STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

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Appeal from Charleston County

Roger M. Young, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

ROBERT T KRONSBERG,

APPELLANT,

Appellate Case No. 2014-002682.

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# INITIAL BRIEF OF RESPONDENT

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I. Did the trial judge erred in admitting Appellant's statement with the police violated Appellant's rights pursuant to the Fifth and Fourteenth Amendments by interrogating him the day after he had invoked his right to silence about the same crime?

II. Did the trial judge err in admitting Appellant's statement to police where the record demonstrated Appellant's purported waiver of his rights was not voluntary due to his ingestion of prescription medication shortly before the interrogation?

## RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

I. The trial court did not abuse its discretion in admitting the Appellant's statements when detectives scrupulously honored Appellant's request not to speak about the crime on February 12, 2013, and re-initiated questioning the following day on February 13, 2013, advised him of his *Miranda* rights again, and upon obtaining his waiver of his rights, spoke with Appellant about the events the night of the murder.

II. The trial court did not abuse its discretion by finding Appellant voluntarily gave his statements to the police, despite the administration of intravenous Haldol approximately two hours prior to his police interview because evidence showed no coercive police conduct and the Appellant was fully capable of understanding and communicating clearly with law enforcement.

## RESPONDENT'S STATEMENT OF THE CASE

A Charleston County grand jury indicted Appellant, Robert t. Kronsberg, in May 2013 for the murder of Tasha Lucia (Indictment Number 2013-GS-1002456) and for possession of a weapon during the commission of a violent crime (Indictment Number 2013-GS-1002457).

On December 1, 2014, Appellant's case was called to trial before the Honorable Roger M. Young, Sr. (T. p. 1). Public Defenders D. Ashley Pennington, Charles Cochran, and Annie Andrews represented Appellant during the trial. (T. p. 1). Assistant Solicitors Chad Simpson and Jessica Baldwin represented the State. (T. p. 1; p. 20, line 14). On December 4, 2014, the jury returned verdicts of guilty as to murder and guilty as to possession of a weapon during the commission of a violent crime. (T. p. 1; p. 671, lines 11-14).

In a separate proceeding held on December 9, 2014, Judge Young sentenced Appellant to life imprisonment for murder and five years' imprisonment for possession of a weapon during a violent crime. (Sentencing sheets)

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

## RESPONDENT'S STATEMENT OF FACTS

*The State's Theory of the Case*

The State argued at trial Appellant killed Tasha Lucia with malice aforethought after a violent argument in the victim's apartment on the early morning hours of February 10, 2013. On the night of February 9, Tasha and her friends were enjoying themselves after the Folly Gras festival at Folly Beach. (T. p. 622, line 10-16.) Appellant was working until 10:00 pm as a cook at Paisano's pizza restaurant while Tasha was out with her friends. The on again/off again couple fought via text and Facebook about Tasha's friendship with an old boyfriend, as they often had before. The fight continued when Appellant ended his shift, went to a bar, had a few drinks, and then returned home to the apartment he shared with Tasha. (T. p. 622, line 16- p. 624, line 16.) The verbal altercation became physical: Appellant hit Tasha hard, and she tried to run for the door. (T. p. 625, lines 4 – 19.) The struggle made its way to the bedroom, and Appellant began choking Tasha repeatedly to "shut her up." (T. p. 626, lines 4-13.) After choking her, Appellant grabbed a hammer and hit her multiple times in the head. (T. p. 627, lines 2-4.) Appellant then went to the kitchen to gather his thoughts. He heard a noise from Tasha in the bedroom, so took a fifteen inch butcher knife and stabbed Tasha brutally in the chest eleven times. (T. p. 628, lines 2 – 8.).

*The Murder*

Tasha Lucia, Laney Childers, and Jessica Nelson, all friends and co-workers at Locklear's Beach City Grill, had been out drinking the night of February 9, 2013. (T. p. 265, line 12 – p. 266, line 25; p. 269, line 24.) The friends were celebrating at local bars after the festival that weekend. (T. p. 273, line 25 – p. 274, line 5.) Tasha was in a good

mood that evening until she received a phone call from her boyfriend, Appellant. (T. p. 267, lines 12-25; p. 273, lines 16-18.) Laney offered to give Tasha a ride home, but Tasha declined, opting to walk home instead. (T. p. 268, lines 15.)

Paul Polensky, Appellant's best friend of ten years, testified the relationship between Appellant and Tasha was volatile. (T. p. 468, line 9-15.) During the off periods in their relationship, Appellant would sleep on Polensky's sofa. (T. p. 469, lines 1-12.) Polensky overhead many instances in which Appellant and Tasha would call each other names. (T. p.470, lines 5 – 9.) Polensky also heard Appellant threaten to kill himself over a breakup with Tasha, though Polensky never took Appellant's threats seriously. (T. p 472, lines 1- 11.) Polensky and Appellant worked together at Paisano's restaurant, and they were both working the evening on February 9, 2013. (T. p. 473, line 4 – p. 474, line 15.) Polensky was a manager in the back kitchen and Appellant was a cook, so because of their close proximity, Polensky was aware Appellant and Tasha were fighting that evening. (T. p. 475, lines 5- 25.) Polensky understood Tasha was with her ex-boyfriend while Appellant was working. (T. p. 476, lines 8-12.)

Polensky testified Appellant left work when his shift ended at approximately 10:30 pm to go to a nearby bar, then later returned to Paisano's. (T. p. 476, line 15 – p. 477, line 3.) When Appellant returned to Paisano's, he appeared to Polensky to be intoxicated. (T. p. 477, lines 6-16.) Appellant asked to borrow Polensky's moped, and Polensky told Appellant to go instead to his house and wait for him to get off work and they would hang out together. (T. p. 477, line 25 – line 478, line 12.) Polensky gave Appellant some money, his moped, and the keys to his apartment. (T. p. 477, lines 18-19.)

Polensky next heard from Appellant about an hour later when he received a text from Appellant saying, "911" several times in a row. (T. p. 479, lines 7- 17.) When Polensky called Appellant, Appellant told him not to call him on the cell phone but to call him from the work phone. (T. p. 479, lines 21-23.) When Polensky called Appellant from the restaurant's phone, Appellant said, "Don't freak out, but I just killed my girlfriend." (T. p. 480, lines 13-14.) Polensky expressed some disbelief, but told Appellant he wanted his things back to "separate myself from the situation." (T. 481, line 16 – p. 482, line 6.) Appellant agreed and returned to the restaurant about fifteen minutes later. (T. p. 482, lines 7-24.) Polensky testified Appellant did not appear to have any injuries on him, nor did it look like he had been in a fight. (T. p. 483, line 11 – p. 484, line 2.)

Appellant asked Polensky not to call the police because he was going to turn himself in to the police. (T. p. 484, lines 5-9.) Polensky asked Appellant what happened, and Appellant told him he "put a knife through her chest." (T. p. 484, lines 11-16.) Appellant explained how Tasha came home and they began arguing. She began comparing Appellant to her ex-boyfriend and saying she was unhappy with him. Appellant claimed she hit him, and then he hit her back. (T. p. 485, lines 4-10.)

Appellant told Polensky he hit Tasha hard, and she was screaming for help. He then choked her to stop her from screaming. (T. p. 485, lines 11-14.) In between breaths, while he was choking her, Tasha was saying, "Stop. I love you. Please don't do this." (T. p. 488, lines 7-10.) Appellant told Polensky when Tasha would not stop screaming, he hit her with a hammer in the head, and she began convulsing. (T. p. 485, lines 15-20.) Appellant then said he ran into the kitchen and grabbed a knife and stabbed Tasha in the chest. (T. p. 485, lines 20-22.)

