STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of General Sessions
Thomas A. Russo, Circuit Court Judge

The State, Respondent,

v.

David Gerrard Johnson, Appellant.

Appellate Case No. 2012-209267

INITIAL BRIEF OF RESPONDENT

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II.

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III.

The trial court erred in admitting evidence that was the product of Appellant's statement where the evidence was the fruit of the poisonous tree, Appellant's statement, which was made without Appellant having the capacity to waive his constitutional rights due to his intellectual disability and where Appellant lacked the capacity to consent to the search of his house.

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Appellant's state and federal constitutional rights to a trial by a fair and impartial jury were violated by the trial judge erroneously excusing a juror, who stated that although she knew members of Appellant's family, she could be fair and impartial.

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(FBOA, p. 1).

RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

I.

Whether the record supports the trial judge's initial determination of admissibility of the statements made by Appellant where Appellant, though diagnosed as intellectually disabled, evidenced the ability to understand his rights, had a history of understanding both constitutional rights and the concept of waiver by way of prior guilty pleas, had been found competent to stand trial which would allow him to waive his constitutional rights if he chose to do so, and there was no disagreement with this ability as Appellant's own defense expert agreed that Appellant was competent to stand trial or plead guilty.

II.

Whether Appellant's assertion his consent to a DNA sample and fingerprinting was invalid due to Appellant's intellectual disability fails where Appellant's intellectual disability does not prevent valid waiver of rights or ability to consent.

III.

Whether Appellant's assertion that the stolen electronic equipment recovered as a result of the statement should be suppressed as fruits of the improper statement fails when the statement was voluntary and admissible.

IV.

Whether the trial judge abused his discretion in not qualifying Juror #130 when the juror evidence significant hesitation due to a knowing defendant's family even while expressing she would be a fair juror in this instance?

V.

Whether the trial judge abused his discretion in admitting three photographs of the victim's body as found by the side of the road when the trial judge carefully reviewed six offered photographs and selected three that were the least gory and graphic that would allow the State to present its case fairly without the danger of unfair prejudice to the defendant.

STATEMENT OF THE CASE

A Florence Grand Jury indicted Appellant, David Gerrard Johnson, in September 2009 for murder, burglary first degree, armed robbery, possession of a weapon during the commission of a violent crime, and conspiracy. (R. p. *). The case was originally noticed as a death penalty case. Robert E. Lee, Esq., was initially appointed to represent Appellant. The State sent a formal letter to Mr. Lee on October 14, 2009, after indictment, conveying the intent to seek the death penalty. (R. p. *). Subsequently, Mr. Lee was relieved and W. James Hoffmeyer, Esq., and Kathy P. Elmore, Esq. were appointed as the required two attorneys in a capital case. On June 11, 2010, the Honorable Thomas A. Russo was assigned jurisdiction over the capital proceedings.[1] (R. p. *). By Order dated January 4, 2012, filed January 9, 2012, Judge Russo determined that Appellant had been diagnosed with intellectual disability and the State was precluded from seeking death. (R. p. *).

W. James Hoffmeyer, Esq., continued to represent Appellant on the charges for the non-capital trial. A jury trial was held February 13-17, 2012. Judge Russo presided. The jury convicted as charged. (Vol. 2, p. 805, lines 2-18). The judge sentenced Appellant to consecutive terms of life without the possibility of parole for murder and burglary; thirty (30) years, concurrent, for armed robbery, and five (5) years, concurrent, for conspiracy. (Vol. 2, p. 826, line 10 – p. 827, line 3). The five (5) year sentence for the weapon charge was not imposed in light of the life sentence. S.C. Code § 16-23-490 ("This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime"). This appeal follows.

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[1] The prior assignment of the Honorable Ralph King Anderson, Jr., from October 19, 2009, was rescinded with Judge Russo's assignment. (R. p. *).

RESPONDENT'S STATEMENT OF FACTS

The victim in this case was sixty-nine-year-old Willie Mae Hayes. Ms. Hayes was stabbed seven times along the front of her neck, the deepest wound measuring 3.8 inches. Her cause of death was determined to be the "stab wounds to her neck with the disruption of the jugular vein." (Vol. 2, p.338, line 14 – p. 339, line 18). Though in his statement to officers Appellant denied the stabbing, evidence at trial indicated that Appellant planned the entry into the home, led the attack on Ms. Hayes in her bedroom, wrapped her body in a sheet, and dumped her body in a ditch along the roadside. Appellant also revealed to officers that he had obtained three electronic pieces (DVD/VCR and CD players) from Ms. Hayes' home. Those pieces of equipment were retrieved from under porch at Appellant's family home. Defense counsel argued at trial, consistent with Appellant's final statement, that Appellant was at Ms. Hayes' home, but did not stab Ms. Hayes. As noted, the jury convicted as charge. In support of this summary of the evidence against Appellant, Respondent sets out the following facts as presented at trial:

On August 25, 2008, family members received a call that Ms. Hayes did not show up for work, which was very unusual, and became worried about Ms. Hayes. Her brother went to her home. Ms. Hayes was not there. Upon inspection of the home, her brother found the back door unlocked and unsecure by a reinforced bar that victim usually placed on the door for added security. (Vol. 2, p. 135, line 5 – p. 137, line 22). Ms. Hayes' daughter noticed a broken vase, then saw a television was missing. (Vol. 2, p. 139, line 3 – p. 140, line 19). The victim's son noticed a screen removed from a window, and saw other evidence of disarray, specifically twisted bed linens in Ms. Hayes' bedroom. (Vol.

2, p. 143, line 13 – p. 145, line 10). While at first they thought perhaps Ms. Hayes had an accident and called the hospital, their concerned increased and they called the police. (Vol. 2, p. 140, lines 21-25; p. 144, lines 14-22). Officers found a point of entry in the kitchen, (Vol. 2, p. 205, lines 16-22), and blood in the bedroom on the mattress and surrounding areas, (Vol. 2, p. 214, line 20 – p. 218, line 10; p. 363, line 2 – p. 364, line 20). Upon further investigation, officers were able to locate the victim's car parked in the same general area near the home, (Vol. 2, p. 269, line 23 – p. 270, line 19), and, also close to the home, found a bag of pillows that tested presumptive positive for blood, (Vol. 2, p. 214, lines 1-18; p. 377, line 16 – p. 378, line 13). Additional investigation in the area led police to request that Appellant come by and speak with the officers. Officers left messages at Appellant's home, with his father, and put the "word on the street." (Vol. 2, p. 535, line 24 – p. 537, line 20; p. 654, line 16 – p. 660, line 25).

Appellant voluntarily went to the station. While Officers Drayton and Godwin were the lead investigators, they were busy interviewing another individual when Appellant arrived. Officer Compton sat with Appellant. Appellant chatted with Officer Compton, had a snack and drink, and even took a nap while waiting. Officer Compton testified the relaxed conversation was cordial, pleasant and intelligent. (Court Exhibit 5; Vol. 1, p. 37, line 7 – p. 40, line 23; p. 60, line 20 – p. 61, line 9; Vol. 2, p. 444, line 6 – p. 449, line 12). Several hours (perhaps as many as eight hours) passed before Officer Compton simply became "curious" and asked Appellant if, given the other detectives were still busy, he would talk to him. (Vol. 1, p. 54, line 1 – p. 55, line 25; p. 40, line 23 – p. 41, line 4). Appellant agreed to talk, and Officer Compton read Appellant the *Miranda* rights. (Vol. 1, p. 41, lines 5- 18). The officer read each one, "one at a time,"

and advised Appellant to "listen up carefully." (Vol. 1, p. 41, line 24 – p. 42, line1). Officer Compton asked if Appellant understood, and Appellant indicated his understanding. Officer Compton had no indication that Appellant did not or could not understand. The officer explained that he had experience with individuals who could not understand and did not see any "red flags" or cause to stop the interview. His impression was that Appellant understood. (Vol. 1, p. 45, line 8 – p. 46, line 23; Vol. 2, p.452, line 5 – p. 454, line 20). Appellant initially denied involvement, then admitted he was in the home. He also agreed to show investigators where the body was dumped. He indicated "Amp" told him were the body was, "Amp" being Anthony Wilson (Court Exhibits 5). (See also Vol. 1, p. 47, line 1 – p. 50, line 18; p. 84, lines 7-9; Vol. 2, p. 455, line 1 – p. 459, line 11; p. 497, line 20 – p. 501, line 8). Another officer, Officer Raines came in to Officer Compton's office during the questioning. Officer Raines also testified in pre-trial that he "heard nothing that would lead [him] to think that he was not understanding what was being said." (Vol. 1, p. 67, lines 8-12).

