STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID GERRARD JOHNSON,

APPELLANT

Appellate Case No. 2012-209267

FINAL BRIEF OF APPELLANT

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II. The trial court's erroneously found Appellant knowingly consented to the police taking a DNA sample and fingerprint standard from him where the undisputed evidence demonstrated Appellant lacked the mental capacity to make a knowing waiver of his rights due to his intellectual disability.

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.

IV. 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.

V. The trial judge erred in admitting photographs of the deceased's body where the danger of unfair prejudice clearly outweighed any probative value of the photographs in light of the judge and prosecutor admitting the photographs were graphic and the prosecutor's failure to use the photographs for the reasons proffered - to corroborate testimony regarding the injuries and to identify the deceased.

STATEMENT OF THE CASE

In a single indictment, a Florence County Grand Jury indicted Appellant for murder, burglary in the first degree, armed robbery, possession of a weapon during the commission of a violent crime, and conspiracy. R. 8, lines 4-11; Indictment. On February 9, 2012, the Honorable Thomas A. Russo presided over a pretrial hearing concerning Appellant's competency to stand trial, the admissibility of his statement to law enforcement, the voluntariness of his consent to a buccal swab and fingerprint standards, and the admissibility of evidence uncovered as a result of Appellant's statement. R. 1; R. 4, lines 6-9; R. 32, line 10 – R. 33, line 23.[1] After the presentation of a witness by the prosecution, Judge Russo concluded Appellant was competent to proceed to trial and to assist his attorney. R. 31, lines 20-25. Concerning the admissibility of Appellant's statement, Judge Russo took the matter under advisement. R. 167, lines 10-18.

The prosecution, represented by E.L. Clements, III and John C. Jepertinger, called the case for trial on February 13, 2012 before Judge Russo and a jury. W. James Hoffmeyer represented Appellant. R. 193. At the conclusion of jury selection, Judge Russo announced his decision on the issues taken under advisement. He ruled Appellant's statement was admissible. R. 205, lines 13-19. As a corollary matter, the judge ruled the items found as a result of Appellant's statement were admissible as well. R. 210, lines 3-25. The judge permitted the state to present additional evidence on the matter of Appellant's consent to the buccal swabs and fingerprint card. At the conclusion of the presentation, the judge ruled the samples were admissible. R. 231, lines 9-16.

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[1] The transcripts are not consecutively paginated. Therefore, Appellant refers to the transcript of the hearing on February 9, 2012 with the abbreviation "Hrg" and to the trial transcript with the abbreviation "Tr."

At the conclusion of the trial, the jury found Appellant guilty of murder, burglary in the first degree, armed robbery, possession of a weapon during the commission of a violent crime, and criminal conspiracy. R. 584, lines 2-18. Judge Russo sentenced Appellant to life without parole for murder and a consecutive life sentence for burglary in the first degree, to thirty years for armed robbery, and five years for conspiracy, which were to run concurrently. The sentence for the weapons charge was subsumed with the life sentence. R. 588, line 10 – R. 589, line 10; Sentence sheets.

Appellant filed a timely notice of appeal. This brief follows.

ARGUMENT

I. The trial court erroneously admitted a statement made by Appellant to police officers where the undisputed evidence demonstrated Appellant's lack of mental capacity to making a knowing waiver of his constitutional rights due to his intellectual disability.

Relevant facts

During a pretrial hearing, the state presented the testimony of Dr. Alicia V. Hall from the Department of Disability and Special Needs. Dr. Hall testified regarding whether Appellant was competent to stand trial. In arriving at her conclusion that Appellant was competent, Dr. Hall determined that Appellant suffered from an intellectual disability, formerly called mental retardation. R. 12, lines 4-16. She classified Appellant as in the mild range of mental retardation. R. 12, lines 17-23. Dr. Hall testified that Appellant "required more time to understand and answer questions than a person who did not have intellectual disability." R. 18, lines 13-17. Importantly, Dr. Hall qualified her opinion that Appellant was competent to enter a guilty plea: "Yes, as long as with the caveat that he was given ample time to understand." R. 19, lines 9-13. Even more importantly, she qualified her finding of competency – "he met the standard for competency, but that he does require more time to answer questions and make sure that he's fully understanding what is being asked of him." R. 27, lines 18-24. During the evaluation, Dr. Hall knew Appellant did not understand something because he would say so, answer a question with "I don't know," or his facial expressions would indicate his confusion. R. 29, lines 18-25.

On cross-examination, Dr. Hall admitted that Appellant's school records indicated a full scale IQ score of 58 in September 1993 and a score of 51 in September 1996. R. 23, lines 18-23; R. 24, lines 2-6. She testified that Appellant's test scores were in the

"extremely low range." R. 24, lines 11-12. During the competency evaluation, Appellant struggled to understand conspiracy. Dr. Hall educated Appellant on the topic and he applied this education to a hypothetical case. R. 25, line 15 – R. 26, line 6. Additionally, Appellant struggled with the concept of a plea bargain, and educating him on this topic required "a good deal of effort and education" by the doctors. R. 26, lines 7-12. According to Dr. Hall, a finding of competency required a fairly low standard of understanding. R. 27, lines 4-7.

Timothy Wade Compton, an officer with the Florence Police Department, testified during the pre-trial hearing as well. At 4 p.m., investigators brought Appellant to Compton's office for Compton to sit with him while investigators handled other matters R. 37, line 7 – R. 38, line 12. Compton testified that he was playing a video game on his computer and Appellant laughed about the game. The two then talked about the video game. After about an hour, Compton and Appellant got something to eat and drink from the vending machines. R. 39, line 10 – R. 40, line 6. Compton began typing reports, and Appellant asked permission to take a nap. According to Compton, Appellant slept in the chair for several hours. R. 40, lines 7-16; R. 60, lines 10-15.[2]

Compton "got tired of typing" and his curiosity as a detective took over. He "decided [he] wanted to see if [Appellant would] like to talk." Compton told Appellant the other detectives were down the hall talking to others and "before they tell them what happened, how about you talk to me." Appellant agreed to talk. Compton stated "before we talk I need to read your rights to you." Compton then read the rights, in toto, from a card. R. 40, line 19 – R. 41, line 8; R. 41, line 24 – R. 42, line 6; R. 57, lines 10-17. . At the

[2] During the trial, Compton testified that he knew the investigators were working the case because he heard what was going on over the radio. R. 385, line 16 – R. 386, line 4.

conclusion of the recitation, Compton asked if Appellant understood and if he wished to talk. R. 45, lines 3-24. Compton claimed Appellant understood his rights, and Compton had no reason to believe otherwise. R. 45, line 21 – R. 46 1; R. 46, lines 17-23.

Initially, Appellant claimed he observed others burglarizing the victim's residence. Compton accused Appellant of lying and instructed him to tell the truth. R. 47, lines 7-17. Then, Appellant stated he was there when others went into the victim's residence and stole items. R. 47, lines 17-19. During the interrogation, two other officers entered the room; thus, three officers participated in the interrogation of Appellant. R. 47, line 20 – R. 48, line 10. Thereafter, Compton told Appellant he needed to tell them where the body was – for the sake of the victim's family. R. 48, lines 13-17.[3] Appellant stated he could take them to the body. R. 48, lines 17-18. Appellant claimed he knew the location of the body because "Amp" told him. R. 48, line 24 – R. 49, line 1. When Appellant moved toward the door to direct the officers to the location, Compton ordered him to stop and directed him to return to his seat. R. 49, line 8-13.