Polensky told Appellant he should turn himself in, but Appellant told his friend he wanted twenty-four hours to contact the police himself. (T. p. 488, lines 12-20.) Polensky received another phone call from Appellant saying he was probably going to kill himself rather than turn himself in. (T. p. 490, lines 9-13.)

Tasha was supposed to work the following morning, but her co-workers were unable to reach her. (T. p. 275, line21 – 276, line 4.) Jessica Nelson became concerned when Tasha's phone immediately went to voice mail because Tasha was fastidious in keeping her phone charged. (T. p. 276, lines 15-20.) Two other co-workers stopped by Tasha's house and knocked on the door, but only heard Tasha's dog barking. (T. p. 276, line 23 – p. 277, line 7.)

Jessica and another friend, Kristen, decided to stop by Tasha's house. Jessica's key would not open the front door, but Kristen was able to fit through an open window. (T. p. 278, lines 12-21.) Kristen unlocked the front door to let Jessica in the apartment. Jessica could hear snoring, but because of the covered windows, could not see Appellant until she turned on the hall light. (T. p. 279, lines 4-12.) Jessica described Appellant as snoring, but wide awake. "His eyes were open, but they were rolling back in his head." (T. p. 279, lines 16-18.) Appellant sat up in a daze and made gurgling sounds. (T. p. 279, lines 20-24.) Meanwhile, Kristen opened the door to the spare bedroom and saw someone under a blanket. (T. p. 281, lines 4-6.) Jessica and Kristen lifted the blanket and saw Tasha's legs covered with blood, and then they saw the knife protruding from her chest. (T. p. 280, lines 8-16.) The women grabbed Tasha's dog and ran out of the apartment and called 911. (T. p. 299, lines 3-5.)

Tasha's neighbor, Kimberly Murry, testified she helped the two girls get inside the apartment when she became concerned about Tasha. After the women ran out screaming, Murry, a registered nurse of four years, entered the apartment to see if she could render assistance to the victim. Murry used a towel to remove a plastic grocery bag from over the victim's face and checked her pulse. Realizing she was past help, Murry left the house and also called 911. (T. p. 308, line 1-24.) At trial, Robert Miller, who was with Kimberly Murry, testified he saw Appellant walking back from the direction of the Dollar General on the day of February 10, between 1:00 pm and 3:00 pm. Appellant was carrying grocery bags, and Miller noticed nothing unusual about Appellant's demeanor. (T. p. 314, line 9 – p. 315, line 12.)

*The Crime Scene*

Officer Scott Remington, a patrol officer with the City of Charleston, was the first responder to the victim's home after dispatch radioed out the 911 call. (T. p. 326, line 18 – p. 327, line 23.) Officer Remington entered the home, found the victim in the back bedroom, and then saw Appellant lying shirtless on the bed in the other room. (T. p. 328 line 1 – p. 329, line 19.) Remington ordered Appellant to put his hands behind his back, which he did, while muttering gibberish. (T. p. 330, lines 1-3.) The other responding officers helped Remington handcuff Appellant and secure the scene. (T. p. 330, lines 9-16.) Remington noticed a marijuana bong on the nightstand and a bottle of vodka on the floor. Appellant also appeared to have lacerations on his wrists. (T. p. 330, line 14- p. 331, line 5.) Appellant was walked out of the house to a gurney and taken by ambulance to MUSC for treatment. (T. p. 331, lines 19-22.)

The victim's body was processed at the crime scene by Charleston police department crime scene investigator Ashley Dockery. (T. p. 350, line 24 – p. 351, line 19.) The victim was found with a plastic bag partially covering her face, with serious trauma to the head area with a substantial amount of blood on the floor near her head. (T. p. 357, line 18 – p. 358, line 11.) The victim had a blood smear on her stomach, her hand was bloodied and bruised, there was a metal plate leaning against her left leg, and near her knee was a hammer. (T. p. 358, lines 17-24.) The hammer had hair the color of the victim's on it. (T. p. 359, lines 15-16.) Dockery also testified she documented shoe prints in blood on the kitchen floor, and a bloody photograph that had been originally on the refrigerator but was lying face down on the floor. (T. p. 361, lines 10-18; p. 367, lines 4-9.) Dockery also collected a notebook found in the bed where Appellant was lying, on which the blood splattered page were written, "She tried to kill me. Fuck." "No one will ever forgive me. I understand." and "Crazy love." (T. p. 377, line 1- p. 379, line 17.)

Jennifer Bartman, of the South Carolina Law Enforcement Division (SLED), performed the DNA analysis of several of items taken from the crime scene. (T. p. 445, line 17- p. 446, line 3.) Bartman testified the DNA profile from the head of the hammer, the Converse shoes, and the swab taken from behind the washer all matched that of the victim, Tasha Lucia. (T. p. 451, lines 2-14.) The cuttings from the jeans found beneath the body of the victim matched the profile of Appellant. (T. p. 451, lines 16-21.) The fingernail clippings from the victim developed a mixture of two DNA profiles, one of the victim and the other of the Appellant, with the statistical probability of having a DNA match at one in 130 million. (T. p. 451, lines 23 – p. 452, line 6.) The swab from the shower wall also resulted in a mixed profile, one of which was matched to the victim, but

the test was inconclusive for a minor contributor. (T. p. 454, lines 18 – 25.) The victim's DNA was found on the hammer handle, and Appellant's YSTR profile[1] was found on the hammer handle. (T. p. 457, lines 3-20.)

Dr. Susan Erin Presnell, the forensic pathologist at MUSC performed the autopsy on the victim on February 11, 2013. (T. p. 568 -572.) The cause of death was cardiac and pulmonary disruption due to multiple stab wounds to the chest and contributory or blunt force injuries. (T. p. 572, lines 3-6.) The victim had contusions around the left eye extending over the left side of the head. She also had contusions on across the bridge of her nose, and similar bruising around her right eye, the base of her nose, and the inside of her lip. (T. p. 574, line 20 – p. 575, line 7.) The victim had bruising as well as abrasions along the back of her neck. (T. p. 576, line 1-5.) Dr. Presnell also found petichiae on the victim's face, as well as bruising on her neck consistent with strangulation. (T. p. 578, lines 20-25.) The victim had fifteen sharp force injuries to her chest. (T. p 581, lines 5-6.) Fours of those wounds were incisions, or cuts (longer on the skin than deep through the body). (T. p. 581, lines 6-10.) Eleven of those sharp forces injuries were stab wounds. (T. p. 581, lines 16-18.) The victim had contusions on the front and back of both arms, and a number of contusions on her legs, as well. (T. p. 583, lines 5-17.) The victim did not have any sharp force defensive injuries to her hands, only bruising. (T. p. 583, lines 18-19; p. 589, lines 6- 22.)

[1] YSTR testing is another type of testing that only looks at male DNA. Bartman testified in the initial DNA report quantifying how much DNA they had, they indicated male DNA present at a much lower level than the total amount of human DNA present, so she performed the specific type of testing to see if she could develop a profile of the male contributor. (T. p. 455, line 22 – p. 457, line 20.)