After recovering Ms. Hayes' body and returning to the station, Appellant gave another statement which was recorded. He was again read his *Miranda* rights, again appeared to understand his rights, and no threats were made or coercive tactics used. (Court Exhibit 3; State's Exhibit 117; State's Exhibit 120; Vol. 1, p. 77, line 5 – p. 79, line 18; p. 80, line 6 – p. 83, line 14; Vol. 2, p. 547, line 1 – p. 550, line 21; p. 673, lines 5 - 19; p. 681, line 21 – p. 685, line 17). In this second statement, Appellant again admitted to being in the home, blamed Wilson for the murder, but admitted taking part in dumping the body and driving the car afterwards. (Court Exhibit 3; State's Exhibit 116;

Vol. 2, p. 686, lines 22-23(statement played for the jury)[2]). Appellant also took officers to his father's home and showed investigators the hidden the electronics taken from Ms. Hayes' home. (Vol. 1, p. 79, line 21 – p. 80, line 1; p. 83, line 15 – p. 84, line 15; Vol. 2, p.556, line 3 – p. 560, line 15; p. 673, line 20 – p. 675, line 17).

Forensic testing determined the blood on the mattress, the bed rail, the bedroom curtains, and the pillows belong to Ms. Hayes. (Vol. 2, p. 312, lines 5-15; p. 313, lines 2-21). Further forensic testing matched samples from the steering wheel in victim's car to Appellant with "[t]he probability of randomly selecting an unrelated individual having a [matching] DNA profile" as one in five point one quadrillion. (Vol. 2, p. 303, lines 12-23). Further still, Appellant's fingerprints were also found on the driver's side area. (Vol. 2, p. 417, lines 1-9).

Co-defendants Anthony Wilson, a/k/a "Amp," and Gregory Montgomery testified at trial. Wilson testified that he was fourteen years old in August 2008. He testified that on August 25, 2008, he was sitting in a swing in Rashawn Bailey's yard next to Ms. Hayes' home. Appellant asked him to "walk with him" and they walked next door to Ms. Hayes' home. Appellant asked Wilson, who was small, to go through a window to gain entry to the house. He opened the door for Appellant and Bailey. At one point, Wilson looked in the bedroom and saw Appellant sitting on top of Ms. Hayes in her bed. He had a pillow over her. Appellant instructed Wilson to enter the room. Appellant pulled a pocketknife open and gave it to Wilson, telling him to stab Ms. Hayes. Wilson, at Appellant's repeated urging, stabbed Ms. Hayes once and ran outside. Appellant came out and asked his help in disposing of the body. Wilson helped Appellant carry the body

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[2] Respondent notes the statement played for the jury omitted references to remorse. (See Court Exhibit 3, pp. 16-17; Vol. 2, p. 86, line 12 – p. 87, line 25).

out, wrapped in a sheet, and placed the body in a ditch by the side of the road. Appellant was concerned the body could be seen, and Wilson attempted to cover the body with twigs and leaves. They returned to Ms. Hayes home. They met Montgomery. Montgomery went into the home with Wilson and Appellant. (Vol. 2, p. 584, lines 24-25; p. 589, lines 7-25; p. 591, line 1 – p. 604, line 22).

Montgomery testified similarly in that he saw Appellant and Wilson in Ms. Hayes' car as they returned. He asked Appellant, who was driving, where he had gotten the car. Appellant replied that "he had pulled a lick, which means he had committed a robbery." Montgomery asked for additional details, but Appellant stated he would be scared if he told Montgomery so Montgomery determined he did not want to know and did not press Appellant. Montgomery then took a ride around the block with Appellant and Wilson. After they returned, Appellant asked Montgomery if he would like to "pull a lick." They group exited the car and went to Ms. Hayes' home. Montgomery entered the home with Appellant and Wilson. He noted the back door was already open. Montgomery could not find anything he "wanted like a TV,VCR, and stuff like that," so he went to the kitchen and took a pack of chicken and Kool-Aid. (Vol. 2, p. 627, lines 6-16; p. 631, lines 2-12; p. 632, line 17 – p. 635, line 16).

ARGUMENT

I.

> The trial judge did not err in finding the statements made to investigating officers were voluntarily made upon knowing and intelligent waiver and therefore admissible where the officers carefully explained Appellant's *Miranda* rights, did not coerce or threaten Appellant, and had no indication of an inability to understand his rights due to intellectual disability. Further, even if error, there is no prejudice on this record where Appellant abandoned his position that his waiver of rights was not sufficient due to his intellectual disability in failing to present any evidence of intellectual disability to the jury when the jury was tasked with determining voluntariness based on the totality of the circumstances.

Appellant does not complain appropriate *Miranda*[3] warnings were not given or that force or intimidation was used to extract a confession. Rather, Appellant makes the single complaint that he lacked the mental capacity "to mak[e] a knowing waiver of his constitutional rights due to his intellectual disability." (FBOA, p. 4, Issue I). As a first matter, Appellant abandoned this position when he failed to introduce evidence of intellectual disability for the jury to consider. There could be no prejudice on this record, thus, Appellant cannot be entitled to relief. Even so, the trial judge did not commit error as his ruling finding by a preponderance of the evidence that the statements were admissible is well supported by the factual record. There is no error.

Abandonment of the Issue Below

> Where voluntariness of a statement is at issue the trial judge must make an initial determination based upon the preponderance standard. If the statement is found to have been given voluntarily, it is then submitted to the jury, where its voluntariness must be established beyond a reasonable doubt.

State v. Washington, 296 S.C. 54, 56, 370 S.E.2d 611, 612 (1988).

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[3] *Miranda v. Arizona*, 384 U.S. 436 (1996) (establishing procedural safeguard warnings must be given prior to the taking of custodial statements).

In this case, Appellant presented evidence of intellectual disability[4] in the pre-trial suppression hearing by way of testimony of defense witness Dr. David Richard Price. Dr. Price was qualified as an expert in the fields of clinical psychology, forensic psychology, and neuropsychology. (Vol. 1, p. 106 lines 11-16). Dr. Price testified that Appellant had an IQ of 59, had reduced comprehension ability (kindergarten level to second grade level), and would not have been able to "know, appreciate, and understand" the *Miranda* warnings and waiver of rights. (Vol. 1, p. 110, line 11 – p. 114, line 23; p. 116, line 19 – p. 117, line 17).[5] Dr. Price described Appellant as being "at the low end of the mild range of mental familiar retardation. (Vol. 1, p. 110, lines 24-25). However, no such evidence was presented to the jury. Further, Appellant actually embraced and relied upon his statements in his closing arguments to the jury, arguing the greater culpability of his co-defendant(s). (See Vol. 2, p. 765, lines 2-11; p. 766, lines 6-24; p. 769, lines 17 – 22; p. 770, line 20 – p. 772, line 7).

