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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In the Supreme Court

On Petition for Writ of Certiorari to the Court of Appeal
APPEAL FROM FLORENCE COUNTY
Court of General Sessions
Thomas A. Russo, Circuit Court Judge

Unpublished Opinion No. 2014-UP-167 (Ct.App. filed April 9, 2014)

The State, Respondent,

v.

David Gerrard Johnson, Petitioner.

Appellate Case No. 2014-001506

RETURN TO PETTITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

MELODY J. BROWN
Senior Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

E.L. CLEMENTS, III
Solicitor, Twelfth Judicial Circuit
Box Q, City-County Complex
Florence, South Carolina 29501
(803) 665-3091

ATTORNEYS FOR RESPONDENT

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PETITIONER'S QUESTIONS PRESENTED

I. Did the Court of Appeals err in affirming the trial court's erroneous admission of a statement made by Petitioner to police officers where the undisputed evidence demonstrated Petitioner's lack of mental capacity to making a knowing waiver of his constitutional rights due to his intellectual disability?

II. Did the Court of Appeals err in affirming the trial court's erroneous admission of evidence that was the fruit of the poisonous tree because police located the items as a result of Petitioner's statement, which was made without Petitioner having the capacity to waive his constitutional rights due to his intellectual disability and where Petitioner lacked the capacity to consent to the search of his home?

III. Did the Court of Appeals err in affirming the trial court's erroneous finding that Petitioner knowingly consented to the police taking a DNA sample and fingerprint standard from him where the undisputed evidence demonstrated Petitioner lacked the mental capacity to make a knowing waiver of his rights due to his intellectual disability?

(Petition, p. FBOA, p. 3).

RESPONDENT'S COUNTER STATEMENT OF QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in affirming the trial judge's admission of Petitioner's statement where the record supports his factual finding that Petitioner, 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 Petitioner's own defense expert agreed that Petitioner was competent to stand trial or plead guilty?

II. Whether the Court of Appeals erred in affirming the trial judge's admission of evidence obtained as a result of the voluntary statement?

III. Whether the Court of Appeals erred in affirming the trial judge's decision that Petitioner consented to a DNA sample and fingerprinting based on the presence of intellectual disability alone where intellectual disability alone does not prevent valid waiver of rights or ability to consent?

RESPONDENT'S STATEMENT OF THE CASE

A Florence Grand Jury indicted Petitioner, 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 Petitioner. 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 Petitioner had been diagnosed with intellectual disability and the State was precluded from seeking death. (R. p. 624).

W. James Hoffmeyer, Esq., continued to represent Petitioner 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 Petitioner 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 Petitioner denied the stabbing, evidence at trial indicated that Petitioner 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. Petitioner 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 Petitioner's family home. Defense counsel argued at trial, consistent with Petitioner's final statement, that Petitioner 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 Petitioner, 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 unsecured 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 Petitioner come by and speak with the officers. Officers left messages at Petitioner'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).

Petitioner voluntarily went to the station. While Officers Drayton and Godwin were the lead investigators, they were busy interviewing another individual when Petitioner arrived. Officer Compton sat with Petitioner. Petitioner 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. 610; R. p. 37, line 7 – p. 40, line 23; p. 60, line 20 – p. 61, line 9; 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 Petitioner if, given the other detectives were still busy, he would talk to him. (R. p. 54, line 1 – p. 55, line 25; p. 40, line 23 – p. 41, line 4). Petitioner agreed to talk, and Officer Compton read Petitioner the *Miranda* rights. (R. p. 41, lines 5- 18). The officer read each one, "one at a time," and advised

Petitioner to "listen up carefully." (R. p. 41, line 24 – p. 42, line 1). Officer Compton asked if Petitioner understood, and Petitioner indicated his understanding. Officer Compton had no indication that Petitioner 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 Petitioner understood. (R. p. 45, line 8 – p. 46, line 23; R. p.388, line 5 – p. 390, line 20). Petitioner 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 Exhibit 5, R. p. 610). (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, Petitioner 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, R. p. 592; State's Exhibit 120, R. p. 620; R. p. 77, line 5 – p. 79, line 18; p. 80, line 6 – p. 83, line 14; p. 465, line 1– p. 468, line 21; p. 541, lines 5 - 19; p. 549, line 21 – p. 553, line 17). In this second statement, Petitioner 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, R. p. 592; State's Exhibit 116,

