

In the Supreme Court of the United States

DAVID GERRARD JOHNSON, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

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SC SUPREME COURT

***ON PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA COURT OF APPEALS***

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether intellectual disability alone may prevent a suspect from knowingly waiving his rights under the Fifth and Fourteenth Amendments to the United States Constitution?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the South Carolina Supreme Court and the South Carolina Court of Appeals were Petitioner David Johnson and Respondent State of South Carolina.

TABLE OF CONTENTS

QUESTION PRESENTED.....i

PARTIES TO THE PROCEEDINGS BELOW..... ii

TABLE OF CONTENTS..... iii

APPENDIX INDEX iv

TABLE OF AUTHORITIESv

CITATION TO OPINION BELOW 1

JURISDICTION..... 2

CONSTITUTIONAL PROVISIONS INVOLVED..... 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION..... 13

CONCLUSION..... 26

APPENDIX

1. Opinion of the South Carolina Court of Appeals	A1
2. Order Denying the Petition for Rehearing of the South Carolina Court of Appeals	A6
3. Order of the Supreme Court of South Carolina Granting Certiorari	A7
4. Motion to Argue Against Precedent filed with the Supreme Court of South Carolina	A8
5. Order Granting the Motion to Argue Against Precedent	A11
6. Opinion of the South Carolina Supreme Court Dismissing Certiorari as Improvidently Granted	A12

TABLE OF AUTHORITIES

CASES

<u>Atkins v. Virginia</u> , 536 U.S. 304 (2002)	13, 19
<u>Berghuis v. Thompkins</u> , 560 U.S. 370 (2010)	14
<u>Brightman v. State</u> , 520 S.E.2d 614 (S.C. 1999)	16
<u>Colorado v. Spring</u> , 479 U.S. 564 (1987).....	14
<u>Commonwealth v. Whitney</u> , 512 A.2d 1152 (Pa. 1986)	17
<u>Connecticut v. Barrett</u> , 479 U.S. 523 (1987).....	14
<u>Flowers v. State</u> , 461 S.E.2d 533 (Ga. 1995)	16, 17
<u>McGowan v. State</u> , 706 So.2d 231 (Miss. 1997).....	17
<u>Miranda v. Arizona</u> , 384 U.S. 426 (1966)	passim
<u>Moran v. Burbine</u> , 475 U.S. 412 (1986)	14, 15
<u>Myles v. State</u> , 399 So.2d 481 (Fla. Dist. Ct. App. 1981).....	16
<u>Oliver v. State</u> , 907 S.W.2d 706 (Ark. 1995).....	16
<u>Patterson v. Illinois</u> , 487 U.S. 285 (1988)	18
<u>People v. Kaiser</u> , 32 P.3d 480 (Colo. 2001)	16
<u>People v. Marts</u> , 639 N.E.2d 1360 (Ill. App. Ct. 1994)	17
<u>Roark v. State</u> , 644 N.E.2d 565 (Ind. 1994).....	17
<u>State v. Adams</u> , 703 P.2d 510 (Ariz. Ct. App. 1985).....	16
<u>State v. Blackstock</u> , 19 S.W.3d 200 (Tenn. 2000)	17
<u>State v. Cain</u> , 144 S.E.2d 905 (S.C. 1965)	16
<u>State v. Callahan</u> , 208 S.E.2d 284 (S.C. 1974)	16
<u>State v. DaEria</u> , 721 A.2d 539 (Conn. App. Ct. 1998)	16
<u>State v. Davis</u> , 422 S.E.2d 133 (S.C. 1992).....	16
<u>State v. Flower</u> , 539 A.2d 1284 (N.J. Super. Ct. Law Div. 1987)	17
<u>State v. Hughes</u> , 521 S.E.2d 500 (S.C. 1999).....	1, 16

<u>State v. Hyster</u> , 504 S.W.2d 90 (Mo. 1974).....	17
<u>State v. Jennings</u> , 309 S.E.2d 759 (S.C. 1983)	16
<u>State v. McCollum</u> , 433 S.E.2d 144 (N.C. 1993).....	17
<u>State v. Moses</u> , 702 S.E.2d 395 (S.C. Ct. App. 2010).....	15
<u>State v. Rossiter</u> , 623 N.E.2d 645 (Ohio Ct. App. 1993).....	17
<u>State v. Shaver</u> , 760 P.2d 1230 (Mont. 1988)	17

CONSTITUTIONAL PROVISIONS

28 U.S.C §1257(a)	2
U.S. Const. amend. V	2, 21
U.S. Const. amend. XIV	2

OTHER AUTHORITIES

Morgan Cloud, et al., <u>Words without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects</u> , 69 U. Chi. L. Rev. 495 (Spring 2002).....	passim
Everington & Fulero, <u>Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation</u> , 37 Mental Retardation 212 (1999).....	13
Paul T. Hourihan, <u>Earl Washington’s Confession: Mental Retardation and the Law of Confessions</u> , 81 Va. L. Rev. 1471 (1995)	14, 15, 18, 23, 24, 25
Saul M. Kassin, <u>The Psychology of Confessions</u> , 4 Ann. Rev. L. & Soc. Sci. 193 (2008)	18, 19

PETITION FOR WRIT OF CERTIORARI

Counsel for David Johnson petitions the Court to issue a writ of certiorari to review the judgment of the South Carolina Court of Appeals affirming his convictions for murder, first degree burglary, armed robbery, possession of a weapon during the commission of a violent crime, and conspiracy.

OPINION BELOW

The opinion of the South Carolina Court of Appeals was filed on April 9, 2014, but is unreported. The opinion is reproduced in the appendix at pages A1-A5. On February 20, 2015, the South Carolina Supreme Court granted certiorari to review the court of appeals' opinion. A copy of that order is reproduced in the appendix at page A7. In accordance with the state procedural rules, Petitioner filed a motion to argue against precedent on September 16, 2015. A copy of the motion is reproduced in the appendix at pages A8-A10. The motion was necessary because South Carolina previously decided that intellectual disability alone was not sufficient to show a defendant was unable to make a knowing waiver of his constitutional rights. See State v. Hughes, 521 S.E.2d 500, 505 (S.C. 1999). The Court granted Petitioner's request. A11. On December 2, 2015, the court dismissed the writ of certiorari as improvidently granted. A copy of that order is reproduced in the appendix at pages A12-A13.