## ARGUMENT

**I. The trial court did not abuse its discretion in admitting the Appellant's statements when detectives scrupulously honored Appellant's request not to speak about the crime on February 12, 2013, and re-initiated questioning the following day on February 13, 2013, advised him of his *Miranda* rights again, and upon obtaining his waiver of his rights, spoke with Appellant about the events the night of the murder.**

*Introduction*

The trial court did not err in admitting the confession of the Appellant because evidence supports the trial judge's finding the detectives scrupulously honored Appellant's invocation of his right to remain silent on February 12, 2013. The initiation of the questioning the following day complied with requirement the detectives "scrupulously honor" the suspect's right to remain silent, as held in *Michigan v. Mosely* 423 U.S. 96 (1975). When the detectives returned February 13, 2013, to interview Appellant they again read Appellant his Miranda rights and obtained his knowing and voluntary waiver of his right to remain silent before attaining his confession. Thus, the statement was properly admissible.

*How the Issue Was Raised at Trial*

After jury selection, the judge held the *Jackson v. Denno*[2] hearing to determine the admissibility of the statements to the police on February 13, 2013. Detective Amanda Cone, of the City of Charleston Police Department, assisted in the investigation of the death of the victim. (T. p 101, lines 1 - 24.) Detective Cone accompanied Detective Holmes to the Medical University of South Carolina (MUSC) to interview Appellant at

[2] *Jackson v. Denno*, 378 U.S. 368 (1964).

10:15 am.[3](T. p. 102, lines 1 – 4.) The detectives had to be buzzed back to obtain access to Appellant, who was handcuffed to the bed in a secure area of the facility. (T. p. 102, lines 18 – 20; p. 108, lines 10-11.) Appellant was asleep when the detectives arrived. (T. p. 102, lines 21 – 22.) The nurse woke Appellant to determine if he would speak to the detectives. (T. p. 102, lines 22 – 23.) Appellant appeared very groggy, lethargic, with slurred speech. (T. p. 103 lines 7 – 9.) Detective Cone did not discuss the medications Appellant was taking with the nurse. (T. p. 103, lines 1 – 4.) Detective Cone recorded the interview with Appellant, which was labeled as Courts Exhibit 6. (T. p. 103, line 10- p. 104, line 1.)

Detective Richard Holmes, a homicide investigator with the Charleston City Police Department, also interviewed Appellant the morning of February 12, 2013. (T. p. 112, line 5 – p. 113, line 13.) Detective Holmes was the lead investigator on the case. (T. p. 113, lines 5-13.) During the recording, Detective Holmes can be heard Mirandizing Appellant. (T. p. 111, lines 8-10.) Following Detective Holmes' administration of the *Miranda* rights to Appellant, the following exchange occurred:

> **Cone**: Tilghman, do you know why you're here?
> **Appellant**: Vaguely.
> **Cone**: Vaguely? Tell us what you know.
> **Appellant**: I don't want to.
> **Cone**: What's that?
> **Appellant**" I don't want to.
> **Cone**: You don't want to?
> **Holmes**: So other words, you're saying you don't want to talk to us about it?
> **Appellant**: I just don't want to talk about.
> **Holmes**: Okay. That's fine. I'll go with that.

(Audio Feb. 12, 2013 at 1:48- 2:11.)

[3] On redirect, Det. Cone testified that though she did not recall the exact time of Appellant's interview, standard police reporting procedure used military time, which would indicate 10:15 am. (T. p. 111, lines 19-23.)

After assessing Appellant, Detective Holmes concluded:

> Based on my investigations, when I do an interview with an individual, if I'm feeling that they are not coherent enough to understand me, I'm not going to continue with the investigation at that time. I'll conclude interview, and just decided at this time that wasn't going to be a good interview with the defendant.

(T. p. 114, lines 12-18.) As a twenty-two year veteran Detective, Holmes understood when a suspect indicated he wished to remain silent, Holmes would respect that right. (T. p. 116, lines 10-14.) Detective Holmes did, however, inform Appellant he would seek to question him again, stating:

> **Holmes**: Tilghman, we're going to do this, okay? We're going to let you recuperate a little bit more. And then in another couple of days we'll come back- and probably in another day or so we'll come back and see you again. Fair enough?
> **Appellant**: Okay.

(Audio Feb. 12, 2013 at 4:28- 4:40) Detectives Holmes and Cone left the hospital, and Detective Holmes a different detective returned the following day on February 13, 2013. (T. p. 117, lines 5-9.)

The following day, Appellant was alert and conscious and more coherent. (T. p. 117, lines 10-12.) Detectives Holmes testified, "it was like I was looking at somebody totally different." (T. p. 119, lines 6-7.) Appellant was sitting up in bed, watching the movie "Predator" when detectives walked into his hospital room. (T. p. 118, lines 14-16; p. 119, lines 6-7.) Detective Holmes noticed none of the groggy speech and none of the lapses in communication from the day before. (T. p. 119, lines 9-13.) Detective Holmes recorded his conversation with Appellant on February 13, as well. (T. p. 120, lines 1-2.)

Appellant received his Miranda warnings a **second** time, and he indicated he understood each individual right as it was read to him. (T. p. 121, lines 2-10; State's 107 Audio of Feb. 13, 2013 at 0:25.) Detective Holmes testified Appellant understood each of his Miranda rights and was willing to initial and sign the form indicating he understood his rights. (T. p. 121, lines 14-25.) Detective Holmes was polite, made no threats, and made no promises in his questioning of Appellant, who willingly answered questions. (T. p. 122, lines 1-16; State's 107 Audio of Feb. 13, 2013.)

At the beginning of the interview, Detective Holmes asked Appellant if he would talk to the detectives, but he interrupted himself and asked Appellant if he knew where he was. (T. p. 132, lines 1-11.) Detective Holmes continued to ask Appellant questions to determine if Appellant knew why he was in the hospital. (T. p. 132, lines 13-18.) Appellant was able to accurately answer Detective Holmes' questions and give basic details about his background and education. (T. p. 132, line 24 – p. 133, line 25: State's 107 Audio of Feb. 13, 2013 at 0:50.) Appellant then talked to the detectives in detail about the night of the murder:

> **Appellant**: I remember her hitting me. Me hitting her. I remember me holding her mouth over her hands [sic] saying. "stop screaming, we'll figure this out. Stop screaming, everything will be okay." And then she went to kick me in the genitals and I held her down some more. She just kept screaming and I said, "Tasha, I love you, please." And she said, "I love you, too" And I said, "But stop right now" and let her go and she just ran for the door and kept screaming. At this point I was in a psychedelic state and I grabbed her while she was hitting me and I choked her. Eventually she stopped moving.
> **Holmes**: Okay. You didn't do anything to her—Tasha—besides choking?
> **Appellant**: Well, after I choked her, I walked away to the kitchen and I was gathering my thoughts and I heard her start gasping for air again and I grabbed a kitchen knife and

> I stabbed her in the chest and covered her up with a blanket. So I thought I was gonna eat a whole bottle of aspirin and eat a bottle of sleeping pills and try to slit my own wrists and kill myself.

(State's 107 Audio of Feb. 13, 2013 at 4:30-6:0.)

*The Trial Court's Finding of Admissibility*

In ruling on the admissibility of Appellant's confession, Judge Young specifically noted the detectives were required to "scrupulously honor" Appellant's first insistence he did not want to speak to them. (T. p. 233, line 9.) The judge found the detectives honored Appellant's request to terminate the question on the 12th, asked Appellant if they could return to speak to him again at a later date, and seemed to obtain his assent. (T. p. 233, lines 14-21.) The detectives gave Appellant twenty-four hours before re-initiating questioning, and the judge could discern no coercive conduct by the officers in their questioning. (T. p. 233, lines 11-13; 22-24.) On this issue, the trial judge found the detectives did not violate Appellant's rights by interrogating him the following day after he invoked his right to remain silent on February 12, 2013.

