VOLUME II of II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

JAMES ALLEN JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000600

APPENDIX

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the autopsy. And then we also submit blood for toxicological analysis.

Q. Was there anything in your lab work, blood work that was unusual or that gave you any cause for concern regarding any of her any injuries, her cause of death?

A. Actually, in this case, there was a survival interval so that she lived in the hospital for a period of time. So we did not do toxicology on her blood because it was no longer the blood that was present at the time when she was injured. So it would not reflect what was happening at the time that she was injured. The microscopic examination demonstrated the changes within the brain that are consistent with lack of oxygen. Basically, the cells of the brain had started to die in a pattern that is consistent with lack of oxygen. The only other significant microscopic finding is that we can't see this on this diagram but there are multiple little pinpoint areas of scab on the skin of the buttocks and the upper legs. There was a history of ant bites. And so we took a section of the skin within this region and, in deed, the microscopic changes were consistent with that of a previous ant bite. So we felt confident that that was indeed what those were. Other than that, there were no other significant findings at autopsy.

Q. Is there some type of blood disease or disorder that

causes people to bruise more easily? And is that anything [Victim] had?

A. Certainly there are hematological disorders that cause easy bleeding. There was certainly no indication of that at autopsy and no history of that prior to the trauma that she received that day.

Q. So we've talked about the microscopic exam and is that your final portion of the autopsy?

A. Yes, it is.

Q. And upon completing your autopsy, all portions of your exam, did you then determine a manner of death?

A. The manner of death, yes, I did.

Q. And what was that?

A. The cause of death in this case was anoxic brain injury due to suffocation. And the manner of death would be homicide.

Q. What other manners of death do you have a choice of at autopsy?

A. We have choice of natural, so that she would have died as a result of some sort of natural disease process. We have suicide, so that any injuries that she had were as a result of intentional injury suffered at her own hand. Accident, which, of course, is something that is unforeseeable. Undetermined, which basically means we're not sure what happened and we don't know why she came to

have those injuries or came to be dead. And, of course, homicide, which are dying as a result of injuries inflicted by the hand of another.

Q. Would it have been medically possible for [redacted] to have presented in this condition if she had taken a sip of tea and choked and vomited?

A. Absolutely not.

Q. What happens to, if you can tell us, what happens to the body when it starts to -- or when lack of oxygen happens, the brain starts to swell, they go into cardiac arrest. What happens to your body involuntarily?

A. Following this suffocation episode, [redacted] would have been unresponsive, unconscious and over a period of time, her brain would have begun to swell, causing her to develop a cardiac arrhythmia and begin to die. She may have become -- as the brain begins to swell, she may have become nauseated. She may have vomited. She may have coughed up, spit up some type of fluid which was in the lungs. But she basically would have been unresponsive, progressing to this cerebral edema, an abnormal heart rate. But, again, frequently these individuals have nausea and vomiting.

Q. I show you what's previously been entered as State's Number 43. And due to the injuries that she had in her mouth, I think we discussed she possibly could have been bleeding as a result of those injuries, or would have been

bleeding in her mouth?
A. Very likely, yes.
Q. And if something was being placed over her nose and mouth, where would the blood have gone?
A. Inside her mouth and down her throat.
Q. Down her throat, okay. And State's Number 43, a picture of a piece of carpet at the house. There's a stain type thing on there. Are you able to tell whether or not there may be a mixture of blood in that stain?
A. State's Exhibit 43 is a photograph of the carpet with a little placard that says "A". And it's centered around a reddish brown stain on the carpet. This could very well be consistent with blood tinged material that could easily be vomitous material or spit-up.
Q. And that is something that possibly could have happened after the hand was taken away from Victim a's mouth and she starts dying basically?
A. Absolutely.
Q. And I'm going to show you State's Number 48. If these were a pair of shorts that Victim had been wearing that day, is it possible that some of the item or the discoloration on here is that same type thing?
A. Yes. There's a reddish brown discoloration to the left front portion of the garment, extending from the waist down to the hem, which again is very consistent with

possibly being blood.
Q. Okay. And then some on the other side, a little bit towards the bottom, is that the same type ---
A. Yes.
Q. All right. And let me show you State's Number 47, a shirt. If this was the shirt that Victim had been wearing, is there anything on this shirt that could possibly go along with any type of bodily functions that might happen once she is starting to die?
A. There's certainly a brownish discoloration to the left upper portion of the garment, extending onto the sleeve, which could very well be vomitous type material mixed with a little bit of blood.
Q. Thank you. Dr. Ward, in your opinion, would Victim have struggled against this? This hand over nose and mouth?
A. Yes, I think she would.
Q. Was she a normal, otherwise healthy, twenty-month-old child?
A. Yes, she was.
Q. Mobile and I guess able to walk, talk, eat, those kind of things as far as your record shows?
A. As far as the records show and from findings at autopsy, there would be no reason why she would not be a normal acting, functioning twenty-month-old child.

Q. What would typically happen to a child if they -- or anyone if they took a sip of a drink and started choking? What's the normal body response?

A. They would cough and potentially -- basically, there's a gag response that if a foreign object or foreign substance goes not down the esophagus but into the trachea, which is what we consider to be choking on food, then there's a gag response were we cough it up, it clears out of our airway and we move on without any problem. It happens probably to most of us on a reasonably consistent basis.

Q. Again, there were be no way that that would cause the injuries that you saw to her brain and certainly all these numerous bruises to her body?

A. Absolutely not.

Q. Thank you. Please answer any of Ms. Manigault's questions.

MS. MANIGAULT: Your Honor, we don't have any questions.

THE COURT: All right. Thank you, Doctor. You may step down.

MS. HODGE: Your Honor, may he be excused?

THE COURT: Without objection the Doctor may be excused.

THE WITNESS: Thank you.

MS. HODGE: Your Honor, the State rests.

THE COURT: Mr. Foreman, ladies and gentlemen, we need to take up some legal matters now and I need to do some scheduling for our next trial that's going to start, and talk to the other attorneys. So we'll take a short -- well, I don't know how short it will be, but it will be a break. We won't keep you waiting. But if you'll go back to your jury room now. Again, I remind you not to discuss the case. You haven't heard everything that you need to hear. And certainly the charge has not been given to you. We'll call you back just as soon as we finish with these administrative and legal matters.

Everyone else, please remain seated while the jury departs.

(WHEREUPON, the jury exited the open court at approximately 9:45 A.M.)

THE COURT: Are there any things we need to take care of before I have an opportunity to talk with Mr. Johnson and discuss with him his rights?

MS. MANIGAULT: Your Honor, the Defense would move for a directed verdict in that the State has not proved the elements of the crime as charged.

THE COURT: Well, as you know, at this stage I have to view all the evidence in the light most favorable to the State, any evidence that reasonably tends to prove

the guilt, either circumstantial or otherwise, which a jury could logically and fairly deduce his guilt. I find there's not a total failure of evidence and I respectfully deny your motion, Ms. Manigault.

MS. MANIGAULT: Thank you, Your Honor.

THE COURT: Any other matters?

MS. MANIGAULT: The other issue is my client has informed me that he intends to testify and the Court may want to question him about that.

THE COURT: All right. I'll be glad to talk with him about that. Are there any impeachable offense the State would have?

MS. HODGE: No, Your Honor.

THE COURT: All right. Ms. Manigault, if you would and Mr. Johnson come forward, please.

(WHEREUPON, Ms. Manigault and the Defendant approached the bar.)

THE COURT: And, Mr. Johnson, if you'd just stand there at the microphone with your attorney. If you would, please, raise your right hand.

(WHEREUPON, the Defendant's right hand was raised.)

THE COURT: Do you swear or affirm the testimony you're about to give me will be the truth, the whole truth, and nothing but the truth so help you God?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Johnson, we've reached the stage of the trial where I need to explain to you certain rights that you enjoy. And as I go through these rights, if you have any questions, please ask your lawyer to interrupt me. I want to make sure you understand the rights that you have. I'm confident you've talked with your attorney already about this, but I need to be satisfied in my own mind that you understand the rights that you have.

We're at the stage of the trial where you could present a defense. The Constitution of South Carolina, the Constitution of the United States of America says that no person can be compelled in any case to be a witness against himself. This means that you can't be required to testify. The State can't call you as a witness. You have a right to testify in your own behalf, but nobody can make you testify. It's a personal right that you enjoy. Nobody can waive this right except you.

Now, if you decide to testify, you'll be subject to the same rules that govern any other witness. You can be examined and cross-examined on any relevant issue in the case. In addition, if you have any convictions for dishonesty or false statements or crimes that are punishable by imprisonment for more than a year and the Court determines that the probative value of admitting this outweighs any prejudicial effect to you, the Solicitor

would be able to introduce your record to attack your credibility. The State has indicated they don't have any prior records for which they would attempt to introduce to challenge your credibility on that. But, again, they have the full right to cross-examine you about the relevant facts of the case.

Now, Mr. Johnson, if you decide to testify, that decision on your part must be freely and voluntarily and intelligently made by you with the knowledge of what I've explained to you of your rights under the Fifth Amendment and the State Constitution to testify, that you don't have to. You also need to be aware of the consequences of your decision to testify, that you'll be subject to cross-examination by the State.

You may make the choice not to testify. If you make that decision, I'm going to tell the jury they can't give that any consideration whatsoever, that you chose not to testify. That's your Constitutional right. You can exercise it if you wish. I'll instruct the jury that they're not to bring it up in the jury room, there would be no prejudice to you because you decided not to testify.

Whether to testify or not testify is left entirely up to you. You can talk with your attorney, with family and friends and others, but the final decision is yours and yours alone to make.

Do you understand what I've discussed with you, Mr. Johnson?

THE DEFENDANT: A little bit of it.

THE COURT: Are there any things that I can further explain to you?

THE DEFENDANT: I really don't understand what you're talking about, about testify. I mean ---

THE COURT: Well, in other words, you testified earlier here in our preliminary matters. You'd be -- come up here to this witness chair, you'd be sworn in. Your lawyer could ask you questions. You could answer those questions. The State's attorney will have a chance to cross-examine you and ask you questions about relevant matters about the case.

That's one of your choices to offer your testimony and let the jury hear what you have to say through your lawyer asking you questions. They'll also hear what you have to say through the State's asking you questions as well.

Your other choice is to not testify, not be sworn in. The jury wouldn't know that you've testified earlier. That would not be brought up to the jury. If you chose not to testify, I'm going to tell them that they can't hold that against you in any way. That's your right to not testify. Do you understand that?

THE DEFENDANT: (Affirmative nod.) Yes, sir.

THE COURT: Anything else you need for me to explain to you? I'm going to give you a chance to talk with your lawyer as we take a break. I'll be glad to try to answer anything you have now. Do you have any questions?

THE DEFENDANT: No, sir. Nothing right now.

THE COURT: All right, sir. If you'll return to your seat with your attorney, please.

All right. We'll take a short break to let you talk further with your client. Let me know when you're ready and if there's any other witnesses that are going to be testifying. If not, then we'll certainly need to talk about a verdict form and any charges that specifically need to be made. We'll take a short break.

I need to talk with Ms. Bentley and Mr. Chambers about the next case.

(WHEREUPON, the court stood at recess for a short break.)

THE COURT: All right. Is the Defense ready to proceed?

MS. MANIGAULT: Yes, sir.

THE COURT: Is your client going to testify?

MS. MANIGAULT: Yes, sir.

THE COURT: All right. Let's have our jury come in if they're ready.

(WHEREUPON, the jury entered the open court at approximately 10:28 A.M.)

THE COURT: Ms. Manigault, the Defense may call its first witness.

MS. MANIGAULT: Thank you, Your Honor. The Defense would call James Allen Johnson, Your Honor.

THE COURT: Come around, please, sir, and be sworn.

THE CLERK: Will you put your left hand on the bible and raise your right hand.

Do you solemnly swear or affirm to tell the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: Have a seat. State your full name for the record.

THE WITNESS: My name is James Allen Johnson.

JAMES ALLEN JOHNSON,

BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MS. MANIGAULT:

Q. And how old are you, Mr. Johnson?

A. Twenty-eight years old.

Q. And how far did you go in school?

A. Eleventh grade.

Q. And was that in Greenville County?

A. Yes, ma'am.
Q. Were you born in Greenville County?
A. Yes, ma'am.
Q. Have you lived in Greenville County most of your life?
A. Yes, ma'am.
Q. Are your parents living?
A. Yes, ma'am.
Q. All right. Do you have any siblings, brothers or sisters?
A. Yes, ma'am.
Q. What do you have?
A. I've got three brothers and two sisters.
Q. And are you the oldest or youngest or in the middle?
A. I'm the second child.
Q. Second child. What kind of grades did you make in school?
A. I can't remember.
Q. Were you in special classes?
A. Yes, ma'am.
Q. Were you in special classes all through elementary school?
A. Yes, ma'am.
Q. And were you in special classes in high school when you went there?
A. Yes, ma'am.

Q. Were you considered a slow learner?
A. Yes, ma'am.
Q. Have you ever worked?
A. I worked at a Waffle House once and once at a welding shop.
Q. Okay. Could you hold those jobs?
A. No, ma'am. I had the job at the Waffle House for a week and I had a job at the welding shop for about two weeks.
Q. And why couldn't you hold those jobs?
A. Because I was slow. And at the restaurant because I couldn't remember the orders or read to write them down. So I got fired from that one. And then the welding shop I got fired because I was not fast as the rest -- everybody else.
Q. Were you raised by your mother ---
A. Yes, ma'am.
Q. --- and father?
A. Not my father. My mother.
Q. Were you always in the custody of your mother?
A. Yes, ma'am. Not always, I mean, they took me when I was young.
Q. Who took you?
A. DSS did.
Q. Okay. And how long did you stay away from your

mother?
A. I think -- two years I think.
Q. But you eventually ended up back with your mother?
A. My mama fought and got me back.
Q. All right. Now, how long have you known Georgia Ann Sprouce?
A. I've known her, I guess, four months. Her sister Denise introduced me to her.
Q. All right. And did you live with Georgia Ann Sprouce?
A. I was supposed to just come over the weekend and she was supposed to bring me back, but when I got there, I guess we hit it off and she didn't want me to go back.
Q. So you stayed with her from the first date ---
A. Yes, ma'am.
Q. --- through the four months? All right. When you were living with -- well, what did you call her?
A. I called her baby.
Q. Baby, okay. When you were living with Georgia Ann Sprouce, what -- did she have children living with her?
A. Yes, ma'am.
Q. And who were the children?
A. Minor 1 and Victim.
Q. All right. And did you babysit any for her, the children?
A. Yes, ma'am. Yes, ma'am, I did.

Q. Did you babysit often?
A. I babysitted, I babysitted one time while she went to a funeral for like a week. And then I babysitted a lot for her when she was at Crystal's a lot. I mean, even when we lived in the apartments, I watched the kids. I got up in the mornings with them. She would be so tired and stuff so I just let her sleep a little bit. Because I loved Ann and I didn't want her to be upset or anything. I wanted her to be happy.
Q. Now, what kind of income did you have?
A. I draw SSI.
Q. SSI. And how much money did you get per month?
A. I get about seven hundred dollars a month. It's not in my name, though. I had to have a payee.
Q. That's fine. Now, when you were living with Georgia Ann Sprouce, were you getting that seven hundred dollars a month?
A. I was getting it but not -- I wasn't getting it all at one time.
Q. Okay. But you did have an income when you lived with her?
A. Yes, ma'am.
Q. And did Georgia Ann have an income?
A. She was getting child support from Victim 's father and Minor 1 s daddy was sending her some money.

Q. And were you giving her money also?
A. I gave her -- a couple of times I gave her some money when I got it. First month I was there, I didn't have no money.
Q. All right.
A. Because I paid -- before I met her, right before I met her, I paid on my trailer I was trying to -- it wasn't livable. I was trying to pay it off. That way I could begin to start working on it and have my brother help me.
Q. Okay. Now, where were you living before you started living with Georgia Ann?
A. I was living right beside my brother, Josh's house ---
Q. Okay. Josh?
A. --- because I had no power or nothing.
Q. So you had no power at your trailer?
A. Yes, ma'am.
Q. So you were living with Josh?
A. (Affirmative nod.)
Q. Now, back to May 25th of 2011. Tell us the events of that day. What happened when you got up that morning and go on from there?
A. That morning when I woke up everybody was in the bed and everything. I woke up. We had all got up. [redacted] and [redacted] and [redacted], we was all in the -- I turned on the cartoons. We went in there. We made them a -- they ate

peanut butter sandwiches that morning. And then we went -- later on we went, we went outside. I took them outside that morning before I ever went to Josh's that morning. And Minor 1 was on the porch. Minor 1 wouldn't climb down the steps by herself. So I already had Victim out there in the yard where they were playing at out there. And she must have crawled over into an ant mound.

Q. Okay. Victim is Victim?

A. Yes, ma'am.

Q. Go ahead.

A. And Minor 1, I went and got Minor 1 and when I got back to Victim she was crying, screaming like something -- she was on fire or something. And I looked and I saw ants all over her. And I picked her up right then and took her in. I dust off what I could and took her in and told Ann. And Ann took her diaper off and changed it cleaned her up.

Q. All right. Now, after that incident did y'all stay home or that's when you left home?

A. Well, we was there a little bit longer. She calmed down. Not much -- it wasn't, I'd say about two or three minutes later, she was good. She wasn't crying no more or nothing. She wasn't hurting. And then we left. They took me to Josh's, my friend where I was staying at before I got with Ann. I went over there to get a memory card for my cell phone because I'd been taking pictures and stuff of

the kids and stuff and I wanted to be able to save them on my phone because it was about full.

Q. Okay.

A. All right. And then they went to, I guess, to get some child support for her oldest son?

Q. Child support money?

A. Yes, ma'am.

Q. Okay.

A. And then they come back and picked me up. We went to the house. Like I say, me, Crystal and Ann was there. All right. Crystal had left a little bit -- not long after we got there to go -- I don't know where she went. I think she went to -- I can't remember her name -- her friend's house, to take her to go get her little girl and their kids.

Q. Okay. Now, did you have a car?

A. No, ma'am.

Q. Did Ann have a car?

A. I've never had a license.

Q. You never had a license?

A. No, ma'am.

Q. So you depended -- when you were living with Crystal you depended -- y'all depended on Crystal for rides back and forth?

A. Yes, ma'am.

Q. All right. So when Crystal left, that left you, Ann and who at the house?

A. Me and Ann and [redacted] and [redacted].

Q. Okay. The four of you were there?

A. (Affirmative nod.)

Q. All right. So what happened after Crystal left and y'all stayed at the house?

A. Well, we laid the kids down for their nap. And when they got back up, we fed them -- cooked some chicken nuggets. And I ate some with them, too, and they ate. And then put them in the living room to play. They was playing in there, had the TV on. And I went to the bathroom. When I come back out of the bathroom -- I was in the bathroom. She hollered at me saying, she's not breathing. Come in here. I went in there. I dialed -- she asked me -- I asked her, I'm calling the ambulance because we may not be able to help her. She looks like -- she's already discolored already when I got in there. And then I called the ambulance while she was hiding Crystal's reefer and her bowl. She was hiding it.

Q. You said you were in the bathroom and she called. Who's she? Who called you out of the bathroom?

A. Ann.

Q. Okay. You were in the bathroom and Ann and the children were in the living room?

A. Yes, ma'am.
Q. When you went in the living room you said that -- where was Victim at that point?
A. She was in front of that -- the red chair. The red chair in there. She was laying in front of it on her back.
Q. On her back?
A. Yes, ma'am. On the rug.
Q. And what was Ann doing when you came in and saw Victim laying on the floor?
A. She was, she was trying to do CPR on her. And I tried to her do CPR and I called 9-1-1 and I put it on speaker phone because I did not know the address, so Ann could tell them the address and Ann could hear what they was saying too. Because I wasn't -- I didn't know how to do it. I've never done CPR in my life.
Q. So you didn't know how to do CPR?
A. No, ma'am.
Q. But at some point, you tried to help?
A. Yes, ma'am. I tried as soon as I got in there.
Q. And what did you do? What were you trying to do?
A. I was doing my hands like this on her chest. (Demonstrating.) And breathing in her mouth. And then I stopped and then Ann would do the same thing. And they was telling us to tilt her head back, see if she was breathing. Ann said that she was breathing a little bit, but I don't

think she ever was breathing.

Q. So you demonstrated that you did your hands like this?

A. Yes, ma'am.

Q. And where was that on ---

A. Right here. (Indicating.)

Q. On the chest area?

A. Yes, ma'am.

Q. So you did -- you were double-handed CPR?

A. (Affirmative nod.)

Q. And while you were doing that, what was Ann doing?

A. She was talking with them on the phone, too. See, the first time the phone hung up because my -- I ain't had good service on my phone. And then I called back and I had it on speaker phone again.

Q. So you were in here when the State played the 9-1-1 tape?

A. Yes, ma'am.

Q. And you heard that? And that's -- you heard your voice on the tape, what you were saying?

A. Yes, ma'am.

Q. And so when you were talking to them, you and Ann were still trying to do CPR?

A. Yes, ma'am.

Q. All right. Now, how long were you gone in the bathroom before Ann yelled for you to come?

A. I was probably in there two or three minutes.
Q. All right. Do you go to the bathroom often?
A. Yes, ma'am.
Q. Do you have a bladder problem?
A. I just go to the bathroom a lot. I don't know why. I always have. Ever since I was little I've always went to the bathroom a lot.
Q. When you were doing the CPR, what -- how long did it take for the firefighters to get there? Do you have any idea?
A. No, I can't remember. Everything was happening so fast. I was worrying about her real bad. I didn't want nothing bad to happen to her because I loved her.
Q. Okay. You're talking about [redacted]?
A. Yes, ma'am.
Q. All right. You said that when you were on the phone trying to call 9-1-1 Ann was trying to hide some reefer?
A. Yes, ma'am.
Q. That's marijuana?
A. (Affirmative nod.)
Q. Had y'all been smoking marijuana that morning?
A. Yes, ma'am.
Q. Did y'all smoke marijuana the night before?
A. Yes, ma'am. We smoked marijuana everyday.
Q. Y'all were smoking marijuana everyday?

A. Yes, ma'am.
Q. And was Ann participating in that?
A. Yes, ma'am.
Q. Was Ann doing it too?
A. Yes, ma'am.
Q. Okay. What about Crystal?
A. Yes, ma'am.
Q. Whose reefer was it?
A. It was Crystal's. At the time, we had bought some for that too.
Q. Okay. So you had bought some too and Crystal had bought some?
A. Yes, ma'am.
Q. All right. Were you talking pills? Were you popping any pills?
A. Not then.
Q. Not then? But do you pop pills?
A. We was taking pills a couple days before that.
Q. What kind of pills?
A. Valiums.
Q. Valiums. Anything else?
A. That's about it.
Q. Okay. Now, why did Ann feel it necessary to hide the reefer?
A. Because she said she didn't want to lose her girls.

She said, at first she said, we can revive her ourself. I said, it don't look like we're going to be able to help her. So we need to call the ambulance, because I don't want where we can't save her.

Q. And so you say you called the ambulance?

A. Yes, ma'am, I did.

Q. So how long -- can you tell me how long [redacted] was on the floor before y'all decided to call the ambulance?

A. She was on the floor maybe a couple of minutes, because I was trying -- we was trying to do CPR on her. And then I said, it's not working, so we called. We called the ambulance. I called 9-1-1.

Q. All right. Now, when the firefighters got there first, then EMS got there; is that correct?

A. Yes, ma'am.

Q. All right. Did you tell the firefighter or EMS personnel what had happened?

A. Ann told them what had happened.

Q. Okay. And what did Ann tell them happened?

A. She told them that she got choked on tea.

Q. Okay. Did Ann tell them that she was in the living room with [redacted] when she got choked on tea?

A. Yes, ma'am.

Q. And where did she tell them that you were?

A. She told them I was in the bathroom.

Q. Now, when EMS left, did y'all try to go with them to the hospital?
A. No, ma'am. We was in the -- they asked her if she would like to ride with them and she said that she's going to ride with Crystal, follow the ambulance. So we followed the ambulance in Crystal's car.
Q. Did one of the officers tell y'all that you couldn't leave?
A. (Witness pauses).
Q. That y'all had to wait for somebody else.
A. We asked if we could go to the hospital and stuff. He said go ahead. We can catch up with you later.
Q. Okay. Now, when you went to the hospital, on the way to the hospital, did you and Crystal talk about anything?
A. Me and Ann was talking about she's a baby girl and she's young, she's strong, strong like her mama and stuff. We talked about that, but not much after that. I put my hand on her shoulder, to tell her it's going to be okay. She's going to be okay. And she pushed me away, pushed my hand away.
Q. All right. Now, when you got to the hospital, you waited in the waiting area?
A. Yes, ma'am. The big waiting area.
Q. All right. And Ann left you at that point; correct?
A. She was there for a few minutes but then they called

her back to another area.

Q. All right. And do you remember talking to any police officers at the hospital?

A. I remember talking to him because he come up to me while I was talking to Ann's biological father.

Q. And that's Sergeant Chris Miller?

A. Yes, ma'am.

Q. This man right here at the table?

A. (Affirmative nod.)

Q. Okay. You talked to him?

A. Yes, ma'am.

Q. And did you go with him to the law enforcement center?

A. Yes, ma'am, I did.

Q. And he -- what did he tell you?

A. First I was -- it was a little bit of small talk. He was talking about he had a bulletin board with this guy that killed his mom on mother's day. I remember just like it was -- it's in the back of my memory like it was just yesterday. And then after that, he asked me what had happened that day. And then that's when I told him.

Q. And what did you tell him -- that was on May 25th. What did you tell him happened?

A. I told him we woke up that morning and we fed the kids and I took them out for a little while and let them play. And [redacted] got bit by ants. So I brought them back in.

And took her clothes off and her mama cleaned her up, then we laid them down for their nap. But before that, before we laid them down for their nap, we brought them back. I mean, we got ready, laid her down for her nap and then we come ...

Q. Okay. Now, do you know how long you stayed with Investigator Miller at that time, Sergeant Miller at this time. Do you know how long you stayed there?

A. I don't -- probably a couple of hours.

Q. Okay. All right. I'm going to show you ---

A. Maybe an hour.

Q. Okay.

A. Not long.

Q. All right. I'm going to show you these two pieces of paper and it's State's Exhibit 49. It's two pages and it says victim/witness statement. The date of it is 5/25/11. And I'm going to ask you, is that your signature right there?

A. Yes, ma'am.

Q. And is that your signature on this second page?

A. Yes, ma'am.

Q. And the only person that was in the room at the time was Investigator Miller, for this?

A. Yes, ma'am.

Q. So you did give him this statement; is that correct?

A. Yes, ma'am, I did.
Q. Now, were you able to see [redacted] while you were at the hospital?
A. No, ma'am.
Q. Okay.
A. Well, when we was at Greer Hospital I seen her for a brief minute. When I asked how she was doing, they said she's doing all right. She was breathing on her on. She'd done got her color back and everything.
Q. All right. Now, on June the 2nd, you talked with Investigator Miller correct and another investigator by the name of Autrey. And I'm going to show you State's Exhibit Number 40 that says, Your Rights. I'm going to ask you to look at that and tell me, is that your signature?
A. That's my handwriting, yes, it is. I don't remember writing it.
Q. Okay. That's fine. And these initials that are on each paragraph, did you initial those?
A. That looks like my handwriting. I still don't remember doing that, no.
Q. Okay. And there's a word circled at the bottom. And the word is coercion. And it has initials under that word. Is that your initial?
A. Yes, ma'am.
Q. It is? Okay. Now, on your rights form. This is June

the 2nd. On your rights form, there are some rights outlined. Did you read these?

A. No, ma'am, I didn't.

Q. Okay. Did Investigator Miller or Investigator Autrey read them to you?

A. I don't remember if they did.

Q. You don't remember? All right. You don't remember they said to you that anything you say can be used against you in Court?

A. No, ma'am. I was on a lot of medicine. I'd been worried about her. Nobody would tell me what was going on with her. So I been trying to -- my mama said I needed to get some rest. I told her I could not rest. I couldn't sleep.

Q. Okay. All right. On this form it says, you have a right to talk to an attorney for advice before we ask you any questions. Do you remember them telling you that?

A. No, ma'am.

Q. All right. Did you ever ask them for an attorney?

A. I don't remember.

Q. You don't remember? Okay. Well, let's deal with that since you don't remember. Why wouldn't you remember? What were you taking?

