 484-485. Tinsley took notes during this interrogation, which she requested Petitioner sign prior to requesting Petitioner provide a written statement. R. 30, ll. 13-20; R. 43, ll. 23-24; R. 488-490. Petitioner's second written statement concluded at 7:54 p.m. R. 29, ll. 10-11. Tinsley also asked Petitioner to use a diagram during this interrogation. R. 29, ll. 16-21; R. 491.

After Petitioner provided the written statement, the police confronted him with information they claimed contradicted his story. R. 32, ll. 1-11. Petitioner told the officers he was tired and wanted to sleep. R. 32, ll. 15-20. Tinsley placed Petitioner under arrest for murder and transported him to the detention center. R. 32, ll. 21-23.

Written statement #3

The following day around lunch time, the officers resumed the interrogation of Petitioner. R. 32, l. 24 – R. 33, l. 16. Tinsley warned Petitioner of his rights again. R. 33, l. 21-25; R. 481. In addition to giving an oral statement, Petitioner provided a third written statement. R. 34, ll. 13-14; R. 486-487.

The trial

On October 28, 2013, an Oconee County grand jury indicted Petitioner for murder and possession of a weapon during the commission of a violent crime in a single indictment (2013-GS-37-1039). R. 492-493. The state, represented by David Wagner, Jr., called the case for trial before the Honorable J. Cordell Maddox, Jr., and a jury on February 23, 2015. R. 1. W. Wilson Burr represented Petitioner. R. 1.

Motion to suppress statements

In light of the state's desire to rely upon Petitioner's statements to law enforcement, the judge convened a hearing to determine the voluntariness of those statements. At the close of the hearing, defense counsel argued Petitioner's statements should be excluded based on Towery telling Petitioner "the warnings he was about to give him did not mean anything" and Towery's observation that Petitioner "appeared to be intoxicated." R. 61, ll. 15-19. Defense counsel argued the errors in the initial Miranda warnings tainted all subsequent interrogations. R. 61, ll. 19-21. The trial judge ruled that anything Petitioner said to Towery was excluded because "you can't tell

somebody this doesn't really matter." R. 63, ll. 7-10. However, the judge ruled Petitioner's subsequent statements to law enforcement were admissible because new Miranda warnings were given. R. 64, ll. 7-12.

Defense counsel argued Petitioner's statements to police should be excluded because he requested counsel and this request was not honored as evident by Ward's request that he sign the statement despite his clear and unequivocal request for a lawyer. R. 61, ll. 19-24; R. 118, ll. 7-8. Despite the objection, the trial judge permitted the state to use the statements during the course of the trial. R. 64, ll. 7-12. According to the judge it was "more of a factual issue." R. 65, ll. 24-25.

Charge conference

During the charge conference, the trial judge indicated he was going to charge murder, voluntary manslaughter, involuntary manslaughter, and accident. R. 406, ll. 16-17; R. 406, l. 20. The state responded, "I'm fine with those four choices." R. 407, l. 5.

After reviewing the printed version of the judge's intended instructions, defense counsel objected to the malice instruction. Specifically, counsel objected to charging the jury that "[i]nferred malice may also arise when the deed is done with a deadly weapon." R. 408, ll. 4-14. Defense counsel noted evidence had been presented to excuse or mitigate the offense, and that by allowing the jury to infer malice from the use of a deadly weapon, the judge was permitting the jury to make an improper conclusion. R. 408, ll. 21-23. The judge agreed "there's been evidence potentially that could reduce or mitigate," but noted "[t]here's also been evidence that they did not." R. 409, ll. 16-18. The judge expressed his thought that this was a "factual" issue for the jury to

decide. R. 409, l. 25 – R. 410, l. 2. Thus, the judge concluded the charge regarding inferred malice was proper in the instant case. R. 409, ll. 18-20.[1]

Jury instructions & deliberations

When instructing the jury regarding murder, the judge defined malice as "hatred, ill will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will ... infer an evil threat or intent." R. 453, ll. 8-13. Further, he instructed the jury that "[m]alice aforethought may be expressed or inferred." R. 453, l. 20. After explaining "[e]xpress malice," the judge told the jury that "[m]alice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon." R. 453, ll. 8-10. He then defined a deadly weapon for the jury. R. 454, ll. 11-21.

