STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

On Certiorari to the South Carolina Court of Appeals
APPEAL FROM FLORENCE COUNTY
Court of General Sessions
Thomas A. Russo, Circuit Court Judge

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

The State, Respondent,

v.

David Gerrard Johnson, Petitioner.

Appellate Case No. 2014-001506.

BRIEF OF RESPONDENT

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PETITIONER'S ISSUES 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 make 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?

(BOP, p. 1).

RESPONDENT'S COUNTER STATEMENT OF ISSUES 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?

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"). Petitioner appealed.

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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).

On August 22, 2013, Petitioner filed a Final Brief of Appellant in the South Carolina Court of Appeals and raised the following issues:

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.

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.

(FBOA, p. 1).

The State filed its Final Brief of Respondent on August 22, 2013, as well. The South Carolina Court of Appeals heard argument on the issues on February 6, 2014. On April 9, 2014, the Court of Appeals issued an unpublished opinion affirming the convictions. (App. p. 1). Petitioner filed a petition for rehearing on April 24, 2014. (App. pp. 6-25). The Court of Appeals denied the petition on June 13, 2014. (App. p. 27). Petitioner sought review by this Court.

On July 17, 2014, Petitioner filed a Petition for Writ of Certiorari in this Court and presented the following questions for consideration:

> 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. 3).

The State made its return to the petition on August 18, 2014. On February 20, 2015, this Court granted certiorari to review Petitioner's Questions I and II. The Court denied review of Question III.

Petitioner filed his Brief of Petitioner on March 12, 2015. This Brief of Respondent follows.

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 out,

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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).

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.

> There is no error in the Court of Appeals' decision affirming the admission of Petitioner's statement as the record supports the trial judge's 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.

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 make a knowing waiver of his constitutional rights due to his intellectual disability." (BOP, p. 4).[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

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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).

[4] In this instant matter, "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

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 his brief to this Court, though, addresses the weight to be afforded the statement, not admissibility, by focusing solely on mental capacity.[6] 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."). Moreover, evaluation of admissibility must first focus on police conduct.

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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," where the testimony described Petitioner's response as, "he could not be forced to talk in court whether he wanted to or not." Petitioner argues that this is evidence of not understanding as it would be illogical in regard to the "wanting to talk" part. (BOP, p. 18). 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 acknowledged and waived such a right. (BOP, pp. 18-19). At any rate, all of this evidence was before the trial judge to consider in analysis of the totality of the circumstances.

Colorado v. Connelly, 479 U.S. 157, 164 (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."). There is no alleged misconduct or even alleged intentional overreaching here. Further, there is ample evidence of understanding by Petitioner during the interview process. There is no error in the trial court's ruling, and the Court of Appeals did not err in affirming same. The record well supports 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 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, though, 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." (BOP, p. 4). 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)). Further, 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

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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.

> 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]

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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

The record fully supports the trial judge's factual findings.

The fine point of Petitioner's argument 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. In contrast to this argument, though, and as the trial judge specifically noted, the record reflects ample lay witness testimony that Petitioner appeared to 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.").

> 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).

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 in-trial 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. 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.").

Moreover, suppression would not be warranted here 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); *State v. Hill*, 361 S.C. 297, 306-307, 604 S.E.2d 696, 701 (2004) ("A defendant's mental condition in and of itself does not render a statement involuntary in violation of due process. Absent coercive police conduct causally related to a confession, there is no basis for finding a confession constitutionally involuntary."); *State v. Hughes*, 336 S.C. 585, 594, 521 S.E.2d 500, 505 (1999) ("Absent coercive police conduct causally related to a confession, there is no basis for finding a confession constitutionally involuntary."); *State v. Salisbury*, 330 S.C. 250, 272, 498 S.E.2d 655, 666 - 667 (Ct. App. 1998) ("Coercive police activity is a necessary predicate to finding a confession is not voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment.").

Even so, Petitioner places great emphasis on the fact of his established intellectual disability and the Supreme Court case of *Atkins v. Virginia*, 536 U.S. 304 (2002) as

dispositive to the issue. Though present, and a bar to seeking the death penalty, the fact of the diagnosis is not dispositive as to voluntariness of the statement. *See Branch v. Epps*, 844 F.Supp.2d 762, 775 (N.D.Miss. 2011) (vacating death sentence upon showing of mental retardation pursuant to *Atkins*, but rejecting claim that defense counsel ineffective for failing to present evidence of mental limitation to suppress statement finding: "Inasmuch as Petitioner's allegation of [police] coercion was rejected, evidence of Petitioner's prior diagnosis of mental retardation would not have led to the suppression of the statement."). *Cf. State v. Francisco*, 101 So.3d 617, 623 (La.App. 3 Cir. 2012) (after acknowledgement that death penalty barred upon showing of mental retardation, on issue of waiver: "when mental retardation is an issue, it should be a factor taken into consideration when the trial court is determining if the waiver of the constitutional right, in this case, absence from trial, is knowingly and intelligently entered.").

