

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas (PCR)

The Honorable Robin B. Stilwell, Post-Conviction Relief Judge

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James Allen Johnson,

Petitioner,

v.

State of South Carolina,

Respondent.

Appellate Case No. 2018-000600

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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There is probative evidence in the record supporting the PCR judge’s ruling denying a claim of ineffective assistance of counsel for failure to preserve an issue pursuant to *Missouri v. Seibert*, 542 U.S. 600 (2004), where the record shows counsel explained why she argued for suppression on other grounds and because the issue, even if preserved, would not have been meritorious on appeal.

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### **PETITIONER'S QUESTION PRESENTED**

Did the PCR court err in not finding trial counsel ineffective for failing to object to the admission of Petitioner's statement pursuant to *Missouri v. Seibert*, 542 U.S. 600 (2004) where the United States Supreme Court precluded the use of mid-stream *Miranda* warnings and Petitioner's statement 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) which was prejudicial to Petitioner because it was a violation of his due process rights?

### **RESPONDENT'S COUNTER PRESENTATION OF QUESTION PRESENTED**

Is there probative evidence in the record supporting the PCR judge's ruling denying a claim of ineffective assistance of counsel for failure to preserve an issue pursuant to *Missouri v. Seibert*, 542 U.S. 600 (2004), where the record shows counsel explained why she argued suppression on other grounds and because the issue, even if preserved, would not have been meritorious on appeal.

### **STATEMENT OF THE CASE**

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

years for homicide by child abuse.

Petitioner filed a timely notice of appeal. David Alexander, Esquire, of the Office of Appellate Defense represented Petitioner throughout the appellate process. The South Carolina Court of Appeals affirmed Petitioner's conviction on July 29, 2015. *State v. Johnson*, Op. No. 2015-UP-378 (Ct. App. 2015). Petitioner 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.

Petitioner 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.

On June 13, 2017, Petitioner filed a PCR application alleging he is being held in custody unlawfully for the following ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and "improper judicial posture." (App. pp. 636-646.) The State filed a return to the application on October 24, 2017. (App. p. 648.)

An evidentiary hearing was held December 12, 2017, before the Honorable Robin B. Stilwell. (App. p. 46.) At the conclusion of the hearing, Judge Stilwell took the matter under advisement. (App. p. 687.) In an order of dismissal dated March 21, 2018, Judge Stilwell denied Petitioner's application with prejudice. (App. pp. 692-710.)

Petitioner appealed the denial of relief and filed his petition for writ of certiorari on November 20, 2018. This return follows.

## STATEMENT OF FACTS OF THE UNDERLING CONVICTION

On May 25, 2011, Emergency Services received a call stating that someone was choking. (App. p. 138.) When the first responders arrived, the twenty-month old Victim was lying on the floor. (App. p. 140.) The child's mother was doing chest compressions with the heel of her palm and Petitioner was performing mouth-to-mouth rescue breathing. (App. p. 140.) The responders immediately noticed bruising on the child's body and forehead. (App. p. 140, p. 158.) The child was pale, not breathing, and without a pulse. (App. p. 140.) Petitioner told the responders, "you can't go to the bathroom without watching your kids anymore," claiming the child had taken a drink, choked, and then vomited. (App. p. 145-146.) James Clardy, an EMS operator, noticed 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. (App. p. 185.) Responders noted that cardiac arrest was not normally an outcome for a child choking on tea. (App. pp. 170-171; p. 181.) Once the ambulance arrived, the responders moved the child to the ambulance and departed for the hospital in Greer. (App. p. 150; pp. 160-161; pp. 172-173.) The child was subsequently transferred by helicopter to Greenville Memorial Hospital. (App. p. 177.)

Dr. Mary Crosswell, 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. (App. p. 371.) Victim had suffered five bruises on her forehead. (App. p. 363.) She was also bruised in the abdominal area, with one bruise consistent with a bite mark. (App. p. 364.) Victim had a cluster of four bruises on her back and two bruises on her buttock. (App. p. 364.) Her arm was bruised and there was extensive bruising on her legs. (App. pp. 364-365.) Victim further had a bruise on her ear. (App. p. 364.) The bruising to Victim's ear, buttock, cheeks, nasal bridge, and abdomen was noted as atypical for accidental injury. (App. pp. 367-

369.) Dr. Crosswell 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." (App. p. 371.)

The child was taken off life support on May 27, 2011, and died. (App. p. 280.) Dr. Michael Ward performed the autopsy on Victim. (App. pp. 485-486.) Dr. Ward testified as to the extensive bruises the child suffered. (App. pp. 488-489; pp. 493-495; pp. 498-500.) Dr. Ward also noted a torn frenulum inside the child's mouth, which was an injury indicating pressure had been applied to the mouth. (App. pp. 490-492.) Dr. Ward opined the cause of Victim's death was suffocation. (App. 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. (App. 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. (App. p. 497.) It would be medically impossible for Victim to present in her condition if she took a sip of tea, choked and vomited. (App. 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. (App. 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. (App. p. 502.)