A. I took a lot of football Xanaxes and I took some Benadryls because they were not working, trying ---

Q. What's a football Xanax?
A. It's a one milligram Xanax?
Q. And that was on June 2nd?
A. Yes, ma'am.
Q. And how many had you taken?
A. I'd been taking them all day that day.
Q. All right.
A. And I was supposed to ride with Josh to go pick his girlfriend up in -- I can't remember what county it was, but I got messed up and Josh said, no, I couldn't ride.
Q. Okay. Don't tell me what Josh said. So what time did you start taking these pills?
A. I'd say about seven o'clock that morning.
Q. And you continued until what time?
A. I passed out for about, I don't know how many hours.
Q. Okay.
A. I remember waking up, I'd say about twenty minutes before them people come to the house.
Q. What people?
A. The people that brought me in here.
Q. Police officers?
A. Yes, ma'am.
Q. Okay. And so you were passed out and you woke up about twenty minutes before they got there. All right. And did you tell them that you were taking drugs -- pills

that day?
A. No, ma'am. I was afraid that I would get in trouble.
Q. Okay. Did you have reefer on you, too?
A. Yes, ma'am. I did.
Q. Okay. So what happened to the marijuana you had on you?
A. I gave it to Josh.
Q. Okay. In front of the police?
A. No, ma'am. They was standing outside and I was -- they told me, I said, well, I'll get my brother to bring me. They said, no, you got to ride with us now. They said that they -- I didn't have to go with them, that's not the truth because they told me I had to go with them.
Q. Okay. So you went back in the house, gave your reefer, your marijuana to Josh?
A. Yeah.
Q. And then went and rode with the two officers?
A. Yes, ma'am.
Q. Okay. Now, do you have any idea the time you got there with them?
A. The time I got there? I have no idea.
Q. Okay. All right. So when you got -- they took you to the law enforcement center; is that correct?
A. (Affirmative nod.)
Q. And when you got to the law enforcement center, did

you then meet up with Investigator Miller at some point?
A. At some point, I reckon.
Q. Right. And then another investigator that has testified earlier, Autrey?
A. I remember bits and pieces of that. I remember him sitting on the opposite side of the desk. And the other one was standing right -- sitting right beside a camera, a big camera like they had in here, sort of.
Q. Okay. So were you under the impression that your interview was being recorded?
A. Yes, ma'am.
Q. Okay. But you've heard testimony that it was not?
A. Yes, ma'am.
Q. All right. Now, when you started talking with them, what did you tell Investigator Miller?
A. (Witness pauses).
Q. Was he asking you about what happened? Did he tell you anything, what Georgia Ann said? What did you tell him?
A. He asked me what happened and I began to tell him what I told them the first time.
Q. Right.
A. And then he said, I wish you would just tell us the truth. She done got back with him. I don't know why you're trying to take up for her.

Q. Okay. Who's got back with who?
A. Ann got back with Victim 's father.
Q. Okay. And so Investigator Miller told you that Ann had gotten back with Mark Gore, Victim 's father. And he didn't know why you were trying to take up for her?
A. Right.
Q. Then what else happened after that?
A. I really don't remember much. I remember bits and pieces.
Q. Okay. Now, I'm going to show you State's Exhibit 41. Is that your signature on two different lines?
A. That looks like my handwriting, yes, ma'am. That is my handwriting.
Q. Okay. And on this form it has initials at the beginning of the paragraph and at the end of the paragraph. Are those your initials?
A. Yes, ma'am.
Q. So this statement is dated -- it's not dated, but this is the statement they said they collected from you on June the 2nd.
A. Yes, ma'am.
Q. All right. And you're saying that you don't remember telling them this?
A. I don't remember nothing. I don't remember them taking me to the police department over there to take my

pictures or nothing. I don't remember.
Q. Okay. On this statement it says, accidents happen. Do you recall telling them that? Accidents happen?
A. No, I don't remember it.
Q. Okay. Then it says, I never would hurt a kid. Remember telling them that?
A. Yes, ma'am.
Q. Okay. It says, I was in the bathroom. And there's pauses, I mean dots. Do you remember telling that?
A. I don't remember that.
Q. Now, on this statement did you read the top part of the statement, the first six lines that talks about getting a lawyer. Did you read that?
A. No, ma'am, I can't read that well.
Q. Okay. Did ---
A. I can barely read.
Q. Okay. Did the investigator read it to you?
A. I have no clue.
Q. You have no clue? All right. Did you tell the investigator that you were on Xanax and whatever else you were popping that day?
A. No, ma'am. I was afraid that I would be in more trouble.
Q. Okay. Now, this statement says, I am not under the influence of any drugs or alcohol. And you put your

initials on there. So what is it that you're saying, you just lied to them right then?

A. Yes, ma'am.

Q. Because you had actually taken Xanax and whatever else that day. Had you smoked marijuana that day too?

A. Yes, ma'am.

Q. All right. Now, while you were talking to the officers, did he give you an opportunity to go to the restroom?

A. I have no clue. I really don't remember.

Q. You don't remember going to the bathroom?

A. I remember him -- what he said yesterday, that's what I remember now. I don't remember nothing really from that day. I remember everything the day that it happened, because I was not on nothing that day at all.

Q. All right. Now, in this statement, there's the line that has your initials by it that says, I don't deserve to live. What's that about?

A. I have no clue.

Q. It says, I never should have picked up that toy that day before. You remember telling him that?

A. (Negative nod.)

Q. It says, I don't know how those bruises got there.

A. I don't.

Q. You don't remember that either?

A. The only bruises that was on her is that one right there and the little beaded one looking. The rest of them bruises was not on her.

Q. Okay. So where did she get the beaded-looking bruises from?

A. Got it from her sister with a beaded necklace.

Q. Okay. Minor 1?

A. Yes, ma'am.

Q. Okay. And you said Minor 1 hit her with the beaded necklace?

A. Yes, ma'am. They used to fight over toys all the time.

Q. There was some testimony that Minor 1 hit Victim with a little toy car or truck or something. Did you know anything about that?

A. I don't remember that right there.

Q. Okay. On your statement it says she started screaming. I was just trying to calm her down? What does that mean?

A. Again, I don't remember that statement at all.

Q. All right. So you're saying that the part where you said she kept crying. I hadn't been on my medication. People are going to hurt me. Ann and her CO's. I don't know what that means. You didn't say any of that? Do you recall saying that?

A. I don't recall saying it, no, ma'am.
Q. Okay. It says I covered Victim's mouth until she quit crying.
A. No, ma'am, I don't remember.
Q. Ann was in the bed. You don't remember that?
A. (Negative nod.)
Q. Okay. So essentially the statement that you signed on June the 2nd, you do not remember most of it. Is that what you're telling us, the Court?
A. Yes, ma'am.
Q. And you don't recall whether you asked the Investigator at that time for an attorney or not?
A. No, ma'am.
Q. Okay. All right. If you said these things, why would you have said that? Why would you have said that?
A. Defending her.
Q. Defending her. Who's her?
A. Ann.
Q. Ann. Why would you feel it necessary to defend Ann?
A. Because she -- me and her was trying to get pregnant and have another child. She wanted to have my baby, she said. And she thought she might be pregnant. And I didn't want her to go to jail with my young'un. I wanted her to be able to be out there and take care of it.
Q. You didn't want her to go to jail with your young'un.

So why did you think she was pregnant?

A. Because she's ---

Q. Did she tell you she was pregnant?

A. She said she felt different, like she might be.

Q. She might be?

A. (Affirmative nod.)

Q. So when did she tell you that?

A. She told me that a couple of days before this happened.

Q. A couple days before it happened. Did you mention that to the investigator?

A. I have no clue.

Q. You don't remember? All right. Did you cause any of the bruises that appear on [redacted]'s forehead?

A. No, ma'am.

Q. All right. On State's Exhibit 28, it shows bruises on [redacted]'s -- between her eyes on the forehead, on the side of her head. Did you cause any of those bruises?

A. No, ma'am.

Q. All right. It shows on State's Exhibit Number 30, this is the right side of the body, it shows three imprints of bruises. Did you cause those?

A. (Negative nod.)

Q. I think the testimony is on the left side of the body, on one of the State's Exhibits, there are bruises there.

Did you cause those?
A. No, ma'am.
Q. All right. Did you cause any of the bruises that were on her arm?
A. (Negative nod.)
Q. Any part of her body?
A. No, ma'am, I did not.
Q. Now, when the officer -- when Investigator Miller finished with the statement, did he read the statement back to you?
A. The first time he did. I don't know if he did the second time. I don't remember.
Q. Okay. The first time was May the 25th. So you remember that statement. You remember he read it back to you?
A. Yes, ma'am.
Q. All right. The second statement you gave them was June the 2nd, 2011. And you don't recall whether he read that back to you or not?
A. No, ma'am, I don't.
Q. All right.

MS. MANIGAULT: No further questions, Your Honor.

THE COURT: You may cross-examine, Solicitor.

MS. HODGE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. HODGE:

Q. In your statement, since we're talking about your statements right now, the May 25th statement, the night that this or the day this incident happened and you talked to Investigator Miller at his office, y'all talked for a good hour, hour and a half, two hours; is that right?

A. Yes, ma'am.

Q. Okay. I just need you to verbally say the answers for the court reporter. And you gave a really, a really detailed statement; is that right?

A. Yes, ma'am.

Q. And it was about how awesome you were with these kids; is that right?

A. I loved them.

Q. How you would get up at six A.M. every morning with these kids?

A. Yes, ma'am.

Q. And you would do all of the taking care of them, feeding them, playing with them?

A. Yes, ma'am.

Q. You were the greatest in your statement. And this is the statement you remember?

A. I remember it. Yes, ma'am.

Q. Okay. And in this statement you say you -- you never say anything about Ann being mean to the kids. She wasn't

mean to them, was she?
A. No, not that I know of. One time she told me that [Minor 1] -- I mean, [Victim] had bitten [Minor 1] and she bit her back just to let her know, and that's it. I didn't think nothing of it because ---
Q. Okay. So that's -- and she old told you that. You didn't see her do it?
A. No, ma'am.
Q. You never saw her grab up [Victim] and squeeze her real tight by the rib cage?
A. No, ma'am.
Q. Okay. You never saw her punch her in the face?
A. (Negative nod.)
Q. You never saw her hit her with a beaded necklace on the head?
A. No, ma'am.
Q. You never saw her throw toys at her?
A. No, ma'am.
Q. You never saw Ann do anything to her?
A. No, ma'am, I hadn't.
Q. All right. And had you seen that, you would have told Investigator Miller that on May 25th, wouldn't you?
A. Yes, ma'am.
Q. Because that's pretty serious; right?
A. Yes, ma'am.

Q. And it's wrong to hit babies? It's wrong to throw things at babies?
A. So wrong. They don't deserve that.
Q. No, they don't. They're innocent aren't they?
A. (Affirmative nod.)
Q. They're sweet. They're little.
A. Little angels.
Q. They're little angels. They look to you to take care of them; don't they?
A. (Affirmative nod.)
Q. And for you to punch them in the face or to throw toys at them, that would be bad; wouldn't it?
A. Yes, ma'am, it would.
Q. And anybody that would do that, that would probably be a not very nice person?
A. I'd say they ain't got a soul.
Q. And you weren't about to tell Investigator Miller you did that; right?
A. If I did it, if I did it and if I did something to her, I would have owned up to it then. I would have been honest.
Q. All right. Well, so that's what eventually happened, though, isn't it. Your conscience eventually got the best of you ---
A. I never ---

Q. --- back on June 2nd?
A. No. My conscience didn't get to me. I don't remember that.
Q. Wait a minute. You don't remember? That's what you're telling us?
A. I really don't. I'm being honest with you. I'm telling the truth. I do not remember that day.
Q. And you don't remember that day because you were taking some illegal drugs?
A. Yes, ma'am.
Q. You were taking Xanax, which you didn't have a prescription for?
A. Yes, ma'am.
Q. And where did you get the Xanax?
A. A friend.
Q. What friend?
A. My buddy Josh's friend.
Q. What's his name?
A. I can't remember his name. I didn't know him that well.
Q. How did you get the drugs?
A. Josh got them for me.
Q. And how did you pay Josh?
A. I had money. I had just got my check.
Q. So you used your disability check that you get from

the government and you bought ---

A. A little bit of it.

Q. --- and you bought pills?

A. I paid Josh and them rent too because I was kicked out of Crystal's house. I didn't have nowhere to go.

Q. Okay. And you were kicked out of Crystals house that night; right? May 25th?

A. Yes, ma'am.

Q. And she ceased having any communication with you?

A. They told me at the hospital not to come back up there.

Q. All right. And Ann also ceased communication with you May 25th?

A. Yes, ma'am.

Q. That was it, y'all were done?

A. Yes, ma'am.

Q. There was no talking about getting back together, nothing like that?

A. No, ma'am.

Q. You weren't -- you didn't even come to [redacted]'s funeral, did you?

A. Nobody told me that she died. My brother tried to tell me and I didn't believe him. But that he heard, he overheard them talking about it.

Q. Well, tell me this, did you ever pick up that phone

and call Ann and say, what happened to [redacted]?

A. I didn't have no phone number to call her. I kept calling -- I called [redacted]s daddy, because that number was in my phone. And I called her step-daddy.

Q. Ann's step-daddy?

A. Her ex-step-daddy.

Q. And they didn't tell you that [redacted] had died?

A. No, they told me that she was better, and she was breathing on her own and everything.

Q. So you just left it. That would have been before -- that would have been within the next two days?

A. Yes, ma'am.

Q. And you just left it at that? So you knew that you and Ann weren't getting back together?

A. I had my mama call and check on her too because they wouldn't tell me nothing. I figured they'd tell her something. They wouldn't tell me nothing.

Q. Did you ever get somebody to get you a ride to go to where Ann might be or where ---

A. I didn't know where she would be.

Q. What about -- you knew where Crystal still lived; right?

A. Yeah.

Q. And did you ever think about calling Crystal's house and asking or calling Crystal?

A. Everybody was blaming me for what happened. And Crystal's friend, what's his name, tried to get me to get my brother to drop me off over there, but not there exactly. He wanted me to come up there by myself. And my brother told me I don't need to go up there because it sounds like they're trying to set me up or something.

Q. Okay. So that's why you didn't follow-up at all with [redacted], this child, this sweet little baby angel, that was basically dead the last time you saw her, you didn't follow-up with anybody on that?

A. She was not the last time I saw her in the hospital. She was breathing on her own and everything. I mean, they had her -- breathing tube ---

Q. In the hospital?

A. Yes. She looked normal again.

Q. All right. And that's it. That's the last time you looked, checked, knew anything, and you just ---

A. I kept trying everyday. I kept trying to get them to tell me what was going on with her. Nobody would tell me nothing. They said they would let me know something if they find out anything. Nobody ever let me know anything.

Q. Okay. All right.

A. I gave the investigator my phone number too.

Q. And he did come back to you, didn't he, on June 2nd and tell you what happened?

A. Never called me or nothing, no.
Q. Well, they came and got you and asked you to come talk to them. And so you were probably interested in what had happened, weren't you?
A. I was interested in what was going on. I never knew anything was wrong with her, though. I'm being honest.
Q. All right. So when you came back on June 2nd and he said she ---
A. I thought she was okay, but I didn't know.
Q. But you found out on June 2nd, didn't you, that she was not okay?
A. Yes, ma'am.
Q. She was dead and it wasn't an accident?
A. Yes, ma'am. I found that out.
Q. And you also found out that Ann has now gotten back with Victim 's dad, or appeared to be that she was back with him?
A. Yes, ma'am.
Q. So that was it for y'all? It was done.
A. (Affirmative nod.)
Q. Now, you're saying that you took -- how many Xanax did you take?
A. A lot. I was taking them actually -- I got started -- I bought them, a lot of them, I'd say about thirty of them May 1st -- no, I mean, June 1st. I bought them that night.

That day I went out to eat and I took my nieces and nephews out to eat, too. And I would keep trying to find out and my brother was trying to find out, I couldn't even really eat. I was worrying. I was just sitting there like, what's wrong? What's wrong with her? Why won't anybody tell me anything?

Q. So you started taking pills?

A. Yes, ma'am.

Q. While you're taking your niece and nephew out to eat you're taking pills?

A. I wasn't driving or nothing.

Q. Okay. But you're supposed to be watching them or what?

A. No, my brother was there.

Q. Oh, he was with you? Oh, okay. I'm sorry. I thought you meant you took them by yourself?

A. No.

Q. And then you're smoking pot?

A. Yes, ma'am.

Q. In front of those kids?

A. No, I wasn't smoking pot then. I started smoking later on that night.

Q. All right. And so what time do you think that was, before you fell asleep or after you fell asleep and got back up?

A. No, that was before I fell asleep I started smoking weed and stuff.
Q. Okay. So then you fell asleep. You got some sleep in there?
A. I fell asleep and then I woke up. I'm still feeling -- worrying and stuff so I took a couple more to make me feel a little bit better.
Q. Okay. How much do you weigh?
A. Then I didn't weigh much at all. I weigh a lot more now. I weigh about a hundred and thirty-one pounds now.
Q. All right. And back then you were significantly less than that?
A. Yes, ma'am.
Q. And you're taking eight, nine, ten Xanax?
A. I had a high tolerance. I've always -- I've took them a long time over the years.
Q. Because you've been using illegal substances for a long time?
A. Over the years, yes, ma'am.
Q. Over the years. All right. And you said the police came to get you. And you had the wherewithal or you understood you couldn't take the pot with you to the police station? That would be dumb?
A. I mean, anybody should know that.
Q. Right. That's pretty dumb. So you had the mind

power, or the willpower, whatever, the knowledge to say, excuse me, officer. And give that to Josh?

A. To Josh.

Q. Okay. And then you kept some pills in your pocket or you didn't have any more pills?

A. I had a few of them in my pocket and the rest Josh had.

Q. Okay. And so you didn't think you needed to take the pills out of your pocket before going to the police station?

A. I knew I could get rid of those.

Q. You could get away with that basically?

A. Yes, ma'am.

Q. All right. And your testimony is then you ride to the police station, but you don't remember riding to the police station?

A. I remember bits and pieces of it. I don't really remember the whole night. I remember them telling me I had to go with them. I looked over. I said my brother's right there. My brother was out there in his yard.

Q. Hadn't your brother already told you to go away or get gone or something, though?

A. Earlier that day, yeah. He told me that I was messed up, I couldn't be around the kids.

Q. You couldn't be over there around the kids, right?

Okay. But now you're saying your brother was going to take you down there, even though he already told you to get away?

A. He would have took me down there, left the kids with his wife.

Q. Okay. But you got in the car with the police instead. And you went to the law enforcement center and met with Investigator Miller who you already knew?

A. Yes, ma'am.

Q. You remember that?

A. I remember Investigator Miller. I remember his face because of the first statement I made. I remember him coming to get me and us riding in a dark -- or I guess a blue colored car. I can't remember. It was dark.

Q. Right. An unmarked car. One that didn't have lights on it or anything like that?

A. Yes, ma'am.

Q. Okay. But this day, on June 2nd, you get there and you recognize this, this is the same man you had talked to. I mean, it wasn't a stranger you were going in to talk to. It was the same man?

A. The same man was there.

Q. Okay. And he was very nice to you, wasn't he?

A. I don't remember. I really don't remember. I'm being honest. I really don't remember.

Q. All right. You remember starting off with your story about being in the bathroom, though, don't you?
A. I remember bits and pieces of it. I know I had pills in my pocket and I didn't have them no more. I didn't get caught with them. So I must have ate them.
Q. Okay. Well, didn't you testify previously in another hearing that you in fact went to the bathroom and took those pills?
A. And took pills.
Q. You remember that?
A. Because I had the pills before I went to the bathroom and I -- I'm being honest with you, ma'am. I had nothing to do with what happened to [redacted]. I loved her. I loved [redacted]. I wanted to be -- Ann even told me herself that I treated them better than their own fathers did.
Q. Uh-huh (affirmative).
A. I loved them kids.
Q. Here's my question. You're telling the jury at one point you don't know how these pills got out of your pocket. And you previously testified that you knew exactly how those pills got out of your pocket because you took them in the bathroom, while Investigator Miller took you to the bathroom; isn't that right?
A. Yeah, I took them. I took them in the bathroom, yes, ma'am.

Q. So you remember that?
A. Yes, ma'am.
Q. But you're trying to get these people to believe that you don't remember anything ---
A. I don't remember ---
Q. --- when you gave this incriminating statement?
A. I don't remember the statement. I'm being honest. I don't remember it. I ain't got no reason to lie to these people.
Q. You don't? You don't think it's pretty serious what's going on here and if you got convicted it would be serious?
A. Yeah. It would be serious, but I did not do it. Since day one ---
Q. Well, when would be a good time lie?
A. Since day one, everybody's been trying to put it on me because I am the boyfriend.
Q. What does that have to do with anything?
A. It's got a lot to do with it.
Q. If you didn't do it, you didn't do it. It doesn't matter if you're the boyfriend or the biological dad, does it?
A. No, it don't. But everybody seems to think that.
Q. Because you did it. That's why they think that; isn't that true.
A. No, I did not do it.

Q. Let's talk about the biological dad. You didn't like Make Gore, did you?
A. No, because of the way he talked to me.
Q. Y'all had some words?
A. He talked to me on the phone like -- I paid for the diapers that she had, [redacted]. I needed the diapers for [redacted], too. Because I'd been watching -- I was watching them kids by myself.
Q. That's right. You had unlimited access to those children alone; right?
A. Yes, ma'am.
Q. Okay. And so he wanted to get some diapers when he came and got [redacted] and you didn't want him to; is that right? Because you paid for them?
A. I paid for them and I needed them for [redacted], too.
Q. Okay. And you didn't particularly care for him popping in and out of [redacted]'s life; is that right?
A. No, I didn't think that was right.
Q. You didn't think that was right. And at some point you offered to, I think -- was it about the diapers? You were going to kick his ass or something like that?
A. I told him if he come over there starting any trouble, that we would have words. That's it. That's all I said.
Q. And he never did ---
A. I said, I hope you will still come and get her,

though, because she needs to be with her father.
Q. Isn't it true that really you didn't want him to come and get her because you didn't like that he wasn't consistent, that he was sporadic?
A. No, it ain't like that. I don't want nobody to not see their own kid.
Q. Now, Ann would talk to him on the phone a fairly good bit, wouldn't she?
A. Yeah.
Q. And when you got ---
A. She talked to [redacted]'s daddy, too, a lot.
Q. And [redacted]'s dad. But he lived in North Carolina; isn't that right?
A. Well, he had -- he called everyday to talk to her. He said that he's going to come and get her several occasions and didn't come.
Q. And didn't do it. And he really never came and got [redacted], did he?
A. No, he didn't.
Q. So he was not ---
A. He come and got her one that I know of, and she spent a night with him and that's it.
Q. He was not really a threat to you and Ann's relationship?
A. No, ma'am.

Q. Because he was not really ever around?
A. No, ma'am. I wasn't worried about him.
Q. But Mark Gore was a little bit different, ---
A. No, that's what I'm talking about ---
Q. --- a little jealousy.
A. --- I ain't worried about him. He was not -- see, [redacted] s daddy, he called everyday to talk to [redacted].
Q. Uh-huh (affirmative).
A. He never called to talk to [redacted].
Q. But he would get [redacted]?
A. No, he got her one time.
Q. So there's only one time -- your testimony is there was only one time he came and got [redacted]?
A. Yes, ma'am.
Q. All right. And you didn't like that?
A. I was happy he come and got her. I told Ann I was happy that he came and got her.
Q. But they would talk on the phone, wouldn't they? Mark Gore. Because [redacted] s dad's name is Mark also?
A. Yes, ma'am.
Q. Mark Gore would talk to Ann on the phone a lot?
A. Yes, ma'am.
Q. Okay. And ---
A. He never would want to talk a lot. He just wanted to talk to her and not [redacted].

Q. Okay. So he just wanted to talk to Ann and not [redacted]. And I'm trying to see if it was -- didn't you tell Investigator Miller that since y'all moved over to Crystal's house that Ann just wasn't being as affectionate towards you anymore; is that right?

A. May have.

Q. Was that accurate? Would that be a fair thing to say, that she was not ---

A. She acted a little bit different. I mean, she was -- I guess she was -- I don't know, trying to be closer to Crystal. I don't know. Because they hadn't been around each other in so long.

Q. You didn't know the fact that she wasn't being as affectionate to you anymore?

A. She wasn't being like she used to be.

Q. Like she used to be. All right. Okay. And ---

A. She used to get mad at me because I would move away from her so I could sit by myself a little bit.

Q. So you pushed them away so you could be by yourself a little bit; is that right?

A. No, Ann. I'm talking about Ann ---

Q. You would push Ann away?

A. No, that's what I'm trying to say. Is Ann used to get mad at me if I would go sit on the love seat instead of right beside her always. She wanted me always right there.

And she used to -- I would lay down on the couch, she'd come in there and lay on my back and stuff.

Q. Okay. And things had changed close in time to when this happened to [redacted]?

A. It was -- it had been like that almost the time we were there.

Q. You were at Crystal's. Which was a couple of weeks while y'all were at Crystal's?

A. We was there about two months.

Q. Okay. Did you move in there the first of May, about?

A. No, it was -- I think it was, I think it was the end of -- actually, it wasn't far in April. Because me and that fellow got into it. I asked him to bring some cooking oil at the apartment. And when he came, Ann and him's been talking on the phone for a little while. I asked Ann to ask him to bring me some cooking oil. Well, he brought me some cooking oil, all right. He hit me in the face with a Mason jar full of it.

Q. All right. I'm glad you brought that up. Let's talk about that. On April the 28th, that's when the police were called because you guys called the law when he attacked you; right?

A. Yes, ma'am.

Q. Okay. And the reason he attacked you is because he saw you abusing [redacted] and that made him mad?

A. No, ma'am.
Q. And that's why he came up there and hit you in the face with that Mason jar?
A. No, ma'am, I've never abused her.
Q. And he saw you hit her in the back with a closed fist and an open fist?
A. No, ma'am.
Q. And, in fact, he told you, stop abusing the kids. And that's why he beat you up?
A. No, ma'am.
Q. And that was on April the 28th of 2011. That was Kenny Smith; right?
A. I can't remember his name.
Q. Did he go by Kenny?
A. I think so.
Q. Did y'all hang out together? Before that happened, y'all used to hang out together some?
A. I think he kept talking about his girlfriend leaving him.
Q. Well, you don't need to tell me what he said. I asked you, did y'all hang out some beforehand?
A. A little bit, yeah.
Q. Okay. And he had a TV in his apartment and you wanted to know if you could bring the girls over there to watch the TV, because y'all didn't have one; is that right?

A. We had one but she went and pawned it.
Q. Went and pawned it. All right. So you were wanting to bring the girls over to be able to watch the TV, to his house; is that right?
A. (Affirmative nod.)
Q. And you would go over there with the girls?
A. Me, Ann and the girls.
Q. And that's when he saw you with the girls; right?
A. I have never hit them kids in their back at all. I may have popped them on their hand and that's about it. And it wasn't no violently smack on the hand either.
Q. You happened to be providing information to Ann and other people that were asking about these injuries on Nay Nay's head. So you just happened to be around when all these things happened to her by some other means?
A. The kids were always in there with me. She was in the bed, always. And sometimes the kids would stay -- Crystal's little girl would stay in there with us while Crystal went somewhere.
Q. So you were the one that would see exactly how these injuries got there; right?
A. Yes, ma'am. Those -- several of those was not there on her. Was not there.
Q. Do those look bad to you?
A. Yes, ma'am.

Q. That looks real bad, doesn't it?
A. Brings tears to my eyes.
Q. Okay. Now, the thing about -- going back to the incident date, your testimony, which you have said earlier, is that you were up with the kids, [redacted] and [redacted]. And your testimony is Ann was up. She was not sleeping?
A. No, she was not.
Q. It was not one of those days where she was real tired and you wanted to treat her well and you wanted her to get rest?
A. No, ma'am.
Q. Like you testified, on other days that you would let her rest and you would take the girls?
A. Not that day. We was planning on going somewhere when Crystal got back.
Q. You were planning on going somewhere?
A. We were. We were all planning on going somewhere.
Q. Okay.
A. In fact, we was going to go to Crystal's friend's actually.
Q. All right. Did you ever tell anybody that?
A. Huh?
Q. Did you ever tell anybody ---
A. That we was going to go ---
Q. --- Investigator Miller that y'all were going to ---

A. We was going to go ---
Q. Ann was up because y'all were going somewhere. Did you ever tell anybody that?
A. Not as I know of.
Q. And so your testimony is [redacted]'s fine. She has none of that stuff on her, happy and playing?
A. She had a few bruises, but she didn't have real big bruises; she didn't have those. She had the little beaded one and the one right there.
Q. And that's it?
A. That's all I saw when I saw her.
Q. And you heard the testimony that she had over twenty-five bruises, and you're telling us ---
A. Yes, ma'am.
Q. --- you saw two that you knew of and you could explain?
A. Yes, ma'am.
Q. All right. And so your testimony is that you go to the bathroom, she's fine but two bruises; is that correct?
A. Yes, ma'am.
Q. All right. And in you're in the bathroom for how long?
A. Two or three minutes.
Q. Two or three minutes. What are you doing in the bathroom?