Although Compton claimed he had very limited involvement in the investigation, he knew the suspected cause of death. Therefore, he decided to query Appellant accordingly. Appellant stated the victim's throat was cut. R. 49, line 17 – R. 50, line 7. Afterwards, Appellant, Compton, Officer Calhoun, and Officer Drulis got into a vehicle, followed by Officers Raines, Drayton, and Godwin in a separate vehicle. R. 50, lines 15-24. Compton did not know what time they left, but admitted it could have been after midnight – or at least

[3] At trial, Compton testified that he gave a spiel about telling the truth and being honest. R. 392, lines 6-9. Additionally, Compton "tried to play on a sympathy card, you know, that we call it. You know, say hey, the family needs closure, we know she is deceased." R. 394, lines 2-7.

eight hours after Appellant initially arrived in his office. He knew it was "a long time." R. 54, lines 10-21.[4] Compton testified that Appellant took them to the body on Malloy Street. R. 51, lines 1-22. Compton accused Appellant of lying again. He told Appellant that he knew the location of the body because he had been shown or he was there when the body was dumped. Appellant responded "yes, sir." R. 52, lines 3-13. The officers and Appellant returned to the police department. Everyone entered the conference room and interrogated Appellant. When "Drayton and Godwin felt they had what they wanted from his statement they recorded his statement." Compton then went home. R. 52, line 18 – R. 53, line 5. On cross-examination, Compton testified that he had no prior knowledge of Appellant and was unaware he suffered from an intellectual disability. R. 57, line 24 – R. 58, line 22.

Melvin Godwin, an investigator on the case, testified that after the individuals searched for the body, everyone returned to the police department "[t]o get a formal statement from the defendant." R. 77, lines 16-18. Godwin advised Appellant of his rights using his card and had Appellant sign a waiver of rights form. R. 77, lines 19-25; R. 88, line 21 – R. 89, line 4. Godwin did not know if Appellant could read and write, so he read the form to Appellant. R. 80, lines 9-16. Godwin read the card completely, and then asked if Appellant understood. R. 78, lines 6-7. Godwin claimed Appellant was "clear, coherent," and Goodwin did not notice anything out of the ordinary. R. 78, lines 19-21.

The officers then talked to Appellant "to clear the matter, anything discrepancies, to get more detail about what happened" before commencing "the official recorded statement."

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[4] During the trial, Compton testified that he did not recall testifying previously that he spoke to Appellant after midnight about the crime. However, he admitted that when they went looking for the body, it was some time the next day. It may have been between the hours of two and three in the morning. R. 409, line 17 – R. 410, line 10.

Godwin did not know how long this process took. R. 79, lines 1-10. Appellant "seemed to understand everything that was being stated in the room" and "never made any statement that he didn't understand everything." R. 79, lines 16-18. The official recorded statement began at 3:15 a.m. – over eleven hours after Appellant arrived at the police department. R. 86, line 8 – R. 87, line 1.

Like Compton, Godwin did not know Appellant's education level or any other details of his background. R. 88, lines 3-20. Godwin did not ask Appellant if he understood the word "waiver." R. 89, lines 12-14. Godwin claimed to have previous experience with severely mentally retarded people, and he knew of their disabilities based on "their behavior and actions." R. 91, lines 7-11.[5] Larry Drayton, another officer with the police department, testified similarly to Compton and Godwin. R. 92, line 25 – R. 104, line 12.[6]

Appellant called Dr. David Richard Price to testify as an expert witness. Dr. Price's testing revealed Appellant had an IQ of 59. This placed Appellant at the low end of mild mental retardation. R. 110, lines 11-25. Additionally, testing placed Appellant at a grade equivalency of a kindergartner. R. 112, lines 14-24. In Dr. Price's expert opinion, Appellant lacked the ability to understand "complex words, complex sentences, complex phrases." R. 113, lines 16-17. For word reading, Appellant scored a grade equivalency of a second grader, but sentence comprehension and verbal comprehension showed severe deficits. R. 113, lines 17 – R. 114, line 2. Appellant's school records supported Dr. Price's results. R. 114, lines 3-17. Appellant could write and read "very simply," but reading did not amount to comprehending. R. 114, lines 18-23.

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[5] Godwin's trial testimony was similar to that of his pretrial testimony. R. 438, line 19 – R. 497, line 15.

Regarding the Miranda rights, Dr. Price testified that Appellant "would have understood them as well as any kindergartner would have understood them." Appellant would not have understood the warnings "as far as the implications for stating them." Put simply, in Dr. Price's opinion, Appellant lacked the ability to understand the Miranda waiver. R. 116, line 19 – R. 118, line 6.

People with intellectual disabilities learn to adapt through acquiescence – they claim to understand when they do not and laugh at jokes they do not understand. R. 118, line 7 – R. 119, line 2. Dr. Price discussed the Miranda warnings with Appellant. He was unable to define "waive." Dr. Price spent a considerable amount of time talking to Appellant about each right and explaining the implications of each right. Of course, this happened after Dr. Hall saw Appellant and educated him as well. R. 119, lines 7-17.

According to Dr. Price, Appellant was more agreeable with the officers because he had been in custody for over eleven hours, it was the middle of the night, and at least three officers were present for the interrogation. R. 120, line 11 – R. 121, line 2. Dr. Price explained that individuals with mental retardation "tend to decompensate under stress." R. 124, lines 11-12.

> Under unusual periods of stress they tend to disintegrate, may need special assistance and counseling. They just cannot factor and process information about what's going on and understanding what's happening around them, cannot make rational decision during those periods.

R. 133, lines 13-24. Being under police investigation and being in custody for over eleven hours would cause a person with mental retardation to withdraw and it would decrease their

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[6] Drayton's trial testimony was similar to that of his pretrial testimony. R. 520, line 17 – R. 571, line 8.

ability to comprehend and make informed choices and decisions. R. 133, line 25 – R. 134, line 19.

On cross-examination, Dr. Price testified that individuals with mild mental retardation may hold a job. When the prosecutor asked about the ability of kindergartners to hold a job, Dr. Price explained that even kindergartners can perform routine skills. Appellant worked at McDonald's. R. 124, line 19 – R. 125, line 16. Additionally, Appellant drove a car, despite doing so without a license. R. 126, lines 12-17. Nevertheless, Dr. Price testified that the police officer's statements regarding how Appellant informed them of the location of the body supported Appellant suffering from mental retardation because he failed to use street names and used other landmarks for his guide. R. 127, lines 11-15.

The prosecutor placed emphasis on the fact that Appellant had entered guilty pleas previously; and therefore, he had been informed of his rights and waived those rights. R. 129, lines 1-11. Dr. Price explained, again, this was an example of acquiescence as all that was required of Appellant was agreement. R. 129, lines 12-21. Dr. Price, like Dr. Hall, explained that competency to stand trial is not the same as competency to enter a guilty plea because Appellant would require "special education" in order to enter a guilty plea. R. 135, lines 10-15.

When asked by the trial court about Appellant's ability to learn from his past exposure with the court system, Dr. Price testified that Appellant "never profited from any of those experiences and he really doesn't have an ability to learn." After being in school for twelve years, appellant can read words at a third grade level and his reading

comprehension was at a kindergarten level. Thus, Appellant did not profit from formal education. R. 138, line 24 – R. 140, line 3.

At the conclusion of the testimony, the prosecutor argued he "fe[lt] like [he] put up gracious sufficient evidence that [Appellant knew what he was doing." According to the prosecutor, "there's nothing complex" about "you have the right to remain silent." He argued it takes very little intelligence to "understand you got the right to keep your mouth shut." He went through each of the warnings and argued "there was nothing complex" about them. The prosecutor found "it ludicrous that you'd think that he's in kindergarten or that he - - or that you would try to argue he was on a kindergarten scale. He held a job at McDonald's for over a year." Holding a job at McDonald's was "well beyond any kindergartner." He argued Appellant knew what he was doing and no one coerced him. Nevertheless, he admitted that Appellant did not "understand a lot of things abstractly," but argued Appellant understood "on a basic level that he had the right to keep his mouth shut." R. 158, line 24 – R. 162, line 16.

