

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

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**RECEIVED**

**Jan 19 2023**

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

ROBERT LEE MILLER, III,

PETITIONER.

APPELLATE CASE NO. 2021-000985

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REPLY BRIEF OF PETITIONER

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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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## ARGUMENT IN REPLY

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.<sup>1</sup>

### **Relevant facts**

Prior to addressing the applicable law, it is necessary to attend to some matters raised by the state's recitation of facts. First, according to the state, "a juvenile was shot in Fairfax, South Carolina, with a gun believed to have been stolen from Johnson's home." BOR at 5. For this proposition, the state cites to argument by the prosecution during pre-trial hearings. See BOR at 5 (citing R. 4). It was the prosecutor who claimed the shotgun used in the shooting in Fairfax was believed to be one of the items stolen from Mr. Johnson's home. R. 4, ll. 5-8. Not only is the prosecutor's argument *not* evidence, but the state conveniently neglected to include defense counsel's argument on this point: "There's been no evidence turned over that there was a gun taken from the home or if there [were] even guns in the home. No one has testified that there [were] even guns in the home or they were taken or that was the gun that was involved in the shooting or that my client was the one with the gun." R. 10, ll. 5-10. Additionally, Marvin Williams *never* mentioned anything about a stolen gun being used in the shooting when he testified during the pre-

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<sup>1</sup> It must be noted that the state's current "counter-statement of issue on certiorari" differs substantially the "counter-statement of issue on certiorari" presented in the state's return. Cf. Ret. at 1 with BOR at 1.

trial hearing regarding admissibility of Petitioner's statements. R. 28-45. There was no actual evidence presented to support the state's claim on this point.

In the statement of facts, the state attempts to set up a straw man argument to defeat easily by stating that during Williams' interrogation of Petitioner, Williams did not question Petitioner about Johnson's death. Specifically, the state claimed that when Petitioner told Williams that he believed the officer wanted to speak about something that happened in Allendale, Williams asked Petitioner what he was talking about and Petitioner "without being questioned about it" volunteered information. BOR at 6; see also BOR at 9. The suggestion that Williams was not questioning Petitioner is an attempt by the state to move this interrogation outside the gambit of Miranda v. Arizona, 384 U.S. 436 (1966). This attempt must fail. Interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. ... Interrogation is defined as express questioning or its functional equivalent which includes 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." State v. Sims, 304 S.C. 409, 416-417, 405 S.E.2d 377, 381-382 (1991). Williams certainly questioned Petitioner, and the state's straw man argument here must not stand.

The state claimed that Petitioner "proceeded to admit to knocking on [the deceased]'s door, hitting him, holding him down, watching him while the others searched the house, and putting the bag over his head." BOR at 8. In providing this summary, the state omitted the techniques used by the SLED agent to produce these admissions. As described in the brief of petitioner, the highly skilled SLED agents employed numerous methods to obtain incriminating statements from

Petitioner, including isolation, negative and positive incentives, false claims of forensic evidence, and minimizations.

### **Standard of review**

Petitioner joins in Respondent's request for reconsideration of the standard of review to be applied when an appellate court reviews a trial court's decision on the admissibility of a defendant's statement to law enforcement. See BOR at 15. Other jurisdictions review the admissibility of an in-custody statement de novo. See e.g., Bunnell v. State, 735 S.E.2d 281, 285 (Ga. 2013) (providing that "[w]hen controlling facts discernible from a videotape are not disputed, our standard of review is de novo"); People v. Valle, 939 N.E.2d 10, 19 (Ill. App. Ct. 2010) (explaining the appellate court's use of de novo review for the voluntariness of confessions where there is a recording of the interrogation). Still others apply a two-part standard of review, examining the trial court's findings of historical facts for clear error and independently reviewing whether the facts satisfy the constitutional standards. See e.g., United States v. D.F., 115 F.3d 413, 419 (7th Cir. 1997) (holding that Ornelas v. United States, 517 U.S. 690 (1996) required the ultimate question of whether a confession is voluntary to be matter of law warranting de novo review with review of historical facts for clear error); United States v. Jacobs, 431 F.3d 99, 104 (3rd Cir. 2005); United States v. Giddins, 858 F.3d 870, 878-879 (4th Cir. 2017); State v. Bormann, 777 N.W.2d 829, 832-833 (2010); People v. Humphrey, 132 P.3d 352, 356 (Colo. 2006). See also Miller v. Fenton, 474 U.S. 104, 116-118 (1985) (holding that the voluntariness of a confession is not an issue of fact, but is a legal question requiring independent consideration in a federal habeas corpus proceeding).

