

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Allendale County
R. Lawton McIntosh, Circuit Court Judge

RECEIVED

Nov 21 2022

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

ROBERT LEE MILLER, III,

PETITIONER.

APPELLATE CASE NO. 2021-000985

BRIEF OF PETITIONER

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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ISSUE PRESENTED

Did the Court of Appeals err when it affirmed the trial court's admission of fifteen-year-old Petitioner's statement by failing to apply the special scrutiny afforded to statements made by juveniles and failing to examine the totality of the circumstances, which included Petitioner's youth and limited cognitive functioning, promises of leniency by police, the use of sophisticated interrogation techniques, the failure of the investigators to advise Petitioner of his constitutionally mandated warnings, and the absence of a parent, where the Court viewed the circumstances individually and held each was insufficient to require exclusion?

STATEMENT

Numerous members of various professional police agencies across South Carolina interrogated Petitioner, a fifteen-year-old boy, over the course of many hours on June 24, 2014. Despite Petitioner suffering from a severe intellectual disability, being without legal counsel, and being without a parent, these trained police officers resorted to coercive interrogation tactics in order to induce Petitioner to provide incriminating information. Unsurprisingly, the statements produced by the professional police officers during the interrogation of Petitioner were the foundation of the state's case at trial due to the trial judge's erroneous ruling that the police obtained the statements legally. Heightening the risk that professional police officers will continue to capitalize on the incompetencies of youth, the Court of Appeals affirmed Petitioner's conviction after engaging in a flawed analysis in a published opinion. Petitioner respectfully requests this Court reverse.

Marvin J. Williams, the police chief for City of Fairfax, interrogated fifteen-year-old Petitioner on June 24, 2014. R. 28, ll. 9-20. Chief Williams claimed he advised Petitioner of his rights using a form. R. 28, l. 21 – R. 29, l. 14; R. 445. The record was unclear when Petitioner arrived at the police station or when the interrogation by Chief Williams began, but the form indicated Petitioner *printed* his name on the form at 4:56 p.m. R. 29, l. 24 – R. 30, l. 2; R. 31, l. 25 – R. 32, l. 3; R. 445. Although Chief Williams was aware of Petitioner's tender age of fifteen, Chief Williams made no inquiries regarding Petitioner's grade level or intelligence. R. 41, l. 20 – R. 42, l. 3. Tiffany Sabb, the mother of Petitioner's friend and with whom Petitioner was living at the time, took Petitioner to the police station so that he could be questioned. R. 32, ll. 4-5. At the time the police were interrogating Petitioner, Sabb's son was at the police station giving a statement *against*

Petitioner. R. 41, ll. 5-11. Sabb was not in the interrogation room while Chief Williams interrogated Petitioner. R. 44, ll. 9-11.

While Chief Williams was conducting his interrogation of Petitioner, Chief Williams claimed Petitioner confessed to killing Willie Johnson in Allendale – outside of Chief Williams’ jurisdiction. R. 34, ll. 3-14. Petitioner’s interrogation by Chief Williams was not recorded and it was never reduced to writing – not even in a police report. R. 35, ll. 15-22; R. 36, ll. 4-9; R. 44, ll. 19-24.

Chief Williams then turned the interrogation of Petitioner over to SLED agents who were investigating the Johnson murder. R. 36, ll. 1-3. For some inexplicable reason, these professional SLED agents, who were investigating a murder in a completely different jurisdiction, were already at the Fairfax Police Department prior to Chief Williams interrogating Petitioner. R. 37, l. 20 – R. 38, l. 2.

Richard Johnson was one of the SLED agents at the Fairfax Police Station who took over the interrogation. R. 47, ll. 3-5. He and fellow SLED Agent Natasha Merrell recorded the interrogation using Agent Merrell’s cell phone, which resulted in an incomplete recording due to the phone not recording while Agent Merrell received phone calls. R. 47, ll. 6-8; R. 47, ll. 17-22; R. 58, ll. 4-7; R. 58, l. 22 – R. 59, l. 15; State’s Exhibit #34. Agents Johnson and Merrell did not bother advising Petitioner of his rights when they initiated their interrogation. R. 48, ll. 6-8; R. 60, ll. 3-5.

Sabb was in the room with Petitioner when Agents Johnson and Merrell initially started their interrogation of Petitioner, but she left at Agent Johnson’s insistence. R. 49, ll. 11-18; R. 58, ll. 8-10; R. 64, ll. 17-23; State’s Exhibit #34. At least one other police officer was present as well. State’s Exhibit #34. SLED’s interrogation lasted about an hour. R. 50, ll. 16-18. Petitioner indicated he did *not* want to talk to Agent Johnson; however, Petitioner agreed to talk to Agent

Merrell. R. 51, ll. 6-13; State's Exhibit #34. Agent Johnson noted that he thought he intimidated Petitioner, and this was the reason why Petitioner wanted him to leave. R. 54, ll. 4-11; State's Exhibit #34. Agent Merrell noted Petitioner was more comfortable with her. R. 65, ll. 5-8.

The SLED agents knew fifteen-year-old Petitioner was only in eighth grade. State's Exhibit #34. They also knew he was in alternative school. State's Exhibit #34. Agent Johnson found a random certificate of service nearby and asked Petitioner to read the certificate during the interrogation. State's Exhibit #34. Petitioner struggled to read the "contributions," which was part of the language on the certificate. State's Exhibit #34. Petitioner did not even know his own social security number or street address. State's Exhibit #34. He had candy in his pocket. State's Exhibit #34.

