STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Allendale County
R. Lawton McIntosh, Circuit Court Judge

Opinion No. 5824 (S.C. Ct. App. filed June 16, 2021)
Lower Court Case No. 2015-GS-03-0050

THE STATE,

RESPONDENT,

V.

ROBERT LEE MILLER, III,

PETITIONER

APPELLATE CASE NO. 2017-001347

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on August 12, 2021. App. 40-41.

QUESTION PRESENTED

Did the Court of Appeals err when it affirmed the trial court's admission of fifteen-year-old Petitioner's statement by failing to apply the special scrutiny afforded to statements made by juveniles and failing to examine the totality of the circumstances, which included Petitioner's youth and limited cognitive functioning, promises of leniency by police, the use of sophisticated interrogation techniques, the failure of the investigators to advise Petitioner of his constitutionally mandated warnings, and the absence of a parent, where the Court viewed the circumstances individually and held each was insufficient to require exclusion?

STATEMENT OF THE CASE

Marvin J. Williams, the police chief for Fairfax, interrogated fifteen-year-old Petitioner on June 24, 2014. R. 28, ll. 9-20. Chief Williams claimed he advised Petitioner of his rights using a form. R. 28, l. 21 – R. 29, l. 14; R. 445. The record was unclear when Petitioner arrived at the police station or when the interrogation by Chief Williams began, but the form indicated Petitioner *printed* his name on the form at 4:56 p.m. R. 29, l. 24 – R. 30, l. 2; R. 31, l. 25 – R. 32, l. 3; R. 445. Although Chief Williams was aware of Petitioner's tender age of fifteen, Chief Williams made no inquiries regarding Petitioner's grade level or intelligence. R. 41, l. 20 – R. 42, l. 3. Tiffany Sabb, the mother of Petitioner's friend and with whom Petitioner was living at the time, took Petitioner 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* Petitioner. R. 41, ll. 5-11. Sabb was not in the interrogation room while Chief Williams interrogated Petitioner. R. 44, ll. 9-11.

While Chief Williams was conducting his interrogation of Petitioner, Chief Williams claimed Petitioner confessed to killing Willie Johnson in Allendale – outside of Chief Williams' jurisdiction. R. 34, ll. 3-14. Petitioner's interrogation by Chief 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.

Chief Williams then turned the interrogation of Petitioner over to SLED agents who were investigating the Johnson murder. R. 36, ll. 1-3. For some inexplicable reason, SLED was already at the Fairfax Police Department prior to Chief Williams interrogating Petitioner. 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 Agent Merrell's phone, which resulted in an incomplete recording due to the phone not recording while Agent 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. Agents Johnson and Merrell did not bother advising Petitioner of his rights when they initiated their interrogation. R. 48, ll. 6-8; R. 60, ll. 3-5.

Sabb was in the room with Petitioner when Agents Johnson and Merrell initially started their interrogation, but she left pursuant to Agent Johnson's insistence. R. 49, ll. 11-18; R. 58, ll. 8-10; R. 64, ll. 17-23; State's Exhibit #34. 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. Petitioner indicated he did *not* want to talk to Agent Johnson, but indicated he would talk to Agent Merrell. R. 51, ll. 6-13; State's Exhibit #34. Agent Johnson noted that he thought he intimidated Petitioner. R. 54, ll. 4-11; State's Exhibit #34. Agent Merrell noted Petitioner was more comfortable with her. R. 65, ll. 5-8.

The SLED agents knew fifteen-year-old Petitioner was only in eighth grade. State's Exhibit #34. They also knew he was in alternative school. State's Exhibit #34. Agent Johnson had Petitioner read a certificate of service during the interrogation. State's Exhibit #34. Petitioner struggled to read "contributions." State's Exhibit #34. Petitioner 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.