(audio); R. p. 554, lines 22-23(statement played for the jury)[2]). Petitioner 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; p. 83, line 15 – p. 84, line 15; p. 474, line 3 – p. 478, line 15; 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; p. 352, lines 2-21). Further forensic testing matched samples from the steering wheel in victim's car to Petitioner 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, Petitioner'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. Petitioner asked him to "walk with him" and they walked next door to Ms. Hayes' home. Petitioner asked Wilson, who was small, to go through a window to gain entry to the house. He opened the door for Petitioner and Bailey. At one point, Wilson looked in the bedroom and saw Petitioner sitting on top of Ms. Hayes in her bed. He had a pillow over her. Petitioner instructed Wilson to enter the room. Petitioner pulled a pocketknife open and gave it to Wilson, telling him to stab Ms. Hayes. Wilson, at Petitioner's repeated urging, stabbed Ms. Hayes once and ran outside. Petitioner came out and asked his help in disposing of the body. Wilson helped Petitioner carry the body

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[2] Respondent notes the statement played for the jury omitted references to remorse. (See Court Exhibit 3, R. p. 592; R. pp. 190-191; 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. Petitioner 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 Petitioner. (R. p. 498, lines 24-25; p. 499, lines 7-25; p. 500, line 1 – p. 513, line 22).

Montgomery testified similarly in that he saw Petitioner and Wilson in Ms. Hayes' car as they returned. He asked Petitioner, who was driving, where he had gotten the car. Petitioner replied that "he had pulled a lick, which means he had committed a robbery." Montgomery asked for additional details, but Petitioner stated he would be scared if he told Montgomery so Montgomery determined he did not want to know and did not press Petitioner. Montgomery then took a ride around the block with Petitioner and Wilson. After they returned, Petitioner 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 Petitioner 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; p. 515, lines 2-12; p. 516, line 17 – p. 519, line 16).

ARGUMENT

I.

Admissibility of Statement Issue

Petitioner does not complain appropriate *Miranda*[3] warnings were not given or that force or intimidation was used to extract a confession. Rather, Petitioner makes the single complaint that he lacked the mental capacity "to mak[e] a knowing waiver of his

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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).

constitutional rights due to his intellectual disability." (Petition, 5).[4] The trial judge appropriately found the factual basis for the statement supported finding the statement admissible.[5] The Court of Appeals found the trial judge's decision reflected a decision correctly based on due consideration of the totality of the circumstances with specific factual support. (App. p. 3). Petitioner's argument in rehearing and in the petition address the weight to be afforded the statement, not admissibility.[6] The admissibility evaluation

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[4] In this instant, "intellectual disability" describes the specific condition formerly termed "mental retardation." *See 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] Respondent argued in the Court of Appeals that the issue was abandoned when Petitioner failed to make this argument to the jury. Essentially, in this jurisdiction, the judge satisfies the federal due process protects stemming from *Jackson v. Denno* by initially determining admissibility by preponderance of the evidence. Such a statement is then admitted and the jury must find beyond a reasonable doubt that the State has shown the statement was voluntary before the statement may be considered. *State v. Washington*, 296 S.C. 54, 56, 370 S.E.2d 611, 612 (1988). Petitioner defaulted in this two-step process. Petitioner presented evidence of intellectual disability in the pre-trial suppression hearing by way of testimony of defense witness Dr. David Richard Price. However, no such evidence was presented to the jury. Further, Petitioner 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; p. 578, lines 17 – 22; p. 579, line 20 – p. 581, line 7). Because Petitioner 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. However, the Court of Appeals did not rule on the issue of abandonment.

[6] For instance, Petitioner takes exception to the Court of Appeals reliance, in part, on the testimony of a clinical psychologist that, in pretrial evaluation, Petitioner "understood that he should not talk to the solicitor without attorney being present and could not be forced to talk in court," (see App. p. 3), where the testimony described Petitioner's response as, "he could not be forced to talk in court whether he wanted to or not," (see R. p. 17, lines 4-5). Petitioner argues that this is evidence of not understanding as it would be illogical in regard to the "wanting to talk" part. (Petition, p. 17). However, a reasonable reading of the testimony (from the doctor, not Petitioner) is that Petitioner understood that it was his decision, he could not be forced to speak in court. Petitioner also makes a temporal argument that similarly goes to jury argument – that because he knew in the evaluation does not mean he knew at the time he gave the statement. That overlooks Petitioner's prior involvement and pleas in which he would have to have

