STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Clifton Newman, Circuit Court Judge

2010-GS-40-1178, 1179
Appellate Case No. 2014-002230

THE STATE,

Respondent,

v.

VICTOR A. WHITE,

Petitioner

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF ISSUE ON CERTIORARI

Whether the majority of the Court of Appeals erred by finding it was harmless error for the trial court not to make sufficient findings as to whether petitioner's statement was admissible under *Missouri v. Siebert* and *State v. Navy,* where there was evidence petitioner's statement acknowledging he was at the crime scene was obtained under the "question first" tactic of obtaining an exculpatory statement and then only giving *Miranda* warnings, as a remand is necessary, at a minimum, under these circumstances for necessary fact findings?

RESPONDENT'S COUNTER STATEMENT OF ISSUE ON CERTIORARI

Contrary to the testimony of the Petitioner, the law enforcement officers upon arrest of the Petitioner, advised the Petitioner of his constitutional rights and received a waiver of the rights prior to the discussion about the crime in any manner with the Petitioner and prior to the recording of a statement. In rejecting the factual claim concerning the timing of the warnings, the trial court implicitly concluded that it was an "advise first, question second" procedure.

STATEMENT OF THE CASE

The Petitioner, Victor A. White, was indicted at the April 16, 2010 term of the Court of General Sessions for Richland County for murder (2010-GS-40-1178) and armed robbery (2010-GS-40-1179). The Petitioner was represented by Courtney Ann Gibbes of the Richland County Public Defenders Office at an initial hearing on August 24, 2011. On October 3, 2011, the case was called to trial before a jury and the Honorable Clifton Newman. At trial, the Petitioner was represented by Ms. Gibbes and Mark A. Sawyer, Jr. The prosecution was handled by Deputy Solicitor Kathryn Campbell Hubbird and Assistant Solicitor Meghan L. Walker of the Fifth Circuit Solicitor's Office.

On October 6, 2011, the jury found the Petitioner guilty of both charges. ROA 476, ll. 15-23. Judge Newman sentenced the Petitioner to thirty-five (25) years imprisonment for murder and twenty (20) years imprisonment for armed robbery. ROA 479, ll. 15-20.

The Petitioner made a timely appeal. In the appeal, the Petitioner was represented by current counsel Robert M. Dudek of the South Carolina Office of Indigent Defense. The South Carolina Court of Appeals affirmed the conviction in *State v. White*, 410 S.C. 56, 762 S.E.2d 726 (2014). App.p. 1-6. A petition for rehearing was filed on August 21, 2014. App.p. 7-12. On September 18, 2014, the Court of Appeals denied the petition. App.p. 13.

The Petitioner made a petition for writ of certiorari on October 30, 2014. This Return follows.

RESPONDENT'S STATEMENT OF THE FACTS

This case involves the shooting death of Steven Pierre Duckett on February 3, 2010. In the early morning hours of February 3, 2010 between midnight and 2:00 a.m., Victor White

placed a call to Steven Pierre Duckett to arrange a purchase of marijuana.[1] ROA 256-257, 266, (phone records). The victim left his brother's home in a Chevy Tahoe and went to the Kentucky Fried Chicken on Taylor Street in Columbia.[2] White was on campus at the time with Reginald Miller[3] and Demond Sanford planning the armed robbery.[4] According to the plan, Sanford was to be the look-out,[5] standing back as Miller and White approached the Chevy Tahoe driven by the victim.

Under the state's theory, Miller entered the front seat[2] and White entered the back seat of the Tahoe.[3] White then took out his gun and shot the victim in the back of the head. Reggie Miller described seconds after they had entered the car once they got around the corner of the drive through window at the KFC, he saw the flash and had the ringing in his ears, fearing he

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[1] Reggie Miller testified that White made the call and then told Miller the guy was on his way and he pulled up at the KFC when they got there. ROA 85-86. Miller stated that he did not know the victim before that night. ROA 86. He stated that he and the Petitioner had walked to the KFC and that Sanford was some ways behind them. ROA 86-87.

[2]According to the victim's girlfriend, he left at around 1:46 a.m. ROA 44 l. 7-10.

[3] Reggie Miller testified that White had called him and wanted him to be the muscle in a robbery. ROA 83-84. He thought that his role was to grab the marijuana and run. ROA 84. He stated that White had asked him if he wanted to make money and that he had told him yes. ROA 84.

[4] Sanford testified that he was going to go with Reggie Miller and Victor who said that they needed him to watch the street and "watch out for cops." ROA 52. In addition, Mike (Jeremiah Henderson) was to open the dorm door so that they could get back into the dorm after curfew. ROA 53. See also ROA 135. (Jeremiah Henderson testimony about propping the door open). He stated that after Reggie and Victor White came to the dorm they left and walked down the street toward the KFC. They told Sanford to stop at the corner. Sanford stated that he thought that they were going to get marijuana and try to either short-change or rip-off the person. ROA 54-55, 69. Sanford stated that he saw the truck come down and pull into the KFC around the same time the Petitioner and Reggie got there. ROA 56. "I was just standing there a little bit , just pacing, and then I heard a loud pop." ROA 56, l. 21-23, 70. When Reggie came up to him after the pop, Sanford asked him what happened and he stated that he said that Vic had shot the guy and kept walking, not answering his questions . ROA 58, 71.

[5] Sanford stated that he was told he was needed that night to be there to scare them. ROA 76-77.

[2] ROA 87.

