STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable G. Edward Welmaker, Circuit Court Judge

ORIGINAL

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S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

JAMES ALLEN JOHNSON,

PETITIONER

APPELLATE CASE NO 2016-000072

BRIEF OF PETITIONER

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ISSUE PRESENTED

1.

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2.

Did the Court of Appeals err in upholding the admission of a statement spawned from a two-phase interrogation of a mentally retarded suspect who did not receive Miranda warnings until after he made incriminating statements, violating state law, the Fifth Amendment, Miranda, and Missouri v. Seibert?

STATEMENT

On September 13, 2011, a Greenville County grand jury indicted petitioner for homicide by child abuse. On June 3, 2013, petitioner was tried before the Honorable G. Edward Welmaker and a jury. R. 1. Kris Hodge represented the State. R. 1. Dorothy Manigault represented petitioner. R. 1. The jury convicted petitioner. R. 588, ll. 4 – 10. Judge Welmaker sentenced appellant to sixty-two years' imprisonment. R. 595, l. 23 – 596, l. 1.

On June 9, 2015, a panel of the Court of Appeals consisting of Judges Short, Lockemy, and McDonald heard oral argument on petitioner's appeal. App. 1-2. On July 29, 2015, the court issued an unpublished *per curiam* opinion affirming petitioner's conviction. App. 1-2. On December 16, 2015, the Court of Appeals denied rehearing. App. 14. On December 2, 2016, this Court granted certiorari and this brief of petitioner follows.

ARGUMENT

1.

The Court of Appeals erred in holding an issue was raised differently on appeal than at trial, and, therefore, not preserved where the trial judge ruled without hearing or taking any argument from the parties and the issue raised on appeal was the legal issue obviously raised by the evidence at the pre-trial *Jackson v. Denno*[1] hearing.

The trial court held a pre-trial Denno hearing to determine whether petitioner's statements would be admitted. The State presented evidence regarding the voluntariness of petitioner's statements, including whether Miranda warnings were given and the timing of the warnings. The State asked multiple questions about petitioner's custody status. The State asked questions about whether petitioner was intoxicated. When the State completed its evidence, petitioner testified and his brother testified. The trial judge ruled after "weighing all the testimony" that petitioner's "statement was freely and voluntarily given, all the statements. And they will be admissible." R. 85, ll. 18 – 24. Petitioner contemporaneously objected to the admission of his statements. R. 360, ll. 16 – 21. R. 366, ll. 17 – 23. R. 373, ll. 14 – 20. Despite the (1) pre-trial hearing, (2) presentation of evidence by both sides regarding Miranda, (3) presentation of evidence regarding petitioner's mental status by both sides, (4) a ruling by the trial judge, and (5) contemporaneous objections by defense counsel, the Court of Appeals accepted the State's boiler-plate argument that the issue of the voluntariness of petitioner's statements was unpreserved. App. 2.

The State's case against petitioner rested primarily on petitioner's incriminating statement. Before the Denno hearing, the trial judge heard Dr. Richard Frierson's testimony

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[1] Jackson v. Denno, 378 U.S. 368 (1964).

during a competency hearing that petitioner, James Allen Johnson ("Johnson"), is mentally retarded. R. 12, ll. 8 – 18. Johnson's IQ is below seventy and Dr. Frierson found that Johnson's ability to even use the word "prosecute" was "pretty surprising given his intellectual functioning." R. 12, ll. 8 – 18. After Judge Welmaker ruled that Johnson was competent to stand trial, he stated, "if we could move to the *Jackson versus Denno* now?" R. 18, ll. 10 – 12. The solicitor told the court that the defendant made four statements and gave the identity of the officer who would testify about the first statement given. R. 18, ll. 13 – 17. The trial judge stated, "Come around and be sworn, please sir," and the officer's testimony began. R. 18, ll. 18 – 24.

The State called three police officers as witnesses during the Denno hearing and then told the court that it had presented all of the statements it was seeking to introduce. R. 65, ll. 8 – 9. The trial judge asked, "Anything from the Defense?" and defense counsel called Johnson to the stand. R. 66, ll. 10 – 12. After Johnson's testimony, the court asked if the defense had any other witnesses and counsel replied that she had a short witness (petitioner's brother). R. 79, ll. 18 – 22. The court asked, "That'll be your last witness?" to which counsel replied, "Yes, sir." R. 79, ll. 23 – 24.

When petitioner's brother's testimony was over, defense counsel informed the court that she had no other witnesses. R. 85, ll. 4 – 5. Judge Welmaker asked if the State had anything in reply and the solicitor said she did not. R. 85, ll. 6 – 8. The court then stated it would "take a belated lunch break" and told the attorneys when to return. R. 85, ll. 9 – 15. The trial judge also told the attorneys he would "weigh my notes" and look at Dr. Frierson's report on competency "and be ready to start back then." R. 85, ll. 9 – 15.