### **Discussion**

In its brief, the state places considerable significance on the waiver of rights form signed by Petitioner. BOR at 20. Petitioner also submits that considerable significance should be paid to the form; however, contrary to the state's position, the form actually supports that Petitioner's waiver of his rights and his subsequent statement to police was involuntary. The waiver form shows that instead of writing his phone number where indicated, Petitioner wrote "Jackson St." R. 445. Even if he believed he was supposed to provide his address there, he failed to provide a complete address. R. 445. He noted that he had completed "8" years of education, but he was unable to sign his name in cursive; rather, his name appears printed in both places where a signature is requested. R. 445. Contrary to the state's implied position that obtaining a "signed" waiver of rights form satisfies the Constitution, it does not. Obtaining waivers of constitutional rights and obtaining voluntary statements should be approached with the greatest of concern and care – it is not simply a checklist of items to do.

In support of its argument that this Court should affirm the Court of Appeals' decision, the state cited to United States v. Robinson, 404 F.3d 850, 860-861 (4th Cir. 2005). BOR at 20. However, the Fourth Circuit's decision offers no assistance to the state as the argument presented there was whether Robinson's age and below average I.Q. made him per se incapable of intelligently waiving his rights. United States v. Robinson, 404 F.3d 850, 860-861 (4th Cir. 2005). As the Court explained, "Robinson does not contend that his waiver was involuntary, but rather argues that, given his age at the time of the interrogation, and his mental ability, he was per se incapable of knowingly waiving his Miranda<sup>2</sup> rights." Id. at 860. Petitioner has not argued that he was incapable of giving a voluntary statement based upon his age and mental ability alone.

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<sup>2</sup> 384 U.S. 436 (1966).

The United States Supreme Court explained that it “has consistently looked to the Due Process Clause of the Fourteenth Amendment to test admissibility” of “confession cases coming from the States.” Miller v. Fenton, 474 U.S. 104, 116 (1985). The Court explained “[t]he locus of the right is significant because it reflects the Court’s consistently held view that the admissibility of a confession turns as much on whether the techniques for extracting the statements as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant’s will was in fact overborne.” Id. (emphasis in original). The analysis for determining whether Petitioner’s statement to police was voluntary and given in compliance with Miranda must be viewed through this lens. At a minimum, the record is clear that the techniques used by the SLED on Petitioner were not compatible with a system that presumes innocence where Petitioner’s confession was induced largely by the SLED agent’s promise to reduce how much time Petitioner would receive if he gave a confession.

#### **Not Harmless Beyond a Reasonable Doubt**

The United States Supreme Court declared “that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.” Chapman v. California, 386 U.S. 18, 22 (1967). In order for a constitutional error to be deemed harmless, it must be determined beyond a reasonable doubt the error did not contribute to the verdict. Id. at 24. At one time, the introduction of a coerced confession could never be treated as harmless error. Id. at 23 n.8. Although harmless error now applies to coerced confessions based upon a plurality decision, the fact that it once did not is of significance. Arizona v. Fulminante, 499 U.S. 279 (1991).

“A confession is like no other evidence.” Id. at 296. A confession “is probably the most probative and damaging evidence that can be admitted against him.” Id. (internal quotation omitted). “Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.” Id. (internal quotation omitted). In fact, this Court has held that a confession is “conclusive” and may form overwhelming evidence of guilt. Smalls v. State, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018).

Here, the state has failed to prove the admission of Petitioner’s confession to law enforcement was harmless beyond a reasonable doubt. See BOR at 25-28. As explained in the brief, the other evidence against Petitioner was far from overwhelming, and the importance of the confession to the state’s case is demonstrated by the prosecutor’s closing argument. The prosecutor repeatedly urged the jurors to listen to the audio recording of the interrogation and rely upon it in making their decision. The case against Petitioner was built upon his coerced confession to police, and its erroneous admission must not be deemed harmless beyond a reasonable doubt.

**CONCLUSION**

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

  
Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER

This 19<sup>th</sup> day of January, 2023.