[3] Miller stated that the victim told them to hop in the car and Victor told him to get in the front seat. ROA 102.

was shot and feeling a breeze across his face. ROA 87, 105-106. Miller stated the car went into the curb and that Miller then hit his head. ROA 87. Miller stated he tried to open the front passenger door, but it would not open because it was broken. ROA 87-88. Miller stated that he dove over the victim's body and went out the driver's door head first. ROA 88, 104. [The car was found the next day by the KFC employees when they opened the store the next day. ROA 39-40. The KFC employee, Franklin Michael Brown, had made a 9-1-1 call upon coming to work that morning. ROA 42-43]. Miller then jumped out of the car and White followed. Miller stated that he walked by Sanford and told him what happened. ROA 90.

They returned to the Benedict campus and went to Jeremiah Henderson and Nathaniel Jones' s dorm room at Gambrell Hall. ROA 59. Miller stated that he was panicking when he got to the room and that he needed to wash his face. He stated that White told them they needed to go back to the car and Miller refused, but Sanford went back. He stated that they returned with the marijuana and scale. ROA 92-93.[Victor testified that he had not seen marijuana until they had returned. ROA 107]. Cf. ROA 60-61. While there, White bragged to them and laughed about shooting the victim, according to Miller. ROA 111-112.[4] White stated that he could not believe that the victim made it easy for them by letting him into the back seat. ROA 111, l. 16-22. Nathaniel Jones stated that White told him that they had hit a lick (robbed somebody) and killed somebody. ROA 125-126. Jones described his demeanor as laughing and bragging. ROA 126-127. Henderson confirmed that White had stated that they had robbed somebody and that "I shot that man." ROA 137, l. 4-7, 145. Henderson observed White with a bag of weed, two cell phones and a gun that night. ROA 138, l. 3-7. Under Henderson's time line, after that White and

[4]Sanford testified that although he stated in his statement that he had heard White saying that he had shot Vic, but Sanford said he did not hear him say that he had shot the guy. ROA 78.

Sanford left the room to go back to the car and search. ROA 138-139. He described Victor's demeanor as nonchalant and laughing and Reggie's as shaken up. ROA 139, 150-151.

At that point, White and Sanford returned to the crime scene and went into the victim's pockets and vehicle until they retrieved a scale. ROA 61-63.[5] Upon returning to Gambrell Hall, they measured the marijuana and then split it among themselves. ROA 110-111, 140-141.

The investigation led to retrieving the victim's cell phone records. In reviewing those records, they learned that the last call was made to Victor White.

When White was arrested, he gave a statement to police. However, under his version, although he admitted being in the car, he placed the blame for the shooting on Reggie Miller. In his version, he was initially about to state he got in the back seat, but then changed and stated that he got in the front seat and Miller got in the back seat. ROA 289-290. See also ROA 307-308. White confirmed that there was a plan for a robbery for marijuana and claimed that Miller suddenly shot the victim. ROA 309-310. White admitted taking around $400 and marijuana from the victim and that he went back to the scene with Sanford to get scales. ROA 290.

[5]Sanford testified that the victim was not moving when they returned to the truck for the scale. ROA 63. Sanford stated that he went back to the truck with Petitioner even knowing that he may have shot somebody. Sanford said that he never saw anyone with a gun that night. ROA 73.

ARGUMENT

I. Contrary to the testimony of the Petitioner, the law enforcement officers upon arrest of the Petitioner, advised the Petitioner of his constitutional rights and received a waiver of the rights prior to the discussion about the crime in any manner with the Petitioner and prior to the recording of a statement. In rejecting the factual claim concerning the timing of the warnings, the trial court implicitly concluded that it was an "advise first, question second" procedure.

In the petition for a writ of certiorari before this Court, White contends that the Court of Appeals erred in finding the alleged error in specifically resolving conflicting evidence on whether the interrogation was begun with the advisement or rights or questioning was harmless error and not reversible error. He contends that the matter, at a minimum should be remanded for specific findings by the trial judge. Petition, p. 10. Alternately, he contends that the record is adequate to show that the interrogation was in violation of State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010) and Missouri v. Seibert, 542 U.S. 600 (2004). Respondent disagrees with these assessments and agree that any error in failing to explicitly reject the argument at trial was harmless. Contrary to the testimony of the Petitioner, the law enforcement officers upon arrest of the Petitioner, advised the Petitioner of his constitutional rights and received a waiver of the rights prior to the discussion about the crime in any manner with the Petitioner and prior to the recording of a statement. In rejecting the factual claim concerning the timing of the warnings, the trial court implicitly concluded that it was an "advise first, question second" procedure. Columbia police officers first advised the Petitioner concerning his constitutional rights, then questioned him concerning the death of Steven Pierre Duckett.

In his brief before this Court, the Petitioner seeks to equate this interrogation setting with the "question first, advise second" procedures of law enforcement found to be error in State v.

Navy, 386 S.C. 294, 302, 688 S.E.2d 838, 841–42 (2010) and Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004). The Petitioner relies exclusively on Petitioner's rejected testimony during the Jackson v. Denno hearing. However, as set forth below, the credible testimony of law enforcement officers was consistent and contrary to Petitioner's testimony. Columbia police officer Reese at the Jackson v. Denno hearing and trial and Sergeant Thomas at the trial were unequivocal in stating that upon arrest, no inquiry or questioning of the Petitioner occurred until **after** the Miranda warnings were given and a waiver was made.