When court resumed, Judge Welmaker immediately ruled on the Denno issue. R. 85, l. 18 – 86, l. 4. Without pausing, the trial judge then ruled on the competency issue. R. 86, ll. 5 – 12. After completing his ruling on competency, Judge Welmaker stated, "All right. Any other matters

we need to take care of before our jury comes in?" R. 86, ll. 13 – 14. The solicitor responded that she wanted to test her tape for a 911 call and, after a brief colloquy about the tape, Judge Welmaker had the bailiff bring the jury into the courtroom. R. 86, l. 15 – 87, l. 7. The court did not ask for argument from defense counsel (or the solicitor) on the Denno issue. R. 86, l. 13, 87, l. 7.

The parenthetical in the Court of Appeals' citation to State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) stated "holding an issue is not preserved for appeal where one ground is raised below and another ground is raised on appeal." App. 2. This ruling begs the question of what issue, other than the voluntariness of appellant's statements under "state law, the Fifth Amendment, Miranda,[2] and Missouri v. Siebert,[3]" was raised during the Denno hearing? Brief of Appellant at 3 (stating issue on appeal).

The proscription against raising a different argument on appeal from the argument below does not apply to Johnson's case. In the Freiburger appeal, appellant challenged the admission of a gun based on defects in the chain of custody. Freiburger at 134, 620 S.E.2d at 741. Below, appellant only raised a Fourth Amendment objection to the admission of the gun as part of "an impermissible pat-down search." Id. A chain of custody issue is **categorically different** than a Fourth Amendment challenge and this Court applied its error preservation rules because of the difference in arguments. Had petitioner's appellate argument raised an issue not involving the voluntariness of the statement or different from the evidence presented during the hearing, the rule cited by the Court of Appeals would be correct. For example, had the appellate issue been that the statements were forgeries, the issue would have been outside of the scope of the evidence presented at the hearing and the trial judge's ruling.

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2 Miranda v. Arizona, 384 U.S. 436 (1966).

3 Missouri v. Seibert, 542 U.S. 600 (2004).

The question of compliance with Miranda was raised, not only by the evidence presented at the hearing, but as required by the Fifth Amendment and state law. Numerous South Carolina cases hold that the State must prove compliance with Miranda. "In order to secure the admission of a defendant's statement, the State must affirmatively show the statement was voluntary *and* taken in compliance with Miranda." State v. Middleton, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986) (emphasis in original). "If a defendant was advised of his Miranda rights, but nevertheless chose to make a statement, the 'burden is on the State to prove by a *preponderance of the evidence* that his rights were voluntarily waived.'" State v. Franklin, 299 S.C. 133, 137-38, 382 S.E.2d 911, 913-914 (1989) (emphasis in original) quoting State v. Washington, 296 S.C. 54, 370 S.E.2d 611 (1988).

Middleton was a death penalty case with horrific facts. Middleton at 23, 339 S.E.2d at 692-93. The defense argued that "the trial judge erred in admitting his confession without having first found the confession had been taken in compliance with the requirements of Miranda." Id. at 25, 339 S.E.2d at 694. The trial court held a Denno hearing and held the statement was voluntary. Id. The State contended that the trial judge's finding "contained an implicit recognition that Miranda had been complied with." Id. The Court held that "an affirmative finding under Miranda was also required." Id. The Middleton Court held it was the State's burden to ensure the trial court made an affirmative finding of compliance with Miranda. Id.

If the Court of Appeals' ruling in this case had been applied in Middleton, the issue regarding Miranda would have been held unpreserved. Under the Court of Appeals' reasoning, the general finding by the trial judge of voluntariness and admissibility would not have been sufficient to raise Miranda on appeal. It would have been the defendant's responsibility, not the State's, to procure affirmative findings regarding Miranda. This Court recognized in Middleton that the State bears the burden of proving the admissibility of a defendant's statements, which necessarily

implicates Miranda. The reasoning of this Court in Middleton demonstrates that petitioner can raise issues regarding the timing of Miranda warnings despite the trial judge's general ruling. Middleton also shows that compliance with Miranda (which since 2004 has included Siebert) is inherent in every Denno hearing and ruling by the trial court.

Also demonstrating the error in the Court of Appeals' reasoning is State v. Callahan, 263 S.C. 35, 208 S.E.2d 284 (1974). Callahan, decided in 1974, confronted a Siebert issue thirty years before Siebert and is very similar to petitioner's case. Just like petitioner, Callahan was mentally retarded, with an IQ in the 55 to 65 range. Callahan at 39-40, 208 S.E.2d at 285. A psychiatrist testified that Callahan would have problems thinking when upset and under even mild stress. Id.

Callahan gave two statements to the police, one on Saturday at which the giving of Miranda warnings was disputed. Id. When Callahan's attorney arrived on Sunday, it was clear that Callahan had already been interrogated and admitted crimes. Id. The trial judge held a "full factual hearing in the absence of the jury." Id. at 43, 208 S.E.2d at 287. The judge's ruling that the defendant's confession was free and voluntary "was general in nature." Id. This Court held that the "ultimate issue was the voluntariness of the Sunday confession." Id. This Court treated the issue like a Siebert issue, asking whether the "Sunday confession was tainted." Id. Ultimately, the Court held that the trial judge's general ruling required a remand. Id. at 43-44, 208 S.E.2d at 287-88. Under the State and the Court of Appeals' reasoning in this case, the issue in Callahan of the tainted confession would be held unpreserved and there would have been no need for a remand. But this Court's holding in Callahan demonstrates that the issue of a confession tainted by the failure to properly give Miranda warnings is preserved even when the trial judge only makes a general ruling such as was made in this case.