During the interrogation, Petitioner repeatedly denied any involvement in Johnson's death. R. 65, ll. 9-12; State's Exhibit #34. Agent Merrell told Petitioner she was "trying to help [him] out." State's Exhibit #34. Petitioner expressed his fear of SLED to Agent Merrell. He explained that he had been told by an adult who knew someone "in the force" that if SLED caught him, he would have a gun pointed on him and he would be taken off. State's Exhibit #34. He was told the night before that if SLED caught him, he would be shot down. State's Exhibit #34. Throughout the entirety of the time that Agent Merrell interrogated Petitioner, he denied involvement. State's Exhibit #34.

Unable to elicit incriminating statements from Petitioner, Agent Merrell requested Agent Johnson take over the interrogation; both professional SLED agents then resumed the interrogation. R. 51, ll. 20-22; R. 54, ll. 16-24; R. 61, ll. 9-11. Agent Johnson immediately launched into Petitioner. R. 51, l. 23 – R. 52, l. 3. Agent Johnson told Petitioner he was "full of it" and was going to jail. R. 51, l. 23 – R. 52, l. 3; State's Exhibit #34. Like Agent Merrell, Agent Johnson told

Petitioner that he wanted to *help* Petitioner. State's Exhibit #34. Agent Johnson assured Petitioner everyone involved *would* get the same amount of time *except* the person who cooperated, and that Petitioner was the first one that the police were interrogating. State's Exhibit #34.

Agent Johnson *lied*, telling Petitioner the police had all the evidence they needed, and alluded to the television show, CSI: Crime Scene Investigation, to explain that evidence. State's Exhibit #34. When Petitioner wanted to know how many years he would receive, Agent Johnson told him he would receive "an ass" of time. State's Exhibit #34. When Petitioner asked what he could do to get out of the situation, Agent Johnson told him he was not getting out of this, but he could "minimize the kind of time." R. 55, ll. 12-16; R. 62, ll. 13-17; State's Exhibit #34. Agent Johnson *promised* to tell the prosecutor if Petitioner cooperated. R. 62, ll. 8-12; State's Exhibit #34.

An exchange on this topic between the solicitor and Agent Merrell was particularly eye-opening:

Q *Other than that*, were there any specific promises of leniency? Did you tell him you'd let him go or anything like that?

A No, sir.

R. 62, ll. 18-21 (emphasis added).

After these threats, promises of leniency, and intimidation, Petitioner began making inculpatory statements. State's Exhibit #34. When Petitioner expressed his exasperation with going to jail, he asked Agent Johnson what would change if he talked to police. State's Exhibit #34. Agent Johnson told him the length of time that he was looking at *would* change. State's Exhibit #34. Specifically, Agent Johnson explained, "Now the thing to do is *let's see how we can minimize it.*" State's Exhibit 34 (emphasis added). Near the conclusion of the interrogation, Agent Johnson said that when he talked to the solicitor, he would explain what Petitioner said, that Petitioner was "hurt about it," and that the solicitor should do whatever the solicitor could to help him. State's Exhibit #34.

During the interrogation, when Petitioner incriminated himself, Agent Johnson repeatedly said, “That’s right,” indicating confirmation of what Petitioner was saying. State’s Exhibit #34. When Petitioner appeared to minimize his conduct, Agent Johnson repeatedly told Petitioner “that’s the wrong answer.” State’s Exhibit #34. By the end of the interrogation, Petitioner, a child, was in tears. R. 76, ll. 10-11. This was unsurprising given the rumors Petitioner heard regarding what SLED was going to do to him. R. 77, ll. 7-10. Exhausted at the end of this three hour marathon interrogation and clearly not understanding the full ramifications of his situation, Petitioner went to sleep on the interrogation room floor. R. 77, ll. 16-21.

The state charged fifteen-year-old Petitioner with the June 17, 2014, murder of Willie Johnson. R. 2, ll. 4-6; R. 459. Petitioner was arrested along with two other juveniles – one was sixteen and one was seventeen. R. 2, ll. 7-10. Due to his age, Petitioner was charged as a juvenile offender. R. 2, ll. 4-13. The state sought to transfer jurisdiction to the Court of General Sessions from the Family Court. R. 2, l. 2 – R. 7, l. 6; R. 17, ll. 10-21. On March 24, 2015, the Honorable Gerald C. Smoak, Jr., convened a hearing on the state’s motion. R. 1. Isaac McDuffie Stone, III, and Christine Grefe represented the state. R. 1. Kimberly Jordan and Stephanie Smart-Gittings represented Petitioner. R. 1. At the conclusion of the hearing, Judge Smoak granted the state’s motion to transfer jurisdiction to the Court of General Sessions. R. 22, l. 12 – R. 23, l. 24; R. 459.

Thereafter, on July 23, 2015, an Allendale County grand jury indicted Petitioner for murder (2015-GS-03-0050). R. 477-478. The state, represented by Sean Thornton and Ann Fitz, called the case to trial before the Honorable R. Lawton McIntosh and a jury on July 11-14, 2016. R. 25-26. Smart-Gittings represented Petitioner. R. 26.

Prior to trial, defense counsel moved to exclude Petitioner's statement to police from evidence. R. 75, l. 15 – R. 80, l. 11. Petitioner's lawyer for purposes of the juvenile charges, Kimberly Jordan, testified regarding what transpired during a pre-adjudicatory waiver evaluation. Jordan explained that when the doctor questioned Petitioner about his rights, Petitioner did not understand, which required the doctor to stop and explain the rights to him. R. 69, l. 14 – R. 70, l. 18. Petitioner had no idea how an attorney may have been helpful to him during the questioning. R. 70, ll. 14-15. Even after the doctor's explanation, Jordan questioned whether Petitioner really understood. R. 70, ll. 19-23. Only after the doctor "explained it step by step" did Petitioner appear to understand. R. 70, l. 25 – R. 71, l. 1.