Contrary to the testimony of Petitioner, it was not until ***after*** the warnings were given that a photograph of the victim and car were shown to Petitioner. Contrary to the testimony of Petitioner, it was not until after the warnings were given that the interrogation and a dry run of the statement was done. Although Navy and Siebert were not expressly cited to the trial court, the suppression motion of White was based solely upon the timing of when the advice of rights form was made. ROA 27, Tr.p. 113. The credibility of the versions of the timing were expressly before the trial court. ROA 27-29, Tr.p. 113-114. In denying the motion to suppress, Judge Newman implicitly determined that the Miranda warnings were given prior to any discussion, consistent with the testimony of Investigator Reese. ROA 28, Tr.p. 114. The reliance upon Navy and Siebert is therefore misplaced. The appeal must be dismissed.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. The court's review of whether a person is in custody is confined to a determination of whether the ruling by the trial court is

supported by the record. State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 409 (2003). Miranda warnings need to be administered after a person is taken into custody or their freedom has been significantly restrained. Miranda v. Arizona, 384 U.S. 436, at 478 (1966). Miranda does not hold, however, "that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period." Oregon v. Elstad, 470 U.S. 298, 309 (1985). On the other hand, suppression of a post- Miranda confession is required if "the two-step interrogation technique [is] used in a calculated way to undermine the Miranda warning." Missouri v. Siebert, 542 U.S. 600, 622 (2004). This exception applies when the two-step technique is used as a matter of policy to purposefully withhold Miranda warnings while a suspect in custody is being interrogated in order to obtain a full confession first, then provide him warnings and get him to re-confess. Navy, supra. Whether the "question first" tactic has been used depends on the totality of the circumstances including the timing, setting and completeness of the pre-warning interrogation, continuity of police personnel and overlapping content of the pre-and post-warning statements. Id. In the instant case, no "question first" tactic is apparent.

HOW THE ISSUE WAS RAISED AND REJECTED AT TRIAL

Prior to the jury being sworn, an in camera hearing concerning the suppression of the February 10, 2010 statement of the Petitioner was held pursuant to Jackson v. Denno, 378 U.S. 368 (1964). ROA 8-28. At the conclusion of the hearing, Judge Newman concluded that the statement was freely and voluntarily given and denied the motion to suppress. ROA 28, ll. 3-8.

During the hearing, the State called Investigator Kevin Reese of the Columbia Police

Department. He testified that the Petitioner was apprehended in Cayce on that date. White was a "person of interest" in the case at that time. ROA 9, ll. 21-22. Investigator Reese was in possession of an independent and outstanding arrest warrant for a probation violation from the Lexington County Office of Probation, Pardon, and Parole. ROA 9, l. 23 - p. 10, l. 10.

Investigator Reese stated that White was seen in the area they were searching where the electronics had taken law enforcement. White had come outside speaking loudly and giving them problems. He was recognized by a SLED agent from a photograph. He was then taken into custody based upon the outstanding probation violation warrant. ROA 10-11.

White was transported to Investigator Reese's office. Investigator Reese reported that this was done to see if White would give them a chance to talk with them. He stated he met with White at his office with Investigator Arthur Thomas. ROA 11.

Investigator Reese declared that prior to getting to his office and advising him of his rights, he did not try to get information from him and "we didn't talk about the case." ROA 12, ll. 21-24.

Investigator Reese described going over the "advice of rights" form, noting that "it is standard for us to fill this form as we start the initial interview." ROA 13, ll. 4-6. Stating that he would put "the date, the time and place that [he] stated the interview", he went over how he presented the form and the Miranda rights to the Petitioner. ROA 13, l. 7 - p. 15, l. 1. Pertinent to this appeal, Investigator Reese stated:

> The last line of the paragraph: I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me, and no pressure or coercion of any kind has been used against me.

I didn't check that because I didn't read that. He read it himself, and he also initialed it.

It was witnessed by myself and witnessed by Investigator Thomas. It started at 11:55 P.M. He signed it waiving his rights, that he waived his rights and that he understood what this document was all about.

ROA 14, l. 18 - p. 15, l. 5. (emphasis added).

Investigator Reese further described the events that occurred during the interview after the "advice of rights" form was prepared at 11:55.

A. That's right. Prior to - - right after advising him of his rights, and him agreeing to talk with the investigators, we went through what we call a rough ride. The beginning of it, to see what his story is going to be and what kind of reaction he's going to give us during the process.

And we advised him about that, that's what we're going to be doing. And after that is done - - this is how we form some of our questions. After that is done then is when we record the statement. We go all the way back over it, our interview.

Q. Okay. And in fact on the first page of this interview of White, you even go back through whether or not he's been advised of his rights again as shown in that transcript - -

A. That's right.

Q. - - just to recap at that point?

A. That's right.

Q. And then there was a recorded statement taken when he put on the record what he wanted to?

A. Yes.

ROA 16, l. 16 - p. 17, l. 11. (emphasis added). See State Exhibit No. 2 (CD of interview); State Exhibit No. 3 (transcript of recorded interview) [ROA 481-523]. He noted that Investigator Thomas was present through the entire interview. After the recorded interview, he was placed under arrest for murder and armed robbery. Investigator Reese declared that he never invoked any rights (right to counsel or right to silence) while he was with them.