Callahan and Middleton show that confessions tainted by the improper giving of Miranda warnings are part and parcel of a ruling on the voluntariness of a confession. Siebert is a part of Miranda. The facts of petitioner's case showed that a mentally retarded, intoxicated suspect did not receive Miranda warnings until after he was in custody and after incriminating himself. Judge Welmaker's general ruling on voluntariness is no different than the rulings in Callahan and Middleton and Siebert is necessarily a part of that ruling.

Finally, this Court should not allow a ruling to stand that creates an incentive for trial judges to avoid appellate review by declining to take argument. Rule 18(a) of the South Carolina Rules of Criminal Procedure are clear: "Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced." Rule 18(a), SCRCrimP. Rule 18(b) states, "No argument shall be made on objections to admissibility of evidence or conduct of trial unless specifically requested by the court." Rule 18(b), SCRCrimP. Judge Welmaker ruled and did not ask for argument. The legal issues on appeal are clear from the facts presented at the hearing. The factual record is fully developed and the merits of the legal issue are ripe for decision on appeal. The Court of Appeals' preservation ruling would only delay a decision on this legal issue until PCR, which is an inefficient use of judicial resources. The Court of Appeals erred in holding this issue unpreserved.

2.

The Court of Appeals erred in upholding the admission of a statement spawned from a two-phase interrogation of a mentally retarded suspect who did not receive *Miranda* warnings until after he made incriminating statements, violating state law, the Fifth Amendment, *Miranda*, and *Missouri v. Seibert*.

The police interrogated the mentally retarded Johnson using, as the solicitor candidly identified it, the "two phase" interrogation tactic condemned by the United States Supreme Court in

Seibert and this Court in State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010).[4] Petitioner is mentally retarded. R. 12, ll. 8 – 18. The State prosecuted him for the death of his girlfriend's child ("Minor"). At the time of Minor's injuries, both Johnson and his girlfriend, Georgia Ann Sprouse ("Sprouse") were at home with Minor. R. 485, ll. 1 – 5. Both Johnson and Sprouse initially told police that Johnson was in the bathroom when Minor choked on tea and stopped breathing. R. 485, ll. 6 – 20. R. 156, l. 24 – 157, l. 10.

After the pathologist ruled Minor's death a homicide, Sprouse, who had a long history with DSS, changed her story to incriminate Johnson. R. 456, ll. 3 – 12. R. 419, ll. 10 -18. R. 305, ll. 5 – 14. The police brought Johnson to the station and three officers questioned him for an indeterminate amount of time, no shorter than one and a half hours, and possibly for as long as four or five hours. R. 374, ll. 15 – 25. R. 441, ll. 10 – 13. R. 550, l. 23 – 551, l. 3. Johnson then admitted suffocating the child. R. 427, l. 20 – 428, l. 3. Only after this admission, and for the first time, the police read Johnson his Miranda warnings. R. 428, ll. 7 – 12. They continued questioning him, using the information they had already obtained to draft a written statement for Johnson to sign. R. 431, ll. 4 – 15. Johnson misspelled his own name on the statement. R. 599 - 600. He and his brother testified that he was heavily intoxicated that day. R. 68, ll. 2 – 15. R. 81, l. 19 – 82, l. 1. Johnson said he did not remember giving the statement. R. 67, ll. 11 – 13.

Relevant Facts

Petitioner Johnson[5] was twenty-eight years old at the time of trial. R. 477, ll. 21 – 22. The court held a Blair hearing before the trial began regarding Johnson's mental competency. Johnson

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4 The solicitor asked one of the police officers present at the interrogation, "Did you hear the Defendant telling Investigator Miller basically what happened in this case? **Two phases**? I guess, **two phases**? Did you hear him give a statement?" R. 554, l. 24 – 555, l. 1 (emphasis added). The officer responded, "Yeah. I heard **both phases**." R. 555, l. 2 (emphasis added).

5 Some of the witnesses refer to Johnson by the nickname, "Parker." R. 188, ll. 2 – 7.

is mentally retarded and his IQ is below seventy. R. 12, ll. 8 – 18. Dr. Frierson testified that Johnson's retardation prevented him from maintaining competitive employment and speculated that "he might be able to go pick up trash somewhere, but he's not going to be able to support himself with work." R. 15, ll. 11 – 22. Johnson took two medications for major depression. R. 11, ll. 10 – 15. Johnson has never had a driver's license. R. 484, ll. 18 – 21. Dr. Frierson opined Johnson was competent to stand trial.