JURISDICTION

The South Carolina Court of Appeals issued its opinion on April 9, 2014. A1-A5. Petitioner filed a timely petition for rehearing, which was denied on June 13, 2014. A6. On July 17, 2014, Petitioner filed a petition for writ of certiorari with the South Carolina Supreme Court. The court granted review on February 20, 2015. A7. After oral argument, the court dismissed the writ as improvidently granted on December 2, 2015. A12-A13. This Court has jurisdiction pursuant to 28 U.S.C §1257(a) because Petitioner Johnson is asserting the deprivation of a right secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides: “No person ... shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. The Fourteenth Amendment provides: “No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Factual Background

Intellectual Disability Unquestioned

Petitioner's intellectual disability was uncontested. Petitioner's school records indicated he had a full scale IQ score of 58 in September 1993 and a score of 51 in September 1996. R. 23, ll. 18-23; R. 24, ll. 2-6. Dr. Alicia V. Hall from the South Carolina Department of Disabilities and Special Needs, who testified on behalf of the state, determined Petitioner suffered from intellectual disability. She relied on Petitioner's school records and other documentation to render this opinion. R. 12, ll. 4-16. Dr. David Price, the defense expert, tested Petitioner's IQ shortly before trial. Testing revealed Petitioner's IQ score was 59, placing him at the low end of mild intellectual disability. Dr. Price also relied upon Petitioner's school records and other documents to arrive at his conclusion. R. 110, ll. 11-25. Thus, the state and the defense agreed Petitioner suffered from intellectual disability.

The Interrogation of an Intellectually Disabled Man

In August 2008, Petitioner arrived at the Florence Police Department after his father told him the police were looking for him. R. 73, ll. 5-9. At 4 p.m., investigators took Petitioner to the office of Detective Timothy Wade Compton to sit while investigators handled other matters. R. 37, l. 7 – R. 38, l. 12. After an hour of playing a video game on his computer, Compton got chips and sodas from the vending machines. R. 39, l. 10 – R. 40, l. 6. Thereafter, Compton began typing reports, and Petitioner slept after obtaining permission to take a nap. R. 40, ll. 7-16; R. 60, ll. 10-

15. While typing his reports, Compton heard details of the investigation over the police radio. R. 385, l. 16 – R. 386, l. 4.

Compton “got tired of typing” and his curiosity as a detective took over. He “decided [he] wanted to see if [Petitioner would] like to talk.” Compton told Petitioner the other detectives were down the hall talking to others and “before they tell them what happened, how about you talk to me.” Petitioner agreed to talk. Compton stated “before we talk I need to read your rights to you.” Compton then read the rights, in toto, from a card. R. 40, l. 19 – R. 41, l. 8; R. 41, l. 24 – R. 42, l. 6; R. 57, ll. 10-17. At the conclusion of the recitation, Compton asked if Petitioner understood and if he wished to talk. R. 45, ll. 3-24. Compton believed Petitioner understood his rights. R. 45, l. 21 – R. 46 1; R. 46, ll. 17-23.

Initially, Petitioner said he observed others burglarizing the residence. Compton accused Petitioner of lying and ordered him to tell the truth. R. 47, ll. 7-17. Petitioner responded to this demand by agreeing with Compton that he was present when others entered the residence and stole items. R. 47, ll. 17-19. While Compton interrogated Petitioner, two other officers entered the room and joined the interrogation. R. 47, l. 20 – R. 48, l. 10.

Thereafter, Compton instructed Petitioner to tell the police where the body was – for the sake of the victim’s family. R. 48, ll. 13-17. Compton gave a “spiel” about telling the truth and being honest. R. 392, ll. 6-9. Compton “tried to play on a sympathy card, you know, that we call it. You know, say hey, the family needs closure, we know she is deceased.” R. 394, ll. 2-7. In response to Compton’s

psychological tactic, Petitioner agreed he could take the police to the body. R. 48, ll. 17-18. Petitioner claimed he knew the location of the body because "Amp" had told him. R. 48, l. 24 – R. 49, l. 1. When Petitioner moved toward the door to show the officers to the location, Compton ordered him to stop and return to his seat. R. 49, l. 8-13.

Despite having listened to investigative updates over the police radio for several hours, Compton claimed he had very limited knowledge about the case. However, he knew the suspected cause of death, and decided to query Petitioner accordingly. Petitioner stated the deceased's throat was cut. R. 49, l. 17 – R. 50, l. 7. Afterwards, Petitioner, Compton, Officer Calhoun, and Officer Drulis got into a vehicle, followed by Officers Raines, Investigator Drayton, and Investigator Godwin in a separate vehicle. R. 50, ll. 15-24. Compton did not know what time they left, but admitted it could have been after midnight – or at least eight hours after Petitioner initially arrived in his office. He knew it was "a long time." R. 54, ll. 10-21. Petitioner took them to the body on Malloy Street. R. 51, ll. 1-22.

Compton accused Petitioner of lying again, stating Petitioner knew the location of the body because he had been shown or he was there when the body was dumped. Petitioner responded "yes, sir." R. 52, ll. 3-13. The officers and Petitioner returned to the police department where everyone entered the conference room and the interrogation of the intellectually disabled man continued. When Investigators "Drayton and Godwin felt they had what they wanted from his statement they recorded his statement." Compton then went home. R. 52, l. 18 – R. 53, l. 5. On

cross-examination, Compton claimed no prior knowledge of Petitioner and was unaware he suffered from an intellectual disability. R. 57, l. 24 – R. 58, l. 22.

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

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

During this portion of the interrogation, the officers’ goals were “to clear the matter, anything [sic] discrepancies, to get more detail about what happened” before commencing “the official recorded statement.” Godwin did not know how long this process took. R. 79, ll. 1-10. Petitioner “seemed to understand everything that was being stated in the room” and “never made any statement that he didn’t understand

everything.” R. 79, ll. 16-18. The official recorded statement began at 3:15 a.m. – over eleven hours after Petitioner arrived at the police department. R. 86, l. 8 – R. 87, l. 1.

The State’s Expert on Competency

According to the state’s expert concerning competency, Dr. Hall, Petitioner “required more time to understand and answer questions than a person who did not have intellectual disability.” R. 18, ll. 13-17. Importantly, Dr. Hall qualified her opinion that Petitioner was competent to enter a guilty plea: “Yes, as long as with the caveat that he was given ample time to understand.” R. 19, ll. 9-13. Even more importantly, she qualified her finding of competency – “he met the standard for competency, but that he does require more time to answer questions and make sure that he’s fully understanding what is being asked of him.” R. 27, ll. 18-24.

Dr. Hall recognized that Petitioner’s test scores were in the “extremely low range.” R. 24, ll. 11-12. During the competency evaluation, Petitioner struggled to understand conspiracy. Dr. Hall educated Petitioner on the topic and he applied this education to a hypothetical case. R. 25, l. 15 – R. 26, l. 6. Additionally, Petitioner struggled with the concept of a plea bargain, and educating him on this topic required “a good deal of effort and education” by the doctors. R. 26, ll. 7-12. According to Dr. Hall, a finding of competency required a fairly low standard of understanding. R. 27, ll. 4-7.