On cross-examination, Investigator Reese confirmed that prior to 11:55, he did not speak with Petitioner about the case. He stated that when he signed the waiver form at 11:55 P.M., he then first initiated a conversation about the case. ROA 19, l. 9 - p. 24, l. 16. In pertinent part:

> A. That was when we read him his rights. I think we may have told him that's what we wanted to talk with him about at some point, then we went directly into the rights.
> Q. You showed him some pictures?
> A. During the interview?
> Q. After Miranda, or was it during the rough meeting?
> A. No, it definitely would have been after.
> Q. Okay. So between - - you had a Miranda at 11:55 and you started recording at 1:04 A.M.; correct?
> A. Yeah.
> Q. So that's - -
> A. Miranda - - Miranda, conversation, getting down to the - -
> Q. So his story didn't change from the pre-recorded to the recorded. Were there any big changes to his story?
> A. No, not very many, no.

ROA 20, ll. 1-16 (emphasis added). Plainly, it was Investigator Reese's testimony that it was Miranda warnings first, then discussion about the case and then showing of pictures after Miranda warnings.

In contrast, Petitioner Victor White testified at the *in camera* hearing. ROA 21-27. He declared that he was arrested at his house on February 10 by the Columbia Police Department.

White testified that after his arrest, he went into the back of the police car and asked him what he was charged with and the officer told him that he did not know. ROA 22. He stated he was then taken to Columbia Police Headquarters and claimed he began talking to the investigators. ROA 22. He stated that he got there around midnight and signed the waiver form around 11:55. ROA 23, ll. 6-16.

Contrary to Investigator Reese's testimony, White testified that when he got to the room, one of the investigators put a picture of Pierre in front of him and asked him if he knew who it was. ROA 23. ll. 20-24. White testified that he told him yes and that he was then asked if he knew what happened after they showed him a picture of the car. ROA 24. White said "that's when I began telling him what I knew." ROA 24, ll. 1-13.

White stated this initial conversation was not recorded. Further, he stated that he had not signed the (waiver of rights) paper yet. He testified he signed it after he made the first statement. ROA 24, ll. 11-13. After he signed the paper, White stated they got the tape recorder and "I told them the same thing I told them the first time." ROA 24, ll. 18-19. He said after that he was taken to the Alvin S. Glenn Detention Center.

On cross-examination, White admitted that he had been advised of his rights, understood them, and wanted to waive them. ROA 26, ll. 2-8. He confirmed that he was wanting to talk with the police to give his version of what happened. ROA 26, ll. 12-17. Pertinently:

> Q. And your only contention is that, according to you, they showed you some pictures first and you talked a little while before they advised you of your rights?
> A. Yes, ma'am.
> Q. But you admit you were advised of your rights and you were voluntary?
> A. Yes, ma'am.
> Q. And that's your signature?

A. Yes, ma'am.
Q. And you never invoked any of your rights?
A. No, ma'am.

ROA 26, l. 18 - p. 27, l. 3.

The Defense Argument at the Hearing

Counsel for the Petitioner asserted that they were not arguing that the statement was not voluntary. He stated the argument was limited to the conflicting issue of when the statement actually began. Counsel stated that Petitioner said he gave a statement that was not recorded prior to signing his Miranda warnings. Counsel moved to suppress because "Miranda was not properly read at the correct time." ROA 27, ll. 12-20.

The State's Opposition to Suppression

Deputy Solicitor Campbell recognized that this issue was a **credibility** issue. She asserted that the credible testimony was that he was advised of his rights properly as required by law. She noted that he got there around midnight and that was the period reflected on the advice of rights form. ROA 27, l. 22 - p. 28, l. 2.[6]

The Trial Judge's Denial

Judge Newman next denied the suppression motion, finding **that "the statement was freely and voluntarily given and the jury will be able to hear the statement."** ROA 28, ll. 3-5. Judge Newman noted that the jury will also be asked to make a finding of voluntariness beyond a reasonable doubt. ROA 28, ll. 6-7. The trial judge was not asked to clarify his conclusion or reconsider his decision. More particularly, Judge Newman was never asked to

[6] Respondent notes that consistent with Investigator Reese's version, although the advice of rights form was signed at **11:55 p.m.**, the recorded statements did not start until **1:04** a.m. ROA 20, ll. 8-10. State Exhibit 2, 3. ROA 481.

specific find whether or not his ruling based upon a determination that the police had questioned first and advised second.

The Trial Testimony on the Timing of the Warnings

During the trial before the jury, Sergeant Arthur Thomas testified that on February 10, the Petitioner was located and taken into custody by himself and Investigator Reese and transported to their office. ROA 283-84. He stated he was located around 11:30. Sgt. Thomas stated that he was taken to headquarters and was then advised of his rights. ROA 284-87.

Sgt. Thomas stated that the advice of rights was at 11:55 p.m. ROA 287, ll. 8-9. Sgt. Thomas stated that after he was advised of his rights, they advised Petitioner that they wanted to speak with him in reference to the murder at KFC.

> We advised him that we had information via phone records as so forth that he was at that location. And then he started speaking with us.

ROA 288, ll. 1-15.

Subsequently, on cross-examination, Sgt. Thomas stated that this practice with Investigator Reese was:

> Pretty much the subject says they want to speak with us after they've been advised of their rights. We just listen to what they have to say. All right, speak.
>
> Okay. They may give what I call the Citadel version, the angel version, so forth so on. We may ask a few questions, get a little more specific. Then they'll clean it up, clear up some things.
>
> And as we're talking to them, if it seems like they are fully cooperating, wanting to go through with it, then we'll record it.