After deliberating for about one hour, the jury requested "a better understanding between voluntary and involuntary." R. 466, ll. 21-24. The jury also requested additional instruction on murder. R. 467, l. 3. Thereafter, the judge instructed the jury on the three charges using most of the

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[1] In discussing the proposed jury charge, the judge and defense counsel referred to a "footnote" on the printed proposed instructions. R. 409, l. 8. The judge explained the footnote stated, in part, that "'[w]here evidence is presented that will reduce, mitigate, excuse, or justify.'" R. 409, ll. 11-13. The judge stated "that should not have been in there. That was a note to me." R. 409, ll. 13-14. Later, the judge said that was "a private note to me that was printed." R. 409, ll. 20-21. It appears the judge was using the proposed jury instructions from the benchbook and had included within his printed version, the **caution** contained in the proposed instructions regarding this very issue. Petitioner notes that jury instructions within the judges' 2015 benchbook contained a "caution" regarding State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). After stating that "[i]nferred malice may also arise when the deed is done with a deadly weapon," the instructions explained Belcher held "[w]here evidence is presented that would reduce, mitigate, excuse, or justify a homicide or assault and battery with intent to kill caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon." See http://www.judicial.state.sc.us/juryCharges/GSInstructions.2015.pdf (last visited November 11, 2015).

same language of his earlier charge. R. 468, l. 1 – R. 472, l. 7. Included within the re-instruction was the language that permitted the jury to infer malice from the use of a deadly weapon. R. 469, ll. 5-6.

Verdict & sentencing

The jury found Petitioner guilty of the lesser-included offense of voluntary manslaughter. R. 473, ll. 19-21. The jury also found Petitioner guilty of possession of a weapon during the commission of a violent crime. R. 473, l. 22 – R. 474, l. 1. Judge Maddox sentenced Petitioner to twenty-five years' imprisonment suspended upon the service of fifteen years' imprisonment and probation for five years. R. 477, ll. 11-15; R. 494. On the weapon charge, Judge Maddox sentenced Petitioner to five years' imprisonment to be served consecutively with the sentence for involuntary manslaughter. R. 477, ll. 20-24; R. 495.[2]

Direct appeal

Petitioner served his notice of appeal on March 3, 2015. After briefing and argument, the Court of Appeals affirmed Petitioner's convictions and sentences. State v. Burdette, 2017-UP-237 (S.C. Ct. App. filed June 7, 2017); App. 1-5. On June 22, 2017, Petitioner filed a petition for rehearing. App. 6-26. The Court denied the petition on August 28, 2017. App. 27. Petitioner now files this petition for writ of certiorari asking this Court to review the decision of the Court of Appeals.

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[2] The trial judge explained he was sentencing Petitioner to a term of five years' imprisonment to be served *consecutively* to the other sentence based upon his understanding that the sentence *must* be served consecutively. R. 475, ll. 8-9; R. 476, ll. 13-15; R. 477, ll. 5-7. Pursuant to statute, a person who was in possession of a firearm during the commission of a violent crime "must be imprisoned five years, in addition to the punishment for the principal crime." S.C. Code Ann. § 16-23-490(A). "The court may impose this mandatory five-year sentence to run consecutively or concurrently." S.C. Code Ann. § 16-23-490(B). See also, Major v. South Carolina Dept. of Probation, Parole, and Pardon Services, 384 S.C. 457, 465-466, 682 S.E.2d 795, 799-800 (2009). Thus, the trial judge sentenced Petitioner to a consecutive term of years based upon a mistake of law. Trial counsel did not object, and the Court of Appeals found this issue unpreserved. App. 5.

