



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
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NOTICE

IN THE MATTER OF ROBERT LEE NEWTON, JR., PETITIONER

On November 8, 2004, Petitioner was definitely suspended from the practice of law for one year, retroactive to September 25, 2003. In the Matter of Newton, 361 S.C. 404, 605 S.E.2d 538 (2004). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than March 7, 2005.

Columbia, South Carolina

January 6, 2005



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NOTICE

IN THE MATTER OF ARTHUR T. MEEDER, PETITIONER

On October 30, 1995, Petitioner was definitely suspended from the practice of law for eleven months. In the Matter of Meeder, 320 S.C. 82, 463 S.E.2d 312 (1995). Thereafter, Petitioner was disbarred on August 4, 1997. In the Matter of Meeder, 327 S.C. 169, 488 S.E.2d 875. He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

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Columbia, South Carolina

January 6, 2005



OPINIONS
OF
THE SUPREME COURT
AND
COURT OF APPEALS
OF
SOUTH CAROLINA

ADVANCE SHEET NO. 2

January 10, 2005

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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

Progressive Casualty Insurance
Company, Plaintiff,

v.

Louis Leachman, Defendant.

CERTIFIED QUESTIONS

Opinion No. 25919
Heard September 22, 2004 – Filed January 10, 2005

QUESTIONS ANSWERED

J.R. Murphy and Adam J. Neil, both of Murphy & Grantland, of Columbia, for plaintiff.

James B. Richardson, Jr., of Richardson & Birdsong, of Columbia; and Jay T. Gouldon, of Stoney, Gouldon & Roddey, of Charleston, for defendant.

Darra W. Cothran and Edward M. Woodward, both of Woodward, Cothran & Herndon, of Columbia; and Richard Hodyl, Jr., Thomas J. Pontikis, and Michael J. Borree, all of Williams, Montgomery & John, of Chicago, for amicus curiae Property Casualty Insurers Association of America.

CHIEF JUSTICE TOAL: The Honorable David C. Norton of the United States District Court, District of South Carolina, certified questions to this Court asking whether an insurer made a meaningful offer of under insured motorist coverage (“UIM”).

FACTUAL / PROCEDURAL BACKGROUND

In April 2001, Louis Leachman (“Leachman”) purchased an automobile insurance policy from Progressive Casualty Insurance Company (“Progressive”). Leachman purchased a \$300,000 combined single limits liability policy. Leachman selected UIM coverage by marking a line designated \$100,000 / \$300,000 / \$50,000 on the offer form. He also signed the form at the bottom, noting that the UIM coverage was lower than his liability coverage (\$300,000). After Leachman signed an acknowledgement of his selection, Progressive issued Leachman the policy.

Available amounts of UIM coverage were described on the first page of Progressive’s form.

Available limits of UM and/or UIM are (for “each person” / “each accident” / “property damage each accident”):

- \$15,000/\$30,000/\$10,000
- \$15,000/\$30,000/\$15,000
- \$25,000/\$50,000/\$10,000
- \$25,000/\$50,000/\$15,000
- \$25,000/\$50,000/\$25,000
- \$50,000/\$100,000/\$25,000
- \$50,000/\$100,000/\$50,000
- \$100,000/\$300,000/\$50,000
- \$250,000/\$500,000/\$100,000
- \$100,000 Combined Single Limit (each accident)
- \$300,000 Combined Single Limit (each accident)
- \$500,000 Combined Single Limit (each accident)

The form also explained that increased coverage was available:

For a modest increase in premium, the higher limits of UM and/or UIM are available up to the limits of your bodily injury

Liability Coverage. Our representative can quote premium prices for you.

The form also had a page for insureds to select the amount of coverage they desired. Leachman selected the following:

- \$15,000/\$30,000/\$10,000- premium = \$8.00
- \$15,000/\$30,000/\$15,000- premium = \$8.00
- \$25,000/\$50,000/\$10,000- premium = \$9.00
- \$25,000/\$50,000/\$15,000- premium = \$9.00
- \$25,000/\$50,000/\$25,000- premium = \$9.00
- \$50,000/\$100,000/\$25,000 - premium = \$11.00
- \$50,000/\$100,000/\$50,000 - premium = \$11.00
- \$100,000/\$300,000/\$50,000 - premium = \$13.00¹
- \$250,000/\$500,000/\$100,000
- \$100,000 Combined Single Limit (each accident) - premium = \$12.00
- \$300,000 Combined Single Limit (each accident) - premium = \$15.00
- \$500,000 Combined Single Limit (each accident)

Finally, the form allowed the insureds to acknowledge that they had selected or rejected UIM coverage. Leachman marked the following:

I have been offered and I have rejected the option to purchase Underinsured Motorist Coverage in the amount equal to my limits of Liability Coverage. Instead, as shown above, I either: (1) elect lower limits of Underinsured Motorist Coverage or (2) reject the option to purchase any Undersinsured Motorist Coverage.