ROA 312, ll. 4-13. Sgt. Thomas stated that this was the same practice done with the interview of

Victor White. He stated he spoke with him after advising him of his rights. ROA 312, ll. 18-19. He stated he then did a pre-interview or "dry run" **after the advice of rights**. Sgt. Thomas stated as far as he could recall the Petitioner's version did not change from the pre-interview and the recorded interview. ROA 313, ll. 2-5.

At trial, Investigator Reese testified concerning the timing of the advice of rights and interviewing similarly to the *in camera* hearing testimony. Investigator Reese described the connection being made to the Petitioner's telephone and the search at Tree Street. ROA 336. He described locating and taking White into custody around 10:30 p.m. ROA 337.

Investigator Reese specifically denied that they tried to interrogate White while they transported him from Cayce to police headquarters, stating "we wouldn't do that." ROA 336, ll. 15-19. He stated his procedure was to advise him of his rights. ROA 336-337. He stated they took White to his office on the second floor into an interview room and advised him of his rights. ROA 337-341. This part of the process was completed with Petitioner's signature at 11:55 p.m. ROA 341, ll. 3-8.

Investigator Reese confirmed that once White had been advised of his rights, he started talking with him about the murder at Kentucky Fried Chicken. ROA 342, ll. 15-18. He described the procedure he uses prior to the recording of a dry run. He confirmed that once these matters are out of the way, they recorded the statement. ROA 344-345.

At the point introducing the recorded statement and transcript (State Exhibit 3), the defense made an objection. ROA 345, ll. 1-3. The objection was overruled. ROA 345, l. 4.

On cross-examination, the following colloquy occurred concerning the timing of the advice of rights and the statement:

Q. And when you took Victor into custody after he was Miranda'd and all of that good stuff, you showed him some pictures?
A. Uh-huh.
Q. Of Pierre and the car?
A. Right.
Q. Okay. And he admitted he knew who that was?
A. Yes, ma'am.
Q. And I know we talked about you doing kind of a rough draft or, you know, a rough go-over of the interview before you record it?
A. Right.

Q. So you gave him his Miranda rights and then you spoke to him?
A. Right.
Q. Prior to recording it?
A. Right.
Q. And I'm going to use your language, you said you want to make sure there's no playful BS?
A. Yeah.

ROA 361, ll. 1-20 (emphasis added).

Subsequent to the conclusion of Investigator Reese's testimony, the defense made a series of motions. ROA 381-384. The trial judge denied the motions, including the motion to suppress. ROA 384, ll. 18-20. See also, ROA 386, ll. 9-14. (motions at close of defense case).

STANDARD OF REVIEW

In Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), the United States Supreme Court declared it axiomatic that a defendant in a criminal case is entitled to an independent evidentiary hearing to determine the voluntariness of statements made by the defendant prior to the submission of such statements to the jury. Thus, where there is conflicting evidence about a statement, the court must first make a finding as to the validity of the statement. See State v. Silver, 307 S.C. 326, 414 S.E.2d 813 (1992), aff'd as modified, 314 S.C. 483, 431

S.E.2d 250 (1993); State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989).[7]

In making the determination, the trial judge should examine the totality of circumstances surrounding the utterance to determine whether the state has met its burden of proof so as to warrant admission of the confession. Part of the State's burden during this hearing is to prove that the statement was voluntary and taken in compliance with Miranda. State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986). The trial judge's resolution of the issue of voluntariness of a statement will not be disturbed on appeal absent an error of law. State v. Atchison, 268 S.C. 588, 235 S.E.2d 294 (1977).

ANALYSIS - *There is No Siebert Error*

In his brief before this Court, White relies entirely upon his in camera testimony at the Jackson v. Denno hearing that, while he was at the police department after his post 10:30 p.m. arrest, but before his Miranda warnings were given, he was shown a picture of the victim and the car. ROA 23-24. He claims that this display led to a discussion about the facts of the case, ultimately leading to his recorded statement. However, in contrast, the testimony of Investigator Reese at the hearing was vastly different concerning the timing of the warnings. He described that upon their arrival at the his office at police station, Reese initially went over the Miranda rights at 11:55 p.m. ROA 14. Investigator Reese then described after the warnings and advice form was completed that the officers began a discussion with White and then showed him the photographs. This occurred within the one hour period between the advice of rights at 11:55 p.m.

[7]The trial court's factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to constitute an abuse of discretion. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id. When reviewing a trial court's ruling concerning voluntariness, the appellate court 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).

and the beginning of the recorded statement at 1:04 a.m. ROA 14, 20. The trial testimony of Investigator Reese and Sergeant Thomas was consistent with the "advise/warnings/waiver first, questions second" scenario. In denying the suppression motion, Judge Newman necessarily rejected the sole claim presented to him. This appeal must be rejected.

In Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004), the Court dealt with a police practice of initially questioning an in custody suspect until incriminating information is elicited, then administering Miranda warnings. Following the warnings, the suspect is again questioned and the incriminating information re-elicited. The post-warning statement is then sought to be admitted. The factors to be considered in determining whether a constitutional violation occurred in this setting, according to the Seibert plurality opinion, are:

1) the completeness and detail of the question and answers in the first round of interrogation;

2) the timing and setting of the first questioning and the second;

3) the continuity of police personnel; and

4) the degree to which the interrogator's questions treated the second round as continuous with the first.