ARGUMENT

Reasons to grant certiorari

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. The decision by the Court of Appeals concerning the admissibility of Petitioner's statements to law enforcement is in conflict with prior decisions of this Court and the United States Supreme Court. See Rule 242(b)(3) & (5), SCACR. The first, second, and third issues concern the admissibility of Petitioner's statements to law enforcement; thus, substantial constitutional issues are directly involved. See Rule 242(b)(4), SCACR. The fourth issue concerns improper burden shifting during the jury instructions in violation of the state and federal constitutions. See Rule 242(b)(4), SCACR. This Court should grant certiorari to review the decision by the Court of Appeals in light of the decision's conflict with the prior decisions of this Court and the Supreme Court and the substantial constitutional issues involved.

I. The Court of Appeals erred in affirming the trial judge's ruling to permit the state to introduce multiple statements made by Petitioner during custodial interrogation because the Court's conclusion that a subsequent reading of *Miranda* warnings cured the taint of the initial officer's advisement that the rights "did not mean anything" contravenes federal and state law.

When the Court of Appeals determined that "the subsequent readings of the Miranda warnings and [Petitioner]'s waivers cured any taint," the Court of Appeals rendered a decision contrary to decisions issued by the United States Supreme Court and this Court.

In 1966, the United State Supreme Court issued its landmark decision Miranda v. Arizona, 384 U.S. 436 (1966). As explained by the Court in Duckworth v. Eagan, 492 U.S. 195, 201 (1989), Miranda established "certain procedural safeguards that require police to advise criminal suspects of

their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation." In Miranda, the Court delineated four specific warnings: "(1) the right to remain silent; (2) that anything he says can be used against him in a court of law; (3) that he has the right to the presence of an attorney, and (4) that if he cannot afford an attorney one will be appointed for him prior to any questioning if he wants." Miranda, 384 U.S. at 479. Concerned that the circumstances surrounding a custodial interrogation can quickly overbear one's will, the Court held advising an individual of his right to consult with a lawyer and to have the lawyer present during interrogation was "an absolute prerequisite to interrogation." Id. at 471.

It was undisputed that the first officer on the scene, John Towery, advised Petitioner of his rights, but also said, "**This does not mean anything, it's just somethin' the law [says] we gotta do.**" R. 9, ll. 8-11 (emphasis added). When asked if he "took away all the meaning of the rights advisements" by saying "it doesn't mean anything," Towery responded, "It coulda been." R. 9, ll. 12-15. The officers' provisions of Miranda warnings *subsequent* to Towery's cavalier admonition that the warnings did "not mean anything" were tainted by Towery's improper and coercive conduct, and that taint was not removed by the subsequent provision of warnings. Two cases illustrate this point – Seibert and Navy.

In Missouri v. Seibert, 542 U.S. 600 (2004), the United States Supreme Court confronted a case very similar to the one presented in the instant matter. An officer questioned Seibert without giving her Miranda warnings. After obtaining some information from Seibert, the officer took a short break. Id. at 604-605. The officer then turned on a tape recorder and gave Seibert the Miranda warnings. He also obtained a written waiver of those rights from her. The officer resumed questioning of Seibert, ultimately obtaining a confession. Id. at 605. The Court explained "[t]he object of question-first is to render Miranda warnings ineffective by waiting for a particularly

opportune time to give them, after the suspect has already confessed." Id. at 611. The "threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as Miranda requires." Id. at 611-612. The Court held "when Miranda warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." Id. at 613-614 (internal quotation omitted). Thus, "these circumstances must be seen as challenging the comprehensibility and efficacy of the Miranda warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk." Id. at 617.

This Court confronted this issue in State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010). After the death of Navy's son, officers interrogated him regarding the child's death. Thereafter, Navy gave a statement in which he described noticing the child having breathing problems and his ensuing panic. Id. at 297-298, 688 S.E.2d at 839. Afterwards, officers informed Navy that the child had suffocated and that there was evidence of broken ribs. Navy inquired if he was under arrest and was told he was not. The officers then engaged in follow-up questioning. "At this juncture, the nature of the interrogation and [Navy]'s status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation." In this first statement, Navy admitted to popping the child on the back and possibly patting the child on the mouth. Id. at 298-299, 688 S.E.2d at 840.

