STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Allendale County

R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT LEE MILLER, III,

APPELLANT

APPELLATE CASE NO. 2017-001347

Opinion No. 5824

PETITION FOR REHEARING

This Court affirmed Appellant's conviction and sentence in a published opinion on June 16, 2021. State v. Miller, Op. No. 5824 (S.C. Ct. App. filed June 16, 2021) (Shearouse Adv. Sh. No. 20 at 61). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear his challenge to the admissibility of his statements to law enforcement because this Court's opinion fails to view the circumstances surrounding his interrogation in their totality as required by controlling case law.

Although this Court recognized that governing case law requires consideration of the totality of the circumstances to determine if a suspect provided an incriminating statement to police

knowingly, freely, and voluntarily, this Court analyzed the circumstances individually. This Court examined – separately – Appellant's youth, Appellant's limited cognitive functioning, the failure of the investigators to advise Appellant of constitutionally-mandated warnings, the use of sophisticated interrogation techniques by police, and the absence of Appellant's parent from the interrogation. This Court recognized how each of these factors weighed in favor of excluding Appellant's statement to police; however, this Court concluded that each factor was "insufficient." Not once did this Court examine the totality of these circumstances to determine if the trial judge erred in admitting Appellant's statements to the police.

This Court recognized that Appellant was only fifteen-years old when he was interrogated by the Chief of Police and two skilled investigators with SLED; however, this Court simply explained that "youth alone is insufficient to prove the voluntariness of a defendant's confession." State v. Miller, Op. No. 5824 (S.C. Ct. App. filed June 16, 2021) (Shearouse Adv. Sh. No. 20 at 61). Appellant concedes that according to South Carolina Supreme Court jurisprudence, youth *alone* will not render a confession involuntary. Here, Appellant presented much more than his youth as a circumstance for concluding his confession to police was not voluntary.

Similarly, this Court determined "the interrogation tactics Agents Johnson and Merrell used against [Appellant] were *not forceful enough* to overbear [Appellant]'s will in light of the surrounding circumstances." Id. (emphasis added). Agent Johnson's misrepresentation of forensic evidence, Agent Johnson's interrogation despite knowing he intimidated Appellant, and Agent Johnson's statements that Appellant could minimize his sentence by speaking to police were not "sufficient to overbear [Appellant]'s will" according to this Court. Id. Likewise, this Court held "the officers interrogating [Appellant] without a parent present was *not sufficient* to render his waiver of rights involuntary." Id. (emphasis added). Finally, this Court also excused the failure of Agents Johnson

and Merrell to warn Appellant of his constitutional rights because another officer had advised Appellant earlier in the day. Id.

This Court was unpersuaded that any of these circumstances required suppression of Appellant's statement. As explained, this Court examined each circumstance and found each one insufficient. Yet, this Court failed to examine the circumstances in the aggregate. Had this Court done so, it would have concluded that that totality of the circumstances required exclusion of Appellant's statement. Therefore, Appellant respectfully requests this Court rehear the matter to examine the impact of the circumstances considered together on the admissibility of Appellant's statement.

In South Carolina, a court must examine the totality of the circumstances surrounding the custodial statement to determine if the totality of the circumstances defeated 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).

As stated earlier, youth *alone* is not a ground for holding a confession inadmissible. However, the age of the confessor is an extremely important factor for determining whether the waiver of rights was voluntary, knowing, and intelligent. Haley v. Ohio, 332 U.S. 596, 600-601 (1948); Gallegos v. Colorado, 370 U.S. 49, 52 (1962). In fact, confessions by juveniles must endure special scrutiny.

Haley, 332 U.S. at 600-601; Fare v. Michael C., 442 U.S. 707, 725 (1979); Thomas v. North Carolina, 447 F.2d 1320, 1322 (4th Cir. 1971); State v. Pittman, 373 S.C. 527, 569, 647 S.E.2d 144, 165-166 (2007). When the police secure an admission from a juvenile without the presence of counsel, "the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright, or despair." In re Gault, 387 U.S. 1, 55 (1967).