A. Using the bathroom, taking a dump.
Q. A number two?
A. Yes, ma'am.
Q. Whatever you want to call it? All right. And then you come out to hearing somebody yelling?
A. Ann. I heard Ann yelling. She was saying, she's not breathing. The baby's not breathing. And so I run in there with my cell phone. I was the only one that had a cell phone.
Q. You're the only one that had a phone. Ann didn't have a phone; right?
A. Ann did have a phone, but her phone got cut off.
Q. So she didn't have a working phone?
A. No, ma'am.
Q. You're the only one ---
A. She could use my phone anytime she wanted to. I let her use it anytime.
Q. Did you have it in the bathroom with you?
A. She used it several times calling Mark.
Q. Did you have it in the bathroom with you?
A. Yes, ma'am, I did because I was using it. I had been using it.
Q. Okay. Were you talking to somebody?
A. Before I went in there, I was.
Q. Who was that?

A. My buddy?
Q. What buddy?
A. I was talking to Josh again.
Q. Oh, okay. Were you setting something up to buy something from Josh?
A. No, ma'am. I was just talking to him. He's my friend.
Q. Okay. So did you ever tell anybody you were talking on the phone when all this happened?
A. No, ma'am.
Q. All right. And you come out to Ann saying, she's not breathing. And you say, let's call 9-1-1?
A. Yes, ma'am.
Q. So that's your testimony. And there's some discussion about getting rid of the pot because y'all had been smoking pot that day?
A. Yes, ma'am.
Q. And isn't it true that Crystal would have kept -- or you or whoever was at the house smoking pot would have kept it in the living room area, where this incident occurred, in something -- some kind of either drawer -- State's Number 3 -- some kind of drawer, end table, something? Where would it normally be kept?
A. Right there.
Q. Right there where the cups are on that table, in that

drawer?
A. Yes, ma'am.
Q. All right. And were there any just like roaches left in the ashtrays or anything like that?
A. Yes, ma'am.
Q. Okay. And so you go and you get those things cleared up?
A. I don't. She does.
Q. All right. But you don't know how to do CPR; right?
A. I was trying.
Q. But she knew how to do CPR?
A. Yes, ma'am.
Q. And y'all thought the best thing was for her to clean up the pot and you to do CPR?
A. I didn't care about the stuff, the weed or nothing. I said, well, let's just call 9-1-1. I didn't care. I went ahead and called 9-1-1. I was calling 9-1-1 while she was hiding the stuff. And they was trying to tell me how to do it, too.
Q. Right. Later in the 9-1-1 call that we hear. They're giving instructions, right?
A. (Affirmative nod.)
Q. Okay. But isn't it true that, in fact, actually you took that pipe and you put it here in Crystal's bedroom, into that drawer right there?

A. No, ma'am, I didn't.
Q. And that's what you were doing while Ann was doing CPR; isn't that right?
A. No, I did not do that.
MS. HODGE: May I have that marked, please?
(WHEREUPON, State Exhibit Number 55 was marked for identification.)
Q. Is that picture of Crystal's bedroom?
A. Yes, ma'am.
Q. And that pipe normally wouldn't be in that drawer; would it?
A. No, ma'am, it wouldn't.
Q. It would be in the table that you're talking about in the living room?
A. (No verbal response.)
Q. So is that an accurate picture of Crystal's bedroom on that day?
A. Yes, ma'am.
Q. Okay.
MS. HODGE: We'd move to admit State's Number 55.
THE COURT: Any objection?
MS. MANIGAULT: No objection, Your Honor.
THE COURT: Without objection it may be admitted and published.
(WHEREUPON, State Exhibit Number 55 was admitted into

evidence.)

MS. HODGE: Okay. I'm not even going to turn on the projector. I'm just going to pass that through here.

Q. Okay. So the pot's being taken care of and [Victim] is laying there purple, purple-lipped?

A. Purple-lipped, yes, ma'am.

Q. All right. And did she have clothes on earlier in the day?

A. She had clothes on then.

Q. She had these little clothes on?

A. And we took them off of her.

Q. Who took them off?

A. Me and Ann did.

Q. You and Ann did?

A. Yeah, because she had this stuff all over it.

Q. What was on it?

A. Something that looked like throw up or tea or something. It looked like tea mostly.

Q. All right. And did you see her throw that up?

A. She -- when we was doing CPR and stuff, we turned her over on her side a little bit and that's when it come up.

Q. Okay. Was this before y'all decide to make the call to 9-1-1?

A. I think so, yes, ma'am.

Q. Because you did hear the 9-1-1 call and there's no

talking about taking her clothes off ---

A. No, ma'am.

Q. --- or cleaning up throw up? So y'all got her cleaned up or somebody got her cleaned up and clothes off?

A. Yes, ma'am.

Q. All right. And so when the EMS people and the firemen get there, she doesn't have the clothes on. She's got a diaper on?

A. Yes, ma'am.

Q. And she doesn't have any throw-up on her anywhere?

A. No, ma'am.

Q. And she really never got to breathing again; did she?

A. Not there. I think the paramedics got her back, though.

Q. Right. But when you were there at the house ---

A. We were breathing into her the whole time until they got there.

Q. You were able to get air going in?

A. We was blowing air in and it was filling up, but it looked like her belly was just ---

Q. Going up and down?

A. Blowing up, and that's it.

Q. Okay. So there wasn't anything like sticking in there when you tried to blow?

A. If you saw her belly, it looked like it was just --

like her belly was swelling. I don't know why. You'd do like that and she would go (witness making hissing sound), it would sound like.

Q. She'd make a noise?

A. Yeah. A noise.

Q. Like a gurgling type or a noise like that?

A. Just a noise. I've never heard that noise before.

Q. Right. Yeah. People that are alive and breathing don't make that noise; right?

A. Yes, ma'am.

Q. Now, this statement that you gave that you say you don't remember, you continued to talk to the officer as you're going out of the police department; aren't you?

A. I don't know.

Q. You don't remember that either?

A. No, ma'am, I don't. I don't remember. I don't even remember them taking this picture.

Q. You got a bracelet on, you mean?

A. Yeah.

Q. Okay. So your testimony is from the point where things started looking bad for you and you're confessing, you don't remember?

A. I don't remember, ma'am. I'm being honest.

Q. And you don't remember making those comments about, yeah, how somebody that would do that would probably --

people wouldn't like that person; would they?
A. They would not. I would not like somebody that had done that. I love, I love kids. Those ain't the only two kids I've ever -- I've babysit in my life. I've helped my sister take care of her kids ever since they were babies, since they couldn't even hold their heads up. And I've watched my other friends' kids too. Nothing's ever happened to them. Them kids love me to death. All of them. They'd never fear of me.
Q. Do you have a temper at all?
A. No, ma'am, not towards no kids.
Q. Do you have a temper in general?
A. Not really. I don't just jump on nobody?
Q. Do you have an impulsive type thing? If somebody -- let's say somebody's getting in your business or something's not good ---
A. If somebody attacks me or something.
Q. --- or says something that you don't like or irritates you?
A. I don't attack on something like that, no. I never put my hands on nobody unless they put their hands on me.
Q. You never put your hands on anybody?
A. Unless the put their hands on me.
Q. But you have laid hands on people before?
A. Yes, ma'am.

Q. Even family members?
A. Defending myself.
Q. Yes. That would be a yes to that, even family members?
A. Yes, ma'am.
Q. Now, I see you've got a few tattoos right here?
A. Yes, ma'am.
Q. You have a tattoo right here under this piece of tissue; don't you?
A. Yeah. My daddy was -- I was told my daddy was murdered.
Q. So why are you covering that up for court?
A. Huh?
Q. Why are you covering that up for Court?
A. Well, I've got a scratch there, too, where I was shaving.
Q. You've got a scratch near your eye where you have a teardrop tattoo, that you now have a -- you have a band-aid over it?
A. Right here, I was -- I've been shaving right here. I'm being honest.
Q. Uh-huh (affirmative). But you're covering it up?
A. My daddy was, my daddy was -- well, I was told my daddy was murdered December the 25th of this year. And that's when I got it.

Q. Okay. Well, why would feel the need to cover that up?
A. Because I don't want people to think bad of me because I got tattoos.
Q. So you're trying to put a little something that's not you in front of the jury, because you do have a tattoo, but you're trying to cover that up; make yourself look better?
A. Everybody's got tattoos.
Q. Well, then what's the big deal?
A. I see the jury with tattoos. I mean, I love tattoos. I draw a lot. I like doing tattoos. I do tattoos on people. I don't see nothing wrong with tattoos.
Q. Well, here's my point. Why cover it up? Why cover it up? It's not a big deal, because you're trying, you're trying ---
A. People told me I should cover it up.
Q. A coverup. You're covering it up. You're covering up the fact that you, in fact, are the one who threw a toy or probably more like punched this child in the face?
A. A inmate told me I should cover it up.
Q. But you covered it up. You made a choice; is that correct? You are the grownup here. Is that correct?
A. Yes, ma'am.
Q. All right. You've covered it up?
A. I've never been in trouble before and had to see a jury. I don't know what I'm supposed to do.

Q. It's not true that you haven't been in trouble before. You've just never seen a jury?
A. No, I ain't never seen no jury. The only thing I've had besides that assault is simple possession.
Q. Assault?
A. Simple possession.
Q. And assault and battery?
A. No, I ain't never had assault and battery. I had assault.
Q. Assault?
A. Yeah.
Q. So we're back to -- the truth is you're not being completely truthful about yourself and what happened here?
A. I'm being honest with you. I've never put my hands on any kids. I've never whooped a kid, but pop them on their hand when they was wrong.
Q. But you did ---
A. Just to let them know.
Q. You did hit [redacted]?
A. No, I did not.
Q. And you did cover her mouth and suffocate her?
A. No, ma'am, I did not.
Q. And she did struggle against you, because she was not going to go down that like that. She was going to struggle.

A. No, ma'am, I did not do that.
Q. And you did freak out?
A. No, I didn't.
Q. And you did make up that story about taking a sip of tea because you didn't know what else to do?
A. No, ma'am, I didn't.
Q. And right now, you're trying to cover that up to this jury, just like you're covering up that tattoo?
A. No, ma'am, I am not.

MS. HODGE: That's all I have.

THE COURT: Any redirect?

MS. MANIGAULT: None, Your Honor.

THE COURT: All right. Thank you, sir. You may step down.

MS. MANIGAULT: Your Honor, we call Alex Johnson.

THE COURT: Sir, if you'll come around and be sworn.

THE CLERK: Do you solemnly swear or affirm to tell the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: Yes, ma'am.

THE CLERK: Please have a seat. Please state your name for the record.

THE WITNESS: Alex Johnson.

ALEX JOHNSON,

BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MS. MANIGAULT:

Q. All right. Mr. Johnson, how old are you?

A. Thirty.

Q. And do you know James Allen Johnson here?

A. Yes.

Q. And how do you know him?

A. He's my younger brother.

Q. He's your younger brother?

A. Yes.

Q. On June the 2nd were you around the police -- two deputies came to pick him up?

A. Yes. I was around earlier that day.

Q. Okay. You have a habit of mumbling. Please keep your voice up?

A. All right.

Q. And do you know what time of day or evening that was?

A. It was right around six, five or six, somewhere around in there.

Q. And had you seen your brother earlier that day before the police came?

A. Yes.

Q. What kind of condition was he in?

A. He was staggering around and drunk. He was staggering

around, messed up, drunk like. I told him he couldn't come into my house because I don't allow him around my kids while he's on -- under the influence.

Q. Okay. He was staggering around, drunk, messed up?

A. Yes.

Q. All right. Did he try to come over to your house?

A. Yes.

Q. Where was he when he was trying to get to your house?

A. At the neighbor's house with Josh.

Q. Is Josh right next door to you?

A. Yes.

Q. All right. And how long was it before the police came and when you told him go back, don't come to your house?

A. They came later on that evening.

Q. Okay.

A. I left and went to the store.

Q. Did you know what James, your brother, was taking? What was he high on?

A. No. I figured he was high on marijuana and drinking or something. I didn't know exactly.

Q. Have you known him to take Xanax or he buys pills off of the street?

A. Yes.

Q. And have you known him to take anything other than Xanax or pills that he doesn't have a prescription for?

A. Yes. I've known him to do any kind of drug he can get his hands on.

Q. So you've known him to do any kind of drug he can get his hands on?

A. Yep.

Q. And so you're saying on June the 2nd he was -- was he just a little bit messed up?

A. He was pretty messed up.

Q. Pretty messed up. Did he stumble, did he fall down in your yard?

A. He fell off my porch.

Q. He fell off of your porch?

A. Yes.

Q. All right. And when the police picked him up, you were there to see him leave or you had already gone?

A. I had already gone. I didn't -- I wasn't there when they picked him up.

Q. Okay. All right. Thank you.

CROSS-EXAMINATION

BY MS. HODGE:

Q. Mr. Johnson, so you're saying you saw him around five or six P.M. That's your best estimate?

A. Yes.

Q. Okay. And you don't know what exactly he had done?

A. Yeah.

Q. You're just making assumptions?
A. I just figured it was marijuana and stuff because he's always -- I've known him to always do that.
Q. He's always done that?
A. Yes.
Q. All right. And when the police were there, you weren't -- or when the police came to pick him up, you weren't even there; right?
A. No, I wasn't there.
Q. Okay. So you weren't able to say, hey, I'll take him, because you weren't even there?
A. No, I was at the store.
Q. Okay. Thank you.

THE COURT: Any redirect?

MS. MANIGAULT: None, Your Honor.

THE COURT: All right. Thank you, sir. You may step down.

MS. MANIGAULT: Your Honor, we'd call Mandy Burnette.

THE CLERK: Come forward and put your left hand on the bible and raise your right.

Do you solemnly swear or affirm to tell the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: Yes.

THE CLERK: Please have a seat. Please state

your name for the record.

THE WITNESS: Mandy Marie Burnette.

MANDY BURNETTE,

BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MS. MANIGAULT:

Q. Ms. Burnette, you'll have to keep your voice up. How old are you?

A. I'm thirty.

Q. Okay. And where do you live?

A. I live in Travelers Rest.

Q. All right. And do you know James Allen Johnson?

A. Yes, ma'am.

Q. And how long have you known him?

A. About five or six years.

Q. And do you have children?

A. I do.

Q. And how many children do you have?

A. I have two.

Q. Two?

A. Uh-huh (affirmative).

Q. All right. Has James Johnson ever babysat for you?

A. Yes, ma'am.

Q. And how older were you children when he did that for you?

A. Starting around age three or four for my youngest, and my oldest would have been nine or ten.
Q. I didn't hear you.
A. My oldest would have been nine or ten at the time.
Q. And has he ever lived in your home with you?
A. Yes, ma'am.
Q. How long did he live in your home with you?
A. Eight months or so; six, eight months.
Q. So did he do the babysitting while he was living in your home?
A. Yes, ma'am.
Q. And did you ever ask him to babysit after he left your home?
A. Yes, ma'am.
Q. All right. And did you ever have any problems with him hitting your children?
A. No, ma'am.
Q. All right. Did you ever notice any bruises on your children?
A. No, ma'am.
Q. And how long a period would you say that he did some babysitting for you, the eight months that he was in your home?
A. Well, pretty much the whole time he was living in the home.

Q. Right.
A. And then the other times would be just if I needed a babysitter or wanted to go out and do something.
Q. Okay. So it would have been over a year or two period?
A. Yeah. At least, yeah.
Q. All right. Thank you.

CROSS-EXAMINATION

BY MS. HODGE:

Q. Ms. Ward or is it -- do you have a ---
A. It's Burnette now.
Q. Burnette now?
A. Yeah.
Q. Okay. It's Burnette. What year are we talking that he would have babysitted?
A. Well, he's been gone for two. I mean, he watched them like the week before he was arrested.
Q. Okay. So close in time before this happened?
A. Oh, yeah. Yeah.
Q. So he was watching your children at the same time he was watching these other children?
A. Well, he had watched them -- after all of that had happened he came to my house before he was arrested, like over the -- through that week or whatever, between it happened?

Q. During that week?
A. And he watched them then for a couple of hours.
Q. Was he messed up on pot and pills when he was watching your kids?
A. Not at my house, no.
Q. Okay. Did you know that he did that?
A. Yeah. He did it. But, I mean, he knows that we don't allow that at my house.
Q. So he was able to -- during that week's time he was able to watch your kids, not do any drugs and be clean and sober?
A. Yes, ma'am.
Q. Okay. And your youngest was like three or four, able to talk?
A. Oh, yes.
Q. Okay.
A. I mean, we have a hard time even making him put them in the corner, you know, if they were bad, you know. So I never had any problems.
Q. Okay. So he was awesome during that week ---
A. Yes, ma'am.
Q. --- before he got arrested?
A. Yeah.
Q. Okay. Thank you.
THE COURT: Any redirect?

MS. MANIGAULT: None, Your Honor.

THE COURT: Thank you, ma'am. You may step down. You may call your next witness.

MS. MANIGAULT: Defense rest, Your Honor.

THE COURT: Anything in reply from the State?

MS. MANIGAULT: Yes, one witness, Your Honor, briefly. Deputy Wilson.

THE COURT: Come around and be sworn, please, sir.

THE CLERK: Do you solemnly swear or affirm to tell the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: Please have a seat. Please state your name for the record.

THE WITNESS: Jim Wilson.

JIM WILSON,

BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MS. HODGE:

Q. Deputy Wilson, you work for the sheriff's office currently?

A. I do.

Q. And did you retired from Greenville City Police?

A. I did.

Q. How long were you with them?
A. I was with Greenville City Police for a little over twenty-five years and I've been with the sheriff's office for a little over two now.
Q. And on June the 2nd of 2011, were you assisting Investigator Miller in a little bit of the investigation in this homicide by child abuse case?
A. I was.
Q. And did he ask you to assist him in locating the Defendant, Mr. Johnson, that day?
A. I did. Myself and Investigator Campbell went to a couple of locations where we might could find him.
Q. Okay. And if you will speak into that mike just a little bit. Everybody's having a hard time speaking up loudly in here.
A. Is that better?
Q. Okay. And when did you go or where did you go and when did you go looking for Mr. Johnson? Do you have a time frame and what locations you went to?
A. We actually located him in a mobile home off of, I believe it was Pine Log Ford Road. I think that was the name of the road. And ...
Q. Okay. Do you have any idea what time of day it might have been?
A. Not right off. I don't really recall right off-the-

bat. It was daytime. I don't remember. It wasn't early morning, wasn't late, late afternoon either, that I remember.

Q. All right. And did you take him someplace? Where did you take him?

A. We did. We brought him to the law enforcement center.

Q. And was he able to tell you guys, no, he didn't want to go with you when y'all showed up to ask him to come?

A. Sure. When we found him, we asked him if he was -- we actually informed him that we were interviewing everybody that was associated with the case. And we asked him if he would come to the law enforcement center. He actually stated that he would, but he didn't have a ride. We told him he could ride with us. And then he said, he didn't have a ride back home. We said, you can ride with us. We'll bring you back home or you can get a ride to come to the law enforcement center, either way. And he volunteered to ride with us.

Q. And you weren't there to arrest him or take him into custody or anything like that?

A. No.

Q. You just were telling him they wanted to talk him and offered a ride if he needed it?

A. Correct.

Q. And was it in a marked patrol car?

A. No. It was an unmarked car.
Q. And so did you handcuff him or do anything like that when you put him in the car?
A. No.
Q. And did you take him straightaway to the LEC, to the law enforcement center?
A. Correct, yes.
Q. And when you met up with him or asking him to come with y'all, or asking him to come down to the LEC, were you able to communicate with him?
A. Yes.
Q. Could you talk to him and understand him?
A. Yes.
Q. Did he appear to understand what you were saying to him?
A. Yes.
Q. In your twenty-five plus years now of law enforcement, have you dealt with people that have been under the influence of alcohol?
A. Yes.
Q. Have you dealt with people under the influence of marijuana?
A. Yes.
Q. Have you dealt with people under the influence of Xanax or other prescription pills?

A. Yes.
Q. People under the influence of meth?
A. Yes.
Q. Did this Defendant, at that time, exhibit symptoms of any illegal substances when you were talking to him?
A. No.
Q. All right. Did he understand that he was going to go down for questioning about this case?
A. Yes.
Q. And he agreed?
A. Yes, ma'am.
Q. All right. So when you take him, how long a drive is it down to the LEC?
A. From there, I would have said probably twenty, twenty to thirty minutes.
Q. Did he stay awake in the car?
A. Yes.
Q. Did anybody talk to him? Was there like small talk going on in the car?
A. I don't remember a whole lot being said. And I wouldn't remember exactly what was said. But, you know, I mean, it might have been some casual conversation, but I wouldn't know exactly what.
Q. All right. You wouldn't have attempted to talk to him about the case. You might have just tried to make some

kind of basic conversation?
A. I don't recall that I did. Investigator Campbell may have. I really don't remember anything being talked about in the car.
Q. Okay. And when you got to the law enforcement center, did you have to wake him up or get him out of the car?
A. No.
Q. Did he get out of the car on his own?
A. Yes, ma'am.
Q. And walk into the offices where Investigator Miller was going to be?
A. That's correct.
Q. And did he understand where y'all were and we're at the law enforcement center?
A. That's correct.
Q. Okay. And was he able to walk fine on his own?
A. Yes, ma'am.
Q. All right. Did you stay with him until Investigator Miller got there?
A. I did.
Q. And did you actually stay and sit in on the interview that Investigator Miller conducted?
A. I did.
Q. 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?
A. Yeah. I heard both phases.
Q. Okay. Initial talking about what he was saying happened in the case? And then was there a bathroom break?
A. There was.
Q. And then did the Defendant come back from the bathroom and continue talking to Investigator Miller?
A. That's correct.
Q. And was he able to speak clearly and understandably?
A. That's correct.
Q. And at that point, did he begin making some confessions?
A. He did. I don't remember word-for-word what he said, but I do remember him saying he really needs to tell the truth and get this off his heart. You know, something along that line. He wanted to tell the truth.
Q. And he was not falling out of his chair ---
A. No.
Q. --- or appearing to be doped up on ten Xanax and some reefer?
A. No.
Q. He had his wits about him and understood what was going on?
A. That's correct.
Q. Okay. And did he become appropriately upset once he

did tell the truth or what happened?

A. Yes.

Q. Were you a part of the process of having him taken over to the detention center?

A. No, ma'am.

Q. Okay. So once they left the -- Investigator Miller's offices, was that the end of your involvement?

A. That was the end of my ...

Q. All right. Thank you. Please answer any of Ms. Manigault's questions.

MS. MANIGAULT: I don't have any questions, Your Honor.

THE COURT: All right. Thank you, Officer Wilson. You may step down.

MS. HODGE: Thank you, Your Honor. That would be the State's reply.

THE COURT: Mr. Foreman, ladies and gentlemen, you've heard all the testimony. I need to instruct you on the law. And the attorneys are going to address you in a closing statement. Before we take care of those matters, I'm going to ask you to go back briefly to your jury room. There's a matter of law we need to take care of as far as the verdict form and so forth for you to have with you. While you're back there, I'm going to let the bailiff's get you some menus to order your lunch. We'll hopefully be

ready to start back in about ten or fifteen minutes with the closing statements. And hopefully, your lunch will be here about the time we finish with the closing statements and the charge on the law. So if you'll do that, we'll take about a ten or fifteen minute break and be ready to call you back out then. Don't discuss the case.

(WHEREUPON, the jury exited the open court at approximately 11:53 A.M.)

THE COURT: All right. I've proposed a verdict charge -- I mean, a verdict form. Let me let y'all each look at that and see if it's in the -- if that's in proper order, if it's typed right. Any other matters that we need to address?

MS. MANIGAULT: Judge, I would ask the Court to consider a charge on involuntary manslaughter. I don't know if it was -- under homicide by child abuse since there was some reference by the officers that my client said, accidents happen. So we would ask the Court to consider that.

MS. HODGE: Your Honor, I don't believe that's a lesser -- it's not a lesser included and I don't believe that we could present both of those charges. It's one or it's the other and he's charged under homicide by child abuse and it's not a lesser included. We actually don't have to prove specific intent, just extreme indifference to

human life.

THE COURT: All right. I'll study that briefly. I'm not inclined to believe that would be a lesser included.

Any other requests for charge from either of you? I'll basically give my standard charge about intoxication. I'll charge that, intoxications, relating to intoxication. There's enough evidence related to that. The statement, I'll let the jury know that they have the ultimate decision about the value of the statement that was given. I'll obviously charge reasonable doubt, burden of proof, credibility, those kind of things in the statute that he's charged under (A)(1), or is that part of the statute?

MS. HODGE: Yes, sir. (A)(1). Yes, sir.

THE COURT: If there's anything else you think of while we're taking our break let me know. We'll give the jury time to get their order made and be ready to start back at ten after twelve. All right.

(WHEREUPON, the court stood at recess for a short break.)

THE COURT: All right. Ms. Manigault, I researched the involuntary manslaughter. I believe the *McKnight* case would prevent that charge or that lesser included offense be charged on the particular case we're here on today. I'll deny your motion.

Are there any matters we need to take care of before the jury comes in?

MS. MANIGAULT: Yes, sir. Your Honor, at this point, I would ask the Court if the Court would consider charging the same section, statute 16-385(A)(2), which reads knowingly aids and abets another person to commit child abuse or neglect and the child abuse or neglect results in the death of a child under the age of eleven. And, Your Honor, we would offer for support that there was testimony of prior bruising on the child by the State's witness, Ms. Ann Sprouce, that she did nothing about, which would fall under the neglect section of the statute. The time lapse before the parties call 9-1-1, we don't know what that was. Time lapse before they entered into trying to assist the child, the lateness of the time lapse there. So we'd ask the Court if you would consider the aiding and abetting section.

THE COURT: Solicitor, I'll be glad to hear from you on that.

MS. HODGE: Thank you, Your Honor. The State does not believe that subsection applies in this case. The evidence that's been presented is that the co-defendant, Ms. Sprouce, denied causing any of the harm to the child. The Defendant's, in fact, testimony initially or statements initially were that he was in the bathroom, he didn't know

how the child got that way. There's no direct evidence linking it to Ann. And, therefore, having him either be an aid or abetter or witness to it -- he's basically stated that Ann's never did anything to these kids and the only injury that he could attribute to her was a possible bite mark. And then he stated in his testimony in Court that that child did not have any of those injuries when he went to the bathroom. In fact, she just had the two that he gave the excuses for falling down and being hit by the sister. So there's no evidence in the record of him witnessing Ann commit any child abuse on these kids and then him aiding and abetting her. The only evidence in the case is basically Ann's testimony that he, in fact, was the person that committed these injuries. Therefore, we don't believe that subsection (2) would apply.

THE COURT: Well, I've tried to keep notes and review my notes and we've gone along, and particularly in light of the motion made, Ms. Manigault, I've tried to reflect on all the evidence that I've heard and even circumstantial evidence or reasonable inference from any circumstantial evidence. I can't find anything to show that that statute would be applicable. I'm not unmindful of the case that came less than a month ago, *State v. Lewis*. I've read that more than once. I just don't believe the facts would warrant that and respectfully deny

your motion.

MS. MANIGAULT: Thank you, Your Honor.

THE COURT: Therefore, I don't believe the facts and the evidence would warrant that.

All right. Any other matters before we have our jury come back?

MS. HODGE: Nothing from the State, Your Honor.

MS. MANIGAULT: Nothing from the Defense, Your Honor.

THE COURT: All right. If they're ready, you can have them come in.

(WHEREUPON, the jury entered the open court at approximately 12:38 P.M.)

THE COURT: Ladies and gentlemen, I believe the Defendant and his attorney need to talk a little while longer. I'm sorry we brought you in a little early. If you'll just step back to your jury room, just briefly. Again, don't discuss the case. We'll be ready for our closing statements in just a moment.

(WHEREUPON, the jury exited the open court at approximately 12:39 P.M.)

THE COURT: All right. We'll just be at ease for a moment until the Defendant and attorney are back.

(WHEREUPON, the court stood at recess in the case.)

THE COURT: All right. Are we ready to proceed?

MS. MANIGAULT: Yes, sir.

THE COURT: All right. I just sent the jury back out as soon as you left. If you need more time, we'll certainly allow more time for you to talk with your client. If everybody's ready to proceed, we'll have our jury come in.

MS. MANIGAULT: Yes, air.

THE COURT: All right. Have our jury come in.

(WHEREUPON, the jury entered the open court at approximately 12:41 P.M.)

THE COURT: Mr. Foreman, ladies and gentlemen, the attorneys are going to address you in their closing statements now. I told you when we began the trial they -- we started out pretty much with opening statements by the attorneys. And what they said to you then, what they say to you now, is not evidence. You've heard all the evidence. While this is not evidence, I urge you to listen carefully as they address you. I'm confident that each of these attorneys can give you some insights to help you in your evaluation of the evidence, the principals that you need to apply in doing so. After each has addressed you, I'll instruct you on the law. The case will be then yours to decide. Ms. Manigault you may address the jury in your closing.

MS. MANIGAULT: Thank you, Your Honor. May it

please the Court. Ms. Hodge.

CLOSING ARGUMENT

BY MS. MANIGAULT:

Ladies and gentlemen, we thank you for your attention to the case and the evidence and facts that have been presented to you. In the opening of the case, Your Honor explained to you the procedure and process, that he is the Judge, he rules on the law. You are the trier of the facts. We have the Prosecutor, Defense attorney. You've heard the evidence. He's going to charge you the law and you're going to take everything back to the jury room and then you're going to make a decision.