State v. Navy, 386 S.C. 294, 302, 688 S.E.2d 838, 841–42 (Jan. 11, 2010). In Seibert,

> Justice Kennedy noted that in Seibert, the two-step technique was used to deliberately avoid Miranda, using a strategy based on the assumption that Miranda warnings will mean less when given after an incriminating statement has already been made. Under these circumstances, Justice Kennedy agreed the statements must be suppressed unless "curative measures" were taken.

Navy, 386 S.C. at 302–03; 688 S.E.2d at 842. The South Carolina Supreme Court held the evidence of a deliberate police practice, the "question first" strategy, was not determinative in

Seibert. Navy, 386 S.C. at 304, 688 S.E.2d at 842.

In Navy, this Court noted:

> The officers began the questioning of [defendant] with knowledge that the child had been suffocated and with the intention of eliciting a confession. After [defendant]'s first oral statement, the officers "sprang" the suffocation/healing rib fractures information on [defendant], and began an unwarned custodial interrogation designed to elicit incriminating information, that is, questioning designed to have [defendant] admit to having hit the child and to having smothered him. Once those incriminating answers were given—i.e. after [defendant] admitted he had popped the child on the back and "patted" his mouth—[defendant] was permitted a supervised cigarette break, then given Miranda warnings, with interrogation by the same officer resuming immediately. Thus the four elements outlined in Seibert were met here.

Navy, 386 S.C. at 303, 688 S.E.2d at 842.

The Supreme Court's opinion in Siebert was, on its face, designed to address and remedy the then perceived common practice of a "question first, warn later" custodial interrogation strategy that was being used by some investigators. Siebert, 542 U.S. at 606. Under such a strategy, investigators intentionally questioned a suspect who was in custody, without reading the suspect his/her rights, and then, after a confession is obtained, warning the suspect and re-taking the confession. In Siebert, both the pre-Miranda statements and the post- Miranda statements were taken from a suspect after the suspect was arrested and placed in custody at the police station. Siebert, 542 U.S. at 605. Moreover, the officers deliberately employed a "question-first strategy" as a calculated strategy to elicit a confession. Siebert, 542 U.S. at 606. In deciding that this practice was inappropriate, the U.S. Supreme Court wanted to prohibit an "end run" around Miranda. Siebert, 542 U.S. at 606.

Here, however, the facts do not support the Petitioner's contentions that he was subjected to a "question first, advise later" form addressed in Navy and Siebert. According to Investigator

Reese, the interview session with White at his office began with the advice of rights form being prepared. ROA 12-13, 361. His testimony is supported by the fact that the form was signed on 11:55 p.m. ROA 13-14, 19, 20, 287, 341 [State Exhibit 1 - advisement of rights form. ROA 480]. The testimony at trial was that Petitioner was arrested for the probation violation in Cayce around 11:30 p.m. and then transported to the Columbia Police Department. ROA 10-11, 284, l. 18-21, 336. This is consistent with Investigator Reese's version. Further, there is a time frame of one hour between the advice of rights at 11:30 and 1:04 a.m. when the recorded interview began. ROA 20, l. 8-10, State Exhibits 1, State Exhibit 2, State Exhibit 3 [ROA 481].

The State's testimony was consistent that the questioning of the Petitioner began after the advice of his rights.[8] First, Investigator Reese stated that prior to getting to his office and advising him, he did not try to get information from White and "we didn't talk about the case." ROA 12, l. 21–24. Also, ROA 386, ll.15-19. Second, Investigator Reese testified that "right after advising him of his rights and him agreeing to talk with the investigators, we went through what we call a rough ride . . .to see what his story is going to be ..." ROA 16, ll. 16-21. Also, ROA 23, l. 9 - p. 24, l. 16. On cross-examination, Investigator Reese confirmed that the showing of the pictures to White "definitely would have been after" the Miranda warnings. ROA 20, l. 1-16. See also, ROA 361, ll. 1-20 (Investigator Reese's consistent trial testimony about the timing of the showing of the photographs); ROA 312-313 (Sgt. Thomas trial testimony similar). Third, there is the time period between the 11:55 advice of rights and the recorded statement to support that the dry run was subsequent to the advice of rights rather than before.

The trial judge was squarely faced with making a credibility determination concerning

[8] Sergeant Thomas confirmed that this was their practice to advise first. ROA 312, l. 4-13..

the timing of the warnings. Each side declared credibility to be the issue. The defense acknowledged that the issue was not whether the statement was voluntary, but the timing issue was whether the Miranda warnings were read prior to giving an initial statement. ROA 27. The prosecution stated that this was a credibility issue and that the credible testimony was that he was advised properly. ROA 27-28. The trial judge's conclusion that the "statement was freely and voluntarily entered" implicitly rejected the defense's claim that the pictures were shown and the discussion of the facts began before the Miranda warnings were given at 11:55 p.m. ROA 28-29. The State's burden was to prove that the statement was voluntary and taken in compliance with Miranda. State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986). The trial judge's resolution of the issue of voluntariness of a statement should not be disturbed on appeal absent an error of law. State v. Atchison, 268 S.C. 588, 235 S.E.2d 294 (1977). When reviewing a trial court's ruling concerning voluntariness, the appellate court 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).