Officers then advised Navy of his Miranda warnings. Thereafter, Navy gave his second statement, this time in writing. The statement mirrored the first except Navy admitted to placing his hand over the child's mouth to stop the crying multiple times, including possibly covering the nose

area as well, popping the child on the back causing the child to cry out real loud, and feeling frustrated because the child was crying. Id. at 299-300, 688 S.E.2d at 840.

Officers contacted the pathologist who stated the description provided by Navy in his second statement could not have caused the child's death. In response to this information, officers obtained a third written statement from Navy. Navy then admitted that he could have held his hand over the child's nose and mouth for longer than he first said, perhaps a minute or two. Id. at 300, 688 S.E.2d at 840-841.

This Court held the first statement was admissible because the record contained evidence to support the trial judge's finding that Navy was not in custody. According to this Court, it was "debatable whether a reasonable person would have believed himself to be in custody at the time the first statement was given." Id. at 301, 688 S.E.2d 841.

However, the second and third statements were inadmissible as they were obtained in violation of the rule announced in Seibert. Courts examine four factors to determine whether a constitutional violation occurred in this setting, including (1) the completeness and detail of the questions and answers in the first interrogation; (2) the timing and setting of the first and second interrogations; (3) the continuity of police personnel; and (4) the degree to which the interrogator's questions treated the second round as continuous with the first. Navy, 386 S.C. at 302, 688 S.E.2d at 841-842.

This Court found the officers initiated the questioning with the knowledge of the cause of death and with the intention of eliciting a confession. After obtaining Navy's first statement, officers introduced the suffocation and healing rib information to Navy. Then, officers "began an unwarned custodial interrogation designed to elicit incriminating information." After receiving those incriminating statements, officers permitted Navy a break, and then gave him his Miranda

warnings. The interrogation resumed with the same officers immediately. The officers made no attempt to cure by warning Navy that his statement made prior to the administration of the warnings may not be admissible or by providing a substantial break in time or change in circumstances. This Court found all four Seibert factors met. Navy, 386 S.C. at 303, 688 S.E.2d at 842.

As explained by the United States Supreme Court and this Court, provision of complete and accurate Miranda warnings *cannot remove the taint from the prior improper police conduct.* Although Towery read Petitioner his rights, he did so while telling Petitioner the rights were *meaningless.*[3] Towery's statement went beyond what happened in Navy and Seibert where there

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[3] See Doody v. Ryan, 649 F.2d 986, 1004-1005 (9th Cir. 2011)(explaining that an officer telling a suspect that the Miranda warnings were for the mutual benefit of the suspect and the officers was confusing and a "misstatement of the purpose of" the warnings, which carried "drastically different connotation than" "a straight-forward explanation that the warnings were given for [the suspect]'s protection, to preserve valuable constitutional rights"); Hopkins v. Cockrell, 325 F.3d 579, 586 (5th Cir. 2003)(explaining "[a]n officer cannot read the defendant his Miranda warnings and then turn around and tell him that despite those warnings, what the defendant tells the officer will be confidential and still use the resultant confession against the defendant"); United States v. Beale, 921 F.2d 1412, 1435 (11th Cir. 1991)(explaining an officer telling a suspect that signing the waiver would not hurt him contradicted the Miranda warning that the suspect's statements could be used against him in court); People v. Musselwhite, 954 P.2d 475, 487 (Cal. 1998)(agreeing "with the proposition that evidence of police efforts to trivialize the rights accorded suspects by the Miranda decision – by 'playing down,' for example, or minimizing their legal significance – may under some circumstances suggest a species of prohibited trickery and weighs against a finding that the suspect's waiver was knowing, informed, and intelligent"); Ross v. State, 45 So.3d 403, 429 (Fla. 2010)(explaining that when an officer referred to the Miranda warnings as a "matter of procedure" during his questioning of a suspect, the officer "conveyed the clear impression that the warnings were merely a bureaucratic formality" and "de-emphasized the significance" of the warnings); Spence v. State, 642 S.E.2d 856, 858 (Ga. 2007)(holding a statement inadmissible where law enforcement told the defendant the statement was "confidential"); Lee v. State, 12 A.3d 1238, 1251 (Md. 2011)(holding an officer's assurance of confidentiality made mid-way through the interrogation directly contradicted the earlier Miranda warnings and rendered the defendant's prior Miranda waiver ineffective for all purposes); State v. Pillar, 820 A.2d 1, 11-12 (N.J. Super. Ct. App. Div. 2003)(holding "[a] police officer cannot directly contradict, out of one side of his mouth, the Miranda warnings just given out of the other" and an officer agreeing to hear an "off-the-record" statement from a suspect "totally undermine[d] and eviscerate[d] the Miranda warnings); People v. Dunbar, 23 N.E.3d 946, 947-948 (N.Y. 2014)(finding a "preamble" to Miranda warnings explain this was the only opportunity for the suspects to tell their stories "undermined the subsequently-communicated Miranda warnings); Commonwealth v. Gibbs, 553 A.2d 409, 411 (Penn.