Because Appellant failed to submit the evidence to the jury for consideration, he abandoned his argument that his intellectual disability rendered him unable to make a knowing and voluntary waiver of his rights. *See State v. Von Dohlen*, 322 S.C. 234, 244-245, 471 S.E.2d 689, 695-696 (1996) ("If the statement is found to be valid by the court, it must be submitted to the jury" as once determined admissible, "it was then within the

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[4] *State v. Stanko*, 402 S.C. 252,741 S.E.2d 708, 724 (2013) (noting that references in the state statute to mental retardation have been deleted and replaced with term "intellectual disability" but same meaning is assigned).

[5] The transcript also reflects, as part of Dr. Price's testimony, that "[i]n 1939 his full scale IQ was 88...." (Vol. 1, p. 114, line 9). It appears that year and level is likely a scrivener's error. In the separate competency to stand trial proceedings, Dr. Alicia V. Hall of the South Carolina Department of Disability and Special Needs testified that Appellant IQ scores were "consistent" and opined that he "met [the] criteria for [mild] intellectual disability." (Vol. 1, p. 12, line 4 – p. 14, line 8). (See also Court Exhibit 1, p. 2, reporting 1993 test as 58). The fact of the intellectual disability is not at issue.

province of the jury to determine the voluntariness of the statement."); *State v. Adams*, 277 S.C. 115, 123, 283 S.E.2d 582, 586 (1981) ("We caution the court on remand to impress upon the jury that no confession may be considered by it unless found beyond reasonable doubt to have been given freely and voluntarily under the totality of the circumstances."), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (abolishing *in favorem vitae* review in capital cases); *State v. Goodwin*, 384 S.C. 588, 683 S.E.2d 500 (Ct.App. 2009) (*quoting State v. Davis*, 309 S.C. 326, 342, 422 S.E.2d 133, 143 (1992)) ("Once the court determines that a defendant received and understood his rights the court allows a confession" to be admitted and "[i]t is then for the jury ultimately to decide whether the confession was voluntary.").[6] Appellant certainly had the ability to introduce the evidence of intellectual disability. *See State v. Cain*, 246 S.C. 536, 541, 144 S.E.2d 905, 908 (1965) ("The appellant had the right to introduce evidence of his insanity at the time of his confession for the purpose of impairing or destroying its effect and it was for the jury to determine what weight should be accorded thereto."), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (abolishing *in favorem vitae* review in capital cases). In fact, immediately after his full ruling on admissibility, the trial judge added:

> Not that doesn't - - obviously, Mr. Hoffmeyer, that doesn't relieve the State of their burden of proving to the jury that the statement was

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[6] Appellant also certainly, as a matter of strategy, could decide to abandon the issue. *See, for example, Basham v. United States*, 2013 WL 2446104, *36-37 (D.S.C. 2013) ("after acknowledging the weakness of any potential argument regarding voluntariness, counsel adopted a reasonable strategy to cross-examine law enforcement witnesses to obtain evidence of Basham's cooperation, thus potentially strengthening their case in mitigation."). Respondent does not suggest otherwise. Simply, if the jury does not hear the evidence, the jury cannot consider the evidence in making the ultimate determination. That omission is conditioned on Appellant's action, not the initial ruling on admissibility.

> freely and voluntarily given. The jury still makes that decision, and certainly at the appropriate time when I charge the jury on the law that, you know, whether or not they believe it was freely and voluntarily given is a decision they'll make based on the testimony and the evidence that they perceive....

(Vol. 2, p. 62, lines 6-14).

Further, Appellant attempted to introduce through cross-examination questions to the investigating officers that the officers knew at the time of trial (not questioning) that Appellant was intellectually disabled. The trial judge disallowed such questions as there was no evidence of same that had been presented to the jury. (See Vol. 2, p. 491, line 24 – p. 493, line 17; p.565, line 19 – p. 566, line 4). However, the trial judge did not at any point prevent the defense from presenting Dr. Price. Dr. Price was simply not offered as a witness by the defense. *Compare State v. Santiago*, 370 S.C. 153, 634 S.E.2d 23 (Ct. App. 2006) (error in not allowing jury to hear psychiatrist's testimony on mental limitation as to voluntariness harmless where case not dependent on confession). Consequently, the challenge to the statement was intentionally abandoned. Forgoing the consideration by the jury should obviate the need to revisit the preliminary ruling. *See generally Ligon v. Norris*, 371 S.C. 625, 633, 640 S.E.2d 467, 472 (Ct. App. 2006) ("An objection withdrawn at trial constitutes an express waiver of the issue and does not preserve the issue for appellate review.").

At bottom, Appellant failed to present the issue to the jury, though the jury ultimately determined voluntariness. Any prejudice on this record, thus, is specifically tied to this default, not the preliminary admissibility ruling. Consequently, error, if any, is premised on Appellant's own conduct, and he may not now complain on appeal. *See State v. Stanko*, 402 S.C. 252, 270, 741 S.E.2d 708, 717 (2013) ("Appellant cannot now

complain of an error which his own conduct induced."); *State v. Brannon*, 341 S.C. 271, 275, 533 S.E.2d 345, 347 (Ct.App. 2000) (same).[7] At any rate, the trial judge did not err in making his preliminary determination on admissibility.

The Trial Judge Did Not Abuse His Discretion in Finding by a Preponderance of the Evidence that the Statements were Voluntarily Made Upon Knowing Waiver of Appellant's Constitutional Rights.

"On appeal, the conclusion of the trial judge as to the voluntariness of a statement will not be reversed unless so erroneous as to show an abuse of discretion." *State v. Miller*, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007) (citing *State v. Von Dohlen,* 322 S.C. 234, 242, 471 S.E.2d 689, 695 (1996)). "When reviewing a trial judge's ruling concerning voluntariness, the appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. *Miller*, 375 S.C. at 378-379, 652 S.E.2d at 448 (citing *State v. Saltz,* 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001)). *See also State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001) ("On review, we are limited to determining whether the trial judge abused his discretion....This Court does not re-

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[7] It is questionable that the issue is even preserved for review as it was not an issue at trial. *See State v. Elmore*, 368 S.C. 230, 628 S.E.2d 271 (Ct. App. 2006) (*quoting State v. Glenn*, 285 S.C. 384, 385, 330 S.E.2d 285, 286 (1985) ("[W]hen the trial judge chooses to make a preliminary ruling on the admissibility of prior convictions to impeach a defendant and the defendant does not testify at trial, the claim of improper impeachment is not preserved for review."). *See also State v. Gilmore*, 396 S.C. 72, 719 S.E.2d 699 (Ct.App. 2011) (adhering to rule). Respondent has not found a case directly on point as to preservation in this particular circumstance, however, there is a fundamental issue of having one's cake and eating it too when an appellant strategically decides to forgo the possibility to have the issue heard by the jury, but still claims on appeal the trial judge erred in admissibility. Defense counsel requested the judge instruct the jury – both when the statements were admitted and at the close of evidence – that the jury had the ultimately responsibility to determine if the statements were voluntary, and the jury was so charged. (Vol. 2, p. 63, lines 16 – 25; p. 451, lines 7-19; p. 783, line 1 – p. 784, line 8).

evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence.").

The Supreme Court has long recognized that one may waive one's constitutional rights upon proper warnings:

> ... we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

Miranda v. Arizona, 384 U.S. 436, 478-479 (1966). However, establishing whether a defendant received the *Miranda* warnings is only one part of the process to determine the correctness of the waiver – the inquiry is divided into two separate parts:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Moran v. Burbine, 475 U.S. 412, 421 (1986). *See also Miranda*, 384 U.S. at 445 ("The defendant may waive effectuation of these rights, *provided* the waiver is made voluntarily, knowingly and intelligently.") (emphasis added).

