THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of General Sessions

Larry B. Hyman, Jr., Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2018-002056
Lower Case Nos. 2014-GS-22-00803 | 2014-GS-22-00804

The State, ...Respondent,

v.

Randy Collins,.....Appellant,

INITIAL BRIEF OF APPELLANT

E. Brandon Gaskins (S.C. Bar No. 72374)
Moore & Van Allen PLLC
78 Wentworth Street
Charleston, SC 29401
Phone: (843) 579-7038
Facsimile: (843) 579-7099
brandongaskins@mvalaw.com

Court Appointed Lead Counsel for Appellant

Robert M. Dudek, Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, SC 29201
Phone: (803) 734-1330
Facsimile: (803) 734-1330

Co-counsel for Appellant

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STATEMENT OF THE CASE

On June 5, 2014, arrest warrants were issued for Appellant Randy Collins on charges of arson, first degree, and criminal conspiracy in connection with a fire that burned a mobile home near Andrews, Georgetown County, that resulted in the death of David Coombs. (Arrest Warrants 2014A221080082 and 2014A221080082.) The grand jury for Georgetown County issued indictments against Mr. Collins on August 20, 2014 for criminal conspiracy; arson, first degree; and murder. (Indictments 2014-GS-22-00803, -00804, and -00805.)

Based on concerns about Mr. Collins's ability to assist his attorney due to possible intellectual disability, Mr. Collins's court appointed trial counsel requested a competency evaluation, which was granted by the Honorable Benjamin Culbertson on August 8, 2018. (Order Competency Stand Trial.) The competency evaluation was conducted on September 24, 2018 by Abby L. Mulay, Ph.D., and Emily D. Gottfried, Ph.D. (Competency Evaluation Rep.) The examiners issued a report on September 26, 2018, concluding that Mr. Collins was competent to stand trial. (*Id.*)

A trial was held at the Georgetown County Courthouse in Georgetown, South Carolina, from November 5, 2018, through November 9, 2018, with the Honorable Larry B. Hyman, Jr., presiding. Prior to the beginning of trial, Judge Hyman held a competency hearing pursuant to *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981). (Tr. p. 10, line 1 – p. 119, line 10.) Judge Hyman adopted the report of the competency evaluators and ruled that Mr. Collins was competent to stand trial. (Tr. p. 117, line 12 – p. 119, line 10.)

Following Judge Hyman's determination of competency, Mr. Collins's counsel moved for reconsideration of the competency finding and requested that an independent evaluation of Mr. Collins be conducted based on his low score on the Montreal Cognitive Assessment ("MoCA") as

conducted by Dr. Mulay and Dr. Gottfried, which indicated possible cognitive impairment. (Tr. p. 151, line 9 – p. 153, line 3.) Judge Hyman denied the motion for reconsideration, concluding that further examination was not needed. (*Id.*)

After ruling that Mr. Collins was competent to stand trial, Judge Hyman held a hearing to determine the voluntariness of Mr. Collins's confession under *Jackson v. Denno*, 378 U.S. 368 (1964). (Tr. p. 119, line 13 - p. 147, line 25; p. 194, line 23 - p. 323, line 10.) At the conclusion of the hearing, Judge Hyman ruled that the state had proven by a preponderance of the evidence that Mr. Collins's confession was voluntarily given. (*Id.*)

On November 9, 2018, the jury convicted Mr. Collins of criminal conspiracy in violation of S.C. Code Ann. § 16-17-410 and arson in the first degree in violation of S.C. Code Ann. § 16-11-110(A). (Tr. p. 870, line 5 – p. 871, line 4.) Judge Hyman then sentenced Mr. Collins to 30 years in prison for the arson conviction and 5 years in prison for the conspiracy conviction to run concurrently with the arson sentence. (Tr. p. 873, line 11 – p. 877, line 14; Sentencing Sheets.)

Mr. Collins timely filed a notice of appeal on November 16, 2018. (Notice App.)

STATEMENT OF FACTS

I. Fire.

In February 2014, Marissa Cohen obtained property insurance in the amount of $25,000 on a mobile home she rented near Andrews, South Carolina. (Tr. p. 393, line 24 – p. 397, 25; State Ex. 14.) About a month later, Ms. Cohen rented a storage unit and began moving furniture and household appliances out of the home. (Tr. p. 406, line 25 – p. 417, line 22.) To assist her in moving, Ms. Cohen enlisted the services of Benjamin "Mano" Brown. (Tr. p. 424, line 11 – p. 426, line 24; p. 431, line 10 – p. 432, line 24.) According to Mr. Brown, Ms. Cohen stated her intention of burning the home, but she did not identify anyone else involved in her plans. (*Id.*) On the same day that Ms. Cohen was moving items out of her home, she purchased kerosene from a nearby convenience store. (Tr. p. 419, line 6 – p. 423, line 8.)

Shortly after Ms. Cohen moved her furniture out of the home, a fire was reported at the home on the morning of March 29, 2014. (Tr. p. 359, line 21 – p. 361, line 10; State Ex. 10.) When firefighters arrived on the scene, they forcibly entered the home and found a deceased child inside. (Tr. p. 359, line 9 – p. 367, line 8.) The child turned out to be Ms. Cohen's twelve-year-old son, David Coombs, who was walking home from a birthday party that night and apparently entered the abandoned trailer to escape the rain and fell asleep. (Tr. p. 349, line 11 – p. 352, line 23; p. 387 line 23 – p. 390, line 18; State Ex. 3.)

