

No. 05-8656

**In the
Supreme Court of the United States**

HAKIM M. ABDUL-WASI,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA

Respondent.

**On Petition for a Writ of Certiorari
to the Supreme Court of Virginia**

**BRIEF IN OPPOSITION TO
THE PETITION FOR A WRIT OF CERTIORARI**

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QUESTION PRESENTED

Given that the federal constitutional issue was neither pressed nor passed upon below, that the state appellate procedural principle at issue is fully consistent with this Court's decisions, and that the constitutionality of the state appellate procedural principle will not have an impact on the ultimate suppression issue, should this Court consider the constitutionality of a state appellate procedural principle?

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BRIEF IN OPPOSITION

The Attorney General of the Commonwealth of Virginia, Robert F. McDonnell, pursuant to this Court's Order of February 21, 2006 directing that a response be filed, responds to the Petition for a Writ of Certiorari.¹

INTRODUCTION

Hakim M. Abdul-Wasi was charged with the first-degree murder of Vernae Hill. Abdul-Wasi confessed to the crime on two occasions. However, at trial he moved to suppress his two confessions to the police, arguing that (1) he had been in custody within the meaning of *Miranda v. Arizona*, 384 U.S. 436 (1966) but was not properly advised of his rights, and (2) his second statement was inadmissible under the Fifth Amendment due to alleged coercion during his earlier statement. The trial court denied the motion.

Thereafter, Abdul-Wasi testified at length in the criminal trial, in an attempt to show either that he had accidentally killed the victim during an altercation or, at worst, was guilty only of second-degree murder or voluntary manslaughter. Abdul-Wasi's tactical decision proved largely successful—the jury convicted him of voluntary manslaughter and imposed a nine-year sentence rather than a potential life sentence on the first-degree murder charge. On appeal, Abdul-Wasi challenged the trial court's refusal to suppress his two confessions. Virginia's intermediate appellate court—applying an established principle of state appellate procedure (“Virginia Waiver Principle”)—held that Abdul-Wasi had waived any challenge to the trial court's denial of his suppression motion by testifying at trial about the same matters that he originally had sought to exclude.

¹ On February 22, 2006, this Court extended the time for filing the response to April 21, 2006.

Abdul-Wasi now asks this Court to review the federal constitutionality of the Virginia Waiver Principle. However, Abdul-Wasi never asked the lower courts to rule on the federal constitutionality of the Virginia Waiver Principle. Rather, he simply attempted to explain why, as a matter of *state* law, the Virginia Waiver Principle should not apply to him. Moreover, the Virginia Waiver Principle: (1) was well-settled at the time of Abdul-Wasi's trial and direct appeal; (2) accords with the general rule; and (3) did not deprive him of a fair appeal, particularly considering the substantial benefits he obtained by testifying at trial. Finally, Abdul-Wasi's failure to offer any merits arguments in support of his suppression claims, as well as their insubstantial nature, counsel against granting certiorari.

STATEMENT OF THE CASE

1. Background

a. Abdul-Wasi's Crimes

Abdul-Wasi lived with Vernae Hill, along with their two children and her two daughters from a prior relationship. Tr. I at 265-66.² Their relationship deteriorated, and Abdul-Wasi became suspicious that Ms. Hill was involved with other men, including Corey Wells. Tr. I at 267, 274-77.³

On Sunday, September 22, 2002, Ms. Hill drove a rental car, while Abdul-Wasi drove an Altima that was registered to Ms. Hill. Tr. I at 281-82. Instead of going to his place of

² In this brief, references to the suppression hearing of April 1, 2003 are designated as "Supp. Tr. at __," references to Abdul-Wasi's initial statement to the police are designated as "T.R. at __," and references to the trial transcript on July 10-11, 2003 are designated as "Tr. I [or II] at __."

³ Abdul-Wasi claims that he was married to Ms. Hill and Virginia disputes that claim. *App.* at 205-06. However, the precise legal status of their relationship is not relevant to this Petition.

employment to begin his night shift, Abdul-Wasi drove to Mr. Wells' residence in Norfolk where he came upon Ms. Hill and Mr. Wells outside the latter's home. Tr. I at 283-84. An argument then erupted between Abdul-Wasi and Ms. Hill, and he followed as she drove away in the rental vehicle to a parking lot where the argument continued. Tr. I at 285-88. Finally, Abdul-Wasi drove to work. Tr. I at 289.

Late on the night of September 22, Ms. Hill swore out a warrant against Abdul-Wasi for the unauthorized use of her car—the Altima. Tr. I at 130. Hampton Police Officer Kathleen Conkle checked several times during the evening to see if the vehicle had been returned to Ms. Hill's home. Tr. I at 119. At about 4:30 a.m., Officer Conkle came upon Abdul-Wasi, who was "soaked in sweat" even though it was only about 60 degrees at the time. Tr. I at 120. Officer Conkle then arrested Abdul-Wasi on the unauthorized use charge; a search of his person disclosed Ms. Hill's driver's license and credit card. Tr. I at 122. The police took Abdul-Wasi to the police station where he was released after about forty-five minutes. Tr. I at 302. Abdul-Wasi then returned home. Tr. I at 303.