Defense counsel argued Petitioner was at the tender age of fifteen and was alone in a room with three police officers. R. 75, ll. 21-24. Petitioner found Agent Johnson intimidating. R. 76, ll. 3-9. By the end of the interrogation, Petitioner was in tears. R. 76, ll. 10-11. Petitioner feared the agents based on what he had heard regarding what SLED was going to do to him. R. 77, ll. 7-10. Clearly not understanding the full ramifications of his situation, Petitioner went to sleep on the interrogation room floor. R. 77, ll. 16-21. Agent Johnson used positive and negative reinforcement to get Petitioner to say what he wanted to hear. R. 78, ll. 5-23. Defense counsel also noted the lies Agent Johnson used, particularly about the alleged forensic evidence to coerce a confession from Petitioner. R. 79, ll. 10-15.

In ruling on the motion, the judge found that Petitioner suffered from a limited educational basis. R. 85, ll. 7-10. He was concerned about Petitioner's "maturity level" and "education level," particularly in light of Petitioner only being in eighth grade at fifteen years of age. R. 86, ll. 4-6. He thought Petitioner was "pretty street smart," however. R. 85, ll. 10-15; R. 86, ll. 10-11. Petitioner's experience with law enforcement was minimal – only one juvenile adjudication. R. 86, ll. 16-25.

The judge found Petitioner was isolated from his parent, but indicated the presence of Sabb was sufficient. R. 88, ll. 7-14. Next, the judge found “there was no coercive nature of this interview that would lead to suppression.” R. 85, l. 23 – R. 86, l. 1. He thought the length of the interrogation “was entirely reasonable” and that the “place was fine.” R. 86, ll. 1-2. Despite contrary evidence in the record, the judge found there were “no police misrepresentations.” R. 87, l. 15. Additionally, the judge did not view Agent Johnson’s repeated promises to help minimize Petitioner’s sentence as promises of leniency. R. 87, ll. 15-19. According to the judge, the fact that Petitioner was told he was going to jail completely obviated the officer’s assurance that Petitioner would receive a lesser sentence if he confessed. R. 87, ll. 19-20. In conclusion, the judge permitted the admission of the statement based on the totality of the circumstances. R. 88, ll. 16-20. When the state moved to introduce the statement during the trial, defense counsel renewed her objections, but the trial judge overruled them. R. 215, l. 11 – R. 216, l. 3; R. 216, l. 24 – R. 217, l. 7; R. 319, ll. 10-14.

Ultimately, the jury found Petitioner guilty as charged. R. 397, l. 24 – R. 398, l. 4. On June 5, 2017, the parties re-convened before Judge McIntosh for sentencing. R. 401. Smart-Gittings continued to represent Petitioner, and Brian Hollen represented the state. R. 402. At the conclusion of the hearing, which included only argument by the lawyers and a colloquy between the deceased’s son and the court, Judge McIntosh sentenced Petitioner to fifty-five years imprisonment. R. 442, l. 25 – R. 443, l. 1; R. 479.

Petitioner served his notice of appeal on June 13, 2017. The Court of Appeals affirmed. State v. Miller, 433 S.C. 613, 861 S.E.2d 373 (Ct. App. 2021); App. 1-17. Instead of examining the circumstances surrounding Petitioner’s statement in the aggregate, the Court of Appeals looked at the circumstances individually. Id. For example, as will be explained in greater detail infra, the Court of Appeals held the interrogation tactics used by the SLED agents “were not

forceful *enough*” to overbear Petitioner’s will. Id. (emphasis added). After conducting this erroneous analysis, the Court of Appeals affirmed the introduction of Petitioner’s statement to police. Id. Petitioner moved for rehearing, which was denied. App. 18-41.

On September 9, 2021, Petitioner filed a petition for writ of certiorari challenging the Court of Appeals’ findings regarding the admissibility of his involuntary statement. On November 8, 2021, the state responded. On April 4, 2022, with leave of this Court, Justice 360 and Cornell Juvenile Justice Project submitted an amicus curiae brief in support of Petitioner. On October 7, 2022, this Court granted certiorari and ordered briefing. This brief follows.

STANDARD OF REVIEW

In State v. Brewer, Op. No. 28120 (S.C. Sup. Ct. filed Oct. 12, 2022) (Howard Adv. Sh. No. 37 at 16), this Court “left for another day” the standard of review to be employed by an appellate court when reviewing the voluntariness of a statement. State v. Brewer, Op. No. 28120 (S.C. Sup. Ct. filed Oct. 12, 2022) (Howard Adv. Sh. No. 37 at 20 n.1). Acknowledging its prior precedent¹ that reviewing courts would use an abuse of discretion standard, this Court expressed a desire to change the standard of review. Id. This Court suggested that reviewing courts examine “the question of whether a statement was voluntarily given as a mixed question of fact and law.” Id.

In light of this Court’s recent jurisprudence, Petitioner respectfully requests this Court analyze whether the statement at issue in this case was voluntarily given as a mixed question of fact and law. Petitioner respectfully requests this Court review the trial court’s factual findings for any evidentiary support and review de novo the legal conclusions reached by the trial court.

¹ Previously, this Court has stated that “[o]n appeal, the conclusion of the trial judge on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion.” State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990); see also State v. Reed, 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998). Put another way, the reviewing court will reverse a trial judge’s ruling on the voluntariness of the confession when the ruling is “so erroneous as to constitute an abuse of discretion.” State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004). “In criminal cases, appellate courts are bound by fact finding in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law.” State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997).

ARGUMENT

Affirming the trial court's erroneous admission of fifteen-year-old Petitioner's statement, the Court of Appeals failed to apply the special scrutiny afforded to statements made by juveniles and failed to examine the totality of the circumstances, which included Petitioner's youth, Petitioner's limited cognitive functioning, promises of leniency by police, the failure of the investigators to advise Petitioner of his constitutionally mandated warnings, the use of sophisticated interrogation techniques, and the absence of a parent where the Court viewed the circumstances individually and held each was insufficient to require exclusion.