The Only Expert on Petitioner’s Intellectual Functioning

Dr. David Price was the only expert witness who testified concerning

Petitioner's ability to understand the Miranda¹ warnings and his waiver of those warnings. His testing revealed Petitioner had an IQ of 59, placing Petitioner at the low end of mild mental retardation. R. 110, ll. 11-25. Additionally, testing placed Petitioner at a grade equivalency of a kindergartner. R. 112, ll. 14-24. In Dr. Price's expert opinion, Petitioner lacked the ability to understand "complex words, complex sentences, complex phrases." R. 113, ll. 16-17. For word reading, Petitioner scored a grade equivalency of a second grader, but sentence comprehension and verbal comprehension showed severe deficits. R. 113, l. 17 – R. 114, l. 2. Petitioner's school records supported Dr. Price's results. R. 114, ll. 3-17. Petitioner could write and read "very simply," but reading did not amount to comprehending. R. 114, ll. 18-23.

Regarding the Miranda rights, Petitioner "would have understood them as well as any kindergartner would have understood them." Petitioner would not have understood the warnings "as far as the implications for stating them." Put simply, in Dr. Price's opinion, Petitioner lacked the ability to understand the Miranda waiver. R. 116, l. 19 – R. 118, l. 6. People with intellectual disabilities learn to adapt through acquiescence – they claim to understand when they do not and laugh at jokes they do not understand. R. 118, l. 7 – R. 119, l. 2. Dr. Price discussed the Miranda warnings with Petitioner. He was unable to define "waive." Dr. Price spent a considerable amount of time talking to Petitioner about each right and explaining the implications of each right. Of course, this happened after Dr. Hall had seen Petitioner and educated him as well. R. 119, ll. 7-17.

According to Dr. Price, Petitioner was more agreeable with the officers because

¹ Miranda v. Arizona, 384 U.S. 426 (1966).

he had been in custody for over eleven hours, it was the middle of the night, and at least three officers were present for the interrogation. R. 120, l. 11 – R. 121, l. 2. Dr. Price explained that individuals with intellectual disability “tend to decompensate under stress.” R. 124, ll. 11-12.

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

R. 133, ll. 13-24. Being under police investigation and being in custody for over eleven hours would cause a person with intellectual disability to withdraw and it would decrease their ability to comprehend and make informed choices and decisions. R. 133, l. 25 – R. 134, l. 19.

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

The prosecutor placed emphasis on the fact that Petitioner had entered guilty pleas previously; and therefore, he had been informed of his rights and waived those rights. R. 129, ll. 1-11. Dr. Price explained, again, this was an example of

acquiescence, as all that was required of Petitioner was agreement. R. 129, ll. 12-21. Dr. Price, like Dr. Hall, explained that competency to stand trial is not the same as competency to enter a guilty plea because Petitioner would require “special education” in order to enter a guilty plea. R. 135, ll. 10-15.

When asked by the trial court about Petitioner’s ability to learn from his past exposure with the court system, Dr. Price testified that Petitioner “never profited from any of those experiences and he really doesn’t have an ability to learn.” After being in school for twelve years, Petitioner can read words at a third grade level and his reading comprehension was at a kindergarten level. Thus, Petitioner did not profit from formal education. R. 138, l. 24 – R. 140, l. 3.

The State’s Argument at Trial

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

the right to keep his mouth shut.” R. 158, l. 24 – R. 162, l. 16.

The prosecutor persisted in arguing the flawed syllogism: if Petitioner were competent to stand trial, then he would be competent to enter a guilty plea; if Petitioner were competent to enter a guilty plea, then he would be competent to waive his rights under Miranda. R. 166, l. 12 – R. 167, l. 9.

Petitioner’s Argument at Trial

Petitioner argued the issue was whether Petitioner understood his rights and then freely and voluntarily chose to give up those rights. The evidence was uncontradicted that Petitioner suffered from an intellectual disability and this disability prevented Petitioner from understanding his rights and making a knowing waiver of those rights. In the alternative, Petitioner explained the totality of the circumstances, which included Petitioner’s mental deficiency, the length of time he had been in police custody, the length of time he had been interrogated, and the number of officers in the room during the interrogation, required exclusion of his statement. R. 162, l. 19 – R. 166, l. 10.

The Trial Judge’s Ruling – Intellectual Disability Alone is Not Enough

The trial judge found the statement was admissible. He rejected Petitioner’s argument that his intellectual disability alone was sufficient to warrant a finding that he was incapable of understanding Miranda and of making a knowing waiver of those rights. He explained “[j]ust the evidence overall taking into consideration both expert and the lay testimony, I believe that it was appropriate for the statement to come in.” He acknowledged that Petitioner was “at the police department for some

length of time, I mean an inordinate length of time with regards to waiting to give his statement.” The judge was persuaded that Petitioner possessed the mental ability to understand his Miranda warnings and knowingly waive them because “he had been through the criminal justice system in the past.” He thought all of Petitioner’s responses to questions were appropriate. He also accepted the prosecutor’s argument that if Petitioner were competent to enter a guilty plea, then he possessed the mental ability to understand and waive his rights knowingly. R. 205, l. 2 – R. 208, l. 16.

The State Appellate Decision

The South Carolina Court of Appeals held Petitioner’s statement to police was admissible despite the “prolonged time” that Petitioner was at the police department before giving his statement and “[e]ven with the acknowledgement that [Petitioner] may have had cognitive deficits” because “(1) there was no undue coercion, threats, or force on the part of law enforcement in procuring the statement”; (2) Petitioner arrived at the police station voluntarily; (3) Petitioner “had been provided food, drink, and the opportunity to rest” prior to giving a statement; (4) Petitioner had been read his rights twice and signed a waiver form; (5) Petitioner had been through the criminal justice system in the past; (6) “none of the officers had reason to believe that [Petitioner] did not understand his rights as read and explained to him;” and (7) Petitioner’s “responses throughout the transcript of his statement indicated he understood the questions that officers asked him.” A1-A5. In short, the court of appeals refused to suppress Petitioner’s statement based upon the uncontradicted evidence that Petitioner was incapable of understanding his rights and making a

knowing waiver of those rights. Instead, the court of appeals declined to find that intellectual disability alone was sufficient to render a statement unknowing and insisted on relying upon a “totality of the circumstances” test.