The prosecutor persisted in arguing a flawed syllogism. He argued that if Appellant were competent to stand trial, then he would be competent to enter a guilty plea; if Appellant were competent to enter a guilty plea, then he would be competent to waive his rights under Miranda. R. 166, line 12 – R. 167, line 9.

Appellant argued the issue was whether Appellant understood his rights and then freely and voluntarily chose to give up those rights.[7] The evidence before the court was uncontradicted that Appellant suffered from mental retardation and that it required "real

[7] Appellant renewed his objections contemporaneous with the introduction of the statements at trial. R. 387, lines 1-19; R. 392, lines 5-11; R. 471, lines 2-5; R. 538, lines 15-19; R. 554, lines 15-21; R. 858, lines 19-24.

effort" to make sure Appellant understood information. Appellant explained the totality of the circumstances included Appellant's mental deficiency, the length of time he had been in police custody, the length of time he had been interrogated, and the number of officers in the room during the interrogation. R. 162, line 19 – R. 166, line 10.

Judge Russo ruled Appellant's statement was admissible. He explained "[j]ust the evidence overall taking into consideration both expert and the lay testimony, I believe that it was appropriate for the statement to come in." He acknowledged that Appellant 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." The judge was persuaded that Appellant possessed the mental ability to understand his Miranda warnings and knowingly waive them because "he had been through the criminal justice system in the past." He thought all of Appellant's responses to questions were appropriate. He also accepted the prosecutor's argument that if Appellant were competent to enter a guilty plea, then he possessed the mental ability to understand and waive his rights knowingly. R. 205, line 2 – R. 208, line 16.

Discussion

In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court held that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 426 (1966). State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 694 (1996); 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); State v. Compton, 366 S.C. 671, 680, 623 S.E.2d 661, 666 (Ct. App. 2005); State v. Crawley, 349 S.C. 459, 463, 562 S.E.2d 683, 685 (Ct. App. 2002). The waiver has two distinct dimensions. It must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and it must be "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 State v. Middleton, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986). 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, ___ U.S. ___, 130 S.Ct. 2250 (2010)(citing Colorado v. Spring, 479 U.S. 564, 573-575 (1987); Connecticut v. Barrett, 479 U.S. 523, 530 (1987)).

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

> Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted). The test requires consideration of "'totality of all the surrounding circumstances -- both the characteristics of

the accused and the details of the interrogation.'" Dickerson v. United States, 530 U.S. 428, 434 (2000)(citations omitted). 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 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), the South Carolina Supreme 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. After Davis's arrest, an officer read the standard Miranda warnings to Davis from a card. 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." Davis responded affirmatively that he understood each of his rights. 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.

In striking contrast to the instant matter, the officers in State v. Jennings, 280 S.C. 62, 63-64, 309 S.E.2d 759, 760 (1983) were aware of the defendant's low intellectual functioning and exercised caution to be sure he understood their communications with him. Based upon law enforcement's careful questioning and the remaining circumstances, the Court found Jennings's statement was admissible.

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. In State v. Flower, 539 A.2d 1284 (N.J. Super. L. 1987), the New Jersey court found a defendant's statement was inadmissible based on the testimony of three teachers who taught the defendant seven years earlier. The teachers testified the defendant had a second or third grade level vocabulary and required instructions in very basic terms. Due to his low level of functioning, he was unable to grasp abstract concepts. The teachers opined that he would not understand his Miranda rights even if explained to him.

Similarly, a psychiatrist and a psychologist testified that the defendant had a mental age of ten or eleven, required instructions to be given in a very slow and deliberate manner, and would not have been able to understand his rights unless they were very carefully explained to him. The defendant would do what he perceived an authority figure wanted

him to do. The court held the statement was inadmissible because the warnings had not been given slowly and carefully enough or with any consideration of the defendant's intellectual functioning, thereby preventing the defendant from making a knowing waiver. State v. Rossiter, 623 N.E.2d 645 Ohio Ct. App. (1993). A court found a defendant's statement inadmissible because she lacked the ability to comprehend her rights where she suffered from mild mental retardation and she functioned on the equivalent of an eight-year old child. People v. Daniels, 908 N.E.2d 1104 (Ill. App. 2009). Although the defendant understood some of his rights and he was the manager of a local restaurant, a trial court properly excluded a statement by a mentally impaired individual, whose IQ was 71, where the expert testified the individual suffered from depression, which would affect his IQ. Albarran v. State, 96 So. 3d 131 (Ala. Crim. App. 2011).

In a case very similar to Appellant's, the Tennessee Supreme Court held a defendant did not knowingly and intelligently waive his rights before police interrogation, even though he appeared to understand his rights and was later found competent to stand trial because evidence showed that he was mentally retarded, with an IQ of 55, and functioned on the level of a child from six to nine years old. State v. Blackstock, 19 S.W.3d 200 (Tenn. 2000).

According to empirical research, "mental retardation makes some people incapable of understanding either the text of the Miranda rights or the consequences of forsaking them. For these people, the words of the warnings latterly have no useful meaning." Morgan Cloud, et al., Words without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects, 69 U. Chi. L. Rev. 495, 499 (Spring 2002). The results of the authors' study revealed

> mentally retarded people simply do not understand the Miranda warnings [because v]irtually all of the disabled subjects failed to understand the context in which interrogation occurs, the legal consequences embedded in the rules or the significance of confessing, the meaning of the sentences that comprise the warnings or even the individual operative words used to construct the warnings.

Id. at 501. Notably, the research showed that not only did people suffering from severe mental retardation not comprehend the warnings, but those classified as mildly mentally retarded failed to understand the warnings as well. Id.

The trial judge erred in admitting Appellant's statement to police officers where the record evidence demonstrated Appellant lacked the requisite mental ability to waive his Miranda rights due to his intellectual disability. The issues are whether Appellant understood abstract concepts, such as rights, whether Appellant understood the words used in the warnings and waiver request, and whether he understood the implications of waiving his rights. The undisputed evidence was that Appellant had an IQ in the 50s, that his ability to understand was the equivalent of a kindergartner, that he was interrogated by multiple officers, that he remained in police custody for approximately eight hours before the initial questioning and was in police custody for approximately eleven hours before the police initiated recording of his statement. The recorded statement illustrated that although Appellant provided some narrative, he primarily responded to leading questions by the officers.

The state's witness, Dr. Hall, testified Appellant required more time to understand information presented to him. In fact, in order to render him competent, the state's doctors had to educate Appellant on multiple aspects of his case and the judicial process. Appellant could not understand complex sentences or even complex words. No officer read the warnings singly and ensured Appellant's understanding of each. No officer explained the

ideas, concepts, and rights comprising the warnings. As indicated by Dr. Price, Appellant did not understand his Miranda warnings or the implication of the waiver. Perhaps most convincing that Appellant did not understand the warnings was the prosecutor's admission that Appellant "did not understand a lot of things abstractly."

II. The trial court's erroneously found Appellant knowingly consented to the police taking a DNA sample and fingerprint standard from him where the undisputed evidence demonstrated Appellant lacked the mental capacity to make a knowing waiver of his rights due to his intellectual disability.

During the pretrial hearings, Shannon Hill, an officer with the Florence Police Department, testified that in September of 2008, he asked Appellant for voluntary consent for a DNA sample and a fingerprint standard. R. 213, line 17 – R. 214, line 4. According to Hill, Appellant agreed and signed the appropriate waiver. R. 215, lines 3-10. Hill showed Appellant the form and explained it to him. R. 215, line 13 – R. 216, line 13. Hill claimed Appellant understood that he wanted to gather a saliva sample and a fingerprint sample and consented to such. R. 216, lines 7-13. Hill walked Appellant through the processes for gathering the samples. R. 216, line 21 – R. 220, line 18. At the end of Hill's direct testimony, he stated "I was assuming that he was understanding everything I told him." R. 222, lines 16-17. On cross-examination, Hill testified that he did not read any Miranda warnings to Appellant. R. 223, lines 4-11.[8]

Dr. Price opined that Appellant did not understand the request for consent for police to obtain a DNA sample from him. Appellant would have acquiesced to the request as part of his adapting. R. 119, lines 18-24.

