

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Florence County

Thomas A. Russo, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

DAVID GERRARD JOHNSON,

APPELLANT

Appellate Case No. 2012-209267

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INITIAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

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

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

III. The trial court erred in admitting evidence that was the product of Appellant's statement where the evidence was the fruit of the poisonous tree, Appellant's statement, which was made without Appellant having the capacity to waive his constitutional rights due to his intellectual disability and where Appellant lacked the capacity to consent to the search of his house.

IV. Appellant's state and federal constitutional rights to a trial by a fair and impartial jury were violated by the trial judge erroneously excusing a juror, who stated that although she knew members of Appellant's family, she could be fair and impartial.

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

## STATEMENT OF THE CASE

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

The prosecution, represented by E.L. Clements, III and John C. Jepertinger, called the case for trial on February 13, 2012 before Judge Russo and a jury. W. James Hoffmeyer represented Appellant. Tr. 1. At the conclusion of jury selection, Judge Russo announced his decision on the issues taken under advisement. He ruled Appellant's statement was admissible. Tr. 59, lines 13-19. As a corollary matter, the judge ruled the items found as a result of Appellant's statement were admissible as well. Tr. 64, lines 3-25. The judge permitted the state to present additional evidence on the matter of Appellant's consent to the buccal swabs and fingerprint card. At the conclusion of the presentation, the judge ruled the samples were admissible. Tr. 85, lines 9-16.

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

At the conclusion of the trial, the jury found Appellant guilty of murder, burglary in the first degree, armed robbery, possession of a weapon during the commission of a violent crime, and criminal conspiracy. Tr. 805, lines 2-18. Judge Russo sentenced Appellant to life without parole for murder and a consecutive life sentence for burglary in the first degree, to thirty years for armed robbery, and five years for conspiracy, which were to run concurrently. The sentence for the weapons charge was subsumed with the life sentence. Tr. 826, line 10 – Tr. 827, line 10; Sentence sheets.

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

## ARGUMENT

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

### **Relevant facts**

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

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

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

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

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

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

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

Although Compton claimed he had very limited involvement in the investigation, he knew the suspected cause of death. Therefore, he decided to query Appellant accordingly. Appellant stated the victim's throat was cut. Hrg. 49, line 17 – Hrg. 50, line 7. Afterwards, Appellant, Compton, Officer Calhoun, and Officer Drulis got into a vehicle, followed by Officers Raines, Drayton, and Godwin in a separate vehicle. Hrg. 50, lines 15-24. Compton

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<sup>2</sup> During the trial, Compton testified that he knew the investigators were working the case because he heard what was going on over the radio. Tr. 449, line 16 – Tr. 450, line 4.

<sup>3</sup> At trial, Compton testified that he gave a spiel about telling the truth and being honest. Tr. 456, lines 6-9. Additionally, Compton "tried to play on a sympathy card, you know,

did not know what time they left, but admitted it could have been after midnight – or at least eight hours after Appellant initially arrived in his office. He knew it was “a long time.” Hrg. 54, lines 10-21.<sup>4</sup> Compton testified that Appellant took them to the body on Malloy Street. Hrg. 51, lines 1-22. Compton accused Appellant of lying again. He told Appellant that he knew the location of the body because he had been shown or he was there when the body was dumped. Appellant responded “yes, sir.” Hrg. 52, lines 3-13. The officers and Appellant returned to the police department. Everyone entered the conference room and interrogated Appellant. When “Drayton and Godwin felt they had what they wanted from his statement they recorded his statement.” Compton then went home. Hrg. 52, line 18 – Hrg. 53, line 5. On cross-examination, Compton testified that he had no prior knowledge of Appellant and was unaware he suffered from an intellectual disability. Hrg. 57, line 24 – Hrg. 58, line 22.

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

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that we call it. You know, say hey, the family needs closure, we know she is deceased.” Tr. 458, lines 2-7.

<sup>4</sup> During the trial, Compton testified that he did not recall testifying previously that he spoke to Appellant after midnight about the crime. However, he admitted that when they went looking for the body, it was some time the next day. It may have been between the hours of two and three in the morning. Tr. 473, line 17 – Tr. 474, line 10.