Petitioner repeatedly denied any involvement in Johnson's death. R. 65, ll. 9-12; State's Exhibit #34. Agent Merrell told Petitioner she was "trying to help [him] out." State's Exhibit #34. Petitioner 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. R. 51, ll. 20-22; R. 54, ll. 16-24; R. 61, ll. 9-11. Agent Johnson immediately launched into Petitioner. R. 51, l. 23 – R. 52, l. 3. Agent Johnson told Petitioner he was "full of it" and was going to jail. R. 51, l. 23 – R. 52, l. 3; State's Exhibit #34. Like Agent Merrell, Agent Johnson told Petitioner that he wanted to *help* Petitioner. State's Exhibit #34. Agent Johnson assured Petitioner everyone involved *would* get the same amount of time except the person who cooperated, and that Petitioner was the first one that the police were interrogating. State's Exhibit #34.

Agent Johnson lied, telling Petitioner the police had all the evidence they needed, and alluded to the television CSI to explain that evidence. State's Exhibit #34. When Petitioner 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 Petitioner asked what he could do to get out of the situation, Agent 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. Agent Johnson promised to tell the prosecutor if Petitioner cooperated. R. 62, ll. 8-12; State's Exhibit #34. An exchange on this topic between the solicitor and Agent Merrell was particularly eye-opening:

> 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.

After these threats, promises of leniency, and intimidation, Petitioner began making inculpatory statements. State's Exhibit #34. When Petitioner 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 Petitioner said, that Petitioner was "hurt about it," and that the solicitor should do whatever the solicitor could to help him. State's Exhibit #34.

When Petitioner incriminated himself, Agent Johnson repeatedly said, "That's right," indicating confirmation of what Petitioner was saying. State's Exhibit #34. When Petitioner appeared to minimize his conduct, Agent Johnson repeatedly told Petitioner "that's the wrong answer." State's Exhibit #34. By the end of the interrogation, Petitioner, a child, was in tears. R. 76, ll. 10-11. This was unsurprising given the rumors Petitioner 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, Petitioner went to sleep on the interrogation room floor. R. 77, ll. 16-21.

The state charged fifteen-year-old Petitioner with the June 17, 2014, murder of Willie Johnson. R. 2, ll. 4-6; R. 459. Petitioner was arrested along with two other juveniles – one was sixteen and one was seventeen. R. 2, ll. 7-10. Due to his age, Petitioner was charged as a juvenile offender. R. 2, ll. 4-13. The state sought to transfer jurisdiction to the Court of General Sessions from the Family Court. R. 2, l. 2 – R. 7, l. 6; R. 17, ll. 10-21. On March 24, 2015, the Honorable Gerald C. Smoak, Jr., convened a hearing on the state's motion. R. 1. Isaac McDuffie Stone, III, and Christine Grefe represented the state. R. 1. Kimberly Jordan and Stephanie Smart-Gittings represented Petitioner. R. 1. At the conclusion of the hearing, Judge Smoak granted the state's motion to transfer jurisdiction to the Court of General Sessions. R. 22, l. 12 – R. 23, l. 24; R. 459.

Thereafter, on July 23, 2015, an Allendale County grand jury indicted Petitioner for murder (2015-GS-03-0050). R. 477-478. The state, represented by Sean Thornton and Ann Fitz, called the case to trial before the Honorable R. Lawton McIntosh and a jury on July 11-14, 2016. R 25-26. Smart-Gittings represented Petitioner. R. 26.

Prior to trial, defense counsel moved to exclude Petitioner's statement to police from evidence. R. 75, l. 15 – R. 80, l. 11. Petitioner's lawyer for purposes of the juvenile charges, Kimberly Jordan, testified regarding what transpired during a pre-adjudicatory waiver evaluation. Jordan explained that when the doctor questioned Petitioner about his rights, Petitioner did not understand, which required the doctor to stop and explain the rights to him. R. 69, l. 14 – R. 70, l. 18. Petitioner 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 Petitioner really understood. R. 70, ll. 19-23. Only after the doctor "explained it step by step" did Petitioner appear to understand. R. 70, l. 25 – R. 71, l. 1.