On the morning of September 23, 2002, Hampton Police Officer Michael Vandenheade was dispatched to the rental vehicle where he found Ms. Hill's body. Tr. I at 110-11. A medic arrived at the scene and confirmed that Ms. Hill was dead. Tr. I at 116. Officer Vandenheade was dispatched to Abdul-Wasi's home and was told to speak with him and place him in "investigative detention." Tr. I at 114, 128. Officer Vandenheade arrived at Abdul-Wasi's home at about 8:00 a.m. and handcuffed him as part of the investigative detention. Supp. Tr. at 6-7, 20. Detective Kimberly Brighton then took charge of the scene. Tr. I at 117, 169-170.

At Detective Brighton's direction, Abdul-Wasi's handcuffs were removed. Supp. Tr. at 22; Tr. I at 170. Detective Brighton asked "if he wouldn't mind coming down to the police

department to speak to me on a consensual basis so we could determine the whereabouts of Ms. Hill.” Tr. I at 170. Abdul-Wasi agreed to do so and agreed to ride there in a police car. Supp. Tr. at 22. Abdul-Wasi acknowledged to Detective Brighton “that he didn’t have a problem riding and he asked me how he was going to get home afterwards and I told him at the completion that I will give him a ride home.” Tr. I at 170.

b. Abdul-Wasi’s First Confession

Upon his arrival at the police department at about 9:00 a.m., Abdul-Wasi went to the rear interview room, which was about ten feet by ten feet and had a rectangular window. Supp. Tr. at 7, 30, 45-46. Abdul-Wasi was told that he was not under arrest and was free to go if he wished. Supp. Tr. at 8, 23. He was offered food and drink. Supp. Tr. at 24. The officer who had given Abdul-Wasi a ride to the police department sat outside the room. Another officer explained to him that they “would give him a ride back when we were finished and he [*i.e.*, the officer] was waiting for a decision about whether to transport him, give him a ride back.” Supp. Tr. at 51-52.

Hampton Detective Steven Hatfield joined Abdul-Wasi at about 12:15 p.m. in the interview room. Supp. Tr. at 43. When Detective Hatfield first saw Abdul-Wasi, “he was sleeping. And several times I would check on him, because we were doing paperwork and running about and I’d go back to check on him to [be] sure he was okay and he was found sleeping.” Supp. Tr. at 57. Detective Hatfield also told him he was free to go if he wanted to leave. Supp. Tr. at 25.

At 4:17 p.m., Detective Hatfield and Brighton began to interview Abdul-Wasi. Supp. Tr. at 49; Tr. I at 172-73, 231. Detective Brighton remained in the room for “a couple of hours”;

later Detective Hatfield and petitioner were joined in the room by Lieutenant Randy Seals. Tr. I. at 173.

At the outset of the interview, Detective Hatfield told Abdul-Wasi “that he was not under arrest and was free to go. And he stated he was there on his own free will.” Supp. Tr. at 50. The police interviewed Abdul-Wasi over the course of six hours, but “it wasn’t a continuous period. We were in and out of the investigation room and there [were] breaks and he was also sleeping on the desk.” Supp. Tr. at 48, 56; Tr. I at 231-32. Detective Hatfield offered Abdul-Wasi refreshments during the interview. Supp. Tr. at 50. At no point during the interview did Detective Hatfield prevent Abdul-Wasi from going to the bathroom or using the telephone, and he never made any effort to get up and walk out of the room even though “the door was left open...quite a bit.” Supp. Tr. at 50-51, 57. Likewise, Detective Hatfield and the other officers made no effort to block the doorway of the room. Supp. Tr. at 26, 29-30, 51.

The interview was recorded and transcribed. T.R. at 1-105. The transcript reflects that shortly after 6:45 p.m. Abdul-Wasi, who had been questioned regarding the events leading up to Ms. Hill’s disappearance and his knowledge of her whereabouts, stated that he had not “been charged with doing anything. You know, I’m here under my own free will.” T.R. at 61. Later, when Abdul-Wasi asked whether, if he decided not to say anything more until the next morning, he would be able to leave, Detective Hatfield replied, “I told you you’re not under arrest. Okay. But I’m begging you to do what’s right, to make the choice, to lay it out in the open so that we can see it.” T.R. at 72. After Lieutenant Seals came into the interview room, he said, “Why don’t we get you something to eat....You need something to eat.” T.R. at 76, 83.

At the end of the interview Abdul-Wasi admitted that in the early morning hours of September 23, 2002 he had gotten into an altercation with Ms. Hill at their home, during which

he put his “arms around her neck,...and she couldn’t move.” T.R. at 104. Then, Abdul-Wasi had carried her body to the rental car. T.R. at 104-05. At that point, Detective Hatfield regarded the interview as having “changed from interview to custodial” and the questioning ended. Supp. Tr at 54.

c. Abdul-Wasi’s Second Confession

Abdul-Wasi then took a break of about twenty minutes. Supp. Tr. at 53. At about 10:50 p.m. he was given his *Miranda* rights, and he agreed to speak with Detective Hatfield. Supp. Tr. at 49, 53. Detective Hatfield had no doubt that he understood his rights. Supp. Tr. at 53. At the suppression hearing, Detective Hatfield testified that Abdul-Wasi was cooperative and “seem to be relieved. Very relieved and willing to go through it.” Supp. Tr. at 54.

Abdul-Wasi then gave a statement that ended at 11:44 p.m. Tr. I at 230. Abdul-Wasi testified at the suppression hearing that he believed “once I gave them my statement, that I was going to be able to leave.” Supp. Tr. at 18. During the interrogation Abdul-Wasi admitted that he had returned home from work at about 2:45 a.m. on September 23, 2002. Tr. I at 182. Abdul-Wasi then confronted Ms. Hill about her affair with Mr. Wells, and she seemed “nonchalant about it.” Tr. I at 183-84. Their argument escalated to the point that Abdul-Wasi put his arms around Ms. Hill’s neck in a “headlock.” Tr. I at 188. Abdul-Wasi conceded that it was “possible” a telephone cord “may have been wrapped around her neck” as the two struggled. Tr. I at 224.