When considering whether to admit a statement from a criminal defendant to be used against that person at trial, a judge must consider both the Due Process Clause and the right against self-incrimination contained within the Fifth Amendment to the Constitution of the United States. Dickerson v. United States, 530 U.S. 428, 433 (2000). 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.” The Court explained that the admissibility of a suspect's confession must pass the “voluntariness test.” Dickerson, 530 U.S. at 432-433. Over the years, the Court had refined the voluntariness “test into an inquiry that examines ‘whether a defendant's will was overborne’ by the circumstances surrounding the giving of a confession.” *Id.* at 434 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 223 (1973)). “The due process test takes into consideration the totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation.” *Id.* (internal quotation omitted). “The determination depends upon a weighing of the circumstances of pressure against the power of resistance of the person confessing.” *Id.* (internal quotation omitted).

A few years later after its decision in Denno, the Supreme Court again confronted the legality of the use of a statement by a defendant during a criminal trial; however, this time, the Court concerned itself with the Fifth Amendment's enshrinement of the right against self-incrimination. To this end, the Court held that in order to admit 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. 436 (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). The Court explained that "[b]ecause custodial police interrogation, by its very nature, isolates and pressures the individual," "[e]ven without employing brutality, the 'third degree' or [other] specific stratagems, ... custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." Dickerson, 530 U.S. at 435 (internal quotation omitted). "[T]he coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be accorded his privilege under the Fifth Amendment ... not to be compelled to incriminate himself." Id. (internal quotation omitted). To address the coercion inherent in custodial interrogations, the Court set forth "concrete constitutional guidelines for law enforcement agencies and courts to follow." Miranda, 384 U.S. at 442. "Those guidelines established that the admissibility in evidence of any statement given during custodial interrogation of a suspect would depend on whether the police provided the suspect with four warnings," including a suspect's right to remain silent, a warning that anything the suspect says can be used against him in a court of law, that the suspect has the right to an attorney, and that an attorney will be appointed prior to any questioning if the suspect cannot afford an attorney. Dickerson, 530 U.S. at 435.

It is not enough that the interrogator advised the suspect of his rights and the suspect made an uncoerced statement. The prosecution must show that the accused understood the rights. Berghuis v. Thompkins, 560 U.S. 370, 384 (2010) (citing Colorado v. Spring, 479 U.S. 564, 573-575 (1987); Connecticut v. Barrett, 479 U.S. 523, 530 (1987)). Thus, “[t]he waiver inquiry ‘has two distinct dimensions’: waiver must be ‘voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,’ and ‘made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.’” Id. at 382-383 (quoting Moran v. Burbine, 475 U.S. 421, 421 (1986)); see also Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (“A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.”).

Here, there is no dispute that Petitioner was subjected to custodial interrogation. Thus, the police were required to advise Petitioner of his Miranda rights. Whether the professional police officers involved in this case advised Petitioner of these rights is suspect. It is undisputed that SLED Agents Johnson and Merrell did *not* advise Petitioner of his rights. Chief Williams claimed he advised Petitioner of his rights using a form. There was no audio or video recording to substantiate Chief Williams’ claim. However, he did produce a form with Petitioner’s *printed* name on it, not a proper signature, to support his contention that he advised Petitioner of his rights. Of course, even according to Chief Williams’ own testimony, he was aware of Petitioner’s age, made no inquiry as to Petitioner’s intelligence or grade level, and simply charged ahead with trying to elicit incriminating information from Petitioner.

Although Petitioner raises on appeal that both his right to due process of law and his right against self-incrimination were violated, the United States Supreme Court has dictated similar tests

– the totality of the circumstances – for both inquiries. Therefore, Petitioner will analyze the constitutional violations together.

Courts have recognized a variety of factors for consideration 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; 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. See Withrow v. Williams, 507 U.S. 680, 693-694 (1993); Fare v. Michael C., 442 U.S. 707 (1979); Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973); State v. Pittman, 373 S.C. 527, 566, 647 S.E.2d 144, 164 (2007); State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Simmons, 384 S.C. 145, 163-164, 682 S.E.2d 19, 28-29 (Ct. App. 2009); State v. Dye, 384 S.C. 42, 47-48, 681 S.E.2d 23, 26-27 (Ct. App. 2009); State v. Parker, 381 S.C. 68, 85-93, 671 S.E.2d 619, 627-632 (Ct. App. 2008); State v. Miller, 375 S.C. 370, 384-386, 652 S.E.2d 444, 451-452 (Ct. App. 2007). In the case sub judice, the Court of Appeals refused to examine the circumstances here in their totality. Instead, the Court of Appeals insisted on looking at each circumstance individually and holding each insufficient to warrant reversal.

The Court of Appeals recognized that Petitioner was only fifteen-years old when he was interrogated by the Chief of Police and two seasoned SLED agents. State v. Miller, 433 S.C. 373, 861 S.E.2d 373 (Ct. App. 2021); App. 1-17. However, the Court hastily brushed this consideration of youth aside by stating simply, “youth alone is insufficient to prove the voluntariness of a defendant’s confession.” Id. Petitioner conceded then – and concedes now –

youth *alone* will not render a confession involuntary. However, here, Petitioner presented much more than his youth as a circumstance for concluding his confession to police was not voluntary under the Due Process Clause and was not the product of a knowing, voluntary, and intelligent waiver of his rights.