“clear, coherent,” and Goodwin did not notice anything out of the ordinary. Hrg. 78, lines 19-21.

The officers then talked to Appellant “to clear the matter, anything discrepancies, to get more detail about what happened” before commencing “the official recorded statement.” Godwin did not know how long this process took. Hrg. 79, lines 1-10. Appellant “seemed to understand everything that was being stated in the room” and “never made any statement that he didn’t understand everything.” Hrg. 79, lines 16-18. The official recorded statement began at 3:15 a.m. – over eleven hours after Appellant arrived at the police department. Hrg. 86, line 8 – Hrg. 87, line 1.

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

Appellant called Dr. David Richard Price to testify as an expert witness. Dr. Price’s testing revealed Appellant had an IQ of 59. This placed Appellant at the low end of mild mental retardation. Hrg. 110, lines 11-25. Additionally, testing placed Appellant at a grade equivalency of a kindergartner. Hrg. 112, lines 14-24. In Dr. Price’s expert opinion, Appellant lacked the ability to understand “complex words, complex sentences, complex

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<sup>5</sup> Godwin’s trial testimony was similar to that of his pretrial testimony. Tr. 520, line 19 – Tr. 579, line 15.

phrases.” Hrg. 113, lines 16-17. For word reading, Appellant scored a grade equivalency of a second grader, but sentence comprehension and verbal comprehension showed severe deficits. Hrg. 113, lines 17 – Hrg. 114, line 2. Appellant’s school records supported Dr. Price’s results. Hrg. 114, lines 3-17. Appellant could write and read “very simply,” but reading did not amount to comprehending. Hrg. 114, lines 18-23.

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

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

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

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<sup>6</sup> Drayton’s trial testimony was similar to that of his pretrial testimony. Tr. 652, line 17 – Tr. 703, line 8.

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.

Hrg. 133, lines 13-24. Being under police investigation and being in custody for over eleven hours would cause a person with mental retardation to withdraw and it would decrease their ability to comprehend and make informed choices and decisions. Hrg. 133, line 25 – Hrg. 134, line 19.

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

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

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

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

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

Appellant argued the issue was whether Appellant understood his rights and then freely and voluntarily chose to give up those rights.<sup>7</sup> The evidence before the court was uncontradicted that Appellant suffered from mental retardation and that it required “real effort” to make sure Appellant understood information. Appellant explained the totality of the circumstances included Appellant’s mental deficiency, the length of time he had been in police custody, the length of time he had been interrogated, and the number of officers in the room during the interrogation. Hrg. 162, line 19 – Hrg. 166, line 10.

Judge Russo ruled Appellant’s statement was admissible. He explained “[j]ust the evidence overall taking into consideration both expert and the lay testimony, I believe that it was appropriate for the statement to come in.” He acknowledged that Appellant was “at the police department for some length of time, I mean an inordinate length of time with regards to waiting to give his statement.” The judge was persuaded that Appellant possessed the mental ability to understand his Miranda warnings and knowingly waive them because “he had been through the criminal justice system in the past.” He thought all of Appellant’s responses to questions were appropriate. He also accepted the prosecutor’s argument that if Appellant were competent to enter a guilty plea, then he possessed the mental ability to understand and waive his rights knowingly. Tr. 59, line 2 – Tr. 62, line 16.

## **Discussion**

In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court held that “a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth

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<sup>7</sup> Appellant renewed his objections contemporaneous with the introduction of the statements at trial. Tr. 451, lines 1-19; Tr. 546, lines 5-11; Tr. 553, lines 2-5; Tr. 670, lines 15-19; Tr. 686, lines 15-21; Tr. 812, lines 19-24.

or falsity of the confession.” To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 426 (1966). State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 694 (1996); State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007); State v. Compton, 366 S.C. 671, 680, 623 S.E.2d 661, 666 (Ct. App. 2005); State v. Crawley, 349 S.C. 459, 463, 562 S.E.2d 683, 685 (Ct. App. 2002). The waiver has two distinct dimensions. It must be “voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,” and it must be “made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” Moran v. Burbine, 475 U.S. 412, 421 (1986); see also State v. Middleton, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986). It is not enough that the interrogator advised the suspect of his rights and the suspect made an uncoerced statement. The prosecution must show that the accused understood the rights. Berghuis v. Thompkins, \_\_\_ U.S. \_\_\_, 130 S.Ct. 2250 (2010)(citing Colorado v. Spring, 479 U.S. 564, 573-575 (1987); Connecticut v. Barrett, 479 U.S. 523, 530 (1987)).