Abdul-Wasi put Ms. Hill’s body in the rental car. Tr. I at 192. After he had driven a short distance, he saw that she was “lifeless” and realized that Hill was dead. Tr. I at 193-94. Consequently, he “panicked,” drove the car to a Hampton neighborhood, left Hill in it, and ran from the scene. Tr. I at 194-96.

During his statement Abdul-Wasi admitted that he believed his placing his arms around Hill's neck had caused her death. Tr. I at 209. As Abdul-Wasi described it: "I choked her basically." Tr. I at 228.

2. Trial

a. Opening Statements

Prior to the introduction of evidence, the trial court denied Abdul-Wasi's renewed motion to suppress his confession. Tr. I at 46-47. During his opening statement, defense counsel acknowledged that Abdul-Wasi was on trial for first-degree murder, "but that doesn't [mean] that it was a murder...." Tr. I at 58. His counsel discussed Abdul-Wasi's background, his purported marriage to Ms. Hill, arguments with her on the day of her death as well as her supposed acknowledgment to him shortly before she died of her ongoing affair with another man, and Abdul-Wasi's attempt to ward off her alleged assault, which resulted in her death. Tr. I at 58-61. His counsel stated that "a terrible accident" had occurred or, alternatively, that "maybe he went too far in that physical altercation that she began," but that in any instance Abdul-Wasi had not murdered Ms. Hill. Tr. I at 61. Defense counsel also discussed the questioning of Abdul-Wasi by the police and Abdul-Wasi's repeated expressions of concern about his children during the questioning. Tr. I at 63-64.

b. Virginia's Evidence

Virginia's case in chief included Abdul-Wasi's confession and the medical examiner's expert testimony that Ms. Hill had died from strangulation. Tr. I at 174-229, 256. Abdul-Wasi then moved to strike the murder count, arguing in part that the expert testimony regarding the cause of death was "fully consistent with the circumstances of someone applying the choke hold as Abdul-Wasi said in his statement that he did when he was trying to keep Mrs. Hill from striking him is consistent with an accident." Tr. I at 258-59. In the alternative, his counsel asserted that the prosecution's evidence proved nothing more than voluntary manslaughter or second-degree murder. Tr. I at 260. The trial court denied the motion on the grounds that there was sufficient evidence to prove that Abdul-Wasi had intentionally murdered Ms. Hill and had acted with premeditation. Tr. I at 262-63.

c. Abdul-Wasi's Defense

The sole defense witness was Abdul-Wasi, who testified at length. Tr. I at 265-335. During his testimony Abdul-Wasi spoke about the same matters that were the focus of the earlier suppression hearing. On direct examination, Abdul-Wasi discussed the deterioration of his alleged marriage, his actions in the hours prior to Ms. Hill's death, the circumstances that resulted in his choking Ms. Hill to death, his subsequent actions in putting her body in a car and abandoning it, his return home and arrest for unauthorized use of a vehicle, the first brief trip to the police station, the second trip to the police station in connection with Ms. Hill's disappearance, his colloquy with police officers at several points during his initial interview, and his eventual confession to the killing. Tr. I at 274-306.

Defense counsel questioned Abdul-Wasi on direct examination regarding his expressions of concern for his children during his interrogation by Detective Hatfield. Tr. I at 278-81. He also explained his statement to Hatfield that he was “tangled” with Hill, testifying that “from the struggle my arm being around her neck and moving around on the floor.” Tr. I at 297. Abdul-Wasi further testified that, contrary to the transcript of his confession, he did not recall putting on the flasher lights of his car and had not known that a tire was flat. Tr. I at 299-300. Abdul-Wasi affirmed the truthfulness of everything he had told the police and testified that he had not used some object other than his hands to strangle Ms. Hill, despite the “considerable pressure” reflected in the transcript to say that he had done so. Tr. I at 304-05.

After both sides rested, defense counsel renewed his motion to strike the evidence. Tr. I at 337-40. Again, defense counsel argued that the prosecution’s own evidence showed that Ms. Hill had died accidentally and that, at most, the jury should be instructed on second degree murder and manslaughter.

d. Closing Arguments

During closing argument, defense counsel, again referring to the transcript of the confession, argued that Abdul-Wasi had declined repeated suggestions by the police to admit he had used a telephone cord or some other object to strangle Ms. Hill and that the findings of the medical examiner who had conducted the autopsy confirmed his account. Tr. II at 43-46. Defense counsel also attacked the prosecutor’s contention that the transcript of the confession showed that Abdul-Wasi had lied about various matters. Defense counsel contended that any errors in Abdul-Wasi’s account to the police resulted from his own fatigue and the fact that “most of the time those words are being put in his mouth by the detective.” Tr. II at 48-49.