was *no* advisement of rights at all. Rather, Towery's statement *affirmatively* and *authoritatively* removed any power from the rights. Towery was quite prophetic in his statement that the advisement of rights did not mean anything – the officers' subsequent conduct bore this out. "[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." Miranda, 384 U.S. at 476. Contrary to the holding of the Court of Appeals, the taint could not be removed by subsequent advisement of rights to Petitioner over the course of a twelve-hour marathon interrogation that ceased only when Petitioner requested rest.

1989)(explaining "[m]isleading statements and promises by the police choke off the legal process at the very moment which Miranda was designed to protect" and, therefore, "[t]he process of rendering Miranda warnings should proceed freely without any intruding frustration by the police" because "if the initial employment of Miranda is exploited illegally, succeeding inculpatory declarations are compromised"); State v. Stanga, 617 N.W. 486, 490-491 (S.D. 2000)(finding an officer's comments assuring confidentiality "nullified the Miranda warnings" and explaining the "warnings would be senseless if interrogating officers can deceive suspects into believing their admissions will not go beyond the interrogation room).

II. The Court of Appeals erroneously affirmed the trial judge's ruling concerning the admissibility of Petitioner's statements to law enforcement by parsing the circumstances in order to consider them individually, instead of in totality, in contravention of federal and state law, and proper consideration of the totality of the circumstances requires suppression.

On appeal, Petitioner challenged the trial judge's ruling permitting the state to introduce multiple statements he made while in custodial interrogation. Specifically, Petitioner argued the statements were inadmissible based on the totality of the circumstances, including (1) the first officer, who advised him of his rights, informing Petitioner the rights did *not* mean anything, (2) Petitioner's intoxication, (3) the length of the interrogation, and (4) the officers' failure to honor his request for counsel. The Court of Appeals erroneously affirmed the trial judge's ruling by parsing the circumstances in order to consider them individually instead of in totality in contravention of federal and state law.

Although the Court of Appeals agreed that the length of interrogation[4] and Petitioner's intoxication[5] were factors to consider in determining if the statements were voluntarily made, the

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[4] Petitioner was interrogated for well over twelve hours. He first encountered Towery around 7 a.m. He was in police custody continuously from that point forward. He was finally placed into the detention after he told the officers he was tired, which occurred sometime after the conclusion of his final written statement of that day – 7:54 p.m. R. 484. While it is true the interrogation was not continuous, his detention certainly was. The interrogation continued the following day when law enforcement removed Petitioner from the jail and re-initiated contact.