The prosecutor argued that Appellant had the ability to waive his Miranda rights, and therefore, and the ability to consent to the search – fingerprints and buccal swab. The prosecutor argued "I don't think a rocket scientist would be needed when you go and ask

[8] Hill testified similarly during the trial. Appellant renewed his objection contemporaneously. R. 313, lines 16-22; R. 320, lines 9-12. Appellant objected when the DNA analyst testified as well. R. 334, line 24 – R. 335, line 6; R. 357, lines 10-19.

somebody, hey, can I take your fingerprints, and he could say no. Or can I take a buccal swab; you can say no. It's not exactly rocket science." R. 228, line 23 – 15.

Appellant countered that Appellant lacked the ability to understand and to consent. Appellant's mental disability along with other factors comprising the totality of the circumstances prevented Appellant from making a knowing waiver of his rights. R. 229, line 17 – R. 230, line 12.[9] The form used to obtain Appellant's consent provided as follows: "I, the undersigned, do hereby voluntarily consent that the City of Florence Police Department obtain from me the following items for the Suspect Evidence Collection Kit: Saliva Sample, Fingerprints." State's Exhibit #117.

Over Appellant's objection, the court found the evidence admissible. Finding that according to Dr. Price Appellant was unable to understand anything beyond that of a kindergartner, the court determined that Dr. Price "seemed to completely discount the testimony that [Appellant] held a job, received wages, worked a job, that he understood or knew certain things." The court disagreed and determined that the evidence showed Appellant "did understand." According to the court, "the reality of it is he operates well about that level [of a kindergartner]." Thus, the court concluded Appellant possessed the intellectual capacity to consent to the buccal swab and fingerprint standards. R. 230, line 13 – R. 231, line 16.

Appellant incorporates the argument presented in Issue I, supra. Appellant lacked the ability to understand his rights and waive those rights to submit to giving a saliva sample and fingerprint standard. In light of the procedures used for obtaining the samples,

[9] Appellant repeatedly objected to the introduction of any evidence obtained through the use of comparisons to Appellant's DNA sample and fingerprint standard. R. 141, lines 10-13;

Appellant was never even advised of his rights and never informed that he could refuse. The totality of the circumstances included Appellant being in police detention from August 27, 2008 through September 5, 2008 when Hill sought the saliva sample and fingerprint standard and the apparent lack of the appointment of counsel for Appellant for those nine days while he remained incarcerated.

R. 142, lines 12-16. Appellant argued that Appellant lacked the mental capacity to consent. R. 143, line 21 – R. 144, line 6.

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.

During the pretrial hearing, Godwin testified that after obtaining Appellant's formal recorded statement, which began at 3:15 am, the officers and Appellant went to Appellant's home searching for items relating to the burglary. R. 83, lines 15-22. According to Godwin, Appellant led the officers to the items. R. 83, line 23 – R. 84, line 5. Godwin testified that Appellant told them "it was all right to go to the house." R. 84, lines 12-14. Godwin admitted the police did not have a search warrant to invade the privacy of Appellant's home. R. 90, lines 6-9.

At trial, Godwin testified that Appellant disclosed, during the interrogation, that items stolen from the deceased were at his home. After the interview, Appellant, accompanied by police officers, went to Appellant's home where Appellant showed the items to the officers. R. 474, lines 3-23; R. 475, lines 7-8. Appellant directed the officers to a crawl space of the home. The officers recovered several items believed to belong to the deceased. R. 476, lines 8-21.

Drayton testified at trial that after the officers interrogated Appellant at the police department, they went with Appellant to his house where he told them some stolen items were located. R. 541, line 20 – R. 542, line 15. Officers found several items belonging to the victim from Appellant's home. R. 542, lines 17-24. Drayton testified that Appellant volunteered to show them where the items were. R. 543, lines 7-11.

Appellant objected to the introduction of evidence found at his home as the product of his statement, which was obtained illegally. R. 33, lines 8-25; R. 153, lines 7-25. Appellant lacked the ability to consent to the search due to his mental infirmity. R. 154, lines 10-20.

Judge Russo held the evidence was admissible. He found Appellant understand his rights and voluntarily offered the information about the location of the stolen items. Therefore, the judge permitted the state to introduce evidence of the stolen items, the location where officers found the items, and how the officers found the items. R. 64, lines 9-25.

Appellant incorporates the arguments presented in Issue I, supra. The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Consequently, the United States Supreme Court created the exclusionary rule to safeguard Fourth Amendment rights. United States v. Calandra, 414 U.S. 338 (1974).

The Fourteenth Amendment incorporates the rule of excluding evidence obtained through an illegal search or seizure and makes it applicable to the states. Mapp v. Ohio, 367 U.S. 643, 655 (1961). The exclusionary rule prohibits the admission of evidence that is the product, or fruit, of an unlawful search, or poisonous tree. Murray v. United States, 487 U.S. 533, 536-537 (1988); Wong Sun v. United States, 371 U.S. 471, 488 (1963); State v.

Sachs, 264 S.C. 541, 560, 216 S.E.2d 501, 511 (1975); see also State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999) (finding if law enforcement exploit an unlawful search to seize evidence that would not have otherwise come to light, that evidence is the "fruit of the poisonous tree" and is not admissible); State v. Brown, 389 S.C. 473, 483, 698 S.E.2d 811, 816 (Ct. App. 2010); State v. Greene, 330 S.C. 551, 499 S.E.2d 817 (Ct. App. 1997).

Furthermore, the United States Supreme Court has held that "searches [and seizures] conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967) (footnote omitted); see Coolidge v. New Hampshire, 403 U.S. 443, 454-455 (1971); see also State v. Weaver, 361 S.C. 73, 80–81, 602 S.E.2d 786, 790 (Ct. App. 2004). "The exceptions are "'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption...that the exigencies of the situation make the course imperative.'" Coolidge, 403 U.S. at 455. More specifically, the burden is on the State to justify a warrantless search or seizure, and the recognized exceptions have included: (1) search incident to a lawful arrest; (2) "hot pursuit;" (3) "stop and frisk;" (4) "automobile exception;" (5) the "plain view" doctrine; and (6) consent. Id.

Yet, despite these exceptions, the United States Supreme Court has emphasized its concern with warrantless searches and seizures:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 14-15 (1948). The Supreme Court of the United States has also addressed the warrant requirement's effect on the seizing officer: "In cases where the securing of a warrant is reasonably practicable, it must be used and when properly supported by affidavit and issued after judicial approval protects the seizing officer against a suit for damages. In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause." Carroll v. United States, 267 U.S. 132, 156 (1925).

In order to introduce evidence based upon a purported consent to search, the prosecution must show the consent was voluntary. Voluntariness is determined by an examination of the totality of the circumstances. State v. Wallace, 269, S.C. 547, 550, 238 S.E.2d 675, 676 (1977)(citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973); State v. Newman, 261 S.C. 352, 200 S.E.2d 82 (1973)); State v. Brannon, 347 S.C. 85, 552 S.E.2d 773 (Ct. App. 2001); State v. Dorce, 320 S.C. 480, 465 S.E.2d 772 (Ct. App. 1995). One of the factors to be considered in determining whether consent was voluntarily given is custodial setting. Wallace, 269 S.C. at 552, 238 S.E.2d at 677; Brannon, 347 S.C. at 90, 552 S.E.2d at 775.