Despite the short shrift given by the Court of Appeals to Petitioner's youth, the age of the confessor is an extremely important factor for determining whether the waiver of rights was voluntary, knowing, and intelligent. Haley v. Ohio, 332 U.S. 596, 600-601 (1948); Gallegos v. Colorado, 370 U.S. 49, 52 (1962). In fact, confessions by juveniles must endure special scrutiny. Haley, 332 U.S. at 600-601; Fare v. Michael C., 442 U.S. 707, 725 (1979); Thomas v. North Carolina, 447 F.2d 1320, 1322 (4th Cir. 1971); State v. Pittman, 373 S.C. 527, 569, 647 S.E.2d 144, 165-166 (2007). When the police secure an admission from a juvenile without the presence of counsel, "the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright, or despair." In re Gault, 387 U.S. 1, 55 (1967).

The factors that require additional consideration when examining a statement made to police by a juvenile include the juvenile's age, the length of the detention without counsel, and any failure to send for the juvenile's parents. Gallegos, 370 U.S. at 55; Williams v. Peyton, 404 F.2d 528, 531 (4th Cir. 1968). The United States Supreme Court explained the reason for such special scrutiny:

[A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.

Gallegos, 370 U.S. at 54. Since the Supreme Court’s recognition of the significant incompetencies of youth in police interrogations, scientific study in the area has only further developed to support this notion.

As one commentator noted, “[w]hile the Miranda warnings do exist, the purpose of their existence is not being achieved when it comes to juveniles.” Wadad Barakat, A Blind Spot in Miranda Rights: Juveniles’ Lack of Understanding Regarding Miranda Language, 31 St. Thomas L. Rev. 174, 186 (Spring 2019). “In general, juveniles lack certain skills that adults possess, such as the psychosocial and cognitive maturity to consider the consequences of a waiver of rights, or the ability to reason how to make such a decision.” Id. at 187. “As a result of their lack of understanding and lack of cognitive mental abilities regarding Miranda warnings, juveniles experience difficulties understanding the language and suffer the consequences.” Id. at 188. “Due to juveniles’ inability to properly assess their situation when the Miranda language is read to them, they are likely to waive their right to counsel.” Id. “Despite whether juveniles are guilty or innocent, they are more prone to confess in response to psychologically oriented interrogation tactics.” Id. at 190. Due to their lack of cognitive and mental abilities, juveniles are subject to coercive interrogations and they become easy targets to waive their constitutional rights. As a result, because juveniles are more vulnerable to agree with a request from a police officer, they are more prone to give false confessions.” Id.

Petitioner was a mere fifteen years of age just like the juvenile in Haley. See Haley, 332 U.S. at 599 (describing the juvenile’s “tender and difficult age” of fifteen). Other courts have acknowledged individuals aged fourteen and fifteen demonstrate difficulty in understanding Miranda rights and the serious implications of waiving those rights. See e.g., Hardaway v. Young, 302 F.3d 757, 764 (7th Cir. 2002) (stating that the “difficulty a vulnerable child of 14 would have in

making a critical decision about waiving his Miranda rights and voluntarily confessing cannot be understated); In re Jerrell C.J., 699 N.W.2d 110, 116-117 (Wisc. 2005); People v. Travis, 985 N.E.2d 1019, 1032 (Ill. App. Ct. 2013). See also Kevin Lapp, Taking Back Juvenile Confessions, 64 UCLA L. Rev. 902, 906 (2017) (discussing the risks of interrogating juveniles and arguing in favor of treating statements produced during juvenile custodial interrogations like the infancy doctrine in contracts by allowing juveniles to retract uncounseled Miranda waivers). Therefore, consideration of the totality of the circumstances surrounding Petitioner's statement to police must be viewed through a special scrutiny lens and with respect paid to Petitioner's age.

Although the advisement of rights and the implication of the waiver of those rights seems like an easily understood endeavor, it is not. Asking children to understand their rights and the consequence of waiving those rights is "a cognitive task that often exceeds their abilities." Lapp at 914. "Overwhelming empirical evidence shows that juveniles do not understand their constitutional privilege against self-incrimination, or the consequence of waiving their rights." Id. "Some [studies] have found that understanding certain portions of the Miranda warnings require high school reading levels." Id. at 915. "Research has shown that adults typically see a legal right as an entitlement, which is provided to them by law and cannot be revoked. In contrast, ... children think of a right as 'conditional' – something that authorities allow them to have, but that could also be retracted." Id. at 917-918. "Adolescents typically underestimate the amount and likelihood of risks compared to adults, more heavily discount the future, and prioritize potential immediate gains over more distant (even if certain) losses." Lapp at 917. Thus, even if the child understands the Miranda warning, the child likely underestimates the risk of waiving that right.

Furthermore, adolescent suspects rarely understand critical components of the warnings and waivers particularly when educational, intellectual, and mental health limitations are at play. Id. at

915. “[S]ince many juvenile in delinquency proceedings have learning disabilities or lower IQs, juvenile suspects are at a greater risk than the general juvenile population of failing to understand their rights.” Id. at 916.

Consideration of a person’s mental capacity is an important factor in determining whether a statement to police was voluntary. State v. Callahan, 263 S.C. 35, 41, 208 S.E.2d 284, 286 (1974) (citing State v. Cain, 246 S.C. 536, 144 S.E.2d 905 (1965)). In fact, the United States Supreme Court has warned that intellectually disabled defendants face the special risk of wrongful execution because of the possibility that they will confess to crimes they did not commit. Atkins v. Virginia, 536 U.S. 304, 320 (2002) (citing Everington & Fulero, Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation, 37 Mental Retardation 212, 212-213 (1999)).

[A] person’s capacity to make an informed waiver requires three abilities: an understanding of the words and phrases contained within the warnings, an accurate perception of their intended functions (e.g., that interrogation is adversarial, that an attorney is an advocate, that these rights trump police powers), and a capacity to reason about the likely consequences of the decision to waive or invoke these rights.