II. Investigation.

SLED and the Georgetown County Sheriff's Office initiated an investigation into the fire and death of Mr. Coombs. The SLED investigators quickly concluded that the fire was intentionally set and investigated it as possible arson. (Tr. p. 729, lines 9-13.) The investigators

received an anonymous tip that Ms. Cohen had purchased kerosene just prior to the fire, and they began investigating her connection to the fire. (Tr. p. 729, line 23 – p. 730, p. 18.)

The sheriff's office also interviewed Mr. Collins a couple weeks after the fire upon receiving an anonymous tip about his alleged involvement. (Tr. p. 730, line 22 – p. 731, line 2; p. 761, line 23 – p. 762, line 1.) Mr. Collins informed the investigator that he had been at a club with his nephew on the night of the fire and that he had nothing to do with it. (Tr. p. 731, line 10 – p. 732, line 24; State Ex. 1.) The investigator then drafted Mr. Collins's statement in his own handwriting. (Tr. p. 731, lines 6-7; p. 761, lines 9-22; State Ex. 1.)

The investigators later obtained a search warrant for Mr. Collins's phone. (Tr. p. 736, lines 11-16.) After conducting the search of Mr. Collins's phone, an investigator arranged for Mr. Collins to retrieve his phone at the Andrews Police Department on June 4, 2014. (Tr. p. 736, lines 11-20.) When Mr. Collins arrived to get his phone, the investigators requested that he participate in an interview. (Tr. p. 737, lines 12-16.) Mr. Collins agreed to answer their questions and they took him into a room, where they began interrogating him. (Tr. p. 736, lines 19-22.)

The investigators recorded the interrogation on a personal camcorder, and it began at 10:24 a.m. (Tr. p. 738, lines 20-25; State Ex. 3 - Collins Interview DVD 1, 1:00-1:10.) Although the investigators read Mr. Collins his *Miranda* rights prior to starting the interview (Tr. p. 135, line 16 – p. 136, line 19; p. 224, line 18 – p. 225, line 1; State Ex. 2)[1], they later promised him that whatever he told the investigators would not leave the room:

> Q: Do you … Not digging into what we've already said. What do you think? Do you think this was, this fire was start, was it started intentionally, do you think somebody might've started that fire or do you think it was a bad accident?

[1] The investigators did not record the *Miranda* warning provided to Mr. Collins. (Tr. p. 224, line 18 – p. 225, line 1.)

A: I don't, I can't say, I ain't know nothing like about that. I can't really say about that. I can't even say. I ain't one to say the wrong thing. I don't know.

Q: Well you're not going to say the wrong thing.

A: Uh huh.

Q: Whatever you tell me it ain't going to leave this room. This tape is going into my file.

A: Yes, sir.

Q: I'm going to burn a copy for him.

A: Mmmhhmm.

Q: And we'll have a copy of this tape. It ain't going to go any further than this room. That's why we have the door shut, blinds pulled ...

A: Yes, sir.

Q: ... there's no sound device in here. I want you to be honest with me and tell me what you think.

(State Ex. 3 - Collins Interview DVD 1, 21:00-21:30; Tr. p. 272, line 20 – p. 273, line 2.)[2]

Mr. Collins began by explaining that he was in physical discomfort from a prior car accident and that he had suffered a stroke about a year earlier. (State Ex. 3 - Collins Interview DVD 1, 3:00-4:30.) He further stated that he had not eaten since the previous night and had problems getting to bed. (State Ex. 3 - Collins Interview DVD 1, 4:30-5:30.)

When questioned about the fire at the beginning of the interrogation, Mr. Collins consistently and repeatedly denied having any involvement in the fire. (State Ex. 3 - Collins Interview DVD 1; Tr. p. 228, line 25 – p. 229, line 6.) He explained his whereabouts on the night

[2] The investigator making this statement admitted that this representation was not true. (*Id.*)

of the fire, which was consistent with the explanation that he had previously provided to the investigators. (State Ex. 3 - Collins Interview DVD 1, 8:15-12:00.)

After the questioning had continued for approximately 30 minutes, Mr. Collins stated that he didn't know that he "had to answer" questions when he came to the police station that morning and that he was not feeling well. (State Ex. 3 - Collins Interview DVD 1, 29:00-30:00; Tr. p. 234, line 24 – p. 235, line 11.) Nevertheless, the investigators continued interrogating him, claiming that they needed to get to the bottom of the truth so that they could inform members of the community that Mr. Collins was innocent. (State Ex. 3 - Collins Interview DVD 1, 30:00-31:00.) And Mr. Collins continued to insist that he was not involved in the fire. (State Ex. 3 - Collins Interview DVD 1, 30:00-31:30; Tr. p. 228, line 25 – p. 229, line 6.)

The investigators then explained to Mr. Collins their theory of the case that Ms. Cohen had obtained insurance on the mobile home with the plan to burn it and collect the insurance proceeds. (State Ex. 3 - Collins Interview DVD 3, 15:00-23:47.) They further stated that they believed that no one knew that Mr. Coombs would be in the trailer and that no one intended for him to die, but that Ms. Cohen failed to make sure that he did not go to the home before the plan to burn it was executed. (State Ex. 3 - Collins Interview DVD 3, 15:00-23:47.)

Then, one of the investigators said that he wanted Ms. Cohen to go to jail for 34 years for her role in the fire but that he would settle for anyone. (State Ex. 3 - Collins Interview DVD 3, 17:20-17:30.) He repeated that he "wanted" Ms. Cohen but that if Mr. Collins was not truthful in the interview he would come back to get Mr. Collins and that Mr. Collins would likely die in prison. (State Ex. 3 - Collins Interview DVD 3, 21:00-21:45; Tr. p. 236, line 20 – p. 237, line 12.) The investigator then assured Mr. Collins: "It's not you I want; it's Marissa. I promise my right hand to God." (State Ex. 3 - Collins Interview DVD 3, 22:10-22:20.)