focuses directly on police conduct, not the individual's level of function. *Colorado v. Connelly*, 479 U.S. 157, 164, 107 S.Ct. 515, 520 (1986) ("Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law."). Petitioner's position would have this Court overrule established precedent that "[a] defendant's mental condition in and of itself does not render a statement involuntary in violation of due process." *State v. Hughes*, 336 S.C. 585, 594, 521 S.E.2d 500, 505 (1999). Further, such would be contrary to this Court ruling that competency to stand trial is competency to waive constitutional rights. *See State v. Barnes*, 407 S.C. 27, 36, 753 S.E.2d 545, 550 (2014) ("We decline to impose a higher competency standard upon an individual who wishes to waive his right to an attorney and represent himself at trial than that required for the waiver of other fundamental constitutional rights afforded a criminal defendant, such as the right against compulsory self-incrimination; the right to trial by jury; and the right to confront one's accusers."). At any rate, the Court of Appeals properly applied this Court's precedent in finding the record supported the trial judge's admission of the statement.

"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

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acknowledged and waived such a right. (See App. p. 129). At any rate, all of this evidence was before the trial judge to consider in analysis of the totality of the circumstances.

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...")

The Supreme Court has long recognized that one may waive one's constitutional rights upon proper warnings. *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, Petitioner challenges only one point – his level of intelligence.[7] He claims he did not "mak[e] a knowing waiver of 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:

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[7] Counsel argued several times that he was not isolating this point, but making the argument the statements were not voluntary based on the totality of the circumstances. (R. p. 164, line 12 – p. 166, line 10). Respondent has interpreted the argument on appeal to be the same, with single focus on the mental state but in light of the totality of the circumstances.

... 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. 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).[8]

The record fully supports the trial judge's factual findings. The fine point of Petitioner's argument, though, appears to be that none of the officers understood that Petitioner did not understand his rights as read and explained to him, thus, the officers failed to do more to ensure Petitioner understood. However, there is ample lay witness

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[8] Further, at sentencing the trial judge noted:

> ... 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). This underscores that the diagnosis – while accepted – did not dictate legal findings. Courts do not abdicate to the medical field the responsibility of making judicial determinations. See generally *Hall v. Florida*, ___ U.S. ___, ___, 134 S.Ct. 1986, 2000 (2014) (noting the Court's ruling was "informed by the views of medical experts. These views do not dictate the Court's decision..."); *Ortiz v. United States*, 664 F.3d 1151, 1168 (8th Cir. 2011) ("Ortiz's argument is also flawed because it incorrectly assumes the *Atkins* [*v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002)] decision delegates to the scientific community the finding of whether an individual is mentally retarded" for purposes of the Eighth Amendment bar to execution).

testimony that Petitioner 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, Petitioner 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 Petitioner 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 Petitioner "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 Petitioner "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, Petitioner 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 Petitioner "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 Petitioner provided proved accurate when compared to what the investigation had already revealed. (R. p. 96, lines 3-6).

Such testimony followed on the heels of the testimony regarding competency. Dr. Alicia V. Hall testified that Petitioner 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. Petitioner 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 Petitioner 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 Petitioner had a much lower ability in understanding, he maintained Petitioner functioned at a kindergarten level, even though Petitioner tested at third grade level in reading. (R. p. 125, line 23- p. 126, line 6). Dr. Price discounted the fact that Petitioner 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 Petitioner had waived his trial rights in his guilty plea in October 2005 to seven charges. (R. pp. 611-617). Dr. Price agreed Petitioner 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 Petitioner 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 Petitioner 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 Petitioner and interact with Petitioner over an extended period of time. Judge Russo had previously considered the evidence of Petitioner'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 the trial judge's explanation of the right to remain silent or the decision not to testify, and that decision, as the judge stated, was Petitioner's 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). Given the ample record support, the Court of Appeals properly affirmed the trial judge's ruling. Certiorari review is not warranted.

II.
Search Issue

Petitioner argues that the search that followed from the information obtained from the statement was improper because the statement was not voluntary. (Petition, p. 22). For all the reasons argued above, however, the statement was not involuntary simply due to Petitioner's intellectual disability. Consequently, Petitioner's argument on the search issue also fails. This is precisely the conclusion made by the Court of Appeals. (App. p. 4). Thus, the Court of Appeals properly affirmed upon resolution of the statement issue.