When taken in the aggregate and applying the special scrutiny that must be used when reviewing confessions given by juveniles, the evidence presented here weighs in favor of exclusion of Appellant's statement because the circumstances overwhelmed Appellant's will. In light of this inquiry requiring a close examination of the facts, a brief recitation of the context in which Appellant's confession was given is necessary.

Marvin J. Williams, the police chief for Fairfax, interrogated Appellant on June 24, 2014. R. 28, ll. 9-20. Williams claimed he advised Appellant of his rights using a form. R. 28, l. 21 – R. 29, l. 14; R. 445. Appellant *printed* his name on this form pursuant to Williams' instruction. R. 29, l. 24 – R. 30, l. 2; R. 31, l. 25 – R. 32, l. 3; R. 445. Although Williams was aware of Appellant's tender age of fifteen, Williams made no inquiries regarding Appellant's grade level or intelligence. R. 41, l. 20 – R. 42, l. 3.

Tiffany Sabb, the mother of Appellant's friend and with whom Appellant was living at the time, took Appellant to the police station so that he could be questioned. R. 32, ll. 4-5. Sabb's son was at the police station giving a statement *against* Appellant. R. 41, ll. 5-11. Sabb was *not* in the interrogation room while Williams interrogated Appellant. R. 44, ll. 9-11.

While Williams was conducting his interrogation of fifteen-year old Appellant, Williams claimed Appellant confessed to killing Willie Johnson in Allendale – outside of Williams'

jurisdiction. R. 34, ll. 3-14. Appellant's interrogation by Williams was not recorded and it was never reduced to writing – not even in a police report. R. 35, ll. 15-22; R. 36, ll. 4-9; R. 44, ll. 19-24. Williams then turned the interrogation of Appellant over to SLED agents who were investigating the Johnson murder. R. 36, ll. 1-3. For some unknown reason, SLED was already at the Fairfax Police Department prior to Williams interrogating Appellant. R. 37, l. 20 – R. 38, l. 2.

Richard Johnson was one of the SLED agents at the Fairfax Police Station who took over the interrogation. R. 47, ll. 3-5. He and fellow Agent Natasha Merrell recorded the interrogation using Merrell's phone, which resulted in an incomplete recording due to the phone not recording while Merrell received phone calls. R. 47, ll. 6-8; R. 47, ll. 17-22; R. 58, ll. 4-7; R. 58, l. 22 – R. 59, l. 15; State's Exhibit #34. Johnson and Merrell did not bother advising Appellant of his rights when they initiated their interrogation. R. 48, ll. 6-8; R. 60, ll. 3-5.

Appellant's lawyer for purposes of the juvenile charges, Kimberly Jordan, testified regarding the pre-adjudicatory waiver evaluation conducted. Jordan explained that when the doctor questioned Appellant about his rights, Appellant did not understand, forcing the doctor to stop and explain the rights to him. R. 69, l. 14 – R. 70, l. 18. Appellant had no idea how an attorney may have been helpful to him during the questioning. R. 70, ll. 14-15. Even after the doctor's explanation, Jordan questioned whether Appellant really understood. R. 70, ll. 19-23. Only after the doctor "explained it step by step" did Appellant understand. R. 70, l. 25 – R. 71, l. 1. Quite simply, Appellant did not understand his rights or the import of waiving such rights due to his age and low intellectual functioning.

Sabb was in the room with Appellant when Agents Johnson and Merrell started their interrogation, but she left pursuant to Johnson's insistence. R. 49, ll. 11-18; R. 58, ll. 8-10; R. 64, ll. 17-23; State's Exhibit #34. Sabb could hardly be considered as acting *in loco parentis* in light of her subsequent testimony against Appellant. See Hardaway v. Young, 302 F.3d 757, 765 (7th Cir. 2002)

(describing the presence of a youth officer during a juvenile's interrogation as "meaningless" where the officer "provided about as much assistance to [the juvenile] as a potted plant"); In re J.J.C., 689 N.E.2d 1172 (Ill. App. Ct. 1998) (discounting the presence of a youth officer during an interrogation where the record was silent of any effort by the officer to affirmatively protect the child's rights). At least one other officer was present as well. State's Exhibit #34 (Williams). SLED's interrogation lasted about an hour. R. 50, ll. 16-18. Appellant indicated he did not want to talk to Agent Johnson, but stated he would talk to Agent Merrell. R. 51, ll. 6-13; State's Exhibit #34. Agent Johnson noted that he thought he intimidated Appellant. R. 54, ll. 4-11; State's Exhibit #34. Agent Merrell noted Appellant was more comfortable with her. R. 65, ll. 5-8.