The recording of the interview stopped approximately an hour and a half after the interrogation began. (Tr. p. 263, line 5 – p. 264, line 10.) According to the investigators, the battery on the camcorder died, unbeknownst to them. (Tr. p. 263, line 5 – p. 264, line 20.) As a result, the interrogation continued without being recorded. (*Id.*) Once they discovered that the camcorder was not recording, the investigators replaced the battery and began recording the interrogation again. (*Id.*)

The video of the interrogation recommences with Mr. Collins speaking mid-sentence, confessing to his partial involvement in the fire and stating that his cousin James started the fire. (State Ex. 3 - Collins Interview DVD 2, 0:01-1:30.) However, he denied seeing James starting the fire. (State Ex. 3 - Collins Interview DVD 2, 0:01-1:00.) The investigators then told Mr. Collins if the solicitors thought he was lying they would push for 34 years in prison. (State Ex. 3 - Collins Interview DVD 2, 1:30-2:00.) After that, Mr. Collins explained that Ms. Cohen had approached him and offered him $5,000 to burn the trailer. (State Ex. 3 - Collins Interview DVD 2, 4:00-5:15.) He also told the investigators that he told James about Ms. Cohen's offer, and James agreed to burn the trailer. (State Ex. 3 - Collins Interview DVD 2, 5:15-6:30.)

At that point, the investigators expressed disbelief in Mr. Collins's account and told him that he needed to start worrying about himself. (State Ex. 3 – Collins Interview DVD 2, 7:00-8:00.) One investigator exclaimed, "Save yourself!" (State Ex. 3 - Collins Interview DVD 2, 7:00-8:00.) When Mr. Collins failed to provide a satisfactory explanation of the events of the fire to the investigators, the investigator told Mr. Collins that the investigator was not going to speak up for him if he wasn't being totally honest. (State Ex. 3 - Collins Interview DVD 2, 8:00-8:30.) Mr. Collins then provided the investigators more information. (State Ex. 3 - Collins Interview

DVD 2, 8:30-9:30.) As the investigators continued to press for more details, they told Mr. Collins that he couldn't save anybody but himself. (State Ex. 3 - Collins Interview DVD 2, 13:10-13:20.)

Although Mr. Collins tried to satisfy the investigators by providing more information, he continued to get confused about the details. He expressed uncertainty about what James had used to start the fire, alternating between a lighter, a match, and a lit piece of paper. (State Ex. 3 - Collins Interview DVD 2, 13:30-16:00.) In addition, Mr. Collins provided inconsistent statements about where he was standing when the fire started as he tried to comply with the investigators' requests for more information. (State Ex. 3 - Collins Interview DVD 2, 13:30-17:00.) The investigators repeatedly told Mr. Collins that they were going to let him go home after the interview. (State Ex. 3 - Collins Interview DVDs 1, 2, 2B, 3.)

Throughout the interview, the investigators expressed disbelief in Mr. Collins's account. When that would happen, the investigators would suggest answers to their questions and get Mr. Collins to agree to what they believed happened. (State Ex. 3 - Collins Interview DVD 2.) In fact, the investigators even suggested at one point that Mr. Collins was attempting to tell the investigators what he believed they wanted to hear. (State Ex. 3 - Collins Interview DVD 2, 22:55-23:20.)

As Mr. Collins attempted to answer their questions, the investigators told him that Ms. Cohen was setting him up. (State Ex. 3 - Collins Interview DVD 2, 32:30-33:00.) At which point, Mr. Collins again tried to explain the events that led to the fire and his participation in it. (State Ex. 3 - Collins Interview DVD 2, 33:00-40:43.) Mr. Collins gave a rambling account in which he admitted to participating in setting the fire, but his timeline was inconsistent with when the fire was actually set and reported. (State Ex. 3 - Collins Interview DVD 2, 37:30-38:00.) In response

to this inconvenient fact, the investigators then convinced Mr. Collins that he was not sure of the timeline. (State Ex. 3 - Collins Interview DVD 2, 38:00-38:30.)

As the interrogation continued, the investigators continued to tell Mr. Collins that they were there to "help" him. (State Ex. 3 - Collins Interview DVD 2B, 1:25-1:45; Tr. p. 236, lines 13-19.) They then told him that Ms. Cohen had more money they did, thereby falsely implying that she had received insurance proceeds from the fire, and that she was going to hire lawyers to defend her who would blame Mr. Collins for the fire. (State Ex. 3 - Collins Interview DVD 2B, 1:45-3:00.)

At that point, the investigators ended the interrogation and stated that they wanted Mr. Collins to write a statement. (State Ex. 3 - Collins Interview DVD 2B, 3:30-4:00.) Mr. Collins requested that the investigators write the statement and that he be allowed to sign it because he could not "spell too good." (State Ex. 3 - Collins Interview DVD 2B, 3:30-4:30.) The investigators agreed that they would write the statement but that it would be a verbatim transcription of what Mr. Collins said. (State Ex. 3 - Collins Interview DVD 2B, 4:30-5:00.) They then requested that Mr. Collins provide a verbal statement for the investigators to transcribe. (State Ex. 3 - Collins Interview DVD 2B, 4:00-4:30.)