In State v. Pichardo, 367 S.C. 84, 106, 623 S.E.2d 840, 852 (Ct. App. 2005), this Court affirmed a trial court's ruling that a car owner did not consent to a search the car voluntarily. The officer initially testified the owner gave consent, but then stated he needed to be certain the owner responded affirmatively. The owner asserted that he did not consent and did not understand English well enough to give consent. Expert testimony supported the owner's assertion that he spoke little or no English, did not understand English, and had

a very limited education. Thus, this Court concluded there was no voluntary consent and the search of the vehicle was not valid.

Officers learned of the evidence at Appellant's house through the process of obtaining Appellant's statement. As explained, supra, Appellant's statement was obtained illegally because he did not knowingly waive his Miranda rights. Therefore, the items were the fruit of the poisonous tree.

Additionally, the officers found the items and seized the items by requesting consent from Appellant, who lacked the mental ability to provide the consent. The totality of the circumstances demonstrated Appellant lacked the mental capacity to consent. The alleged consent was obtained while Appellant was in custody and at some point after Appellant's recorded statement, which began at 3:15 a.m. At that point, Appellant had been in police custody over eleven hours and had been interrogated at least over three hours. His prolonged detention, the presence of numerous police officers maintaining his continued custody by the police, his undisputed lack of intellectual capacity, and the marathon interrogation easily show Appellant's alleged consent to search his home was not voluntary.

IV. 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.

Relevant facts

During voir dire, a juror disclosed that she lived in the neighborhood where the alleged crime took place and that in her job as a hair stylist, she had done the hair of Appellant's aunt and sister in the past. R. 195, line 18 – R. 196, line 6; R. 196, lines 14-15; R. 197, lines 8-12. The juror, Tiffany Murray, admitted she had no discussions with anyone about the case and had no information pertaining to the case. When asked if she could be fair and impartial, she stated she could. She explained her only concern was her future relationship with Appellant's sister and mother. R. 196, lines 8-24; R. 197, lines 21-22; R. 198, line 9; R. 198, lines 11-22.

The prosecution moved to strike her for cause because she would be uncomfortable and "it would be hard for [her] to deliberate with a free conscious, free mind." The prosecutor remarked he "didn't think it would be inappropriate to excuse the juror." R. 198, line 25 – R. 199, line 13. The judge responded that she "indicated that she could be fair and impartial. I respect you for that. I agree with that." R. 199, lines 14-16. Thus, the judge found the juror credible when she stated she could be fair and impartial to both sides. Thereafter, the judge told the attorneys: "The concern I have is with the juror who clearly doesn't want to serve because it puts her in a very difficult position although she can say she can be fair and impartial." R. 200, lines 5-8.

The prosecution responded that serving "would affect [her] pecuniary interest because if she decides against them they might not come to get their hair done there

anymore." R. 200, lines 9-12. Further, the prosecutor stated: "But I think part of the danger ... is that somebody extraneous other than evidence would enter that jury room in terms of deliberation and that would be what effect is this going to have if I have to rule against him." R. 200, lines 15-20. Appellant properly responded that the juror would be instructed appropriately and the law presumes jurors follow the instructions. Additionally, Appellant emphasized that the juror "reiterated more than once she could be fair and impartial." R. 200, lines 21-24.

Initially, Judge Russo indicated his decision was to excuse her despite the fact that he believed her response that she could be fair and impartial. He stated he was concerned because the juror said she would not know how to face Appellant's family if he were found guilty. He also determined there was a pecuniary interest because family members were her clients and the judge feared this would enter into the juror's deliberation. He concluded that if after qualification, they had enough jurors, then he was inclined to excuse her. R. 201, lines 12-25. At the conclusion of qualifications, Judge Russo excused Juror #130.[10] R. 203, line 25 – R. 204, line 3.

Immediately before opening arguments, Appellant renewed his objection to the judge excusing Juror #130. Appellant reiterated that she stated she could be fair despite feeling uncomfortable. R. 244, line 18 – R. 245, line 9. Judge Russo again acknowledged that Juror #130 stated she had not discussed the case with her clients and that she could be fair. He referred to her statement that she'd feel uncomfortable, however. On that basis, Judge Russo excused her: "I excused her because she was very concerned about serving."

[10] Judge Russo stated he was excusing "Ms. Byrd," but indicated the juror's number was 130. Juror Tiffany Murray was number 130, and he indicated that he would decide whether to exclude her based upon the conclusion of qualifications.

He admitted that the concern over a pecuniary interest was not raised by Juror #130, but was one raised by the prosecution. He further admitted he had no reason to doubt Juror #130's statement that she could be fair and impartial. R. 245, line 10 – R. 247, line 11.

Discussion

"The Sixth and Fourteenth Amendments of the United States Constitution guarantee a criminal defendant a fair trial by a panel of impartial and indifferent jurors. Estelle v. Williams, 425 U.S. 501 (1976); Irvin v. Dowd, 366 U.S. 717 (1961); see also S.C. Const. art. I, §§ 3 & 14. A jury must "render its verdict free from outside influences of whatever kind and nature" and make its decision based solely on the evidence admitted during the trial. State v. Cameron, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct. App. 1993); see also State v. Cooper, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999), State v. Bantan, 387 S.C. 412, 422, 692 S.E.2d 201, 206 (Ct. App. 2010). The South Carolina Supreme Court held "[i]n a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences." State v. Kelly, 331 S.C. 132, 141, 502 S.E.2d 99, 104 (1998). Conduct that affects the jury's impartiality will affect the verdict. Id.

In State v. Burgess, 391 S.C. 15, 17-18, 703 S.E.2d 512, 513-514 (Ct. App. 2010), this Court found no error in a trial judge's decision not to remove a jury who disclosed he knew a member of the victim's family. This Court explained "the fact that a juror has some relationship with the victim does not automatically require the trial judge to remove the juror." Id. at 18, 703 S.E.2d at 514. Similarly, this Court held trial judge's decision to permit a juror to remain despite the juror's exposure to outside influences was not in error where the juror stated the outside information would have no effect on her ability to be fair and impartial. State v. Bell, 374 S.C. 136, 148-149, 646 S.E.2d 888, 895 (Ct. App. 2007).

In a capital case, State v. Ivey, 331 S.C. 118, 121-123, 502 S.E.2d 92, 94 (1998), the South Carolina Supreme Court held a trial judge's decision to allow a juror to remain was not in error where the juror admitted she knew the person who loaned the gun to Ivey's co-defendant. The judge inquired into what effect the juror's knowledge of the witness would have on her ability to be fair and impartial. The juror responded "It shouldn't affect me." The Court characterized this as an unequivocal statement by the juror that the information would have "no effect on her ability to render an impartial verdict." Thus, the trial judge did not abuse his discretion in permitting the juror to remain on the jury. Id.; see also Washington v. Whitaker, 317 S.C. 108, 451 S.E.2d 894 (1994)(finding the trial court did not abuse his discretion in permitting a juror to remain on the jury panel after learning the juror heard a radio program about the case because the juror stated "unequivocally, that she would not permit the radio broadcast to influence her decision").

In a post-conviction relief (PCR) matter, the South Carolina Supreme Court found no error where a juror failed to disclose that he and the defendant were incarcerated together prior to trial. Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007). During the PCR hearing, the juror testified that he had no bias or prejudice against the defendant, but admitted that he told the other jurors that he had been incarcerated with the defendant. Id. at 516-517, 654 S.E.2d at 528. The Court determined the juror had not concealed information about his relationship with the defendant because the trial court had not asked whether any jurors knew the defendant. Id. at 519, 654 S.E.2d at 530.