*Standard of Review*

The admission or exclusion of evidence rests on the sound discretion of the trial judge and will not be reversed absent an abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). An abuse of discretion occurs when the conclusions of the trial court are based on an error of law. *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice. *State v. Kelley*, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995); *see also State v. Navy*, 386 S.C.

294, 301, 688 S.E.2d 838, 841 (2010) (stating appellate courts must uphold the trial court's findings regarding whether a defendant was in custody when statements were made if the trial judge's ruling is supported by the record). On appeal, the conclusion of the trial judge on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion. *State v. Livingston,* 223 S.C. 1, 6, 73 S.E.2d 850, 852 (1952); *see also State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990). The standard of review is limited to determining whether the trial court's ruling is supported by **any evidence**. *State v. Breeze*, 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct. App. 2008) (emphasis added).

*Analysis*

Appellant does not complain appropriate *Miranda*[4] warnings were not given or that force or intimidation was used to extract Appellant's confession. Rather, Appellant complains the detectives violated his Fifth and Fourteenth Amendment rights by interrogating him the day after he invoked his right to remain silent. (IBOA, p. 8, Issue I). In *Miranda,* the Court set forth safeguards to protect the constitutional rights of persons subjected to custodial police interrogation. The Court held that "the interrogation must cease" when the person in custody indicates that "he wishes to remain silent." *Miranda* at 474; *see also State v. Hoyle*, 397 S.C. 622, 628, 725 S.E.2d 720, 723 (Ct. App. 2012) (Once warnings have been given, the subsequent procedure is clear: If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.) However, the court provided further guidance on when law enforcement may initiate a subsequent interrogation in *Michigan*

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

*v. Mosely* 423 U.S. 96 (1975). In *Mosely*, the Court concluded the admissibility of statements obtained after the person in custody has decided to remain silent depends on whether his "right to cut off questioning" was "scrupulously honored." *Michigan v. Mosley,* 423 U.S. 96, 103-04 (1975).

Courts interpreting *Mosley* have set forth five factors to analyze to ascertain whether the defendant's right to cut off questioning was "scrupulously honored:"

> (1) whether the suspect was given *Miranda* warnings at the first interrogation; (2) whether police immediately ceased the interrogation when the suspect indicated he did not want to answer questions; (3) whether police resumed questioning the suspect only after the passage of a significant period of time; (4) whether police provided a fresh set of *Miranda* warnings before the second interrogation; and (5) whether the second interrogation was restricted to a crime that had not been a subject of the earlier interrogation.

*State v. Benjamin*, 345 S.C. 470, 549 S.E.2d 258 (2001).

In *Benjamin*, the defendant and his co-defendant robbed a convenience store and shot and killed the store's employee, stealing approximately $100. *Id.* at 473, 549 S.E.2d at 260. Benjamin was arrested at 1:30 pm and refused to speak to the sheriff. *Id* The sheriff did not Mirandize or question the suspect further. *Id.* Approximately an hour later, a SLED agent arrived at the station and was told the sheriff had not interviewed Benjamin. *Id.* Benjamin then agreed to talk to the agent and was read his *Miranda* rights. *Id.* The court found under the totality of the circumstances, the one hour window was sufficient time to pass to re-initiate questioning. *Id.* at 477, 549 S.E.2d at 262.

The *Benjamin* court further concluded "a subsequent interrogation concerning the same crime does not, in and of itself, violate an accused's right to remain silent." *Id.* at 478, 549 S.E.2d at 262. Rather, "[w]hat is paramount is that police, under the totality of

the circumstances, 'scrupulously honor' " a suspect's right to remain silent. *Id.* The court found Benjamin's right to remain silent was "scrupulously honored" as he had the right to terminate questioning at any time; the original officer immediately stopped questioning Benjamin upon his invocation of his right to remain silent; at least one hour passed before the SLED agent arrived; the SLED agent informed Benjamin of his *Miranda* rights; and Benjamin initialed and signed all the waivers. *Id.*

In *State v. Franklin*, the defendant was charged with murder, burglary, and possession of a weapon during the commission of a crime. *State v. Franklin*, 390 S.C. 535, 540-41, 702 S.E.2d 568, 571-72 (Ct. App. 2010). Officers read Franklin his *Miranda* rights at 11:39 am, and he invoked his right to remain silent but did not request counsel. Approximately three hours later, the officer met with Franklin again to inform him of the victim's death. Franklin was Mirandized and signed the form, waiving his right to remain silent. The court found, under the totality of the circumstances, the officers complied with the mandates of *Mosley,* and the trial court properly admitted Franklin's statement. *Franklin* at 540-41, 702 S.E.2d at 571-72.

Clearly in accordance with the case law of our state, the detectives scrupulously honored Appellant's right to remain silent. First, Appellant was read his *Miranda* rights during the detectives' first attempt to interview him. (Court's Exhibit 6 at 0:30.) Second, once the detectives realized Appellant was not in any condition to discuss the events leading to Tasha's death, and Appellant told them he did not want to speak with them about it, the detectives stopped the interview. The detectives continued with some small talk about cigarettes and Appellant's treatment thus far, but they did not attempt to question him further about the crime. Moreover, the detectives asked Appellant if it were

"fair enough" if they returned to see him the next day, and Appellant agreed. (Court's Exhibit 6 at 4:35.) Far from overbearing Appellant's will, the detectives were courteous, straightforward, and respectful of Appellant's invocation of his rights. Once the detectives understood Appellant's intentions, they ceased the interrogation.

Third, as promised, the detectives returned approximately twenty-four hours later to question Appellant about the night of the murder. This passage of time is significantly longer than periods found acceptable by the *Franklin* court (more than three hours) and the *Benjamin* court (at least one hour). In addition to the significant passage of time, the detectives also found Appellant in a substantially different medical state. Whereas on February 12, Appellant was confused and lethargic, by February 13, he was neurologically at baseline normal and ready for discharge from the hospital. Thus, the twenty-four hours during which the detectives waited to discuss the events with Appellant represented significant improvement in Appellant's ability to rationally make decisions.

Fourth, Detective Holmes read Appellant his *Miranda* rights again and Appellant was given the opportunity to acknowledge he understood his rights and opt whether he wanted to waive them.(State's 107 Audio of Feb. 13, 2013 at 0:28-0:54.) Despite Detective Holmes' use of the expression "real quick" when referring to reading Appellant his rights, the reading was thorough and complete. Appellant was given the opportunity to consider each right and its waiver before he elected to talk to the detectives.

Lastly, clearly the detectives questioned Appellant about the same crime that was the subject of the earlier interrogation, but as the *Franklin* and *Benjamin* courts made clear, that one factor alone is not dispositive of the issue. The remaining *Mosely* factors in

favor of the State support the trial judge's finding the detective scrupulously honored Appellant's invocation of his right to remain silent, and their re-initiation of questioning did not infringe upon those rights.