The SLED agents knew fifteen-year old Appellant was only in eighth grade. State's Exhibit #34. They also knew he was in alternative school. State's Exhibit #34. Johnson had Appellant read a certificate of service during the interrogation. State's Exhibit #34. Appellant struggled to read "contributions." State's Exhibit #34. Appellant did not even know his social security number or his street address. State's Exhibit #34. He had candy in his pocket. State's Exhibit #34. Again, Appellant's age and poor cognitive abilities showed Appellant's lack of understanding of his rights.

At first, Appellant repeatedly denied any involvement in Johnson's death. R. 65, ll. 9-12; State's Exhibit #34. Agent Merrell told Appellant she was "trying to help [him] out." State's Exhibit #34. Appellant expressed his fear of SLED to Agent Merrell. He explained that he had been told by an adult who knew someone "in the force" that if SLED caught him, he would have a gun pointed on him and he would be taken off. State's Exhibit #34. He was told the night before that if SLED caught him, he would be shot down. State's Exhibit #34.

Upon Agent Merrell's request, Agent Johnson re-entered the interrogation room despite Appellant's earlier request that Agent Johnson not be present and the agents' awareness that Agent

Johnson intimidated Appellant. R. 51, ll. 20-22; R. 54, ll. 16-24; R. 61, ll. 9-11. Agent Johnson immediately launched into Appellant. R. 51, l. 23 – R. 52, l. 3. Agent Johnson told Appellant he was "full of it" and was going to jail. R. 51, l. 23 – R. 52, l. 3; State's Exhibit #34. Agent Johnson even *lied*, telling Appellant the police had all the evidence they needed, and alluded to the television show CSI to explain that evidence. State's Exhibit #34.

Like Agent Merrell, Agent Johnson told Appellant that he wanted to help Appellant. State's Exhibit #34. Agent Johnson assured Appellant everyone involved *would* get the same amount of time *except* the person who cooperated and that Appellant was the first one that the police were interrogating. State's Exhibit #34. When Appellant wanted to know how many years he would receive, Agent Johnson told him he would receive "an ass" of time. State's Exhibit #34. When Appellant asked what he could do to get out of the situation, Johnson told him he was not getting out of this, but he could "minimize the kind of time." R. 55, ll. 12-16; R. 62, ll. 13-17; State's Exhibit #34. These were not some ethereal promises to tell the judge or solicitor he cooperated. Rather, these were promises that Appellant *would* get less prison time than others if, and only if, he cooperated with the police. In fact, when the solicitor questioned Agent Merrell on this subject, it was clear that everyone viewed Agent Merrell's and Agent Johnson's words to Appellant to be promises of leniency:

> Q *Other than that*, were there any specific promises of leniency? Did you tell him you'd let him go or anything like that?
>
> A No, sir.

R. 62, ll. 18-21 (emphasis added).

After these threats, promises of leniency, and intimidation, Appellant began making inculpatory statements. State's Exhibit #34. When Appellant expressed his exasperation with going to jail, he asked Agent Johnson what would change if he talked to police. State's Exhibit #34. Agent

Johnson told him the length of time that he was looking at *would* change. State's Exhibit #34. Specifically, Agent Johnson explained, "Now the thing to do is let's see how we can minimize it." State's Exhibit 34. Near the conclusion of the interrogation, Agent Johnson said that when he talked to the solicitor, he would explain what Appellant said, that Appellant was "hurt about it," and that the solicitor should do whatever the solicitor could to help him. State's Exhibit #34.