"In South Carolina, the test for determining whether a defendant's confession was given freely, knowingly, and voluntarily focuses upon whether the defendant's will was overborne by the totality of the circumstances surrounding the confession." *State v. Moses*, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct.App. 2010). Factors to consider include "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." *Id*, 390 S.C. at 513-514, 702 S.E.2d at 401. Other courts have also specifically considered and noted prior interaction with law enforcement and exposure to one's constitutional rights as points supportive of knowledge and understanding. *See, for example, United States v. Pruden*, 398 F.3d 241, 246 (3rd Cir. 2005) ("Pruden was familiar with his rights, having been involved in the justice system on numerous previous occasions."); *United States v. Robinson*, 404 F.3d 850, 861 (4th Cir. 2005) ("Robinson had, on two prior occasions, been read his *Miranda* rights and waived them."). Again, no one point is dispositive: "Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Moran v. Burbine*, 475 U.S. at 421. Here, Appellant challenges only one point – his level of intelligence.[8] He claims he did not "mak[e] a knowing waiver of

[8] Counsel argued several times that he was not isolating this point, but making the

his constitutional rights due to his intellectual disability." (FBOA, p. 4, Issue I). However, "under State law, a confession is not inadmissible because of mental deficiency alone." *State v. Hughes*, 336 S.C. 585, 594, 521 S.E.2d 500, 505 (1999) (*citing State v. Doby*, 273 S.C. 704, 258 S.E.2d 896 (1979), cert. denied, 444 U.S. 1048 (1980)). The trial judge considered the evidence of intellectual disability and found, under a correct totality of the circumstances evaluation, the statements were admissible:

> ... I have ruled that based on the testimony before the Court that at least for purposes of Jackson v. Denno I've ruled that the statement is admissible under that standard taking all of the evidence into consideration and appreciating and certainly recognizing Doctor Price's expertise. Just the evidence overall taking into consideration both expert and the lay testimony, I believe that it was appropriate for the statement to come in. There did not appear to be any undue coercion or threats or force with regards to the statement. Mr. Johnson was at the police department for some length of time, I mean, an inordinate length of time with regards to waiting to give his statement. But the testimony that the Court understood was that he had heard, or his father had heard or someone had heard on the street, that there was interest and the police had interest in speaking with him regarding this case and he came in voluntarily. He wasn't called in by law enforcement, but he was – he came in on his own. He was placed in a room where there was a couch and seating; officer Compton was there. He was given food and drink with he asked for it. He was allowed to sleep for some period to time. He had conversation with Officer Compton. He was, in fact, read his Miranda rights both by Officer Compton, initially by Officer Compton, then by Officer Godwin and Drayton. He signed a waiver of rights form.
>
> The issue that Doctor Price raised was that his belief that the defendant would not have been able to comprehend or understand his rights and therefore that his waiver would not have been a free and voluntary waiver. However, the testimony that was before the Court was that he had been through the criminal justice system in the past. He had, in fact, entered guilty pleas some years prior to this. He'd been through the system before and was able to successfully go through the process at that time. He did not indicate at any time during this case in questioning his, in going over his rights, that he had any question about these rights.

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argument the statements were not voluntary based on the totality of the circumstances. (See Vol. 1, p. 164, line 12 – p. 166, line 10). Respondent interprets the argument on appeal to be the same, with single focus on the mental state but light of totality of the circumstances.

He appeared to all persons present that he had the wherewithal. I read the transcript of the statement he gave. And throughout that transcript all of his responses were appropriate to the questions that were asked, id not seem to have any difficulty understanding those questions. And I realize that was post-Miranda, but again, it's evidence to indicate that at the time that the statement was given that he was lucid and appeared to understand the things which were asked of him. Also, he had in fact been found to be competent to stand trial; and by Doctor Price's own testimony, that he believed that he was, in fact, competent to stand trial and that if this case were to change direction and resolve toward guilty plea that he would be able to enter a guilty plea. And obviously that would require him understanding his rights regarding that.

All this is to say that I have considered all of the evidence before the Court, all of the lay testimony, the expert testimony, the circumstances surrounding the rights, and I do believe that under Jackson v. Denno that the rights and were done owe appropriately. I believe that he did, in fact, was not under any coercion or any undue stress or threats and that the rights were given properly and, that it's appropriate to be admitted into this case.

(Vol. 2, p. 59, line 13-p. 62, line 5). Further, at sentencing the trial judge noted:

... This burglary could have occurred by simply burglarizing this home and leaving Ms. Hayes. There was nothing in the evidence - - there's nothing that I'm aware of that caused them to assault Ms. Hayes. She was, from what I understand, actually asleep in her bed so she wasn't bothering anybody.

There is a course of conduct, Mr. Johnson, that we've seen from you. I heard all the testimony and I heard all of the evidence regarding your intellectual disability, and I have – there's nothing that I know of that would cause me to question that at all. I don't question that. What I do question is to the level that Doctor Price seemed to think that disability, to the depth that he seemed that disability went. I've spoken to you on several occasions and asked you questions, and I think you've understood my questions. You appear to have understood them. I think you intelligently answered the questions that I've asked of you. I listened to the interview tape that you gave. I don't believe there was – I would agree with the jury's assessment that that was a statement that was voluntarily given. I do believe you understood your rights and the way you responded to the questions from law enforcement during that interview seemed to show me that you understood their questions and your responses were appropriate with regards to answering those questions. And so although I do believe and I understand that you may have some level of intellectual disability as the doctors determined, I do believe that you're clearly a competent individual who understood the difference between right and wrong and the consequences of your actions....

(Vol. 2, p. 824, line 2 – p. 825, line 10).

The record fully supports the trial judge's factual findings. The fine point of the Appellant's argument appears to be that none of the officers understood that Appellant did not understand his rights as read and explained to him, thus, the officers failed to do more to ensure Appellant's understanding and the statements were improper. (See FBOA, p. 18). However, this argument essentially concedes there is ample lay witness testimony that Appellant did in fact understand his rights as they were explained to him. *See State v. Davis*, 309 S.C. 326, 337, 422 S.E.2d 133, 141 (1992) (*overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999) (finding "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.").

Officer Compton testified that he had experience with individuals who do not understand their rights, and he has ended the interview. However, Appellant gave him no reason to think that he did not understand. (Vol. 1, p. 46, lines 9-23). Officer Raines similarly testified that he detected no "red flags" that would alert the officers that Appellant did not understand. (Vol. 1, p. 67, line 8 – p. 68, line 1). Officer Godwin also testified that saw nothing of concern. He testified that Appellant "was very clear, coherent," and he "didn't notice anything out of the ordinary with him, understood what was going on." (Vol. 1, p. 78, lines 17-21). He testified Appellant "seemed to understand everything that was being stated in the room. He never made any statement that he didn't understand anything." (Vol. 1, p. 79, lines 16-18). (See also Vol. 1, p. 89, lines 23-24, "he didn't give no indications that he had any kinds of issues."). Officer Drayton also testified that he had experience with individuals who do not understand

their rights and he will suspend questioning at that time. However, Appellant gave no indication, "nothing verbal, no expression," that would indicate any issue with understanding. (Vol. 1, p. 95, line 11 – p. 96, line 21). Officer Drayton testified Appellant "appeared to be willing and cooperate[d]" in the investigation. (Vol. 1, p. 97, lines 7-13). Further, Officer Drayton testified that a lot of information Appellant proved accurate when compared to what the investigation had already revealed. (Vol. 1, p. 96, lines 3-6).