Additionally, the record otherwise well supports the voluntariness and consent to the search itself.

"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). After giving his recorded statement, Petitioner 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).[9] Under the totality of the circumstances, it is readily apparent that Petitioner 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. Thus, the record well and fully supports the trial judge's factual findings, and legal conclusion on admissibility. The Court of Appeals properly affirmed. Certiorari review should be denied.

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[9] Further, the record reflects the officers also obtained the permission of Petitioner'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.").

III.

Consent for DNA and Fingerprints Issue

Petitioner similarly argues the Court of Appeals erred in upholding the trial judge's ruling that Petitioner knowingly and voluntarily consented to DNA and fingerprint samples when the record established Petitioner was diagnosed with intellectual disability. (Petition, p. 23). The Court of Appeals found that intellectual disability alone did not establish "an inability to give consent" for the DNA and fingerprint samples. (App. p. 4).[10] 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."). The Court of Appeals emphasized that *Forrester* does not require that information. (App. p. 4). Petitioner does not clearly address *Forrester*, or the totality of the circumstances; rather, Petitioner again places the sole focus on his intellectual disability. (App. p. 25). He argues, essentially the Court of Appeals erred in relying on the totality of the circumstances, including "Applicant having held a job and earned wages..." (Petition, p.

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[10] The State raised a procedural bar as to the fingerprints, as Petitioner 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). The Court of Appeals did not address the Petitioner's failure to preserve the argument. *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."). At any rate, the Court's logic on the consent issue is sound.

25). Again, the diagnosis does not inform the legal conclusion. To the extent he is arguing that such does not preclude a diagnosis of intellectual disability, that is not the relevant inquiry for determining constitutional questions. (See n. 8 supra). 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.").

Critically, though, there is not, on this record, a question of voluntariness of the consent based on coercion, threat or duress. Rather, the question was whether Petitioner understood the rights he waived in consenting to the search. As waiver principles are not applicable to consent, Petitioner's argument fails. At any rate, the argument, if cognizable, would fail because the record fully supports the trial judge's ruling that Petitioner'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 Petitioner 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. He was adequately asked and gave consent for the samples. As the Court of Appeals found, the record supports the trial judge's decision. Specifically, the record shows that Officer Shannon Hill testified that he both showed Petitioner the one page consent form to take

swab DNA sample and fingerprinting, and also explained the request "in his own words." Specifically, he told Petitioner that the samples were "sent to SLED for further analysis." Officer Hill also asked Petitioner if Petitioner 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, R. p. 619). Defense counsel argued the consent for the DNA sample was not voluntary due to Petitioner'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).

Again, the record well supports the trial judge's ruling. 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.").[11] A *Schmerber*[12] order could have been obtained. Had Petitioner 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

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[11] Petitioner's fingerprints were already on file and would have been matched. (R. p. 141, line 20 – p. 142, line 8).

[12] *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).

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 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, this Court need not consider the alternative basis as there was no error in the trial court's ruling, and, consequently, no error in the Court of Appeals' ruling affirming same. Again, certiorari review should be denied.

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that the entire petition for writ of certiorari should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

MELODY J. BROWN
Senior Assistant Attorney General

E.L. CLEMENTS, III
Solicitor, Twelfth Judicial Circuit

BY: _____
MELODY J. BROWN
S.C. Bar No. 14244

Office of the Attorney General
Post office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

ATTORNEYS FOR RESPONDENT

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Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In the Supreme Court

On Petition for Writ of Certiorari to the Court of Appeal
APPEAL FROM FLORENCE COUNTY
Court of General Sessions
Thomas A. Russo, Circuit Court Judge

Unpublished Opinion No. 2014-UP-167 (Ct.App. filed April 9, 2014)

The State, Respondent,

v.

David Gerrard Johnson, Petitioner.

Appellate Case No. 2014-001506

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the *Return to Petition for Writ of Certiorari* on Petitioner by depositing two (2) copies of same in the United States mail, postage prepaid, addressed to his attorney of record:

Susan B. Hackett, Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211-1589

This 18th day of August, 2014.

MELODY J. BROWN
Senior Assistant Attorney General
S.C. Bar No. 14244

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3742