Mr. Collins's oral statement began, "I did not do it." (State Ex. 3 - Collins Interview DVD 2B, 4:30-4:45.) The investigators then interrupted Mr. Collins and coached him on what to write. (State Ex. 3 - Collins Interview DVD 2B, 4:45-5:00.) On instruction from the investigators, Mr. Collins stated that "Tina" approached him about burning the home. (State Ex. 3 - Collins Interview DVD 2B, 5:00-5:30.) The investigators interrupted Mr. Collins again and asked if he knew "Tina's" real name. (State Ex. 3 - Collins Interview DVD 2B, 5:00-5:30.) Although there had been repeated references and discussions about Ms. Cohen's name being "Marissa," Mr. Collins

explained that "Tina" was the only name he knew. (State Ex. 3 – Collins Interview DVD 2B, 5:00-5:30.) Then at the prompting of the investigators, Mr. Collins stated that James had agreed to burn the home and that he was with James when James lit the fire. (State Ex. 3 - Collins Interview DVD 2B, 5:30-17:00.) Then he stated that "Marissa" had called him later in the night, just minutes after not being able to remember Marissa's name. (State Ex. 3 - Collins Interview DVD 2B, 15:00-15:15.) Mr. Collins then signed the statement that had been transcribed by the investigator. (State Ex. 3 - Collins Interview DVD 2B, 19:00-19:25.)

At the conclusion of the interrogation, the investigators repeated what they had previously said, which was that Mr. Collins had gotten himself on the track to "save" himself by confessing to his participation in the fire. (State Ex. 3 - Collins Interview Vol. DVD 23:30-24:05.) One investigator added further that "if you're helping us, we're helping you." (State Ex. 3 - Collins Interview DVD 2B, 28:30-28:40.) The interrogation concluded at 1:51 p.m., approximately 3 ½ hours after it began. (State Ex. 3 - Collins Interview DVD 2B, 30:45-30:58; Tr. p. 240, lines 6-10.)

On June 5, 2014, arrest warrants were issued for Mr. Collins on charges of arson, first degree, and criminal conspiracy. (Arrest Warrants 2014A221080082 and 2014A221080082.) The grand jury for Georgetown County issued indictments against Mr. Collins on August 20, 2014 for criminal conspiracy; arson, first degree; and murder. (Indictments 2014-GS-22-00803, -00804, and -00805.)

III. Competency Evaluation & Hearing.

Upon the issuance of Judge Culbertson's order for a competency evaluation, Mr. Collins was evaluated by two forensic psychologists at the Medical University of South Carolina under the purview of the Department of Mental Health. (Order Competence Stand Trial; Competency

Evaluation Rep. p. 1.) The primary evaluator was Abby Mulay, who testified in a competency hearing for the first time in Mr. Collins's case. (Tr. p. 13, line 12 – p. 14, line 7.)

The evaluators conducted a clinical interview of Mr. Collins and discovered that he had a history of childhood abuse, including an incident in which his father had pushed him to the concrete as a child. (Competency Evaluation Rep. p. 2; Tr. p. 17, lines 2-9.) As a result of this incident, Mr. Collins suffered a concussion and was hospitalized for two weeks. (Competency Evaluation Rep. p. 3.) In school, Mr. Collins was placed in special education classes because he was "slow at learning." (*Id.*) Mr. Collins could not remember how far he made it school but estimated the he left school in either 7th, 8th, or 9th grade. (*Id.*) He also reported that he suffered a stroke in April 2013 which causes him to forget things. (*Id.*)

As part of the evaluation, Mr. Collins's medical records were reviewed. These records confirmed that Mr. Collins suffered a stroke in April 2013, less than a year before the fire. (Competency Evaluation Rep. p. 4.) They also showed that, as a result of the stroke, he experienced expressive aphasia, i.e. partial loss of the ability to produce language, and altered mental status and dysarthia, i.e., difficult to understand articulation of speech. (*Id.*) At the competency hearing, the evaluator testified that a neurologist who treated Mr. Collins for the stroke concluded that Mr. Collins's appearance was consistent with encephalopathy, which is a neurological disorder. (Tr. p. 18, line 13 – p. 20, line 7.) However, the evaluator stated that she was not a medical doctor and that neurological disorders were outside of her expertise. (Tr. p. 18, lines 13-17.)

The evaluators also administered the Montreal Cognitive Assessment ("MoCA"), which is an instrument used to assess cognitive dysfunction. (Competency Evaluation Rep. p. 5.) MoCA assesses attention and concentration, executive functions, memory, language, visuoconstructional

skills, conceptual thinking, calculations, and orientation. (*Id.*) A MoCA score below 26 is considered impaired, and Alzheimer's patients score an average of 16.2 on test. (*Id.*; Tr. p. 21, line 21 – p. 29, line 24.) Mr. Collins scored 18 out of 30, which "indicated that [he] had global impairments in the domains of visuoconstructional skills, language, attention, abstraction, and delayed recall." (Competency Evaluation Rep. p. 5.)

Although Mr. Collins's score was suggestive of cognitive impairments, the evaluation did not include any testing overseen by a neuropsychologist, which is necessary to make a diagnosis of cognitive impairments or neurocognitive disorder. (Tr. p. 26, lines 15-24.) No intelligence testing of Mr. Collins was performed either. (Tr. p. 35, lines 11-16.)

Instead of having neurocognitive or intelligence testing performed on Mr. Collins, the evaluators conducted a mental status exam, which appears to have consisted of questions being posed to Mr. Collins. In this exam, Mr. Collins reported that he sometimes hears "somebody whispering" to him and that he occasionally sees Jesus. (Competency Evaluation Rep. p. 5.) He could not name the current President of the United States, and he identified "Kennedy" as first President. (*Id.*)

Despite the various indicators of low intelligence, neurological and neurocognitive disorders, and mental impairments, the evaluators concluded that Mr. Collins was competent to stand trial. (Competency Evaluation Rep. p. 9.) This conclusion appears to be based primarily on Mr. Collins's "factual understanding of the [legal] proceedings against him." (*Id.*) However, the evaluators admitted that Mr. Collins believed at different times during the exam that the jury was made up of "1,000" or "200" individuals. (Competency Evaluation Rep. p. 9.) The evaluators further stated that Mr. Collins expressed "confusion regarding the roles of various courtroom

personnel" and could only retain the correct information following "education by the examiners." (*Id.*; Tr. p. 45, line 3 – p. 46, line 11.)