This testimony followed on the heels of the testimony regarding competency. Dr. Alicia V. Hall testified that Appellant did have a basic understanding of his rights. Specifically, Dr. Hall testified that he explained not only that he did not have to speak in court or with the solicitor, and he could describe the basic danger in speaking to the solicitor without counsel. (Vol. 1, p. 16, line 10-p. 17, line 18). This is an example of his ability. Appellant certainly understood basic concepts. In fact, Dr. Hall testified that finding him competent means he understand the legal process, at least to some degree. (See Vol. 1, p. 14, lines 3-12). In general terms, Dr. Hall found that "required more time to understand and answer questions," but that he had the ability to understand and answer. (Vol. 1, p. 18, lines 13-19). Dr. Hall testified that Appellant would indicate if he had a question, either verbally or by expression. (Vol. 1, p. 29, line 22- p. 30, line 5). However, she did not have to educate him on not having to talk to the solicitor or that it would not be in his best interest to talk to the solicitor. He knew that point and informed her he understood. He also understood murder was most serious and he could face thirty years to life. He needed no education on those points, either. (Vol. 1, p. 30, lines 6-21).

While Dr. Price testified that Appellant had a much lower ability in understanding. He maintained Appellant function at a kindergarten level, even though Appellant tested at third grade level in reading. (Vol. 1, p. 125, line 23- p. 126, line 6). Dr. Price discounted the fact that Appellant knew some of his rights during the DDSN evaluation because Dr. Price had "educated" him on those. (See Vol. 1, p. 131, lines 20-24). The solicitor established that Appellant had waived his trial rights in his guilty plea in October 2005 to seven charges. (Court Exhibits 6-12). Dr. Price agreed Appellant had pled guilty before, but did not believe that gave him understanding. (Vol. 1, p. 129, lines 8-16). Dr. Price also disagreed that either holding a job or driving a car (both of which Appellant did) could be indicative a higher level of understanding that a kindergartener. (Vol. 1, p. 124, line 23- p. 127, line 15). However, Dr. Price agreed that Appellant was competent to stand trial in regard to the instant charges, and with "special education," could waive his right to trial and plead guilty. (Vol. 1, p. 135, lines 10-20).

Judge Russo specifically questioned Dr. Price on whether an individual with intellectual disability would benefit from education and life experience. Dr. Price indicated that was "possible but in this specific case, this intellectual level, he never really profited from any of those experiences and he really doesn't have an ability to learn." (Vol. 1, p. 139, lines 15-18).

Further, Judge Russo had been assigned exclusive jurisdiction of this matter as a capital case. As he referenced at sentencing, he had the opportunity to observe Appellant and interact with Appellant over an extended period of time. Judge Russo had previously considered the evidence of Appellant's intellectual disability in precluding the State from seeking the death penalty. (See R. p. *). It is of no little note that counsel had no

objection to judge's explanation of the right to remain silent or the decision not to testify, and that decision, as the judge stated, was his own decision to make, which he stated he understood. (See Vol. 2, p. 707, line 4 – p. 710, line 12). This was arguably a more complicated right to understand, with attendant considerations, than the right to remain silent and the assertion of that right. However, there was no indication during this subsequent exchange that understanding was an issue.

Simply, the existence of intellectual disability was not at issue. However, intellectual disability covers a range of deficiency and does not adequately reference strengths. It is not dispositive of a certain level of understanding *See Walker v. Kelly*, 593 F.3d 319, 334 (4th Cir. 2010) (quoting AAMR, User's Guide: Mental Retardation: Definition, Classification, and Systems of Support 8 (10th ed. 2002) (2007) ("'Within an individual, limitations often coexist with strengths.' This means that people with mental retardation are complex human beings who likely have certain gifts as well as limitations. Like all people, they often do some things better than other things. Individuals may have capabilities and strengths that are independent of their mental retardation). The trial judge was well within his discretion in finding on this record that the statement was voluntarily and admissible even with the existence of intellectual disability. *See United States v. Rojas-Tapia*, 446 F.3d 1, 7 (1st Cir. 2006) (71 IQ "not dispositive of the waiver determination); *Young v. Walls*, 311 F.3d 846, 850 (7th Cir. 2002) (defendant with 56 IQ statement voluntary: "*Miranda* is not about abstract understanding, nor does the Constitution protect suspects against confessions that are made for reasons other than official coercion."); *United States v. Turner*, 157 F.3d 552, 555 (8th Cir. 1998) ("although Turner's I.Q. was in the low-average to borderline range, he was 'clearly intelligent

enough to understand his right'" and testimony supported "Turner was cooperative, reviewed and initialed each admonition of the waiver form, agreed to answer questions, and gave accurate information") (internal citation omitted); *Correll v. Thompson*, 63 F.3d 1279, 1288 (4th Cir. 1995) ("the totality of the circumstances indicates that Correll's waiver was knowing and intelligent. Although Correll possessed an I.Q. of only 68, he was 24 years old and had had numerous experiences with law enforcement and *Miranda* warnings; the trial court characterized Correll as 'streetwise.'"); *Moore v. Dugger*, 856 F.2d 129, 132 (11th. Cir. 1988) (statement not involuntary where defendant "had an IQ of 62, functioned at the intellectual level of an eleven-year old, and was classified as educable mentally handicapped" absent evidence of police coercion); *State v. Jennings*, 280 S.C. 62, 64, 309 S.E.2d 759, 760 (1983) (no error in finding confession of mildly mentally retarded defendant, twenty-two years old, admissible where "[n]either the length of custody before the confessions was made, nor the physical deficiencies of the appellant, were conclusive of the issues concerning the voluntariness of the confession."). Suppression would not be warranted where there was no improper police conduct in exploiting an inability to understand. *See Colorado v. Connelly*, 479 U.S. 157, 166 (1986) (where no improper police conduct found "suppressing respondent's statements would serve absolutely no purpose in enforcing constitutional guarantees. The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution. Only if we were to establish a brand new constitutional right—the right of a criminal defendant to confess to his crime only when totally rational and properly motivated—could respondent's present claim be sustained.") (internal citation omitted). Appellant is not entitled to any relief.

II.

The trial judge did not abuse his discretion in finding Appellant knowingly and voluntarily consented to a DNA sample and fingerprint standard even where evidence at the pre-trial rulings on competency and voluntary statement demonstrated Appellant has intellectual disability but that did not prevent his understanding of his rights and the waiver of those rights.

Relevant Facts:

On September 5, 2008, Officer Shannon Hill testified that he both showed Appellant the one page consent form to take swab DNA sample and fingerprinting, and also explained the request "in his own words." Specifically, he told Appellant that the samples "sent to SLED for further analysis." Officer Hill also asked Appellant if Appellant understood or had questions. He asked no questions, appeared to understand, and complied with the procedures. (Vol. 2, p. 69, line13 – p. 70, line 9; p. 70, line 14- p. 72, line 13; p. 73, line 2 – p. 75, line 11). Officer Hill testified, "to my understanding he understood what I was explaining to him. And then he signed in cursive on the line where he [was] supposed to sign his signature." (Vol. 2, p. 70, lines 9-12). (See also State's Exhibit 117). Defense counsel argued the consent for the DNA sample was not voluntary due to Appellant's his intellectual disability and his inability to understand. He incorporated the evidence from Dr. Price as presented in regard to the voluntariness of the statement. (Vol. 2, p. 83, line 17 – p. 84, line 12; p. 142, lines 12-16). The trial judge acknowledged the testimony, but ruled the consent was proper:

> ... I do recall the testimony from Doctor Price. The thing is, you know, as I've read case law on these issues and looked ... into these matters, you know, Doctor Price is basically giving an opinion based on what clinically he knows, how these things reacts. And you know, for example, he – he seemed to discount; I mean again, and it's, I guess it depends on how you perceive the testimony. But Doctor Price seemed to ... be of the belief that because of Mr. Johnson's intellectual disability that he's unable to

> understand anything beyond that of a kindergartner, be able to consent to anything; and yet, he's shown through that he, at least the evidence was before the Court, that he did understand. Doctor Price seemed to completely discount the testimony that Mr. Johnson held a job, received wages, worked a job, that he understood or knew certain things. That Doctor Price says he's operating as a kindergarten level, but clearly, he – the reality of it is he operates well above that level when you consider those things. And so based on the totality of the circumstances before the Court and the evidence that's been before the Court, I believe that the samples were requested appropriately. I don't believe there was any coercion or undue force or stress under the situation. I'm going to allow the evidence of those samples in....