Saul M. Kassin, The Psychology of Confessions, 4 Ann. Rev. L. & Soc. Sci. 193, 199 (2008).

Research reveals that individuals with low levels of intelligence, particularly those with intellectual disability, “do not comprehend their rights as fully or know how to apply them as well as older adolescents and adults.” Id. “On standardized tests that measure people’s comprehension of Miranda rights, comprehension scores correlate significantly with IQ.” Id. at 206. Therefore, “most people who are mentally retarded, being limited in their cognitive and linguistic abilities, cannot adequately comprehend their rights or know how to apply them in their own actions.” Id. Further, “people who are mentally retarded exhibit a high need for approval, particularly from others in positions of authority, which reveals itself in an acquiescence response bias.” Id.

“[P]eople who are mentally retarded are limited in their capacity to foresee the consequences of their actions when making legal decisions.” Id. “[W]hen dealing with a mentally deficient juvenile, extreme care must be used to assure that he knowingly and intelligently waived his rights.” In re J.M., 8 N.E.3d 1213, 1219 (Ill. Ct. App. 2014).

This Court addressed mental deficiency in the context of the admissibility of a statement concerning an adult. While not directly on point due to the age of the offender, the case offers some assistance here. In State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999), this Court held that although Davis suffered from mild mental retardation with an IQ of 66, he had the capacity to make a knowing waiver of his constitutional rights to silence and counsel. Id. at 336, 422 S.E.2d at 140. After Davis’s arrest, an officer read the standard Miranda warnings to Davis from a card. Id. The officer testified he “read slowly, paused after each sentence, looked at Davis, and asked him to verbally indicate whether he understood what had been read to him.” Id. Davis responded affirmatively that he understood each of his rights. Id. When asked if he wanted a lawyer present, Davis stated he did not need a lawyer. The officer also “explained” that Davis could end the interrogation at any time. Davis indicated he understood this and agreed to give a taped statement. Due to a problem with the audio equipment, the officer asked Davis for a second statement. Again, the officers explained to Davis his constitutional rights and Davis waived those rights and provided a statement. Id. at 336, 422 S.E.2d at 140.

A forensic psychiatrist testified that he interviewed Davis in detail regarding his understanding each of the rights afforded to him pursuant to Miranda. Id. at 336-337, 422 S.E.2d at 140. The psychiatrist admitted Davis’s understanding “would be on a different, less abstract, level from a person of average intelligence, but Davis’s comprehension was adequate to enable Davis to

knowingly and intelligently waive those rights.” On the other hand, Davis presented experts who testified he lacked the mental ability to understand the implications of Miranda. Id. at 337, 422 S.E.2d at 140. The Supreme Court held “there was sufficient evidence on the record, both lay and expert, to support the trial judge’s determination that Davis was competent to waive his Miranda rights.” Id.

Numerous courts throughout the country have found statements to police inadmissible where the defendants lacked the ability to understand their rights and the implications of waiving such rights due to low intellectual functioning. See e.g., State v. Flower, 539 A.2d 1284 (N.J. Super. L. 1987); State v. Rossiter, 623 N.E.2d 645 (Ohio Ct. App. 1993); People v. Daniels, 908 N.E.2d 1104 (Ill. App. 2009); Albarran v. State, 96 So.3d 131 (Ala. Crim. App. 2011); State v. Blackstock, 19 S.W.3d 200 (Tenn. 2000); United States v. Jennings, 491 F.Supp.2d 1072 (M.D. Ala. 2007); United States v. Preston, 751 F.3d 1008 (9th Cir. 2014); United States v. Hull, 441 F.2d 308, 309 (7th Cir. 1971).

The Court of Appeals recognized that Petitioner “had a low I.Q.,” but claimed the record showed “he was streetwise and knew how to conduct himself in front of police officers.” State v. Miller, 433 S.C. 613, 861 S.E.2d 373 (Ct. App. 2021); App. 1-17. The Court relied upon the fact that Petitioner “gave an alibi several times” and “knew several officers that he came into contact with during the investigation.” While these facts are true, none show Petitioner was “streetwise.” The self-preservation instinct that manifested itself into Petitioner giving an alibi, which would have fallen apart had the police investigated it, exists in toddlers, in no way demonstrated that Petitioner was sophisticated or intelligent enough to understand his rights or the import of waiving those rights. The Court ignored the evidence that Petitioner had limited interactions with law enforcement as found even by the trial judge, could not even read the word

“contributions” on a certificate located in the interrogation room, and how his low intellect, when considered with the other circumstances, affected his ability to voluntarily waive his rights and provide incriminating information to police.

Next, the Court of Appeals determined “the interrogation tactics Agents Johnson and Merrell used against [Petitioner] were *not forceful enough* to overbear [Petitioner]’s will in light of the surrounding circumstances.” Id. (emphasis added). Agent Johnson’s misrepresentation of forensic evidence, Agent Johnson’s interrogation despite knowing he intimidated Petitioner, and Agent Johnson’s statements that Petitioner could minimize his sentence by speaking to police were not “sufficient to overbear [Petitioner]’s will” according to the Court. Id. The Court appeared to ignore the principal that whether officers exercised coercion is determined from the perspective of the suspect. Illinois v. Perkins, 496 U.S. 292 (1990). The Court certainly ignored the requirement to use special scrutiny and evaluate these circumstances in the aggregate.