**II. The trial court did not abuse its discretion by finding Appellant voluntarily gave his statements to the police, despite the administration of intravenous Haldol approximately two hours prior to his police interview because evidence showed no coercive police conduct and the Appellant was fully capable of understanding and communicating clearly with law enforcement.**

*Introduction*

The trial court did not abuse its discretion in admitting the February 13, 2013, statement into evidence, despite the administration to Appellant of five milligrams of intravenous Haldol approximately two hours prior to the interview by police detectives, because the evidence showed Appellant was fully capable of understanding and communicating with the officers. The use of Haldol prior to questioning does not preclude a knowing and voluntary waiver when the evidence supports the finding Appellant was not substantially impaired and maintained full control of his capacities. *See, e.g., State v. White*, 311 S.C. 289, 294-95, 428 S.E.2d 740, 743 (Ct. App. 1993); *United States v. Curtis*, 344 F.3d 1057 (10th Cir. 2003). Appellant received his *Miranda* rights and police made no threats nor used coercion to obtain his statement. Thus, Appellant's statement to the detectives on February 13, 2013 was a voluntary waiver of his right to remain silent pursuant to *Miranda*.

*How the Issue Was Raised at Trial*

During the *Jackson v. Denno* hearing, The State called expert Diana Mullis, a medical doctor in the Department of Psychiatry at the Medical University of South Carolina for twelve years, to testify about the effects of the medication Appellant was

prescribed while admitted to MUSC. (T. p. 136, line 14 – p. 140, line 13.) The State specifically asked Dr. Mullis to testify about the side effects and the duration of two of Appellant's medications: Ativan (also known as Lorazepam) and Haldol (also known as Haloperidol). (T. p. 140, line 11- p. 141, line 14.)

Beginning with the Ativan, Dr. Mullis testified that the elimination half-life is anywhere from 8 to 12 hours, requiring about five half-lives to actually eliminate the medication from the system. (T. p.141, lines 17-21.) Dr. Mullis testified a medication may become inactive metabolite before it is excreted some hours later. (T. p. 141, line 22-25.) Appellant's last dose of Ativan was administered February 11 at 1:09 pm and his confession was on February 13, between 10:00 am and 11:00 am. (T. p. 142, line 19-21.) Dr. Mullis explained that at about forty-eight hours out from his dosage of Ativan, approximately a milligram to a milligram and a half would still be in Appellant's system, but she believed at that point the Ativan would no longer have any impact on the Appellant. (T. p. 142, line 1-11.)

Dr. Mullis testified Haloperidol, or Haldol, is used to treat a number of symptoms. (T. p. 142, line 24 - p. 143, line 4.) In reviewing the dosage given to Appellant, Dr. Mullis believed he received the standard dosage for treating someone agitated and in a delirious state. (T. p. 144, lines 12-22.) Appellant was given five milligrams. (T. p. 144, lines 23-25.) By comparison, Dr. Mullis testified she might treat a patient with a serious mental illness who is agitated and psychotic with ten milligrams every thirty minutes until the patient calm and less paranoid. (T. p. 145, lines 4-11.) Dr. Mullis testified Haldol rarely causes confusion and is not a medication that tends to cause sedation. (T. p. 146, lines 23-25.) Instead, Haldol is considered a high potency, antipsychotic drug. (T. p.

145, lines 1-3.) Haldol would not interfere with the exercise of the patient's free will, and it would, in fact, clarify the patient's thinking. (T. p. 147, lines 17-24.) Dr. Mullis reviewed the timeline for Appellant's dosage of Haldol:

February 10, 2013 – 5 mg at 22:27
February 11, 2013 – 5 mg at 10:48
February 11, 2013 – 5 mg at 15:27
February 12, 2013 – no dosage
February 13, 2013-- 5 mg at 7:53

(T. p. 148, lines 13-17; p. 162, lines 1-8.) Dr. Mullis testified when giving Haldol intravenously the therapeutic maximum effect is immediate. (T. p. 149, lines 5-11.) Appellant's final dose of Haldol, five milligrams, was given at 7:53 am, and his confession was obtained between 10:00 am and 11:00 am later that morning. When asked whether she was able to make any conclusion regarding Appellant's free-will, ability to make decisions, and state of mind at the time of the confession, Dr. Mullis testified:

> It's my opinion, to a reasonable degree of medical certainty, that the 5 mg of Haldol administered intravenously at 7:53 February 13, 2013 to Mr. Kronsberg did not impair his capacity to understand and comprehend the situation.

(T. p. 150, lines 2-12.) Dr. Mullis testified Haldol does not break the will of a person or make them do anything they do not want to do; Haldol is not, in effect, a truth serum. (T. p. 150, line 18 – p. 151, line 2.) Dr. Mullis listened to the recording of Appellant's interview with Detectives on February 12 and opined, judging from his speech impairment, his latency to respond, and his confusion, Appellant was cognitively impaired. (T. p. 151, lines 11-23.) She testified the recording of the interview of February 13 was significantly different: Appellant's responses were appropriate and timely, detailed, and he spoke with clarity. (T. p. 151, line 24 – p. 152, line 13.)

Dr. Mullis testified at 8:51am a registered nurse performed family and patient teaching on Appellant to assess his comprehension, and the assessment indicated Appellant had no barriers to learning. (T. p. 156, lines 4-8.) The doctor saw Appellant at 7:50 am on February 13 and indicated his mental status was back to baseline and ordered his discharge from MUSC. (T. p. 156, lines 17-21.) The discharge paperwork was completed at 10:30 am (T. p. 157, lines 7-9.) Appellant was ready to be discharged when the detectives finished speaking to him the morning of the February13. (T. p. 157, lines 12-13.)

On cross-examination, Dr. Mullis was asked about the effects of Haldol when treating a patient who is psychotic, or schizophrenic, as opposed to treating a patient who is normal or nonpsychotic. Dr. Mullis discussed the differing reasons why a patient may be treated with the same drug:

> A. Well, it depends on what you're treating in the nonpsychotic person. You could be treating mania. You could be treating delirium, which it appears he was having some delirium from a salicylate overdose. He certainly had some high rates of changes.
> Q. And that's why it was administered on Monday?
> A. Yeah. They were using the – – yes, they were using the Haldol to treat what appeared to be a delirious state.
> Q. And you indicated it was needed again because it was administered on Wednesday morning at almost 8 o'clock in the morning?
> A. According to the notes, it was for anxiety, and that would increase the RASS score and so they – – based on the RASS score in the intensive care unit, they will give medications are not give them, as was documented that he was anxious, and they gave them the Haldol.
> Q. So they described that this was being offered for anxiety, yes?
> A. That's why it was noted.
> Q. It does not say is that he's experience hallucinations?
> A. No.

(T. p. 164, line 7- p. 165, line 4.)

The defense called Dr. Leonard Mulbry, Junior, to the stand to offer counter expert testimony on the effects of Haldol on Appellant. (T. p. 169, lines 1-23.) Dr. Mulbry reviewed the literature on Haldol and its effects on nonpsychotic patients, stating "there are a number of very interesting articles, though, many date back a few years, where people could – – did, actually, described very, very well, and so I tracked down as many of those articles as I could find." (T. p. 177, lines 6-10.) Dr. Mulbry cited a British study in which two researchers self-administered five miligrams of Haldol in order to study its effects. (T. p. 178, lines 1-5.) The researchers complained of in inability to do work, a paralysis of volition, and the lack of physical and psychic energy. (T. p. 178, lines 13-16.) However, the study, which was not a scientifically accepted methodology of research, was essentially a narrative of the two researchers during the 1960's. (T. p. 187, line 12 – p. 188, line 10.) Dr. Mulbry also cited a Swedish study in which researchers studied the effects of Haldol for its use as a pre-surgical anti-nausea drug. The test subjects were all nonpsychotic patients who were given five miligrams and described a condition of psychic indifference and a "removal from emotional and sensory stimuli." (T. p. 179, line 1- p. 180, line 25.) Under cross examination, Dr. Mulbry testified the Haldol might impact a patient's sense of self protection, but admitted the effects of the drug would not make the patient's actions, per se, involuntary. (T. p. 190, line 20 – p. 191, line 4.)