Now, there are principals of law that Your Honor will tell you when he does his charge that deals with the credibility and the believability of witnesses. He will tell you that you can believe any witness that you choose to believe, whether they're expert, police officers, civil, lay people, doesn't matter. It is your decision who you believe. You can believe a portion of a testimony or you can believe all the testimony or you can believe none of the testimony. That is totally your decision and it is in your purview. He has instructed and he will instruct you again, that even with an expert witness you still decide what the expert has said. And then you apply it to the facts that you've heard and the evidence that has been

presented by the State to you.

And so he will talk about the presumption of innocence, the reasonable doubt and all of that as premise of law. When you get all the evidence back and start your deliberation and come to a conclusion, that is the verdict and that verdict must be unanimous, twelve people decide, yea or nay, guilty or not guilty.

Now, you've heard the testimony. I'm only going to deal with the testimony of the Defendant. You've heard the testimony of James Allen Johnson. You will have in your jury room the two statements that you can read over if you want to or you don't have to read it. But you'll have the two statements, one made on May 25th, 2011, one made on June 2nd, 2011. Your Honor will tell you that voluntary intoxication is not a defense to a crime. It's not a defense. What you heard Mr. Johnson testify to from this witness stand is that, yes, he gave two statements. Yes, he remembers the May 25th statement. But, no, he doesn't remember most of the June 2nd statement. Yes, these are his initials on the statements. Yes, these are his signature. You heard him testify that these are his initials and this is his signature.

My question to him was, why would you say, why would you say something like that? Why would you tell the officers? There was indication the officer told him what

to say. So that's all the questions you have to consider. There is no question that this young baby, precious life, died. The death is not a question. There is no question that there are multiple bruises on this young child. That is right here for you to see. It has been testified to by the doctors, by the medical examiner, by the officers who observed.

The question is, who put it there? How did it get there? Ms. Hodge told you in her opening that it's called shifting the blame. Well, the decision you have to make is who put it there. My client never said -- he said that he didn't do it. So why did you say in your statement that you did it? He was trying to protect somebody that he thought was pregnant and going to have a baby for him. A stupid, dumb, whatever. He was told that she was going to have a baby two days before.

The reason, that's for you to decide. Believable, that's for you to decide. Whether he did it, that's for you to decide. Did Crystal do it? Did Ann do it? So the bruises are there; the baby is dead. I am sorry that the baby has died. None of us would have wanted that for our child or any child that we know, this kind of circumstance.

You noticed during the trial there were objections or periods where we had a side bar to the bench or where the Solicitor was showing me -- that's all process and

procedure. So don't hold any of that against us as lawyers. That's what we have to do to ensure that the evidence is presented properly. If I objected too many times, don't hold that against my client. That is a process. The Judge has to make a decision. So all I'm asking you to do is, when you go back and review the evidence, that you come back with a verdict that will suit the evidence that you've reviewed. Thank you.

THE COURT: Solicitor, you may address the jury.

MS. HODGE: Thank you, Your Honor. May it please the Court, Ms. Manigault.

CLOSING ARGUMENT

BY MS. HODGE:

I told you, ladies and gentlemen, that this was a case about death and about guilt. And I think we have unfortunately seen the ugly, violent, sad death of [redacted]. This death was not an accident. This death was not choking on tea. There is indisputable evidence that this child was murdered. This was violent and this was intentional. It was an intentional act, a guilty act of the Defendant and the Defendant alone. He placed the injuries on the child. And did girlfriend, Ann, give him that ability? Absolutely. She was more worried about her and she took herself out of the picture. She wanted to nap and she didn't care what happened to these kids. So is anybody

trying to say Ann is squeaky clean in this or she didn't have anything to do with it? Well, she did. She gave, basically a stranger from the get-go, care and custody of her two little babies, baby girls. And the evidence that the State has presented is the Defendant is the person that has administered all of the blows to this child. Even by his own testimony he had sole custody and care practically all the time of this little girl, [redacted]. [redacted] was there too, but we're talking about [redacted]. How do we know then, through the evidence in this case, that the Defendant is the one that did these acts. Well, I've got a couple pieces of evidence I want you to take back to the jury room and look at and listen in your deliberations. The 9-1-1 call. It might have been a little hard to hear in here initially, but you'll be able to listen to it as many times as you want. But what I want you to listen to is the very first two to three seconds before the operators pick up the phone. You'll recall Ms. Buford, our first witness who worked at the 9-1-1 recording area, says when a call comes in, before the operator answers, they're recording what's being said. So it's fairly faint, but I want you guys to listen to it and you decide if you hear what I heard. And what I heard was Ann asking the Defendant, what do I say? Because ladies and gentlemen, she wasn't in there and she didn't know how the child got

in this condition. And she's looking to him to tell her, what do I say? So I'd like for you to listen to that yourself. Obviously, you can listen to that, see if that's what you hear.

The other interesting thing about Ann and her statement versus the Defendant's statements, is it makes no sense if you are going to smother your baby, you're going to beat your baby, then you're going to smother your baby and hold it down and suffocate it until it basically passes out, dies. Are you going to put yourself there? Are you going to say, oh, yeah. It was me and just me. No. You're going to say, I was nowhere around. It was him. That's what you would say initially. You initially, if something so horrible happened, would not place yourself in the middle of it. You would do like the Defendant, separate. You would be in the bathroom. And that's exactly how these stories went. They took the opposite path of the truth. The person who had nothing to do with it and had no idea it was going on said, oh, yeah, okay, I was right there. I was there. It was good. Because if she had known what had gone on, if she had seen that act, I have a feeling she'd try to separate herself too. I don't know. We were both taking a nap. We woke up and that's how the child was.

But she places herself there in the beginning because

she's scared, like she said. She's scared that if she's not with her child, DSS is going to come and they're going to take that child, they're going to take Minor 1. So she puts herself there not knowing this heinous act has actually happened. And the person that did know it happened, he's in the bathroom. But the truth has a way of coming out.

And after enough time and after being presented enough times with inconsistent evidence, they converge back to what really happened. Ann really wasn't there. She really knew in her heart of hearts, this is what he was doing to her kid. She knew that. And unfortunately, she was more interested in doing drugs, hanging out, not being bothered. You know, kids that age, if you don't have children, maybe you've babysat or you work in a school or something, they're very, very needed. Or maybe you have little brothers and sisters, you remember. They're on you. They don't give you that break. You don't get to take naps with a two and a half year old and an eighteen month old. They need something to drink, they need their diaper changed, they want to play, they need attention. When they get bitten by ants, they might be a tiny bit whiney. They get punched in the face, they might cry. They're not just going to sit there and let you take a nap. Ann didn't want to hear that. Ann wanted to take a nap. She was high.

The Defendant had to sit there with the whining, the fussing, the neediness. And quite frankly, again, the truth came back around. He got irritated. And he did exactly what he said in his statement -- or I submit to you, he did fairly close to what he put in his confession.

And I submit, ladies and gentlemen, that he hit this child. Now, that's for you to decide. He says in his statement he threw a toy. I want you to go back and look at State's Number 20. There's also State's 3 and 4. Pictures that show the actual living room area where this occurred. I want you to find a toy that he would have thrown to hit her in the head. There isn't one, unless he picked up this baby wheel barrow, but I don't think it was that big. I submit to you he hit her and she cried. And he didn't want to hear the crying and he didn't want Ann to get mad at him, so he did exactly what the medical examiner said. And he suffocated her. And he did it long enough for the child to be completely brain dead.

And then I submit he panicked. Because when Ann said she came in the room, these clothes, they were not on the child. These clothes that have the blood-tinged sputum, not on the child. He did some panicking and he did some figuring out what he needed to do to cover this up. Tea, okay, we'll go with that. This stuff she threw up, he's not a medical person. He doesn't know that that is blood-

tinged sputum. It looks like tea. And, in fact, there may be a kernel of truth in that she grabbed his tea. And maybe that got him mad. I don't know. Maybe she took a sip of that tea. Maybe that's when she got hit. We don't know exactly. There are a few things that we don't know because we don't have the evidence. Only the Defendant knows and only Victim knows.

Now, Minor 1 was in the room. Minor 1 was two and half. She cannot come and testify. So we have to go with the evidence that comes from Victim. She is speaking today to y'all. And the evidence the Defendant gives us. And his information does match up with her information.

I submit to you that in the end when he had his guilty conscience starting to clear, he started telling some of the truth. Of course, again, shifting and downplaying, not wanting to say he actually beat the child. He just threw a toy. That sounds better. But coming clean. Finally coming clean with the truth.

Why would he say that if it wasn't true? Because he clearly knows and we all know, you admit to something like this, you are looked at as a pretty bad person. Now, it's only for God to judge as far as a bad person. But our society says, you don't do that. And we all know that that is one of the most heinous crimes there is, crimes against children.

So he started coming clean and he had the appropriate emotions for it, starting saying, people aren't going to like me. People are going to think bad about me. Why would he say all of that stuff if he didn't do it? There's no reason. There's nothing that makes sense for him to admit to this crime. Because supposedly Ann might be pregnant with this child? Doesn't make sense, no. And he'd even been told by the police, she's back with this other man now. So it's not like they were going to get back together and he was protecting her and they were going to be a good little family. No. It was over. It was done and I think he finally had that release he needed to have and told the truth.

So ladies and gentlemen, I ask you to look at the evidence, the evidence regarding Victim 's death and the ugly truth about her death, and have a verdict that speaks the truth. A truth of guilty against this Defendant for homicide by child abuse. Thank you.

CHARGE

BY THE COURT:

Mr. Foreman, ladies and gentlemen, it's now my responsibility to instruct you on the law of the case. Let me remind you, the fact that this indictment that I hold charges the Defendant with homicide by child abuse, the fact that he's been arrested, that he was charged and that

the indictment was issued, that's not evidence in the case. It doesn't prove any guilt, can't be any inference of guilt on your part. The indictment is merely the document by which the case is brought before this Court for disposition.

Now, the Defendant has entered a plea of not guilty to the charge and that plea places the burden on the State of South Carolina to prove his guilt. A person charged with committing a criminal offense in South Carolina is never required to prove himself innocent. That's an important rule of law. In a criminal trial, no matter how serious the charge may be, that one charge, the Defendant will always be presumed innocent of the crime for which that indictment was issued, unless guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt.

Presumption of innocence doesn't end when you begin your deliberations, but it continues throughout the trial, and stays with the Defendant until you've reached a verdict, based on the evidence convincing you, satisfying you of guilt beyond a reasonable doubt. Often presumption of innocence has been described as a robe of righteousness that's placed about the shoulders of a Defendant, remains with that Defendant until it's been stripped from him by evidence that satisfies that jury of the Defendant's guilt

beyond a reasonable doubt. Presumption of innocence, ladies and gentlemen, isn't a mere legal theory. It's not a legal phrase that's tossed about. It is a substantial right to which every Defendant is entitled, unless you, the jury, are satisfied from the evidence of the Defendant's guilt beyond a reasonable doubt.

Now, you may ask yourself, what is a reasonable doubt in the law? A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act. Some of you in the past may have had an opportunity to serve as a juror in a trial. And it would have been in a civil case and the Judge told you that it was only necessary to prove a fact by what was the greater weight of the evidence or the preponderance of the evidence. In criminal cases the State's proof is more powerful that that. It must be beyond a reasonable doubt. And that would be proof that leaves you firmly convinced of the Defendant's guilt. In this life, there are very few things that we can know with absolute certainty. And in criminal cases, the law doesn't require proof that overcomes every possible doubt. If, based upon your consideration of the evidence you're firmly convinced the Defendant is guilty of the crime charged, then you must find the Defendant guilty. If, on the other hand, you think there's a real possibility that the Defendant is not guilty, then you must give the Defendant

the benefit of that doubt and find him not guilty.

Now, ladies and gentlemen, I remind you that during this trial you and I have had certain duties to perform. As the Trial Judge, it's been my responsibility to preside over the trial of the case, to rule on the admissibility of evidence that's been offered during the trial. You're to consider only the competent evidence that is before you. Any objection that was made and sustained to any evidence then, of course, you would disregard that testimony. You're to consider only the testimony that's been presented from the witness stand, the exhibits that have been made a part of the record and that alone. I also have the additional duty to charge you the law that's applicable to this case.

Now, as the Presiding Judge, I'm the sole, exclusive Judge of the law. It's your duty as jurors to accept the law and apply the law just as I state it to you. Some of you may have an idea of what the law is or even a notion of what the law ought to be in a case such as this, and if you have such an idea and it's in conflict with what I now tell you the law is, then you must abandon such an idea. Because under your oath, you've sworn to accept the law and apply the law just as I state it to you.

Every case that's tried in this courtroom before a jury, that jury becomes the sole, exclusive judge of the

facts in the case. A Trial Judge can't intimate or state or comment on or make any statement whatsoever to a trial jury about the facts in a case. Since you, ladies and gentlemen, are the sole judges of the facts in this case, you're not to infer from anything I've said during the progress of the trial, any rulings I've made on the admissibility of evidence or otherwise, anything I say to you now in the course of this instruction to you, that I have an opinion about the facts in the case. I don't have an opinion about the facts of the case. The Constitution of South Carolina prohibits a Trial Judge from having an opinion about the facts in the case. That's exclusively up to you and you alone to determine what the facts are. You must make that determination as to the effect, the value, the weight and the truth of the evidence that has been presented during the trial.

Ordinarily in a trial there's two types of evidence. There's what's called direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness. It's evidence which immediately establishes the main fact to be proved. Circumstantial evidence is proof of a chain of facts and circumstances that would indicate the existence of a fact. It's evidence which immediately establishes collateral facts from which the

main fact may be inferred. In other words, circumstantial evidence is based on inference and not upon personal knowledge or observation. The law makes absolutely no distinction between the weight or the value to be given either direct evidence or circumstantial evidence. Nor is a greater degree of certainty required for circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. And after weighing the evidence if you're not convinced of the guilt of the Defendant beyond a reasonable doubt, then you must find the Defendant not guilty.

Necessarily, you must determine credibility of witnesses who've testified in the case. Credibility simply means believability. It becomes your duty as the jury to analyze and evaluate the evidence, determine which evidence convinces you of its truth. In determining the believability of witnesses who've testified, you can believe one witness over several witnesses. You can believe several witnesses over one witness. You can believe part of the testimony of a witness and reject the remaining part of the testimony of that very same witness. In your discretion, you can believe the testimony of a witness in its entirety. You can reject the testimony of a witness in its entirety. You can consider whether any witnesses exhibited to you any interest or bias or

prejudice or other motive in the case. You can consider the appearance of the witness while on the witness stand, the demeanor of that witness. Was the witness straightforward or hesitant in answering? Was the testimony of the witness consistent or inconsistent or how did the witness come to know the testimony to which that witness offered? The statements, was the testimony of one witness strengthened or weakened by other evidence in the case? It's totally your prerogative, ladies and gentlemen, to determine the credibility of witnesses who have testified.

Now, ordinarily the rules of evidence would not permit a witness to testify to opinions or conclusions, but there is an exception to this rule for what we call expert witnesses. A witness who, by education and experience, has become an expert in some art or science or profession or other field or calling, may give an opinion as to the relevant material matter to which that witness claims to be an expert and can state the reasons for that opinion. Now, you should consider any expert opinion received into evidence in this case, and like other evidence, give it the weight that you think it deserves. If you decided that the opinion of an expert is not based on sufficient education and experience, or if you conclude the reasons given by the expert in support of that opinion are not sound, or the

opinion is outweighed by other evidence, you can disregard the opinion entirely. An expert witness testimony is to be given no greater weight than that of any other witness simply because that witness is an expert. Furthermore, you're not required to accept an expert's opinion, even though it may be uncontradicted.

In order to establish criminal liability, criminal intent is required and must be proven by the State beyond a reasonable doubt. Criminal intent is always a matter that must be determined by a jury from the circumstances surrounding the situation. There's no way that we can prove intent to mathematical certainty. So the law says that criminal intent may be inferred from the circumstances shown to have existed. It's not necessary to establish intent by direct and positive evidence. But intent may be established by inference in the same way as any other fact, taking into consideration the acts of the parties, all the facts and circumstances of the case. Criminal intent is a mental state. It's a conscious wrongdoing. It's up to you to determine what the Defendant intended to do based upon the circumstances shown to have existed.

Now, there's been evidence presented that witnesses have made prior statements, which are not consistent with the witness's present testimony. You may use this evidence to decide whether to believe a witness. You may also use

evidence of the earlier contradictory statements to determine the truth of those statements. It's up to you to decide whether to believe the earlier statements or the testimony given at trial. If a witness is known to have knowingly testified untruthfully concerning any material matter, you may consider this in determining whether to trust the witness's testimony as to other matters. You may reject all testimony of a witness or give all or part of the testimony the weight you think it deserves as I've explained to you earlier.

Now, in this case the statement alleged to have been made by the Defendant has been admitted into evidence. And while the Court has determined that the statement is admissible, I instruct you, you make the ultimate decision of whether or not the Defendant made the statement. If the Defendant did make the statement, you must determine whether the statement was made by the Defendant voluntarily and of his own free will. This means the statement was not caused by pressure or force or fear, threats, coercion or intimidation or by hope or promise of leniency or reward of any kind. In determining whether the statement was voluntarily made, you should consider both the characteristics of the Defendant and the details of the questioning. Some of the factors that you may consider, should consider, are the age of the Defendant, the

Defendant's education or lack of education, the mental ability and capacity of the Defendant, the background and the environment of the Defendant, the place, the length of the detention, the nature of the questioning and the advice or lack thereof to the Defendant of his Constitutional rights, including but not limited to the right to remain silent, that any statement could be used against him in a court of law, the right to have a lawyer present and if he could not afford a lawyer, a lawyer would be appointed to represent him without any cost. And that he could stop making a statement at any time. You must carefully consider all the surrounding circumstances before you give any weight to an alleged statement. The State has the burden of proving beyond a reasonable doubt that the alleged statement was voluntary. If you determine it was, you may give the statement any further consideration that you deem proper. You must decide what weight, if any, should be given to the alleged statement. If you determine the allege statement was not the free and voluntary statement of the Defendant, you should not consider that statement at all.

Now, a person who voluntarily becomes intoxicated is just as responsible for acts committed while intoxicated as when the person was not intoxicated.

In this case, ladies and gentlemen, the Defendant is

charged with homicide by child abuse. The State must prove beyond a reasonable doubt that the Defendant caused the death of a child under the age of eleven, while committing child abuse or neglect. Child abuse or neglect is an act or a failure to act which causes harm to the child's physical health or welfare. Harm to the child's physical health or welfare means that the Defendant either: one, inflicted or allowed to be inflicted on the child physical injury; two, failed to supply the child with adequate food, clothing, shelter or health care, and that this failure caused a physical injury or condition which caused death; or three, abandoned the child causing the child's death. The State must also prove beyond a reasonable doubt that death occurred under circumstances showing an extreme indifference to human life.

Now, Mr. Foreman, I've prepared a verdict form. I believe it'll be self-explanatory. The verdict form merely says that the jury unanimously finds the Defendant guilt or not guilty of the charge alleged. That being homicide by child abuse. There's no significance in the order in which the choices are made. One simply has to be listed before the other. Your verdict must be unanimous. All twelve of you must agree upon that verdict. Your verdict cannot be based upon sympathy or passion or prejudice or emotion or any other consideration not in evidence. When you have

reached that unanimous verdict, I ask that, Mr. Foreman, you merely check the appropriate block, sign your name as foreperson, date it, and we'll receive your verdict back here in the courtroom.

At this time, I'm going to ask you to go back to your jury room. Don't start your deliberations just yet. There's a final matter of law I need to take care of with the attorneys, after which, hopefully, we'll have the verdict form and the exhibits and other matters back for you to begin your deliberations. But for right now, don't start your deliberations. I'll instruct you when you are to. You may retire to your jury room at this time. Everyone else, please remain seated.

(WHEREUPON, the jury exited the open court at approximately 1:15 P.M.)

THE COURT: Any exceptions to the charge, from the State?

MS. HODGE: None from the State, Your Honor.

THE COURT: From the Defense?

MS. MANIGAULT: None from the Defense, Your Honor.

THE COURT: All right. If y'all will make sure all the exhibits are in order, we'll get them back with the verdict form to the jury.

Could I see the lawyers here just for a minute?

(WHEREUPON, Ms. Hodge and Ms. Manigault approached the bar.)

THE COURT: Just leave that there and ask Ms. Wilson to come out for a minute, okay?

(WHEREUPON, Juror number 184, Amanda E. Wilson, entered the courtroom at approximately 1:21 P.M.)

THE COURT: Ms. Wilson, you have exams this week; right?

THE JUROR: Well, I talked to my professors.

THE COURT: I wanted to verify with you, you're okay today?

THE JUROR: Yes.

THE COURT: You don't have any tests today?

THE JUROR: No, I have until tomorrow.

THE COURT: So you're good?

THE JUROR: Yes.

THE COURT: Thank you very much.

THE JUROR: Thank you.

THE COURT: You can return back.

(WHEREUPON, Juror number 184, Amanda E. Wilson, left the courtroom and returned to the jury room.)

THE COURT: All right. You can take that back and then have the two alternates come out. Then you can tell them they can begin deliberating.

THE BAILIFF: The food is here, Judge.

THE COURT: The food is here? Ask them if they would -- ask the jury if they'd rather eat first with all fourteen of them, but they can't talk about the case, or either if they're ready to start deliberating, I need the alternates. Any objection to that if they want to eat first? They've got food here for the alternates, but not discussing it. Or either if they want to deliberate while they eat, then we'll send it back, but not with the alternates.

THE BAILIFF: They're going to eat and deliberate at the same time.

THE COURT: They want to eat and deliberate at the same time?

THE BAILIFF: Yeah.

THE COURT: Okay. If you'll tell them to start their deliberations, then bring the alternates in here for me, okay?

(WHEREUPON, the verdict form and exhibits were delivered to the jury and deliberations began at approximately 1:22 P.M.)

(WHEREUPON, the two alternate jurors entered the courtroom.)

THE COURT: Hey. Your fellow jurors have survived so you're not going to be needed on this case. I understand they have lunch for you. Ms. Olsen tells me

that she may need you on the panel that's going to be here in fifteen minutes. So if you could go back to the assembly room after you get your lunch. If you want to eat back there or want to go elsewhere, but if you'll be back in the assembly room. We're going to be selecting a jury in about twenty minutes or thirty minutes or so. And so if you would, report back down there. Thank you for your service on this case.

THE JURORS: Okay.

THE COURT: Thank you very much.

All right. We'll be at ease until we hear from our jury.

(WHEREUPON, court stood at recess awaiting a verdict from the jury.)

THE COURT: All right. Are there any matters we need to take care of before we hear from our jury? I understand that the jury has reached a verdict. Anything from the State?

MS. HODGE: Nothing from the State, Your Honor.

THE COURT: Anything from the Defense?

MS. MANIGAULT: Nothing from the Defense, Your Honor.

THE COURT: I understand that a case of this nature has a lot of emotion involved and can create a lot of emotion for family and friends, the parties, the

lawyers, the Defendant. And I don't know what the jury verdict is. I know they listened carefully. They've deliberated now. If there's any person in the courtroom that believes that their emotion would not allow them to have no outburst, whatever the verdict may be, this would be the time to excuse yourself. We're going to receive the verdict. We're going to listen to the verdict as it's read. If anyone believes they're just going to be compelled to give an outburst of elation or sadness, this is not the time to do that. I'm not trying to hamper anyone in anyway, but I want to make sure that the jury, that we have the proper decorum when we hear the jury verdict. If anyone feels they can't contain themselves, obviously, you can come right back in after we get the verdict and be subject to all the procedures then. But this is the time to excuse yourself if you feel like you just can't hold yourself emotionally. Otherwise, I will expect everyone in the audience to have the proper decorum as we hear the verdict.

All right. Everyone's staying. All right. If the jury's ready, you can have them come in.

(WHEREUPON, the jury entered the open court at approximately 3:24 P.M.)

THE COURT: Mr. Foreman, I understand the jury has reached a verdict; is that correct?

THE JUROR: We have, Your Honor.

THE COURT: Is it a unanimous verdict?

THE JUROR: It is.

THE COURT: If you would, please, hand the verdict form to the bailiff.

Madam Clerk, you may publish the verdict.

THE CLERK: The State of South Carolina versus James Johnson, indictment number 2011-GS-23-7262. We, the jury, find the Defendant, James Johnson, as to the charge of homicide by child abuse, guilty.

THE COURT: Is this your verdict and still your verdict? If so, would you please indicate by raising your right hand?

(WHEREUPON, all jurors' right hands were raised.)

THE COURT: Thank you. Let the record reflect that all jurors have raised their hand.

Any other matters we need to take care of with the jury in this case, from the State?

MS. HODGE: Nothing from the State, Your Honor.

THE COURT: From the Defense?

MS. MANIGAULT: Nothing from the Defense.

THE COURT: Mr. Foreman, ladies and gentlemen, thank you very much for your service to us this week. You've been a conscientious group. You've been reflective as you listened. I noticed your demeanor as you listened

to the case. You paid attention and I appreciate that so much. You've been a treat for me to work with. You've been good judges of the facts and I appreciate so much your willingness to serve this week. We have another trial now in progress so we've already selected twelve people with an alternate to serve on that jury. I don't know what we may have for the rest of the week, but just out of a world of precaution, I'm going to ask you, if you would, to call back tonight after six o'clock. There'll be an instruction for you on the answering machine as to whether you need to call back or to come back later this week. Thank you for your service again. I hope that when you get the next summons for jury service -- you may remember from Monday that I told you every three years you don't have to serve. You'll get an exemption. I hope you'll waive that exemption and serve again. I'm confident if you ever find yourself not sitting in a jury box, but sitting at one of those tables for whatever civil action or a criminal charge against you, you'll want good, solid, sound, conscientious jurors such as yourself to serve in that jury box for you. You're excused at this time. If you would, call back tonight after six o'clock. You can go with the bailiff now. You're certainly welcome to stay if you wish.

Mr. Foreman, I would ask if you would wait in the hallway just a moment. There's one additional paper I need

for you to sign for the clerk. The rest of you are excused. Thank you very much for your service today.

(WHEREUPON, the jury exited the open court at approximately 3:26 P.M.)

THE COURT: All right. We'll wait just a moment until the clerk comes back.

All right. Any matters we need to take care of before sentence is imposed in this case?

MS. MANIGAULT: Yes, sir. Your Honor, the Defense would renew all of its pertinent motions made during the trial, including the motion for a directed verdict. And we additionally make a motion for a new trial.

THE COURT: Well, I believe the evidence was sufficient for the jury to make their factual determination and I respectfully deny your motions, Ms. Manigault.

Is the sentencing sheet prepared?

Ms. Manigault, if you would come forward with your client.

(WHEREUPON, Ms. Hodge, Ms. Manigault and the Defendant approached the bar.)

THE COURT: Anything from the State before I hear from Ms. Manigault. And I'll be glad to hear from Mr. Johnson.

MS. HODGE: Yes, Your Honor. The State --

obviously you've been here through the whole trial. You see what a horrific, sad, senseless case this is. She was really just a baby and, Your Honor, the evidence showed, the State believes, the Defendant brutally abused this child and killed this child, and clearly showed no acceptance of responsibility by forcing the case to trial, which I know we're not asking you to punish him for going to trial. But there was overwhelming evidence of his guilt. He refused to accept that responsibility and acknowledge that guilt. I don't think he should be given a benefit for non-acceptance. The State originally offered thirty-five years on the case. He declined that plea offer.

And I know that the family would like to address the Court. He does not have a significant prior record, but he does have a prior record going back to juvenile charges in 2001. And then some magistrate level charges of disorderly conduct and drug paraphernalia in 2005. And I believe Tina Marie would like to speak on behalf of Victim. This is Victim's aunt.

THE COURT: Yes, ma'am. If you would state your name for the record, I'll be glad to hear from you.

MS. CULBERTSON: I'm Tina Marie Culbertson.

THE COURT: Excuse me?

MS. CULBERTSON: Tina Marie Culbertson.

THE COURT: All right, Ms. Culbertson.

MS. CULBERTSON: Your Honor, our family understands that no matter what we say or do today, we will not be able to bring [redacted] back. Our family would like to see James Allen Johnson serve life in prison without parole. Knowing [redacted] cannot be here to live her life and be free, why should James Allen Johnson, who took her life, be able to live freely.

THE COURT: Thank you, Ms. Culbertson.

MS. HODGE: Thank you.

THE COURT: Anything else from the State?

MS. HODGE: No, Your Honor. I'm sorry. I do need to say that the child's biological father, Mr. Gore, he was present for the first day of Court. He was here during the first day of trial. He was emotionally overcome during that day. He said he could not come back. He could not hear this anymore. He wanted you to know that he was here and he obviously was concerned and he stated that he would also ask for life. He would ask the Court for you to impose a life sentence. He just could not bring himself to come back. He also knew that photographs were going to be admitted and some more detailed testimony was coming out. He is very, very concerned and those were his wishes.