(Vol. 2, p. 84, line 13 – p. 85, line 16).

Discussion:

As a first matter, Appellant argued at trial only that the DNA evidence should be suppressed, not the DNA and fingerprint evidence should be suppressed. (Vol. 1, p. 142, lines 12 -22). As such, the present argument on appeal suggesting the fingerprint evidence should also be suppressed is procedurally barred from review. *See, e.g., State v. McDonald*, 400 S.C. 272, 280, 734 S.E.2d 167, 171 (Ct. App. 2012) (*quoting Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). As to the DNA evidence, Appellant argued "the voluntariness of the consent form on the buccal swab" and incorporated Dr. Prices' opinion on intellectual disability and its affect on Appellant's ability to consent. (Vol. 1, p. 142,lines 12- 16; p. 143, line 21 – p. 144, line 6). Appellant's argument is on even less firm ground than the preceding issue.

Intellectual disability does not indicate an inability to consent. Consent, like knowledge in a waiver situation, requires a determination based on the "totality of the circumstances." *State v. Wallace*, 269 S.C. 547, 238 S.E.2d 675 (1977) (*quoting*

Schneckloth v. Bustamonte, 412 U.S. 218 (1973)). However, different from waiver, consent does not require explanation of rights or proof of knowledge. *Id. See also State v. Forrester*, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001) ("like the federal standard, our state standard does not require a law enforcement officer conducting a search to inform the defendant of his right to refuse consent."). Level of education, however, has been cited as a factor to consider in regard to the circumstances as a whole. *See State v. Pichardo*, 367 S.C. 84, 106, 623 S.E.2d 840, 852 (Ct.App. 2005) (citing fact Reyes "speaks little to no English, did not 'understand' English and had a very limited education" in finding "[a] plethora of evidence in the record [that] buttresses the circuit judge's determination... Reyes' purported consent to search was not voluntary.").

There is not, on this record, a question of voluntariness of the consent based on coercion, threat or duress. Rather, the question was whether Appellant understood the rights he waived in consenting to the search. As waiver principles are not applicable to consent, Applicant's argument fails. At any rate, the argument, if cognizable, would fail because the record fully supports the trial judge's ruling that Applicant's mental limitations did not prevent intelligent waiver of rights. In support of this assertion Respondent incorporates the argument as to Issue I as if repeated verbatim. Moreover, unlike *Pichardo* there is no question that Appellant understood English. Further still, he understood the legal system to such that he was found competent to stand trial or enter a guilty plea. He was not unfamiliar with the legal system thus susceptible to additional pressures of having no experience with officers, judges and lawyers.

Further, and in the alternative, the State also correctly argued the inevitable discovery doctrine. (Vol. 1, p. 141, line 10 – p. 142, lines 7-20). *State v. Spears*, 393

S.C. 466, 482, 713 S.E.2d 324, 332 (Ct.App. 2011) ("The inevitable discovery doctrine, one exception to the exclusionary rule, states that if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, the information is admissible despite the fact it was illegally obtained.").[9] A *Schmerber*[10] order could have been obtained. Had Appellant not consented, the State would have sought such an order. (Vol. 2, p. 81, line 12 – p. 82, line 2). However, the Officers had every reason to believe the consent was valid. Indeed, the record supports that it was. The exclusionary doctrine works to deter police from improper action, not as an independent right of suppress. *See Davis v. United States,* 131 S.Ct. 2419, 2426 (2011) ("Exclusion is 'not a personal constitutional right,' nor is it designed to 'redress the injury' occasioned by an unconstitutional search. The rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations.") (internal citations omitted). There was no improper action here. In this circumstance, the police did not detect any limitation at all. Exclusion would not be warranted in such circumstances. At any rate, a reasonable probability existed to obtain a warrant based on investigation and statements separate and apart from the DNA evidence. Again, the sample would have been obtained by this separate and independent route if consent had been withheld. *See Spears, supra. See also Nix v. Williams*, 467 U.S. 431, 447 (1984) ("if the government can prove that the evidence *would have been* ***obtained*** *inevitably* and, therefore, would have been admitted *regardless of any overreaching by the police*, there

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[9] Appellant's fingerprints were already on file and would have been matched. (Vol. 1, p. 141, line 20 – p. 142, line 8).

[10] *Schmerber v. California*, 384 U.S. 757 (1986). *Schmerber* allows the circuit court to order the collection of evidentiary samples from a defendant's person upon a showing of probable cause. *See State v. Simmons*, 384 S.C. 145, 682 S.E.2d 19 (Ct.App. 2009).

is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation, the State has gained no advantage at trial and the defendant has suffered no prejudice.") (emphasis added).

However, the Court need not reach the question of exclusion and inevitable discovery as the record well supports the trial judge's finding the consent was voluntary. Appellant is not entitled to any relief.

III.

The trial court did not abuse his discretion in finding that Appellant consented to a search of his home even where evidence at the pre-trial rulings on competency and voluntary statement demonstrated Appellant has intellectual disability.

Relevant Facts:

After giving his recorded statement, Appellant took the officers to his father's home and showed the officers where several electronic pieces from the robbery were hidden behind a board, under a porch. (Vol. 1, p. 83, line 15 – p. 84, line 15). (See also Court Exhibit 3, at pp. 11-12). Defense counsel argued for suppression at trial in that the search was a result of the involuntary statement and the consent was not voluntarily due to Appellant's mental limitation. (Vol. 1, p. 153, line 7-p. 154, line 20).

Discussion:

Again, this issue is premised on an argument that intellectual disability renders one incapable of consent to search. Again, for all the arguments previously forward in response to Issues I and II, the argument fails. Respondent incorporates those arguments as if repeated verbatim. Simply, the record supports the trial judge's ruling.

"Whether a consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the "totality of the circumstances." *State v. Wallace*, 269 S.C. 547, 550, 238 S.E.2d 675, 676 (1977). "A trial judge's conclusions on issues of fact regarding voluntariness will not be disturbed on appeal unless so manifestly erroneous as to be an abuse of discretion." *State v. Mattison*, 352 S.C. 577, 585, 575 S.E.2d 852, 856 (Ct.App. 2003).

Under the totality of the circumstances, it is readily apparent that Appellant voluntarily advised the officers where the electronics were hidden, and further that rather

than just giving consent to search, accompanied the officers to the home to recover the items. The record well and fully supports the trial judge's factual findings. His ruling should not be disturbed.

Further, the record reflects the officers also obtained the permission of Appellant's father to search the home. (Vol. 1, p. 90, lines 1-16). This consent from another resident of the home is not contested, thus, the search was conducted with consent. *See Georgia v. Randolph*, 547 U.S. 103, 105-106 (2006) ("The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained."). In sum, nothing in the record shows any overreaching by officer such as would necessitate the exclusion of evidence to deter future improper police conduct. At any rate, Appellant is not entitled to relief as he fails to show an abuse of discretion. He is not entitled to any relief.

IV.

The trial judge did not abuse his discretion in excusing Juror #130 who stated that she knew members of Appellant's family, and that she could be fair and impartial but expressed great hesitation on having to serve on the jury and face those family members after trial.