Near the conclusion of redirect, the trial court questioned Dr. Mulbry on the effects of Haldol in the numerous instances in which the trial judge is taking guilty pleas from defendant who is prescribed the drug. The judge asked Dr. Mulbry if his testimony implied someone under the effect of Haldol would be complicit with whatever the judge

asked, particularly when the judge asked if they were pleading knowingly and voluntarily. (T. p. 201-202.) Dr. Mulbry responded:

> In other words, just because your own Haldol, per se, does not take away your decision – making capacity, but in Mr. Kranzburg, he's had no experience with Haldol and he's nonpsychotic, and all of a sudden they give him this stuff, and I'm not saying automatically, per se, made him incompetent, but it had an impact.
> The Court: let me ask you this: does Haldol make you more likely to make things up?
> The witness: no, sir. I would not anticipate that.

(T. p. 203, lines 9-19.)

*The Trial Court's Finding of Admissibility*

In ruling on the admissibility of Appellant's confession, Judge Young specifically found, "there was absolutely no coercive conduct on the part of the police that I could discern." (T. p. 233, lines 23-24.) The judge found the audio tape recording of the interview was the best evidence the police were not asking leading questions and Appellant's answers were narratives. (T. p. 234, lines 1-6.) Further, the judge found no police misconduct regarding the detectives honoring Appellant's request not to talk to them on February 12. (T. p. 234, lines 7-15.) The detectives told Appellant they would return the following day to talk to him, and Appellant assented, which is indeed what happened. (T. p. 234, lines 7-15.)

Concerning whether the Haldol interfered with Appellant's ability to make a knowing and intelligent waiver of his right to remain silent, the trial judge found Appellant's will was not overborne based on the totality of the circumstances. (T. p. 234, lines 16-24.) The judge found Appellant was entirely coherent throughout the interview on February 13; he gave responses to questions that were not leading, and his answers were consistent. (T. p. 235, lines 12-23.) Specifically the judge found the Haldol did not

cause his confession to become involuntary, nor did it cause his will to be overborne. (T. p. 236, lines 1-3.)

*Analysis*

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

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

> ... we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him

> throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

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

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

*Moran v. Burbine*, 475 U.S. 412, 421 (1986) (emphasis added). *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.").

"In South Carolina, the test for determining whether a defendant's confession was given freely, knowingly, and voluntarily focuses upon whether the defendant's will was overborne by the totality of the circumstances surrounding the confession." *State v. Moses*, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct.App. 2010). Factors to consider include "background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the

deprivation of food or sleep." *Id*, 390 S.C. at 513-514, 702 S.E.2d at 401. Other courts have also specifically considered and noted prior interaction with law enforcement and exposure to one's constitutional rights as points supportive of knowledge and understanding. *See, for example, United States v. Pruden*, 398 F.3d 241, 246 (3rd Cir. 2005) ("Pruden was familiar with his rights, having been involved in the justice system on numerous previous occasions."); *United States v. Robinson*, 404 F.3d 850, 861 (4th Cir. 2005) ("Robinson had, on two prior occasions, been read his *Miranda* rights and waived them."). Again, no one point is dispositive: "Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Moran v. Burbine*, 475 U.S. at 421.

Here, Appellant challenges one point – the effect of intravenous Haldol on his ability to make a voluntary waiver of his rights. He claims his waiver of rights "was not voluntary due to his ingestion of prescription medication shortly before the interrogation." (IBOA, p. 14, Issue II). However, numerous jurisdictions have shed light on what it means to voluntarily waive one's rights within the context of intoxication or while under the influence of drugs or other impairments. Intoxication is one factor to be considered by the trial court in determining voluntariness and validity of a waiver of *Miranda* rights. However, the influence of intoxicants alone does not invalidate a knowing, intelligent, and voluntary waiver.

*Coercion as a Necessary Predicate*

In *Colorado v, Connelly*, our Supreme Court held the some form of police misconduct in the form of coercion is "a necessary predicate to the finding that a

confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v, Connelly* , 479 U.S. 157, 167, (1986). In *Connelly*, the defendant approached a uniformed officer and told him he wanted to confess to a murder. *Id.* at 160. The officer advised him of his rights, and Connelly assured the officer he understood but wanted to confess anyway because his conscience had been bothering him. *Id.* Connelly answered questions about a murder he had committed the year prior. *Id.* The following day, Connelly became disoriented and complained of hearing voices. *Id.* at 161. Upon further evaluation, he was found to be in and out of a psychotic state the day before he confessed and suffering from chronic schizophrenia. At the time of his confession, the officers had no knowledge and Connelly made no mention of the voices compelling him to confess to the crime. *Id.* Absent a showing of coercive conduct by the police, the court refused to suppress the statement based solely upon the mental defect of the suspect alone, stating, "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. " *Connelly,* 479 U.S. 157, 166, 107 S. Ct. 515, 521, 93 L. Ed. 2d 473 (1986).

The *Connelly* court made is clear there must be some showing of coercive conduct by the police to overcome the will of the defendant, in addition to the alleged mental deficiency. South Carolina courts have faithfully adhered to the bright line holding of *Connelly*. *See, e.g., State v. Pittman*, 373 S.C. 527, 568, 647 S.E.2d 144,165 (2007) (noting "courts generally do not find a juvenile's confession involuntary where there is no evidence of extended, intimidating questioning or some other form of coercion."); *see also State v. Salisbury*, 330 S.C. 250, 272, 498 S.E.2d 655, 666 (Ct. App.

1998) *aff'd as modified*, 343 S.C. 520, 541 S.E.2d 247 (2001) ("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.")

In the case *sub judice*, Appellant argues the re-initiation of the interview was improper after the Appellant invoked his right to remain silent the previous day. (IBOA p. 14.) However, as fully discussed in Section I previously, law enforcement is permitted is some circumstances to re-initiate questioning of a suspect about the same crime and yet still scrupulously honor the suspect's invocation of his right to remain silent. Thus, the fact alone that the officers returned to question should not be allowed to bootstrap the conduct into impermissible coercive conduct for purposes of an involuntary waiver argument.

Further, Appellant attributes some significance to the moment when Detective Holmes asked Appellant if he wished to talk to the police, but then interrupted himself and asked Appellant if he knew where he was. (IBOA, p. 14; T. p. 132, lines 1-7.) Appellant. This question indicated Holmes proceeded cautiously in questioning Appellant, by confirming Appellant was in a proper state of mind that morning. Detective Holmes thoroughly read Appellant his Miranda rights, and Appellant signed the form indicating he wished to waive them and talk to the police. (T. p. 121, lines 2-8.) Regardless of whether Appellant answered Detective Holmes' question about whether he wished to talk to the police, the fact that he did do so after receiving his *Miranda* rights indicated his willingness to talk. Despite Appellant's efforts to suggest otherwise, Detective Holmes' interruption of himself was nothing more than the Detective's attempts to ensure the Appellant was cognizant of his whereabouts. Further, the record

reflects the detectives had no knowledge of the medication administered to the Appellant earlier that day. (T. p. 130, lines 13-20.) There is simply no indication the detective used any improper or coercive techniques to question the Appellant the morning of his discharge from the hospital.