Defense counsel concluded by arguing that the jury either should acquit Abdul-Wasi, if it found that his wife's death had occurred accidentally, or convict him of voluntary manslaughter, if it concluded "the emotions of this struggle that they had rose out of control to the point where he was at fault or partially at fault..." Tr. II at 52-53.

e. Jury Verdict and Sentencing

The trial court instructed the jury on first-degree murder, second-degree murder, voluntary manslaughter, and not guilty. Tr. II at 63-64. Subsequently, the jury returned a verdict of voluntary manslaughter. Tr. II at 66. In the penalty phase of the trial, the prosecutor asked the jury to impose the maximum sentence of ten years in prison. Tr. II at 115. In his own closing argument, defense counsel stated that the fact the jury had convicted Abdul-Wasi only of voluntary manslaughter indicated that it had "made certain decisions about what happened that night and I think those decisions are correct." Tr. II at 118. Thereafter, the jury imposed a term of imprisonment of nine years. Tr. II at 122.

At the post-trial sentencing the trial judge noted that there had been "some substantial testimony about Mr. Abdul-Wasi in trial that was very positive...." Oct. 21, 2005, Tr. at 11. The trial court, however, concluded that the evidence fairly supported the jury's verdict and thus imposed a nine-year prison sentence. *Id.* at 11-12.

3. The Appeals

Abdul-Wasi appealed his conviction to the Court of Appeals of Virginia, arguing that the trial court had wrongly denied his motion to suppress his confession because he was in custody under *Miranda* and the police thus should have advised him of his *Miranda* rights prior to or

during his initial interview. Abdul-Wasi also asserted that his initial interview was so coercive as to render his subsequent interrogation involuntary, even though the latter was preceded by the reading of his *Miranda* rights.

During oral argument the question arose whether Abdul-Wasi waived his right to challenge the trial court's denial of his suppression motion, since he had testified at trial about the same matters that were the subject of his confession. The court then directed the parties to file supplemental briefs regarding the reviewability on appeal of petitioner's issues under state law cases such as *Hubbard v. Virginia*, 413 S.E.2d 875 (Va. 1992), and *Bynum v. Virginia*, 506 S.E.2d 30 (Va. 1998).

After the parties filed supplemental briefs on the waiver issue, the Court of Appeals, in an opinion dated May 3, 2005, affirmed Abdul-Wasi's conviction. The Court of Appeals ruled that Abdul-Wasi's trial testimony waived his challenge to the denial of his suppression motion. The court concluded that "during his case-in-chief [petitioner] testified at length concerning evidence of the same character as that to which he objected at the suppression hearing." The state court opinion did not address the constitutionality of Virginia's Waiver Principle. Petitioner did not seek rehearing *en banc* by the Court of Appeals.

Abdul-Wasi then petitioned for an appeal to the Supreme Court of Virginia. On October 12, 2005, that court refused the petition for appeal. This Petition followed.

REASONS FOR DENYING THE WRIT

Certiorari should be denied for three reasons. First, the federal constitutional claim was not raised in state court. Second, the Virginia Waiver Principle is consistent with this Court's

decisions. Third, resolution of the constitutionality of the Virginia Waiver Principle will not affect the suppression claims.

I. THE FEDERAL CONSTITUTIONAL CLAIM WAS NOT RAISED IN STATE COURT.

Because this Court sets as a court of review, not as a court of “first view,” *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2120 n.7 (2005), this Court generally does not address arguments that were neither pressed nor passed upon in the lower courts. *See Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) (“[W]e generally do not address arguments that were not the basis for the decision below.”). *See also Heath v. Alabama*, 474 U.S. 82, 87 (1985) (“Even if we were not jurisdictionally barred from considering claims not pressed or passed upon in the [lower courts], as has sometimes been stated, . . . the longstanding rule that this Court will not consider such claims creates, at the least, a weighty presumption against review.”). Indeed, this Court’s Rules require that the Petition explicitly identify the specific federal constitutional questions advanced in state courts and the way in which those courts passed on the federal questions “so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.” Sup. Ct. R. 14.1(g)(i).

Abdul-Wasi did not raise the federal constitutionality of Virginia’s Waiver Principle in the lower courts. The Virginia Waiver Principle that Abdul-Wasi challenges did not arise at trial since it is a rule of appellate, not trial court, procedure. In response to the order of the Court of Appeals of Virginia directing the parties to brief the reviewability of petitioner’s Fifth Amendment claims, Abdul-Wasi framed the issue under *Hubbard* and *Bynum* “as whether [his] testimony at trial about the circumstances of his confession acted as a waiver [of] his objection to

the trial Court's refusal to impress his confession...." *Memo* at 1. Thereafter Abdul-Wasi mostly discussed, in state law terms, the potential application of Virginia's Waiver Principle to this case and his assertion that his trial testimony was rebuttal evidence admissible under state law, which did not waive his appellate claims. *Memo.* at 7.

After stating that the authorities recited in the memorandum of law were "the Virginia cases on point on this issue," Abdul-Wasi merely observed that "there are also several federal cases that should be considered," and that he would "first draw this Court's attention to *Lee v. Mississippi*, 332 U.S. 742 (1949)...." *Memo.* at 7. Apart from briefly quoting *Lee* as well as a Sixth Circuit decision, *Kordenbrock v. Scroggy*, 919 F.2d 1091 (6th Cir. 1991), the sole case that Abdul-Wasi mentioned was this Court's decision in *Dickerson v. United States*, 530 U.S. 428 (2000). *Memo.* at 8-9. Twice, Abdul-Wasi asserted that, insofar as the state law decisions at issue might support the conclusion that he had waived his Fifth Amendment claims by testifying at trial, those claims were overruled by *Dickerson*. *Memo.* at 8-9.