REASONS FOR GRANTING THE PETITION

Introduction

This case presents an opportunity for the Court to align constitutional jurisprudence governing knowing waivers of Miranda with the undisputed science concerning intellectual disability. Intellectually disabled defendants face the special risk of wrongful conviction because of the possibility that they will confess to crimes they did not commit. Atkins v. Virginia, 536 U.S. 304, 320 (2002) (citing Everington & Fulero, Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation, 37 Mental Retardation 212, 212-213 (1999)). Thus, it is necessary to conform our legal principles with what empirical studies have shown concerning the ability of the intellectually disabled to understand their rights and the consequences of waiving those rights.

Many years ago, the Court established a two-prong test to determine whether a criminal defendant had waived his constitutional rights in order to permit a statement made by the defendant to be admitted at his trial. In Miranda v. Arizona, 384 U.S. 426, 467-475 (1966), the Court held that a suspect must be advised of certain rights and make a knowing and voluntary waiver of those rights prior to giving a statement to law enforcement during custodial interrogation. Without question, the waiver has two distinct dimensions. It must be “voluntary in the sense that it was

the product of a free and deliberate choice rather than intimidation, coercion, or deception,” *and* it must be “made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” Moran v. Burbine, 475 U.S. 412, 421 (1986).

At first blush, it appears the “knowing” prong would ensure that confessions extracted from intellectually disabled individuals were not admitted. However, courts throughout the country have conflated the “voluntariness” prong with the “knowing” prong or ignored the “knowing” prong altogether. See Paul T. Hourihan, Earl Washington’s Confession: Mental Retardation and the Law of Confessions, 81 Va. L. Rev. 1471, 1485-1490 (1995). Thus, this case presents the Court with an opportunity to invigorate the “knowing” prong so that courts will apply the correct governing constitutional principles to protect the intellectually disabled and society against wrongful convictions.

The Problem – Courts Conflating “Voluntariness” and “Knowing”

It is not enough that the interrogator advised the suspect of his rights and the suspect made an uncoerced statement. The prosecution must show that the accused understood the rights. Berghuis v. Thompkins, 560 U.S. 370, 384 (2010) (citing Colorado v. Spring, 479 U.S. 564, 573-575 (1987); Connecticut v. Barrett, 479 U.S. 523, 530 (1987)). However, in South Carolina and most states, the analysis for the the “knowing” prong of the analysis is conflated with the “voluntariness” prong and the

same test is applied.²

In South Carolina, a court examines the totality of the circumstances surrounding the custodial statement to determine whether the individual voluntarily *and* knowingly waived his rights. According to the appellate courts of South Carolina, the only question that matters is: did totality of the circumstances surrounding the custodial statement defeat the defendant's will? State v. Moses, 702 S.E.2d 395, 401 (S.C. Ct. App. 2010). The factors the court may consider in this analysis include the suspect's background, experience, age, physical condition, mental health, education, and intelligence; the accused's conduct; the length of custody or detention; police misrepresentations; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep. Id. at 401. See also Moran, 475 U.S. at 421 (explaining that the totality of the circumstances surrounding an interrogation must show both an uncoerced choice and the requisite level of comprehension in order for a court to conclude the suspect waived Miranda); Hourihan, supra at 1486 (explaining that courts use a "totality of the circumstances" approach in determining whether a suspect's waiver is knowing and intelligent).

In South Carolina, consideration of a person's mental capacity is only one factor in determining whether a statement to police was made following a knowing

² See Morgan Cloud, et al., Words without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects, 69 U. Chi. L. Rev. 495, 584 (Spring 2002)(explaining that many "courts have obfuscated the 'knowing and intelligent' prong of the waiver test while focusing solely on the existence of government coercion as a measure of voluntariness").

waiver of constitutional rights. State v. Callahan, 208 S.E.2d 284, 286 (S.C. 1974) (citing State v. Cain, 144 S.E.2d 905 (S.C. 1965); see also State v. Davis, 422 S.E.2d 133, 140 (S.C. 1992), overruled on other grounds by Brightman v. State, 520 S.E.2d 614 (S.C. 1999); State v. Jennings, 309 S.E.2d 759, 760 (S.C. 1983). Further, the South Carolina Supreme Court held that “mental deficiency alone” will not render a confession inadmissible. State v. Hughes, 521 S.E.2d 500, 505 (S.C. 1999).

South Carolina is not alone. See e.g., State v. Adams, 703 P.2d 510, 513 (Ariz. Ct. App. 1985)(stating that “[l]ow intelligence, in itself, will not invalidate an otherwise knowing and intelligent waiver”); Oliver v. State, 907 S.W.2d 706, 711-712 (Ark. 1995)(re-iterating its holding that “a low intelligence quotient, in and of itself, will not render a waiver of rights involuntary where the evidence shows the waiver was knowing and voluntary” in a case where the defendant was in the seventh grade after having failed three grades, had a second-grade reading level, an IQ as low as 74, and a mental age of a twelve-year old); People v. Kaiser, 32 P.3d 480, 486-487 (Colo. 2001)(holding “a defendant’s mental capacity ... should not be the only, or even the primary, factor in a trial court’s analysis” and finding a statement by a mentally retarded woman admissible); State v. DaEria, 721 A.2d 539, 551 (Conn. App. Ct. 1998)(re-iterating prior rulings that mental retardation does not by itself prevent a defendant from knowingly and intelligently waiving his rights); Myles v. State, 399 So.2d 481, 482 (Fla. Dist. Ct. App. 1981)(explaining that mental capacity may be considered among the totality of the circumstances, but is generally “considered only as it relates to credibility and not admissibility); Flowers v. State, 461 S.E.2d 533,

534 (Ga. 1995)(holding that mental disability is not a sufficient basis upon which to exclude a statement); People v. Marts, 639 N.E.2d 1360, 1366 (Ill. App. Ct. 1994)(holding that intelligence is only one factor relevant to the voluntariness determination); Roark v. State, 644 N.E.2d 565, 568 (Ind. 1994)(same); McGowan v. State, 706 So.2d 231, 235 (Miss. 1997)(same); State v. Hyster, 504 S.W.2d 90, 95 (Mo. 1974)(same); State v. Shaver, 760 P.2d 1230, 1233 (Mont. 1988); State v. McCollum, 433 S.E.2d 144, 160 (N.C. 1993)(same); Commonwealth v. Whitney, 512 A.2d 1152, 1156-1157 (Pa. 1986)(same).