*Requirement of Substantial Impairment*

Even supposing this court finds the detectives did engage in some form of misconduct by interviewing Appellant on February 13, 2013, Appellant's argument the Haldol precluded his ability to voluntarily waive his right to remain silent is without merit. Courts in various jurisdictions have provided guidance on this issue, requiring a substantial level of impairment before the defendant's waiver is compromised.

In *State v. White*, the Court held that a suspect voluntarily waived his Miranda rights when he was in hospital bed on four point restraints and had been given sodium pentothal five hours prior to the questioning. 311 S.C. 289, 294-95, 428 S.E.2d 740, 743 (Ct. App. 1993). The officers did not question the suspect until after they had given him the *Miranda* warnings. White seemed to understand what he said to them and be aware of why the troopers were there. "The fact that he had been under medication and was strapped to his bed was, at best, only a circumstance the trial court was to consider in determining voluntariness." *Id.* at 294-295, 428 S.E.2d at 743; *see also People v. Veloz*, 946 P.2d 525 (Colo.App.1997) (finding that intoxicated defendant who was stumbling around was properly advised of his rights and made statements voluntarily); *State v. Tribou*, 488 A.2d 472 (Me.1985) (although defendant had been drinking and smoking marijuana on the day of incident, he was not intoxicated and was able to understand and

voluntarily to waive his rights); *State v. Finson*, 447 A.2d 788 (Me.1982) (even a person heavily intoxicated is not necessarily incapable of waiving constitutional rights).

In *United States v. Curtis*, 344 F.3d 1057 (10th Cir. 2003), the court found a valid waiver where the defendant was under the influence of marijuana, crack cocaine, and alcohol consumed earlier in the day. In *Curtis,* the defendant looked "a little punchy," laid his head on the table, closed his eyes at times, and had bloodshot eyes. After reviewing the entire record, the court nevertheless determined the defendant knowingly and intelligently waived his rights. *Id.* at 1065. In reaching this conclusion, the court relied particularly on the testimony of the arresting officer that the defendant was calm, cool, and able to answer questions, and appeared to be operating under his own free will. *Id.*

Similarly, in *United States v. Morris*, 287 F.3d 985 (10th Cir. 2002), the court found the defendant, although in the hospital recovering from gunshot wounds, had nevertheless knowingly and intelligently waived his *Miranda* rights. The court acknowledged the defendant's mental capacity was affected by pain medication administered at the hospital, and the posttraumatic stress of being shot in the back multiple times. *Id.* at 989. Nevertheless, looking at the totality of the circumstances, the court said the defendant knowingly and intelligently waived his rights because he was "alert and responsive during the interview," "coherent in previous conversations with the agents guarding the room," and "demonstrated that he understood his right to remain silent." *Id.*

In *U.S. v. Cristobal*, the Fourth Circuit held the defendant's statement was admissible even though he was on soft restraints in the surgical trauma unit following

emergency surgery. *U.S. v. Cristobal,* 293 F.3rd 134 (2002). The court noted a deficient mental condition, as a result of pain-killing narcotics administered after emergency treatment, was not enough to render a waiver involuntary. *Cristobal,* 293 F.3d 134, 141 (4th Cir. 2002) (quoting *Connelly*, 479 U.S. at 164–65, 107 S.Ct. 515.( "[W]hile mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the confessant's state of mind can never conclude the due process inquiry.") The court looked to the conduct of the officers involved in the questioning and the manner in which the interview was conducted to determine whether the waiver was voluntary, or, uncoerced. *Cristobel* at 142. In a separate analysis, the court considered whether the waiver was knowingly made while under the effects of pain killers post-surgery. The court found no evidence of the medication's effect on his ability to think rationally. *Cristobal*, 293 F.3d 134, 142 (4th Cir. 2002)

These cases indicate a defendant must be impaired to a substantial degree to overcome his ability to knowingly and intelligently waive his privilege against self-incrimination. *See also U.S. v. Phillips*, 506 F.3d 685 (8th Cir. 2007) (waiver was voluntary despite defendant's claimed intoxication from four ecstasy pills and a cup of brandy); *U.S. v. Shan Wei Yu*, 484 F.3d 979 (8th Cir. 2007) (waiver was voluntary despite defendant's argument that he was on prescription medicine and should have received rights in Chinese). The mere fact of drug or alcohol use does not preclude a finding of a knowing and voluntary waiver of rights. "The defendant must produce evidence showing his condition was such that it rose to the level of substantial impairment. Only then could we conclude the government has failed to prove the defendant possessed full awareness

of both the nature of his rights and the consequences of waiving them." *United States v. Burson*, 531 F.3d 1254, 1258 (10th Cir. 2008)

Appellant claims his waiver on February 13, 2013, was not voluntary due to the administration of intravenous Haldol approximately two hours prior to the police interview. According to Appellant's medical records and the testimony of Dr. Mullis, the State's expert, Appellant was given five milligrams of Haldol at approximately 7:53 am the morning of February 13 for the treatment of his anxiety. However, neurologically, Appellant was at baseline, or normal, the morning of the February 13, 2013. Appellant was not in a psychotic state.

Significantly, Dr. Mullis testified Haldol rarely causes confusion and is not a sedative. (T. p. 146, lines 23-25.) In fact, she testified Haldol would clarify a patient's thinking and would not interfere with their exercise of free will. (T. p, 147, lines 17-24.) She also testified on the morning of the interview, Appellant was alert, oriented, and able to follow commands. (T. p. 154, line 25 – 155, line 3.) Appellant also received patient teaching the morning of February 13, 201, and was assessed with no barriers to learning. (T. p. 156, lines 4-8.) Indeed, the record reflects Appellant was fully cognizant of his circumstances and aware of his rights when he indicated he would talk to the detectives. (T. p. 121, lines 2-25.) He acknowledged the receipt of his Miranda rights and signed the form wishing he indicated to waive those rights. (T. p. 121, lines 2-10.) Appellant was alert and responsive to questioning. (T. p. 151, line 24- p. 152, line 13.) Finally, though Appellant was still in restraints per police protocol, his discharge paperwork had been completed and he was medically cleared to be released from MUSC. (T. p. 157, lines 7-

13.) The record is clear Appellant was not substantially impaired, or impaired at all, from the administration of Haldol two hours prior to the interview with detectives.

Appellant offers the testimony of his expert witness, Dr. Mulbry, to support his argument the Haldol precluded his ability to make a knowing and voluntary waiver of his *Miranda* rights. As the basis for his opinion, Dr. Mulbry cited two studies in which Haldol was administered to non-psychotic subjects to study its effects. (T. p. 178, lines 1-5; p. 179, line 1- p. 180, line 25.) The British study was a non-scientific, narrative from the 1960's in which two researchers injected themselves with Haldol and documented their reactions over the next few days. (T. p.187, line 12 – p. 188, line 10.) Despite Appellant's claims, the narrative has no relevance to Appellant's state of mind on the morning of February 13, 2013. Even if the researchers' reactions were accepted as true, the experiment was predicated on the administration of five milligrams of Haldol to two non-psychotic subjects **who were not experiencing anxiety**. Similarly, Appellant also cited a Swedish study in which Haldol was given to non-psychotic subjects to study its effect as an anti-nausea drug. (T. p. 179, line 1- p. 180, line 25.) Appellant, on the other hand, was given the Haldol **for symptoms of anxiety** the morning of February 13, 2013. Again, these subjects may have been non-psychotic, but unless they were also suffering from anxiety, the impact of the Haldol on those subjects are not analogous to the those on the Appellant. The studies are therefore irrelevant. Moreover, Appellant's own expert testified Haldol does not, per se, take away a patient's decision making capacity. (T. p. 203, lines 9-19.) Dr. Mullis, the State's expert, specifically opined about the clarity of Appellant's mental condition and behavior the morning of February 13, 2013. On the

other hand, Appellant cannot show how his decision making capacity was in any way compromised the morning the detectives interviewed him for the second time.