Here, Agents Johnson and Merrell used textbook methods to overcome the will of a suspect. See In re Elias V., 188 Cal. Rptr. 3d 202 (Cal. Ct. App. 2015) (describing the real danger of false confessions and explaining that an estimated 14 to 25 percent of wrongful convictions resulted from false confessions). “The Reid Technique” has been described as first requiring the isolation of the suspect in a small, private room. Id. at 211. This increases the suspect’s anxiety and desire to escape. Id. Thereafter, the interrogator uses both negative and positive incentives to extract a confession. Id. “[T]he interrogator confronts the suspect with accusations of guilt, assertions that may be bolstered by evidence, real or manufactured, and refuses to accept alibis and denials.” Id. On the positive side of this incentive coin, “the interrogator offers sympathy and moral justification, introducing ‘themes’ that minimize the crime and lead suspects to see confession as an expedient means of escape.” Id.

“[C]ontemporary police manuals on interrogation” encourage interrogators to show confidence in the suspect’s guilt and maintain an interest *only* in confirming certain details. Id. at 213. “The guilt of the suspect is to be posited as a fact.” Id. Officers should “minimize the moral seriousness of the offense, to cast blame on the victim or on society.” Id. “These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already – that he is guilty.” Id.

Just as the investigator acted in Elias V., Agent Johnson was aggressive and persistent. See id. at 214. Agent Johnson used classic maximization techniques when he accused Petitioner of committing the murder, overrode all of Petitioner’s objections to the accusation, and claimed to have evidence of Petitioner’s guilt, which served to “shift [Petitioner’s] mental state from confident to hopeless[ness].” See id. As planned, Agent Johnson’s minimization tactics provided promises of leniency to Petitioner for confessing. See id. “A convincing body of evidence demonstrates that implicit promises can put vulnerable innocents at risk to confess by encouraging them to think that the only way to lessen or escape punishment is compliance with the interrogator’s demand for confession, especially when minimization is used on suspects who are also led to believe that their continued denial is futile and prosecution inevitable.” Id. Agent Johnson’s use of these deceptive techniques, especially given the vulnerabilities of a fifteen-year-old, must weigh against a finding of voluntariness of Petitioner’s statement. See id. at 222.

The most vulnerable innocents must be children. See id. at 217-218 (explaining that “children and adolescents are much more vulnerable to psychologically coercive interrogations and in other dealings with the police than resilient adults experienced with the criminal justice system”). In fact, “the risk interrogation will produce a false confession is significantly greater for juveniles than for adults; indeed, juveniles usually account for one-third of proven false confession cases.”

Id. at 218. “[R]esearch has demonstrated that juveniles make up a disproportionate share of documented false confession.” Lapp at 920. One study found that of 113 documented false confessions, juveniles were overrepresented, comprising approximately one-third of false confessions. Id. “Another study ... found that 42 percent of all juvenile wrongful convictions involved false confessions, compared to only 13 percent of adult wrongful convictions.” Id.

Recently, several jurisdictions have banned police deception during juvenile interrogations. Illinois recognized the risk of false confessions from juveniles when law enforcement employs deceptive techniques and has banned the practice through legislative act. 705 Ill. Comp. Stat. 405/5-401.6 (Ill. 2021). Under the new Illinois law, any statement by a minor “shall be presumed to be inadmissible as evidence against the minor making the confession in a criminal proceeding or a juvenile court proceeding ... if, during custodial interrogation, a law enforcement officer or juvenile officer knowingly engages in deception.” 705 Ill. Comp. Stat. 405/5-401.6(b). For purposes of the statute, “[d]eception’ means the knowing communication of false facts about evidence or unauthorized statements regarding leniency by a law enforcement officer to a subject of custodial interrogation.” 705 Ill. Comp. Stat. 405/5-401.6 (a).

On July 14, 2021, the Oregon legislative assembly approved a similar bill. 2021 Or. Laws Ch. 487 (S.B. 418). According to the new Oregon statute, “[a] statement made by a person during a custodial interview conducted by a peace officer is presumed to be involuntary if the person is under 18 years of age” and the statement is made in connection with a criminal investigation when the court determines the officer intentionally used false information to elicit the statement. Id. The presumption is rebuttable, but only by clear and convincing evidence that the statement was voluntary and not made in response to the false information used by the officer. Id. Utah followed suit in September 2022 banning law enforcement officers from using false information but evidence

that is reasonably likely to elicit an incriminating response from a child or from making an unauthorized statement about leniency. Utah Code Ann. § 80-6-206(7). As recently as October 10, 2022, Delaware banned the use of deceptive tactics in a custodial interrogation of a person under 18 years of age. 11 Del. Code § 2022(a).

Despite widespread awareness and acknowledgement of the effects of sophisticated police interrogation techniques, particularly on young suspects, the Court of Appeals concluded the tactics used by Agents Johnson and Merrell were not forceful enough to overwhelm the will of Petitioner. The Court of Appeals viewed this factor in isolation without consideration of the impact of these interrogation tactics in conjunction with the other circumstances surrounding Petitioner's interrogation.

The Court of Appeals further determined that Agent Johnson's "statements about minimizing [Petitioner]'s prison sentence were [in]sufficient to overbear [Petitioner]'s will." State v. Miller, 433 S.C. 613, 861 S.E.2d 373 (Ct. App. 2021); App. 1-17. The Court neglected to consider the *numerous* promises of leniency offered by Agent Johnson and *how* those promises *impacted* Petitioner. The law is clear that a "confession may not be extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of improper influence." State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990) (internal quotations omitted). A statement "induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise." State v. Compton, 366 S.C. 671, 680, 623 S.E.2d 661, 666 (Ct. App. 2005); Rochester, 301 S.C. at 200, 391 S.E.2d at 247.

In State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987), this Court held a defendant's statements to police were not admissible as they had been induced by a promise of

leniency where the officer told the defendant the prosecution would not see the death penalty if the defendant made a statement. On the other hand, this Court found a polygraph examiner's statement to a defendant that it would be in the defendant's best interest to tell the truth was not an inducement by promise of leniency. It was not the kind of hope or reward or benefit condemned by the law. Rochester, 301 S.C. at 201, 391 S.E.2d at 247.