On the other hand, a few states addressing this issue have determined that intellectual disability alone may render a statement inadmissible as it was not the product of a knowing waiver. See e.g., State v. Flower, 539 A.2d 1284, 1288 (N.J. Super. Ct. Law Div. 1987)(holding the defendant, who had a mental age of a six or seven year old child, could not understand and appreciate his rights and knowingly waive them); State v. Rossiter, 623 N.E.2d 645, 649-650 (Ohio Ct. App. 1993)(holding a statement was inadmissible where the defendant had a mental age of ten or eleven, required instructions to be given in a very slow and deliberate manner, and would not have been able to understand his rights unless they were very carefully explained to him, but refusing to hold that an accused who is mildly mentally retarded is per se incapable of waiving his constitutional rights); State v. Blackstock, 19 S.W.3d 200, 208-209 (Tenn. 2000)(holding a defendant did not knowingly and intelligently waive his rights because evidence showed that he was mentally retarded, with an IQ of 55, and functioned on the level of a child from six to nine years old).

Although most courts agree that “mental capacity is relevant to a suspect’s knowing intelligence, no clear guidance has emerged as to what degree of mental impairment is necessary for a waiver to be invalid on knowing intelligence grounds.” Hourihan, supra at 1488. Currently, the courts are engaging in “ad hoc determination[s] of whether a given defendant understood the nature of a waiver of Miranda rights.” Id. at 1489. This “ad hoc approach with regard to this second prong of the inquiry has led to no clear standard.” Id. at 1490. Importantly, this patchwork has left unclear whether intellectual disability *alone* is sufficient to render a suspect incapable of knowingly waiving his constitutional rights.

The Solution - Invigorate the “Knowing” Prong of the Waiver Test

The capacity of any individual to make an informed waiver requires three abilities: (1) an understanding of the words and phrases contained within the warnings, (2) an accurate perception of their intended functions, and (3) a capacity to reason about the likely consequences of the decision to waive or invoke these rights. Saul M. Kassin, The Psychology of Confessions, 4 Ann. Rev. L. & Soc. Sci. 193, 199 (2008); see also, Patterson v. Illinois, 487 U.S. 285, 293 (1988)(explaining that a waiver of rights requires the accused to know what he is doing, that his choice be made with eyes open, and that the accused have a full awareness of the nature of the right being waived and the consequences of the waiver). Research reveals that intellectually disabled individuals “do not comprehend their rights as fully or know how to apply them as well as older adolescents and adults.” Kassin, supra, at 199.

“On standardized tests that measure people’s comprehension of Miranda

rights, comprehension scores correlate significantly with IQ.” Id. at 206. Therefore, “most people who are mentally retarded, being limited in their cognitive and linguistic abilities, cannot adequately comprehend their rights or know how to apply them in their own actions.” Id. Further, “people who are mentally retarded exhibit a high need for approval, particularly from others in positions of authority, which reveals itself in an acquiescence response bias.” Id. “[P]eople who are mentally retarded are limited in their capacity to foresee the consequences of their actions when making legal decisions.” Id.

Due to the intellectually disabled’s impairments, “they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.” Atkins, 536 U.S. at 318. The intellectually disabled “often act on impulse rather than pursuant to a premeditated plan, and [] in group settings they are followers rather than leaders.” Id. In light of their cognitive and behavioral impairments, intellectually disabled individuals are less morally culpable. Id. at 320.

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

mentally retarded people simply do not understand the Miranda

warnings [because v]irtually all of the disabled subjects failed to understand the context in which interrogation occurs, the legal consequences embedded in the rules or the significance of confessing, the meaning of the sentences that comprise the warnings or even the individual operative words used to construct the warnings.

Id. at 501.

Notably, the research showed that not only did people suffering from severe mental retardation not comprehend the warnings, but even those classified as mildly mentally retarded failed to understand the warnings. Id. Additionally, the study revealed “that the ‘totalities’ analysis employed by the courts is incapable of identifying suspects competent to understand the Miranda warnings.” Id. at 502. Thus, the writers concluded “[n]either the primary device used during custodial interrogations – the Miranda warnings – nor the traditional ‘totalities’ analysis is an adequate device for enforcing the constitutional rights of this population.” Id.

The words used by the police in advising a suspect of his rights are “meaningless” to intellectually disabled individuals because these individuals “cannot subjectively understand them.” Id. The researchers used three testing components to examine the ability of the intellectually disabled to understand Miranda rights: (1) the Vocabulary Test; (2) the Warnings Test; and (3) the Concepts Test . Id. at 532-534. The “disabled group scored an average of only 20 percent correct on the Vocabulary Test, compared to 83 percent correct for the control group; 27 percent on the Warnings Test, compared to 90 percent for the controls; and 38 percent for the Concepts Test, compared to 87 percent for the controls.” Id. at 539. Combining all three tests, “the disabled on average got only 30 percent right, compared to 87 percent

for the nondisabled controls.” Id. at 539. The intellectually disabled “understand neither the ‘basic privilege guaranteed by the Fifth Amendment’ no ‘the consequences of speaking freely’ to police officers.” Id.

One remarkable outcome of the study was that the disabled subjects’ scores during the Warnings Test suggest “that the disabled are actively confused about their Miranda rights, rather than simply lacking understanding.” Id. at 543. Random guessing on the portion of the Warnings Test using a yes/no format would have yielded a correct percentage of approximately 50 percent. Id. However, the disabled scored 43 percent correct, which “was far worse, and statistically significantly so, than guessing would have achieved.” Id. The testing showed “abysmal performance in which the disabled performed worse than if, on each question, they had flipped a coin.” Id. Thus, the intellectually disabled “systematically choose wrong answers, rather than simply guessing wrong randomly.” Id. “The disabled’s conditions lead them to believe mistakenly that they understand the world’s workings and their rights within it. The disabled are not clueless. They have strong beliefs that are wrong. The disabled appear to choose the wrong answer with confidence.” Id. at 543-544. This “condition of groundless confidence is especially dangerous in contacts with law enforcement.” Id. at 544.

The results of the Concepts Test showed “that even if retarded suspects could understand the Miranda rights, they would lack sufficient understanding of the legal context in which they had become enmeshed to be able to waive their rights knowingly and intelligently.” Id. at 552. Surprisingly, “[m]ost of the disabled do not

understand that the lawyer is the suspect's advocate" and "confuse the role of the lawyer with the roles of the police, prosecutor, and judge." Id. at 557. In fact, "53 percent believed that the lawyer was the suspect's adversary." Id. This "confusion about the lawyer's role eviscerates their right to counsel. A suspect who believes that the lawyer will be the suspect's adversary will choose not to request a lawyer." Id. at 559. "[O]nly 2 percent recognized that the suspect could not be penalized for asserting his right to silence." Id. at 560. That means "98 percent of the disabled subjects believed that the decision to remain silent would be punished." Id. This confusion "effectively eliminate[s] the right." Id. at 560-561.