In June 2002, while taking a walk, Leachman was hit by a car and was seriously injured. Leachman claimed that the damages from the accident exceeded the driver's automobile liability coverage limit, which was \$15,000. Leachman made a claim for UIM coverage, and Progressive tendered \$100,000. Leachman also sought additional coverage up to the amount of his liability coverage (\$300,000).

¹ The "x" indicates the amount of coverage selected by Leachman.

Progressive filed a declaratory judgment action in the United States District Court, District of South Carolina asking the Court, to determine the amount of UIM coverage provided under the policy. The Honorable David C. Norton of the United States District Court, District of South Carolina, has certified the following questions to this Court:

- I. In attempting to make an insured a “meaningful offer” of UIM coverage, is it sufficient for an insurer to offer all of the options of UIM coverage that the insurer is authorized to sell, up to the limits of the insured’s liability policy, or must an insurer provide a blank line, or some equivalent, that allows the insured to select any increment of UIM coverage up to the insured’s liability limits?
- II. Does the form used in this case constitute a meaningful offer?

LAW / ANALYSIS

We will address the second certified question first.

Leachman argues Progressive failed to make a meaningful offer of UIM coverage, and the policy should be reformed to include UIM coverage equal to the amount of liability coverage of \$300,000. We disagree.

The insurer bears the burden of establishing that it made a meaningful offer. *Butler v. Unisun Ins. Co.*, 323 S.C. 402, 405, 475 S.E.2d 758, 759 (1996). A noncomplying offer has the legal effect of no offer at all. *Hanover Ins. Co. v. Horace Mann Ins. Co.*, 301 S.C. 55, 57, 389 S.E.2d 657, 659 (1990). “If the insurer fails to comply with its statutory duty to make a meaningful offer to the insured, the policy will be reformed, by operation of law, to include UIM coverage up to the limits of liability insurance carried by the insured.” *Butler*, 323 S.C. at 405, 475 S.E.2d at 760.

In general, for an insurer to make a meaningful offer of UIM coverage, (1) the insurer’s notification process must be commercially reasonable, whether oral or in writing; (2) the insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms; (3) the

insurer must intelligibly advise the insured of the nature of the optional coverage; and (4) the insured must be told that optional coverages are available for an additional premium. *State Farm Mut. Auto. Ins. Co. v. Wannamaker*, 291 S.C. 518, 521, 354 S.E.2d 555, 556 (1987).

In response to *Wannamaker*, the legislature passed a statute establishing the requirements for forms used in making offers of optional insurance coverage such as UIM. The statute directs the insurer to include the following in its offer:

- (1) a brief, concise explanation of the coverage;
- (2) a list of available limits and the range of premiums for the limits;
- (3) space for the insured to mark whether the insured chooses to accept or reject the coverage, and a space to select the limits of coverage desired;
- (4) a space for the insured to sign the form, acknowledging that the optional coverage has been offered; and
- (5) the mailing address and telephone number of the Department, so that the insured may contact it with any questions that the insurance agent is unable to answer.

S.C. Code Ann. § 38-77-350(A) (2003).

An insurer enjoys a presumption that it made a meaningful offer if it executes a form that complies with this statute. S.C. Code Ann. § 38-77-350(B) (2003); *Antley v. Nobel Ins. Co.*, 350 S.C. 621, 632, 567 S.E.2d 872, 878 (Ct. App. 2002). If the form does not comply with the statute, the insurer may not benefit from the protections of the statute. *Osborne v. Allstate Ins. Co.*, 319 S.C. 479, 486, 462 S.E.2d 291, 295 (Ct. App. 1995). Furthermore, a form does not necessarily constitute a meaningful offer simply because it was approved by the Department of Insurance. *Butler*, 323 S.C. at 408-409, 475 S.E.2d at 761.