It should be noted that the crime and interrogation happened after the decisions of Siebert (2004) and Navy (January 10, 2010). In Navy, Justice Pleicones for the majority noted that the Siebert issue did not turn on whether there was an established and deliberate practice of "question first, advise later" and that since Siebert had not been decided at the time of the Navy trial, it was not surprising that defense counsel did not question the officers on whether they had used a "question first, warn later" strategy. Justice Pleicones emphasized that the Siebert court acknowledged that it was unlikely that law enforcement would admit it was using the "question first" technique, and thus that officers were following this [question first] protocol was not

necessary to find a Miranda violation. 386 S.C. 294, 304, 688 S.E.2d 838.

However, Respondent submit that this should not be read that a Siebert claim is completely met by the mere presentation of evidence that claims a defendant was questioned first, then warned. The burden of proof remains on the prosecution to prove that Miranda and Siebert were complied with by the warnings of a custodial person prior to the interrogation. As in this case, the two conflicting versions demanded the trial judge to weigh whether Investigator Reese's testimony was credible that the warnings came before the inquiry. Respondent submits the trial judge concluded that the correct version derived from Investigator Reese. The appeal must be dismissed since there was no Siebert violation.

REMAND FOR FURTHER FINDING ALTERNATIVE

While White maintains in his Petition that he is entitled to a new trial, he alternately contends that the appropriate remedy is to remand this case for a suppression hearing only "so that the court can make findings of fact and conclusions of law based upon the testimony of the Petitioner and argument of his attorney based on this testimony." State v. White, *Initial Brief of Appellant*, p. 11, 12.6 This one -sided suggestion ignores that if a remand were made it should include consideration of the investigators' testimonies and argument of the state. As noted above, Respondent submit that the trial court's finding implicitly concluded that the investigators version was correct. The timing and credibility issue was squarely presented. Both Navy and Siebert had already been decided at the time of the trial. No suggestion was made after the trial

6 In the dissent below, Chief Judge Few concluded that he agreed with the majority that the trial court failed to make sufficient factual findings. From the trial court's conclusory statement, Judge Few was of the opinion that based upon the "conclusory" statement of Judge Newman it could not be determined whether the court admitted the statement for the reason the court expressed—the statement was freely and voluntarily given or the court actually ruled on the issue raised before Judge Newman - whether the police violated the principles set forth in *Missouri v. Seibert*, 542 U.S. 600, 601–02, 124 S.Ct. 2601, 159 L.Ed.2d 643, and *State v. Navy*, 386 S.C. 294, 302, 688 S.E.2d 838, 841 (2010). In his opinion, however, if there was error in admitting the statement, the error was not harmless. I would remand for a hearing and require the trial court to make sufficient factual findings. App.p. 5-6.

court denied suppression that Judge Newman needed further fact finding by either party. The result was understood that the defense's contested fact based claim was rejected.

However, neither the Constitution nor the Jackson v. Denno decision mandate a new trial, if, in a soundly conducted collateral proceeding, appellant's confession is determined to be voluntary. State v. Cannon, 248 S.C. 506, 151 S.E.2d 752 (1966).7 In fact, these cases, and others like them, establish the precedent that makes necessary a remand of an issue that the trial judge, as opposed to the jury, was required to decide where the record shows the trial judge failed to decide the issue and the record does not affirmatively show a remand would be inappropriate. If this court is of the opinion that Judge Newman did not resolve the factual issue, then a remand would be an appropriate course. As noted above, Respondent submits that Judge Newman implicitly made that finding.

HARMLESS ERROR

The Petitioner suggests in his brief that the error in the admission of his statement could not be harmless error because the statement placed Petitioner at the crime scene. However, in

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7 See also State v. Primus, 312 S.C. 256, 440 S.E.2d 128 (1994) (since determination of whether appellant was "in custody" presents a factual issue, the case was remanded to circuit court for a Jackson v. Denno hearing); State v. Fortner, 266 S.C. 223, 222 S.E.2d 508 (1976) (although appellant is entitled to a new hearing on the issue of voluntariness, he is not necessarily entitled to a new trial); But see State v. Victor, 387 S.E.2d at 250 (remand for suppression hearing only inadequate remedy where the jury never considered the issue of voluntariness); State v. Creech. 314 S.C. 76, 87, 441 S.E.2d 635, 641 (S.C.App. 1994); State v. Fortner, 266 S.C. 223, 222 S.E.2d 508 (1976) (wherein the court, because the trial judge failed to conduct a proper hearing on the voluntariness of the defendant's confession, remanded a conviction for housebreaking and grand larceny pursuant to Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964)); State v. Callahan, 263 S.C. 35, 208 S.E.2d 284 (1974) (wherein the court, because the trial judge failed to make specific findings regarding whether a confession had been tainted by use of articles illegally obtained, remanded convictions of burglary, rape, and robbery for a determination of whether the defendant's confession was voluntary), cert. denied, 420 U.S. 981, 95 S.Ct. 1411, 43 L.Ed.2d 663 (1975); State v. Curley, 253 S.C. 513, 171 S.E.2d 699 (wherein the court, because the trial judge failed to make an independent determination of whether the warnings required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), had been given the defendant and whether his privilege against self-incrimination had been voluntarily and intelligently waived, remanded a safecracking conviction for appropriate findings), cert. denied, 400 U.S. 834, 91 S.Ct. 69, 27 L.Ed.2d 66, and cert. denied, 400 U.S. 834, 91 S.Ct. 70, 27 L.Ed.2d 66 (1970); State v. Cannon, 248 S.C. 506, 151 S.E.2d 752 (1966) (a capital case wherein the court remanded a rape conviction for an independent determination of the voluntariness of the defendant's confession), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