Prior to trial, Judge Hyman conducted a *Blair* hearing and adopted the report of the evaluators, ruling that Mr. Collins was competent to stand trial. (Tr. p. 117, line 12 – p. 119, line 10.) At the hearing, Dr. Mulay admitted that the examiners did not conduct any testing to determine intellectual disability but that there were indications that Mr. Collins was intellectually impaired. (Tr. p. 21, line 13 – p. 32, line 24; p. 35, lines 11-16; p. 36, line 19 – p. 37, line 19.) In response to questioning by the judge, Dr. Mulay advised that further evaluation by the Department of Disabilities and Special Needs ("DDSN") would add clarity to whether Mr. Collins, in fact, suffered from an intellectual disability. (Tr. p. 37, line 20 – p. 38, line 10.)

Following the questioning of the examiners, the judge acknowledged that evidence indicated that Mr. Collins suffered from an "intellectual disability." (Tr. p. 117, lines 12 – 22.) He also expressed concern that the matter should have been referred to DDSN for further evaluation, but he stated that was not warranted because Dr. Mulay and Dr. Gottfried found no indications of "mental retardation." (Tr. p. 118, line 20 – p. 119, line 4.) The judge then ruled that Mr. Collins had not proved by a preponderance of the evidence that he lacked capacity to stand trial. (Tr. p. 119, lines 4-10.)

Mr. Collins's counsel moved for reconsideration of this finding and requested that further evaluation of Mr. Collins be conducted due to his low MoCA score and the inexperience of the evaluator. (Tr. p. 151, line 9 – p. 152, line 4.) Judge Hyman denied that motion, finding that there was no need for a DDSN evaluation because there was no indication of "mental retardation." (Tr. p. 152, line 10 – p. 153, line 3.)

IV. Trial.

At trial, the state's case against Mr. Collins was based almost entirely on his confession. There was no evidence that Mr. Collins helped Ms. Cohen obtain an insurance policy. (Tr. p. 405, lines 11-19.) There was no evidence that Mr. Collins aided Ms. Cohen in securing a storage unit. (Tr. p. 411, lines 6-18.) There was no evidence that Mr. Collins helped Ms. Cohen move her furniture and appliances. (Tr. p. 431, line 25 – p. 432, line 16.) There was no evidence that Mr. Collins purchased kerosene. (Tr. p. 423, lines 11-23.) There was no evidence that Ms. Cohen told others that Mr. Collins was involved in her plan to burn the home and collect insurance proceeds. (Tr. p. 432, lines 9-16.) And other than his confession, there was no evidence that Mr. Collins was present when the fire began or participated in the burning of the home. (Tr. p. 644, lines 2-5.)

ARGUMENT

I. Appellant's statements should not have been admitted because they were induced by deception regarding their use, promises of leniency, threats of severe punishment, and other factors indicating that the statements were not voluntarily given.

"[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 to the truth or falsity of the confession." *Jackson v. Denno*, 378 U.S. 368, 373 (1964). If a defendant "was advised of his *Miranda* rights, but nevertheless chose to make a statement, the burden is on the State to prove by a preponderance of the evidence that his rights were voluntarily waived." *State v. Neely,* 271 S.C. 33, 40, 244 S.E.2d 522, 526 (1978).

The trial judge's determination of whether a statement was knowingly, intelligently, and voluntarily made, requires an examination of "the totality of the circumstances" surrounding the waiver. *State v. Doby*, 273 S.C. 704, 708, 258 S.E.2d 896, 899 (1979). The totality of the circumstances includes "the youth of the accused, his lack of education or his low intelligence, the

lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep." *State v. Pittman*, 373 S.C. 527, 563, 647 S.E.2d 144, 164 (2007) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)).

Furthermore, a "statement may not be extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or obtained by the exertion of improper influence." *State v. Miller*, 375 S.C. 370, 386, 652 S.E.2d 444, 452 (Ct. App. 2007).

In this case, the totality of the circumstances demonstrate that Mr. Collins's confession was not made freely and voluntarily.

A. Misrepresentations and Deception About the Use of Mr. Collins's Statements.

The investigators coerced and tricked Mr. Collins into making inculpatory statements regarding his participation in burning the home by misrepresenting to him that his statements would not be used against him. After Mr. Collins insisted on his innocence, the investigators informed him that his statements and the video recording of his interrogation would "not leave this room." (Tr. p. 272, line 20 – p. 273, line 2; State Ex. 3 - Collins Interview DVD 1 20:53-21:30.) Furthermore, the investigators told him that the video recording would merely be placed in their files, suggesting that it would not be used against him in a future trial. (*Id.*) Of course, these representations turned out to be false (Tr. p. 272, line 20 – p. 273, line 2), as the State relied almost exclusively on Mr. Collins's statements during the interrogation to convict him. And it was only after the investigators' promise to keep his statements buried in their files did Mr. Collins make any incriminating statements.

The fact that the investigators prefaced the interview with a *Miranda* warning does not obviate the coercive nature of their tactics. Instead, the promise that Mr. Collins's statements and

the video recording would not leave the interrogation room rendered the *Miranda* warning meaningless.