"Because cognitive understanding of the content of the warnings is required if the warnings are to fulfill their instrumental functions, a person who is not capable of understanding the warnings logically cannot execute a waiver that is either knowing or intelligent." Id. at 525. In the study conducted by Cloud and his researchers, the results were clear – "the mentally retarded subjects simply did not understand the Miranda warnings ... regardless of the level of disability, they did not understand all of the important principles contained in the Miranda warnings." Id. at 538. Quite simply, intellectually disabled individuals "possessed insufficient understanding to execute valid waivers of their Miranda rights." Id.

The empirical results "demonstrate that the Miranda warnings are not 'effective' for the population of mentally retarded people." Id. at 572. In light of these results, courts require the ability to find statements to law enforcement given by intellectually disabled individuals unknowing – either in the sense that the

individuals did not understand the warnings or the individuals did not understand the consequences of waiving their constitutional rights. The law must require “that a suspect understand the words and concepts of the Miranda waiver at the time it is made before finding any waiver constitutionally valid.” Hourihan, *supra* at 1490. Our legal principles must conform to what empirical studies have shown concerning the ability of the intellectually disabled to understand their rights and the consequences of waiving those rights. This conformity will assist in protecting the intellectually disabled and society from wrongful convictions.

The Solution - Eliminate the “Totalities” test from the “Knowing” Prong

Research revealed “the presence of the factors commonly used in th[e] totalities analysis – age, education, experience with the criminal justice system, experience with the warnings, and the degree of the disability – do not compensate for a subject’s lack of understanding resulting from his disability.” Cloud, *supra* at 531. These circumstances simply “do not correlate to understanding.” *Id.* at 538. “Regardless of the presence of absence of these factors, whether taken singly or in combination, if the person was retarded, he did not understand the Miranda warnings.” *Id.*

“Multivariate regression analysis demonstrates that the courts’ totality-of-the-circumstances test for evaluating confessions by mentally retarded suspects is inappropriate and misguided.” *Id.* at 563. “[M]ost of the factors that courts assume can increase understanding do not have that effect.” *Id.* “[I]f a subject is disabled, then the subject cannot understand Miranda warnings, regardless of the presence of any other factors.” *Id.* The researchers concluded a “disabled subject fails to

understand the warning, regardless of other factors.” Id. at 566. This was because “no disabled person in [the] sample understood the warnings adequately.” Id. at 567.

[A]mong the disabled group, those who were only mildly disabled did not understand the warnings substantially better than those who were severely disabled. If the subject was disabled, even just mildly, then the subject did not understand the warnings. Whether or not the subject was disabled determined understanding. The degree of disability had little impact.

Id. “Contrary to the court’s typical assumption, the disabled do not understand their Miranda rights, regardless of how mild their disability is and regardless of other factors.” Id. at 568. Thus, the question a reviewing court must ask is “whether a disabled individual possessed the ‘requisite level of comprehension’” without considering factors that do not affect comprehension – those factors considered as part of the “totalities” test. Id. at 588.

There is no cure for intellectual disability. Hourihan, supra at 1492. An intellectually disabled person’s social and intellectual abilities are “fixed.” Id. The intellectually disabled are more susceptible to coercion and friendliness designed to induce confidence and cooperation. Id. at 1492-1493. The intellectually disabled are particularly susceptible to suggestibility. Id. at 1492. Intellectually disabled individuals “have difficulty finding refuge even in silence, as often they feel compelled to answer – even when the questions are beyond their abilities.” Id. at 1493. They are inclined to “answer in the affirmative questions regarding behaviors they believe are desirable, and answering in the negative questions concerning behaviors they believe are prohibited.” Id. In fact, some “have incomplete concepts of blameworthiness and culpability” resulting in many accepting blame in an attempt to

please the accuser. Id. This couples with the desire to please authority figures resulting in confessions, often false confessions. Id. As one commentator noted, “an intelligent waiver’ by a mentally retarded person is simply an oxymoron.” Id. at 1494.

The problem with the current status of the law concerning knowing waivers of Miranda is clear and requires attention. Action is necessary to require courts to engage in the proper analyses for determining whether a waiver was voluntary and knowing. The conflation of the concepts must end. Further, when analyzing the “knowing” prong of the waiver test, courts must be permitted to hold that a suspect’s intellectual disability alone resulted in an unknowing waiver in order to align the constitutional jurisprudence with the science. Finally, the “totalities” test serves no useful purpose when evaluating an intellectually disabled individual’s ability to knowingly waive his constitutional rights, and as a result, the test should be altered.

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

March 1, 2016

In the Supreme Court of the United States

DAVID GERRARD JOHNSON, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA COURT OF APPEALS**

CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari and appendix in this case have been served upon opposing counsel for Respondent, the State of South Carolina, Melody J. Brown, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 1st day of March, 2016. Counsel is also today, March 1, 2016, sending a copy of the petition for writ of certiorari and appendix to opposing counsel by e-mail to: mbrown@scag.gov.


SUSAN B. HACKETT
Counsel of Record

SWORN TO BEFORE me this 1st day
of March, 2016.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.

In the Supreme Court of the United States

DAVID GERRARD JOHNSON, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

***ON PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA COURT OF APPEALS***

A P P E N D I X

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ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

1. Opinion of the South Carolina Court of Appeals	A1
2. Order Denying the Petition for Rehearing of the South Carolina Court of Appeals.....	A6
3. Order of the Supreme Court of South Carolina Granting Certiorari	A7
4. Motion to Argue Against Precedent filed with the Supreme Court of South Carolina	A8
5. Order Granting the Motion to Argue Against Precedent.....	A11
6. Opinion of the South Carolina Supreme Court Dismissing Certiorari as Improvidently Granted.....	A12

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

David Gerrard Johnson, Appellant.

Appellate Case No. 2012-209267

Appeal From Florence County
Thomas A. Russo, Circuit Court Judge

Unpublished Opinion No. 2014-UP-167
Heard February 6, 2014 – Filed April 9, 2014

AFFIRMED

Appellate Defender Susan Barber-Hackett, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant Deputy
Attorney General Donald J. Zelenka, and Assistant
Attorney General Melody Jane Brown, all of Columbia;
and Solicitor E.L. Clements, III, of Florence, for
Respondent.

PER CURIAM: David Gerrard Johnson appeals his convictions for murder, first-degree burglary, armed robbery, possession of a weapon during the commission of a violent crime, and conspiracy, arguing the trial court erred in (1) admitting a statement Johnson made to the police and evidence that was the product of this statement; (2) finding Johnson knowingly and voluntarily consented to providing DNA and fingerprint evidence, (3) excusing a juror; and (4) admitting graphic photographs of the deceased victim's body. We affirm.