Other jurisdictions have ruled favorably upon the admission of statements obtained following the administration of Haldol. For example, the North Carolina Supreme Court found a defendant made a knowing and voluntary waiver of her Miranda rights though she had been injected with five milligrams of Haldol prior to questioning in *State v. Perdue*, 320 N.C. 51 (1987). In March of 1985, Ms. Perdue called her husband to report something was wrong with their infant daughter. *Id* at 53.Her husband returned to their home, and upon seeing the lifeless body of their child, called 911. *Id.* The defendant was transported via ambulance with the body of her daughter, who was pronounced dead at the hospital. *Id.* The hospital staff observed Ms. Perdue's behavior as becoming increasingly erratic, and administered five milligrams of Haldol to calm her down before she was transported to the sheriff's department for questioning. *Id.* at 54. The court relied on the trial judge's findings from the officer's observations of the defendant, noting she was coherent and not in a trance like state. *Id.* at 59. The court declined to make a de novo review of the medical evidence on Haldol's impact on a particular defendant and instead considered the totality of the circumstances surrounding the statement at the time it was taken. *Id.* at 60. The court noted, however, the plethora of cases in which the administration of Haldol did not preclude a knowing and voluntary waiver of *Miranda* rights. *Id.* at 60 (citing *People v. Kincaid*, 429 NE 2nd 508 (1981), *cert. denied*, 455 U.S. 1024(1982) (confession made two hours after receiving the five milligram dose of Haldol); *People v. Madden*, 501 N.E.2d. 1297 (1986), *appeal denied*, 505 N.E.2d 358 (1987) (confession voluntary, notwithstanding injection of Haldol); *State v. Jones,*

386So.2d 1363 (La. 1980)(expert testified Haldol does not lower inhibitions; defendant's statement one day after drug administered, properly found to be voluntary). *But cf. State v. Porter*, 595 P.2d 1003 (Ariz. App. 1978) (defendant took Haldol two hours prior to arrest; trial court erred in failing to instruct jury on voluntariness of confession)). Thus, in other jurisdictions the admissibility of a statement following the administration of Haldol has been upheld as a voluntary waiver of *Miranda* rights.

Assuming this Court disregards the expert testimony of Dr. Mullis, and assuming further this Court finds the studies cited by Appellant's expert relevant and persuasive, the State submits the studies and the testimony from Dr. Mulbry suggests the Haldol may affect only the patient's compliance or sensitivity to surroundings. As Appellant correctly pointed out, the waiver inquiry has two components: the knowing and voluntary portions. (IBOA p. 20.) No evidence was presented of Appellant's ordinary mental deficiency, and their expert did not present evidence to show Haldol affects competency or sedation. Appellant's argument is premised entirely on the voluntary prong of the waiver standard. Again, Appellant offers no evidence on coercive conduct on the part of the officers. The trial judge made a finding of no coercive conduct. Because police misconduct is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment, Appellant's argument must fail.

*Harmless Error*

Even if, as Appellant argues, his statement was admitted in violation of *Miranda*, its admission was harmless beyond a reasonable doubt. In *Chapman v. California*, the Supreme Court held error of even constitutional magnitude may be deemed harmless if,

"considering the entire record on appeal, the reviewing court finds beyond a reasonable doubt that the error did not contribute to the verdict." 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *see also Taylor v. State*, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993). Similarly, in *State v. Easler*, our Supreme Court intimated that any error in the failure to suppress a statement allegedly taken in violation of *Miranda* is subject to a harmless error analysis. 327 S.C. 121, 129, 489 S.E.2d 617, 621–22 (1997); *see also State v. Newell*, 303 S.C. 471, 477, 401 S.E.2d 420, 424 (Ct.App.1991) (finding failure to suppress evidence for *Miranda* violation harmless where record contained overwhelming evidence of guilt); *State v. Lynch*, 375 S.C. 628, 636, 654 S.E.2d 292, 296 (Ct.App.2007) ("The failure to suppress evidence for possible *Miranda* violations is harmless if the record contains sufficient evidence to prove guilt beyond a reasonable doubt.")

Here, considering the entire record on appeal, any error in admitting Appellant's statements to detectives on February 13, 2013, was harmless beyond a reasonable doubt. The State presented compelling evidence of Appellant's guilt of murder, sufficiently proving the element of malice aforethought even without Appellant's statement of February 13, 2013. Appellant confessed the graphic progression of the murder in detail to his friend Polensky, who testified at trial. (T. p. 475-493.) Polensky told the jury how Appellant struck Tasha, choked her, hit her with a hammer, and then ran to the kitchen to get the knife to finish the murder. (T. p. 475-493.)The pathologist testified about the victim's extensive injuries, describing how she suffered from blunt force trauma, strangulation, sharp force trauma, and eleven stab wounds. (T. p. 574-583.) The State introduced the note pad which contained Appellant's varying written statements in which he appeared to explain why he killed the victim. (T. p. 377, line 1 – p. 379, line 17.)

Following the murder, Appellant was seen walking to the apartment after shopping at the local Dollar General and appeared to be in no distress. (T. p. 314, line 9- p. 315, line 12.) Finally, Appellant was found sleeping at the crime scene while the victim's body was covered in a sheet in a nearby bedroom. (T. p. 279, lines 16-18.)

The State's case against Appellant was compelling. Even excluding Appellant's statement to police, the record supports the jury's verdict of murder beyond of reasonable doubt. Any error in its admission by the trial court judge was harmless.

## CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully submitted,

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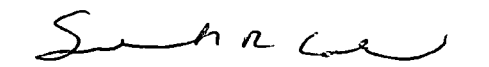
BY: 
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ATTORNEY FOR RESPONDENT

November 23, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Charleston County

Roger M. Young, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

ROBERT T KRONSBERG,

APPELLANT,

Appellate Case No. 2014-002682.

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**PROOF OF SERVICE**

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I, Susannah Cole, counsel for the Respondent, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing copies of the same in the United States mail, first class, postage prepaid, addressed to her attorney of record:

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

I further certify that all parties required by Rule to be served have been served.

This 23rd day of November, 2015.

Susannah R. Cole
Assistant Attorney General
SC Bar No. 68383




ALAN WILSON
ATTORNEY GENERAL

November 23, 2015

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Robert T. Kronsberg
Appeal from Charleston County
Appellate Case No. 2014-002682

Dear Ms. Kitchings:

Enclosed please find the original plus one (1) copy of ***Initial Brief of Respondent*** and ***Designation of Matter***, along with proof of service, in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,

Susannah R. Cole
Assistant Attorney General

SRC/pm

Enclosures

cc: Susan B. Hackett, Appellate Defender
The Honorable Scarlett A. Wilson, Ninth Circuit Solicitor
Trisha Allen, Victim Services