Co-defendant Sprouse was Minor's mother. R. 247, ll. 6 – 10. She was thirty-two years old at the time of trial. R. 246, ll. 10 – 12. She had three children by three different fathers. R. 246, l. 22 – 247, l. 23. She was charged in this case with homicide by child abuse, aiding and abetting, and accessory after the fact.[6] R. 246, ll. 19 – 21. From her testimony, it was apparent that Sprouse had a long history with DSS, with "at least three different" investigations. R. 305, ll. 5 – 14. Minor was taken from Sprouse immediately when Minor was born because she tested positive for marijuana. R. 251, ll. 4 – 21. Sprouse also testified that "every time that I've had my kids took" and "[e]ach time that I've had a DSS case" it involved her drug addiction. R. 253, ll. 5 – 21. Sprouse eventually got Minor and her other daughter back after spending nine months at a drug rehabilitation facility. R. 252, ll. 1 – 17.

Sprouse met Johnson through her sister. R. 256, l. 17 – 18. The same day she met Johnson, she invited him to move in with her and they began a romantic relationship. R. 257, ll. 1 – 13. Sprouse depended upon government assistance and child support. R. 258, l. 23 – 259, l. 4. She was abusing drugs before she met Johnson. R. 257, ll. 22 – 24. She knew that Johnson received a disability check because of his mental retardation. R. 259, ll. 5 – 7. R. 481, ll. 10 – 14. Because of

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6 The Department of Corrections website reflects that Sprouse received a fourteen-year sentence shortly after Johnson's trial ended.

Johnson's retardation, he had to have a payee for his disability payments. R. 481, ll. 10 – 14. Johnson's brother testified that Johnson is not allowed to live by himself. R. 84, ll. 5 – 7.

At the end of April 2011, Johnson, Sprouse, and Sprouse's daughters moved in with Sprouse's friend, Crystal Inman ("Inman"). R. 524, ll. 3 – 23. Inman was married and had three children. R. 173, ll. 15 – 174, l. 8. Inman and Sprouse had been "childhood friends forever." R. 175, ll. 5 – 9. Inman never noticed Sprouse or Johnson hitting the children other than "a pop on the hand and put in a corner." R. 189, ll. 8 – 18.

May 25, 2011: Minor is Taken to the Hospital

On the afternoon of May 25, 2011, Inman asked Sprouse to ride with her to pick up her children from school, but Sprouse declined because she "was too high and [she] was tired." R. 269, ll. 3 – 11. Sprouse and Johnson were home alone with Minor and Sprouse's other daughter ("Sister"). R. 485, ll. 1 – 5. Minor was approximately one-and-a-half years old and Sister was approximately two-and-a-half years old. R. 247, ll. 6 – 10.

Sprouse gave several different versions of what happened to Minor that afternoon, but she told the first police officer who arrived at the scene that Minor "was drinking tea and she started choking and she threw up." R. 156, l. 24 – 157, l. 10. The police found a spot on the rug that they suspected was vomit. R. 392, l. 19 –393, l. 4. Johnson told the same police officer, "I don't know what happened. I was in the bathroom." R. 157, ll. 5 – 7. Johnson was the one who called 911. R. 490, ll. 7 – 12.

Johnson testified that the children were playing in the living room when he went to the bathroom. R. 485, ll. 6 – 20. While he was in the bathroom, Sprouse yelled to him that Minor was not breathing. R. 485, ll. 6 – 20. When Johnson got to the living room, he saw that Minor was "already discolored." R. 485, ll. 6 – 20. Sprouse, Johnson, and Inman had been smoking marijuana

that morning and Sprouse originally wanted to attempt to revive Minor themselves because she was afraid that if they called 911, the authorities would find the marijuana and she would lose her children. R. 488, l. 16 – 490, l. 12. Johnson called 911 while Sprouse hid the marijuana. R. 488, ll. 16 – 20. A firefighter was the first to arrive and saw Sprouse performing chest compressions and Johnson "doing mouth-to-mouth rescue breathing on the child." R. 104, ll. 10 – 15. Emergency personnel took Minor to the hospital. R. 114, ll. 6 – 16.

The Medical Evidence

The paramedics were able to regain a pulse. R. 152, l. 22 – 153, l. 10. At the hospital, Minor was placed on a ventilator. R. 324, ll. 22 – 24. Tragically, Minor suffered a "severe neurologic injury." R. 326, ll. 9 – 14. Minor was taken off life-support on May 27, 2011, and died. R. 244, ll. 6 – 8.

Dr. Mary Fran Croswell, who said she was "a child abuse pediatrician," examined Minor while she was on life-support. R. 324, ll. 13 – 17. She testified that the child had multiple bruises on her body. R. 326, l. 9 – 331, l. 6. Dr. Croswell opined that the location of some of the bruises raised "red flags for an abusive injury." R. 331, ll. 7 – 16.

The pathologist who performed the autopsy, Dr. Michael Ward, also found numerous bruises. R. 452, l. 5 – 453, l. 25. Despite the bruises, the autopsy revealed "no trauma" to any of the child's internal organs. R. 463, ll. 11 – 18. The pathologist opined that the child died of lack of oxygen to the brain. R. 460, ll. 1 - 19. There was no direct trauma to the brain. R. 460, ll. 1 - 19.