Family members of the victim initially became concerned after receiving a call informing them the victim failed to show up for work. They went to her home, where they noticed signs of suspicious activity. The police later found the victim's car away from her home. Nearby, they found a bag of pillows that tested presumptive positive for blood.

After additional investigation, police notified Johnson through Johnson's father and "word on the street" that they wanted to speak with him about the victim's disappearance. Johnson voluntarily went to the police station and, after waiting several hours, agreed to talk with one of the officers. The officer then read Johnson his *Miranda* rights.¹ Johnson then proceeded to give several different accounts about what had happened, but eventually led the police to the victim's body. When the officers returned to the police station with Johnson, Johnson again received *Miranda* warnings, after which he gave a formal statement in which he admitted to being in the victim's home when she died and witnessing her death at the hand of another individual. He also told police he accompanied other participants in the crime when they removed the victim's body, which they accomplished by using her car to drive it to a remote location. Johnson also revealed that after he and other participants drove the victim's car back to her home, he remained inside the car while the others stole items from inside the residence. Johnson also showed the police various electronic items that had been taken from the victim's home and were being stored at his father's house.

Johnson later signed a release form authorizing law enforcement to obtain his fingerprints and a sample of his saliva. Forensics testing showed the victim's blood on the mattress, bed clothes, and furniture in her bedroom. Additional tests

¹ See *Miranda v. Arizona*, 384 U.S. 436 (1966).

revealed Johnson's DNA on the steering wheel of the victim's car and his fingerprints on the driver's side area.

Johnson was subsequently indicted for murder, first-degree burglary, armed robbery, possession of a weapon during the commission of a violent crime, and conspiracy. A jury found him guilty on all charges.

1. Johnson first argues that because of the evidence demonstrating his lack of mental capacity to make a knowing and voluntary waiver of his constitutional rights, the trial court should not have admitted the statement he made to the police. We hold the trial court did not abuse its discretion in admitting the statement; therefore, we affirm the court's ruling. *See State v. Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996) ("On appeal, the conclusion of the trial judge as to the voluntariness of a confession will not be reviewed unless so erroneous as to show an abuse of discretion."). Here, the trial court, though acknowledging the prolonged time that Johnson was at the police department before giving his statement, noted: (1) there was no undue coercion, threats, or force on the part of law enforcement in procuring the statement; (2) Johnson had come to the police station voluntarily; (3) before making his statement, Johnson had been provided food, drink, and the opportunity to rest; (4) Johnson had been read his *Miranda* rights twice and signed a waiver form; (5) Johnson had previously been through the criminal justice system, having entered into guilty pleas in the past; (6) none of the officers had reason to believe that Johnson did not understand his rights as read and explained to him; and (7) Johnson's responses throughout the transcript of his statement indicated he understood the questions that the officers asked him. Furthermore, a clinical psychologist who evaluated Johnson a few months before his trial testified that Johnson understood that he should not talk to the solicitor without his attorney being present and could not be forced to talk in court. Even with the acknowledgment that Johnson may have had cognitive deficits, there is evidence to support the trial court's admission of his statement. *See State v. Myers*, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004) ("A determination whether a confession was 'given voluntarily requires an examination of the totality of the circumstances.'" (quoting *Von Dohlen*, 322 S.C. at 243, 471 S.E.2d at 694-95)); *State v. Miller*, 375 S.C. 370, 378-79, 652 S.E.2d 444, 448 (Ct. App. 2007) ("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." (citing *State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001))).

2. Johnson also argues the trial court erred in admitting evidence that was the product of his statement because that evidence was the fruit of the poisonous tree. Because, however, Johnson's statement was obtained legally, the admission of any evidence resulting from the information he provided is not barred by the doctrine of the fruit of the poisonous tree. *See State v. Copeland*, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996) ("The 'fruit of the poisonous tree' doctrine provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality.").

3. Johnson also argues the trial court erroneously found he knowingly and voluntarily consented to providing the police a DNA sample and fingerprint standard, again relying primarily on evidence that he lacked the mental capacity to make a knowing and voluntary waiver of this right. Intellectual disability alone, however, does not amount to an inability to give consent, which, like knowledge in a waiver situation, requires a determination based on the totality of the circumstances. *See State v. Wallace*, 269 S.C. 547, 550, 238 S.E.2d 675, 676 (1977) ("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'"). Here, the trial court, when determining whether Johnson signed the consent form voluntarily, noted Johnson had held a job and received wages, thus evidencing some ability to understand a request for fingerprint and DNA evidence. Furthermore, "our state standard does not require a law enforcement officer conducting a search to inform the defendant of his right to refuse consent." *State v. Forrester*, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001).

4. Johnson next contends he did not receive a fair trial because the trial court erroneously excused a juror who stated she could be fair and impartial even though she knew members of Johnson's family. We find no error in the trial court's decision to excuse the juror. By statute, the trial court must make its own determination as to whether a prospective juror should be excused from serving on a particular case and "[i]f it appears to the court that the juror is not indifferent in the cause, he must be placed aside as to the trial of that cause and another must be called." S.C. Code Ann. § 14-7-1020 (Supp. 2013); *see also State v. Franklin*, 267 S.C. 240, 248, 226 S.E.2d 896, 899 (1976) (stating the words "if it appears to the court," as used in a prior version of section 14-7-1020, "are evidence of discretion vested in the trial judge" (citing *State v. Faries*, 125 S.C. 281, 287, 118 S.E. 620,

622 (1923))). Here, even though the juror stated she could be fair, she also expressed discomfort about the prospect of having to face Johnson's family if she were to sit on a jury that eventually convicted him. Given the juror's hesitation, we hold the trial court, as required by statute, made an independent finding as to whether the juror was genuinely "indifferent in the cause" and properly exercised its discretion in excusing her. *See State v. Rogers*, 263 S.C. 373, 381, 210 S.E.2d 604, 608 (1974) (stating the "applicable general rule" that the "matter of excusing jurors is addressed to the sound discretion of the trial judge, the exercise of which will not be interfered with unless it is clearly shown to have been abused to the actual prejudice of the complaining party" (quoting 50 C.J.S. Juries § 205 (1947))); *State v. Farries*, 125 S.C. 281, 288, 118 S.E. 620, 622 (1923) ("The manner and bearing of the juror; nature's stamp of character on form and countenance, are evidential exhibits for the consideration of the circuit judge, which may be more indicative of the juror's real attitude than his words. Those things cannot adequately be spread upon the record." (citation omitted)).