[5] A defendant's level of intoxication is a factor to consider when determining whether a defendant waived his rights in a knowing and voluntary manner. See State v. Young, 875 P.2d 1119, 1122 (N.M. Ct. App. 1994). However, in some cases, intoxication *alone* may result in an involuntary and unknowing waiver. See e.g., State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973)(holding when the level intoxication was "such that [the accussed] did not realize what he was saying," then the statement is not voluntary); Gladden v. Unsworth, 396 F.2d 373, 380-381 (9th Cir. 1968)(explaining that "[i]f by reason of ... use of drugs or extreme intoxication, the confession could not be said to be the product of a rational intellect and a free will, ..., it is not admissible"); Logner v. State, 260 F.Supp. 970, 975-976 (M.D.N.C. 1966)(holding a confession inadmissible where the defendant "was under the influence of alcohol and drugs to such an extent as

Court did "not find *either* rendered the statements involuntary." App. 3 (emphasis added). Based on this wording, the Court considered those factors independently. Further, the Court considered those factors independent of the taint of Towery's statement that the Miranda warnings did not mean anything. Finally, the Court "further" found the request for Petitioner to sign his statement after he invoked his right to counsel did not render his statement involuntary. App. 3. Thus, this factor was considered independently as well. The Court of Appeals erred in considering the factors individually; the law requires the factors be considered in totality. Proper consideration of the facts and circumstances in this case require suppression of Petitioner's statements to law enforcement.

In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court held that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 426 (1966). State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007).

In South Carolina, a court must examine the totality of the circumstances surrounding the custodial statement. The examining court must answer the question: did totality of the circumstances surrounding the custodial statement defeat the defendant's will? State v. Moses, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010).

> Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention;

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to affect his judgment" because "[a] person who has lost control of his mental faculties is incapable of making an admissible confession").

> police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted). The Court of Appeals erred in deciding this case in direct contravention to controlling state and federal law, which requires consideration of the totality of the circumstances surrounding the custodial statements.

Proper consideration of the totality of the circumstances in the present case requires exclusion of Petitioner's statements to law enforcement. Towery's statement that the rights did not mean anything completely nullified his advisement of rights. Towery's statement runs counter to the very purpose of providing the rights and the Constitutional requirement that individuals be advised of their rights. Petitioner was interrogated for over twelve hours, allowed rest, and the interrogation continued the following day. At least two of Petitioner's interrogators admitted he appeared to be under the influence, stating that Petitioner was "outta sorts" and did not understand what he was saying. Finally, the officers failed to honor Petitioner's request for counsel near the end of the first interrogation.[6] This was a clear indication to Petitioner that Towery was absolutely correct and the advisement of rights really did "not mean anything." The totality of these circumstances requires exclusion of Petitioner's statements to law enforcement.

[6] This fact is raised as a separate issue, where it is discussed in greater detail. Nevertheless, the officers' failure to honor Petitioner's request for counsel is a factor to consider in determining whether his statements to police were voluntary.

III. The Court of Appeals erred in affirming the trial judge's decision to allow the introduction of statements given by Petitioner during custodial interrogation where the police requested Appellant sign his statement after he requested counsel in violation of the Fifth and Fourteenth Amendments to the Constitution.

On appeal, Petitioner challenged the trial judge's decision permitting the introduction of a statement given by Petitioner during custodial interrogation where the police requested Petitioner sign his statement *after* he requested counsel because the officers' conduct violated Petitioner's rights pursuant to the Fifth and Fourteenth Amendments to the Constitution. Offering no analysis, the Court of Appeals held "the request for [Petitioner] to sign his statement after he invoked his right to counsel did not render that statement or subsequent statements involuntary." App. 3. To arrive at such a conclusion, the Court of Appeals ignored long-standing case law from this Court and the United States Supreme Court.

"[T]he right to have counsel present at [an] interrogation is indispensable to the protection of the Fifth Amendment privilege." Miranda, 384 U.S. at 469. This right to counsel includes "not merely a right to consult with counsel prior to questioning, but to have counsel present during any questioning." Id. at 470. According to the Supreme Court, a defendant may waive his rights. Id. at 444.

> If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

Id. at 444-445. The Fifth Amendment guarantees the right to speak with counsel upon request in a custodial setting. U.S. Const. Amend. V; Edwards v. Arizona, 451 U.S. 477 (1981). If a

suspect invokes his right to counsel, police interrogation ***must*** cease unless the suspect himself initiates further communication with police. Edwards v. Arizona, 451 U.S. 477 (1981); see also Davis v. United States, 512 U.S. 452, 458 (1994).