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

Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his

or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted). The test requires consideration of “totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation.” Dickerson v. United States, 530 U.S. 428, 434 (2000)(citations omitted). Consideration of a person’s mental capacity is an important factor in determining whether a statement to police was voluntary. State v. Callahan, 263 S.C. 35, 41, 208 S.E.2d 284, 286 (1974)(citing State v. Cain, 246 S.C. 536, 144 S.E.2d 905 (1965)).

In State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999), the South Carolina Supreme Court held that although Davis suffered from mild mental retardation with an IQ of 66, he had the capacity to make a knowing waiver of his constitutional rights to silence and counsel. After Davis’s arrest, an officer read the standard Miranda warnings to Davis from a card. The officer testified he “read slowly, paused after each sentence, looked at Davis, and asked him to verbally indicate whether he understood what had been read to him.” Davis responded affirmatively that he understood each of his rights. When asked if he wanted a lawyer present, Davis stated he did not need a lawyer. The officer also “explained” that Davis could end the interrogation at any time. Davis indicated he understood this and agreed to give a taped statement. Due to a problem with the audio equipment, the officer asked Davis for a second statement. Again, the officers explained to

Davis his constitutional rights and Davis waived those rights and provided a statement. Id. at 336, 422 S.E.2d at 140.

A forensic psychiatrist testified that he interviewed Davis in detail regarding his understanding each of the rights afforded to him pursuant to Miranda. Id. at 336-337, 422 S.E.2d at 140. The psychiatrist admitted Davis's understanding "would be on a different, less abstract, level from a person of average intelligence, but Davis's comprehension was adequate to enable Davis to knowingly and intelligently waive those rights." On the other hand, Davis presented experts who testified he lacked the mental ability to understand the implications of Miranda. Id. at 337, 422 S.E.2d at 140. The Supreme Court held "there was sufficient evidence on the record, both lay and expert, to support the trial judge's determination that Davis was competent to waive his Miranda rights." Id.

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

Numerous courts throughout the country have found statements to police inadmissible where the defendants lacked the ability to understand their rights and the implications of waiving such rights. In State v. Flower, 539 A.2d 1284 (N.J. Super. L. 1987), the New Jersey court found a defendant's statement was inadmissible based on the testimony of three teachers who taught the defendant seven years earlier. The teachers testified the defendant had a second or third grade level vocabulary and required instructions in very basic terms. Due to his low level of functioning, he was unable to grasp abstract

concepts. The teachers opined that he would not understand his Miranda rights even if explained to him.

Similarly, a psychiatrist and a psychologist testified that the defendant had a mental age of ten or eleven, required instructions to be given in a very slow and deliberate manner, and would not have been able to understand his rights unless they were very carefully explained to him. The defendant would do what he perceived an authority figure wanted him to do. The court held the statement was inadmissible because the warnings had not been given slowly and carefully enough or with any consideration of the defendant's intellectual functioning, thereby preventing the defendant from making a knowing waiver. State v. Rossiter, 623 N.E.2d 645 (1993). A court found a defendant's statement inadmissible because she lacked the ability to comprehend her rights where she suffered from mild mental retardation and she functioned on the equivalent of an eight-year old child. People v. Daniels, 908 N.E.2d 1104 (Ill. App. 2009). Although the defendant understood some of his rights and he was the manager of a local restaurant, a trial court properly excluded a statement by a mentally impaired individual, whose IQ was 71, where the expert testified the individual suffered from depression, which would affect his IQ. Albarran v. State, 96 So. 3d 131 (Ala. Crim. App. 2011).

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

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

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

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

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

Appellant provided some narrative, he primarily responded to leading questions by the officers.

The state's witness, Dr. Hall, testified Appellant required more time to understand information presented to him. In fact, in order to render him competent, the state's doctors had to educate Appellant on multiple aspects of his case and the judicial process. Appellant could not understand complex sentences or even complex words. No officer read the warnings singly and ensured Appellant's understanding of each. No officer explained the ideas, concepts, and rights comprising the warnings. As indicated by Dr. Price, Appellant did not understand his Miranda warnings or the implication of the waiver. Perhaps most convincing that Appellant did not understand the warnings was the prosecutor's admission that Appellant "did not understand a lot of things abstractly."

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

During the pretrial hearings, Shannon Hill, an officer with the Florence Police Department, testified that in September of 2008, he asked Appellant for voluntary consent for a DNA sample and a fingerprint standard. Tr. 67, line 17 – Tr. 68, line 4. According to Hill, Appellant agreed and signed the appropriate waiver. Tr. 69, lines 3-10. Hill showed Appellant the form and explained it to him. Tr. 69, line 13 – Tr. 70, line 13. Hill claimed Appellant understood that he wanted to gather a saliva sample and a fingerprint sample and consented to such. Tr. 70, lines 7-13. Hill walked Appellant through the processes for gathering the samples. Tr. 70, line 21 – Tr. 74, line 18. At the end of Hill's direct testimony, he stated "I was assuming that he was understanding everything I told him." Tr. 76, lines 16-17. On cross-examination, Hill testified that he did not read any Miranda warnings to Appellant. Tr. 77, lines 4-11.<sup>8</sup>

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

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

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<sup>8</sup> Hill testified similarly during the trial. Appellant renewed his objection contemporaneously. Tr. 233, lines 16-22; Tr. 240, lines 9-12. Appellant objected when the DNA analyst testified as well. Tr. 294, line 24 – Tr. 295, line 6; Tr. 318, lines 10-19.

somebody, hey, can I take your fingerprints, and he could say no. Or can I take a buccal swab; you can say no. It's not exactly rocket science." Tr. 82, line 23 – 15.

Appellant countered that Appellant lacked the ability to understand and to consent. Appellant's mental disability along with other factors comprising the totality of the circumstances prevented Appellant from making a knowing waiver of his rights. Tr. 83, line 17 – Tr. 84, line 12.<sup>9</sup> The form used to obtain Appellant's consent provided as follows: "I, the undersigned, do hereby voluntarily consent that the City of Florence Police Department obtain from me the following items for the Suspect Evidence Collection Kit: Saliva Sample, Fingerprints." State's Exhibit #117.

Over Appellant's objection, the court found the evidence admissible. Finding that according to Dr. Price Appellant was unable to understand anything beyond that of a kindergartner, the court determined that Dr. Price "seemed to completely discount the testimony that [Appellant] held a job, received wages, worked a job, that he understood or knew certain things." The court disagreed and determined that the evidence showed Appellant "did understand." According to the court, "the reality of it is he operates well about that level [of a kindergartner]." Thus, the court concluded Appellant possessed the intellectual capacity to consent to the buccal swab and fingerprint standards. Tr. 84, line 13 – Tr. 85, line 16.

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

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<sup>9</sup> Appellant repeatedly objected to the introduction of any evidence obtained through the use of comparisons to Appellant's DNA sample and fingerprint standard. Hrg. 141, lines 10-13;

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

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

III. The trial court erred in admitting evidence that was the product of Appellant's statement where the evidence was the fruit of the poisonous tree. Appellant's statement, which was made without Appellant having the capacity to waive his constitutional rights due to his intellectual disability and where Appellant lacked the capacity to consent to the search of his house.

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

At trial, Godwin testified that Appellant disclosed, during the interrogation, that items stolen from the deceased were at his home. After the interview, Appellant, accompanied by police officers, went to Appellant's home where Appellant showed the items to the officers. Tr. 556, lines 3-23; Tr. 557, lines 7-8. Appellant directed the officers to a crawl space of the home. The officers recovered several items believed to belong to the deceased. Tr. 558, lines 8-21.

Drayton testified at trial that after the officers interrogated Appellant at the police department, they went with Appellant to his house where he told them some stolen items were located. Tr. 673, line 20 – Tr. 674, line 15. Officers found several items belonging to the victim from Appellant's home. Tr. 674, lines 17-24. Drayton testified that Appellant volunteered to show them where the items were. Tr. 675, lines 7-11.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Appellant's state and federal constitutional rights to a trial by a fair and impartial jury were violated by the trial judge erroneously excusing a juror, who stated that although she knew members of Appellant's family, she could be fair and impartial.

**Relevant facts**

During voir dire, a juror disclosed that she lived in the neighborhood where the alleged crime took place and that in her job as a hair stylist, she had done the hair of Appellant's aunt and sister in the past. Tr. 12, line 18 – Tr. 13, line 6; Tr. 13, lines 14-15; Tr. 14, lines 8-12. The juror, Tiffany Murray, admitted she had no discussions with anyone about the case and had no information pertaining to the case. When asked if she could be fair and impartial, she stated she could. She explained her only concern was her future relationship with Appellant's sister and mother. Tr. 13, lines 8-24; Tr. 14, lines 21-22; Tr. 15, line 9; Tr. 15, lines 11-22.

The prosecution moved to strike her for cause because she would be uncomfortable and "it would be hard for [her] to deliberate with a free conscious, free mind." The prosecutor remarked he "didn't think it would be inappropriate to excuse the juror." Tr. 15, line 25 – Tr. 16, line 13. The judge responded that she "indicated that she could be fair and impartial. I respect you for that. I agree with that." Tr. 16, lines 14-16. Thus, the judge found the juror credible when she stated she could be fair and impartial to both sides. Thereafter, the judge told the attorneys: "The concern I have is with the juror who clearly doesn't want to serve because it puts her in a very difficult position although she can say she can be fair and impartial." Tr. 17, lines 5-8.

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

anymore.” Tr. 17, lines 9-12. Further, the prosecutor stated: “But I think part of the danger ... is that somebody extraneous other than evidence would enter that jury room in terms of deliberation and that would be what effect is this going to have if I have to rule against him.” Tr. 17, lines 15-20. Appellant properly responded that the juror would be instructed appropriately and the law presumes jurors follow the instructions. Additionally, Appellant emphasized that the juror “reiterated more than once she could be fair and impartial.” Tr. 17, lines 21-24.

Initially, Judge Russo indicated his decision was to excuse her despite the fact that he believed her response that she could be fair and impartial. He stated he was concerned because the juror said she would not know how to face Appellant’s family if he were found guilty. He also determined there was a pecuniary interest because family members were her clients and the judge feared this would enter into the juror’s deliberation. He concluded that if after qualification, they had enough jurors, then he was inclined to excuse her. Tr. 18, lines 12-25. At the conclusion of qualifications, Judge Russo excused Juror #130.<sup>10</sup> Tr. 42, line 25 – Tr. 43, line 3.

Immediately before opening arguments, Appellant renewed his objection to the judge excusing Juror #130. Appellant reiterated that she stated she could be fair despite feeling uncomfortable. Tr. 109, line 18 – Tr. 110, line 9. Judge Russo again acknowledged that Juror #130 stated she had not discussed the case with her clients and that she could be fair. He referred to her statement that she’d feel uncomfortable, however. On that basis, Judge Russo excused her: “I excused her because she was very concerned about serving.”

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<sup>10</sup> Judge Russo stated he was excusing “Ms. Byrd,” but indicated the juror’s number was 130. Juror Tiffany Murray was number 130, and he indicated that he would decide whether to exclude her based upon the conclusion of qualifications.

He admitted that the concern over a pecuniary interest was not raised by Juror #130, but was one raised by the prosecution. He further admitted he had no reason to doubt Juror #130's statement that she could be fair and impartial. Tr. 110, line 10 – Tr. 112, line 11.

### **Discussion**

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

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

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

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

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

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

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

### **Relevant facts**

Prior to trial, Appellant objected to the admission of photographs marked as state's exhibits 56, 57, 58, 59, 60, 61, and 62. Admitting the photos were "graphic," the prosecution argued the photos, which were of the deceased's body, would "give a full and complete presentation ... of injuries sustained." Tr. 90, line 21 – Tr. 91, line 9. Appellant argued the prejudicial value clearly outweighed the probative value of the photos. The photographs would not assist the jury in understanding the manner of death because the prosecution intended to present testimony from a forensic pathologist that the deceased died as a result of seven stab wounds and testimony from police officers regarding where the body was found and its condition. Tr. 92, line 1 – Tr. 93, line 3. Ultimately, the trial judge excluded 57, 58, 60, and 62, but allowed 56, 59, and 61. Tr. 98, line 7 – Tr. 99, line 2. Therefore, Appellant will address the arguments as they relate to the admitted graphic photographs.

Appellant argued that #56 was the least graphic, but the potential for unfair prejudice increased with each photograph. Appellant argued #59 and #61 were "extremely inflammatory pictures." As a result, Appellant argued, the photographs had "a severe probability ... of impassioning a jury as those pictures are gruesome." Tr. 93, line 3 – Tr. 94, line 1. Specifically relating to #59, Appellant argued the prejudicial effect outweighed

that probative value, which was corroborating testimony regarding stab wounds. The photograph showed the deceased as she was found days after her death; thus showing some level of decomposition. Appellant argued the photograph provided a “distorted picture” as it showed the deceased not relative to her time of death and not showing the cause of death. Tr. 97, line 8 – Tr. 98, line 1.

Regarding #61, which showed the deceased after her body was moved and unwrapped, the prosecutor argued the photograph identified the deceased and corroborated Appellant’s statement regarding whose house the individuals entered. Tr. 94, line 19 – Tr. 95, line 4. Appellant responded that he had never challenged the identity of the deceased and would not do so. Appellant further argued #61 showed the deceased’s body after officers had altered the state in which they found her and that the photograph was “very gruesome and could impassion the jury.” Tr. 95, lines 12-22.

The judge permitted the introduction of #56 because it showed “what they found when they came on to the scene where her body was.” Admitting he did not know what the testimony would be, the judge allowed #56 because it showed the body wrapped in a bed sheet, which corroborated Appellant’s statement to law enforcement. Tr. 94, lines 2-13. Moving to #61, the judge allowed the photograph because it showed that the deceased was in fact Willie Mae Hayes, despite the fact that the photograph did not show her face, and it corroborated the testimony that she was in her nightgown and bed clothing. Tr. 95, line 21 – Tr. 96, line 8. The judge allowed #59 finding that it depicted the injuries that would be the topic of testimony and it did not seem to be overly gruesome, “depend[ing] on the view of it.” Tr. 96 line 9 – Tr. 97, line 4; Tr. 98, lines 5-6.

When the prosecutor offered the photographs into evidence through police officer Shannon Hill, Appellant renewed his objection. The court overruled the objection and permitted the photographs to be published to the jury. Tr. 226, lines 1-4; Tr. 226, lines 9-12; Tr. 226, line 23 – Tr. 227, line 1.

### **Discussion**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

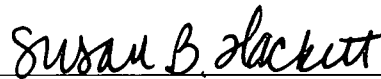
The trial judge erred in admitting the photographs of the deceased’s body as it was found and as it was altered by police after it was found because the danger of unfair

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

CONCLUSION

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

Respectfully submitted,



\_\_\_\_\_  
Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of January, 2013.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Florence County

Thomas A. Russo, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

RESPONDENT,

V.

DAVID GERRARD JOHNSON,

APPELLANT

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and David Gerrard Johnson, # 312138, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 16th day of January, 2013.

*Susan B. Hackett*  
\_\_\_\_\_

Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 16th day of January, 2013.

*Emily Byrne* (L.S.)  
Notary Public for South Carolina  
My Commission Expires: November 16, 2022.

RECEIVED  
JAN 16 2013  
SC COURT OF APPEALS