THE COURT: All right. Ms. Manigault, I'll be glad to hear from you, your client or anyone else who would

like to address me.

MS. MANIGAULT: Please the Court, Your Honor. My client's been in jail since June 2nd of 2011. He did not make bond. We did receive an offer. The last offer we received from the solicitor's office was an offer of thirty years. My client refused that offer. The account that the Court heard during his testimony is the account that he has given me from day one of our interview back in June of 2011. The Court has heard all the evidence and testimonies. You've heard that his background, education is limited. You heard Dr. Frierson testify that he has a very low IQ of sixty-seven, that he has mild intellectual deficiency, which in the past was called mental retardation. Dr. Frierson also testified that he could not hold a job and he would need to be supervised in certain areas of his life, daily activities, especially financial.

I understand that the Court also has heard and my client has admitted that he had freely used illegal substance drugs, marijuana, Xanax, pills and whatever. Of course, we realize that that is not an excuse for anything. So we ask the Court for mercy in this case. I don't have any other information to present on his background history. He did just go to the eleventh grade. His mother has been here in Court with him. His sister has been here. His brother has been here with him. Friends of the family has

been here, trying to support -- show support for him. So we would ask the Court for your mercy and consideration in sentencing.

THE COURT: Thank you, Ms. Manigault.

Mr. Johnson, anything else you want to say?

THE DEFENDANT: I loved them. I loved that whole family, [redacted] and [redacted]. I wish this wouldn't have happened to her. I wanted to be her daddy. That's all I can say.

THE COURT: All right. Thank you, sir.

MS. MANIGAULT: Your Honor, I'd like to state this for the record.

THE COURT: Yes, ma'am.

MS. MANIGAULT: We had numerous opportunities to review all of the evidence and the discovery presented to us by the State starting back in October the 4th of 2011. And we've had ample opportunity to continue to review the case with our client, including all the photographs that were presented here this week, except for maybe one. But we had an opportunity to show those photographs to him before the case continued. So we had ample opportunity for him to review all the evidence in the case.

THE COURT: Some of the photos, I believe, were not admitted. Does the State still wish to make those Court Exhibits?

MS. HODGE: Yes, Your Honor.

THE COURT: Okay. I think they're up here. I'll make sure those are marked as Court Exhibits before we conclude.

Sir, as I understand the statute, it requires me to consider aggravating, particularly mitigating, circumstances. I've certainly tried to do that. I've read and re-read Dr. Frierson's report. So I want, particularly the defense, to know that I've considered all the factors and his testimony that we had earlier in the case, and his findings from a psychological standpoint.

Mr. Johnson, it's unfortunate for you that you've not just been in jail for two years, but you, yourself, made a jail because of your drug addiction for most of your life, I'm sure. You've really not been a free man since you've been addicted and under that control. My job is to put you behind other bars that society demands. I hope that you can find some peace there. I certainly hope the family for this tragic, tragic event that occurred can find peace as well. I don't know what that young child could have been had she lived. We don't know the impact she could have had on society.

This is case 2011-GS-23-7262. The sentence of the Court is Defendant be committed to the State Department of Corrections for a period of sixty-two years. I wish you

the best.

MS. HODGE: Thank you, Your Honor.

THE COURT: We'll take a short break and we'll be ready to start back with our other trial.

(WHEREUPON, Court Exhibit Numbers 3, 4 and 5 were marked for identification.)

[END OF REQUESTED TRANSCRIPT OF RECORD]

CERTIFICATE OF REPORTER

I, the undersigned Danette P. Hanks, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Greenville County, South Carolina, on the 3rd day of June, 2013.

This transcript may contain quoted material. Such material is reproduced as read by the speaker.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

September 16, 2013

Circuit Court Reporter

634

FORM 5

STATE OF SOUTH CAROLINA)
County of Greenville,)
James Allen Johnson)
Full name and prison number (if any) of Applicant)
v.)
State of South Carolina)

IN THE COURT OF COMMON PLEAS

FILED-CLERK OF COURT
PAUL B. WICKENSIMER
GREENVILLE S.C.
2017 JUN 13 PM 3:56

APPLICATION FOR POST-CONVICTION RELIEF

2017-CP-23- 03817

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Broad River Correctional Institution South Carolina Dept. of Corrections
2. Name and location of Court which imposed sentence Court of General Sessions, 13th circuit, Greenville, S.C.
3. Name(s) of co-defendant(s) (if any) Georgia Ann Sprouse
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
   (a) 2011-GS-23-07262,
   (b) Murder, Homicide by Child Abuse

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) June 5, 2013, imprisonment of 62 years

(b) _____

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty ✓

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. S.C Appellate Court "Direct Appeal"

ii. S.C. Court of Appeals

iii. S.C. Supreme Court

(b) the result in each such Court to which you appealed:

i. Affirmed

ii. Sentence Affirmed

iii. Sentence Affirmed

(c) the date of each such result:

i. Not sure, but filed on 8-8-13

ii. July 29, 2015

iii. May 24, 2017

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Not Known

ii. Please see Enclosed 8(d)(ii)

iii. Please see enclosed 8(d)(iii)

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) N/A

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective assistance of Counsel "Trial"

(b) Ineffective Appellate Counsel

(c) Improper Judicial Posture

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) See Attatchment 11(a)

(b) See Attatchment 11(b)

(c) See Attatchment 11(c)

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? Appeal

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO

(d) any other petitions, motions or applications in this or any other Court? NO

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. Direct Appeal

ii. Appeal

iii. Writ of Certiorari to the court of appeals

iv. _____

(b) the name and location of the Court in which each was filed:

i. S.C. Appellate Court

ii. ~~S.C Supreme Court~~

iii. SC. Supreme Court.

iv. _____

(c) the disposition thereof:

i. Affirmed

ii. affirmed

iii. affirmed

iv. _____

(d) the date of each such disposition:

i. N/A

ii. July 29, 2015

iii. May 24, 2017

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. 2015-UP-378

iii. 2017-MO-009

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) _____

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? yes

(b) your trial, if any? yes

(c) your sentencing? yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

NO

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Dorothy A. Manigault
305 East North St. Suite 123, Greenville S.C. 29601

ii. Same as Above

iii. David Alexander, Appellate Defense
S.C.C.T.D

(b) the proceedings at which each such attorney represented you:

i. Arraignment, Plea, Trial, Sentencing

ii. _____

iii. Appeal

19. State clearly the relief you seek in filing this application:

New Trial, Suppression of defendants pre-Miranda statements.

20. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of Greenville)

I, James A Johnson, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

James A Johnson

SWORN to and subscribed before me this 20 day of June, 2017

(L.S.)
Notary Public

My Commission Expires: 9/16/2020

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, James A Johnson, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

James A Johnson
Applicant

SWORN or affirmed to and subscribed before me this 6 day of June, 2017.

Notary Public

My Commission Expires: 4/16/2020

Attachment 8(d)(ii)

Per Curiam: James Johnson appeals his conviction for Homicide by child Abuse, arguing the trial court erred in admitting his incriminating statement made to officers at the law enforcement center because it was the result of a two-phase interrogation in violation of Miranda V. Arizona 384 U.S. 436 (1966) and Missouri V. Seibert, 542 U.S. 600 (2004). We affirm pursuant to Rule 220(b), S.C.A.C.R., And the following authorities; State v Pagan 369 S.C. 201, 208 631 S.E2d 262, 265 (2006) (The admission of evidence is within the discretion of the Trial Court and will not be reversed absent an abuse of discretion"); id. ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentuary support or are controled by an error of law.") State v Freiburger 366 S.C. 125, 134 620 S.E2d 737, 741 (2005) (holding an issue is not preserved for appeal, where one ground is raised below and another ground is raised on appeal).

Affirmed

Short, Lockemy, and McDonald, JJ., concur

Attachment 8(d)(iii)

Per Curiam: The court of appeals' opinion. State v. Johnson, Op. No. 2015-up-378 (S.C.Ct. App. filed July 29, 2015), is affirmed pursuant to rule 220(b)(1), S.C.A.C.R, because Petitioners argument that the Trial Court Erred in admitting his incriminating statements is not preserved for our review. See S.C. Dep't of Transp. v. First Carolina Corp of S.C. 372 S.C. 295, 302. 641 S.E2d 903, 907 (2007) (stating to preserve an issue at trial for appellate review, the issue must be: (1) raised to and ruled upon by the Trial Court; (2) raised by the Appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity). Therefore, we do not address the merits of Petitioners argument.

Affirmed.

Beatty, C.J., Kittredge, Few, James, JJ., and acting Justice Maite D. Murphy, Concur

Attatchment II (a)

1. The Supreme Court has ruled that my trial lawyer failed to preserve the arguments regarding the admissability of my statement for appeal. The failure to preserve an issue constitutes deficient performance. In my opinion, my case differs in no material respect from State v. Navy. And it is also possible that a false confession expert may have been needed in the event the confession was admissable

2. The other significant issue I saw was regarding the Doctors opinion that the child was suffocated because of a torn frenulum - the little piece of skin between the upper lip and gum. This child was intubated at least twice in the back of a moving ambulance on a rough rural road. My attorney failed to have a Doctor (clarify) that the Frenulum could have been torn during intubation and that would have called the States Doctor's testimony into doubt.

3. The common sense view of this tragic ordeal, is that there was a

Attatchment 11(a)

mentally retarded father with an I.Q of less than 70. Attempting to perform C.P.R. on his unconsious child while being given instructions over the phone by a 911 operater. While in a state of panic and anxiety. To a point that he could barely talk to 911. Is it possible that the child swallowed an ice cube that melted away.

Attatchment 11 (b)

1. My appellate defender never once Suggested that my trial counsel could have been below standard.

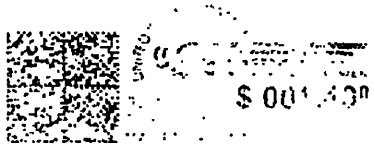
2. I did file a motion to remove my Trial lawyer Dorothy A. Manigault from my case the motion was heard on may 17, 2014. In the Greenville County court of General Sessions, 13th circuit heard by the Honorable Deadra L. Jefferson, Judge and Quoting from Transcript of this proceeding pase 7 Lines 16,17 Judge Jefferson States: I've known her "Dorothy Manigault" Not to be prepared.

I was charged with Homicide I never felt my attorney was competant.

Attatchment II(c)

1. When Judge Wellamaker made his rulings on Competancy. He ruled without any argument from either the Defense or the opposition

-James A. Johnson 355670
-Broad River C.I. Marion 122A
-4460 Broad River
-Columbia S.C. 29210



-Greenville County Clerk of Court
-Paul B. Wickensimer
-305 East North Street
-Greenville S.C. 29601

2017-CP-23- 03817

LEGAL MAI

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	
	)	
James Allen Johnson, #355670,	)	Case No.: 2017-CP-23-3817
	)	
Applicant,	)	
	)	**RETURN AND PARTIAL**
v.	)	**MOTION TO DISMISS**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Respondent, making its Return to the application for Post-Conviction Relief ("PCR") filed on June 13, 2017, would respectfully show this Court:

I. Procedural Posture

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. In September 2011, the Greenville County Grand Jury indicted Applicant for homicide by child abuse (2011-GS-23-7262). The charge resulted from Applicant's abuse of a twenty-month-old baby girl which culminated in Applicant causing the baby's death by suffocation. Dorothy Manigault, Esquire represented Applicant. Kris Hodge, Esquire prosecuted the case. On June 3, 2013, Applicant proceeded to trial before the Honorable G. Edward Welmaker. The jury found Applicant guilty as indicted. On June 5, 2013, Judge Welmaker sentenced Applicant to imprisonment for sixty-two years for homicide by child abuse.

Applicant filed a timely notice of appeal. David Alexander, Esquire, of the Office of Appellate Defense represented Applicant throughout the appellate process. The South Carolina Court of Appeals affirmed Applicant's conviction on July 29, 2015. State v. Johnson, Op. No. 2015-

UP-378 (Ct. App. 2015). Applicant filed a petition for rehearing on August 12, 2015. The South Carolina Court of Appeals denied the petition for rehearing by order filed December 16, 2016.

Applicant filed a petition for writ of certiorari on January 29, 2016. The Supreme Court of South Carolina granted the petition by order filed December 2, 2016. The Supreme Court of South Carolina affirmed the court of appeals' opinion by a memorandum opinion filed May 24, 2017. State v. Johnson, Op. No. 2017-MO-009 (2017). The remittitur was returned to the circuit court on June 9, 2017.

Attached to this Return are the records of the Greenville County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the Applicant's appellate records. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II. Allegations

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons (quoted verbatim):

1. "Ineffective Assistance of Trial Counsel," in that:

    a. "The Supreme Court has ruled that my trial lawyer failed to preserve the arguments regarding the admissibility of my statement for appeal. The failure to preserve an issue constitutes deficient performance. In my opinion, my case differs in no material respect from State v. Navy."
    b. "It is also possible that a false confession expert may have been needed in the event the confession was admissible."
    c. "The other significant issue I saw was regarding the doctor's opinion that the child was suffocated because of a torn frenulum – the little piece of skin between the upper lip and gum. This child was intubated at least twice in the back of a moving ambulance on a rough rural road. My attorney failed to have a doctor testify that the

frenulum could have been torn during intubation, and that would have called the State's doctor's testimony into doubt."

d. "The common sense view of this tragic ordeal is that there was a mentally retarded [*sic*] father with an IQ of less than 70 attempting to perform CPR on his unconscious child while being given instructions over the phone by a 911 operator while in a state of panic and anxiety to a point he could barely talk to 911. Is it possible that the child swallowed an ice cube that melted away?"

2. "Ineffective Assistance of Appellate Counsel"

   a. "My appellate defender never once suggested that my trial counsel could have been below standard.
   b. "I did file a motion to remove my trial lawyer from my case. The motion was heard on May 17, 2014 in the Greenville County Court of General Sessions, 13th Circuit heard by the Honorable Deadra L. Jefferson, and quoting from the transcript of page 7, line 16 of this proceeding Judge Jefferson states: 'I've known [Trial Counsel] not to be prepared."
   c. "I was charged with homicide. I never felt my attorney was competent."

3. "Improper Judicial Posture"

   a. "When Judge Welmaker made his ruling on competency, he ruled without any argument from either the defense or the opposition.

III. "Ineffective Assistance of Trial Counsel" Allegation

Respondent submits Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having

produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Applicant's reliance on State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010) is misplaced. Officers in Navy conducted questioning for the purposes of eliciting a confession while the officers involved in Applicant's case did not. Moreover, Navy's encounter with police lasted much longer than Petitioner's. There is no evidence of comparable questioning in this case. Furthermore, while Applicant alludes to intellectual disability in his allegations, there is no evidence this was a relevant factor in this case. In fact, the conductor of the competency evaluation testified during the competency hearing that Applicant had an understanding of courtroom procedures, implications, and legal issues involved. (Tr. p. 49).

Respondent therefore submits Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV. "Ineffective Assistance of Appellate Counsel" Allegation

Applicant also contends he received ineffective assistance of appellate counsel. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Respondent contends Applicant's appellate attorney rendered effective assistance of counsel. However, this ground for relief may raise factual issues that are not conclusively refuted

by the record. Respondent requests an evidentiary hearing on this allegation.

V. "Improper Judicial Posture" Allegation

Respondent interprets Applicant's final allegation to allege that the trial judge conducted the competency hearing improperly by not hearing argument from the State or the defense. A defendant must be mentally competent to stand trial so that the defendant is able to assist counsel in his own defense. Drope v. Missouri, 420 U.S. 162 (1975). S.C. Code § 44-23-430 provides, "If upon completion of the hearing and consideration of the evidence the court finds that the person is fit to stand trial, it shall order the criminal proceedings resumed." In this case, a competency hearing was held at the beginning of trial. (Tr. p. 45-53). Dr. Frierson, the conductor of the competency evaluation and a professor of psychiatry at the University of South Carolina School of Medicine, testified that it was his opinion and continued to be his opinion that Applicant was competent to stand trial. (Tr. p. 45-53). Moreover, Dr. Frierson testified that he spoke to Applicant about the trial and Applicant understood courtroom procedures, implications, and legal issues involved. (Tr. p. 49). There is no evidence the trial court failed to observe proper procedure regarding Applicant's competency hearing. Therefore, Respondent submits this allegation should be dismissed.

VI. State's Assertion and Reservation of Rights

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCP. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCP. Pro se filings will not be considered at the

PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCP.

VII. Request for Evidentiary Hearing

Respondent therefore requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to § 17-27-70 of the South Carolina Code of Laws on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VIII.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

[Signature block on following page]

IX.

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claims of ineffective assistance of trial counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General

By: DHM
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

October 24, 2017

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE JAMES ALLEN JOHNSON, 355670 Applicant, vs STATE OF SOUTH CAROLINA, Respondent.	IN THE COURT OF COMMON PLEAS 2017-CP-23-3817 AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return and Partial Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Rodney W. Richey, Esquire
Post Office Box 10916
Greenville SC 29603

DATED this 24th day of October, 2017.

Judy A. C. Carey, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	2017-CP-23-03817
	)	
	)	ORIGINAL
	)	
JAMES ALLEN JOHNSON	)	
APPLICANT	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
THE STATE OF SOUTH CAROLINA	)	
RESPONDENT	)	

December 12, 2017
Greenville, South Carolina

B E F O R E:

THE HONORABLE ROBIN B. STILWELL, Judge.

A P P E A R A N C E S:

RODNEY RICHEY, ESQ.
Attorney for the Applicant

DESHAWN MITCHELL, ESQ.
Attorney for the Respondent

APRIL HERRON
Official Court Reporter

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	2017-CP-23-03817
	)	
	)	ORIGINAL
	)	
JAMES ALLEN JOHNSON	)	
APPLICANT	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
THE STATE OF SOUTH CAROLINA	)	
RESPONDENT	)	

December 12, 2017
Greenville, South Carolina

B E F O R E:

THE HONORABLE ROBIN B. STILWELL, Judge.

A P P E A R A N C E S:

RODNEY RICHEY, ESQ.
Attorney for the Applicant

DESHAWN MITCHELL, ESQ.
Attorney for the Respondent

APRIL HERRON
Official Court Reporter

INDEX OF WITNESSES

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APPLICANT'S EXHIBITS

NO	DESCRIPTION	ID	EV
1	Opinion	9	9

ALL EXHIBITS WERE RETAINED BY THE GREENVILLE COUNTY CLERK OF COURT.

THE COURT: Call the next case, sir.

MR. MITCHELL: Thank you, Your Honor may it please the Court. This is 2017-CP-23-3817, James Allen Johnson vs. The State of South Carolina. The Applicant is presently confined in the South Carolina Department of Corrections pursuant to Order of Commitment of the Greenville County Clerk of Court. September 2011 the Greenville County Grand Jury indicted The Applicant for homicide by child abuse. Dorothy Manigault represented The Applicant.

On June 3rd, 2013, Applicant proceeded to trial before the Honorable G. Edward Welmaker. The jury found Applicant guilty as indicted. On June 5th, 2013, Judge Welmaker sentenced Applicant to imprisonment for 62 years for homicide by child abuse. The Applicant filed a timely notice of appeal. The South Carolina Supreme Court affirmed Applicant's conviction on July 29, 2015. And The South Carolina Court of Appeals denied the petition for rehearing by Order filed December 16th, 2016.

Applicant filed petition for Writ of Certiorari on January 29th of 2016. The Supreme Court of South Carolina granted the petition by Order filed December 2, 2016. The Supreme Court of South Carolina affirmed The Court of Appeals opinion by a

memorandum opinion filed May 24th, 2017. The remitter was returned to the circuit court on June 9th, 2017.

Mr. Johnson is present in the courtroom today represented by Mr. Richey.

THE COURT: Okay.

Mr. Richey.

MR. RICHEY: Thank you, Your Honor, we call Mr. Johnson.

THE COURT: All right, Mr. Johnson, if you'd come forward, please.

THE CLERK: Mr. Johnson, please place your left hand on the Bible, raise your right hand.

James Johnson, after being duly sworn, testifed as follows:

THE CLERK: Thank you, you may be seated. Please state your name for the record.

THE WITNESS: James Allen Johnson.

DIRECT EXAMINATION

BY MR. RICHEY:

Q Mr. Johnson, are you incarcerated right now? In jail?

A Yes, sir.

Q And where are you incarcerated?

A McCormick Corrections.

Q And what are you incarcerated for?

A Murder by child abuse. Homicide.

Q Okay. And did you plead guilty or have a trial on that case?

A I asked for a trial on that case.

Q Okay. Who represented you on that trial?

A Dorothy Manigault.

Q Okay. At the conclusion of that trial, were you found guilty or not guilty?

A I was found guilty in the trial.

Q Okay. And what type of sentence did you receive?

A Sixty-two years.

Q Okay. And you filed this application for post-conviction relief because you believed that Ms. Manigault did not properly represent you; is that correct.

A Yes, sir.

Q Okay. And I'm going to get this issue out first. This allege -- this case involved a child, correct? You have to answer.

A Yes, sir.

Q Of a woman that you were dating; is that correct?

A Yes, sir.

Q And at some point in time did the police -- at some point in time, was a statement taken from you?

A Yes, sir.

Q And was that an incriminating statement that you know of?

A Yes sir, they said it was.

Q Okay. And you and Ms. Manigault, y'all had a Jackson v. Denno hearing, right? To try to suppress the statement, correct?

A Yes, sir.

Q And that statement was a very important part of The State's case against you, correct?

A Yes, sir.

Q And you didn't recall giving a statement; is that correct?

A No, sir.

Q Did you believe that that statement should have been suppressed?

A Yes, sir, I think it should have been -- I don't think it should have been used.

Q Okay. And you attempted to appeal that issue to the Court of Appeals, correct?

A Yes, sir.

Q And --

Can I approach the witness, Your Honor?

THE COURT: Yes, sir.

BY MR. RICHEY:

Q Okay. Mr. Johnson, this -- you recall getting this document from your appellate lawyer?

A Yes, sir.

Q And what is that?

A Saying that the Judge ruled in my favor on here.

Q On the statement?

A Yes, sir.

Q And what happened in that ruling? Was that ultimately reversed by the Supreme Court?

A Supreme Court didn't -- I don't think -- the Judge ruled in my favor but the Supreme Court wouldn't allow it or something.

Q Okay. Well, would you -- this opinion by The South Carolina Supreme Court, you're familiar with them saying that you could not raise that issue because it wasn't preserved?

A Yes, sir.

Q And was it -- their ruling is it wasn't preserved by trial counsel?

A Yes, sir.

Q Okay. So -- so, you believe that Ms. Manigault was ineffective for not preserving this issue?

A Yes, sir.

Q And that dealt with the statement.

Your Honor, we'd like to offer this as Applicant's 1.

THE COURT: Okay.

Any objection, sir?

MR. MITCHELL: No objection, Your Honor, it's already part of the record.

THE COURT: Okay. All right.

You can go ahead and mark it, sir.

(WHEREUPON, Applicant's Exhibit No. 1 was marked for identification and received into evidence.)

BY MR. RICHEY:

Q And it's your position if that statement had been suppressed, the outcome of your trial would have been different; is that correct?

A Yes, sir?

Q And do you believe by not preserving that issue that Ms. Manigault ineffectively represented you?

A Yes, sir.

Q And you think that you were prejudiced or hurt by that?

A Yes, sir.

Q Okay. And you believe that Ms. Manigault was -- was ineffective for not competently representing you, correct?

A Yes, sir.

Q Okay. And did you try to talk to her in the case?

A Yes, sir.

Q Okay. Did you understand the talks you had with her?

A Yeah, I told her I'm innocent. And the statement, I don't remember taking a statement. She said there's a statement saying that you did.

Q Okay. Do you recall any plea offers in the case?

A Yes, sir.

Q And what were they?

A Thirty-five with a cap and then 20 to life. Then 35 with a cap, then 30 to 20 and then 35 to life -- I mean, 25 to life.

Q Okay.

A I don't remember but I think there was one more right before trial but I don't remember what it was.

Q Okay. Did you go over your case with Ms. Manigault?

A Yeah. I told her -- I seen her like a couple of times. But I kept trying to tell her that I don't remember this, I was on medication when they came and picked me. And they said I was not -- they said I was not

under arrest but they made me go in handcuffs, so.

Q Okay. When you say you don't remember, are you alleging to the statement, not what happened?

A Yes, sir, the statement.

Q Okay. So, in terms of the crime, are you saying you don't remember or you're not -- what's your position on the crime?

A I'm not guilty.

Q Okay. So, you had nothing to do with this child's death, correct?

A Yes, sir.

Q And did you tell Ms. Manigault that?

A Yes, sir.

Q Did you have a hard time understanding Ms. Manigault based on your level of education?

A Yes, sir.

Q You did?

A (The witness nods.)

Q Okay. Did anyone else discuss your case with her?

A I don't think anybody in my family, no -- I don't understand what you're saying right there.

Q Okay. Well, did anybody help you with your case? Understand it, other than Ms. Manigault?

A No, sir.

Q Okay. And those are all the plea offers that you remember that was provided to you?

A Yes, sir.

Q Okay.

Thank you, answer the questions The Attorney General has.

MR. MITCHELL: May it please the Court, Your Honor?

THE COURT: Yes, sir.

CROSS-EXAMINATION

BY MR. MITCHELL:

Q Good morning, Mr. Johnson, how are you?

A All right.

Q I just have a few questions for you. Do you recall how many times you met with Ms. Manigault prior to going to trial?

A Just a couple of times. It wun't [verbatim] very many.

Q Okay. Now, during those times did she go over the discovery with you in the case? The evidence against you?

A It was pretty much just my statement against me.

Q Just your statement. So, was that the only thing?

A That's the only thing I got against me.

Q Okay. Now, let me ask you this, did she talk to you about any possible defenses that you had in this case?

A No, sir. Plea offers that's all she was saying.

Q Okay. Now, you made multiple statements in this particular case, correct?

A Sir?

Q Did you give multiple statements to police in this case?

A No, sir.

Q So, you just gave one?

A I gave them that statement and then -- whatever that statement was. And then later, when I didn't go with that statement because that statement is not true.

Q Okay. So, when the police arrived to the scene, did you talk to them then?

A I talked to them at the house.

Q Okay. So, you gave multiple statements, more than one?

A Yes, sir.

Q Okay. Let me ask you this, you said that there were plea offers and that Ms. Manigault presented those plea offers to you. Was it your decision not to take those offers?

A Yes, sir, it was my decision. I feel like if you're innocent you shouldn't take no offer.

Q Okay. And besides the statements that you gave -- because I think Mr. Richey asked you if that was the most incriminating piece of evidence. Didn't your co-defendant in this trial against you?

A Yes, sir but her statements, she had changed her statements like six or seven times.

Q Okay. Notwithstanding that, she testified against you, correct?

A Yes, sir.

Q So, is it fair to say that there was other evidence against you in this case, besides your statement?

A But it wun't a credible witness.

Q Okay. You testified in this case, correct?

A Yes, sir.

Q Okay. And you discussed that decision with Ms. Manigault, right?

A Yes, sir.

Q Okay. And that was your decision to testify?

A She asked me if I wanted to. I thought, I didn't know if I was supposed to or not. I guess I was supposed to testify.

Q Well, the Judge asked you questions before you got up to testify, right?

A Yes, sir.

Q Okay. And he informed you that you didn't have

to, right?

A Yeah but she told me to testify.

Q Okay.

MR. MITCHELL: Judge, that's all the questions I have for The Applicant.

THE COURT: Mr. Richey, any additional questions, sir?

MR. RICHEY: No questions.

THE COURT: All right, thank you, Mr. Johnson, appreciate it, you may step down.

Okay, you want to swear her in.

THE CLERK: Oh, I'm sorry, I apologize.

Rebecca Parker, after being duly sworn, testified as follows:

THE CLERK: Thank you. Please state your full name for the record.

THE WITNESS: Rebecca Parker.

THE CLERK: Thank you, ma'am, you may be seated.

THE COURT: You can have a seat, ma'am.

DIRECT EXAMINATION

BY MR. RICHEY:

Q Ms. Parker, are you related to Mr. Johnson?

A Yes, I am.

Q And how are you related to him?

A I'm his mother.

Q Okay. Do you recall any kind of plea offers in this case?

A Yes, I do.

Q And what were they?

A I recall a 15 year sentence plea.

Q Okay. And was that offer related to your son?

A Yes, it was.

MR. MITCHELL: Objection, Your Honor, any additional testimony would be hearsay. Unless she heard directly.

THE COURT: Okay. All right, I'll respectfully overrule your objection, I'll allow it.

You may proceed, Mr. Richey.

BY MR. RICHEY:

Q Did you talk to your son about that?

A Yes, I did.

Q Okay. And in terms of his educational level, is his educational level high or low?

A Low.

Q Okay. Does he have any issues with reading?

A Yes, he does.

Q And understanding?

A Yes, he does.

Q Okay. And do you believe he understood his talks with the lawyer?

A No, I don't.

Q Okay. What was that?

A No, sir, I don't.