This Court recently addressed the issue of whether an insurer made a meaningful offer of UIM to an insured. *Bower v. Nat'l Gen. Ins. Co.*, 351 S.C. 112, 569 S.E.2d 313 (2002). In *Bower*, this Court held that when the

insurer failed to inform the insured that UIM coverage was available *in any amount up to the insured's liability coverage*, a meaningful offer was not made. *Id.* at 119, 569 S.E.2d at 316 (citing *Garris v. Cincinnati Ins. Co.*, 280 S.C. 149, 311 S.E.2d 723 (1984)) (emphasis added). The form at issue in *Bower* listed four choices for UIM coverage amounts. Three of the choices included coverage up to the limits of the insured's liability coverage.² Other amounts of coverage were not available on the form. The form did, however, provide a blank line, which allowed the insured to write in any amount of coverage the insured desired. Bower rejected UIM coverage altogether. This Court held the form did not constitute a meaningful offer, and therefore had the legal effect of being no offer at all. *Id.* As a result, the insurance policy was reformed to include UIM up to the liability limits. *Id.*

In another case, the court of appeals held that no meaningful offer was made when the insurer listed only three choices for UIM coverage. *Wilkes v. Freeman*, 334 S.C. 206, 512 S.E.2d 530 (Ct. App. 1999). *Wilkes* also involved an insured who rejected UIM coverage altogether. After suffering injuries, the insured wanted UIM coverage up to the amount of his policy limits, arguing he did not receive a meaningful offer. The court held that no meaningful offer was made, and the policy was reformed to include coverage for the insured in the amount of liability coverage. *Id.*

The facts in the present case are distinguishable from *Bower* and *Wilkes*. Unlike the insureds in *Bower* and *Wilkes*, the insured in the present case purchased UIM coverage. Moreover, Progressive's form, titled "UIM selection form," allowed Leachman to choose from eleven different amounts of UIM coverage up to the amount of liability coverage, including \$300,000.³ Because this offer gave the insured the opportunity to make an intelligent and informed decision on whether to purchase UIM coverage, we hold that Progressive made a meaningful offer.

² The fourth choice exceeded Bower's liability limits, and therefore he was not permitted to select it.

³ The form also had two other options: a twelfth level of coverage, which was above the insureds liability limits, and an option to select no UIM whatsoever.

There are also policy reasons for finding that Progressive made a meaningful offer. The goal, as set forth in *Wannamaker*, is to provide an insured with adequate information to make an intelligent decision on whether to accept or reject UIM coverage. 291 S.C. at 521, 354 S.E.2d at 556. In addition, a meaningful offer allows an applicant to purchase UIM insurance in any amount up to the limits of liability at an additional premium. *Bower*, 351 S.C. at 117, 569 S.E.2d at 315. To conclude that Progressive did not make a meaningful offer in this case would lead to an absurd result. If this Court applies the rationale of *Bower* and *Wilkes*, Progressive would be required to pay an amount that Leachman specifically rejected. To compel coverage would overstep the purpose behind mandating a meaningful offer.

In addition, these public policies behind mandating a meaningful offer would be undermined if the insurer were forced to provide full coverage when it failed to offer *every conceivable combination* of coverage up to an insured's liability limits. *See Wilkes*, 334 S.C. at 211-212, 512 S.E.2d at 533 (insurer is not required to offer every possible coverage limit combination and merely listing several available options without providing a clear description that the applicant may request other limits is not a meaningful offer). In other words, the policy behind requiring a meaningful offer is promoted without creating a rule that places such an unfair burden on insurers.

As to the first certified question, we hold that it is sufficient for an insurer to offer all of the coverage amounts the insurer is authorized to sell by the Department of Insurance,⁴ without providing a blank line for insureds to write in any amount of coverage up to the policy limit.