The Supreme Court "set forth a 'bright-line rule' that *all* questioning must cease after an accused requests counsel." Smith v. Illinois, 469 U.S. 91, 98 (1984)(citing Solem v. Stumes, 465 U.S. 638, 646 (1984))(emphasis in original). The purpose of the prohibition is to eliminate "explicit or subtle, deliberate or unintentional" conduct by police that "might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." Id. (citing Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983); Fare v. Michael C. 442 U.S. 707, 719(1979)). "Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease." Smith, 469 U.S. at 98. "[A]n accused's subsequent statements are relevant only to the question whether the accused waived the right he had invoked." Id. The fact that Petitioner signed the statement cannot be used to determine that he waived his earlier unambiguous invocation. See Edwards, 451 U.S. at 484 (holding a valid waiver "cannot be established by showing only that [the accused] responded to further police-initiated custodial interrogation").

It simply cannot be denied in this case that Petitioner invoked his right to counsel and the police failed to cease all interrogation by asking Petitioner to sign the written statement. Petitioner was entitled to consult with counsel at any time during the interrogation, including what the police perceived to be nearing the end – the signing of the statement. In fact, a suspect signing a written statement may be the most important part of an interrogation from a police perspective due to the talismanic significance of a signature. There was no suggestion, or even argument, that Petitioner's request for counsel was anything but clear and unambiguous. The police knew Petitioner sought

legal advice, but instead of honoring that request, as the officers knew they were required to do pursuant to the United States Constitution, the officers continued the interrogation by asking Petitioner to sign the statement. As a result, Petitioner's statements to police should have been excluded from consideration by the jury.

IV. The Court of Appeals erred in concluding Petitioner "suffered no prejudice" from the undisputed erroneous jury charge regarding inference of malice from the use of a deadly weapon based upon the charge as a whole, the erroneous language being charged twice, the evidence supporting the defense of accident, and the heightened risk of a compromise verdict based upon the erroneous charge.

Although the Court of Appeals held the trial judge erred by instructing the jury that malice may be inferred from the use of a deadly weapon because evidence was presented tending to reduce, mitigate, excuse, or justify the homicide, the Court held Petitioner "suffered no prejudice" from the erroneous charge. App. 4-5. According to the Court, "the erroneous charge could not have contributed to the jury's verdict of the lesser-included offense, voluntary manslaughter." App. 5. The Court of Appeals erred as its decision failed to consider whether the erroneous jury instruction was harmless in light of the overall instructions given, the erroneous language being charged twice, Petitioner's assertion of the defense of accident, and the increased risk of a compromise verdict in this case.

In State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803-804 (2009), this Court overruled prior law and held "that a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide." This Court concluded "that instructing a jury that 'malice may be inferred by the use of a deadly weapon' [was] confusing and prejudicial where evidence [was] presented that would reduce, mitigate, excuse or justify the homicide. A jury charge [was] no place for purposeful ambiguity." Id. at 611, 685 S.E.2d at 809. In light of the evidence of self-defense presented at Belcher's trial and it was "conceivable that the only evidence of malice was Belcher's use of a handgun," this Court held the permissive

inference charge was not harmless error and Belcher was entitled to a new trial. Id. at 612, 685 S.E.2d at 810. Specifically, this Court stated the prejudice resulting from the charge was "highlight[ed]" because evidence of self-defense was presented. Id.

In the present case, when instructing the jury regarding murder, the judge explained the state must prove malice. The judge defined malice as "hatred, ill will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will ... infer an evil threat or intent." R. 453, ll. 8-13. Further, he instructed the jury that "[m]alice aforethought may be expressed or inferred." R. 453, l. 20. After explaining "[e]xpress malice," the judge told the jury that "[m]alice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon." R. 453, ll. 8-10.