Q Okay. And do you believe that the lawyer effectively represented him?

A No, I don't. No, sir, I don't.

Q Why is that?

A She told me in the elevator one day that all I wanted was my child to get off free. And I don't think that was a good thing to say to me. And I told her that I thought that he was innocent. And if I thought he was guilty, that I wouldn't want him to get off free, you know. So. And when she was representing him, she didn't say things to the jury to -- I can't think of the words to say. I had a--

Q So, it's your position that she didn't say things that were convincing to the jury; is that correct?

A Yes, sir.

MR. RICHEY: Okay. All right, thank you, ma'am. Answer any questions that the attorney general has for you.

CROSS-EXAMINATION

BY MR. MITCHELL:

Q Ms. Parker, I just have a couple of questions for you. Were you present at all the meetings between

your son's lawyer and your son?

A No, sir, I wasn't.

Q Okay. So, you weren't aware of any type of trial strategy or anything to that effect, were you?

A No, sir, I wasn't?

MR. MITCHELL: Thank you, Judge, that's all the questions I have.

THE COURT: Okay. All right.

MR. RICHEY: No questions for this witness.

THE COURT: All right, thank you, ma'am. I appreciate your being here. You may step down.

MR. RICHEY: We call Ms. Manigault.

THE CLERK: Ms. Manigault, place your left hand on the Bible right hand.

Dorothy Manigault, after being duly sworn, testified as follows:

THE CLERK: Thank you, please state your full name for the record.

THE WITNESS: Dorothy A. Manigault.

DIRECT EXAMINATION

BY MR. RICHEY:

Q Ms. Manigault, do you recall representing Mr. Johnson in this case?

A Yes.

Q Okay. And I'm going to get to the issue about

the statement, do you recall he gave a statement, correct?

A Correct.

Q And that statement was incriminating, correct?

A One of them was.

Q The last one at the police station was incriminating, right?

A Yes, the statement on June 2nd, 2011.

Q And you had a hearing on that statement, correct?

A Yes.

Q Okay. And you wanted that statement suppressed, correct?

A Correct.

Q Okay. And you've heard the testimony about The Supreme Court saying that issue wasn't preserved?

A Correct.

Q Okay. Do you believe that was that a viable issue for him to take to appeal?

A I agree that it wasn't preserved because I didn't make the motion pursuant to Missouri vs. Seabrook.

Q Okay. Let me -- and so, did you talk to him, discuss the case with him?

A Oh, yes.

Q Okay. And do you think he understood your talks?

A Yes, I do.

Q Okay. And did you convey all the plea offers to him?

A Yes, I did.

Q Did he understand those offers?

A Yes, he did.

Q Did he tell you consistently that he was not guilty?

A He flip flopped back and forth. He would say he didn't mean to hurt the child. Then he said quote, unquote, he didn't do anything wrong. Then he said it was the co-defendant. So, he changed his story several times with me also.

Q Okay. And -- but he did insist on going to trial?

A Yes.

Q Okay.

A He said it was advised by his -- either mother or whoever to go to trial.

Q Okay. He was advised by somebody other than you?

A Yes.

Q Do you recall a 15 year offer out there?

A No.

Q Okay. You don't recall any 15 year plea?

A No.

Q Okay. Was the offers consistent with what Mr.Johnson said, 35?

A Thirty-five cap. And we could argue for anything under 35.

Q Okay. Did you advise him to accept or decline that offer?

A I advised him that I thought it was a good offer, that we could argue -- at that point we could effectively Judge shop and argue for less than 35. But the cap was just 35.

MR. RICHEY: Thank you, ma'am. Answer any questions that the attorney general has.

MR. MITCHELL: May it please the Court, Your Honor.

CROSS-EXAMINATION

BY MR. MITCHELL:

Q Good morning, Ms. Manigault, how are you?

A Doing good, sir.

Q Good. I have some questions for you. How long have you practiced criminal law here in South Carolina?

A At least 35 plus years.

Q Thirty-five plus years. How much of that time has been devoted to criminal law?

A At least 35 plus.

Q Okay. Fair enough. And in regards to this case, were you retained or were you appointed?

A Appointed through the Public Defender's Office.

Q Okay. And without getting too much into detail, do you recall some of the facts of the case?

A Yes. My client was living with his girlfriend. She had two children. At least two children there. On the date of the incident, which was May 25th, 2011, the EMS was called. The child, according to Mr. Johnson, has strangled on iced tea. And he gave a statement on the scene to the police. He was taken down to the police department. He gave a written statement on, I think, it was May 25th or 7th, I can't remember. Yeah, the 27th because the child died on the 27th. At some point he gave another statement on June 2, 2011.

As he said, Ms. Sprouse gave several statements also. The defense of the child choking on tea was not confirmed by the autopsy or the medical examiner. The medical examiner said that he was suffocated. Lost oxygen to the brain. There was several bruises on the child's forehead, face, body, arms, leg. So, there was some indication of continuing abuse to the child. And again, the medical examiner said she was suffocated and it was not choking on tea.

Q Okay. Now, after you were appointed to this

case, did you meet with Mr. Johnson several times?

A Yes, I did.

Q Okay. And did you recall what discussed in these meetings with him?

A Because he indicated that he had a problem with reading, I would meet with him on various occasions to read all of the discovery to him. When we received it from the solicitor's office. So, I would read the police report, the autopsy report, the medical examiner report. Read his statements to him, read Ms. Sprouse's statement to him. Gave him the theory of the solicitor's prosecution. Asked for his defense. His defense was between she choked on tea, drinking tea. And he tried to do PCR.

Q Now, let me ask you this, before I talk more about -- or ask you more about, I should say, about the discovery in the case. Were there ever any issues with regards to competency?

A Mr. Johnson had informed me that he was going to mental health for ADHD, depression, anxiety but he had stopped, at least a year prior to the incident date, not taking medication, not going for counseling. So, I had him -- requested The Court do an evaluation. They did a double evaluation on mental health and the disabilities. And the report -- to report result was that he was

competent, through assistance of attorney, and was aware, understand what was going on.

Q Okay.

A So, I didn't have any issue, I just wanted to make sure that there was nothing -- nothing there that I was not aware of.

Q So, you got him tested?

A Yes.

Q And then that also at the trial the doctor who conducted the evaluation testified prehearing motion, correct?

A Yes.

Q Okay. And testified that Mr. Johnson was competent to stand trial?

A Yes.

Q Okay. Turning your attention back to the discovery in the actual case, besides the statement that he gave, the incriminating statement, was there any other evidence?

A The co-defendant testified.

Q The co-defendant?

A Yes.

Q So, the mother of the child?

A Yes.

Q Okay. Did you review the charges with him, the

possible punishment, sentence, that he could--

A Yes.

Q Okay. And I know there's been talk about plea offers in the case. You said that there was a plea off in this case?

A Yes. The plea offer that I received, that is written and that I provided copies to Mr. Johnson was a 35 year cap.

Q Okay. And whose discussion was it to decline the plea offer?

A Mr. Johnson.

Q Okay. Was he always adamant about going to trial?

A Yes. Yes and no.

Q Okay.

A Tells me he was wanting to go to trial, well he might plead because he didn't want to take a chance. Then he was back to trial after counseling with various family members, I'm assuming.

Q Okay. Let's talk about the this particular statement that he gave to the police that day. There's no question that you had a Jackson v. Denno hearing, correct?

A That's right.

Q Would it be fair to say that it was your position that you believe that this statement was not

voluntary?

A That was what my presentation to The Court.

Q Okay. And what was your argument for that?

A He's saying that he was upset, he wasn't aware. He testified today that he was on medication. He had indicated to me that he hadn't had medication for over a year.

Q Okay.

A So, when you look at the statement, the statements says that he was not intoxicated, this was a voluntary statement. I was going on his presentation to me that he did not remember giving the statement, he was not aware of what he had said or what was in his statement. And that he believed that he was forced to give a statement by the police.

Q Okay. And ultimately the Judge decided that the statement that he gave was voluntary, correct?

A Correct.

Q Now, I think Mr. Richey asked you about the opinion from the Supreme Court saying that the issue concerning his statement wasn't preserved for appeal?

A Right.

Q And I think you said that you failed to make a motion pursuant to Missouri v. Seabrook?

A That is correct.

DOROTHY MANIGAULT-REDIRECT BY MR. RICHEY

Q But there's no question that you attacked the voluntariness of the statement to try to keep it out, correct?

A Yes.

Q Okay.

MR. MITCHELL: Judge, that's all the questions I have for her.

REDIRECT EXAMINATION

BY MR. RICHEY:

Q Ma'am, isn't one of the issues with the June 2nd statement was the length of time that he stayed at the police department before they ultimately gave him miranda warnings? Wasn't that one of the issues you had with it?

A If that was what was raised in the transcript, yes.

Q And he was picked up late afternoon and he gave this -- he was there for about six hours and they gave him his miranda warnings after about four to six hours after him being there; is that correct?

A If that's what the transcript says, yes.

Q And this second statement, it was actually his first statement and then the girlfriend actually flipped on him; do you recall that?

A Yes.

Q After the girlfriend flipped, is when they went

back to him to get the June 2nd statement, do you recall that?

A There was continuing conversation with the co-defendant and the police throughout.

Q And do you recall them telling him, It's over with, she's got -- y'all not together anymore and all this stuff, do you recall any of that?

A Is it in the statement?

Q The cops to him?

A Okay, yeah.

Q Okay. But there's no question that the girlfriend flipped on him at some point, correct?

A Yes. She started at the hospital and continued from that point on.

MR. RICHEY: Thank you, ma'am.

MR. MITCHELL: I have no further questions, Judge.

THE COURT: Okay. All right.

You may step down, thank you.

THE WITNESS: Thank you.

THE COURT: Yes, ma'am.

MR. RICHEY: No other witnesses.

THE COURT: Okay, anything from The State?

MR. MITCHELL: Nothing, Your Honor.

THE COURT: Okay.

All right, anything we need to put on the record before we adjourn the hearing?

MR. MITCHELL: Judge, just for the record sake in regards to the applicable standard for the issue -- allegations that have been raised that the issue was not preserved and that counsel was ineffective for it, the proper standard for evaluating that is under McCann vs. State, 404 S.C. 465. And the standard is not that the issue was not preserved for appeal, counsel would be ineffective for doing so. The Applicant must prove that the issue would be meritorious on appeal had it been preserved.

THE COURT: Okay.

All right, Mr. Richey.

MR. RICHEY: Your Honor, I think there's no question that this is a meritorious issue in terms of the record. I will say to The Court the problem with this second confession, and I think the case Missouri vs. Seabrook, I think this case is almost identical to that situation in terms of the amount of time that the Defendant was at the police department before he was actually given his miranda warning. And I think the Seabrook court talks about how their oppose this two-stage interrogation. Meaning, this court in

Seabrook is saying, get the guy there, hold him there for a long period of time, hold him, hold him, hold him. Then he think made a confession. Then you give him his miranda rights, then he signed a statement. And that's what happened in this case. Because I think the transcript will reflect it, that my client, he was there some three to four hours up to six hours before he was ever given his miranda. And so, he gives this confession and then he signs.

So, I think that's clearly within Seabrook. So, I think the issue being meritorious, is a meritorious issue that was raised. And 1that why counsel sought to suppress the statement because the statement was not -- the statement was not helpful to her case. And so, I this counsel made the correct arguments and all that but it just wasn't preserved. And it's our position that he should be granted a new trial. Thank you, Your Honor.

THE COURT: All right, I'll take it under advisement.

MR. RICHEY: Thank you, Your Honor.

MR. MITCHELL: Thank you, Judge.

(WHEREUPON, the proceedings were concluded.)

CERTIFICATE OF REPORTER

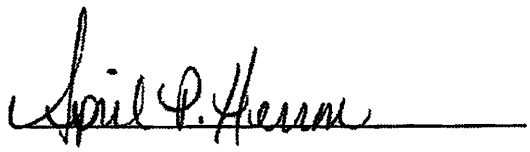
STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

I, APRIL P. HERRON, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 12th day of December, 2017.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

June 13, 2018



APRIL P. HERRON, Court Reporter

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STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

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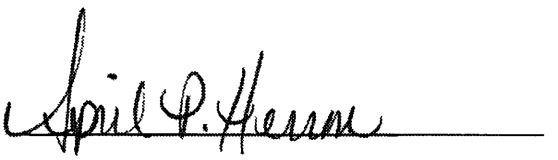
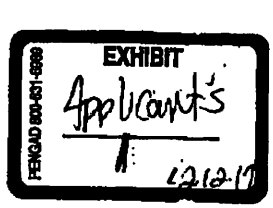
June 13, 2018



APRIL P. HERRON, Court Reporter



THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

James Allen Johnson, Petitioner.

Appellate Case No. 2016-000072

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
The Honorable G. Edward Welmaker, Circuit Court Judge

Memorandum Opinion No. 2017-MO-009
Heard April 13, 2017 – Filed May 24, 2017

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General Robert Bolchoz, Senior Assistant Attorney General J. Benjamin Aplin, and Assistant Attorney General Susannah R. Cole, all of Columbia; and Solicitor

William W. Wilkins, III, of Greenville, all for Respondent.

PER CURIAM: The court of appeals' opinion, *State v. Johnson*, Op. No. 2015-UP-378 (S.C. Ct. App. filed July 29, 2015), is affirmed pursuant to Rule 220(b)(1), SCACR, because Petitioner's argument that the trial court erred in admitting his incriminating statements is not preserved for our review. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007) (stating to preserve an issue at trial for appellate review, the issue must be: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity). Therefore, we do not address the merits of Petitioner's argument.

AFFIRMED.

BEATTY, C.J., KITTREDGE, FEW, JAMES, JJ., and Acting Justice Maite D. Murphy, concur.

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
James Allen Johnson, #355670, Applicant, v. State of South Carolina, Respondent.	2017-CP-23-3817 **ORDER OF DISMISSAL** ENTERED COMPUTER

This matter comes before the Court by way of an application for post-conviction relief filed on June 13, 2017 by James Allen Johnson (Applicant). Respondent made its Return on or about October 24, 2017. An evidentiary hearing into the matter was convened on December 12, 2017, at the Greenville County Courthouse in Greenville, South Carolina. Applicant was present and represented by Rodney W. Richey, Esquire. Respondent was represented by DeShawn H. Mitchell, Esquire of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Applicant's Trial Counsel Dorothy A. Manigault, Esquire also testified as did Applicant's mother, Rebecca Parker. This Court had before it a copy of the records of the Greenville County Clerk of Court regarding the Applicant's convictions, the transcript from Applicant's trial, the PCR application, Respondent's Return, Applicant's records from the Department of Corrections and Applicant's appellate records. After reviewing the record and everything presented, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to post-conviction relief and denies this application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. In September 2011, the Greenville County Grand Jury indicted Applicant for homicide by child abuse (2011-GS-23-

7262). The charge resulted from Applicant's abuse of a twenty-month-old baby girl which culminated in Applicant causing the baby's death by suffocation. Dorothy Manigault, Esquire represented Applicant. Kris Hodge, Esquire prosecuted the case. On June 3, 2013, Applicant proceeded to trial before the Honorable G. Edward Welmaker. The jury found Applicant guilty as indicted. On June 5, 2013, Judge Welmaker sentenced Applicant to imprisonment for sixty-two years for homicide by child abuse.

Applicant filed a timely notice of appeal. David Alexander, Esquire, of the Office of Appellate Defense represented Applicant throughout the appellate process. The South Carolina Court of Appeals affirmed Applicant's conviction on July 29, 2015. State v. Johnson, Op. No. 2015-UP-378 (Ct. App. 2015). Applicant filed a petition for rehearing on August 12, 2015. The South Carolina Court of Appeals denied the petition for rehearing by order filed December 16, 2016.

Applicant filed a petition for writ of certiorari on January 29, 2016. The Supreme Court of South Carolina granted the petition by order filed December 2, 2016. The Supreme Court of South Carolina affirmed the court of appeals' opinion by a memorandum opinion filed May 24, 2017. State v. Johnson, Op. No. 2017-MO-009 (2017). The remittitur was returned to the circuit court on June 9, 2017.

FACTUAL HISTORY

On May 25, 2011, Emergency Services received a call stating that someone was choking. (Tr. p. 138.) A team of firefighters were the first responders to the scene. (Tr. p. 139.) When the firefighters arrived, there was a child lying on the floor, twenty-month old Victim. (Tr. p. 140.) The child's mother was doing chest compressions with the heel of her palm and Applicant was performing mouth-to-mouth rescue breathing on the child. (Tr. p. 140.) The firefighters

immediately noticed bruising on the child's body and forehead. (Tr. p. 140, p. 158.) The child was pale, not breathing, and without a pulse. (Tr. p. 140.) They assembled a bag valve mask and started breathing for the child as well as performing chest compressions. (Tr. p. 145.) Applicant told the firefighters, "you can't go to the bathroom without watching your kids anymore," claiming the child had taken a drink, choked, and then vomited. (Tr. p. 145-146.) James Clardy, an EMS operator, also noted that the child had some very large bruises in various stages of healing on her face, bruises on the torso, and bruises on her legs and arms. (Tr. p. 185.) Responders noted that cardiac arrest was not normally an outcome for a child choking on tea. (Tr. pp. 170-171; p. 181.) Once the ambulance arrived, the responders moved the child to the ambulance and departed for the hospital. (Tr. p. 150; pp. 160-161; pp. 172-173.) The paramedics made the decision to take the child to the hospital in Greer because it was the closest facility. (Tr. p. 173-174.) The child was subsequently transferred by helicopter to Greenville Memorial Hospital. (Tr. p. 177.)

Dr. Mary Croswell, an expert in pediatrics with a specialty in child abuse, examined Victim while she was hospitalized and described in detail the bruises on Victim's body, a total of twenty-eight bruises. (Tr. p. 371.) Victim had suffered five bruises on her forehead. (Tr. p. 363.) She was also bruised in the abdominal area, with one bruise consistent with a bite mark. (Tr. p. 364.) Victim had a cluster of four bruises on her back and two bruises on her buttock. (Tr. p. 364.) Her arm was bruised and there was extensive bruising on her legs. (Tr. pp. 364-365.) Victim further had a bruise on her ear. (Tr. p. 364.) The bruising to Victim's ear, buttock, cheeks, nasal bridge, and abdomen was noted as atypical for accidental injury. (Tr. pp. 367-369.) Dr. Croswell further opined that the explanation given for the Victim's forehead bruises, that her two-year-old half-sister had hit her with Mardi Gras beads, was "atypical and unusual." (Tr. p.

371.) When Dr. Crosswell saw Victim the following day, Victim had been declared brain dead. (Tr. p. 372.)

The child was taken off life support on May 27, 2011, and died. (Tr. p. 280.) Dr. Michael Ward performed the autopsy on Victim. (Tr. pp. 485-486.) Dr. Ward testified as to the extensive bruises the child suffered. (Tr. pp. 488-489; pp. 493-495; pp. 498-500.) Dr. Ward also noted a torn frenulum inside the child's mouth, an injury indicating pressure had been applied to the mouth. (Tr. pp. 490-492.) Dr. Ward opined the cause of Victim's death was suffocation. (Tr. p. 496.) Dr. Ward elaborated that an object, most likely a hand, was placed over the mouth and nose, obstructing the airway which eventually caused an anoxic brain injury. (Tr. p. 496-497.) Dr. Ward explained the airway would have to be occluded for at least a minute for this injury and cardiac arrhythmia to occur. (Tr. p. 497.) It would be medically impossible for Victim to present in her condition if she took a sip of tea, choked and vomited. (Tr. p. 503; p. 506.) Dr. Ward noted that vomiting or spitting up fluid from the lungs is common when someone is suffocated, and in Victim's case she may have spit up blood from the torn frenulum in her mouth.[1] (Tr. pp. 503-504.) Dr. Ward's final conclusion was the cause of death was anoxic brain injury due to suffocation, and the manner of death was homicide. (Tr. p. 502.)

The Victim's mother, Georgia Ann Sprouse ("Sprouse"), gave several different accounts of what happened. (Tr. p. 449.) Sprouse admitted giving investigators three different accounts of the events leading to Victim's hospitalization. (Tr. pp. 315-317.) Sprouse initially claimed her daughter choked while drinking a glass of tea. (Tr. p. 316.) Sprouse told Officer Carl Mathias ("Mathias") that her daughter was drinking tea, started choking, and threw up. (Tr. p. 193.)

[1] It was also noted that Victim had worn an outfit with a green bow earlier in the day, Victim was wearing only a diaper when paramedics arrived. (Tr. p. 171; pp. 232-233.) The clothing was later found in the home and was stained. (Tr. p. 428-431; p. 433-434.) There was also a small stain on the carpeting. (Tr. p. 193-194; 232.)

Sprouse also told Officer Kevin Azzara that the Victim walked to a table where there was a glass of tea, took a drink, and started choking. (Tr. p. 201.) Sprouse maintained that story while at the hospital, telling doctors, DSS workers, and law enforcement officers that Victim choked on tea. (Tr. p. 316.) In this initial version of events, Sprouse placed Applicant in the bathroom when Victim began choking. (Tr. p. 313; p. 411.) Sprouse's story changed slightly the following days, May 26-27. (Tr. p. 316; p. 384-385.) Sprouse amended her story to say she was in the kitchen at the time Victim allegedly started choking on the tea. (Tr. p. 316; pp. 323-324; pp. 384-385; p. 449.) Sprouse also claimed Applicant was in the living room with Victim at the time she allegedly started choking on the tea. (Tr. p. 449.) On June 2, Sprouse was confronted by investigators who stated that Sprouse's story was not making sense and that she needed to tell the truth. (Tr. p. 392, p. 455.) Sprouse told the investigators that on the day of the incident, she smoked marijuana and went to sleep. (Tr. pp. 389-392; p. 455.) She was then awoken by Applicant who told her that Victim was not breathing. (Tr. pp. 389-392; p. 455.) Following her statement, officers gave Sprouse a ride back to the mortuary. (Tr. p. 456.) Sprouse testified at trial that this third account of the events of May 25th was in fact the truth. (Tr. pp. 305-311, pp. 315-317.) Sprouse also claimed that the story about choking on tea was Applicant's. (Tr. p. 309; p. 311.) Sprouse was ultimately arrested for homicide by child abuse and accessory after the fact. (Tr. p. 470.)

Applicant also spun a variety of tales for law enforcement. Mathias arrived on scene as a first responder on May 25. He arrived as the child was being moved to the ambulance. (Tr. p. 192.) Mathias encountered Sprouse in the front yard and came inside with her. Applicant was in the living room. When Mathias asked Sprouse what happened, Applicant volunteered that he was

in the bathroom and did not know what had happened. Sprouse explained that Victim had choked on tea. (Tr. pp. 55-57; pp. 192-194.)

Later that day, Investigator Jennings Autrey ("Autrey") and Investigator Christopher Miller ("Miller") proceeded to the hospital for an update on Victim's medical condition. (Tr. p. 59; p. 377.) They spoke with Applicant and the others present to collect personal information and get a preliminary understanding of the events. (Tr. p. 60; pp. 380-384; 437.) When Autrey asked Applicant what happened, Applicant replied that he was in the bathroom and heard Sprouse call for help and tell him to call 9-1-1. (Tr. p. 60; pp. 380-382.) Applicant stated he then saw Victim lying on the floor with Sprouse attempting CPR. (Tr. p. 61; p. 381.) At the hospital, Applicant agreed to ride with Miller to the law enforcement center. (Tr. pp. 437-438.) He was not in custody and was being treated as a witness. (Tr. pp. p. 81; p. 84; pp. 437-438; p. 475.) Applicant spoke casually with Miller in his office and ultimately provided a statement. (Tr. pp. 438-440.) Applicant maintained that he went to the bathroom, leaving Sprouse, Victim, and two other children in the living room. He then heard Sprouse yelling that Victim was not breathing. Applicant stated that when he came out of the bathroom, Victim was on her back and Sprouse was attempting CPR. Applicant claimed Sprouse told him Victim choked on tea, and while he performed CPR on Victim tea came up. (Tr. pp. 440-442.) In this statement, Applicant also explained the bruises on Victim's face as the result of falls and being struck with Mardi Gras beads by her half-sister. (Tr. p. 443-444.) In response to additional questions from Miller, Applicant also stated that both children were fussy and that there were also toys in the room which Victim could have choked on. (Tr. pp. 444-445.) Applicant also noted an incident a week earlier in which law enforcement came to the house because Victim's half-sister was outside unsupervised. Applicant claimed to have been in the bathroom during this incident as well. (Tr.

p. 446.) After providing the statement, Miller drove Applicant back to the hospital. (Tr. p. 85; p. 448.) The interview lasted around an hour and a half to two hours including the ride. (Tr. p. 85.)

Applicant next spoke to police a week later, on June 2. (Tr. p. 61.) Two deputies transported Applicant to the law enforcement center, and Autrey and Miller met Applicant there. (Tr. p. 62; p. 392-393; pp. 456-457.) Officers advised Applicant that they were "interviewing everybody that was associated with the case,"[2] and he did not have to come with them.[3] (Tr. p. 479; pp. 586-587.) Miller testified that Applicant was not in custody at this time. (Tr. pp. 457-458.) Applicant appeared to recognize Miller from their previous conversation. (Tr. p. 458.) Applicant was present freely and voluntarily and was advised that he was there because the police needed more information to determine what happened. (Tr. p. 458.) Applicant did not appear to be under the influence of drugs or alcohol at the time of the interview, and Applicant himself denied any drug use at the time. (Tr. pp. 71-72; p. 74; p. 394-395; p. 405; p. 459; p. 467; p. 479.) Officers did not notice any smell of alcohol on Applicant's breath, nor did they notice the dilated pupils or bloodshot eyes that would indicate drug use. (Tr. p. 413, p. 459; p. 479.) Applicant was not slurring his speech nor was he unsteady on his feet. (Tr. p. 413; p. 459.)

The initial conversation was casual. (Tr. p. 87; p. 460.) Officers informed Applicant that Sprouse now claimed Applicant was the one in the den with the child at the time of the incident. (Tr. p. 88; p. 461.) Applicant repeated his prior story, calmly relating that he was in the bathroom when he heard Sprouse's cries for help. (Tr. p. 63-64; p. 395; p. 461.) Applicant and Miller talked for a while about his dislike for Victim's father. (Tr. p. 461.) After an hour, Miller asked

[2] The same day Miller also obtained additional statements from Crystal Inman, the woman Applicant and Sprouse lived with at the time, and Sprouse. (Tr. p. 452-p.456.)

[3] Applicant claimed police said he had to go with them. Applicant testified that his brother was in the yard when this occurred and could have given him a ride, but officers insisted he come with them. (Tr. pp. 552-553.) However, Applicant's brother denied that he was present when police arrived, stating he was at the store at the time. (Tr. p. 580.)

Applicant if he would like anything to eat or drink. (Tr. p. 461.) Applicant refused Miller's offer. (Tr. p. 461.) Miller asked Applicant if he would like to use the restroom, and Applicant replied that he would. (Tr. p. 461.) Miller testified that the only public restroom is downstairs and is a long walk, so he took Applicant to the employee restroom. (Tr. p. 461-462.) Miller accompanied Applicant to the employee restroom because it is not open to the public. (Tr. p. 462.) As a policy, non-employees are not allowed to go to the employee restroom unescorted. (Tr. p. 462.)

After returning from the bathroom, Miller asked Applicant if he was being truthful. (Tr. p. 463.) Applicant "continued talking about how he wanted the child to have help, he wanted to help, wanted peace." (Tr. p. 64; p. 396.) Applicant then bent over in his chair and started sobbing. (Tr. p. 463.) Applicant stated, "accidents happen. He said he wishes that she never went away." (Tr. p. 65; p. 398; p. 463.) Miller asked Applicant, "Tell me what you're talking about." (Tr. p. 463.) Applicant then told Investigator Miller that he got angry at Victim and threw a toy across the room at her. (Tr. p. 65; p. 398; p. 463.) Applicant then stated that he tried to get Victim to stop crying but she would not. (Tr. p. 463.) Applicant told Miller he was afraid the crying was going to wake Sprouse so he held his hand over the victim's mouth until she stopped crying. (Tr. pp. 463-464.) Applicant stated when she stopped crying is when Victim stopped breathing. (Tr. p. 464.) Applicant then demonstrated covering the victim's mouth and nose. (Tr. p. 464.) Upon this admission, Applicant confessed Sprouse was in bed at the time, and he made up the story about Victim choking on tea because he was scared. (Tr. p. 65; p. 398.)

Miller testified that at this point, Applicant was no longer free to leave, and Miller read Applicant his Miranda rights. (Tr. pp. 65-68; p. 89; pp. 398-404; p. 464.) Approximately one and a half hours had passed prior to Applicant's admission and rights warning. (Tr. p. 74; pp. 407-408; p. 410; p. 458; p. 467; p. 476.) Miller followed his normal procedure for advising Applicant

of his rights. (Tr. p. 464.) Miller advised Applicant of each line, one at a time, and that it was his choice to waive his rights or not. (Tr. p. 89; p. 465.) Applicant initialed each line on the form saying he understood the rights he had been advised of. (Tr. p. 465; R. p. ___, Court's Exhibit 1.) Applicant then signed the waiver of rights form saying that he wished to talk to investigators even though he didn't have to. (Tr. p. 466.) Conversation resumed. (Tr. p. 467.) Investigators then began drafting a suspect defendant's statement. (Tr. p. 467.) Applicant was read his rights again. (Tr. p. 467.) Applicant then provided a written statement. (Tr. p. 69; pp. 404-406.)