Although it does not appear that South Carolina courts have addressed the voluntariness of a statement after police have assured its confidentiality, other jurisdictions have ruled that such assurances alone preclude a finding of voluntariness. For example, in *Redmond v. People*, 180 Colo. 24, 501 P.2d 1051 (1972), the Colorado Supreme Court reversed the trial court's ruling that a confession was voluntarily given. In that case, the police detective provided the defendant a full *Miranda* warning but then told the defendant that they were only interested in an alleged co-conspirator. *Id.* at 26, 501 P.2d at 1052. The detective further instructed that what the defendant told the defective would be just between the two of them and would be off the record. *Id.*

Quoting *Miranda*, the court concluded that the defendant's subsequent confession was not voluntary because any evidence that the defendant "was threatened, tricked, or cajoled into a waiver will . . . show that the defendant did not voluntarily waive his privilege [against self-incrimination]." *Id.* at 27, 501 P.2d at 1052. In so ruling, the court declared that the *Miranda* "warning was meaningless after the defendant was told that parts of his statement would not be used against him and that the focus of attention was not upon him, but upon" his alleged co-conspirator. *Id.* at 28, 501 P.2d at 1053.

Similarly, in *Porter v. State*, 143 Ga. App. 640, 239 S.E.2d 694 (Ga. Ct. App. 1977), the Georgia Court of Appeals reversed the trial court's admission of a confession obtained after the investigations misrepresented how the defendant's statements would be used. In that case, the investigator read the defendant his *Miranda* rights and then told the defendant that his statements would not be used against him and that the interview was being recorded as an aid in developing

the investigator's file. *Id.* at 642, 239 S.E.2d at 696. The court ruled that a "confession given under such a pretense may not be admitted against the confessor." *Id.*

More recently, the Ninth Circuit Court of Appeals ruled in *United States v. Preston*, 751 F.3d 1008 (9th Cir. 2014), that the police's deception about how the defendant's statements would be used was a significant factor in the involuntary nature of his confession. There, the police, while interrogating the defendant, suggested that his statements would not be used against him if he confessed. *Id.* at 1027. According to the court, this type of deception that went beyond the facts of the case was impermissible, and it ruled that the trial court erred in admitting the defendant's confession. *Id.* at 1027-28; *see also, Henry v. Kernan*, 197 F.3d 1021, 1027-28 (9th Cir. 1999) (ruling that police's "slippery" tactic of conveying the impression that statements would not be used against defendant deceived him into confessing); *People v. Parada*, 188 Colo. 230, 232-33, 533 P.2d 1121, 1122 (1975) (affirming exclusion of confession induced by promise not to use against defendant).

In this case, the investigators' deception regarding the use of Mr. Collins's statements are nearly identical to the coercive tactics involved in the cases discussed above. Their promises to Mr. Collins that his statements would not leave the room and that the video recording would be placed only in their files conveyed to him that whatever he said would not be used against him. Moreover, they rendered the previous *Miranda* warnings meaningless and ineffective. Thus, Mr. Collins did not knowingly waive his privilege against self-incrimination, and his statements were not made voluntarily. The trial court, therefore, erred in admitting his statements into evidence.

B. Promises of Leniency.

As stated above, a statement may not be obtained by "any sort of threats . . . [or by] any direct or implied promises, however slight." *Miller*, 375 S.C. at 386, 652 S.E.2d at 452. "A

statement induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise." *State v. Peake*, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987).

Here, Mr. Collins statements were not voluntary because they were induced by implied promises of leniency if he cooperated in the interview and threats of dying in prison if he did not. Specifically, the investigators conveyed that the focus of their investigation was Ms. Cohen and that Mr. Collins could "save" himself if he provided information that could lead to her prosecution. (State Ex. 3 - Collins Interview DVD 2, 7:00-8:00 and DVD 3, 23:40-24:05.) One of the investigators said that he "wanted" Ms. Cohen but that if Mr. Collins was not truthful in the interview then he would come back to get Mr. Collins and that Mr. Collins would likely die in prison. (State Ex. 3 - Collins Interview DVD 3, 21:00-21:45.) The investigator then assured Mr. Collins: "It's not you I want; it's Marissa. I promise my right hand to God." (State Ex. 3 - Collins Interview DVD 3, 22:10-22:20) (emphasis added).

Shortly after the investigators made these threats and promises, Mr. Collins began making incriminating statements. Yet when he was short on providing details or if the investigators believed he was not telling the whole truth, the investigators encouraged him to "save" himself by providing fully truthful answers. (State Ex. 3 - Collins Interview DVD 2, 7:00-8:00.) They also said they were there to help him but that they would not speak up for him if he wasn't telling the truth. (State Ex. 3 - Collins Interview DVD 2, 8:00-8:30.) Overall, the investigators created the unmistakable impression that Mr. Collins could "save" himself from dying in prison if he confessed to his role in burning the home.

These empty promises of leniency for confessing and implied threats of harsh sentencing are precisely the types of coercion that the South Carolina Supreme Court declared improper in

Peake. In that case, the police officer suggested to the defendant that the state would not seek the death penalty if he gave a statement. *Id.* at 139, 352 S.E.2d at 488. The court concluded that the police officer's suggestion was tantamount to a promise of leniency and ruled that it rendered the statement involuntary as a result. *Id.*

The coercive nature of the investigators' promises of leniency and threats of harsh punishment is compounded with other promises that they would not use his statements against him. Together, they created the impression that his statements were needed to aid the prosecution of Ms. Cohen and that they would not be used against him because he could save himself by providing information against her. As a result, they rendered his statements involuntary, and the trial court erred in admitting them.