The judge then told the jury: "You are going to have to choose between murder and voluntary manslaughter and involuntary manslaughter." R. 454, ll. 22-24. He reiterated this limited number of choices: "So there are going to be *three* choices that you have to make a determination." R. 454, ll. 24-25 (emphasis added). Twice, he failed to mention the fourth choice – not guilty.

Next, the judge instructed the jury that if the jury determined the state failed to prove Petitioner committed murder, then the next step would be consideration of voluntary manslaughter. R. 455, ll. 1-7. The judge explained that voluntary manslaughter was "**included** within the offense of murder as a lesser charge." R. 455, ll. 6-7 (emphasis added). The trial judge told the jurors that "[t]o prove voluntary manslaughter, the state must prove beyond a reasonable doubt that the defendant took the life of another in the sudden heat of passion based on sufficient legal provocation." R. 455, ll. 8-11. He defined those terms, but he **never** told the jury that malice was **not** an element of voluntary manslaughter. Instead, his instruction specifically omitted this fact.

Finally, the judge told the jurors they had "the option of dealing with involuntary manslaughter," which the judge stated "again" was "a lesser included offense." R. 456, ll. 22-24. He told the jurors that involuntary manslaughter was "a lesser included charge of voluntary." R. 457, ll. 4-5. Immediately thereafter, he defined involuntary manslaughter, explaining that it was a killing "**without** malice." R. 457, ll. 6-13 (emphasis added). The phrase "without malice" appeared ***twice*** in his instruction on involuntary manslaughter. R. 457, ll. 6-13.

Additionally, Petitioner's defense to the murder charge was accident. Recognizing the evidence presented supported the instruction, the judge informed the jury that Petitioner had "raised the defense of accident." R. 459, ll. 18-19. The judge instructed the jury that "[a]n act may be excused on the ground of accident if it is shown that the act was unintentional, that the defendant was acting lawfully and that reasonable care was used by the defendant in the handling of the weapon." R. 459, ll. 19-23.

After deliberating for about one hour, the jury requested "a better understanding between voluntary and involuntary." R. 466, ll. 21-24. The jury also requested additional instruction on murder. R. 467, l. 3. Thereafter, the judge instructed the jury on the three offenses using most of the same language of his earlier charge. R. 468, l. 1 – R. 472, l. 7. Included within the re-instruction was the language that permitted the jury to infer malice from the use of a deadly weapon. R. 469, ll. 5-6. The re-instruction also included the language that voluntary manslaughter was "included" within murder as a "lesser offense." R. 469, ll. 13-15. Although defining voluntary manslaughter to include the sudden heat of passion and sufficient legal provocation, the judge did **not** inform the jury that voluntary manslaughter was the killing of another without malice. R. 469, ll. 16-22. Just as the judge did previously, he instructed the jurors that involuntary manslaughter was the killing of another without malice. R. 471, ll. 3-11.

In ruling that the trial judge's erroneous jury instruction permitting malice to be inferred from the use of a deadly weapon was harmless beyond a reasonable doubt solely because Petitioner was convicted of voluntary manslaughter, the Court of Appeals failed to consider the actual language charged to the jury, the erroneous language being charged twice, the evidence supporting the defense of accident, and the heightened risk of a compromise verdict based upon the erroneous charge. The jury instruction regarding voluntary manslaughter informed the jurors that voluntary manslaughter was a "lesser-included" offense of murder, but did not inform the jurors that it was a killing without malice. Juxtaposing the judge's instruction on voluntary manslaughter with the instruction on involuntary manslaughter – a "lesser-included" offense involving a killing without malice – evidences just how harmful the instruction was. At a minimum, the state has not proven beyond a reasonable doubt that the erroneous jury charge did not contribute to the verdict.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of October, 2017.

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Oconee County
J. Cordell Maddox, Circuit Court Judge

Opinion No. 2017-UP-237 (S.C. Ct. App. filed June 7, 2017)
2013-GS-37-01039

THE STATE,

RESPONDENT,

V.

SHANE ADAM BURDETTE,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Susannah R. Cole, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Shane Adam Burdette, #356957, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 6th day of October, 2017.

Susan B Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 6th day of October, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.