Thus, Abdul-Wasi preserved one federal constitutional claim in the state appellate court, but it is not the one he advances in the present petition. In *Dickerson*, this Court held that *Miranda* is constitutionally based and thus may not be overruled by an Act of Congress and that this Court would not overrule *Miranda*. 530 U.S. at 432, 444. *Miranda* did not address the different procedural claim advanced by Abdul-Wasi. Abdul-Wasi correctly acknowledges that the state courts did not reach the "custody" and "coercion" claims he advanced on direct appeal after determining he had waived them. *Pet.* at 4. Because the state court's opinion did not represent a rejection of *Miranda*, it raised no issue under *Dickerson*. Further, Abdul-Wasi's fleeting references to *Lee* and *Kordenbrock* did not fairly apprise the state court that he believed those decisions invalidated the Virginia Waiver Principle. In this regard, merely citing "book and

verse on the federal constitution” does not afford a state court “a fair opportunity” to consider the defendant’s federal constitutional claim. *Picard v. Connor*, 404 U.S. 270, 275 (1971). *See also Duncan v. Henry*, 513 U.S. 364 (1995) (per curiam); *Anderson v. Harless*, 459 U.S. 4 (1982) .

Significantly, the state appellate court’s opinion discussed only the applicability of Virginia’s Waiver Principle to this case, not its constitutional validity. This fact suggests that Abdul-Wasi did not fairly apprise the state court of any claim regarding the federal constitutionality of the Virginia Waiver Principle. Indeed, in both *Anderson*, 459 U.S. at 6-7, and *Duncan*, 513 U.S. at 366, this Court relied upon the fact that the state appellate court had analyzed the particular claim at issue in state law terms to hold that the petitioner could not satisfy the “fair presentation” test. If Abdul-Wasi believed the state appellate court had wrongly disregarded a federal constitutional claim in his memorandum of law, then he should have filed a petition for rehearing. Abdul-Wasi, however, did not do so. *See Gray v. Netherland*, 99 F.3d 158, 166 (4th Cir. 1996) (If Court of Appeals “mistakenly overlooked” federal constitutional claim supposedly raised in initial habeas appeal, “it is difficult to understand why Gray filed to raise this as a ground for granting his Petition for Rehearing.”).

Regardless of whether Abdul-Wasi’s memorandum of law in the intermediate appellate court in Virginia preserved his constitutional challenge to the Virginia Waiver Principle, his failure to raise the issue in his subsequent appeal to the Supreme Court of Virginia means the matter was not considered by Virginia’s highest court. Abdul-Wasi assigned as error: “(1) [t]he Trial Court erred in refusing to suppress Appellant’s confession...; (2) [t]he Court of Appeals of Virginia erred in ruling that Appellant waived his issue as to the suppression of his confession by testifying at trial as to circumstances of his confession.” *App.* at 2. This second assignment of error merely attacked the intermediate appellate court’s application of the state procedural rule to

this case, not the constitutionality of the Virginia Waiver Principle. The argument portion of Abdul-Wasi's petition for appeal then repeated, virtually verbatim, his argument in the Court of Appeals.

Regardless of the nature of the arguments Abdul-Wasi advanced in his petition for appeal to the Supreme Court of Virginia, they could not expand the scope of his claims beyond his assignments of error. The purpose of an assignment of error in Virginia "is to point out the errors with reasonable certainty in order to direct [the appellate] court and opposing counsel to the points on which appellant *intends to ask* a reversal of the judgment, and to limit *discussion to these points.*" *Yeatts v. Murray*, 455 S.E.2d 18, 21 (Va. 1995) (emphasis added). Thus, in *Hamilton Development Co. v. Broad Rock Club*, 445 S.E.2d 140 (Va. 1994), the Supreme Court of Virginia, emphasizing that "[t]he language of an assignment of error may not be changed," restricted its review of the appellant's claim to the argument he had preserved at trial and that was fairly encompassed in the assignment of error. *Hamilton Development*, 445 S.E.2d at 142-43. The state court refused to consider the "metamorphosis" of the assigned error, by which the appellant attempted to raise an issue not preserved at trial. *Id.*

II. THE VIRGINIA WAIVER PRINCIPLE IS CONSISTENT WITH THIS COURT'S DECISIONS.

Moreover, the Virginia Waiver Principle is consistent with this Court's previous decisions. Abdul-Wasi's reliance upon this Court's decision in *Lee*, 332 U.S. 742, is misplaced. In such decisions as *Ohler v. United States*, 529 U.S. 753 (2000), and *Luce v. United States*, 469 U.S. 38 (1984), this Court has recognized that a defendant at trial often is subject to difficult choices, which may significantly influence, for example, his decision regarding whether to

testify in his own behalf. However, that circumstance alone, does not implicate the defendant's federal constitutional rights. Particularly considering the significant role that Abdul-Wasi's exculpatory trial testimony played in his conviction only of voluntary manslaughter (rather than the initial charge of first-degree murder), fundamental fairness did not require the state appellate courts to reach the merits of Abdul-Wasi's suppression issues.

Indeed, this Court already has signaled its rejection of Abdul-Wasi's claims under closely analogous circumstances. In *Lee*, this Court held that the defendant had a due process right to argue on appeal that his confession had been coerced even though he had testified at trial that he had not made the confession. This Court reasoned that a conviction based on an involuntary confession "is no less void because the accused testified at some point in the proceeding that he had never in fact confessed, voluntarily or involuntarily. Testimony of that nature can hardly legalize a procedure which conflicts with the accepted principles of due process....[I]nconsistent testimony as to the confession should not and cannot preclude the accused from raising the due process issue in an appropriate manner." 332 U.S. at 745.