One specific injury inside the child's mouth led the pathologist to conclude that she had been suffocated. The "frenulum" is the "little piece of tissue that attaches the lip to the upper gum. It's in the very midline of your lip." R. 453, ll. 20 – 22. Minor's frenulum on the upper portion of her lip was torn. R. 453, ll. 22 – 24. The pathologist also saw "a small amount of hemorrhage

within the mucosa of the inside of her mouth." R. 453, ll. 23 – 25. The torn frenulum signified to the pathologist that the child had been smothered with "pressure placed against the upper lip, basically covering the mouth." R. 456, ll. 3 – 12. The pathologist also said it would have been medically impossible for the child to have died from choking on tea and vomiting. R. 467, ll. 4 – 7.

The pathologist stated that a torn frenulum was not an injury he had seen caused by CPR. R. 456, ll. 17 – 19. Even though Dr. Croswell was not able to examine the child's frenulum, she still opined that it would have been caused by "some type of blunt force trauma" or a "suffocation type of injury." R. 334, ll. 20 – 23. Dr. Croswell also stated that she "would not expect to see" a torn frenulum from CPR. R. 337, ll. 5 – 10. In addition to the CPR performed by Sprouse and Johnson, the firefighter who was the first to respond to the scene checked Minor's airway and tried to hear or feel whether she was breathing. R. 108, ll. 6 – 15. The firefighters initially used a bag valve mask to help Minor breathe. R. 108, ll. 16 – 21.

The first paramedic to testify said that, in the moving ambulance, his partner "intubated the child correctly and did the correct procedure, in the correct manner, the correct depth. I mean, everything was, **everything was textbook.**" R. 139, ll. 14 – 18 (emphasis added). When asked if intubating the child could have caused a tear in the frenulum, the first paramedic stated, "There was not enough force. There was not – he didn't apply enough force to do that, no." R. 139, ll. 19 – 22. However, the paramedic who actually intubated the child testified that the first intubation came loose and "probably pulled up past the vocal cords." R. 152, ll. 1 – 21. They removed the tube, continued alternate ventilation, and then "attempted one other time to intubate the child and noted some edema or some swelling in the throat." R. 152, ll. 12 – 16. They abandoned their second attempt to intubate the child. R. 152, ll. 12 – 21. He said it was "a rough ride" to the hospital. R. 152, ll. 3 – 5. "The roads are – you know, the roads aren't the greatest in the world and with a

firefighter driving sometimes, especially with a twenty-month old in the back, the drive can get kind of rough." R. 152, ll. 5 – 8. This paramedic also claimed that intubation could not have caused any injury to the frenulum. R. 151, ll. 17 – 24. At the hospital, ventilation tubes were inserted into Minor's airway. R. 324, ll. 22 – 24.

Sprouse's Changing Story

Sprouse gave three versions of what happened to Minor. Sprouse told the first police officer who arrived at the scene that Minor "was drinking tea and she started choking and she threw up." R. 156, l. 24 – 193, l. 10. She told another deputy at the scene that "the child walked over to the table where there was a glass of tea, took a drink of tea, started choking, threw up" and then they called 911. R. 165, ll. 8 – 17. This deputy released Sprouse and Johnson from the scene and they went to the hospital. R. 167, ll. 9 – 15. She again told an investigator at the hospital that the child choked on tea and gave a written statement. R. 280, ll. 7 – 9. In her statement, she described the cup from which the child drank, described Minor throwing up and holding her until Sprouse realized Minor was not breathing, and described yelling for Johnson who was on the toilet. R. 290, l. 12 – 292, l. 16.

The next day, Sprouse changed her story. R. 280, ll. 10 – 16. This interview also took place at the hospital. R. 392, ll. 15 – 22. She told the police that she was in the kitchen when the child began choking. R. 287, l. 15 – 288, l. 3. She also now placed Johnson in the room with Minor when she started choking instead of in the bathroom. R. 412, l. 23 – 413, l. 5.

Between Sprouse's second and third versions, the child died and the autopsy was performed. R. 413, ll. 23 – 24. R. 414, l. 22 – 418, l. 14. Christopher Miller ("Miller") was the lead investigator on the case. R. 42, ll. 17 – 20. He attended the autopsy on May 28 and learned the

pathologist's preliminary finding that Minor's death was a homicide resulting from suffocation. R. 414, l. 22 – 415, l. 22.

On June 2, Investigator Miller and two other officers located Sprouse at the mortuary and took her to the law enforcement center for questioning. R. 418, ll. 10 – 419, l. 5. They told Sprouse the results of the autopsy and that her story was "just not making sense." R. 419, ll. 1 – 5. Investigator Miller told Sprouse, "We need the truth," and "pressed her pretty hard." R. 419, l. 4. R. 419, ll. 19 – 22. Sprouse then spun her third version of events—that she had been asleep from smoking marijuana and was awakened by Johnson who told her that Minor was not breathing. R. 419, ll. 10 – 18. Sprouse used this third version as her trial testimony. R. 269, ll. 3 – 270, l. 15. The police gave her a ride back to the mortuary. R. 420, ll. 16 – 19.