Applicant gave Autrey permission to type his statement. (Tr. p. 467.) In his statement, Applicant went through the events of the day, including his confession to holding his hands over Victim's mouth until she stopped breathing. (Tr. p. 467.) After Applicant's statement was typed, Applicant had an opportunity to read over it. (Tr. p. 468.) Applicant initialed at the beginning and end of each paragraph before signing the statement. (Tr. p. 468.) Miller estimated that it took an additional hour to complete the written statement. (Tr. p. 480.) Applicant was in custody at this point. (Tr. p. 468.) Following this statement, a warrant was obtained for Applicant's arrest. (Tr. p. 408; p. 469.) During arrest and booking, Applicant "continued to say things...about wishing God had never created him, that he did not deserve to live...that he would never kill himself, but he knew someone in jail would kill him because of what he'd done. ..." (Tr. p. 469.)

Applicant recalled speaking with Miller on May 25 and recalled giving a statement that day. (Tr. pp. 528-530; p. 542-543.) However, Applicant maintained he could not remember the entire interaction with officers on June 2. (Tr. p. 103; pp. 530-531.) Applicant claimed that on June 2, before officers came to pick him up, he "was smoking a little bit of reefer, and I had some Xanaxes." (Tr. p. 104; pp 531-532.) Applicant claimed to have taken about ten Xanax

before police arrived and to have taken three more while in the bathroom at the police station.[4] (Tr. pp. 104-105.) Applicant seemed to remember certain things about the interview (e.g., leaving marijuana at his friend's house before going to the police station, the ride to the police station, being told that Sprouse had resumed a relationship with someone else, going to the bathroom) but was consistently hazy on receiving Miranda warnings and providing incriminating details. (Tr. pp. 105-108; pp. 110-111; pp. 114-115; pp. 530-531; p. 533-539; 554-555.) Applicant speculated that if he had said such incriminating things he must have done so to defend Sprouse since she could be pregnant with his child. (Tr. p. 539-540.)

Before the jury, Applicant reverted to his original story. Applicant testified that he was in the bathroom for two to three minutes when Sprouse called out for help, and he emerged to find Victim laying in the living room, already discolored. (Tr. p. 521-522; p. 524.) Applicant testified he called 9-1-1and attempted to help with CPR. (Tr. pp. 522-523.) Applicant also reported that at the time he and Sprouse smoked marijuana on a daily basis, and Sprouse was hiding marijuana while he called 9-1-1. (Tr. p. 521; pp. 524-525.)

In addition to statements given to police, Applicant and Sprouse were placed together for transport from prison to Family Court on one occasion. During that transport, after the court appearance, Applicant told Sprouse, "he was sorry for what he had did. That he did not mean to... he was sorry and that he hoped [she] would forgive him and so on and so on." (Tr. pp. 346-347.)

The State also presented evidence from Crystal Inman, the woman they lived with at the time, who felt Applicant favored Victim's older half-sister. (Tr. p. 223-224.) She recalled Applicant at the hospital saying that Victim would "just fall and fall, all the time." (Tr. p. 239.) Sprouse described a series of bruises Victim sustained while in Applicant's care which Applicant

[4] Miller accompanied Applicant to the restroom but noted no unusual actions. (Tr. p. 462.)

attributed to various incidents – being hit by her 2-year-old sister, falling on a stepping stone or tripping in a bedroom. Sprouse also believed Applicant tended to favor Victim's older half-sister. (Tr. p. 303.) Sprouse revealed that Applicant did not get along with Victim's father. (Tr. p. 347.)

ALLEGATIONS

In his application, Applicant alleges he is being held in custody unlawfully for the following reasons (quoted verbatim):

1. "Ineffective Assistance of Trial Counsel," in that:

    a. "The Supreme Court has ruled that my trial lawyer failed to preserve the arguments regarding the admissibility of my statement for appeal. The failure to preserve an issue constitutes deficient performance. In my opinion, my case differs in no material respect from State v. Navy."
    b. "It is also possible that a false confession expert may have been needed in the event the confession was admissible."
    c. "The other significant issue I saw was regarding the doctor's opinion that the child was suffocated because of a torn frenulum – the little piece of skin between the upper lip and gum. This child was intubated at least twice in the back of a moving ambulance on a rough rural road. My attorney failed to have a doctor testify that the frenulum could have been torn during intubation, and that would have called the State's doctor's testimony into doubt."
    d. "The common sense view of this tragic ordeal is that there was a mentally retarded [*sic*] father with an IQ of less than 70 attempting to perform CPR on his unconscious child while being given instructions over the phone by a 911 operator while in a state of panic and anxiety to a point he could barely talk to 911. Is it possible that the child swallowed an ice cube that melted away?"
    e.

2. "Ineffective Assistance of Appellate Counsel"

    a. "My appellate defender never once suggested that my trial counsel could have been below standard.
    b. "I did file a motion to remove my trial lawyer from my case. The motion was heard on May 17, 2014 in the Greenville County Court of General Sessions, 13th Circuit heard by the Honorable Deadra L. Jefferson, and quoting from the transcript of page 7, line 16 of

this proceeding Judge Jefferson states: 'I've known [Trial Counsel] not to be prepared."

c. "I was charged with homicide. I never felt my attorney was competent."

3. "Improper Judicial Posture"

a. "When Judge Welmaker made his ruling on competency, he ruled without any argument from either the defense or the opposition.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING

Applicant's Testimony

Applicant testified he met with his attorney multiple times and asked her to get him a plea offer. He testified he ended up getting a sixty-two year sentence. Applicant testified he had given an incriminating statement to the police regarding the case. However, he believed the statement should have been suppressed because he was under the influence of drugs when he gave it. He testified he believed the outcome of the trial would have been different had his statement been suppressed and that he was prejudiced because of the statement's inclusion in his trial. He testified at some point there were two different plea offers from the State that included a thirty-five year cap plea offer and also another plea offer of twenty years to life. Applicant testified he went over the discovery with his attorney in the case and told her he was under the influence of drugs when he gave the incriminating statement. He testified he was not guilty and told Trial Counsel that. Applicant testified he had a hard time understanding the conversations he had with Trial Counsel.

Applicant's Mother's Testimony

Applicant's mother, Rebecca Parker, testified there was a fifteen year plea offer made to her son in his case. She testified she did not believe Trial Counsel effectively represented her son. On cross-examination, Ms. Parker testified she was never present at any meetings or talks

between her son and Trial Counsel.

Trial Counsel's Testimony

Trial Counsel when called by Applicant testified they had a hearing on the admissibility of Applicant's statement prior to trial. She testified she tried to get the statement suppressed but admitted she did not make a proper motion pursuant to Missouri v. Seibert 542 U.S. 600 (2004). She testified she agreed the issue was not properly preserved for appellate review. Trial Counsel testified she conveyed all plea offers from the State to Applicant.

On cross-examination, Trial Counsel testified she had been practicing law for over thirty-five years. She testified she was appointed to represent Applicant. Trial Counsel testified she met with Applicant to discuss his charges on several occasions and read all of his discovery to him as he had issues understanding or reading it. Trial Counsel testified she discussed with Applicant his constitutional rights, the State's burden of proof and the possible sentences he was facing in his case. Trial Counsel testified she entered into plea negotiations on behalf of Applicant and she received an offer from the State for Applicant to plead guilty to an open plea with a cap of thirty-five years. She testified Applicant did not want to take the plea so they went to trial. She testified prior to trial she had Applicant evaluated and the results were he was competent to stand trial. Trial Counsel testified there were incriminating statements made by Applicant to the police that were problematic because he confessed. She testified prior to trial she conducted a Jackson v. Denno hearing to try and suppress his confession as involuntary however the trial judge allowed the statement in.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the

witnesses presented at the hearing, and can weigh their testimony and credibility accordingly. These credibility findings have been applied to the Court's findings and conclusions set forth below. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland v. Washington, 466 at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable

probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 (1985).

After careful review of the entire record, including the testimony presented at the evidentiary hearings, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel discussed below.

Failure to Preserve Issue for Appeal

Applicant alleged in his application ineffective assistance of counsel for failure to preserve the argument regarding the admissibility of his statement for appeal. This Court finds that Applicant cannot show that he was prejudiced by Counsel's failure to preserve the issue for appeal because he has failed to prove the issue would have been successful on appeal. Our courts have previously held an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a post-conviction relief claim alleging ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003); Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). However, to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam, 404 S.C. at 475–76, 746 S.E.2d at 47 ("Since the Fourth Amendment issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in McHam's PCR claim.") (citing Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is **meritorious** and that the verdict would have been different absent the evidence

that should have been excluded." (emphasis in McHam)). Therefore, before a post-conviction relief court can find an applicant has prevailed on a claim of ineffective assistance of trial counsel for failing to preserve a ground for appellate review, the court must determine the underlying claim was meritorious and a reasonable probability that it would have resulted in reversal and a new trial.

In this matter, the Applicant complains that Trial Counsel did not object to the introduction of his statement. The Applicant argues that the Supreme Court's ruling in Missouri v. Seibert 542 U.S. 600 (2004) precludes the use of midstream Miranda warnings in "question first" interrogations. The record indicates that Trial Counsel did specifically request a Jackson v. Denno hearing to determine the voluntariness of the statements. The testimony clearly set forth the manner and method of questioning and the circumstances surrounding the Applicant's statement. The record is clear that Trial Counsel did not object specifically to the introduction of the statement under Missouri v. Seibert. Further, the record reflects that the Trial Judge made a general ruling indicating the statements were made freely and voluntarily and did not violate Miranda. The Court of Appeals' decision is further general and does not state specifically that an objection to the introduction of the statement under Missouri v. Seibert was not preserved. Therefore, lacking clarity from the trial transcript, and the rulings of the Trial Court and Court of Appeals, the PCR Court is left to review the transcript to determine whether Applicant has shown that he was prejudiced by Trial Counsel's failure to preserve the issue for appeal. After having fully reviewed the transcript of record, this Court finds that Applicant has failed to establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. It is true and unfortunate that Trial Counsel did not state objections with clarity and specificity. However, Trial Counsel did request a Jackson v. Denno hearing and

elicited any and all information upon which the trial court could make an informed and intelligent decision regarding the voluntariness of the statements. Thereafter, the trial court did make a ruling finding that the statements were voluntary, notwithstanding the officer's having provided Miranda warnings after the Applicant began to offer his statement.

The record indicates that Applicant's case is distinguishable from Missouri v. Seibert. In Missouri v. Seibert, the interrogating officer testified that he made a 'conscious decision' to withhold Miranda warnings, thus resorting to an interrogation technique that he had been taught: question first, then give the warnings, and then repeat the questions 'until I get the answer that she's already provided once.' (citations omitted.) Based upon the trial transcript, this was clearly not the case in this instance. The record reflects that Applicant was not under arrest and was engaged in a voluntary conversation with the officers. That may be a dubious assertion by the officer; however, the Trial Court found it credible. When Applicant began to offer inculpatory information, the officer stopped immediately and administered the Miranda warnings. This Court finds this was clearly not an employment of the "question first" technique used by law enforcement in Missouri v. Seibert. Therefore, this Court finds Applicant has failed to establish the underlying claim was meritorious and would have resulted in a reversal on appeal to a reasonable probability and as such that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving Counsel failed to render effective assistance of counsel. The allegation is denied and dismissed.

Ineffective Assistance of Appellate Counsel

Applicant alleged in his application ineffective assistance of appellate counsel. Applicant did not present any evidence on this allegation at the PCR hearing. Accordingly, this Court finds

Applicant failed to prove there was any evidence of ineffective assistance of appellate counsel. This Court denies and dismisses this allegation.

Improper Judicial Posture

Applicant alleged in his application improper judicial posture. Applicant stated in his application "when Judge Welmaker made his ruling on competency, he ruled without any argument from either the defense or the opposition." Applicant did not present any evidence on this allegation at the PCR hearing. However, this Court would note Applicant was found competent to stand trial. Additionally, Dr. Richard Frierson who conducted Applicant's competency evaluation testified pre-trial after being called by Trial Counsel. (Tr. p. 45-50). Dr. Frierson testified that Applicant was competent to stand trial and that he understood the judicial process. (Tr. p.49). Moreover, the State was also able to cross-exam Dr. Frierson. Accordingly, this Court finds Applicant failed to prove there was any evidence of improper judicial posture. Accordingly, this Court denies and dismisses this allegation.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice

James Johnson v. State of SC
2017-CP-23-03817

of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. Reefer to Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;

2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 21st day of March, 2018.

~~ROBIN B. STILWELL~~
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

WITNESSES

C. T. Miller

Greenville County Sheriffs Office

6/2/2011

DOCKET NO. 2011-GS-23- KBF 007262

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

September

TERM 2011

CM

THE STATE

vs.

JAMES ALLEN JOHNSON

ARREST WARRANT NUMBER
I433991

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Guilty

Foreperson of Petit Jury

Date: JUNE 5, 2013

Indictment for

2356

HOMICIDE BY CHILD ABUSE

VIOLATION § 16-03-0085(A)(1)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
HOMICIDE BY CHILD ABUSE

At a Court of General Sessions, convened on SEP 13 2011 the Grand Jurors of Greenville County present upon their oath:

That JAMES ALLEN JOHNSON did in Greenville County, on or about the 25th day of May, 2011, cause the death of N. D. S., a child under the age of eleven, while committing child abuse or neglect, and the death occurred under circumstances manifesting an extreme indifference to human life. This is in violation of §16-03-0085(A)(1) of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)
STATE VS.)
James Allen Johnson)
AKA:)
Race: WHITE Sex: M Age: 28)
DOB: [redacted]-1984 SS#: [redacted])
Address: [redacted])
City,State,Zip: Marietta, SC 29661)
DL#: [redacted] SID#:)
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS2307262
A/W#: I433991
Date of Offense: 5/25/2011
S.C. Code § : 16-03-0085
CDR Code #: 2356

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐PLEADS
TO: Murder / Homicide by child abuse (20Y to Life)

in violation of § 16-03-0085 of the S.C. Code of Laws, bearing CDR Code # 2356
☐ NON-VIOLENT ☒ VIOLENT ☐SERIOUS ☒MOST SERIOUS ☐Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐§17-25-45

The charge is: ☒ As Indicted, ☐Lesser Included Offense, ☐Defendant Waives Presentment to Grand Jury. (defendant's initials)
The plea is: ☐Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: [signature] 8245
Hodge, Kris SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is commited to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 62 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of $; provided that upon the service of days/months/years and/or payment
of $; plus costs and assessments as applicable*; the balance is suspended with probation for
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:
☑ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP
Total: $ plus 20% fee: _____ $
Payment Terms:
☐ Set by SCDPPPS

Recipient:

days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp.
May serve W/E begining
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ beginning
$ paid to Public Defender Fund
Other:

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$ 5
3% to County (if paid in installments)		$
TOTAL		$

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Paul B Widenaemen
Court Reporter: Hawkes
Presiding Judge [signature]
Judge Code: 213
Sentence Date: 6/5/13

SCCA/217 (03/2011)

ARREST WARRANT

I-433991 5005

STATE OF SOUTH CAROLINA 6-6-11

[X] County/ [ ] Municipality of

Greenville

THE STATE 01-11-074615

against

James Allen Johnson

Address: [redacted]

Travelers Rest, SC 29690-

Phone: SSN: [redacted]

Sex: M Race: W Height: 5 10 Weight: 130

DL State: SC DL #: [redacted]

DOB: [redacted]/1984 Agency ORI #: SC0230000

Prosecuting Agency: Greenville County Sheriffs Office

Prosecuting Officer: C.t. Miller - 0545

Offense: Murder / Homicide by child abuse (20Y to Life)

Offense Code: 2356

Code/Ordinance Sec: 16-03-0085(A)(1)(

This warrant is CERTIFIED FOR SERVICE in the [ ] County/ [ ] Municipality of . The accused is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant James Allen Johnson on 6-2-2011

*1080/1663

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Greenville General Sessions
305 E. North Street
Greenville County Courthouse
Greenville, SC 29601-2120

(Chick Springs) Garrett

ORIGINAL ORIGINAL ORIGINAL ORIGINAL

AFFIDAVIT

ORIGINAL

Form Approved by S.C. Attorney General April 21, 2003 SCCA 518

STATE OF SOUTH CAROLINA)
[X] County/ [ ] Municipality of)
Greenville)

Personally appeared before me the affiant C.t. Miller who being duly sworn deposes and says that defendant James Allen Johnson did within this county and state on or about 05/25/2011 violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Greenville) in the following particulars:

DESCRIPTION OF OFFENSE Murder / Homicide by child abuse (20Y to Life)

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

The affiant an Investigator with the Greenville County Sheriff's Office has a written statement by the defendant James Allen Johnson, which states that on the above date, the defendant did cause the death of the one year old victim N[redacted] D[redacted] S[redacted] by means of suffocation. This incident occurred at 1942 Fews Chapel Rd. in Greenville County and is filed under the Greenville County Sheriff's Office case # 1-11-074615.

Signature of Affiant C.T. Miller

STATE OF SOUTH CAROLINA)
[X] County/ [ ] Municipality of)
Greenville)

Affiant's Address 4 Mcgee Street
Greenville, SC 29601-

Affiant's Telephone (864)467-5227

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on or about 5/25/2011 defendant James Allen Johnson did violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Greenville) as set forth below:

DESCRIPTION OF OFFENSE: Murder / Homicide by child abuse (20Y to Life)

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

Sworn to and subscribed before me on 06/02/2011

(L.S.)

Signature of Issuing Judge

Vilvin Garrison

Judge Code: 5946

Judge's Address 20 Mcgree St
Greenville, SC 29601-

Judge's Telephone

Issuing Court: [X] Magistrate [ ] Municipal [ ] Circuit

ORIGINAL ORIGINAL ORIGINAL ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES ALLEN JOHNSON,

PETITIONER

APPELLATE CASE NO 2016-000072

BRIEF OF PETITIONER

DAVID ALEXANDER
Appellate Defender

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

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

1.

Did the Court of Appeals err 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 hearing?

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

[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.

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January 3, 2017

Susannah Cole, Esquire
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

Re: The State v. James Allen Johnson

Dear Ms. Cole:

Enclosed are two copies of the Brief of Petitioner in the above entitled case, which I have filed today with the South Carolina Supreme Court.

Please call me if you have any questions.

Sincerely,

David Alexander
Appellate Defender

DAA/cnp

Enclosure

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January 3, 2017

Mr. James Allen Johnson, #355670
Broad River Correctional Institution
4460 Broad River Road
Columbia, SC 29210

Re: Your appeal

Dear Mr. Johnson:

Enclosed is a copy of the Brief of Petitioner in your case, which I have filed with the South Carolina Supreme Court.

Please contact me if you have any questions.

Sincerely,

David Alexander
Appellate Defender

DAA/cnp

Enclosure

James,

Got your letter. Here is a copy of the brief at the Supreme Court I just filed for you. The next step is the State will file its brief. - David

ALAN WILSON
ATTORNEY GENERAL

February 3, 2017

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: State v. James Allen Johnson
Appellate Case No. 2016-000072

Dear Mr. Shearouse:

Yesterday, on February 2, 2017, we filed the original and fifteen (15) copies of the Brief of Respondent, with a Proof of Service, in the above-referenced matter. Yesterday afternoon I realized I inadvertently neglected to adjust the font size of the footnotes within the Brief of Respondent from 10 point font to 12 point font. Please accept my apologies for this oversight, and please accept this original corrected Brief of Respondent and Proof of Service and fifteen copies. By copy of this letter, I am notifying opposing counsel of this oversight and serving counsel with the corrected Brief of Respondent.

Thank you for your assistance in this matter.

Sincerely,

Susannah R. Cole
Assistant Attorney General
Bar # 68383

SRC/pjc
Enclosures
cc: David Alexander, Esquire, Appellate Defender

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
G. Edward Welmaker, Circuit Court Judge

THE STATE,

Respondent,

vs.

JAMES ALLEN JOHNSON,

Petitioner.

Appellate Case No. 2016-000072

BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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PETITIONER'S QUESTION PRESENTED

I. Did the Court of Appeals err 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?

II. 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[2] warnings until after he made incriminating statements, violating state law, the Fifth Amendment, *Miranda*, and *Missouri v. Seibert*?[3]

COUNTER STATEMENT OF QUESTIONS PRESENTED

I. Did the Court of Appeals err in finding the question of whether Petitioner's statement was the result of a two-phase interrogation in violation of *Miranda v. Arizona* and *Missouri v. Seibert* was not raised to and ruled upon by the trial court and therefore not preserved for review?

II. Did the Court of Appeal err in finding the trial judge did not abuse his discretion when he admitted a voluntary confession where Petitioner was not subjected to custodial interrogation prior to his incriminating statement, and *Miranda* rights were promptly given as soon as incriminating information was volunteered?

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[1] *Jackson v. Denno*. 378 U.S. 368 (1964).
[2] *Miranda v. Arizona*. 384 U.S. 436 (1966).
[3] *Missouri v. Seibert*. 542 U.S. 600 (2004).

STATEMENT OF THE CASE

Petitioner James Allen Johnson was indicted for homicide by child abuse (2011-GS-23-07262). He proceeded to a jury trial on June 3, 2013, before the Honorable G. Edward Welmaker. On June 5, 2013, the jury found Petitioner guilty as indicted. (R. p. 588.) Petitioner was sentenced by Judge Welmaker to imprisonment for a term of sixty-two years. (R. p. 595.) Petitioner appealed his conviction to the South Carolina Court of Appeals and his conviction was affirmed in an unpublished opinion. (2015-UP-378, filed July 29, 2015.) Petitioner filed a Petition for Rehearing on August 12, 2015, which was denied on December 16, 2015.

Petitioner then filed a Petition for Writ of Certiorari on January 29, 2016. The State made its Return to the Petition on February 23, 2016. By order dated December 2, 2016, the Supreme Court granted certiorari and ordered the parties to dispense with briefing. Petitioner filed his Brief of Petitioner on January 3, 2017, and the State now files the Brief of Respondent.

STATEMENT OF FACTS

On May 25, 2011, Emergency Services received a call stating that someone was choking, and a team of firefighters was the first responders to the scene. (R. pp. 102-103.) When the firefighters arrived, a twenty month old child (Victim) was lying on the floor. (R. p. 104.) The child's mother was doing chest compressions with the heel of her palm and Petitioner was performing mouth-to-mouth rescue breathing on the child. (R. p. 104.) The firefighters immediately noticed bruising on the child's body and forehead. (R. p. 104, p. 122.) The child was pale, not breathing, and without a pulse. (R. p. 104.) They assembled a bag valve mask and started breathing for the child as well as performing chest compressions. (R. p. 109.) Petitioner told the firefighters, "you can't go to the bathroom without watching your kids anymore," claiming the child had taken a drink, choked, and then vomited. (R. p. 109-110.) James Clardy, an EMS operator, also noted that the child had some very large bruises in various stages of healing on her face, bruises on the torso, and bruises on her legs and arms. (R. p. 149.) Responders noted that cardiac arrest was not normally an outcome for a child choking on tea. (R. pp. 134-135; p. 145.) Once the ambulance arrived, the responders moved the child to the ambulance and departed for the hospital. (R. p. 114; pp. 124-125; pp. 136-137.) The paramedics made the decision to take the child to the hospital in Greer because it was the closest facility. (R. p. 137-138.) The child was subsequently transferred by helicopter to Greenville Memorial Hospital. (R. p. 141.)

Dr. Mary Croswell, an expert in pediatrics with a specialty in child abuse, examined Victim while she was hospitalized and described in detail the bruises on Victim's body, a total of twenty-eight bruises. (R. p. 335.) Victim had suffered five bruises on her forehead. (R. p. 327.) She was also bruised in the abdominal area, with one bruise consistent with a bite mark. (R. p. 328.) Victim had a

cluster of four bruises on her back and two bruises on her buttock. (R. p. 328.) Her arm was bruised and there was extensive bruising on her legs. (R. pp. 328-329.) Victim further had a bruise on her ear. (R. p. 328.) The bruising to Victim's ear, buttock, cheeks, nasal bridge, and abdomen was noted as atypical for accidental injury. (R. pp. 331-333.) Dr. Croswell further opined that the explanation given for the Victim's forehead bruises, that her two-year-old half-sister had hit her with Mardi Gras beads, was "atypical and unusual." (R. p. 335.) When Dr. Crosswell saw Victim the following day, Victim had been declared brain dead. (R. p. 336.)

The child was taken off life support on May 27, 2011, and died. (R. p. 244.) Dr. Michael Ward performed the autopsy. (R. pp. 449-450.) Dr. Ward testified to the extensive bruises the child suffered. (R. pp. 452-453; pp. 457-459; pp. 462-464.) Dr. Ward also noted a torn frenulum inside the child's mouth, an injury indicating pressure had been applied to the mouth. (R. pp. 454-456.) Dr. Ward opined the cause of Victim's death was suffocation. (R. p. 460.) Dr. Ward elaborated that an object, most likely a hand, was placed over the mouth and nose, obstructing the airway which eventually caused an anoxic brain injury. (R. p. 460-461.) Dr. Ward explained the airway would have to be occluded for at least a minute for this injury and cardiac arrhythmia to occur. (R. p. 461.) It would be medically impossible for Victim to present in her condition if she took a sip of tea, choked and vomited. (R. p. 467; p. 470.) Dr. Ward noted that vomiting or spitting up fluid from the lungs is common when someone is suffocated, and in Victim's case she may have spit up blood from the torn frenulum in her mouth.[4] (R. pp. 467-468.) Dr. Ward's final conclusion was the cause of death was anoxic brain injury due to suffocation, and the manner of death was homicide. (R. p. 466.)

[4] It was also noted that Victim had worn an outfit with a green bow earlier in the day, Victim was wearing only a diaper when paramedics arrived. (R. p. 135; pp. 196-196.) The clothing was later found in the home and was stained. (R. p. 392-395; p. 397-398.) There was also a small stain on the

The Victim's mother, Georgia Ann Sprouse ("Sprouse"), gave several different accounts of what happened. (R. p. 413.) Sprouse admitted giving investigators three different accounts of the events leading to Victim's hospitalization. (R. pp. 279-281.) Sprouse initially claimed her daughter choked while drinking a glass of tea. (R. p. 280.) Sprouse told Officer Carl Mathias ("Mathias") that her daughter was drinking tea, started choking, and threw up. (R. p. 157.) Sprouse also told Officer Kevin Azzara that the Victim walked to a table where there was a glass of tea, took a drink, and started choking. (R. p. 165.) Sprouse maintained that story while at the hospital, telling doctors, DSS workers, and law enforcement officers that Victim choked on tea. (R. p. 280.) In this initial version of events, Sprouse placed Petitioner in the bathroom when Victim began choking. (R. p. 277; p. 375.) Sprouse's story changed slightly the following days, May 26-27. (R. p. 280; p. 348-349.) Sprouse amended her story to say she was in the kitchen at the time Victim allegedly started choking on the tea. (R. p. 280; pp. 287-288; pp. 348-349; p. 413.) Sprouse also claimed Petitioner was in the living room with Victim at the time she allegedly started choking on the tea. (R. p. 413.) On June 2, Sprouse was confronted by investigators who stated that Sprouse's story was not making sense and that she needed to tell the truth. (R. p. 356, p. 419.) Sprouse told the investigators that on the day of the incident, she smoked marijuana and went to sleep. (R. pp. 353-356; p. 419.) She was then awoken by Petitioner who told her that Victim was not breathing. (R. pp. 353-356; p. 419.) Following her statement, officers gave Sprouse a ride back to the mortuary. (R. p. 420.) Sprouse testified at trial that this third account of the events of May 25th was in fact the truth. (R. pp. 269-275, pp. 279-281.) Sprouse also claimed that the story about choking on tea was Petitioner's. (R. p. 273; p. 275.) Sprouse was ultimately arrested for homicide by child abuse and accessory after the fact. (R.

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carpeting. (R. p. 157-158; 196.)

p. 434.)

Petitioner also spun a variety of tales for law enforcement. Mathias arrived on scene as a first responder on May 25. He arrived as the child was being moved to the ambulance. (R. p. 156.) Mathias encountered Sprouse in the front yard and came inside with her. Petitioner was in the living room. When Mathias asked Sprouse what happened, Petitioner volunteered that he was in the bathroom and did not know what had happened. Sprouse explained that Victim had choked on tea. (R. pp. 19-21; pp. 156-158.)

Later that day, Investigator Jennings Autrey ("Autrey") and Investigator Christopher Miller ("Miller") proceeded to the hospital for an update on Victim's medical condition. (R. p. 23; p. 341.) They spoke with Petitioner and the others present to collect personal information and get a preliminary understanding of the events. (R. p. 24; pp. 344-348; 401.) When Autrey asked Petitioner what happened, Petitioner replied that he was in the bathroom and heard Sprouse call for help and tell him to call 9-1-1. (R. p. 24; pp. 344-346.) Petitioner stated he then saw Victim lying on the floor with Sprouse attempting CPR. (R. p. 25; p. 345.) At the hospital, Petitioner agreed to ride with Miller to the law enforcement center. (R. pp. 401-402.) He was not in custody and was being treated as a witness. (R. pp. p. 45; p. 48; pp. 401-402; p. 439.) Petitioner spoke casually with Miller in his office and ultimately provided a statement. (R. pp. 402-404.) Petitioner maintained that he went to the bathroom, leaving Sprouse, Victim, and two other children in the living room. He then heard Sprouse yelling that Victim was not breathing. Petitioner stated that when he came out of the bathroom, Victim was on her back and Sprouse was attempting CPR. Petitioner claimed Sprouse told him Victim choked on tea, and while he performed CPR on Victim tea came up. (R. pp. 404-406.) In this statement, Petitioner also explained the bruises on Victim's face as the result of falls and being

struck with Mardi Gras beads by her half-sister. (R. p. 407-408.) In response to additional questions from Miller, Petitioner also stated that both children were fussy and that there were also toys in the room which Victim could have choked on. (R. pp. 408-409.) Petitioner also noted an incident a week earlier in which law enforcement came to the house because Victim's half-sister was outside unsupervised. Petitioner claimed to have been in the bathroom during this incident as well. (R. p. 410.) After providing the statement, Miller drove Petitioner back to the hospital. (R. p. 49; p. 412.) The interview lasted around an hour and a half to two hours including the ride. (R. p. 49.)

Petitioner next spoke to police a week later, on June 2. (R. p. 25.) Two deputies transported Petitioner to the law enforcement center, and Autrey and Miller met Petitioner there. (R. p. 26; p. 356-357; pp. 420-421.) Officers advised Petitioner that they were "interviewing everybody that was associated with the case,"[5] and he did not have to come with them.[6] (R. p. 443; pp. 550-551.) Miller testified that Petitioner was not in custody at this time. (R. pp. 421-422.) Petitioner appeared to recognize Miller from their previous conversation. (R. p. 422.) Petitioner was present freely and voluntarily and was advised that he was there because the police needed more information to determine what happened. (R. p. 422.) Petitioner did not appear to be under the influence of drugs or alcohol at the time of the interview, and Petitioner himself denied any drug use at the time. (R. pp. 35-36; p. 38; p. 358-359; p. 369; p. 423; p. 431; p. 443.) Officers did not notice any smell of alcohol on Petitioner's breath, nor did they notice the dilated pupils or bloodshot eyes that would indicate drug use. (R. p. 377, p. 423; p. 443.) Petitioner was not slurring his speech nor was he unsteady on

[5] The same day Miller also obtained additional statements from Crystal Inman, the woman Petitioner and Sprouse lived with at the time, and Sprouse. (R. p. 416-p.420.)

[6] Petitioner claimed police said he had to go with them. Petitioner testified that his brother was in the yard when this occurred and could have given him a ride, but officers insisted he come with them. (R. pp. 516-517.) However, Petitioner's brother denied that he was present when police arrived,

his feet. (R. p. 377; p. 423.)

The initial conversation was casual. (R. p. 51; p. 424.) Officers informed Petitioner that Sprouse now claimed Petitioner was the one in the den with the child at the time of the incident. (R. p. 52; p. 425.) Petitioner repeated his prior story, calmly relating that he was in the bathroom when he heard Sprouse's cries for help. (R. p. 27-28; p. 359; p. 425.) Petitioner and Miller talked for a while about his dislike for Victim's father. (R. p. 425.) After an hour, Miller asked Petitioner if he would like anything to eat or drink. (R. p. 425.) Petitioner refused Miller's offer. (R. p. 425.) Miller asked Petitioner if he would like to use the restroom, and Petitioner replied that he would. (R425. p. 425.) Miller testified that the only public restroom is downstairs and is a long walk, so he took Petitioner to the employee restroom. (R. p. 425-426.) Miller accompanied Petitioner to the employee restroom because it is not open to the public. (R. p. 426.) As a policy, non-employees are not allowed to go to the employee restroom unescorted. (R. p. 426.)

After returning from the bathroom, Miller asked Petitioner if he was being truthful. (R. p. 427.) Petitioner "continued talking about how he wanted the child to have help, he wanted to help, wanted peace." (R. p. 28; p. 360.) Petitioner then bent over in his chair and started sobbing. (R. p. 427.) Petitioner stated, "accidents happen. He said he wishes that she never went away." (R. p. 29; p. 362; p. 426.) Miller asked Petitioner, "Tell me what you're talking about." (R. p. 427.) Petitioner then told Investigator Miller that he got angry at Victim and threw a toy across the room at her. (R. p. 29; p. 362; p. 427.) Petitioner then stated that he tried to get Victim to stop crying but she would not. (R. p. 427.) Petitioner told Miller he was afraid the crying was going to wake Sprouse so he held his hand over the victim's mouth until she stopped crying. (R. pp. 427-428.) Petitioner stated when she

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stating he was at the store at the time. (R. p. 544.)

stopped crying is when Victim stopped breathing. (R. p. 428.) Petitioner then demonstrated covering the victim's mouth and nose. (R. p. 428.) Upon this admission, Petitioner confessed Sprouse was in bed at the time, and he made up the story about Victim choking on tea because he was scared. (R. p. 29; p. 362.)

Miller testified that at this point, Applicant was no longer free to leave, and Miller read Applicant his *Miranda* rights. (R. pp. 29-32; p. 53; pp. 362-368; p. 428.) Approximately one and a half hours had passed prior to Petitioner's admission and rights warning. (R. p. 38; pp. 371-372; p. 374; p. 422; p. 431; p. 440.) Miller followed his normal procedure for advising Petitioner of his rights. (R. p. 428.) Miller advised Petitioner of each line, one at a time, and that it was his choice to waive his rights or not. (R. p. 53; p. 429.) Petitioner initialed each line on the form saying he understood the rights he had been advised of. (R. p. 429; R. p. 600, Court's Exhibit 1.) Petitioner then signed the waiver of rights form saying that he wished to talk to investigators even though he didn't have to. (R. p. 430.) Conversation resumed. (R. p. 431.) Investigators then began drafting a suspect defendant's statement. (R. p. 431.) Petitioner was read his rights again. (R. p. 431.) Petitioner then provided a written statement. (R. p. 33; pp. 368-370.)

Petitioner gave Autrey permission to type his statement. (R. p. 431.) In his statement, Petitioner went through the events of the day, including his confession to holding his hands over Victim's mouth until she stopped breathing. (R. p. 431.) After Petitioner's statement was typed, and Petitioner had an opportunity to read over it. (R. p. 432.) Petitioner initialed at the beginning and end of each paragraph before signing the statement. (R. p. 432.) Miller estimated that it took an additional hour to complete the written statement. (R. p. 444.) Petitioner was in custody at this point. (R. p. 432.) Following this statement, a warrant was obtained for Petitioner's arrest. (R. p. 372; p.

433.) During arrest and booking, Petitioner "continued to say things...about wishing God had never created him, that he did not deserve to live...that he would never kill himself, but he knew someone in jail would kill him because of what he'd done. ..." (R. p. 433.)

Petitioner recalled speaking with Miller on May 25 and recalled giving a statement that day. (R. pp. 492-494; p. 506-507.) However, Petitioner maintained he could not remember the entire interaction with officers on June 2. (R. p. 67; pp. 494-495.) Petitioner claimed that on June 2, before officers came to pick him up, he "was smoking a little bit of reefer, and I had some Xanaxes." (R. p. 68; pp 495-496.) Petitioner claimed to have taken about ten Xanax before police arrived and to have taken three more while in the bathroom at the police station.[7] (R. pp. 68-69.) Petitioner seemed to remember certain things about the interview (e.g., leaving marijuana at his friend's house before going to the police station, the ride to the police station, being told that Sprouse had resumed a relationship with someone else, going to the bathroom) but was consistently hazy on receiving Miranda warnings and providing incriminating details. (R. pp. 69-72; pp. 74-75; pp. 78-79; pp. 494-495; p. 497-503; 519-519.) Petitioner speculated that if he had said such incriminating things he must have done so to defend Sprouse since she could be pregnant with his child. (R. p. 503-504.)

Before the jury, Petitioner reverted to his original story. Petitioner testified that he was in the bathroom for two to three minutes when Sprouse called out for help, and he emerged to find Victim laying in the living room, already discolored. (R. p. 485-486; p. 488.) Petitioner testified he called 9-1-1and attempted to help with CPR. (R. pp. 486-487.) Petitioner also reported that at the time he and Sprouse smoked marijuana on a daily basis, and Sprouse was hiding marijuana while he called 9-1-1. (R. p. 485; pp. 488-489.)

[7] Miller accompanied Petitioner to the restroom but noted no unusual actions. (R. p. 426.)

In addition to statements given to police, Petitioner and Sprouse were placed together for transport from prison to Family Court on one occasion. During that transport, after the court appearance, Petitioner told Sprouse, "he was sorry for what he had did. That he did not mean to... he was sorry and that he hoped [she] would forgive him and so on and so on." (R. pp. 310-311.)

ARGUMENT

I. The Court of Appeals correctly found the question of whether Petitioner's statement was the result of a two-phase interrogation in violation of *Miranda v. Arizona* and *Missouri v. Seibert* was not raised to and ruled upon by the trial court and therefore was not preserved for review.

Petitioner contends the trial judge erred in admitting his incriminating statements to officers at the law enforcement center. Petitioner asserts that since Petitioner did not receive Miranda warnings until after he made incriminating statements, his statement was obtained as part of a two-phase interrogation in violation of *Miranda* and *Missouri v. Seibert*. First, Petitioner's argument was not raised to and ruled upon by the trial judge and is therefore not preserved for appellate review. Second, Petitioner was not in custody at the time he made the incriminating statements, nor was Petitioner subjected to an interrogation. The trial judge committed no error in admitting Petitioner's statements. Petitioner's conviction should be affirmed.

Petitioner failed to preserve his argument for appellate review. Regarding admissibility of statements, Petitioner simply stated that a motion pursuant to *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), needed to be heard. Witnesses were called to testify as to the circumstances surrounding Petitioner's various statements:

- Petitioner's unsolicited statement to Deputy Mathias at the home on May 25.
- Petitioner's verbal statement to Investigator Autrey at the hospital on May 25.
- Petitioner's written statement taken the evening of May 25 by Investigator Miller.
- Petitioner's statements taken on June 2.

(R. pp. 18-86.) The cross-examination and evidence Petitioner presented at this hearing focused on his alleged gross intoxication on June 2. (R. p. 61; pp. 66-85.) After the State and Petitioner

presented witnesses, no arguments were made. The trial court found:

> All right. I've reviewed my notes and looked at the evidence on the *Jackson*, 378 U.S. 368 hearing. Obviously at this stage it's based upon a preponderance of the evidence. In weighing all the testimony, what I've heard, I find the statement was freely and voluntarily given, all the statements. And they will be admissible. Of course, I'll instruct the jury that they make the ultimate decision as to the value of any statements that are given. But I believe that weighing all the evidence I've heard that they were freely and voluntarily made by Mr. Johnson in the course of the investigation by the officers.

(R. pp. 85-86.) Again, no arguments or exceptions were made following this pronouncement.

When the incriminating portions of the June 2 statements were admitted at trial, Petitioner's only objections were:

- "I would take this opportunity at this point to renew my objection ---" (R. p. 360, lines 18-19.) (Objection made when Autrey began relating the incriminating portion of Petitioner's oral statement on June 2.)
- "Subject to my previous objections in the *Jackson Denno* hearing." (R. p. 366, lines 19-20.) (Objection made when written statement taken June 2 was offered.)

Neither of these objections clarified the matter.

Petitioner failed to articulate with any specificity the nature of his objection to the admission of the statement at trial; therefore Petitioner's argument is not preserved for appellate review. If any argument could be inferred from the testimony presented at the *Jackson* hearing, it would seem to be that the incriminating portion of his June 2 statement was involuntary because he was grossly intoxicated. The trial court cannot be left to guess what argument that a defendant is making; neither can a defendant claim to have raised every foreseeable argument regarding admissibility of statements by virtue of a request for a *Jackson* hearing. While a party need not use the exact name of

a legal doctrine in the trial court in order to preserve it for appellate review, it must be clear that an argument has been made on such ground. *State v. Dunbar*, 356 S.C. 138, 587 S.E.2d 691 (2003). Here, Petitioner made no argument as to the basis for suppression of his statements. Moreover, the objections that were offered when the evidence was introduced provided no specific grounds, only referring nebulously back to the *Jackson* hearing. Finally, no objection was made when Miller began relating the incriminating verbal portion of the June 2 statement. (R. p. 427-432.)

The ground raised in support of a claim of error on appeal must be the same ground offered in support of the objection at trial. *State v. Smith*, 337 S.C. 27, 34, 522 S.E.2d 598, 601 (1999); *State v. Russell*, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). A party cannot argue one ground below then argue another on appeal. *State v. Hudgins*, 319 S.C. 233, 237, 460 S.E.2d 388, 390-391 (1995) overruled *by State v. Collins*, 329 S.C. 23, 495 S.E.2d 202 (1998). Trial counsel failed to put on the record that Petitioner's statements were inadmissible due to a violation of *Miranda* or *Seibert*. The trial court's general ruling clearly did not address this argument. *State v. Clute*, 324 S.C. 584, 480 S.E.2d 85 (Ct. App. 1996) overruled by *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000) (issue not preserved where Petitioner failed to request a specific ruling).

For all these reasons, the argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review by this court. *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005). The Court of Appeals' reliance on *Freiburger* for this proposition was entirely on point.

II. The Court of Appeals properly found the trial judge did not abuse his discretion when he admitted a voluntary confession where Petitioner was not subjected to custodial interrogation prior to his incriminating statement, and *Miranda* rights were promptly given as soon as incriminating information was volunteered.

Even if this Court finds that the issue of whether Petitioner's statements were admitted in violation of *Miranda* or *Seibert* to be preserved, evidence would support a finding of admissibility by the trial court. Petitioner was not in custody nor were the statements made as a result of an interrogation. Petitioner's statements were made voluntarily to police as part of their investigation, Petitioner was under no obligation to speak with the police, and his freedom of action was not restrained. Under the totality of the circumstances, a reasonable person in Petitioner's position would believe he was free to leave at any time. Therefore, Petitioner was not in custody for *Miranda* purposes, and the officers were allowed to speak with him without reading him his constitutional rights. *Seibert* mandates that officers may not conduct a custodial interrogation before providing *Miranda* warnings and then re-elicit the same information after providing warnings. *Seibert* does not require police to anticipate when, during the course of a non-custodial interview, the interviewee may suddenly change course and blurt something incriminating.

In criminal cases, appellate courts suit to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The reviewing court is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Quattlebaum*, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but instead, simply determines whether the trial judge's ruling is supported by any evidence. *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827 (2001) A.E.2d 827, 829 (2001).

As the Court of Appeals correctly noted, the admission or exclusion of evidence rests on the sound discretion of the trial judge and will not be reversed absent an abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the

conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." *State v. Kelley*, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995); *see also State v. Navy*, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010) (stating appellate courts must uphold the trial court's findings regarding whether a defendant was in custody when statements were made if the trial judge's ruling is supported by the record).

Under *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), prior to custodial interrogation, a suspect must be warned he has a right to remain silent, any of his statements may be used against him, and he has a right to an attorney. However, these requirements only apply to situations involving custodial interrogation and were not intended to interfere with the traditional function of law enforcement officers in investigating crimes. *Id.* at 477. "*Miranda* warnings are required for official interrogations only when a suspect 'has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *State v. Easler*, 327 S.C. 121, 127, 489 S.E.2d 617, 621 (1997)(quoting *Miranda*, 384 U.S. at 444). Thus, custodial interrogations are made up of two key components- custody and interrogation. *State v. Whitner*, 380 S.C. 513, 518, 670 S.E.2d 655, 658 (Ct. App. 2008).

"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 appropriate inquiry involves objectively viewing the circumstances to determine whether a reasonable person in the suspect's position would have understood himself to

be in custody. *Easler*, 327 S.C. at 128.

Petitioner was also not subjected to the "interrogation" prong of the custodial interrogation. "Interrogation can be either express questioning or its functional equivalent and includes words or actions on the part of the police (other than those normally attendant to arrest and custody) the police should know are reasonably likely to illicit an incriminating response." *Id.; see Rhode Island v. Innis*, 446 U.S. 291 (1980)("[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response.") The requirement for *Miranda* warnings does not apply to voluntary statements which are not the product of interrogation. *State v. Sprouse*, 325 S.C. 275, 282, 478 S.E.2d 871, 875 (Ct. App. 1996). "Volunteered statements of any kind are not barred by the Fifth Amendment[.]" *Miranda*, 384 U.S. at 478.

In the case sub judice, examining the totality of the circumstances, Petitioner was not subjected to custodial interrogation at the law enforcement center. On June 2, Petitioner was asked to come speak with law enforcement as police were interviewing everyone associated with the case. Petitioner agreed. He was offered the option of riding with someone else or riding with officers, and he volunteered to ride with officers. Petitioner asked about a ride home afterward, and Wilson promised a return ride home as well. (R. p. 551.) Wilson was not tasked with arresting Petitioner or taking him into custody. At the time of the interview, Petitioner was as much a witness as a potential suspect. (R. pp. 63-64.) Petitioner was expressly advised that the purpose of the interview was to get more information, "that it was just another questioning." (R. p. 50; p. 422.) Petitioner was at no point threatened with arrest nor were references made to consequences if he was not forthright. During the interview, Petitioner initially repeated his original version of events to officers. There is no evidence

that officers challenged him during this rendition.

Even when officers informed him of Sprouse's most recent statement, there is no evidence that officers did so in a manner so as to suggest disbelief in Petitioner's version of events. Miller's question asking whether Petitioner was telling the truth about being in the room could just as easily elicited a response that Petitioner saw Sprouse do something to the child. This question is indicative that Petitioner was being treated as a witness – merely asking Petitioner if he was present in no way implicates a belief that he was a criminal actor. However, Petitioner leaned over in his chair and started sobbing. Petitioner then stated that "accidents happen sometimes." (R. p. 427.) Investigator Miller said, "tell me what you're talking about." (R. p. 427.) At this point Petitioner gave Investigator Miller a lengthy account of the events leading up to Victim's death and his role in it. Petitioner's incriminating statement was given, not in response to an interrogation, but as a voluntary statement to police when clarifying the events of the day and what happened to Victim. There is no evidence that officers engaged in complete and detailed questions regarding the incriminating information before providing *Miranda* warnings. The only testimony is that Miller asked Petitioner to "tell [him] more what [he's] talking about" (which appears to have led to Petitioner rendering a narrative) and asked for a demonstration of how Petitioner covered Victim's mouth before halting the interview and reading *Miranda* rights. (R. pp. 427-428.) Petitioner volunteered his statement to police, which is not barred by the Fifth Amendment.

Petitioner was not handcuffed or restrained in any way. Petitioner could have ceased the interview with police at any time. Miller testified that Petitioner elected to talk to police freely and voluntarily. Seeing as Petitioner was free to go and volunteered to answer police questions to aid in the investigation, it is clear that Petitioner was not in custody.

Petitioner points to the solicitor's questioning of Wilson about "two phases" of the interview as damning evidence that a Seibert two-phase tactic was employed. (R. pp. 554-555.) The "two phases" referred to by Wilson were (1) the portion of the interview where the Petitioner maintained his innocence and (2) the portion of the interview where Petitioner gave an inculpatory statement. In contrast, the two phase tactic deplored in *Seibert* involves inculpatory statements in both phases – an unwarned inculpatory statement followed by a warned inculpatory statement.

Moreover, the circumstances of June 2 closely mirror those of May 25, a circumstance Petitioner does not argue to be an unconstitutional encounter. In both encounters, Petitioner was picked up from his location by law enforcement and transported to the law enforcement center. No one accompanied Petitioner on either occasion. On both occasions, Petitioner spoke to Miller in the same office for the same amount of time, about an hour and a half. Miller described the June 2 interview as "pretty much the same conversation [as before]." (R. p. 425.) On May 25, Petitioner was given a ride back to the hospital. Based on his own prior experience, it would seem that Petitioner would have no reason to believe he was in custody. *See State v. Jones*, 153 N.C. App. 358, 570 S.E.2d 128 (2002)(facts supporting finding 16 year-old boy with mild mental retardation was not in custody included that he voluntarily accompanied police, was interviewed in a comfortable office, was not restrained in any way, and had been interviewed four days before and allowed to leave).

Petitioner would liken his case to *Evans*, 354 S.C. 579. In *Evans*, after an extensive three-hour unwarned interview in which agents repeatedly told Evans they did not believe her various explanations, Evans was reduced to sobbing, asking agents "'to get her some help.'" *Id.* At that point agents "determined that the interview was bearing fruit" and decided to have another agent, a female, come in to talk to Evans. *Id.* at 582. The agent then interviewed Evans for an additional forty-five

minutes to an hour, sympathizing with Evans on topics such as "female problems," her deceased mother, and religion. *Id.* at 581-582. Evans was escorted to the restroom by the female agent twice. Evans finally told the female agent that she started the fire in her home, at which point the original interviewing agents returned to the room, and Evans repeated the statement three more times before it was written on a "voluntary statement form." *Id.* at 582. Evans' cousin's three requests to see Evans during the interview were denied. *Id.*

Petitioner's case is distinguishable from *Evans*. While officers did escort Petitioner to the restroom, it was because he was taken to the more convenient employee restroom which was in a controlled area. In such a case, it would be unreasonable for Petitioner to expect that he would be allowed to roam freely in a restricted area of the police station. *See Howes v. Fields*, 132 S. Ct. 1181, 182 L. Ed. 2d 17 (2012) (respondent, an inmate in prison, was not allowed to leave conference room by himself to return to cell but under no circumstances could he have reasonably expected to roam freely). The evidence regarding the officers' purpose in Petitioner's case is also much different. Miller's single sympathetic response was followed by Petitioner's confession after a much shorter time frame; there was no coordinated effort to elicit a confession. Miller's short, sympathetic, "tell me what you're talking about," in no way compares to the *Evans* agent's lengthy, far-ranging sympathetic discussion. In contrast to the several hours Evans was interviewed, Petitioner was interviewed for an hour and a half or two hours before giving his statement (less than half the time of Evans' interview). Further, while the interview was conducted in an office in the police station, this fact alone is not determinative. *State v. Williams*, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013), reh'g denied (Sept. 19, 2013).

Petitioner would also have his case paralleled with *Navy*, 386 S.C. 294. In *Navy*, the accused

provided a statement at the hospital on the day the child was hospitalized. A few days later, the accused was picked up from home and transported to the police station around 9:00 am. Navy gave his first oral statement at 9:50 am, a statement largely consistent with the first story he gave at the hospital. Officers then proceeded to inform Navy that the child died from suffocation and broken ribs. They followed this revelation with detailed questioning, "asking specifically how respondent had comforted the crying child." *Navy*, 386 S.C. 294. As a result of the follow-up questions, officers elicited "that he had 'popped' the child on the back" and "that he may have 'patted' the child on its mouth to stop the crying." *Id.* at 298-299. Only after this targeted questioning was Navy given *Miranda* warnings at 11:35 am. Navy then provided a written statement at 11:40 am. In this statement, officers continued asking questions targeted at eliciting further details about how Navy harmed the child. Police then consulted the pathologist with the details provided in Navy's second statement. Upon being told that Navy's story could not have caused the child's death as he would have had to hold his hand over the child's mouth for at least a minute, officers returned for a third statement at 12:25 pm. In this third statement, officers asked specific questions about how long Navy had his hand over the child's mouth and nose. The Court found that evidence supported the trial court's ruling that the first statement was admissible. In suppressing the second and third statements, the Court found:

> The officers began the questioning of respondent with knowledge that the child had been suffocated and with the intention of eliciting a confession. After respondent's first oral statement, the officers "sprang" the suffocation/healing rib fractures information on respondent, and began an unwarned custodial interrogation designed to elicit incriminating information, that is, questioning designed to have respondent admit to having hit the child and to having smothered him. "

Navy, 386 S.C. 294.

Where officers in *Navy* conducted questioning aimed at a confession, the officers here did not. Though aware of the autopsy findings, there is no evidence that these findings were shared with Petitioner. Further, where in *Navy* officers followed the "sprung" information of how the child died with follow up questions regarding Navy's conduct, in the present case officers Petitioner responded to information that Sprouse now claimed he was in the room by "bending over in his chair" and "sobbing a little bit" and the words, "accidents happen sometimes." (R. p. 427.) When Miller asked what he meant by that, Petitioner told his story. There is no evidence of ongoing, pointed questions which would indicate interrogation in this case as there was in *Navy*. Miller ceased the interview and provided *Miranda* rights as soon as Petitioner appeared to incriminate himself (R. p. 53); in contrast, the officers in *Navy* continued to press Navy about his actions even after he made an admission which could incriminate him and pressed him on his conduct before Mirandizing him. Navy's encounter also lasted much longer than Petitioner's.

Where Petitioner paints Miller's sympathetic response as an interrogation tactic, Miller's single sympathetic response to Petitioner's doleful expression that "accidents happen sometimes," is more human than tactical. (R. p. 427.) The testimony actually differentiates Miller's sympathetic response to Petitioner's disconsolation from even simple interrogation tactics such as "good cop, bad cop," let alone more sophisticated interrogation methods. (R. p. 56, line 12 – p. 57, line 4.) Talking to someone "really nicely" and having a sympathetic response to a show of emotion are not tactical maneuvers; rather this is how we would expect law enforcement professionals to speak to witnesses or any other civilian they encounter. Petitioner's experience certainly did not amount to a coercive, police-dominated encounter.

Finally, while evidence was presented that Petitioner has an intellectual disability (R.p. 12, p. 14), there was no evidence that this disability made him unable to comprehend the circumstances of the interview. Certainly there has been no blanket rule indicating that persons with intellectual disabilities are incapable of understanding whether they are in custody, and no showing was made that this defendant specifically had any such deficit of understanding. Indeed, the psychiatrist who found Petitioner competent to stand trial noted Petitioner's basic understanding of the court and particularly his ability to give "rational reasons why he believes, particularly his second statement, should not be admitted into evidence." (R. p. 13.) There is no evidence that officers should have been objectively aware of any disability. There is no evidence that Petitioner had difficulty conversing with officers, and he represented to them that he had a 12th grade education and could read and write. (R. p. 599, State's Exhibit 41.) In fact, Petitioner's argument seemed to be that he understood his situation on May 25, but was hampered by his illicit drug use, not his intellectual disability, on June 2.

In sum, the police interview with Petitioner did not constitute a custodial interrogation, and the police were under no obligation to give Petitioner his *Miranda* warnings until Petitioner's incriminating statements led police to place him in custody. Accordingly, the trial court was properly within its discretion to admit Appellant's statements to law enforcement. Petitioner's conviction and sentence should be affirmed.

CONCLUSION

For all of the foregoing reasons, Respondent submits this Court should either dismiss certiorari as improvidently granted or affirm the decision of the Court of Appeals.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

February 2, 2017

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County
The Honorable G. Edward Welmaker, Circuit Court Judge

Appellate Case No. 2016-000072

THE STATE,

Respondent,

v.

JAMES ALLEN JOHNSON,

Petitioner.

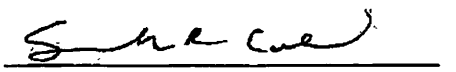
PROOF OF SERVICE

I, Susannah R. Cole, certify that I have served the within Brief of Respondent, with proof of service, on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.

This 3rd day of February, 2017.



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The South Carolina Court of Appeals

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Re: The State v. James Allen Johnson
Appellate Case No. 2013-001314

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

Jenny A. Kitchings (JT)
CLERK

cc: The Honorable G. Edward Welmaker

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

James Allen Johnson, Appellant.

Appellate Case No. 2013-001314

Appeal From Greenville County
G. Edward Welmaker, Circuit Court Judge

Unpublished Opinion No. 2015-UP-378
Heard June 9, 2015 – Filed July 29, 2015

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Assistant Attorney General Mary Williams Leddon, and Staff Attorney Susannah Rawl Cole, all of Columbia, and Solicitor William Walter Wilkins, III, of Greenville, for Respondent.

PER CURIAM: James Johnson appeals his conviction for homicide by child abuse, arguing the trial court erred in admitting his incriminating statement made to officers at the law enforcement center because it was the result of a two-phase interrogation in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Missouri v. Seibert*, 542 U.S. 600 (2004). We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion."); *id.* ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."); *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue is not preserved for appeal where one ground is raised below and another ground is raised on appeal).

AFFIRMED.

SHORT, LOCKEMY, and MCDONALD, JJ., concur.