Defense counsel argued Petitioner was at the tender age of fifteen and was alone in a room with three police officers. R. 75, ll. 21-24. Petitioner found Agent Johnson intimidating. R. 76, ll. 3-9. By the end of the interrogation, Petitioner was in tears. R. 76, ll. 10-11. Petitioner feared the agents based on what he had heard regarding what SLED was going to do to him. R. 77, ll. 7-10. Clearly not understanding the full ramifications of his situation, Petitioner went to sleep on the interrogation room floor. R. 77, ll. 16-21. Agent Johnson used positive and negative reinforcement to get Petitioner to say what he wanted to hear. R. 78, ll. 5-23. Defense counsel also noted the lies Agent Johnson used, particularly about the forensic evidence to coerce a confession from Petitioner. R. 79, ll. 10-15.

In ruling on the motion, the judge found that Petitioner suffered from a limited educational basis. R. 85, ll. 7-10. He was concerned about Petitioner's "maturity level" and "education level," particularly in light of Petitioner only being in eighth grade. R. 86, ll. 4-6. He thought Petitioner was "pretty street smart," however. R. 85, ll. 10-15; R. 86, ll. 10-11. Petitioner's experience with law enforcement was minimal – only one juvenile adjudication. R. 86, ll. 16-25. The judge found Petitioner was isolated from his parent, but indicated the presence of Sabb was sufficient. R. 88, ll. 7-14. Next, the judge found "there was no coercive nature of this interview that would lead to suppression." R. 85, l. 23 – R. 86, l. 1. He thought the length of the interrogation "was entirely reasonable" and that the "place was fine." R. 86, ll. 1-2. Despite contrary evidence in the record, the judge found there were "no police misrepresentations." R. 87, l. 15. Additionally, the judge did not view Agent Johnson's repeated promises to help minimize Petitioner's sentence as promises of leniency. R. 87, ll. 15-19. According to the judge, the fact that Petitioner was told he was going to jail completely obviated the officer's assurance that Petitioner would receive a lesser sentence if he confessed. R. 87, ll. 19-20. In conclusion, the judge permitted the admission of the statement based on the totality of the circumstances. R. 88, ll. 16-20. When the state moved to introduce the statement during the trial, defense counsel renewed her objections, but the trial judge overruled them. R. 215, l. 11 – R. 216, l. 3; R. 216, l. 24 – R. 217, l. 7; R. 319, ll. 10-14.

Ultimately, the jury found Petitioner guilty as charged. R. 397, l. 24 – R. 398, l. 4. On June 5, 2017, the parties re-convened before Judge McIntosh for sentencing. R. 401. Smart-Gittings continued to represent Petitioner, and Brian Hollen represented the state. R. 402. At the conclusion of the hearing, which included only argument by the lawyers and a colloquy between the deceased's son and the court, Judge McIntosh sentenced Petitioner to fifty-five years imprisonment. R. 442, l. 25 – R. 443, l. 1; R. 479.

Petitioner served his notice of appeal on June 13, 2017. The Court of Appeals affirmed. State v. Miller, ___ S.C. ___, 861 S.E.2d 373 (Ct. App. 2021); App. 1-17. Instead of examining the circumstances surrounding Petitioner's statement in the aggregate, the Court of Appeals looked at the circumstances individually. State v. Miller, ___ S.C. ___, 861 S.E.2d 373 (Ct. App. 2021); App. 1-17. For example, as will be explained in greater detail infra, the Court of Appeals held the interrogation tactics used by the SLED agents "were not forceful *enough*" to overbear Petitioner's will. State v. Miller, ___ S.C. ___, 861 S.E.2d 373 (Ct. App. 2021); App. 1-17 (emphasis added). After conducting this erroneous analysis, the Court of Appeals affirmed the introduction of Petitioner's statement to police. State v. Miller, ___ S.C. ___, 861 S.E.2d 373 (Ct. App. 2021); App. 1-17. Petitioner moved for rehearing, which was denied. App. 18-41.

This petition for writ of certiorari follows.

ARGUMENT

Affirming the trial court's erroneous admission of fifteen-year-old Petitioner's statement, the Court of Appeals failed to apply the special scrutiny afforded to statements made by juveniles and failed to examine the totality of the circumstances, which included Petitioner's youth, Petitioner's limited cognitive functioning, promises of leniency by police, the failure of the investigators to advise Petitioner of his constitutionally mandated warnings, the use of sophisticated interrogation techniques, and the absence of a parent where the Court viewed the circumstances individually and held each was insufficient to require exclusion.

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 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. 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).

It is not enough that the interrogator advised the suspect of his rights and the suspect made an uncoerced statement. The prosecution must show that the accused understood the rights. Berghuis v. Thompkins, 560 U.S. 370, 384 (2010) (citing Colorado v. Spring, 479 U.S. 564, 573-575 (1987); Connecticut v. Barrett, 479 U.S. 523, 530 (1987)). Thus, "[t]he waiver inquiry 'has two distinct dimensions': waiver must be 'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,' and 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon

it.'" Id. at 382-383 (quoting Moran v. Burbine, 475 U.S. 421, 421 (1986)); see also Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.").

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). The Court of Appeals refused to examine the circumstances here in their totality. Instead, the Court of Appeals insisted on looking at each circumstance individually and holding each insufficient to warrant reversal.

This Court should grant certiorari because the decision of the Court of Appeals conflicts with prior decisions of this Court regarding the requirement of courts to examine the totality of the circumstances and to do so through the lens of special scrutiny when a juvenile is involved. Rule 242(b)(3), SCACR. Likewise, this Court should grant certiorari because the decision of the Court of Appeals includes a federal question, the admissibility of a statement by a juvenile, and the opinion of the Court of Appeals conflicts with the decisions of the United States Supreme Court that

require special scrutiny of the totality of the circumstances. Finally, this Court should grant certiorari because it involves a substantial constitutional issue. Rule 242(b)(4), SCACR.

The Court of Appeals recognized that Petitioner was only fifteen-years old when he was interrogated by the Chief of Police and two seasoned SLED agents. State v. Miller, ___ S.C. ___, 861 S.E.2d 373 (Ct. App. 2021); App. 1-17. However, the Court hastily brushed this consideration of youth aside by stating simply, "youth alone is insufficient to prove the voluntariness of a defendant's confession." State v. Miller, ___ S.C. ___, 861 S.E.2d 373 (Ct. App. 2021); App. 1-17. Petitioner conceded then – and concedes now – youth *alone* will not render a confession involuntary. However, here, Petitioner presented much more than his youth as a circumstance for concluding his confession to police was not voluntary.

Despite the short shrift given by the Court of Appeals to Petitioner's youth, 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).

The factors to consider when examining a statement made to police by a juvenile include the juvenile's age, the length of the detention without counsel, and any failure to send for the juvenile's

parents. Gallegos, 370 U.S. at 55; Williams v. Peyton, 404 F.2d 528, 531 (4th Cir. 1968). The United States Supreme Court explained the reason for such special scrutiny:

> [A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.

Gallegos, 370 U.S. at 54.

Petitioner 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 individuals aged fourteen and fifteen demonstrate difficulty in understanding Miranda rights and the serious implications of waiving 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); In re Jerrell C.J., 699 N.W.2d 110, 116-117 (Wisc. 2005); People v. Travis, 985 N.E.2d 1019, 1032 (Ill. App. Ct. 2013). Therefore, consideration of the totality of the circumstances surrounding Petitioner's statement to police must be viewed through a special scrutiny lens and with respect paid to Petitioner's age.

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 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), this 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., State v. Flower, 539 A.2d 1284 (N.J. Super. L. 1987); State v. Rossiter, 623 N.E.2d 645 (Ohio Ct. App. 1993); People v. Daniels, 908 N.E.2d 1104 (Ill. App. 2009); Albarran v. State, 96 So.3d 131 (Ala. Crim. App. 2011); State v. Blackstock, 19 S.W.3d 200 (Tenn. 2000); United States v. Jennings, 491 F.Supp.2d 1072 (M.D. Ala. 2007); United States v. Preston, 751 F.3d 1008 (9th Cir. 2014); United States v. Hull, 441 F.2d 308, 309 (7th Cir. 1971).

The Court of Appeals recognized that Petitioner "had a low I.Q.," but claimed the record showed "he was streetwise and knew how to conduct himself in front of police officers." State v. Miller, ___ S.C. ___, 861 S.E.2d 373 (Ct. App. 2021); App. 1-17. The Court relied upon the fact that Petitioner "gave an alibi several times" and "knew several officers that he came into contact with during the investigation." While these facts are true, none show Petitioner was "streetwise." The self-preservation instinct that manifested itself into Petitioner giving an alibi, which would have fallen apart has the police investigated it, exists in toddlers, and in no way demonstrated that Petitioner was sophisticated or intelligent enough to understand his rights or the import of waiving those rights. The Court ignored the evidence that Petitioner had limited interactions with law enforcement as found even by the trial judge, could not even read the word "contributions" on a certificate located in the interrogation room, and how his low intellect, when considered with the other circumstances, affected his ability to voluntarily waive his rights and provide incriminating information to police.

Next, the Court of Appeals determined "the interrogation tactics Agents Johnson and Merrell used against [Petitioner] were *not forceful enough* to overbear [Petitioner]'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 Petitioner, and Agent Johnson's statements that Petitioner could minimize his sentence by speaking to police were not "sufficient to overbear [Petitioner]'s will" according to the Court. Id. The Court appeared to ignore the principal that whether officers exercised coercion is determined from the perspective of the suspect. Illinois v. Perkins, 496 U.S. 292 (1990). The Court certainly ignored the requirement to use special scrutiny and evaluate this circumstances in the aggregate.

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 Petitioner of committing the murder, overrode all of Petitioner's objections to the accusation, and claimed to have evidence of Petitoiner's guilt, which served to "shift [Petitioner's] mental state from confident to hopeless[ness]." See id. As planned, Agent Johnson's minimization tactics provided promises of leniency to Petitioner 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 Petitioner'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. 705 Ill. Comp. Stat. 405/5-401.6 (Ill. 2021). Under the new Illinois law, any statement by a minor "shall be presumed to be inadmissible as evidence against the minor making the confession in a criminal proceeding or a juvenile court proceeding … if, during custodial interrogation, a law enforcement officer or juvenile officer knowingly engages in deception." 705 Ill. Comp. Stat. 405/5-401.6(b). For purposes of the statute, "'[d]eception' means the knowing communication of false facts about evidence or unauthorized statements regarding leniency by a law enforcement officer to a subject of custodial interrogation." 705 Ill. Comp. Stat. 405/5-401.6 (a).

Despite widespread awareness and acknowledgement of the effects of sophisticated police interrogation techniques, particularly on young suspects, the Court of Appeals concluded the tactics

used by Agents Johnson and Merrell were not forceful enough to overwhelm the will of Petitioner. The Court of Appeals viewed this factor in isolation without consideration of the impact of these interrogation tactics in conjunction with the other circumstances surrounding Petitioner's interrogation.

The Court of Appeals further determined that Agent Johnson's "statements about minimizing [Petitioner]'s prison sentence were [in]sufficient to overbear [Petitoiner]'s will." State v. Miller, ___ S.C. ___, 861 S.E.2d 373 (Ct. App. 2021); App. 1-17. The Court neglected to consider the numerous promises of leniency offered by Agent Johnson and how those promises impacted Petitioner. The law is clear that a "confession may not be extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of improper influence." State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990) (internal quotations omitted). 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. Compton, 366 S.C. 671, 680, 623 S.E.2d 661, 666 (Ct. App. 2005); Rochester, 301 S.C. at 200, 391 S.E.2d at 247.

In State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987), this Court held a defendant's statements to police were not admissible as they had been induced by a promise of leniency where the officer told the defendant the prosecution would not see the death penalty if the defendant made a statement. On the other hand, this Court found a polygraph examiner's statement to a defendant that it would be in the defendant's best interest to tell the truth was not an inducement by promise of leniency. It was not the kind of hope or reward or benefit condemned by the law. Rochester, 301 S.C. at 201, 391 S.E.2d at 247.

Here, Agent Johnson knew Petitioner's primary concern was the length of time he would be required to spend in jail because Petitioner perseverated on this point. Agent Johnson skillful capitalized on this showing of weakness by repeatedly telling Petitioner that cooperating with the police would minimize the kind of time he would have to serve. This was not a mere hope that Agent Johnson conveyed. Rather, this was an assurance – a promise – that Petitioner's waiver of his rights and providing of an incriminating statement would benefit Petitioner by reducing his sentence. Even the solicitor's questioning on this point showed the solicitor considered the SLED agents' conduct as promises of leniency. After the questioning of Agent Merrell revealed the agents told Petitioner he could minimize his time by talking, the solicitor asked "[o]ther than that, were there any specific promises of leniency?" R. 62, l. 18. Thus, even the state considered what the agents did as promises of leniency to Petitioner to induce him to waive his rights and speak to police. Nevertheless, the Court of Appeals considered this factor separate and apart from the other factors. The Court was required to view the circumstances in totality.

Just as the Court of Appeals examined the other circumstances individually and determined them lacking to render the statement involuntarily, the Court held "the officers interrogating [Petitioner] without a parent present was *not sufficient* to render his waiver of rights involuntary." State v. Miller, ___ S.C. ___, 861 S.E.2d 373 (Ct. App. 2021); App. 1-17 (emphasis added). As previously mentioned, Tiffany Sabb was present with Petitioner at the police station. However, Sabb could hardly be considered as acting *in loco parentis* in light of her subsequent testimony against Petitioner. 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). Furthermore, the Court of Appeal considered of the lack of parent or parental figure present for Petitioner's interrogation in isolation and not as part of the totality of the circumstances. When viewed in the proper context, the absence of Petitioner's parent weighs heavily in favor of excluding his statement as involuntary.

Finally, the Court of Appeals also excused the failure of Agents Johnson and Merrell to warn Petitioner of his constitutional rights because another officer had advised Petitioner earlier in the day. Chief Williams claimed he advised Petitioner of his rights using a form, which did show Petitioner's *printed* name, instead of a proper signature. Despite his knowledge of Petitioner's age, Chief Williams did not ask about Petitioner's grade level or intelligence. He simply charged ahead with trying to elicit incriminating information from Petitioner. Notably, Chief Williams' interrogation of Petitioner not recorded in any way – audio, video, or written. Although Chief Williams advised Petitioner of his rights, this circumstance still must be viewed in totality with the other circumstances and through the lens of special scrutiny. To the extent this factor weighs in favor of admissibility or is rendered neutral, the totality of other circumstances require exclusion of Petitioner's statements.

The Court of Appeals erred in failing to consider the *totality* of the circumstances presented here that required exclusion of Petitioner's statements to law enforcement. Rather, the 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 the Court examined the circumstances in the aggregate, then the circumstances would have added up to provide *sufficient* totality to require exclusion. Due to Petitioner's age – a mere fifteen – the interrogation he endured and the statement he provided required special scrutiny. Petitioner could not even read the word

"contributions," indicating his comprehension level was very low. Petitioner'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. Petitioner had no parent or lawyer present during the three hour long marathon interrogation. Petitioner 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 Petitioner to elicit a confession created a coercive environment that overwhelmed Petitioner's will. Examining the circumstances in the aggregate using the special scrutiny required for statements made by juveniles leads to the conclusion that totality of the circumstances required exclusion of Petitioner's statement.

CONCLUSION

Petitioner respectfully requests this Court grant certiorari to review the question presented and order full briefing. In the event this Court grants certiorari and dispenses with full briefing, Petitioner respectfully requests this Court reverse his conviction and remand for a new trial.

Respectfully Submitted,

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

ATTORNEY FOR PETITIONER

This 9th day of September, 2021.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Lexington County
J. Mark Hayes, Circuit Court Judge

Opinion No. 2021-UP-099 (S.C. Ct. App. filed March 31, 2021)
Lower Court Case No. 13-CP-32-0614

BOYD RASHAEEN EVANS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001287

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 writ of certiorari and supplemental appendix in this case have been served on W. Joseph Maye, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is jmaye@scag.gov; and Boyd Rashaeen Evans, #338854, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201, this 26th day of July, 2021.

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

ATTORNEY FOR PETITIONER