The controlling statute does not require insurers to provide a blank line. *See* S.C. Code Ann. § 38-77-350(A) (requiring insurers to provide a list of available limits, a space for the insured to mark whether the insured chooses to accept or reject the coverage, and a space to select the limits of coverage

⁴ South Carolina statutory law provides that “no insurer may make or issue a policy except in accordance with its filings with the Department as to approved premium amounts.” S.C. Code Ann. § 38-73-920 (2003).

desired). Moreover, a blank line maybe helpful but it is not necessary. *Bower*, 351 S.C. at 121-122, 569 S.E.2d at 317-318 (Toal, C.J., dissenting). Further, an offer is not necessarily meaningful when a blank space is provided for the insured to write in the desired amount of coverage. *Id.* at 119, 569 S.E.2d at 316. If the legislature had intended for insurers to provide a blank line allowing insureds to choose any amount of coverage, the blank-line mandate would have been included in the statute.

Therefore, we hold that when an insurer offers all amounts of coverage authorized by the Department of Insurance, insurers have provided insureds with the opportunity to make an intelligent decision as to whether to accept or reject UIM coverage.

CONCLUSION

The holding in *Bower* should not be extended to require the insurer to offer every possible numerical combination of coverage for UIM. Instead, the goal is for insureds to know their options and to make an informed decision as to which amount of coverage will best suit their needs. Accordingly, the Court finds that Progressive made a meaningful offer, and therefore the second question is answered in the affirmative. As to the first question, it is sufficient, in making a meaningful offer, for an insurer to offer an insured all of the coverage amounts that the insurer is authorized to sell by the Department of Insurance.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jonathan Kyle Binney, Appellant.

Appeal from Cherokee County
J. Derham Cole, Circuit Court Judge

Opinion No. 25920
Heard September 21, 2004 – Filed January 10, 2005

AFFIRMED

Acting Chief Attorney Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General William Edgar Salter, III, all of Columbia; and Harold W. Gowdy, III, of Spartanburg, for Respondent.

CHIEF JUSTICE TOAL: In November 2002, Appellant Jonathan Kyle Binney (Binney) was convicted of murder and first-degree burglary and sentenced to death by a Cherokee County jury. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In early June 2000, Cherokee County police received a call that a local resident, upon returning home from work, was surprised and shot by a man who was hiding inside her house. When police went to the victim's residence to investigate, they found a suicide note Binney wrote and signed. Binney was later found in the crawl space of his Spartanburg County residence.

Before Binney was arrested and was read his *Miranda* rights, Binney turned to Cherokee County Sheriff's Deputy Steve Reynolds and said, "she's dead isn't she?" Reynolds replied, "who?" And Binney responded, "the woman I shot."

During Binney's detainment and eventual arrest, Binney's wife was talking on a cordless phone to Bill Bannister (Bannister), Binney's attorney in another matter.¹ Captain Mike Fowlkes (Fowlkes) with the Cherokee County Sheriff's Department testified that while Binney's wife was on the phone, she repeatedly told Binney not to say anything to the officers. Eventually, while still at the residence, SLED agent DeWitt "Spike" McCraw (McCraw) spoke with Bannister and assumed that Bannister would continue to represent Binney in the present matter.²

After hearing of Binney's arrest, Don Thompson (Thompson), Public Defender for Cherokee County, went to the jail to talk to Binney. Binney told Thompson that he wanted the death penalty, and Thompson told Binney

¹ Bannister was representing Binney in a pending case where Binney was charged with criminal sexual conduct with a minor (CSC).

² Later, Bannister declined to represent Binney, and Don Thompson, public defender for Cherokee County, was appointed; however, Thompson did not represent Binney at trial. Instead, Binney hired Trent N. Pruet and Sam "Mitch" Slade, Jr., both of the Pruet Law Firm in Gaffney, SC, as his trial counsel.

not to talk to the police. Thompson met with Binney again a few days later, and Binney was still determined to get the death penalty.³

At trial, Thompson testified that almost everyday during the first week of Binney's incarceration, either agent McCraw or the solicitor's office asked for permission to interrogate Binney. Thompson testified that he repeatedly refused their requests and told them that they could not talk to Binney.

On Friday, June 14, 2000, approximately a week after Binney's arrest, Thompson visited Binney and later testified that "it was hard to talk to him about anything," and that Binney mostly wanted to talk about the death penalty. On that same day, McCraw called Thompson and asked if he could send Binney a message asking Binney to submit to an interrogation without the presence of an attorney. Thompson told McCraw that he could not.

Also on June 14, McCraw contacted Travis Alexander (Alexander), a jailer who worked at the prison where Binney was incarcerated. McCraw told Alexander to find Binney and let him know that if he wanted to talk then he had to make a written request to talk with a detective without the presence of an attorney.⁴ Within hours of contacting Alexander, McCraw received a handwritten note from Binney, which included a request to see a detective, without the presence of an attorney.

On that same day, McCraw and Fowlkes picked Binney up and brought him to the Sheriff's Office. Before questioning began, Binney was advised of his rights, and he signed a pre-interrogation waiver form. In addition, at trial, he testified that he did not have any trouble understanding what the

³ Binney was put on suicide watch for the first several days that he was incarcerated.

⁴ McCraw denies that he told Alexander to tell Binney that he would have to specify in writing that he did not want an attorney present; however, Binney testified that he included this specification in his request at Alexander's instruction.

officers told him about his right to an attorney. McCraw and Fowlkes testified that during the interrogation, Binney appeared coherent, indicated that he understood the nature of the interrogation, and was never promised anything or coerced in anyway. Eventually, Binney wrote and signed a five-page statement confessing to the murder.⁵ At no time during Binney's arrest, incarceration, or questioning did Binney ask to have his attorney present.

During his confession, Binney told police what took place during the commission of the murder. He explained that before he was tried for the CSC charge, Bannister, Binney's lawyer at the time, told him that, if convicted, he would be sentenced to ten years, at the very least. The potential for substantial, future jail time made Binney very anxious. He went to a local shopping center and found a friend who sold him a handgun. He then went to the victim's house and hid just off the property line and watched the house and looked for activity. Binney never met the victim before the day of the murder. He stayed in the surrounding woods overnight thinking about whether he should just go into the house "to commit suicide or rape someone, or to just shoot all of them and kill [himself]."

The next morning, he waited until the victim and her husband left the house and then entered the house through an unlocked window. He cut all the phone lines in the house and put kitchen knives and other possible weapons out of reach. Late that afternoon, the victim came home and found Binney in her bathroom. The victim startled Binney because he did not hear her enter the house. Binney fired the gun in her direction and then chased her out of the house. Once outside, he shot in her direction again to "keep her scared and running" and then ran in the opposite direction into the woods. He ran home and hid under his house, where he was later found by police.

In his June 14 statement, Binney requested that he be given the death penalty: "the crime I committed definitely warrants it." In addition, he stated that he was not promised anything or coerced in any way. In addition, Binney wrote "I waive my right to an attorney." After Binney wrote and

⁵ This is the June 14 statement that Binney argues was improperly admitted.

signed his June 14 statement, he took McCraw and Fowlkes to the woods next to the victim's house where he hid his moped and the murder weapon.

On Monday, June 17, three days after Binney sent his first written request, Binney sent McCraw another request to meet. Again, McCraw read Binney his rights and had him sign another waiver. Mike Prodan (Prodan), head of the Behavioral Science Unit at SLED, also attended the June 17 interrogation, because McCraw requested the assistance of someone with experience in investigating crimes involving sexual motives.

Meanwhile, on that same day, Thompson received a message that Binney met with police and signed a statement the previous Friday, June 14. Thompson eventually found Binney at the Sheriff's Office. McCraw and Prodan testified that Thompson "burst in" to the interrogation room and told Binney to quit talking. When Binney turned to McCraw and asked him what to do, McCraw responded, "*he works for you.*" (Emphasis added.) Binney told Thompson to leave so that he could continue talking to the officers.

At the suppression hearing, McCraw testified that Thompson never told him not to talk to Binney. The judge found that Binney never invoked his Fifth Amendment right to an attorney. Moreover, the judge found that Binney knowingly and intelligently waived his Fifth Amendment right to an attorney and that McCraw's communication to Binney inviting him to request a meeting was not an "interrogation."

Binney raises the following issue on appeal:

Did the trial judge err in admitting into evidence Binney's June 14 statement because it was taken in violation of Binney's Fifth Amendment right to have an attorney present during a custodial interrogation?

LAW/ANALYSIS

Binney argues that the trial judge erred in admitting the June 14 statement in which he confessed to murder because the statement was

procured in violation of his Fifth Amendment right to have an attorney present during a custodial interrogation. We disagree.

The State has the burden to show by the preponderance of the evidence that a defendant has voluntarily waived his right to counsel. *State v. Franklin*, 299 S.C. 133, 137, 382 S.E.2d 911, 913 (1989). Police must inform criminal suspects of their right to have an attorney present during a custodial interrogation before the interrogation commences. *Miranda v. Arizona*, 384 U.S. 436, 473-474 (1966). The Court went on to say that “[o]nce warnings have been given, the subsequent procedure is clear...[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present.” *Id.* In addition, police are restricted from initiating contact with a suspect when that contact is the “functional equivalent” of an interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). The “functional equivalent” of an interrogation is

any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from a suspect.

Id.

In *Edwards v. Arizona*, the United States Supreme Court elaborated on one’s right to have an attorney present during a custodial police interrogation. 451 U.S. 477 (1981). In that case, the police reinitiated an interrogation and eventually elicited a confession sometime after the defendant requested an attorney and interrogation had ceased. The Supreme Court of Arizona upheld the conviction, holding that the defendant’s confession was voluntarily given. The United States Supreme Court reversed, holding “waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege.” *Id.* at 483.

To invoke a Fifth Amendment right to counsel, one must give “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 v. Wisconsin*, 501 U.S. 171, 178 (1991); *see also State v. Kennedy*, 333 S.C. 426, 430, 510 S.E.2d 714, 715 (1998) (holding that an unequivocal invocation of the Fifth Amendment right to counsel must be presented in a manner that a reasonable police officer, under similar circumstances, would understand the statement to be a request for the presence of an attorney).

Nevertheless, this Court has held that

[a] valid waiver of the right to counsel will not be presumed simply from the silence of the accused after *Miranda* warnings are given. The record must show an accused was offered counsel but intelligently and knowingly rejected the offer.

State v. McCray, 332 S.C. 536, 546, 506 S.E.2d 301, 306 (1998).

In addition, a criminal suspect’s rights are not violated when the suspect, not the police, “initiates further communication, exchanges, or conversations with the police.” *State v. Howard*, 296 S.C. 481, 489, 374 S.E.2d 284, 288 (1988) (citing *Edwards*, 451 U.S. at 485). Finally, this Court has held that, after it has been determined that the waiver was valid, the analysis is over:

[o]nce it is determined that a suspect’s decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state’s intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.

State v. Drayton, 293 S.C. 417, 426, 361 S.E.2d 329, 334-335 (1987) (citing *Moran v. Burbine*, 475 U.S. 412 (1986)).

In the present case, we find that the following facts support the conclusion that Binney’s Fifth Amendment rights were not violated and that his June 14 statement was admissible:

- (1) There is no evidence that Binney ever asked for an attorney at any point during his arrest, incarceration, or questioning.
- (2) Binney has an adequate level of intelligence, and he has been arrested and read his rights before.
- (3) In his written request, Binney stated that he did not want an attorney present during the meeting with detectives.
- (4) Before Binney provided police with a statement, he was again read his rights and he signed a waiver of rights.

In addition, McCraw's message to Binney instructing him to write a written request to meet was not the initiation of an "interrogation," because it would not reasonably elicit an incriminating response. Instead, McCraw's message was simply an invitation for Binney to initiate contact. Moreover, Binney's request to meet with a detective and his later confession both were made out of his own free will, without coercion or deception. In fact, the record indicates that Binney was motivated to talk with police to get off of suicide watch. Finally, nothing in the record suggests that Binney was not fully informed of his rights, did not understand his rights, or that the confession was not the product of his own free will.

SENTENCE REVIEW

The Court must conduct a proportionality review of Binney's death sentence based on the record. S.C. Code Ann. § 16-3-25(A) (2003). In conducting the review, the Court considers similar cases in which the death penalty has been upheld. *See* S.C. Code Ann. § 16-3-25(E) (2003).

We find Binney's death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the evidence supports the trial judge's findings of aggravation. *See* S.C. Code Ann. § 16-3-25(C) (2003). In addition, Binney's sentence, in relation to the sentences this Court has upheld in similar cases, was not excessive or disproportionate to his crime. *See State v. Tench*, 353 S.C. 531, 59 S.E.2d 314 (2003); *State v. Weik*, 356

S.C. 76, 507 S.E.2d 683 (2002), *cert denied*, 539 U.S. 930 (2003); *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000).

CONCLUSION

For the foregoing reasons, we affirm Binney's conviction and sentence and hold that the trial judge did not err in admitting the June 14 statement into evidence.

AFFIRMED.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.