C. Intelligence.

Although mental deficiency alone is not sufficient to render a confession involuntary, it is a factor to be considered along with other attendant facts and circumstances in determining the voluntariness of a confession. *Doby*, 273 S.C. at 709, 258 S.E.2d at 899. As the court explained in *Preston*, those who are intellectually disabled are more susceptible to deceptive interrogation practices:

> "Because of their cognitive deficits and limited social skills, the mentally retarded . . . often lack the ability to appreciate the seriousness of a situation." Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 919-20 (2004). "Under interrogation, they are not likely to understand that the police detective who appears to be friendly is really their adversary or to comprehend the long-term consequences of making an incriminating statement." Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. Crim. L. & Criminology 825, 847 n.119 (2010). They fail "to understand the context in which interrogation occurs, the legal consequences embedded in the rules or the significance of confessing." Cloud et al., *supra*, at 501. In particular, research shows that the intellectually disabled are "significantly

> more likely . . . to believe the suspect will be allowed to go home after making a confession" to a serious crime. Gudjonsson, *supra*, at 326. So being told falsely that, after a confession, one could simply "move on," or that the confession would be kept confidential, is likely to have a considerably greater impact on a person with serious intellectual impairments, such as [the defendant], than on an individual of normal intelligence.

751 F.3d at 1027.

In this case, Mr. Collins's low level of education, recent stroke, and cognitive impairments, when considered along with the investigators' other coercive interrogation tactics, demonstrate that his confession was not voluntary. Mr. Collins's intellectual challenges made it difficult for him to reconcile the *Miranda* warning with the investigators' inconsistent representations that his statements would not be used against him. (Tr. p. 282, line 23 – p. 284, line 13.) Also, Mr. Collins likely believed the investigators' assurances that they were there to help him and that they were focused on getting information from him to aid the prosecution of Ms. Cohen without fully appreciating that they were laying traps that would lead to his own conviction. Similarly, the investigators' promises that he would be allowed to go home after the interview further created the impression that his statements would not result in the severe sentence that he ultimately received. (State Ex. 3 – Collins Interview DVD 2, 10:30-11:00.) Overall, Mr. Collins's cognitive impairments deprived him of the ability to provide a voluntary waiver of his right against self-incrimination when faced with the deceptive tactics of experienced and well-trained interrogators.

D. Length of Interrogation; Physical Condition; Deprivation of Food and Sleep.

Finally, the length of the interrogation and Mr. Collins's physical and mental condition contributed to the involuntary nature of his statements. The investigators convinced Mr. Collins to come to the police station to retrieve his phone when they actually planned to interrogate him when he arrived. (Tr. p. 220, line 2 – p. 223, line 12.) They then proceeded to interrogate him for

nearly three and a half hours although he had not eaten since the night prior. (State Ex. 3 - Collins Interview DVD 2B, 30:45-30:58.) He complained of physical ailments and informed the investigators that he had a hard time getting to sleep the night before. (State Ex. 3 - Collins Interview DVD 1, 3:00-5:30.) When he tried to explain that his memory was not good, they interrupted him and would not let him finish his statements. (State Ex. 3 - Collins Interview DVD 3, 18:00-19:00; Tr. p. 241, lines 5-13.) Although the investigators informed Mr. Collins that he would be able to leave the police station after the interview, they never informed him that he was free to leave at any time during the interview. In fact, at one point, the investigators informed him that he could not leave the interrogation room. (Tr. p. 272, lines 7-19; p. 277, lines 4-9.)

Under these conditions, Mr. Collins's resolve was broken and he eventually succumbed to the pressure exerted by the investigators so that the interview would end. The video recording shows that Mr. Collins became increasingly confused as the interrogation continued. (State Ex. 3 – Collins Interview DVD 2-2B.) He began by insisting on his innocence. (Tr. p. 228, lines 25 – p. 229, line 6.) But after the investigators assured Mr. Collins that what he told him would not leave the room and that their focus was on Ms. Cohen, he began making incriminating statements, albeit in a rambling and incoherent manner. (State Ex. 3 – Collins Interview DVD 2-2B.) He could not remember details, and those that he did claim to remember were often inconsistent. (*Id.*) He got confused about Ms. Cohen's real name, at one time claiming he only knew her as Tina and then calling her Marissa just a few minutes later. (State Ex. 3 - Collins Interview DVD 2B, 5:00-5:30, 15:00-15:15.) Mr. Collins was obviously providing information that he believed investigators wanted to hear, which the investigators acknowledged during the interview. (State Ex. 3 - Collins Interview DVD 2, 22:55-23:20.)

All of this demonstrates that Mr. Collins's will was overborne by the investigators' deception, the length of interrogation, and his impaired physical and mental condition and that he was saying whatever he could to end the interview and get home, as the investigators had promised him. (State Ex. 3 – Collins Interview DVD 2, 10:30-11:00.) Thus, the totality of circumstances reveals that Mr. Collins's confession was not given voluntarily.

II. The trial court erred by not requiring further evaluation of Appellant's competency based on the examiners' conclusion that there was indication of intellectual disabilities.

Prior to trial, the circuit court ordered that Mr. Collins undergo a competency evaluation pursuant to *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981), and S.C. Code Ann. § 44-23-410. Under Section 44-23-410(A), whenever a circuit court judge has reason to believe that a defendant is not fit to stand trial because he lacks capacity to understand the proceedings against him or to assist his own defense because of mental capacity, the judge shall order examination of the defendant. The examination should be conducted by the Department of Mental Health ("DMH") if the person is suspected of having a mental illness or by DDSN if the person is suspected of having an intellectual or related disability. § 44-23-410(A). If the examiners designated by DMH find indications of an intellectual or related disability but not mental illness, they should not render an evaluation on the person's mental capacity but should recommend that the person be evaluated by DDSN. § 44-23-410(D).