5. Finally, Johnson takes issue with the trial court's decision to admit three photographs of the deceased victim's body. We find no error. The photographs were relevant, as required by Rule 401, SCRE, in that they had a tendency to enhance the probability of the existence of certain facts, including information in Johnson's statement about the manner of the victim's death and the concealment and removal of her remains. Furthermore, the photographs, in addition to being relevant, were not "calculated to arouse the sympathy or prejudice of the jury" so as to justify their exclusion. *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010). To the contrary, the trial court was presented with other photographs, which it excluded as overly gruesome and graphic.

AFFIRMED.

HUFF, THOMAS, and PIEPER, JJ., concur.

The South Carolina Court of Appeals

The State, Respondent,

v.

David Gerrard Johnson, Appellant.

Appellate Case No. 2012-209267

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Luff J.

Paul R. Brown J.

Daniel G. Pieper J.

Columbia, South Carolina

cc:

Susan Barber Hackett, Esquire
Melody Jane Brown, Esquire

FILED

June 13, 2014

RECEIVED

JUN 13 2014

SC OFFICE OF
APPELLATE DEFENSE

A6

The Supreme Court of South Carolina

The State, Respondent,

v.


David Gerrard Johnson, Petitioner.


Appellate Case No. 2014-001506

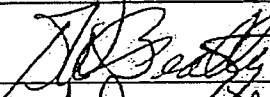
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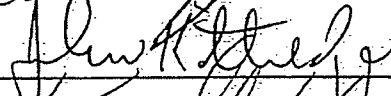
ORDER

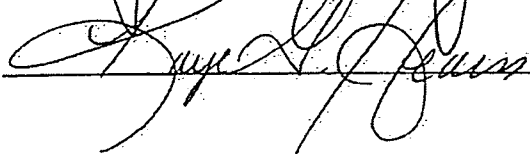
We grant the petition for a writ of certiorari to review the Court of Appeals' decision in *State v. Johnson*, No. 2014-UP-167 (S.C. Ct. App. filed April 9, 2014), as to petitioner's questions I and II. The petition is denied as to petitioner's question III. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR:


C.J.


J.


J.


J.

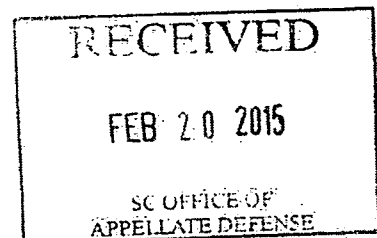

J.

Columbia, South Carolina

February 20, 2015

cc:

Susan Barber Hackett, Esquire
Alan McCrory Wilson, Esquire
Melody Jane Brown, Esquire
The Honorable Jenny Abbott Kitchings
The Honorable Connie Reel-Shearin



THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Florence County
Thomas A. Russo, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DAVID GERRARD JOHNSON,

PETITIONER.

Appellate Case No. 2014-001506

MOTION TO ARGUE AGAINST PRECEDENT

Pursuant to Rule 217, SCACR, Petitioner moves this Court to permit argument against precedent. This case is scheduled for oral argument on October 8, 2015 at 10:00 a.m. before this Court. There are two issues in the case; however, both concern Petitioner's ability to make a knowing and voluntary waiver of his constitutional rights. Specifically, the central issue is whether Petitioner had the capacity to make a knowing and voluntary waiver of his rights during the custodial interrogation in light of his intellectual disability (mental retardation).

In State v. Hughes, 336 S.C. 585, 594, 521 S.E.2d 500, 505 (1999), this Court held "[a] defendant's mental condition in and of itself does not render a statement involuntary in violation of due process." Although Petitioner will argue that the totality of the circumstances indicates that his waiver was not made knowingly and voluntarily,

Petitioner respectfully requests permission to argue that “a defendant’s mental condition in and of itself *does* render a statement involuntary in violation of due process” as an alternative argument. This argument will be against existing precedent of this Court.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

September 16, 2015

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Florence County
Thomas A. Russo, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

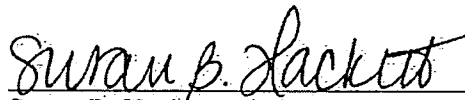
v.

DAVID GERRARD JOHNSON,

PETITIONER.

CERTIFICATE OF SERVICE

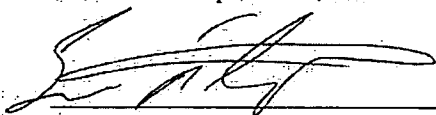
The undersigned attorney hereby certifies that a true copy of the Motion to Argue Against Precedent in the above referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th of September, 2015.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

SUBSCRIBED AND SWORN TO before me
this 16th of September, 2015.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.

The Supreme Court of South Carolina

The State, Respondent,

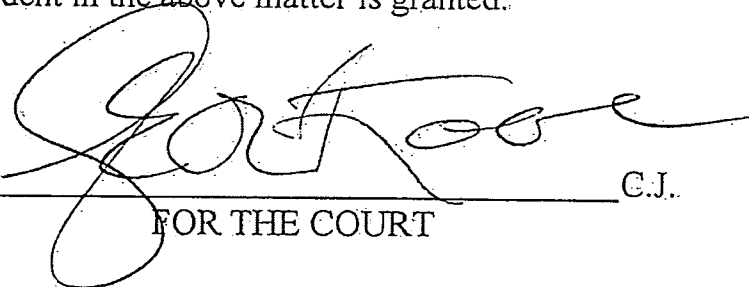
v.

David Gerrard Johnson, Petitioner.

Appellate Case No. 2014-001506

ORDER

The Motion to Argue Against Precedent in the above matter is granted.



C.J.
FOR THE COURT

Columbia, South Carolina

September 29, 2015

cc:

~~Susan Barber Hackett, Esquire~~

Melody Jane Brown, Esquire

Edgar Lewis Clements, III, Esquire

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Respondent,

v.

David Gerrard Johnson, Petitioner.

Appellate Case No. 2014-001506

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Florence County
Thomas A. Russo, Circuit Court Judge

Memorandum Opinion No. 2015-MO-067
Heard October 8, 2015 – Filed December 2, 2015

**CERTIORARI DISMISSED AS IMPROVIDENTLY
GRANTED**

Appellate Defender Susan Barber Hackett, of Columbia,
for Petitioner.

Attorney General Alan McCrory, Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Donald J. Zelenka, Senior

REC'D
DEC 4 2015
SC OFFICE OF
APPELLATE DEFENSE

Assistant Attorney General Melody Jane Brown, all of
Columbia, and Solicitor Edgar Lewis Clements III, of
Florence, all for Respondent.

PER CURIAM: We granted certiorari to review the court of appeals' opinion in *State v. Johnson*, Op. No. 2014-UP-167 (S.C. Ct. App. filed April 9, 2014). We now dismiss the writ of certiorari as improvidently granted.

**TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ.,
concur.**