Here, Agent Johnson knew Petitioner's primary concern was the length of time he would be required to spend in jail because Petitioner perseverated on this point. Agent Johnson skillful capitalized on this showing of weakness by repeatedly telling Petitioner that cooperating with the police would minimize the kind of time he would have to serve. This was not a mere hope that Agent Johnson conveyed. Rather, this was an assurance – a promise – that Petitioner's waiver of his rights and providing of an incriminating statement would benefit Petitioner by reducing his sentence. Even the solicitor's questioning on this point showed the solicitor considered the SLED agents' conduct as promises of leniency. After the questioning of Agent Merrell revealed the agents told Petitioner he could minimize his time by talking, the solicitor asked, "*Other than that, were there any specific promises of leniency?*" R. 62, l. 18 (emphasis added). Thus, even the state considered what the agents did as promises of leniency to Petitioner to induce him to waive his rights and speak to police. Nevertheless, the Court of Appeals considered this factor separate and apart from the other factors. The Court was required to view the circumstances in totality.

Just as the Court of Appeals examined the other circumstances individually and determined them lacking to render the statement involuntarily, the Court held "the officers interrogating [Petitioner] without a parent present was *not sufficient* to render his waiver of rights involuntary." State v. Miller, 433 S.C. 613, 861 S.E.2d 373 (Ct. App. 2021); App. 1-17 (emphasis added). As

previously mentioned; Tiffany Sabb was present with Petitioner at the police station. However, Sabb could hardly be considered as acting *in loco parentis* in light of her subsequent testimony against Petitioner. See Hardaway v. Young, 302 F.3d 757, 765 (7th Cir. 2002) (describing the presence of a youth officer during a juvenile's interrogation as "meaningless" where the officer "provided about as much assistance to [the juvenile] as a potted plant"); In re J.J.C., 689 N.E.2d 1172 (Ill. App. Ct. 1998) (discounting the presence of a youth officer during an interrogation where the record was silent of any effort by the officer to affirmatively protect the child's rights). Furthermore, the Court of Appeal considered of the lack of parent or parental figure present for Petitioner's interrogation in isolation and not as part of the totality of the circumstances. When viewed in the proper context, the absence of Petitioner's parent weighs heavily in favor of excluding his statement as involuntary.

The Court of Appeals erred in failing to consider the *totality* of the circumstances presented here that required exclusion of Petitioner's statements to law enforcement. Rather, the Court affirmed the trial court's decision based upon a singular view of each circumstance and a determination that each circumstance was *insufficient* on its own. Had the Court examined the circumstances in the aggregate, then the circumstances would have added up to provide *sufficient* totality to require exclusion. Due to Petitioner's age – a mere fifteen – the interrogation he endured and the statement he provided required special scrutiny. Petitioner could not even read the word "contributions," indicating his comprehension level was very low. Petitioner's intelligence level was very low – his IQ measured only 76, which is within the range of intellectual disability. By the age of fifteen, he was still in eighth grade. Petitioner had no parent or lawyer present during the three hour long marathon interrogation. Petitioner expressed that he was intimidated by Agent Johnson, who made promises of minimizing his sentence and misrepresented the evidence the

police had against him. Agent Johnson's textbook interrogation of Petitioner to elicit a confession created a coercive environment that overwhelmed Petitioner's will. Examining the circumstances in the aggregate using the special scrutiny required for statements made by juveniles leads to the conclusion that totality of the circumstances required exclusion of Petitioner's statement based upon both the Due Process Clause and the right against self-incrimination found in the Fifth Amendment. Not only was Petitioner's statement involuntary, but it was not the product of a knowing, voluntary, and intelligent waiver of his rights.

The admission of Petitioner's statement must not be considered harmless beyond a reasonable doubt. "A confession is like no other evidence." Arizona v. Fulminante, 499 U.S. 279, 296 (1991) (White, J., dissenting). "Confession evidence colors the perceptions of investigators, judges, and juries alike." Lapp at 919. "[T]he introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained." Id. (internal quotation omitted). "[M]ost people assume that a confession ... is, by its very nature, true." Id. Upon the jury hearing that Petitioner allegedly confessed to the murder of Johnson, the jury was left with the only option of rendering a guilty verdict.

Furthermore, the evidence against Petitioner outside of his statement to police was far from overwhelming. Kiawah Cave, Johnson's neighbor saw three young men in Johnson's yard on the evening of Jun 17, 2014. R. 135, ll. 1-11. Cave did not think anything of it because people were often at Johnson's home as he was an older man who received assistance from others. R. 135, l. 22 – R. 136, l. 3. Most importantly, Cave could not identify any of these young men. R. 136, ll. 12-14. The best evidence the state could present against Petitioner was that the police found a box of trash bags and Petitioner's mother's home that were consistent in appearance with the bag that was found around Johnson's head and a SLED agent who claimed that Petitioner's fingerprint was consistent

with a print found in blood in Johnson's home. R. 192, ll. 2-10;. R. 227, ll. 3-7. Without Petitioner's alleged confession to the police, the state's case would have barely made it passed the directed verdict stage. The state's closing argument proves this point. The state made Petitioner's alleged confession the centerpiece of his closing to convince the jury to return guilty verdicts. R. 363, ll. 2-4; R. 366, l. 8 – R. 367, l. 13; R. 368, l. 1 – R. 371, l. 9; R. 371, l. 25 – R. 372, l. 15; R. 377, ll. 21-23; R. 379, ll. 1-2; R. 382, l. 2 – R. 384, l. 22.

CONCLUSION

Petitioner respectfully requests this Court reverse his conviction and remand for a new trial.



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

This 21st day of November, 2022.