Relevant Facts:

In qualifying the jury, the trial judge questioned if anyone "knows anything about this case based on what I've shared with you from the indictment or the allegation contained in the indictment...." (Vol. 2, p. 12, lines 5-9). Juror #130, a hairdresser, indicated she knew Appellant's family. Specifically, she advised the court that Daisy Johnson, a sister, was a then current client. She asked to be excused because she knows the family. (Vol. 2, p. 13, lines 4-7). She stated she "would be fair, but [did not] want that overhead." (Vol. 2, p. 13, lines 12-13). She stated: " I just wouldn't feel comfortable on that case." (Vol. 2, p. 13, lines 13-24). Juror #130 added that she also knew another family member and had done work for that family member, as well. (Vol. 2, p. 14, lines 1-12). Juror #130 indicated that she was would be in a "bad position" if asked to serve, and concluded she "would give [her] opinion. Yeah, I would have to do what I have to do; but I just don't feel comfortable being on it being that I do her hair." (Vol. 2, p. 14, line 13 – p. 15, line 22). The solicitor acknowledge that service may be difficult to deliberate with a "free mind." The juror expressed, "If he's guilty I wouldn't know how to ...." (Vol. 2, p. 16, lines 6-19). After the juror returned to her seat, the solicitor noted to the trial judge that service could "affect pecuniary interest because if she decides against them they might not come to get their hair done there anymore." (Vol. 2, p. 17, lines 3-12). Defense counsel noted that the juror indicated she could be fair and impartial. (Vol. 2, p. 17, line 21 – p. 18, line 3). The trial judge expressed the

inclination to excuse the juror, and likely would if there remained sufficient numbers in the jury pool. (Vol. 2, p. 18, line 12 – p. 19, line 2). The trial judge, satisfied with the number of jurors available, excused Juror #130. (Vol. 2, p. 42, line 24 – p. 43, line 3). Counsel preserved an objection to the excusal after selection but before the jury was sworn. (Vol. 2, p. 109, line 20 – p. 110, line 9). The trial judge reaffirmed his ruling noting the jury, while she said she could be fair, "was very, very uncomfortable" and expressed concern over having to "face his family again." Further there was a pecuniary interest to consider, and there were ample other jurors without that interest. The trial judge noted the juror was "clearly uncomfortable serving" and, because there were ample jurors in the pool without those distractions, he excused the juror. (Vol. 2, p. 110, line 10 – p. 112, line 11).

Discussion:

"It is the duty of the trial judge to assure himself that each and every prospective juror is unbiased, fair, and impartial." *State v. Holland*, 261 S.C. 488, 495, 201 S.E.2d 118, 122 (1973). The trial judge is tasked with initially qualifying the jury pool prior to jury selection. State law leaves to the discretion of the trial judge whether a juror should be set aside: "*If it appears to the court* that the juror is not indifferent in the cause, he *must* be placed aside as to the trial that cause and another must be called." S.C. Code § 14-7-1020 (emphasis added). *See also State v. Franklin*, 267 S.C. 240, 248, 226 S.E.2d 896, 899 (1976) ("The words of the statute, 'if it appears to the court,' are evidence of the discretion vested in the trial judge."). This decision may be based upon a number of things including demeanor. As such deference to the trial judge is especially important: "Deference to the trial court is appropriate because it is in a position to assess the

demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." *Uttecht v. Brown*, 551 U.S. 1, 9-10 (2007). *See also State v. Mercer*, 381 S.C. 149, 157, 672 S.E.2d 556, 560 (2009) (trial judge's reliance on demeanor in determining juror was not qualified to serve on a capital jury).

Here, the trial judge considered the extreme hesitancy the juror repeatedly expressed. He reasonably determined that avoidance of those pressures would be the best route to ensure a selection of indifferent jurors. See 50 A C.J.S Juries § 381 (last updated June 2013) ("It has been said that a jury that contains friends and acquaintances of one of the parties is not impartial."). The existence of the juror's declaration that she would be fair and impartial is not definitive of her competence as a juror in light of the repeated expressions of discomfort in service and the unknown impact of the pressure of returning a verdict and having to face the family. In sum, the record well supports the exercise of discretion to excuse the juror upon these facts. Further, Applicant cannot prove prejudice on this record as here is no right to be tried by a jury composed of particular individuals." *State v. McDaniel*, 275 S.C. 222, 224, 268 S.E.2d 585, 586 (1980). However, because the record fairly supports the trial judge's exercise of discretion, Appellant cannot show an abuse of discretion in the ruling. Consequently, he is not entitled to relief. *State v. Jones*, 298 S.C. 118, 121, 378 S.E.2d 594, 596 (1989) ("The determination of a juror's competence is within the trial judge's sole discretion, and is not reviewable on appeal absent an abuse constituting an error of law.").

V.

The trial court did not abuse his discretion in admitting photographs of the deceased's body where he carefully examined and excluded photographs that he considered overtly graphic and admitted only those photographs which would allow the State to prove its case without the danger of unfair prejudice to Appellant.

Relevant Facts:

The State initially advised the trial judge it would offered seven photographs of the victim's body as found in the ditch by the side of the road to corroborate facts of the murder and disposal. Defense counsel objected and argued "the prejudicial value clearly outweighs the probative value," and cause of death and manner of death would be established thought testimony. He also argued the photographs showed the body "several days" after the murder. (Vol. 1, p. 92, line 6 - p. 94, line 1; p. 97, line 8 – p. 98, line 4). The trial judge carefully reviewed the photographs at issue, State's 56-62. The trial judge struck a balance between the State's need to present corroborating evidence and the defense need to avoid unfair prejudice. He admitted 56, 59, and 61. The trial judge kept out 57, 58, 60 and 62. (Vol. 2, p. 98, line 5 – p. 99, line 2).

Discussion:

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). *See also State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; *State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003); *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991). "To constitute unfair prejudice, the photographs must create a

'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" *State v. Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 370-71 (1995) (*quoting Alexander*, 303 S.C. at 377, 401 S.E.2d at 149). However, "'[i]f the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.'" *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 229 (2010) (*quoting Nance*, 320 S.C. at 508, 466 S.E.2d at 353). *See also State v. Salley*, 398 S.C. 160, 169, 727 S.E.2d 740, 744 (2012) (photograph of child "substantiated [forensic pathologist] Dr. [Joel] Sexton's testimony that the child's sickle cell trait was not outwardly apparent" thus "had a purpose independent of arousing sympathy, and was properly admitted").

Appellant contends that trial judge erred because the admitted photographs reflected the "body as it was found and as it was altered by police after I was found," and that photos were not otherwise used to identify the victim or illustrate the manner of death. (FBOA, pp. 40-41). The second argument on the use of the photographs was not squarely before the judge and is procedurally barred from review here. *McDonald, supra*. At any rate, the argument should be rejected as those are not the only two things that photographs may corroborate, nor does such a photograph have to be relied upon in a medical summary for admissibility. Here, the photographs corroborated the statements by co-defendants and Appellant's own knowledge of the crime as referenced in his own statement describing the facts of the murder and the disposal of the body. (See Vol. 2, p. 94, lines 2-25). The proper question for determining relevance was whether the photographs had "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Because the photographs were probative of issues in

contest and properly admitted. *See State v. Kelsey*, 331 S.C. 50, 76, 502 S.E.2d 63, 76 (1998) (photographs of various bone and bomb fragments and clothing found at crime scene were admissible in murder prosecution, despite claim that, because victim's body was found in woods 46 days after crime was committed, weather or local fauna could have altered crime scene during that period; photographs corroborated other testimony concerning condition of victim's body as first discovered by police at crime scene, and location of bone and bomb fragments supported testimony that bomb had been detonated in victim's mouth); *State v. Edwards*, 10 S.E.2d 587, 588 (1940) ("In our opinion the trial Judge did not abuse his discretion in admitting the photograph [depicting head, torso, neck wound, decomposition and maggots] as being relevant, nor can we attach any importance, in view of the facts of this case, to the contention that the photograph prejudiced the jury against the defendant. Everything depicted by the photograph was, subsequent to its introduction, testified to in detail by the witnesses.").

Further, unlike the photographs in *State v. Collins*, 398 S.C. 197, 201-14, 727 S.E.2d 751, 754-60 (Ct.App. 2012), the photographs at issue here were not "calculated to arouse the sympathy or prejudice of the jury." Indeed, the trial judge carefully sorted through the photographs to evaluate the photographs. He reference the need to corroborate facts as related in the statements, including the neck wounds. The trial judge acknowledged that some of the photographs were graphic, but also acknowledged "all photographs involving someone who has been killed are [going to] be difficult for lay folks." (Vol. 2, p. 96, lines 20-23). He was careful to disallow "overly gruesome" or "bloody" photographs. (Vol. 2, p. 97, lines 1-5). The photographs support that rule. State's 56 merely shows the wrapped body in grass. State's 59 shows the neck wounds.

State's 61 shows the body in the sheet and there is indication of blood but it not overtly gory. Conversely, State's 58 shows the body but the wounds are not readily visible. It is less probative of a fact in issue. State's 60 is a more graphic close-up of the wounds and blood on the face than compared to State's 59.[11] Also, State's 62 appears to show traces of blood on the neck, but shows basically the same wounds as demonstrated in State's 59. Of course, State's 59 also shows a nightgown and sheet as do the remaining photographs. Again, the trial judge struck a careful and considered balance in admitting State's 57, 58, and 61. There is no abuse of discretion on this record.

Further still, only three photographs of the seven offered were introduced. This stands in contrast to the numerous photographs of a very graphic nature admitted in *Collins* and other cases where this Court or the Supreme Court have held that there was an abuse of discretion. *See, for example, Collins*, 398 S.C. at 208, 727 S.E.2d at 757 (referencing seven photographs of a partially eaten ten year old victim: "It is difficult to look at each photo, and the combined effect of all seven is disturbing."); *State v. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986) (at least four photographs introduced of graphic, but autopsy-related, damage to remains, *i.e.* "victim's scalp pulled away from her skull" and "surgically opened vaginal cavity exposing a large amount of seminal fluid"); *State v. Waitus*, 224 S.C. 12, 27, 77 S.E.2d 256, 263 (1953) ("four pictures of deceased taken in the boiler room of the parish house before the body was removed" should have been excluded because injuries, "the condition of the clothes," and the fact "her rings had been removed and placed on the index finger," were "fully

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[11] Respondent notes Appellant has not contested the photographs showing large patches of blood on the mattress, (See State's 42), and the bloody pillows , (State's 9). These photographs show copious amounts of blood.

established both by uncontradicted medical and lay testimony" thus "were calculated to inflame and arouse the passions of the jury and their introduction was wholly unnecessary to establish the facts claimed").

Finally, any error in the introduction of these photographs must be viewed as non-prejudicial and harmless beyond a reasonable doubt, since it could not reasonably have affected the result of the trial. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial"); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result"). At worst, the photographs were cumulative to the other evidence concerning the crime scene and the condition of the victim's body. *See State v. Robinson*, 201 S.C. 230, 22 S.E.2d 587, 588 -589 (1942) ("The photographs, it is true, were only corroborative of the spoken word, and proved to be unnecessary in this particular case, but they were no more than harmless surplusage. They showed material conditions which existed, and were not inflammable fuel to be consumed by the minds of the jurors, nor do we think that they were calculated to arouse the prejudices of the jury."). *See also State v. Haselden,* 353 S.C. 190, 577 S.E.2d 445 (2003) (improper evidence harmless where merely cumulative to other evidence); *State v. Evans*, 378 S.C. 296, 299, 662 S.E.2d 489, 491 (Ct. App. 2008) (evidence "merely cumulative, insubstantial" did not affect the result of trial and considered harmless).

Moreover, there was overwhelming evidence of guilt. Appellant's participation was not only established by his own statement, but his possession of stolen items, the

testimony of co-defendants, and DNA testing and fingerprints from his presence in the car. This detailed, competent evidence well supports the jury's verdict such that the admission of photographs, if considered error, could only be harmless on this record. *Bailey, supra.*

However, the record supports the basis for the trial judge's ruling admitting the photographs over Applicant's objection. The ruling should not be disturbed on appeal.

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

July 3, 2013.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of General Sessions
Thomas A. Russo, Circuit Court Judge

The State, Respondent,

v.

David Gerrard Johnson, Appellant.

Appellate Case No. 2012-209267

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

In addition to the matter designated by Appellant, Respondent proposes the following be included in the Record on Appeal:

(1) Transcript, Vol. 1 (pre-trial transcript from Feb. 9, 2012), pages:
12-14
16-18
29-30
37-41
45-50
54-55
60-61
67-68
77-79
80-84
89-90
95-97
106
110-117
124-127
129
131
135

139
141-144
153-154
164-166

(2) Transcript, Vol. 2 (trial transcript from Feb. 13-17, 2012), pages:
12-19
42-43
59-63
69-75
81-87
92-94
96-99
109-112
135-140
142-145
205
214-218
269-270
303
312-313
338-339
363-364
377-378
417
444-449
451-459
491-493
497-501
535-537
547-550
556-560
565-566
584
589
591-604
627
631-635
654-660
673-675
681-686
707-710
765-766
769-772
783-784
805

824-827

(3) Indictment;

(4) September 4, 2009 and October 14, 2009 Letters re: Notice of Intent To Seek the Death Penalty;

(5) June 11, 2010 Order (assigning Judge Russo);

(6) January 4, 2012 Order (Atkins Hearing), with Court 1, December 22, 2011 Letter from DDSN;

(7) Court Exhibits (from trial):
1 (forensic evaluation);
3 (transcript of statement);
5 (incident report);
6-12 (sentencing sheets, prior offenses);

(8) State Exhibits (from trial):
9 (photograph of pillows);
42 (photograph of mattress);
47 (photograph of mattress);
56 (photograph of body);
57 (photograph of body);
58 (photograph of body);
59 (photograph of body);
60 (photograph of body);
61 (photograph of body);
62 (photograph of body);
116 (audio of statement);
117 (DNA sample/Fingerprints consent);
120 (waiver form);

(9) Motion to Suppress Evidence/Illegal Search and Seisure;

(10) Motion to Suppress Statements of the Defendant and Suppress Any Evidence Derived From Those Statements.

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this designation contains no matter which is irrelevant to this appeal.

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July 3, 2013.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of General Sessions
Thomas A. Russo, Circuit Court Judge

The State, Respondent,

v.

David Gerrard Johnson, Appellant.

Appellate Case No. 2012-209267

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the *Initial Brief of Respondent* and *Designation of Matter* on Appellant by depositing two copies of same in the United States mail, postage prepaid, addressed to his attorney of record:

Susan B. Hackett, Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
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This 3rd day of July, 2013.

MELODY J. BROWN
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July 3, 2013

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: The State v. David Gerrard Johnson
Appeal from Florence County
Appellate Case No. 2012-209267

Dear Ms. Kitchings:

Enclosed please find the original ***Initial Brief of Respondent and Designation of Matter***, dated, along with proof of service, in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

MJB/mv

Enclosures

cc: Susan B. Hackett, Appellate Defender
The Honorable E.L. Clements, III, Twelfth Circuit Solicitor
Sandi Wofford, Victim Services