Thus, *Lee* held that a defendant is not precluded from raising an argument on direct appeal, particularly on so important matter as the validity of his confession, merely because it conflicted with an alternative argument at trial. This is entirely reasonable, considering the number of cases where a defendant asserts at trial that he did not confess to a crime but, if he did, he was so intoxicated as to invalidate his confession. There is no reason to preclude an appellate challenge to such a confession, and Virginia has no such bar.⁴

⁴ It is worth noting that the Supreme Court of Virginia has not disregarded this Court's ruling in *Lee*. See *Wilson v. Virginia*, 255 S.E.2d 464, 468 (Va. 1979).

Fundamental fairness, which underlies the federal constitutional due process guarantee, *see Darden v. Wainwright*, 477 U.S. 168, 178-183 (1986), was not undermined by the application of Virginia's Waiver Principle to Abdul-Wasi's claims. Regarding Abdul-Wasi's assertion that he was forced to choose "between presenting as complete a trial defense as possible and preserving an evidentiary issue for appeal," *Pet.* at 6, this Court has pointed out that the "criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *McKune v. Lile*, 536 U.S. 24, 41 (2002), quoting *McGautha v. California*, 402 U.S. 183, 213 (1971). Thus, in *Luce*, 469 U.S. at 43, this Court held that in order to raise and preserve for appellate review a claim that he was improperly impeached with a prior conviction, a defendant must testify at trial.

Ohler is particularly instructive regarding the fairness of Virginia's Waiver Principle generally and its application to this case in particular. In ruling on the prosecution's motions *in limine* seeking to introduce the defendant's prior felony conviction as character evidence and as impeachment evidence, the trial court denied the former motion but ruled that, if the defendant testified, her prior conviction could be admitted to impeach her. The defendant then testified at trial and admitted on direct examination that she had a prior drug possession conviction.

Ohler held that a defendant who preemptively introduces evidence of a prior conviction on direct examination may not on appeal challenge the admission of such evidence. 529 U.S. at 760. This Court's reasoning is highly relevant to Abdul-Wasi's claim. This Court noted the general rule that "a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted," and characterized the rule as "this well-established commonsense

principle....” 529 U.S. at 755-56. This Court also rejected the defendant’s argument that the application of the waiver rule to her was unfair, inasmuch as “it compels a defendant to forego the tactical advantage of preemptively introducing the conviction in order to appeal the *in limine* ruling.” 529 U.S. at 757. To the contrary, as this Court emphasized, “both the Government and the defendant in a criminal trial must make choices as the trial progresses....In our view, there is nothing ‘unfair,’ as petitioner puts it, about putting petitioner to her choice in accordance with the normal rules of trial.” 529 U.S. at 757, 759. And, the possibility remained that the trial court would change its mind after hearing the defendant’s testimony at trial. 527 U.S. at 758 n.3.

Similarly, *Ohler* rejected the defendant’s claim that application of the Virginia Waiver Principle to her appellate argument would unduly burden her right to testify. The Court acknowledged that the government’s right to cross-examine a defendant who chooses to testify and to impeach by way of a prior conviction “may deter a defendant from taking the stand. [However,] ‘it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify.’” 529 U.S. at 759-60.⁵

Thus, the application of Virginia’s Waiver Principle to Abdul-Wasi’s appeal accorded with the general “commonsense principle” of law and did not render his trial or direct appeal fundamentally unfair. Much as in *Luce* and *Ohler*, he suffered no constitutional deprivation by having to choose whether to testify about the same matters he previously had moved to suppress. Indeed, as the Court of Appeals of Virginia found on direct appeal, “[i]t was uncontroverted that

⁵ It is true that *Ohler* is not a federal constitutional decision, but instead addressed the defendant’s claim under the Federal Rules of Evidence. Considering, though, the holdings of this Court in *Ohler* rejecting the defendant’s various “fairness” contentions, there is no reason to reach a different result on Abdul-Wasi’s due process claim.

[Abdul-Wasi] killed his wife. He admitted it in both his statement and in his testimony at trial. In both, he attempted to mitigate his culpability. We note, in fact, that his tactical decision to explain his actions effectively reduced his offense from murder to manslaughter.” Given Abdul-Wasi’s successful tactical decision to testify at trial about his interrogations and the circumstances surrounding the death of his wife, he cannot reasonably assert that the waiver of his argument on appeal violated his due process right. *See also United States v. Weiner*, 988 F.2d 629, 632-33 (6th Cir. 1992) (defendant’s tactical decision in prosecution for “Ponzi” scheme to introduce recordings of his conversations with public official waived any objection to the recordings); *United States v. Ortiz*, 857 F.2d 900, 905 (2nd Cir. 1988) (defendant’s decision to restrict argument that he had possessed drug for personal use, whereby he “obtained the trial advantage of a limitation of evidence on the intent issue,” precluded his challenge to “evidentiary ruling because his tactics caused an inadequate record for review”). *See also Hinton v. Uchtman*, 395 F.2d 810, 821 n.11 (7th Cir. 2005) (Where habeas petitioner voluntarily chose to testify at trial, he had to accept results of his decision and could not argue that he would not have testified if his confession had been excluded.).