The trial judge erred in excusing Juror #130 from the jury panel where he applied the wrong legal standard in determining whether she should remain. The judge excused the juror because the juror indicated she did not know how she would face the family if the

verdict was guilty and that he believed the juror had a pecuniary interest in the outcome of the trial. The proper standard was whether the juror could be fair and impartial to both sides. Juror #130 stated unequivocally and repeatedly that she could be fair and impartial. Even when expressing her concern about facing the family after a verdict, she indicated that she could find Appellant guilty regardless of her relationship with Appellant's family. The judge's second reason was not supported by the record. Juror #130 never once indicated she feared losing a client as a result of her participation in the trial. In fact, her responses indicated she fully expected to see the family again.

V. The trial judge erred in admitting photographs of the deceased's body where the danger of unfair prejudice clearly outweighed any probative value of the photographs in light of the judge and prosecutor admitting the photographs were graphic and the prosecutor's failure to use the photographs for the reasons proffered - to corroborate testimony regarding the injuries and to identify the deceased.

Relevant facts

Prior to trial, Appellant objected to the admission of photographs marked as state's exhibits 56, 57, 58, 59, 60, 61, and 62. Admitting the photos were "graphic," the prosecution argued the photos, which were of the deceased's body, would "give a full and complete presentation ... of injuries sustained." R. 234, line 21 – R. 235, line 9. Appellant argued the prejudicial value clearly outweighed the probative value of the photos. The photographs would not assist the jury in understanding the manner of death because the prosecution intended to present testimony from a forensic pathologist that the deceased died as a result of seven stab wounds and testimony from police officers regarding where the body was found and its condition. R. 236, line 1 – R. 237, line 3. Ultimately, the trial judge excluded 57, 58, 60, and 62, but allowed 56, 59, and 61. R. 242, line 7 – R. 243, line 2. Therefore, Appellant will address the arguments as they relate to the admitted graphic photographs.

Appellant argued that #56 was the least graphic, but the potential for unfair prejudice increased with each photograph. Appellant argued #59 and #61 were "extremely inflammatory pictures." As a result, Appellant argued, the photographs had "a severe probability ... of impassioning a jury as those pictures are gruesome." R. 237, line 3 – R. 238, line 1. Specifically relating to #59, Appellant argued the prejudicial effect outweighed

that probative value, which was corroborating testimony regarding stab wounds. The photograph showed the deceased as she was found days after her death; thus showing some level of decomposition. Appellant argued the photograph provided a "distorted picture" as it showed the deceased not relative to her time of death and not showing the cause of death. R. 241, line 8 – R. 242, line 1.

Regarding #61, which showed the deceased after her body was moved and unwrapped, the prosecutor argued the photograph identified the deceased and corroborated Appellant's statement regarding whose house the individuals entered. R. 238, line 19 – R. 239, line 4. Appellant responded that he had never challenged the identity of the deceased and would not do so. Appellant further argued #61 showed the deceased's body after officers had altered the state in which they found her and that the photograph was "very gruesome and could impassion the jury." R. 239, lines 12-22.

The judge permitted the introduction of #56 because it showed "what they found when they came on to the scene where her body was." Admitting he did not know what the testimony would be, the judge allowed #56 because it showed the body wrapped in a bed sheet, which corroborated Appellant's statement to law enforcement. R. 238, lines 2-13. Moving to #61, the judge allowed the photograph because it showed that the deceased was in fact Willie Mae Hayes, despite the fact that the photograph did not show her face, and it corroborated the testimony that she was in her nightgown and bed clothing. R. 239, line 21 – R. 240, line 8. The judge allowed #59 finding that it depicted the injuries that would be the topic of testimony and it did not seem to be overly gruesome, "depend[ing] on the view of it." R. 240 line 9 – R. 241, line 4; R. 242, lines 5-6.

When the prosecutor offered the photographs into evidence through police officer Shannon Hill, Appellant renewed his objection. The court overruled the objection and permitted the photographs to be published to the jury. R. 306, lines 1-4; R. 306, lines 9-12; R. 306, line 23 – R. 307, line 1.

Discussion

"Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or unnecessary to substantiate material facts or conditions." State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010) (citing State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997)). Rule 403 of the South Carolina Rules of Evidence provides that even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Photographs are unfairly prejudicial when they have a "'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" Id. (citing State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995)).

Recently, this Court reviewed the admissibility of the photographs using a four-step analysis in State v. Collins, 398 S.C. 197, 727 S.E.2d 751 (Ct. App. 2012). The first step required an examination of the probative value of the photographs, including whether the photographs corroborated testimony. Next, an evaluation the danger of unfair prejudice resulting from the introduction of the photographs was conducted. Third, this Court balanced the probative value and unfair prejudice. Fourth, the Court reviewed the trial court's decision for an abuse of discretion. Id.

Determining the probative value of the photographs required an understanding of the practical context of the trial, including the charged offenses. Id. at 203, 727 S.E.2d at

754. Where the prosecutor elicited ample testimony from the forensic pathologist concerning the victim's injuries and the cause of death prior to the introduction of the photographs, "the photos added very little to the jury's ability to understand the pathologist's testimony on this point." Id. at 204, 727 S.E.2d at 756. Additionally, this Court held "the danger of unfair prejudice of the admitted photos is extreme" because looking at each of the seven color photographs of the ten-year old boy's partially devoured corpse on the autopsy table was "difficult," but the "combined effect of all seven is disturbing." This Court explained the photographs were "chilling." Id. at 208, 727 S.E.2d at 757.

In Torres, 390 S.C. at 623, 703 S.E.2d at 229, the prosecution offered several autopsy photographs into evidence during the sentencing phase of a capital murder trial. The pathologist used the photographs to illustrate the number and location of the injuries, as well as the manner in which the injuries were inflicted. Id., 390 S.C. at 624, 703 S.E.2d at 229. The purpose of the close-up photographs was to help identify the nature of each particular injury. Id., 390 S.C. at 623, 703 S.E.2d at 229. As explained by the Court, "the scope of the probative value is much broader [in capital sentencing proceedings] than [in] the guilt phase." Id. (citing State v. Kornahrens, 290 S.C. 281, 289, 350 S.E.2d 180, 186 (1986)). Thus, in capital cases, the Court has held autopsy photographs are admissible to show the circumstances of the crime and character of the defendant, which are considerations unique to the sentencing phase of a capital case. Id., 390 S.C. at 623-624, 703 S.E.2d at 229 (citing State v. Rosemond, 335 S.C. 593, 597, 518 S.E.2d 588, 590 (1999); State v. Burkhart, 371 S.C. 482, 487, 640 S.E.2d 450, 453 (2007)). In Torres, the trial judge also exercised his discretion by excluding three photographs offered by the

prosecution as they were duplicative and unfairly prejudicial. Id. Nevertheless, the Court warned that the photographs at issue were "at the outer limits of what our law permits a jury to consider ... [and] strongly encouraged all solicitors to refrain from pushing the envelope on admissibility in order to gain a victory which, in all likelihood, was already assured because of other substantial evidence in the case." Id.

Our Supreme Court held autopsy photographs were admissible in a homicide by child abuse case where the photographs corroborated the testimony of the pathologist and refuted statements by the accused. State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009). In Holder, 382 S.C. at 281-282, 676 S.E.2d at 692-693, the prosecution accused the victim's mother and her live-in boyfriend of homicide by child abuse. Initially, Holder told hospital personnel the victim had been involved in an All-Terrain Vehicle (ATV) accident. Id., at 281, 676 S.E.2d at 692. Holder testified that she was not aware of any marks on her son prior to his death and thought he was suffering from food poisoning. Id., at 291, 676 S.E.2d at 697. During an in-camera hearing concerning the photographs, the pathologist testified the photographs would assist him in "'demonstrating the anatomic relationships and the disruption of those anatomic relationships. There may be some lack of knowledge of internal anatomy [among the jurors].'" Id., at 290, 676 S.E.2d at 697. The pathologist admitted he could explain the injuries without the photographs but was not sure he could "'explain it to their understanding.'" Id. The pathologist then used the photographs to explain to the jury that some of the victim's internal injuries showed signs of healing, the victim had external bruising to his abdomen, and the victim had extensive bruising over his body. Id.