Jackson v. Denno Hearing: The June 2, 2011, Interrogation of Johnson

The police witnesses were vague about the timeline of events surrounding the interrogation of Johnson on June 2. What is known for certain is that at 10:02 PM, Johnson signed a Miranda waiver. R. 600. What is not known is how long Johnson was interrogated before the police read him his rights.

During the Denno hearing, Investigator Miller told Judge Welmaker that he started speaking to Johnson "probably some time right before ten o'clock." R. 50, l. 21 – 51, l. 4. However, Johnson was already at the station when Investigator Miller returned from the mortuary. R. 60, ll. 10 – 23. He described Johnson as making incriminating statements after returning from a bathroom break and once these statements were made, Investigator Miller read him his rights. R. 52, l. 4 – 53, l. 11. During cross-examination at the Denno hearing, Investigator Miller allowed "about forty-five minutes to an hour" of "talking" before the bathroom break. R. 62, ll. 13 – 18.

Before the bathroom break, Investigator Miller confronted Johnson with Sprouse's statement from earlier in the day. R. 52, ll. 4 – 13. Investigator Miller escorted Johnson to the bathroom. R. 52, l. 4 – 53, l. 11. When they returned, Investigator Miller told Johnson "that there was things that just didn't make sense, that I, you know, I needed the truth to come out." R. 52, ll. 20 – 22. He used the "sympathy" technique to question Johnson. R. 56, l. 12 – 57, l. 4. He told Johnson that "sometimes accidents happen" and "that we do things sometimes that we don't intend to happen." R. 56, l. 12 – 57, l. 4. "Sometimes we lose our temper." R. 56, l. 12 – 57, l. 4. "I explained that I have kids and, you know, that I know what it's like to have a kid that's crying that just will not stop. And, you know, and that I understood where he was—why he was so frustrated." R. 56, l. 12 – 57, l. 4.

Johnson then supposedly told the three policemen in the room that he threw a toy at Minor's head which caused her to cry. R. 52, l. 4 – 53, l. 11. Minor would not stop crying and fearing that it would awaken Sprouse, Johnson told the policemen that "he held his hands over her nose and mouth to make her be quiet, and then she became unresponsive." R. 52, l. 4 – 53, l. 11. Investigator Miller then read Johnson his rights. R. 52, l. 4 – 53, l. 11. The policemen typed up a statement and had Johnson initial and sign it. R. 53, l. 5 – 57, l. 19. R. 599 - 600. He was then placed under arrest and taken to jail. R. 58, l. 14 – 59, l. 21.

The other officer present during the interrogation was Investigator Jennings Autrey ("Autrey"). R. 25, ll. 15 – 19. Investigator Autrey confirmed that Johnson was already at the station when he and Investigator Miller returned from dropping Sprouse off at the mortuary. R. 26, ll. 3 – 13. During the Denno hearing Investigator Autrey guessed the entire interview lasted an hour and a half to two hours. R. 38, l. 20 – 39, l. 2. He conceded that Johnson "was a possible suspect at that time." R. 39, ll. 20 – 22. Investigator Autrey confirmed that Johnson did not receive Miranda

warnings until after making incriminating statements. R. 39, l. 23 – 40, l. 8. During his trial testimony, Investigator Autrey guessed they had been with Johnson for an "[h]our, hour and a half" before Miranda warnings were given. R. 374, ll. 15 – 25.

During trial, the State called Deputy Jim Wilson ("Wilson") as a reply witness.[7] R. 549, ll. 2 – 7. He was present during the questioning of Sprouse at the law enforcement center on June 2. R. 418, l. 22 – 419, l. 5. Investigator Miller took Sprouse back to the mortuary and asked Deputy Wilson to fetch Johnson and bring him to the law enforcement center. R. 420, l. 16 – 421, l. 12. Investigator Miller testified that he dropped Sprouse off at the mortuary in Greer and then drove straight back to the law enforcement center in Greenville. R. 421, ll. 16 – 21. Investigator Miller said that Deputy Wilson was already back at the law enforcement center with Johnson when he returned from the mortuary. R. 521, ll. 16 – 21.

Deputy Wilson was not certain about the exact time he picked up Johnson, but recalled several important details: "It was daytime. I don't remember. It wasn't early morning, **wasn't late, late afternoon either, that I remember.**" R. 550, l. 23 – 551, l. 3 (emphasis added). Deputy Wilson's memory that it was not "late, late afternoon" when he picked up Johnson is consistent with Investigator Miller dropping Sprouse off at a mortuary during what was likely regular business hours. No witness testified that Sprouse was at the mortuary after hours for a visitation or any other reason. If Deputy Wilson is correct, that means that Johnson likely arrived at the law enforcement center sometime not "late, late afternoon" between 4:00 PM and 6:00 PM. That meant that Johnson could have been questioned as much as five or six hours before he was given Miranda warnings at 10:02 PM.