III. RESOLUTION OF THE CONSTITUTIONALITY OF THE VIRGINIA WAIVER PRINCIPLE WILL NOT AFFECT THE SUPPRESSION CLAIMS.

Even if this Court were to grant review to determine the constitutionality of the Virginia Waiver Principle, resolution of that issue will not affect Abdul-Wasi’s suppression claims. As Abdul-Wasi acknowledges, he does not now present any merits arguments on the suppression claims he advanced at trial and on direct appeal. *Pet.* at 4. In *Luce*, this Court emphasized that an appellate court “is handicapped in any effort to rule on subtle evidentiary questions outside a

factual context.” 469 U.S. at 41. Abdul-Wasi’s failure to present a merits argument on his suppression claims deprives this Court of such a factual context in this case. To state it differently, considering that petitioner has made no showing of even a reasonable possibility of success on the merits, there is little reason for this Court to exercise discretionary review in this case to consider the validity of a waiver that may have had little practical impact. Moreover, considering the substantial benefits that Abdul-Wasi derived by testifying at trial, it is impossible for this Court to gauge the “fairness” of his appellate waiver of his suppression claims without being able to evaluate the strength of those claims.

Regardless, the trial record demonstrates the insubstantial nature of Abdul-Wasi’s suppression claims that he waived on direct appeal. Regarding his “custody” argument, *Miranda*, of course, requires that an officer advise an individual of his rights only if he is in “custodial interrogation.” As this has Court elaborated on the requirement of custody:

An officer’s obligation to administer *Miranda* warnings attaches...only where there has been such a restriction on a person’s freedom as to render him in custody. In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. [T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned....Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest.

Stansbury v. California, 511 U.S. 318, 322-23 (1994) (*per curiam*) (citations and internal quotations omitted).

Consistent with these principles, the record in this case establishes that Abdul-Wasi was not in custody either before or during his initial interview, and thus the police officers did not

have to give his *Miranda* warnings. Although he initially was briefly handcuffed and put in a police car after the discovery of Hill's body in the rental vehicle, the handcuffs were removed after Detective Brighton came to his home and asked Abdul-Wasi "if he wouldn't mind coming down to the police department to speak to me on a consensual basis so we could determine the whereabouts of Ms. Hill." Tr. I at 110-17, 169-70. See *Oregon v. Mathiason*, 429 U.S. 492, 494-95 (1977) (*per curiam*) (Parolee, who voluntarily went to police station, where he was immediately told he was not under arrest, not in custody.).

Thus, Abdul-Wasi plainly knew the purpose of the requested interview as well as his right to refuse it. Indeed, he acknowledged during his testimony at the suppression hearing that he had voluntarily gone to the police department to talk with Brighton. Supp. Tr. at 21-22. Moreover, Abdul-Wasi went to the police department, knowing that the officer would give him a ride back to his home upon the completion of the interview. Supp. Tr. at 51-52.⁶

At some point after his arrival at the police station at about 9:00 a.m. on September 23, 2002, petitioner went into an interrogation room. Abdul-Wasi admitted that he was told he was not under arrest. Supp. Tr. at 8. Further, when Detective Hatfield first came upon him in the interview room at about 12:15 p.m., Abdul-Wasi was sleeping. Supp. Tr. at 43, 57. Likewise, before Detectives Hatfield and Brighton began their initial interview of Abdul-Wasi at 4:17 p.m., he "was found sleeping." Supp. Tr. at 46, 57.⁷ Both before and during the interview the door to

⁶ Under the facts of this case, Abdul-Wasi could not reasonably have expected to drive his own car to the police department. Hill's body had only been found in the rental vehicle earlier that morning, and the other car was the subject of the pending unauthorized use charge.

⁷ In denying the suppression motion, the trial court plainly found credible Hatfield's testimony on this point, rather than Abdul-Wasi's testimony that he had never slept while at the police station. Supp. Tr. at 23-24. The trial judge noted that there was "some indication that he did, in fact, rest during the day." Supp. Tr. at 71.

the interrogation room was frequently open. Supp. Tr. at 50-51, 57. *See New Mexico v. Nieto*, 12 P.3d 442, 450 (N.M. 2000). The officer who had given Abdul-Wasi a ride to the police department sat in a chair outside the interrogation room. Abdul-Wasi knew that this was part of an arrangement under which the officer would give him a ride back to his home after the interview was finished. Supp. Tr. at 51-52; Tr. I at 170.

The record further reflects that before the initial interview began, Abdul-Wasi was not questioned and was offered food and drink. Supp. Tr. at 24. Prior to and during the interview no officer ever attempted to block the door or prevent him from leaving the interrogation room. Supp. Tr. at 26-30. Abdul-Wasi admitted at the suppression hearing that none of the three officers who at various times participated in his questioning ever told him that he could not leave the room. Supp. Tr. at 29. Moreover, when asked on cross-examination if any of the officers had “said in any other way or [given] you any language that would suggest to you that you were prohibited from leaving that room,” Abdul-Wasi replied, “Not verbally, no.” Supp. Tr. at 29.

The transcript of Abdul-Wasi’s initial interview reflects his acknowledgement that he was there voluntarily and that he was “not under arrest [and was] free to go.” T. R. at 1. During the interview there were never more than two officers present. For a portion of the interview, Detective Hatfield was the only officer present. Supp. Tr. at 9, 15, 28. The interview was not uninterrupted; rather, “there [were] breaks and he was also sleeping on the desk.” Tr. I at 231-32. Abdul-Wasi also was offered refreshments and use of the bathroom. *See United States v. Brave Heart*, 397 F.3d 1035, 1038-1040 (8th Cir. 2005).