When Appellant incriminated himself, Agent Johnson repeatedly said, "That's right," indicating confirmation of what Appellant was saying. State's Exhibit #34. When Appellant appeared to minimize his conduct, Agent Johnson repeatedly told Appellant "that's the wrong answer." State's Exhibit #34. By the end of the interrogation, Appellant, a child, was in tears. R. 76, ll. 10-11. This was unsurprising given the rumors Appellant heard regarding what SLED was going to do to him. R. 77, ll. 7-10. Exhausted at the end of this three hour marathon interrogation and clearly not understanding the full ramifications of his situation, Appellant went to sleep on the interrogation room floor. R. 77, ll. 16-21.

Appellant was a mere fifteen years of age just like the juvenile in Haley. See Haley, 332 U.S. at 599 (describing the juvenile's "tender and difficult age" of fifteen). Other courts have acknowledged the ages of fourteen and fifteen demonstrate difficulty in understanding Miranda rights and the serious implications from the waiver of those rights. See e.g., Hardaway v. Young, 302 F.3d 757, 764 (7th Cir. 2002) (stating that the "difficulty a vulnerable child of 14 would have in making a critical decision about waiving his Miranda rights and voluntarily confessing cannot be understated); People v. Travis, 985 N.E.2d 1019, 1032 (Ill. App. Ct. 2013); In re Jerrell C.J., 699 N.W.2d 110, 116-117 (Wisc. 2005).

Consideration of a person's mental capacity is also 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 fact, the United States Supreme Court has warned that intellectually disabled defendants face the special risk of wrongful execution because of the possibility that they will confess to crimes they did not commit. Atkins v. Virginia, 536 U.S. 304, 320 (2002) (citing Everington & Fulero, Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation, 37 Mental Retardation 212, 212-213 (1999)).

> [A] person's capacity to make an informed waiver requires three abilities: an understanding of the words and phrases contained within the warnings, an accurate perception of their intended functions (e.g., that interrogation is adversarial, that an attorney is an advocate, that these rights trump police powers), and a capacity to reason about the likely consequences of the decision to waive or invoke these rights.

Saul M. Kassin, The Psychology of Confessions, 4 Ann. Rev. L. & Soc. Sci. 193, 199 (2008).

Research reveals that individuals with low levels of intelligence, particularly those with intellectual disability, "do not comprehend their rights as fully or know how to apply them as well as older adolescents and adults." Id. "On standardized tests that measure people's comprehension of Miranda rights, comprehension scores correlate significantly with IQ." Id. at 206. Therefore, "most people who are mentally retarded, being limited in their cognitive and linguistic abilities, cannot adequately comprehend their rights or know how to apply them in their own actions." Id. Further, "people who are mentally retarded exhibit a high need for approval, particularly from others in positions of authority, which reveals itself in an acquiescence response bias." Id. "[P]eople who are mentally retarded are limited in their capacity to foresee the consequences of their actions when making legal decisions." Id.

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 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. Id. at 336, 422 S.E.2d at 140. After Davis's arrest, an

officer read the standard Miranda warnings to Davis from a card. Id. 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." Id. Davis responded affirmatively that he understood each of his rights. Id. 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.

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 due to low intellectual functioning. See e.g., United States v. Hull, 441 F.2d 308, 309 (7th Cir. 1971); United States v. Preston, 751 F.3d 1008 (9th Cir. 2014); United States v. Jennings, 491 F.Supp.2d 1072 (M.D. Ala. 2007); Albarran v. State, 96 So.3d 131 (Ala. Crim. App. 2011); People v. Daniels,

908 N.E.2d 1104 (Ill. App. 2009); State v. Flower, 539 A.2d 1284 (N.J. Super. L. 1987); State v. Rossiter, 623 N.E.2d 645 (Ohio Ct. App. 1993); State v. Blackstock, 19 S.W.3d 200 (Tenn. 2000).