The Court found the photographs demonstrated "the extent and nature of the injuries in a way that would not be as easily understood based on the testimony alone." Id. The Court held the photographs in combination with the pathologist's testimony was "particularly helpful to jurors who [were] unversed in medical matters." Id., at 291, 676 S.E.2d at 697. In addition, the photographs refuted Holder's testimony that she was not aware of any bruising on her son as the "photographs demonstrate[d] that the damage to the child would have been difficult to ignore" due to the extensive bruising in various stages of healing and torn internal organs. Id.

In the companion case to Holder, this Court held the autopsy photographs of the internal organs and other injuries of the child were admissible during the trial of Holder's live-in boyfriend, Martucci. State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008). This Court held the photographs were admissible to corroborate the testimony of the pathologist and were relevant to prove the elements of the charged offense – homicide by child abuse. The photographs showed evidence of abuse, including injuries at various stages of healing, that the abuse was the cause of death, and that the abuse manifested an extreme indifference to human life, which were elements of homicide by child abuse. Id., at 250, 669 S.E.2d at 608.

In State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (Ct. App. 2002), this Court held the admission of several autopsy photographs of the victim in the homicide by child abuse and accessory after the fact of murder case was not error. This Court held the photographs were necessary to corroborate the testimony presented. The photograph of the anal injuries due to sexual abuse corroborated the testimony of the pathologist and of other witnesses concerning Jarrell's motive for planning to kill the baby due to the abuse being readily

apparent. Id., at 106, 564 S.E.2d at 371. The photographs corroborated the pathologist's time of death testimony, and testimony of others that the child was in a state of rigor mortis and the beginning stages of decomposition. Id. Finally, this Court concluded the photographs assisted the jury in understanding the testimony of the pathologist. Id., at 106-107, 564 S.E.2d at 371.

During the sentencing proceeding of the capital trial of Andre Rosemond, the trial judge admitted six enlarged color photographs of the victims. Three of the photographs were from the crime scene and three were from the autopsy. State v. Rosemond, 335 S.C. 593, 596, 518 S.E.2d 588, 589 (1999). The South Carolina Supreme Court held admission of the photographs during the sentencing phase was not unduly prejudicial. Id., at 597, 518 S.E.2d at 590. As explained, the purpose of bifurcated proceedings in capital cases is to permit the introduction of evidence in the sentencing phase that would be inadmissible during the guilt phase. Although a capital sentencing jury may see photographs of the victims' bodies in the same condition in which the defendant left them, the trial judge must balance the prejudicial effect of the photographs against the probative value, which is broader in scope in the sentencing phase of a capital case. Id., at 596-597, 518 S.E.2d at 590 (quoting State v. Kornahrens, 290 S.C. 281, 289, 350 S.E.2d 180, 185-186 (1986)). The Court held the photographs from the crime scene showed the victims in substantially the same condition as the defendant left them and all of the photographs corroborated the pathologist's testimony concerning the position of the victims as they died and the wounds received by the victims. Id., at 597, 518 S.E.2d at 590. The Court concluded the photographs were "admissible in the sentencing phase of a death penalty trial to show the circumstances of the crime and the character of the defendant." Id.

The admission of three photographs of the victim's face in a murder case was not erroneous because the photographs corroborated the experts' testimony of the angle and distance from which the victim was shot and to show the residue on the victim's eyelids suggesting his eyes were closed when he was shot according to our state supreme court. Thus, the photographs were relevant and probative of a material issue in the case. Additionally, the photographs were not unduly gruesome in light of the insignificant amount of blood. State v. Nichols, 325 S.C. 111, 121-122, 481 S.E.2d 118, 123-124 (1997).

In State v. Brazell, 325 S.C. 65, 480 S.E.2d 64 (1997), the Court held three color photographs were admissible in a murder case. The photographs were from the crime scene and were not close-ups. After reviewing the offered photographs and balancing the probative value against the prejudicial effect, the trial judge selected three of them. The judge excluded other photographs of the crime scene and autopsy based on the unfair prejudice of the photographs. The Court held the photographs supported the testimony of several witnesses, including that of a witness who testified concerning the location of the body on the side of the road and of the pathologist concerning the injuries sustained. In addition, the prosecution used the photographs to establish the "murder was a deliberate and calculated act." Id., at 78-79, 480 S.E.2d at 72.

The Court upheld the trial judge's admission of three photographs showing injuries suffered by one of the victims in State v. Nance, 320 S.C. 501, 466 S.E.2d 349 (1996). The photographs were of the surviving victim in his hospital bed and showed the cleaned stab wounds to his hands, abdomen, right shoulder, and face. Id., at 507-508, 466 S.E.2d at 353. According to this Court, the photographs corroborated the testimony of a doctor who testified concerning the surviving victim's medical condition and the surviving victim's

testimony concerning his injuries. Additionally, the "photographs were ... relevant to the issue of malice, an element of assault and battery with intent to kill." Id.

During the trial of Donald Kelley for murder, the trial judge permitted the introduction of photographs and video of the crime scene. State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995). Two photographs were of the victim's nude body on the living room floor showing her body and face visibly swollen and showed blood smeared on the walls and floor. The video panned the crime scene. The Court held the photographs and video were relevant to show the crime scene and to establish malice, in light of Kelley's contention that he was drunk and guilty of the lesser-included offense of voluntary manslaughter. Concerning Kelley's argument that the photographs and video were unfairly prejudicial, this Court held the photographs and video "depicted the excess nature of the killing" and as such "their probative value on the issue of malice was great enough to negate the risk of the jury's basing its decision on an improper passion." Id., at 178, 460 S.E.2d at 370-371.

In State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986), the Court held the trial court erred in admitting three color autopsy photographs of one of the victims in this capital murder trial. Although the photographs were used to corroborate other evidence, the trial judge erred in permitting their introduction because they were unfairly prejudicial. "[T]he information contained within the photographs was not really at issue." Additionally, "any arguable evidentiary value of the photographs" was negated by the forensic pathologist's testimony. Id.

The trial judge erred in admitting the photographs of the deceased's body as it was found and as it was altered by police after it was found because the danger of unfair

prejudice to Appellant outweighed any probative value. Both the prosecutor and the trial judge admitted the photographs were graphic. The prosecutor used the photographs with only one witness – a police officer who described where the body had been found. The photographs were not used by the prosecutor to identify the victim or by the pathologist to describe the manner of death.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and sentences and order a new trial.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd of August, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

August 22nd, 2013

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID GERRARD JOHNSON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Melody J. Brown, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 22nd day of August, 2013.

Susan B. Hackett

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ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 22nd day of August, 2013.

Emily Brown (L.S.)

Notary Public for South Carolina
My Commission Expires: November 16, 2022.

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

FINAL BRIEF OF RESPONDENT

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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.

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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 evidenced significant hesitation due to 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 seven 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. 632). 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. 622). 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. 623). 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. 624).

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. (R. p. 584, 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. (R. p. 588, 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. 623).