Simply, it is a far different concept to reduce sentence exposure based on mental capacity than to exclude valid evidence. *See State v. Grady*, 108 So.3d 845, 852 (La.App. 2 Cir. 2013) ("The inquiry about a defendant's ability to understand *Miranda* is not limited to expert opinion. Courts are able to consider many sources of information, not only expert testimony, in making the determination as to whether a mildly mentally retarded person is capable of understanding and waiving the *Miranda* rights."); *State v. Robinson*, 729 S.E.2d 88, 97 (N.C. Ct. App. 2012) (though defendant could show evidence of "limited mental capacity and his previously determined IQ score placing him in the category of borderline mental retardation," evidence supported "waiver of his *Miranda* rights prior to making any incriminating statements was knowing, intelligent, and voluntary. The record reveals defendant was familiar with the criminal justice

system, having four prior convictions, two of which were felony offenses. The record reveals no threats or promises were made to defendant"). Though, as Petitioner points out, there are cases where suppression is ordered, (see BOP, pp. 15-17), it appears the cases turned on individual facts. See Paul Marcus, *Does Atkins Make a Difference in Non-Capital Cases? Should It?*, 23 Wm. & Mary Bill Rts. J. 431, 447-449 (2014) (though recognizing research captured some cases where intellectually disabled defendant's waiver of *Miranda* rights found involuntary, concluding "far easier to find cases in which the waivers by such defendants were viewed as constitutionally adequate" in light of remaining circumstances).

For example, in *State v. Blackstock,* 19 S.W.3d 200 (Tenn. 2000), though the state court found the circumstances warranted suppression, the court also noted: "Although there is likely to be a level of deficiency so great that it renders a defendant unable to make a knowing and intelligent waiver, nearly every court to consider the issue has held that mental impairments or mental retardation are factors that must be considered along with the totality of the circumstances." 19 S.W.3d at 208. Consequently, the state court concluded, as is offered here, that "courts tend to reach results that are somewhat fact-specific." *Id.* In that case, the state court simply found the evidence supported suppression. Specifically in regards to the interview, the opinion reflects there was evidence the detective taking the statement noted the defendant's "speech and communication worsened and that he was frequently difficult to understand," and that he "did not know his social security number and that he misspelled his own last name on the waiver of rights form." 19 S.W.3d at 209.

In another example of case specific rulings, in *United States v. Jennings*, 491 F.Supp.2d 1072 (M.D. Ala. 2007), the district court rejected a finding by the magistrate there were competing opinions from experts, when the record only supported there was one opinion, and that opinion was that the defendant did not understand his rights. 491 F.Supp.2d at 1078.

Thus, the cases cited in Petitioner's brief as supportive of finding an improper waiver do not diminish the totality of the circumstances evaluation reflected in the trial judge's ruling here. Critically, while Petitioner argues a broad "intellectual disability" similarity, Petitioner does not show in any of the cases that alone was dispositive, or even dispostive over the same factual basis shown here. Each case reflects a discerning review of the statement process and police action.

Given the ample record support for the factual findings, and the well-supported view that mental limitation alone is not enough to render a statement involuntary, the Court of Appeals properly affirmed the trial judge's ruling.

II.

The Court of Appeals did not err in affirming the admission of evidence obtained as a result of the voluntary statement.

Petitioner argues that the search that followed from the information obtained from his statement was improper because the statement was not voluntary. (BOP, p. 20). 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).

To be clear, the standard for showing consent differs from the waiver of *Miranda* rights. While there also needs to be a showing of voluntariness, whether the waiver is "knowing and intelligent" is not at issue. *Schneckloth v. Bustamonte*, 412 U.S. 218, 241 (1973) ("There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing, either in the purposes behind requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the

constitutional guarantee against unreasonable searches and seizures."). Thus, the assertion the diagnosis of mental retardation affects consideration of the voluntariness of the consent to search is even further removed than in the challenge to the statement. Even so, the facts of record fairly support the trial judge's findings of voluntary consent.

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 his legal conclusion on admissibility is sound based on existing, established precedent, both state and federal. Again, the Court of Appeals properly affirmed on this issue.

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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.").

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that no relief is due as Petitioner fails to show any error in the Court of Appeals' opinion.

Respectfully submitted,

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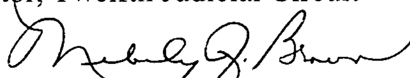
BY: 
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April 13, 2015.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In the Supreme Court

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APR 13 2015

S.C. Supreme Court

On Certiorari to the South Carolina Court of Appeals
APPEAL FROM FLORENCE COUNTY
Court of General Sessions
Thomas A. Russo, Circuit Court Judge

Opinion No. 2014-UP-167 (S.C. 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 *Brief of Respondent* on Petitioner by depositing two copies of same in the United States mail, postage prepaid, addressed to his attorney of record:

Susan B. Hackett, Appellate Defender
South Carolina Commission on Indigent Defense
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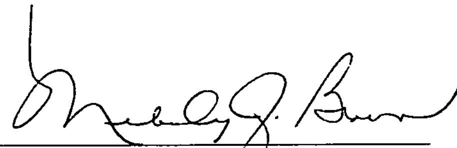
This 13th day of April, 2015.



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RECEIVED
APR 13 2015
S.C. Supreme Court

April 13, 2015

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

Re: The State v. David Gerrard Johnson
Appellate Case No. 2014-001506

Dear Mr. Shearouse:

Enclosed please find the original and fourteen (14) copies of the Brief of Respondent, dated April 13, 2015, together with a Proof of Service in the above-referenced matter.

Thank you for your assistance in this matter. Please call this office if you need any additional information.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

MJB/mv

Enclosures
cc: Susan B. Hackett, Appellate Defender
The Honorable E.L. Clements, III, Twelfth Circuit Solicitor
S.C. Court of Appeals
Trisha Allen, Victim Services

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