making his assessment, White claims "if the jury believed Petitioner's statement [that had Miller as the triggerman] and found Miller shooting the victim was not foreseeable, appellant could not be convicted under the "hand of one hand of all" theory." Petition, 13.[9] This is an odd approach because it suggests that it was in the appellant's interest and defense to have the statement introduced to combat evidence of the state's witness, i.e. that it aided his defense that the planned robbery with the accomplices had been called off and that Miller was acting independent of him. Respondent is unclear how this admission would contribute to the guilty verdict. The Petitioner also claimed in his brief that the statement was devastating because it allowed police to place White at the crime scene. Brief, p. 10. See State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010) (a defendant who has not actually committed the homicidal act must have aided, abetted, assisted, encouraged, or advised the killing and acted with the intention of encouraging and abetting the commission of the homicide in order to be regarded as a participant in a homicide)[10] ; State v. Peterson, 287 S.C. 244, 335 S.E.2d 801 (1985) (law required the homicide was a natural or probable consequence of the acts actually agreed on by the appellants before the law

[9] At the conclusion of the case, in requesting a mere presence charge, defense counsel relied upon the Petitioner's statement that White had agreed to buy weed and that there was to be a drug deal, however in his statement he did not think that Reggie was going to do a robbery because White had told him because the seller was his brother's friend that he couldn't do it and that he thought it was no longer an issue. ROA 387. However, he notes that within the statement, White stated that he eventually took $400 out of the victim's pocket. State Exhibit 3, ROA 503-504. However, the defense noted that their defense was White's statement. ROA 394.

[10] It is well settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense. State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000). "Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct.App.2002).

"Under accomplice liability theory, 'a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.' " State v. Langley, 334 S.C. 643, 648–49, 515 S.E.2d 98, 101 (1999).

"In order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987); see Wilson v. Wilson, 319 S.C. 370, 373, 461 S.E.2d 816, 817 (1995) ("Prior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of the crime.").

would hold him responsible for such a homicide).

The key factor for determining whether a trial error constitutes reversible error is "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " State v. Charping, 313 S.C. 147, 157, 437 S.E.2d 88, 94 (1993) (quoting Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). "Whether an error is harmless depends on the circumstances of the particular case." State v. Mitchell, 378 S.C. 305, 316, 662 S.E.2d 493, 499 (2008). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it 'could not reasonably have affected the result of the trial.' " Id. (quoting State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971)).

Engaging in this harmless error analysis, the issue is not whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the alleged trial error did not contribute to the guilty verdict. See State v. Mizzell, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002) (harmless error jurisprudence requires that the error not contribute to the verdict obtained).

In finding Petitioner guilty, the jury made a number of factual determinations. Even without defendant's admissions to some involvement in the robbery plan - albeit limiting his role in the shooting, the undisputed evidence of his participation in the crime was extensive. As set forth in Respondent's Statement of the Facts, infra., at pages 1-4, Reggie Miller, Demond Sanford and Jeremiah Henderson and Nathaniel Jones each testified and corroborated the Petitioner's culpability in the crime and placed him at the crime scene. Further forensic data tied Petitioner's telephone to making the last call on the victim's phone, corroborating the testimony

that Petitioner had planned the robbery and inveigled the unexpecting victim to the KFC. Independent evidence placed Petitioner with a weapon. These witnesses testified in consistent detail about defendant's actions and location. Petitioner's motive was thus independently established by the testimony of Reggie Miller, Demond Sanford and Jeremiah Henderson. The Petitioner's argument that the statement's admission provided a potential defense to Petitioner based upon his claim that Miller was the shooter, not Petitioner does not create harmful error. See State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006) ("When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this [c]ourt will not set aside a conviction for insubstantial errors not affecting the result."). The Court of Appeals reliance upon these factors in making the harmless error conclusion is a reasonable interpretation of the record upon proper appellate review.

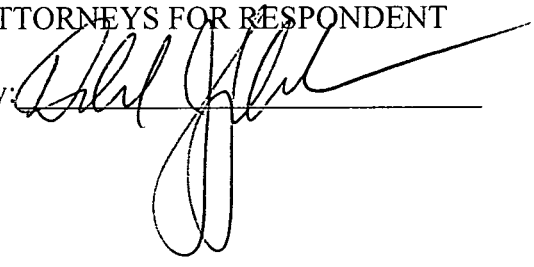
CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be dismissed and judgment of conviction affirmed. Alternately, if the Court is of the opinion that the fact-finding on the issue concerning the timing of the warnings was inadequate, a limited remand to the Honorable Clifton Newman would be appropriate rather than a new trial.

Respectfully submitted,

DONALD J. ZELENKA
Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

By: 

Columbia, South Carolina
December 8, 2014

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the ***Return to Petition for Writ of Certiorari*** in the foregoing action by depositing copies in the United States Mail, postage prepaid, to Robert M. Dudek, Division of Appellate Defense, P. O. Box 11589, Columbia, SC 29211 this 8th day of December, 2014.

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
DEC 09 2014
S.C. SUPREME COURT

December 8, 2014

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211

Re: State v. Victor A. White
Appellate Case No. 2014-002230

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Lonetta B. Brawley
Legal Assistant to Donald J. Zelenka
Senior Assistant Deputy Attorney General

/lbb
Enclosures

cc: Robert M. Dudek, Esquire
Daniel E. Johnson, Solicitor
Trisha Allen, Director, Victims Assistance