Throughout the interview Abdul-Wasi was repeatedly told that he was not under arrest, and he repeatedly indicated he was there of his own free will. T. R. at 1, 32, 50-51, 59, 61, 62, 67, 73. Abdul-Wasi’s own characterization of the circumstances surrounding his interview —

made when it was more than halfway over — confirmed his understanding: “I’m sitting here being interrogated, being told that I did something, but I haven’t been charged with doing anything. You know, I’m here under my own free will.” T. R. at 61.

Significantly, once Abdul-Wasi made incriminating statements about Hill’s disappearance, Hatfield ended his interrogation, reflecting the officer’s awareness that the nature of the questioning had “changed from interview to custodial....” Supp. Tr. at 54; T. R. at 104-05. Detective Hatfield afforded him a break of about 20 minutes before apprising him of his *Miranda* rights and then conducting a second questioning that lasted not quite one hour. Supp. Tr. at 53; Tr. I at 230. By Abdul-Wasi’s own description, he believed that he would “be able to leave” after he had given his statement. Supp. Tr. at 18.

The cases Abdul-Wasi relied on in the Court of Appeals of Virginia are not persuasive. For example, the sole issue in *Withrow v. Williams*, 507 U.S. 680 (1993) was whether *Stone v. Powell*, 428 U.S. 465 (1976), which normally bars federal habeas review of a Fourth Amendment claim, should be extended to a *Miranda* claim. 507 U.S. at 685, 685 n.2. Additionally, in contrast to this case, in two cases cited by Abdul-Wasi the trial court had found the defendant *had* been in custody prior to being given his *Miranda* rights. In each instance the appellate court simply held that there was sufficient evidence in the record to support such ruling. *See South Carolina v. Evans*, 582 S.E.2d 407, 410 (S.C. 2003); *Colorado v. Horn*, 790 P.2d 816, 818-19 (Col. 1990).⁸ Furthermore, in *Evans* the trial court found that the defendant had

⁸ *Horn* is even less persuasive, given the court’s statement in that case, contrary to this Court’s decision in *Thompson v. Keohane*, 516 U.S. 99 (1995), that a determination of custody by a trial court is a question of fact. 790 P.2d at 818.

not been free to leave, 582 S.E.2d at 410. Similarly, in *Louisiana v. Menne*, 380 So.2d 14 (La. 1980), the defendant was never told he was not under arrest. 380 So.2d at 17.

Thus, under the objective “reasonable person” inquiry, Abdul-Wasi would not have believed he was under the kind of restraints on his freedom of action associated with a formal arrest. Given his voluntary presence at the police station and his plain awareness of the fact he was not under arrest and could leave if he so chose to do so, he was not under custody. Certainly, his curious assertion in the Court of Appeals of Virginia that “a reasonable person in [his] place would have known he had killed his wife” fails under the objective inquiry applicable here. Def. Br. at 11. *See Florida v. Bostick*, 501 U.S. 429, 438 (1991) (“‘reasonable person test’ presupposes an innocent person”).

Abdul-Wasi also argued in the state courts that, apart from the issue of custody under *Miranda*, his initial interview was so coercive as to render his subsequent interrogation involuntary, despite the fact that it was preceded by the reading of his *Miranda* rights.⁹ Petitioner asserted that so little time elapsed between the end of the first interview and the beginning of the second that the latter “was clearly a product of the coercion of the first.” Def. Br. at 15.

For much the same reasons that Abdul-Wasi was not in custody during the first interview (for example, the fact that he came to the police station voluntarily, was repeatedly told that he was not under arrest and could leave, slept several times, and was given breaks as well as refreshments and use of the bathroom) he was not subjected to such coercive pressures in the first questioning as to taint his second questioning. Of course, the fact that Abdul-Wasi was fully advised of his *Miranda* rights before he was questioned the second time by the police and

⁹ Abdul-Wasi did not argue that the *Miranda* warnings were deficient.

appeared to Hatfield entirely comprehending of his rights reinforces this conclusion. Supp. Tr. at 53-54.

Further, even if the police should have given Abdul-Wasi his *Miranda* rights before or during the initial interview, his later post-*Miranda* confession nevertheless was admissible. In *Oregon v. Elstad*, 470 U.S. 298 (1985), this Court made clear that an initial interview containing a *Miranda* violation, “without more,” does not invalidate subsequent admissions made after the suspect has been properly advised of his *Miranda* rights. 470 U.S. at 300. Thus, in *Elstad* the Court held that the defendant’s confession, given after he had been advised for the first time of his *Miranda* rights and one hour after he had made an initial statement, was admissible. *See also Missouri v. Seibert*, 542 U.S. 600, 614-15 (2004); *Pruett v. Virginia*, 351 S.E.2d 1, 3-6 (Va. 1986).

In sum, Abdul-Wasi was thirty-four years old and obviously intelligent and articulate. He was fully aware of the fact that he was voluntarily present at the first interview and could leave at any time. He was well aware of the rights he was foregoing when he chose to speak with the police twenty minutes after the first interview had concluded (a time not so much less than in *Elstad* as to be constitutionally significant).

CONCLUSION

The Petition for a Writ of Certiorari should be **DENIED**.

Respectfully submitted,

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April 19, 2006

CERTIFICATE OF SERVICE

On April 19, 2006, I served one copy of the RESPONDENT'S BRIEF IN OPPOSITION upon all parties required to be served, by United States Postal Service in accordance with Rule 29(3), as follows:

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