Here, Agents Johnson and Merrell used textbook methods to overcome the will of a suspect. See In re Elias V., 188 Cal. Rptr. 3d 202 (Cal. Ct. App. 2015) (describing the real danger of false confessions and explaining that an estimated 14 to 25 percent of wrongful convictions resulted from false confessions). "The Reid Technique" has been described as first requiring the isolation of the suspect in a small, private room. Id. at 211. This increases the suspect's anxiety and desire to escape. Id. Thereafter, the interrogator uses both negative and positive incentives to extract a confession. Id. "[T]he interrogator confronts the suspect with accusations of guilt, assertions that may be bolstered by evidence, real or manufactured, and refuses to accept alibis and denials." Id. On the positive side of this incentive coin, "the interrogator offers sympathy and moral justification, introducing 'themes' that minimize the crime and lead suspects to see confession as an expedient means of escape." Id.

"[C]ontemporary police manuals on interrogation" encourage interrogators to show confidence in the suspect's guilt and maintain an interest *only* in confirming certain details. Id. at 213. "The guilt of the suspect is to be posited as a fact." Id. Officers should "minimize the moral seriousness of the offense, to cast blame on the victim or on society." Id. "These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already – that he is guilty." Id.

Just as the investigator acted in Elias V., Agent Johnson was aggressive and persistent. See id. at 214. Agent Johnson used classic maximization techniques when he accused Appellant of committing the murder, overrode all of Appellant's objections to the accusation, and claimed to have evidence of Appellant's guilt, which served to "shift [Appellant's] mental state from confident to hopeless[ness]." See id. As planned, Agent Johnson's minimization tactics provided promises of

leniency to Appellant for confessing. See id. "A convincing body of evidence demonstrates that implicit promises can put vulnerable innocents at risk to confess by encouraging them to think that the only way to lessen or escape punishment is compliance with the interrogator's demand for confession, especially when minimization is used on suspects who are also led to believe that their continued denial is futile and prosecution inevitable." Id. Agent Johnson's use of these deceptive techniques, especially given the vulnerabilities of a fifteen-year-old, must weigh against a finding of voluntariness of Appellant's statement. See id. at 222.

The most vulnerable innocents must be children. See id. at 217-218 (explaining that "children and adolescents are much more vulnerable to psychologically coercive interrogations and in other dealings with the police than resilient adults experienced with the criminal justice system"). In fact, "the risk interrogation will produce a false confession is significantly greater for juveniles than for adults; indeed, juveniles usually account for one-third of proven false confession cases." Id. at 218. At least one jurisdiction, Illinois, has recognized the risk of false confessions from juveniles when law enforcement employs deceptive techniques and has banned the practice through legislative act. S.B. 2122, 102nd Gen. Assembly, 1st Reg. Sess. (Ill. 2021).

This Court erred in failing to consider the *totality* of the circumstances presented here that required exclusion of Appellant's statements to law enforcement. Rather, this Court affirmed the trial court's decision based upon a singular view of each circumstance and a determination that each circumstance was *insufficient* on its own. Had this Court examined the circumstances in the aggregate, then the circumstances would have added up to provide *sufficient* totality to require exclusion. Due to Appellant's age – a mere fifteen – the interrogation he endured and the statement he provided required special scrutiny. Appellant could not even read the word "contributions," indicating his comprehension level was very low. Appellant's intelligence level was very low – his

IQ measured only 76, which is within the range of intellectual disability. By the age of fifteen, he was still in eighth grade. Appellant had no parent or lawyer present during the three hour long marathon interrogation. Appellant expressed that he was intimidated by Agent Johnson, who made promises of minimizing his sentence and misrepresented the evidence the police had against him. Agent Johnson's textbook interrogation of Appellant to elicit a confession created a coercive environment that overwhelmed Appellant's will.

For these reasons, Appellant respectfully requests this Court rehear the matter to address these particular points that were overlooked or misapprehended by this Court.

Respectfully Submitted,

s/*Susan B. Hackett*
SUSAN B. HACKETT
Appellate Defender

This 1st day of July, 2021.

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SC Court of Appeals

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APPELLATE CASE NO. 2017-001347

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the petition for rehearing in the above-entitled case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is mfarthing@scag.gov; and Robert Lee Miller, #372515, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 1st day of July, 2021.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT