STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
Sep 09 2021
S.C. 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)

THE STATE,

RESPONDENT,

V.

ROBERT LEE MILLER, III,

PETITIONER

APPELLATE CASE NO. 2017-001347

APPENDIX

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

MARK FARTHING
Assistant Attorney General
1000 Assembly Street, Room 519
Columbia, SC 29201

ISAAC MCDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

ATTORNEYS FOR RESPONDENT

INDEX

INDEX i

STATE V. MILLER, OP. NO. 5824 (S.C. Ct. App. filed June 16, 2021)........................1

PETITION FOR REHEARING..18

RETURN TO PETITION FOR REHEARING 32

ORDER DENYING PETITION FOR REHEARING..40

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Robert Lee Miller, III, Appellant.

Appellate Case No. 2017-001347

Appeal From Allendale County
R. Lawton McIntosh, Circuit Court Judge

Opinion No. 5824
Heard November 3, 2020 – Filed June 16, 2021

AFFIRMED

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

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General W. Jeffery Young, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Assistant Attorney General Sherrie Butterbaugh, and Assistant Attorney General Mark Reynolds Farthing, all of Columbia; and Solicitor Isaac McDuffie Stone, III, of Bluffton; all for Respondent.

WILLIAMS, J.: Robert Lee Miller, III, a juvenile offender, appeals his sentence of fifty-five years' imprisonment for the murder of Willie Johnson (Victim). Miller argues the trial court erred by imposing what amounted to a de facto life sentence,

which he asserts requires a finding of irreparable corruption under *Aiken v. Byars*.[1] Miller also argues the trial court erred in admitting statements he made to officers during a custodial interrogation, contending he did not voluntarily and knowingly waive his *Miranda*[2] rights. We affirm.

FACTS/PROCEDURAL HISTORY

On June 17, 2014, fifteen-year-old Miller, Miller's older brother, and his brother's friend, Gabriel, broke into Victim's home in Allendale. After asking Victim if he had any sugar, Miller and his accomplices forced their way into his home. The boys knocked Victim to the ground, bound his hands behind his back, robbed him, and ransacked his home. Victim was beaten so badly that his dentures were scattered about the room. Then a plastic bag was placed over his head so he could not look at them. Victim later died in his home with his hands bound and the bag over his head. An expert who conducted Victim's autopsy testified his cause of death was asphyxia from the plastic bag wrapped around his head and stated blunt force trauma was a contributing factor.

On June 24, 2014, Chief Marvin Williams, of the Fairfax Police Department, questioned Miller as a suspect in an unrelated crime that occurred in Fairfax. Before questioning Miller, Chief Williams presented him with a *Miranda* rights acknowledgment and waiver form and asked Miller to read the form to him line-by-line. Chief Williams asked Miller if he understood each right after Miller read them aloud. Miller initialed after each individual right and signed his name at the bottom of the form. Soon after Chief Williams began questioning Miller, Miller stated he did not commit the Fairfax crime, and he thought Chief Williams wanted to question him about Victim's murder. According to Chief Williams, he asked Miller what he was talking about and Miller described his and his accomplices' participation in Victim's murder. Chief Williams and Miller were the only two people in the room during the confession, and Chief Williams did not write a report or summary of the confession, have Miller make a written statement, or record the confession in any manner. Chief Williams testified he did not offer Miller leniency during the interview, did not threaten him, and did not coerce him to confess.

After Chief Williams concluded his interview with Miller, Agents Richard Johnson and Natasha Merrell, both of the South Carolina State Law Enforcement Division

---

[1] 410 S.C. 534, 765 S.E.2d 572 (2014).
[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

(SLED), interrogated Miller about Victim's murder. The two agents recorded the interview on Agent Merrell's SLED cell phone. Neither of the agents re-Mirandized Miller before questioning him, and during the first portion of his interview, Miller was accompanied by Tiffany Sabb. Initially, Agent Johnson explained SLED's role as a state investigative agency and asked Miller about his relationship with Sabb. Miller stated Sabb was "like a mother to [him]."[3] Agent Johnson also asked Miller where his mother was, and Miller replied she was at home but he was comfortable speaking to SLED without her. Agent Johnson clarified Miller was in the eighth grade and that he could read and write by asking Miller to read a certificate that was in the room. Miller read the first few sentences but could not read the word "contributions" or the cursive portions on the certificate. Agent Johnson then asked Sabb to leave the room, and when she left, Miller expressed apprehension about talking with Agent Johnson, stating he was more comfortable speaking to Agent Merrell instead. Agent Johnson replied, "You don't like males? I intimidate you," and he exited the room after confirming that Miller was willing to talk to Agent Merrell and that Miller understood it was his decision to speak with her. Miller confirmed that he would talk to Agent Merrell.

When questioned by Agent Merrell, Miller denied any involvement in the murder, stating he was in Fairfax the entire week of the murder until Friday when a bus dropped him off in Allendale. Miller claimed his neighbor, the school bus driver, could confirm his alibi. Agent Merrell stated she was there to help Miller and asked him to be honest with her. She asked Miller if he got a ride from Allendale to Fairfax on the evening of the murder, and Miller explained that he did and that he was in Allendale that day for a school hearing. When asked how he got back to Fairfax that night, Miller did not answer the question.

Miller then told Agent Merrell how the situation was "crazy" and how acquaintances told him that they heard he kicked Victim's door in and that he held Victim while the other boys beat him. Agent Merrell asked which story was true, and Miller again denied involvement in Victim's murder. Agent Merrell asked again about Miller's transportation from Allendale to Fairfax on the day of the murder and whether he could remember what he did between the school hearing and Wednesday morning. Again, Miller failed to answer the question. Agent

---

[3] Sabb is the mother of Johnathan Capers, one of Miller's friends from Allendale. Miller spent a great amount of time with Capers and Sabb, often living with them for weeks at a time. Both Capers and Sabb gave incriminating statements against Miller before he was interrogated, and both testified at Miller's trial that he confessed to them he murdered Victim.

Merrell then asked Miller about an encounter he had with Allendale police regarding Gabriel, his accomplice. Miller denied knowing Gabriel, but explained the police wanted to talk to his brother about Gabriel. Agent Merrell then existed the room and returned with Agent Johnson.

Agent Johnson immediately explained that he and Agent Merrell were trying to help Miller but also told Miller he was going to jail. Miller asked if he was going to jail that day, and Agent Johnson replied, "Yea, and there ain't nothing we can do to stop it." Miller replied, "I know." The colloquy that proceeded is as follows:

> Agent Johnson: Here's what we want to do is to try and help you on the far end. Why? When you're young . . . truth, you're the very first one we're talking to and that's why you getting that break. Cause in South Carolina, the hands of one is the hands of all. It doesn't matter which one of you did what, you were there. That makes you equal. [Boy], if we charge you with assault and battery, everybody else is going to get charged with assault and battery.
>
> Miller: Yes, sir. . . . If they charge me with murder . . . everybody is going to get charged with murder.
>
> . . . .
>
> Agent Johnson: I'm lazy. I'm ready to go home. Alright? There's this thing that you don't know. That while you were here, we already got what we need. . . .
>
> Miller: Can I ask you something?
>
> Agent Johnson: Yes, sir.
>
> Miller: How many years I got?
>
> Agent Johnson: I don't know. I don't know. You know what an a** is? You know what an a** of time is? That's a lot of time. You ever hear the prosecutor say an a** of time?

Miller: So what can I do to get me out of this situation?

Agent Johnson: You ain't getting out of this, but what you can do is minimize the kind of time. Look at it this way, alright, I don't know what kind of time you'll get. I can't tell you that. I'm not the judge or the lawyer. But here's what I'm getting at, I'm just throwing some hypothetical numbers out. Let's say if you were looking at 30 years and because you talked, let's say you tell the truth and come clean. . . . You come clean and you lay it out on the table, and you cooperate? What we do is, is let the prosecutor know.

. . . .

Miller: Alright, alright. I'll tell you. I'll be honest with you. I ain't really wanting to do this. I ain't really wanting to do it. Tell you the truth, I was sitting on the porch . . . and he came by me. He came at me and told me, he told me about the situation.

Agent Johnson: Who's he?

Miller: Gabriel! The one, the one, the one it's the, it's the main boy! The main one. He's the main one.

Agent Johnson: Okay.

Miller: I ain't want to do none of this man. All I wanted to do was go to Fairfax cause I ain't want to stay in Allendale.

Agent Johnson: Okay.

Miller: I knocked on the door and I opened it and . . . after that and tied him down. . . .

. . . .

Agent Johnson: Alright, so you say Gabriel tie[d] him down?

Miller: I say . . .

Agent Johnson: No, no that's the wrong, that's the wrong answer, wrong.

Miller: No . . .

Agent Johnson: Rob, look at me [boy], look at me, look at me Rob . . . s*** happens. . . . You said you didn't wanna be there and from what we was told it wasn't supposed to go down like that. Y'all was just doing a lick.[4] S*** happens. Now, the thing to do is let's see how we can minimize it. I told you . . .

Miller: I don 't . . .

Agent Johnson: I told you up front . . .

Miller: I don't . . . but listen . . .

Agent Johnson: (talking over each other) going to jail. . . .

Miller: I don't really care . . . minimize or not. I'm still getting locked up. Ain't nothing changed about that.

Agent Johnson: Yes, it is.

Miller: No, I'm still getting locked up[,] ain't nothing going to change about that. What's changed about it, tell me one thing that's changed about it?

Agent Johnson: The length of time that you going to be looking at.

---

[4] To "hit a lick" or "do a lick" means to get a lot of money quickly, usually by illegal means such as robbing someone.

Miller: It still don't mean nothing, I'm still going to be doing the time. I'm still doing the time man it's . . . just please stop, just please stop with me. Please, just please.

Agent Johnson: Well [boy], like I told you from the beginning . . .

Miller: I said . . . I been honest with you.

Agent Johnson: Listen, it's like I told you from the beginning, it's up to you to talk to us. You don't have to talk to us. If you wanna stop at any time we can stop. It's up to you. What do you wanna do?

Miller: I just wanna go home man.

Agent Johnson: Huh?

Miller: I just wanna go home man.

Agent Johnson: Well you ain't going home, but what you wanna do?

Miller: I'm being honest with y'all. I told you.

Agent Johnson: I understand that man.

Miller: I told you what I do . . .

Agent Johnson: No, the only thing you told us was that you didn't want to be there and Gabriel planned . . . Gabriel did this, Gabriel did that . . . and . . . but you didn't tell us details.

Miller: I was just . . . told you. . . . I knocked on the door, I went in and I hit him. And I hold him down. . . . Well he, he (inaudible) wanted to go searching the house. I know he (inaudible) . . . . He was the main thing

searching. (inaudible) I was just posted up the whole time.

Agent Johnson: Yep. That's right. . . . That's right. You stayed in the living room with him, with, with the old man.

Miller: Watching him.

Agent Johnson: Watching him, that's right.

Miller: They kept coming back.

Agent Johnson: Who put the bag over his head?

Miller: I did.

Agent Johnson: Thank you. You did. Alright, who took the wallet out of his, umm, pocket?

Miller: I did.

Agent Johnson: And you know your prints and stuff will be on that wallet.[5]

. . . .

Agent Johnson: Alright, so . . . . All we, all we need is a clear picture from you, so when I talk with the Solicitor, "this is what Robert told us. He's hurt. I can tell he is hurt about it. Whatever you can do to help him, you help him." But like I told you from the beginning, ain't nothing we can do about stopping jail time.

Miller: No[,] that's what I said, just lock me up. I, I only got two choices in my life right now, either go to jail or

---

[5] During cross-examination, Agent Merrell admitted Agent Johnson lied to Miller regarding his finger-prints and none of Miller's fingerprints were found on the Victim's wallet.

> die. . . . I just wanna, I just wanna go, I just wanna leave here. I'm done talking. Whenever y'all ready to lock me up, I'm ready. Let's go, please. I'm ready.
>
> Agent Johnson: Okay, alright. You, you through talking with us?
>
> Miller: I already told you. I told y'all the details of what happened. I admitted I did it.
>
> Agent Johnson: I just wanted to make sure, I (inaudible) . . . you ain't wanna talk no more.
>
> Miller: I ain't wanna talk no more. I say what I have to say, I [am] just ready to go man.

The family court waived jurisdiction to try Miller as a minor pursuant to *Kent v. United States*,[6] finding Miller could not be rehabilitated in the state's juvenile justice system. An Allendale County grand jury indicted Miller for murder, and the case proceeded to trial. The trial court held a pretrial *Jackson v. Denno*[7] hearing to determine the admissibility of Miller's confession based upon its voluntariness. During the hearing, Chief Williams and Agents Johnson and Merrell testified for the State. Kimberly Jordan, a Fourteenth Circuit juvenile public defender, testified regarding Miller's pre-waiver evaluation[8] and his ability to understand his *Miranda* rights. According to Jordan, Miller did not understand the right to remain silent or how an attorney would be helpful to him.

After reviewing the interrogation transcript, the trial court determined based upon the totality of the circumstances that Miller's statements were voluntary and his confession was admissible at trial. The trial court relied upon the following facts in making its decision: (1) Miller received *Miranda* warnings before the interrogations, and the length and location of the interrogations was reasonable; (2) although Miller likely had limited learning abilities, he was street smart and attempted to create an alibi; (3) Miller was in good physical condition with no record of mental health issues, and his criminal record was fairly limited; (4)

---

[6] 383 U.S. 541 (1966).
[7] 378 U.S. 368 (1964).
[8] The family court conducts a pre-waiver evaluation when determining if it will waive its jurisdiction to try a juvenile for his or her crimes.

neither Chief Williams nor the SLED agents made misrepresentations, promises of leniency, or threats of violence against Miller; and (5) Miller's isolation from a parent or friend was minor, considering Agent Johnson asked Miller if he was willing to talk to them after Sabb left the room and he responded "yes."

The jury unanimously found Miller guilty of murder, and the trial court held an individualized sentencing hearing as required by *Byars*. During the sentencing hearing, Miller argued that *Miller v. Alabama*,[9] established a presumption that all juveniles are not irreparably corrupt. Miller contended the State must prove he was irreparably corrupt, and the court must find him irreparably corrupt before moving into the *Byars* factors. The trial court ruled *Byars* does not require a finding of irreparable corruption before sentencing a juvenile to life without the possibility of parole (LWOP) and then proceeded to consider the *Byars* factors. The court considered Miller's age at the time of the murder and the peer pressure from his brother and Gabriel. The court also considered Miller's poor home environment and minimal parental guidance in his life. The court also gave weight to the brutality of the crime, particularly Victim's dentures being scattered about the room, the plastic bag placed over Victim's head, and the evidence showing Miller watched Victim's breath move the plastic bag as he left the house. In listing these particular facts, the trial court noted even someone of Miller's relatively low mental capacity should appreciate the severity of his actions.[10] The court concluded its analysis by allowing Miller to address his possibility for rehabilitation. Based on its findings, the trial court sentenced Miller to fifty-five years' imprisonment. This appeal followed.

ISSUES ON APPEAL

I. Is Miller's fifty-five-year prison sentence a de facto life sentence, and if so, must a trial court find Miller irreparably corrupt before imposing such a sentence?

II. Did the trial court err in finding Miller voluntarily waived his *Miranda* rights and in admitting Miller's confessions?

---

[9] 567 U.S. 460 (2012).

[10] At the time of the hearing, Miller was eighteen years old, and the last time his I.Q. was tested, he was in the fifth grade, and he scored in the seventy-sixth percentile. On most I.Q. tests, scoring in the ninetieth percentile is "average." The seventy-sixth is classified as "very low" or "well below average."

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); *see also State v. Finley*, 427 S.C. 419, 423, 831 S.E.2d 158, 160 (Ct. App. 2019) ("When considering whether a sentence violates the Eighth Amendment's prohibition on cruel and unusual punishments, the appellate court's standard of review extends only to the correction of errors of law."). Thus, the trial court's factual findings are binding on the appellate court unless clearly erroneous or controlled by an error of law. *See State v. Winkler*, 388 S.C. 574, 582–83, 698 S.E.2d 596, 601 (2010). On appeal, "the reviewing court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial [court's] ruling is supported by any evidence." *State v. Parker*, 391 S.C. 606, 611–12, 707 S.E.2d 799, 801 (2011) (quoting *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001)). This court will not disturb the trial court's admissibility determinations absent a prejudicial abuse of discretion. *State v. Adkins*, 353 S.C. 312, 326, 577 S.E.2d 460, 468 (Ct. App. 2003). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." *Id.*

LAW/ANALYSIS

I. De Facto Life Sentence

Miller argues his sentence of fifty-five years' imprisonment is a de facto life sentence and that a trial court must first find he was irreparably corrupt before sentencing him to life in prison. We disagree.

The Eighth Amendment to the United States Constitution states "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The prohibition against cruel and unusual punishment safeguards an individual's rights against excessive and disproportionate criminal sanctions, "highlighting the essential principle that courts must consider 'the human attributes even of those who have committed serious crimes.'" *Finley*, 427 S.C. at 424, 831 S.C. at 161 (quoting *Graham v. Florida*, 560 U.S. 48, 59 (2010)). "In this vein, sentences that are grossly out of proportion to the severity of the crime are unconstitutional." *Id.*

In *Roper v. Simmons*, the Supreme Court categorically banned all death sentences for juvenile offenders who were under the age of eighteen at the time they

committed their offense. 543 U.S. 551, 568 (2005). In *Graham*, the Supreme Court held the Eighth Amendment banned the "imposition of a life without parole sentence on a juvenile offender who did not commit homicide." 560 U.S. at 82. The Court noted, however, that states are "not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What [states] must do . . . is give [juveniles] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75. Finally, in *Miller*, the Supreme Court held "that mandatory life without parole for those under the age of [eighteen] at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 567 U.S. at 465. The Court explained its rationale by relying on *Graham* and *Roper*, stating "[those decisions] make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty" on a juvenile. *Id.* at 489. The Court reasoned that an individualized sentencing hearing, in which it considered the defendant's age, maturity, family life, circumstances surrounding the homicide offense, the offender's ability to aid in his defense, and the possibility of rehabilitation was required to sentence a juvenile to life in prison without the possibility of parole. *Id.* at 477–78.

Our supreme court interpreted *Miller* as creating a categorical ban on juvenile LWOP sentences "absent individualized considerations of youth" and establishing a duty for courts to "fully explore the impact of the defendant's juvenility on the sentence rendered." *Byars* at 540–41, 543, 765 S.E.2d at 575, 577. Therefore, pursuant to *Byars*, trial courts must hold individualized sentencing hearings and consider the mitigating factors of youth discussed in *Miller* before imposing an LWOP sentence on a juvenile. *See id.* at 544, 765 S.E.2d at 577.

In *State v. Slocumb*, our supreme court held "[n]either *Graham* nor the Eighth Amendment, as interpreted by the [United States] Supreme Court currently prohibits the imposition of aggregate sentences for multiple offenses amounting to a [de facto] life sentence on a juvenile nonhomicide offender." 426 S.C. 297, 314–15, 827 S.E.2d 148, 157. The court reasoned it was not appropriate, "as an inferior court, to extend federal constitutional protections under the Eighth Amendment beyond the boundaries the Supreme Court set in *Graham*." *Id.* at 306–07, 827 S.E.2d at 153.

Based on the aforementioned precedent, we find the trial court's term-of-years sentence does not violate the Eighth Amendment. As the court noted in *Slocumb*, we are bound by the constitutional protections implemented by the Supreme Court,

which has thus far declined to extend the holding of *Graham* and its progeny to term-of-year sentences.

As to Miller's argument that a trial court must specifically find a juvenile is "irreparably corrupt" before sentencing him or her to a life sentence, pursuant to *Jones v. Mississippi*, such a finding is not required under the Eighth Amendment. *See* 141 S. Ct. 1307, 1318–19 (2021) ("[T]he Court has unequivocally stated that a separate factual finding of [irreparable corruption] is not required before a [trial court] imposes a life-without-parole sentence on a murderer under 18."). Further, in a case involving a juvenile who commits homicide, "a [s]tate's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient." *Id.* at 1313. In South Carolina, *Byars* mandates only that trial courts hold an individualized sentencing hearing in which all the "mitigating hallmark features of youth are fully explored." 410 S.C. at 545, 765 S.E.2d at 578; *see also Miller*, 567 U.S. at 480 ("Although we do not foreclose a [trial court's] ability to [impose a sentence of life without parole] in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.").

We find the trial court did not err in its sentencing procedure. The record shows the trial court held an individualized sentencing hearing in which both the State and Miller were able to present arguments regarding Miller's juvenility. The trial court stated if Miller was an adult, it would impose a de jure sentence of life in prison; however, the trial court considered each factor listed in *Byars* and then sentenced Miller to a term-of-years prison sentence under South Carolina's discretionary sentencing scheme. Because neither the Eighth Amendment nor *Byars* requires the trial court to find Miller "irreparably corrupt" and the court considered the "mitigating hallmark features" of Miller's youth in an individualized sentencing hearing, we find it did not err in sentencing Miller. Accordingly, we affirm the trial court on this issue.

II. Admission of Incriminating Statements

Miller argues the trial court erred in admitting confessions he made during custodial interrogation. Specifically, Miller argues that due to his age, his low intellectual functioning, and the coercive pressure applied during the interrogation, his confessions were not given pursuant to a voluntary, knowing, and intelligent waiver of his *Miranda* rights. We disagree.

In *Jackson v. Denno*, the United States Supreme Court held, "It is now axiomatic 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." 378 U.S. at 376. "A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his [constitutional] rights." *State v. Miller*, 375 S.C. 370, 379, 652 S.E.2d 444, 449 (Ct. App. 2007). "If [an] interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda*, 384 U.S. at 475. Whether an individual voluntarily waived his *Miranda* rights requires a two-step inquiry:

> (1) the 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 (2) the waiver must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."

State v. Moses, 390 S.C. 502, 513, 702 S.E. 395, 401 (Ct. App. 2010) (quoting *Berghuis v. Thompkins*, 560 U.S. 370, 382–83 (2010)).

"In South Carolina, the test for determining whether a defendant's confession was given freely, knowingly, and voluntarily focuses upon whether the defendant's will was overborne by the totality of the circumstances surrounding the confession." *Id.*

> [T]he 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, 566, 647 S.E.2d 144, 164 (2007) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (citations omitted)). Regarding juveniles, our courts have also weighed (1) the juvenile's background, experience, conduct, maturity, physical condition, mental health, and isolation

from a parent and (2) any misrepresentations, threats of violence, exertion of improper influence, or promises made by law enforcement. *Moses*, 390 S.C. at 513–14, 702 S.E.2d at 401. "No one factor is determinative; each case requires careful scrutiny of all the surrounding circumstances." *In re Tracy B.*, 391 S.C. 51, 66, 704 S.E.2d 71, 79 (Ct. App. 2010).

We find the trial court did not err in finding Miller voluntarily waived his *Miranda* rights based on the totality of the circumstances. First, although Miller was fifteen years old when he murdered Victim and when he confessed, youth alone is insufficient to prove the involuntariness of a defendant's confession. *See Pittman*, 373 S.C. at 569, 647 S.E.2d at 166 (stating that when only evidence of a defendant's youth is presented, that alone is not probative of coercion); *accord Williams v. Peyton*, 404 F.2d 528, 530 (4th Cir. 1968) ("Youth by itself is not a ground for holding a confession inadmissible."). Further, our precedent clearly establishes that a juvenile is capable of voluntarily waiving his *Miranda* rights before incriminating himself. *See e.g.*, *Pittman*, 373 S.C. at 569–70, 647 S.E.2d at 166 (holding a twelve-year-old who was questioned alone by two officers voluntarily waived his rights before confessing to a double homicide); *State v. Boys*, 302 S.C. 545, 548, 397 S.E.2d 529, 531 (1990) (finding a seventeen-year-old voluntarily waived his rights after his mother told him he needed an attorney and to not speak to officers); *Moses*, 390 S.C. at 514–15, 702 S.E.2d at 401–02 (finding a seventeen-year-old special education student who could read and write on a third grade level voluntarily waived his rights); *In re Christopher W.*, 285 S.C. 329, 329–31, 329 S.E.2d 769, 769–70 (Ct. App. 1985) (holding an eleven-year-old voluntarily waived his rights even after the trial court expressed extreme displeasure with the coercive nature of his interrogation because the juvenile was "intelligent, quick, and articulate").

Second, although Miller had a low I.Q., the record indicates that he was streetwise and knew how to conduct himself in front of police officers. *See In re Williams*, 265 S.C. 295, 301, 217 S.E.2d 719, 722 (1975) ("Mental deficiency alone is not sufficient to render a confession involuntary but . . . it is a factor to be considered along with all of the other attendant facts and circumstances in determining the voluntariness of the confession."). The trial court relied on the fact that Miller gave an alibi several times when talking to Agent Merrell, and he knew several officers that he came into contact with during the investigation. The record also showed Miller was only one year behind in school. Chief Williams testified he Mirandized Miller before interrogating him, and Miller read him each right individually from a standard waiver form. Chief Williams stated he asked Miller if he understood his rights, and Miller responded affirmatively and initialed beside

each right. Miller also signed the written waiver form. *See State v. Smith*, 268 S.C. 349, 352–54, 234 S.E.2d 19, 20–21 (1977) ("The decisions are voluminous that the signing of a written waiver is usually sufficient [to constitute a voluntary waiver]."); *see also Moses*, 390 S.C. at 514–15, 702 S.E.2d at 401–02 (holding a juvenile who could read and write on a third grade level voluntarily and knowingly waived his rights because the officer read the juvenile's rights verbatim from a waiver of rights form and asked if he understood the rights).

Third, although Miller was questioned twice by three different officers and was not re-Mirandized before his second interrogation, the length of both interrogations was not prolonged, and the amount of time between the first and second interrogation was minimal. *In re Tracy B.*, 391 S.C. at 67–68, 704 S.E.2d at 79 (finding that even though a juvenile did not receive fresh *Miranda* rights before interrogation recommenced, he voluntarily waived those rights because the interrogating officer asked him if he had already received *Miranda* warnings, the juvenile responded that he had, and less than two hours had passed since the juvenile was initially Mirandized). The record shows that Miller arrived at the police station at approximately 4:00 P.M., and Agents Johnson and Merrell concluded their interrogation around 7:00 P.M. Miller received *Miranda* warnings before his initial interrogation by Chief Williams, and even though Agents Johnson and Merrell did not re-Mirandize Miller before interrogating him, Agent Johnson repeatedly advised him that it was his choice to speak with them and that he could end the interrogation at any time.

Fourth, the interrogation tactics Agents Johnson and Merrell used against Miller were not forceful enough to overbear Miller's will in light of the surrounding circumstances. *See State v. Register*, 323 S.C. 471, 479, 476 S.E.2d 153, 158 (1996) ("[A] defendant's will is not overborne merely because he is led to believe that the government's knowledge of his guilt is greater than it actually is."); *id.* at 478, 476 S.E.2d at 158 (holding that a defendant's waiver of rights was voluntary even though officers isolated him and deceived him by telling him someone saw him with the victim the night of the murder, his shoes and car tires matched impressions found at the murder scene, and that the officers had irrefutable DNA evidence establishing his guilt). Agent Johnson's statements that Miller's fingerprints would be on Victim's wallet and that the State had enough evidence against Miller to prosecute him, when combined with all the other facts, were insufficient to overbear Miller's will. Agent Johnson's interrogation of Miller after Miller expressed an apprehension about talking to him nor his statements about minimizing Miller's prison sentence were sufficient to overbear Miller's will. The agents did not coerce Miller or threaten him with adverse consequences or physical

punishment if he did not cooperate during his interrogation, and they did not make him any specific promises of leniency. *See Pittman*, 373 S.C. at 568, 647 S.E.2d at 165 ("Although courts have given confessions by juveniles special scrutiny, courts generally do not find a juvenile's confession involuntary whe[n] there is no evidence of extended, intimidating questioning or some other form of coercion.").

Finally, we find the officers interrogating Miller without a parent present was not sufficient to render his waiver of rights involuntary. *See In re Christopher W.*, 285 S.C. at 330, 329 S.E.2d at 770 ("The South Carolina Supreme Court has rejected the position a minor's inculpatory statement obtained in the absence of counsel, *parent*, or other friendly adult is [per se] inadmissible." (emphasis added)); *see also Moses*, 390 S.C. at 515, 702 S.E.2d at 402 (finding a juvenile's mother's request to be present during her child's interrogation was not dispositive of the juvenile's waiver). Miller stated during his interrogation that he was comfortable talking to agent Merrell without both his mother and Sabb present.

Based on the foregoing, we find the trial court did not abuse its discretion in finding Miller voluntarily waived his rights. *See Adkins*, 353 S.C. at 326, 577 S.E.2d at 468 (stating that appellate courts do not disturb a trial court's admissibility determinations absent a finding of prejudicial abuse of discretion).

CONCLUSION

Accordingly, Miller's sentence and conviction is

AFFIRMED.

HUFF and GEATHERS, JJ., concur.

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.

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

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

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Allendale County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2017-001347

THE STATE,

Respondent,

vs.

ROBERT LEE MILLER, III,

Appellant.

RETURN TO APPELLANT'S PETITION FOR REHEARING

On June 16, 2021, this Court issued a published opinion in which it unanimously affirmed Appellant Robert Lee Miller, III's conviction for murder, which stemmed from the brutal killing of an eighty-six-year-old man during the course of a violent home invasion, along with the fifty-five-year sentence that accompanied it. State v. Miller, Op. No. 5824 (S.C. Ct. App. filed June 16, 2021). In affirming Miller's conviction, this Court properly followed the applicable standard of review and correctly concluded the trial judge's ruling regarding the voluntariness of Appellant's statements to law enforcement did not constitute an abuse of discretion under the circumstances involved. Likewise, in affirming Miller's sentence, this Court correctly found the trial judge did not err when imposing Appellant's sentence based on the fact he conducted an individualized sentencing hearing and considered the appropriate factors before sentencing Appellant to a term of years for his brutal crime.

Even though this Court accurately analyzed the issues raised in Miller's case and correctly affirmed, Miller has now submitted a petition for rehearing solely challenging this Court's ruling on the admissibility of his statements to law enforcement. Through that petition, Miller has largely repeated the arguments contained in his appellate brief in a highly-similar manner to the manner in which they were originally presented and reasserts his position the totality of the circumstances—based on his own personal view of how those circumstances should be considered and weighed—established his statements to law enforcement were not, in fact, voluntary and admissible. In addition to that, Miller now also claims this Court purportedly failed to appropriately consider the totality of the circumstances surrounding his statements to law enforcement because it allegedly evaluated the circumstances singularly instead of collectively.

Contrary to what Miller currently claims, this Court did *not* fail to appropriately consider the circumstances surrounding Miller's statements collectively and in totality. Instead, this Court: (1) demonstrated its understanding of the appropriate test for voluntariness determinations by explicitly stating the proper test involves an examination of the totality of the circumstances; (2) thoroughly recounted all the facts and circumstances that surrounded Appellant's statements to law enforcement; and (3) listed the specific facts and circumstances the trial judge identified as being most significant to his ultimate voluntariness finding. Accordingly, as this Court's analysis clearly demonstrates, this Court viewed the "surrounding circumstances" in totality and evaluated them in combination "with all the other facts" before determining—"[b]ased on the foregoing" circumstances it had identified and discussed—the trial judge did not abuse his discretion by finding Miller's statements to be voluntary, and, therefore, this Court conducted a proper totality of the circumstances analysis.

Meanwhile, in challenging the correctness of this Court's affirmance of the trial judge's voluntariness determination through his petition for rehearing, Miller maintains a proper analysis of the totality of circumstances purportedly "*weighs* in favor" of a finding his statements to law enforcement were involuntary before identifying various facts and circumstances he believes support a conclusion his will was overborne. (emphasis added). Thus, in essence, Miller appears to seek for this Court to conduct de novo review of the circumstances involved in his case, weigh the factors he believes warrant a finding of involuntariness heavily in his favor, and ignore or assign little weight to the factors the trial judge found supported a finding of voluntariness. Significantly though, if this Court had conducted the analysis Miller seems to suggest it should have conducted, that analysis would have exceeded the scope of the deferential standard of review applicable to voluntariness rulings and, as a result, would itself have been improper. See, e.g., State v. Makins, Op. No. 28039 (S.C. Sup. Ct. filed June 23, 2021) (Shearouse Adv. Sh. No. 21 at 23, 28) (stressing the "critical" nature of the standard of review applicable to an issue being challenged on appeal).

Looking to the pertinent standard of review, an appellate court reviewing a trial judge's ruling concerning the voluntariness of a statement "does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by *any evidence*." State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) (emphasis added). Thus, pursuant to that highly-deferential standard of review, the appellate court is *not* tasked with reviewing the record to determine whether it believes any evidence existed that could have supported a contrary conclusion from the one reached by the trial judge or that would have lead it to rule differently if it—and not the trial judge—had been the one tasked with deciding the voluntariness question in the first instance. See State v. Breeze, 379

S.C. 538, 543, 665 S.E.2d 247, 250 (Ct. App. 2008) ("Our role when reviewing a trial court's ruling concerning the admissibility of a statement upon proof of its voluntariness is not to reevaluate the facts based on our view of the preponderance of the evidence."). Instead, the appellate court must simply review the record to determine whether any evidence supported the factual conclusion reached by the trial judge and may *only* reverse when the trial judge's ruling is lacking in evidentiary support or otherwise manifestly erroneous. Id.; see State v. Reed, 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998) ("The trial judge's determination of the voluntariness will not be disturbed unless so manifestly erroneous as to show an abuse of discretion amounting to an error of law.").

With that standard of review in mind, the trial judge was presented with evidence and testimony from which he could legitimately have found Miller's statements to law enforcement were knowingly, freely, voluntarily, and intelligently made following a valid waiver of his rights. Specifically, the evidence and testimony presented—which included testimony from Chief Williams, Agent Johnson, and Agent Merrell—established: (1) Miller was informed of his rights prior to being subjected to any interrogation and appeared to understand those rights; (2) Miller initialed and signed a waiver form; (3) Miller was expressly advised he was free to leave at the outset of interrogation; (4) Miller had a trusted adult present with him for some of the interrogation conducted; (5) Miller personally volunteered information about his victim's murder, including during the course of an interview that was not even being conducted in regard to that crime; (6) Miller did not appear to have any trouble communicating or understanding during the interviews and did not seem to be under the influence of any substances; (7) the conversation was relaxed for the most part and Miller even laughed at some points during it; (8) no force, threats, or promises were used to extract a statement from Miller; and (9) Miller was

savvy enough to attempt to manufacture an alibi for himself during the course of the interrogation, which reflected an understanding of the situation he was in. (R. pp. 30-35; p. 42; p. 45; pp. 48-53; pp. 59-60; pp. 62-63; pp. 446-453). Meanwhile, the trial judge was not presented with any testimony from Miller himself to support a conclusion he made the statements he made to law enforcement in anything other than a free, knowing, intelligent, and voluntary manner. Cf. Breeze, 379 S.C. at 545, 665 S.E.2d at 251 ("Conversely, Breeze did not contradict [the officer]'s testimony with respect to the issue of whether the statement was voluntary. . . . Faced with [the officer]'s undisputed testimony the trial court concluded the State had showed that Breeze voluntarily made the statement. Based on [the officer]'s testimony, we cannot conclude the trial court's ruling is unsupported by any evidence."). Accordingly, since there was evidence in the record supporting the trial judge's finding of voluntariness, the applicable standard of review *required* this Court to affirm the trial judge's ruling. See Saltz, 346 S.C. at 136, 551 S.E.2d at 252 (recognizing a trial judge's ruling in regard to the voluntariness of a statement will be affirmed on appeal when supported by *any* evidence); State v. Arrowood, 375 S.C. 359, 365, 652 S.E.2d 438, 441 (Ct. App. 2007) ("Factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion."); see also Berkemer v. McCarty, 468 U.S. 420, 433, n. 20 (1984) ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare.").

However, even if this Court's conclusion regarding the admissibility of Miller's statements to law enforcement was somehow erroneous, any error resulting from the admission of the statements in Miller's case nonetheless would have been harmless beyond a reasonable

doubt in light of the cumulative nature of those statements to Miller's other out-of-court statements coupled with the fact other overwhelming evidence of Miller's guilt was presented during trial, which included evidence establishing Miller's handprint was found on the wall of the elderly victim's home *in the victim's blood*. See State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008) ("Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained."); State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence."); cf. State v. Tench, 353 S.C. 531, 537, 579 S.E.2d 314, 317 (2003) ("Given the abundant evidence of Tench's guilt, we find any error in admission of the seized items clearly harmless beyond a reasonable doubt."); State v. Easler, 327 S.C. 121, 129, 489 S.E.2d 617, 621-622 (1997) ("[A]ny error in the failure to suppress his statements was harmless beyond a reasonable doubt. . . . The overwhelming evidence of Easler's guilt renders any Miranda violation harmless."), overruled on other grounds by State v. Greene, 423 S.C. 263, 814 S.E.2d 496 (2018); State v. White, 410 S.C. 56, 60, 762 S.E.2d 726, 728 (Ct. App. 2014) (finding any error in the trial judge's failure to suppress White's statement placing White at the scene of a murder as the product of impermissible "question first and warn later" questioning was harmless beyond a reasonable doubt because, "notwithstanding White's statement, cell phone evidence clearly placed [the victim] and White together at the time and place of the murder" and further finding any error to be harmless in light of the witness testimony linking White to the murder). Under such circumstances, there is no need for rehearing.

In light of all the foregoing reasons coupled with the arguments raised in both the State's appellate brief and during oral argument before this Court, this Court correctly affirmed Miller's

conviction and sentence. Therefore, no legitimate grounds exist warranting a grant of rehearing in Miller's case. Miller's petition for rehearing should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Attorney General

By: ______________________
Mark R. Farthing
S.C. Bar Number 76901

July 26, 2021

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Allendale County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2017-001347

THE STATE,

Respondent,

vs.

ROBERT LEE MILLER, III,

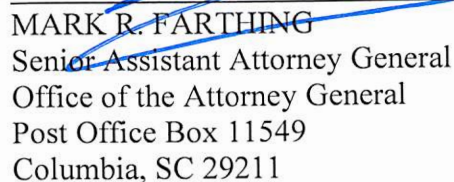
Appellant.

PROOF OF SERVICE

I, Mark R. Farthing, certify I have served the within Return to Appellant's Petition for Rehearing on Appellant by sending an electronic copy via email to the address listed in AIS for the following individual:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify all parties required by Rule to be served have been served.
This 26th day of July, 2021.



MARK R. FARTHING
Senior Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

The South Carolina Court of Appeals

The State, Respondent,

v.

Robert Lee Miller, III, Appellant.

Appellate Case No. 2017-001347

ORDER

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

Thomas C. Huff, J.

H. Bruce Williams, J.

John D. Geathers, J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Susan Barber Hackett, Esquire
Donald J. Zelenka, Esquire
Melody Jane Brown, Esquire
Sherrie Butterbaugh, Esquire

FILED
Aug 12 2021

W. Jeffrey Young, Esquire
Isaac McDuffie Stone, III, Esquire
Mark Reynolds Farthing, Esquire
Elaine Sabb