In this case, the trial judge erred in failing to order further evaluation based on the indications that Mr. Collins suffered from an intellectual disability. The judge acknowledged that the competency examiners found indications of "some intellectual disabilities." (Tr. p. 117, lines 16-22.) Under S.C. Code Ann. § 44-23-410(D), those indications alone required that the examiners not opine on Mr. Collins's competency to stand trial. Instead, the matter should have been referred

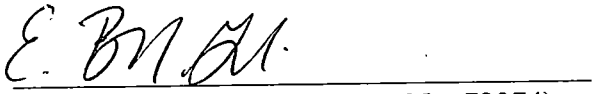
to DDSN. But the trial judge refused to do because he found no indication of "mental retardation." (Tr. p. 118, line 20 – p. 119, line 4; p. 152, line 10 – p. 153, line 3.)

By refusing to order further evaluation of Mr. Collins, the judge violated the clear and unambiguous requirements of S.C. Code Ann. § 44-23-410(D). In disregarding the indications of "intellectual disability" and finding no indication of "mental retardation," the judge seemed to make a distinction between "intellectual disability" and "mental retardation." However, any such distinction is in error under the law because "intellectual disability" and "mental retardation" have the same meaning. *State v. Stanko*, 402 S.C. 252, 283, 741 S.E.2d 708, 724 fn. 1 (2013). As a result, Mr. Collins should have been evaluated further by DDSN because of the indications of an intellectual disability (Tr. p. 21, line 21 – p. 29, line 24; p. 36, line 17 – p. 38, line 10), and the court abused its discretion in failing to order it. *See State v. Evans*, 309 S.C. 471, 424 S.E.2d 512 (Ct. App. 1992) (reversing and remanding conviction where preliminary indications of mental retardation required further competency evaluation under § 44-23-410).

CONCLUSION

For the foregoing reasons, Mr. Collins respectfully requests that the Court reverse his conviction based on his involuntary confession or, in the alternative, reverse and remand the matter for further evaluation of competency to stand trial under S.C. Code Ann. § 44-23-410.

Respectfully submitted,



E. Brandon Gaskins (S.C. Bar No. 72374)
Moore & Van Allen PLLC
78 Wentworth Street
Charleston, SC 29401
Phone: (843) 579-7038
Facsimile: (843) 579-7099
brandongaskins@mvalaw.com

Court Appointed Lead Counsel for Appellant

Robert M. Dudek, Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, SC 29201
Phone: (803) 734-1330
Facsimile: (803) 734-1330

Co-counsel for Appellant

June 19, 2019
Charleston, SC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of General Sessions

Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2018-002056
Lower Case Nos. 2014-GS-22-00803 | 2014-GS-22-00804

The State, ...Respondent,

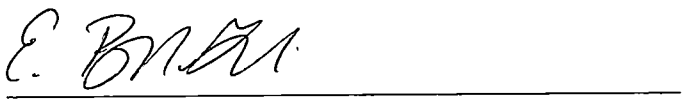
v.

Randy Collins,.....Appellant,

PROOF OF SERVICE

This is to certify that I have this day served counsel for the Respondent in the foregoing matter with a copy of the foregoing ***Initial Brief of Appellant and Designation of Matter*** by depositing the same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

Alan McCrory Wilson, Esquire
John Benjamin Aplin, Esquire
South Carolina Office of the Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
PO Box 11549 (29211)
Columbia, SC 29201



E. Brandon Gaskins (S.C. Bar No. 72374)
Moore & Van Allen PLLC
78 Wentworth Street
Charleston, SC 29401
Phone: (843) 579-7038
Facsimile: (843) 579-7099
brandongaskins@mvalaw.com

Court Appointed Lead Counsel for Appellant

Robert M. Dudek, Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, SC 29201
Phone: (803) 734-1330
Facsimile: (803) 734-1330

Co-counsel for Appellant

June 19, 2019
Charleston, SC

Moore&VanAllen

E. Brandon Gaskins
Attorney at Law

T 843 579 7038
F 843 579 8738
brandongaskins@mvalaw.com

Moore & Van Allen PLLC

78 Wentworth St.
Charleston, SC 29401-1428

Mailing Address:
Post Office Box 22828
Charleston, SC 29413-2828

June 19, 2019

VIA U.S. MAIL

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Post Office Box 11629
Columbia, SC 29211

Re: ***The State v. Randy Collins***
Appellate Case No. 2018-002056
Lower Court Case Nos. 2014-GS-22-00803; 2014-GS-22-00804
MVA File No. NB7900.16

Dear Ms. Kitchings:

Enclosed for filing please find an original and one (1) copy of the following:

1. Initial Brief of Appellant;
2. Designation of Matter to be Included in the Record on Appeal; and
3. Proof of Service.

Please file the originals and return a filed-stamped copy of each to our office in the self-addressed stamped envelope provided.

Thank you for your assistance with this matter.

Sincerely,

MOORE & VAN ALLEN PLLC

E. Brandon Gaskins

EBG/meh
Enclosures: as stated.

cc: Robert Michael Dudek, Esquire (*w/enclosure*)
Alan McCrory Wilson, Esquire (*w/enclosure*)
John Benjamin Aplin, Esquire (*w/enclosure*)
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Moore&VanAllen

Moore & Van Allen PLLC

78 Wentworth Street
Post Office Box 22828
Charleston, SC 29413-2828

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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Post Office Box 11629
Columbia, SC 29211

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