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." (R. p. 371, line 14 – p. 372, 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 the 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. (R. p. 248, line 5 – p. 249, line 22). Ms. Hayes' daughter noticed a broken vase, then saw a television was missing. (R. p. 252, line 3 – p. 253, 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. (R. p. 255, line 13 –

p. 257, line 10). While at first they thought perhaps Ms. Hayes had an accident and called the hospital, their concern increased and they called the police. (R. p. 253, lines 21-25; R. p. 256, lines 14-22). Officers found a point of entry in the kitchen, (R. p. 285, lines 16-22), and blood in the bedroom on the mattress and surrounding areas, (R. p. 294, line 20 – p. 298, line 10; R. p. 373, line 2 – p. 374, line 20). Upon further investigation, officers were able to locate the victim's car parked in the same general area near the home, (R. p. 332, line 23 – p. 333, line 19), and, also close to the home, found a bag of pillows that tested presumptive positive for blood, (R. p. 294, lines 1-18; R. p. 375, line 16 – p. 376, 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." (R. p. 453, line 24 – p. 455, line 20; R. p. 522, line 16 – p. 528, 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; R. p. 37, line 7 – p. 40, line 23; R. p. 60, line 20 – p. 61, line 9; R. p. 380, line 6 – p. 385, 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. (R. p. 54, line 1 – p. 55, line 25; R. p. 40, line 23 – p. 41, line 4). Appellant agreed to talk, and Officer Compton read Appellant the *Miranda* rights. (R. p. 41, lines 5- 18). The officer read each one, "one at a time," and advised Appellant to

"listen up carefully." (R. p. 41, line 24 – p. 42, line 1). 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. (R. p. 45, line 8 – p. 46, line 23; R. p.388, line 5 – p. 390, 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 where the body was, "Amp" being Anthony Wilson (Court Exhibits 5). (See also R. p. 47, line 1 – p. 50, line 18; R. p. 84, lines 7-9; R. p. 391, line 1 – p. 395, line 11; R. p. 433, line 20 – p. 437, 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." (R. 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; R. p. 77, line 5 – p. 79, line 18; R. p. 80, line 6 – p. 83, line 14; R. p. 465, line 1 – p. 468, line 21; R. p. 541, lines 5 - 19; R. p. 549, line 21 – p. 553, 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; R. p. 554,

lines 22-23(statement played for the jury)[2]). Appellant also took officers to his father's home and showed investigators the hidden electronics taken from Ms. Hayes' home. (R. p. 79, line 21 – p. 80, line 1; R. p. 83, line 15 – p. 84, line 15; R. p. 474, line 3 – p. 478, line 15; R. p. 541, line 20 – p. 543, line 17).

Forensic testing determined the blood on the mattress, the bed rail, the bedroom curtains, and the pillows belong to Ms. Hayes. (R. p. 351, lines 5-15; R. p. 352, 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. (R. p. 342, lines 12-23). Further still, Appellant's fingerprints were also found on the driver's side area. (R. p. 377, 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. 190-191; R. p. 232, line 12 – p. 233, 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. (R. p. 498, lines 24-25;R. p. 499, lines 7-25; R. p. 500, line 1 – p. 513, 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. (R. p. 514, lines 6-16; R. p. 515, lines 2-12; R. p. 516, line 17 – p. 519, 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. (R. 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. (R. p. 110, line 11 – p. 114, line 23; R. 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. (R. 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). (R. p. 576, lines 2-11; p. 577, lines 6-24; R. p. 578, lines 17 – 22; R. p. 579, line 20 – p. 581, 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...." (R. 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." (R. 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....

(R. p. 208, 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. (R. p. 427, line 24 – p. 429, line 17; R. p. 483, line 19 – p. 484, 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

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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 ultimate responsibility to determine if the statements were voluntary, and the jury was so charged. (R. p. 209, lines 16 – 25; R. p. 387, lines 7-19; R. p. 582, line 1 – p. 583, line 8).

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.").

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. (R. 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 in light of the 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, did 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.

(R. p. 205, line 13 - p.208, 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....

(R. p. 586, line 2 – p. 587, 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. (R. 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. (R. p. 67, line 8 – p. 68, line 1). Officer Godwin also testified that he 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." (R. 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." (R. p. 79, lines 16-18). (See also R. 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. (R. p. 95, line 11 – p. 96, line 21). Officer Drayton testified Appellant "appeared to be willing and cooperate[d]" in the investigation. (R. p. 97, lines 7-13). Further, Officer Drayton testified that a lot of information Appellant provided proved accurate when compared to what the investigation had already revealed. (R. 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, he could describe the basic danger in speaking to the solicitor without counsel. (R. 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 understands the legal process, at least to some degree. (See R. 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. (R. p. 18, lines 13-19). Dr. Hall testified that Appellant would indicate if he had a question, either verbally or by expression. (R. 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. (R. 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. (R. 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 R. 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. (R. 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 of a higher level of understanding than a kindergartener. (R. 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. (R. 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." (R. 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. 588). 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. (R. 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 voluntary 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. (R. p. 215, line 13 – p. 216, line 9; p. 216, line 14- p. 218, line 13; p. 219, line 2 – p. 221, 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." (R. p. 216, 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 intellectual disability and his inability to understand. He incorporated the evidence from Dr. Price as presented in regard to the voluntariness of the statement. (R. p. 229, line 17 – p. 230, line 12; R. 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....

(R. p. 230, line 13 – p. 231, 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. (R. 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 effect on Appellant's ability to consent. (R. p. 142, lines 12- 16; R. 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. (R. 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. (R. p. 227, line 12 – p. 228, 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. (R. 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. (R. p. 83, line 15 – p. 84, line 15). (See also Court Exhibit 3, at pp. 592-593). 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. (R. 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. (R. 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...." (R. p. 195, 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. (R. p. 196, lines 4-7). She stated she "would be fair, but [did not] want that overhead." (R. p. 196, lines 12-13). She stated: "I just wouldn't feel comfortable on that case." (R. p. 196, lines 13-24). Juror #130 added that she also knew another family member and had done work for that family member, as well. (R. p. 197, lines 1-12). Juror #130 indicated that she 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." (R. p. 197, line 13 – p. 198, line 22). The solicitor acknowledged that service may be difficult to deliberate with a "free mind." The juror expressed, "If he's guilty I wouldn't know how to ...." (R. p. 199, 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." (R. p. 200, lines 3-12). Defense counsel noted that the juror indicated she could be fair and impartial. (R. p. 200, line 21 – p. 201, line 3). The trial judge expressed the inclination to excuse the juror, and

likely would if there remained sufficient numbers in the jury pool. (R. p. 201, line 12 – p. 202, line 2). The trial judge, satisfied with the number of jurors available, excused Juror #130. (R. p. 203, line 24 – p. 204, line 3). Counsel preserved an objection to the excusal after selection but before the jury was sworn. (R. p. 244, line 20 – p. 245, line 9). The trial judge reaffirmed his ruling noting the juror, 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. (R. p. 245, line 10 – p. 247, 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 there 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 offer 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. (R. p. 236, line 6 - p. 238, line 1; R. p. 241, line 8 – p. 242, 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. (R. p. 242, line 5 – p. 243, 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 it 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. (R. p. 238, 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 referenced 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." (R. p. 240, lines 20-23). He was careful to disallow "overly gruesome" or "bloody" photographs. (R. p. 241, 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 is 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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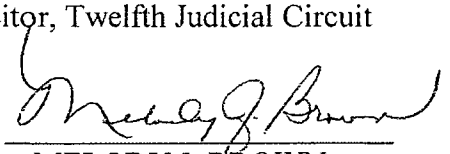
BY: 
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August 22, 2013.
Columbia, South Carolina.

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,

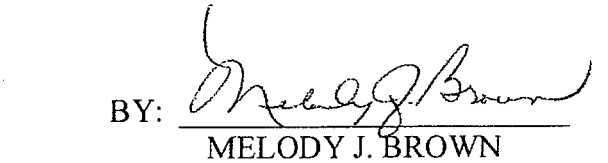
v.

David Gerrard Johnson, Appellant.

Appellate Case No. 2012-209267

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court, "Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

BY: 

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PROOF OF SERVICE

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

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