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[7] Interestingly, the State did not call Deputy Wilson during the Denno hearing. He was called as a reply witness to refute Johnson's testimony that he was intoxicated the night of June 2.

During the pre-trial Denno hearing, which was held after the Blair hearing where the trial judge learned Johnson was mentally retarded, the State offered the testimony of Investigators Miller and Autrey, but not Deputy Wilson. Johnson and his brother, Alex Johnson, also testified. Johnson testified that he did not remember giving the statement on June 2. R. 67, ll. 11- 13. According to Johnson, two deputies came to his house and told him he "had to go with them." R. 67, ll. 14 – 17. That day, Johnson smoked marijuana and took approximately ten Xanaxes. R. 68, ll. 2 – 15. He took three Xanaxes with him to the police station and took them during his trip to the bathroom. R. 68, l. 16 – 69, l. 2. Johnson admitted that the handwriting on the Miranda waiver and the statement were his, but could not remember giving the statement. R. 69, l. 3 – 71, l. 10.

Johnson's brother testified that he saw Johnson approximately an hour before the police took him and Johnson "was heavily intoxicated. He was staggering around, falling around everywhere. Fell off my porch and everything." R. 81, l. 19 – 82, l. 1. The brother expressed disbelief that the police would interrogate his retarded brother without his legal guardian present. R. 84, ll. 1 – 4. The brother stated that Johnson is "only twenty-something. But he is not allowed to live by hisself or nothing." R. 84, ll. 5 – 7. As explained in Issue 1 above, the trial judge held that after weighing the testimony, he found that Johnson's statement was freely and voluntarily given without taking argument from the parties. R. 85, l. 18 – 86, l. 4.

Discussion

In Siebert, the United States Supreme Court condemned a deliberate practice used in police departments throughout the country meant to circumvent Miranda. Siebert at 610-12 and n.2. The Court cited the Police Law Institute's manual which instructed officers to use a "two-stage interrogation" and not give Miranda warnings until after arrestees have confessed. Id. at

610. The Court listed multiple sources advising officers on how to obtain confessions and then curing the failure to give Miranda warnings. Id. at 610 n.2.

The Court called this practice "question-first" and rejected the notion that the subsequent giving of Miranda warnings could transmute these confessions into admissible evidence. Id. at 610-13. "By any objective measure . . . it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content." Id. at 613. "After all, the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset." Id. "Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again." Id.

The police in Siebert were surprisingly honest and admitted they were deliberately using the two-phase question-first strategy. Id. at 605-05. While the police made no such honest admission in this case, Siebert recognized that such admissions are unnecessary: "Because the intent of the officer will rarely be as candidly admitted as it was here (even as it is likely to determine the conduct of the interrogation), the focus is on facts apart from intent that show the question-first tactic at work." Id. at 617 n.6.

The facts cited in Siebert showing the police strategy are present in this case. In Siebert, the Court emphasized the following:

> The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating

> potential left unsaid. The warned phase of questioning proceeded after a pause of only 15 to 20 minutes, in the same place as the unwarned segment.

Id. at 616. The police referred back to the unwarned statements after giving Miranda warnings. Id. The pre-Miranda questioning only lasted "30 to 40 minutes." Id. at 604-05. Only one officer questioned Siebert. Id.

In this case, three officers interrogated Johnson. R. 51, l. 23 – 52, l. 3. Investigator Miller admitted using the subtle tactic of sympathy to interrogate Johnson. R. 56, l. 12 – 57, l. 4. The police confronted Johnson with Sprouse's contention that he was alone in the room with Minor when she stopped breathing. R. 52, ll. 4 – 16. The police knew the findings from the autopsy. R. 414, l. 22 – 415, l. 22. If Investigators Miller and Autrey are to be believed, the pre-Miranda interrogation lasted approximately two hours[8] R. 441, ll. 10 – 13. R. 374, ll. 15 – 25. However, if Deputy Wilson's testimony is to be believed that it "wasn't late, late afternoon" when he brought Johnson to the law enforcement center, then it is possible that the pre-Miranda interrogation lasted for more than three or four hours. R. 550, l. 23 – 551, l. 3. Deputy Wilson's testimony is consistent with the fact that Investigator Miller dropped Sprouse off at a place of business—the mortuary—and then returned directly to the station house where Johnson and Deputy Wilson were waiting. R. 356, l. 9 – 357, l. 7. Finally, unlike Siebert, Johnson is mentally retarded. The facts of this case demonstrate that the three officers used "question-first" and Johnson's statements should be suppressed under Seibert.

Miranda conditions "the admissibility at trial of any custodial confession on warning a suspect of his rights: failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained." Seibert at 608.

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8 It should be remembered that during his direct testimony at the Denno hearing, Investigator Miller told Judge Welmaker he did not start talking to Johnson until "probably some time right before ten o'clock." R. 50, l. 21 – 51, l. 4.

Johnson was in custody when he made his initial incriminating statements and Siebert prevents the late Miranda warnings from curing the earlier failure to warn. While the officers repeatedly testified that Johnson was not under arrest, the talismanic invocation of the words "You're under arrest" does not determine whether is a suspect is in custody and should receive Miranda warnings. "To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning." State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003). "The custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody." Id.

In Evans, the defendant made her own way to the police station accompanied by her relatives. Id. at 581, 582 S.E.2d at 408-09. Two police officers took the defendant "into a back office to take her statement." Id. The police knew that the deadly fire they were investigating started with an accelerant. Id. at n.2. The police told the defendant they did not believe her explanations for the fire. Id. at 581, 582 S.E.2d at 409. The two policemen left the room and sent in a female SLED agent, who used a sympathy tactic. Id. The two women were in the room for forty-five minutes. Id. The SLED agent followed the defendant to the bathroom and waited outside the door. Id.

The Evans Court found that the defendant was in custody even though she was not formally arrested until shortly after making the statement. Id. at 584, 582 S.E.2d at 410. When analyzing whether the defendant was free to leave, the Court emphasized that the SLED agent accompanied her to the restroom and waited outside the door. Id. In this case, Investigator Miller did not wait outside the bathroom door like the SLED agent in Evans, but followed Johnson inside the bathroom. R. 426, ll. 3 – 20. The Evans Court emphasized that the interview took place in a back office and

that it lasted three hours. Id. Here, the interrogation was in a back office by three officers, not one, and lasted at least three hours—and perhaps as many as six hours. Finally, the Evans Court found that the police's purpose was important and used the fact that they challenged the defendant's story and switched officers to divine the officers' intent. Id. Here, Johnson was a suspect and was confronted by Sprouse's statement. R. 427, ll. 2 – 13. Unlike Evans, Johnson was brought to the police station by two officers. No one was with the mentally retarded suspect, which shocked Johnson's brother. Johnson had no driver's license. Johnson was not free to leave and was in custody.

This case's facts eerily resemble State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010). Navy also concerns a Seibert two-phase interrogation. Kenneth Navy was convicted of suffocating his two year old son. Id. at 296, 688 S.E.2d at 838. EMS responded to Navy's house and found him giving the child CPR. Id. at 297, 688 S.E.2d at 838. Navy gave an unsatisfactory statement to the police at the hospital that night. Id. The police subsequently met with the pathologist who told them that the child died from suffocation. Id.

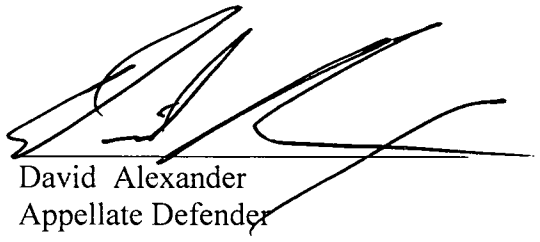
With this knowledge in hand, the police took Navy from his house to the police station. Id. He was not formally under arrest. He gave a statement that was not incriminating. Id. at 298, 688 S.E.2d at 839. Questioning continued and police confronted Navy with information from the autopsy. Id. at 298, 688 S.E.2d at 839-40. The Court found that "[a]t this juncture, the nature of the interrogation and respondent's status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation." Id. Without giving Miranda warnings, the police ultimately obtained a confession from Navy which they memorialized after having him sign a Miranda waiver. The Court ruled these statements violated Siebert and were inadmissible. Id. at 301-04, 688 S.E.2d at 841-43.

The police conduct in this case exceeds the transgressions of Navy. All of the factors cited by Navy were present. They "began an unwarned custodial interrogation designed to elicit incriminating information." Id. at 303, 688 S.E.2d at 842. Two officers questioned Navy; three questioned Johnson. Both men were picked up from their house by the police. Both men were confronted with contradictory evidence. Both sets of officers knew the results of an autopsy. Neither man received Miranda warnings until after they had confessed. Unlike Navy, though, Johnson is mentally retarded and even less capable of protecting himself from these police tactics.

Even seven years after Seibert and over a year after this Court's opinion in Navy, the police in Greenville County were using a playbook the Courts had condemned. As in these cases, the Court should focus on the actions of these officers and ignore their many conclusory recitations that Johnson was free to leave. The refusal to give Miranda warnings in this case requires suppression of Johnson's statement. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse the decisions of the Court of Appeals and the trial court, reverse petitioner's conviction, and remand this case for a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of January, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Honorable G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

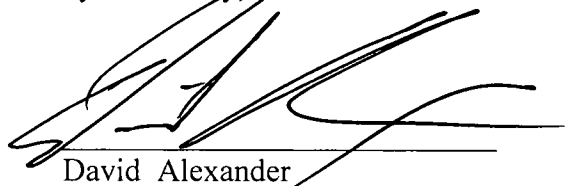
V.

JAMES ALLEN JOHNSON,

PETITIONER

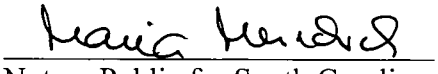
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Susannah Cole, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner has been served on James Allen Johnson, #355670, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 3rd day of January, 2017.



David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 3rd day of January, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.