The Victim's mother, Georgia Ann Sprouse ("Sprouse"), gave several different accounts of what happened. (App. p. 449.) Sprouse admitted giving investigators three different accounts of the events leading to Victim's hospitalization. (App. pp. 315-317.) Sprouse initially claimed her daughter choked while drinking a glass of tea. (App. p. 316.) Sprouse told Officer Carl Mathias ("Mathias") that her daughter was drinking tea, started choking, and threw up. (App. p.

193.) 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. (App. p. 201.) Sprouse maintained that story while at the hospital, telling doctors, DSS workers, and law enforcement officers that Victim choked on tea. (App. p. 316.) In this initial version of events, Sprouse placed Petitioner in the bathroom when Victim began choking. (App. p. 313; p. 411.) Sprouse's story changed slightly in the following days. (App. 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. (App. p. 316; pp. 323-324; pp. 384-385; p. 449.) Sprouse also claimed Petitioner was in the living room with Victim at the time she allegedly started choking on the tea. (App. 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. (App. p. 392, p. 455.) Sprouse told the investigators that on the day of the incident, she smoked marijuana and went to sleep. (App. pp. 389-392; p. 455.) She was then awakened by Petitioner who told her that Victim was not breathing. (App. pp. 389-392; p. 455.) Following her statement, officers gave Sprouse a ride back to the mortuary. (App. p. 456.) Sprouse testified at trial that this third account of the events was in fact the truth. (App. pp. 305-311, pp. 315-317.) Sprouse also claimed that the story about choking on tea was Petitioner's. (App. p. 309; p. 311.) Sprouse was ultimately arrested for homicide by child abuse and accessory after the fact. (App. p. 470.)

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. (App. p. 192.) 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. (App. 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. (App. p. 59; p. 377.) They spoke with Petitioner and the others present to collect personal information and get a preliminary understanding of the events. (App. p. 60; pp. 380-384; 437.) 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 911. (App. p. 60; pp. 380-382.) Petitioner stated he then saw Victim lying on the floor with Sprouse attempting CPR. (App. p. 61; p. 381.) At the hospital, Petitioner agreed to ride with Miller to the law enforcement center. (App. pp. 437-438.) He was not in custody and was being treated as a witness. (App. pp. p. 81; p. 84; pp. 437-438; p. 475.) Petitioner spoke casually with Miller in his office and ultimately provided a statement. (App. pp. 438-440.) Petitioner maintained 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 said 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, Victim’s tea came up. (App. pp. 440-442.) 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. (App. p. 443-444.) In response to additional questions from Miller, Petitioner also stated that both children were fussy and that there were also toys in the room on which Victim could have choked. (App. pp. 444-445.) 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. (App. p. 446.) After providing the statement, Miller drove Petitioner back to the hospital. (App. p. 85; p. 448.) The interview lasted around an hour and a half to two hours including the ride. (App. p. 85.)

Petitioner next spoke to police a week later, on June 2. (App. p. 61.) Two deputies transported Petitioner to the law enforcement center, and Autrey and Miller met Petitioner there. (App. p. 62; p. 392-393; pp. 456-457.) Officers advised Petitioner that they were “interviewing everybody that was associated with the case,” and he did not have to come with them. (App. p. 479; pp. 586-587.) Miller testified that Petitioner was not in custody at this time. (App. pp. 457-458.) Petitioner appeared to recognize Miller from their previous conversation. (App. p. 458.) Petitioner was present freely and voluntarily and was advised that he was there because the police needed more information to determine what happened. (App. p. 458.) 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. (App. 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 Petitioner’s breath, nor did they notice the dilated pupils or bloodshot eyes that would indicate drug use. (App. p. 413, p. 459; p. 479.) Petitioner was not slurring his speech nor was he unsteady on his feet. (App. p. 413; p. 459.)

The initial conversation was casual. (App. p. 87; p. 460.) Officers informed Petitioner that Sprouse now claimed Petitioner was the one in the den with the child at the time of the incident. (App. p. 88; p. 461.) Petitioner repeated his prior story, calmly relating that he was in the bathroom when he heard Sprouse’s cries for help. (App. p. 63-64; p. 395; p. 461.) Petitioner and Miller talked for a while about his dislike for Victim’s father. (App. p. 461.) After an hour, Miller asked Petitioner if he would like anything to eat or drink. (App. p. 461.) Petitioner refused Miller’s offer. (App. p. 461.) Miller asked Petitioner if he would like to use the restroom, and

Petitioner replied that he would. (App. p. 461.) Miller testified that the only public restroom is downstairs and is a long walk, so he took Petitioner to the employee restroom. (App. p. 461-462.) Miller accompanied Petitioner to the employee restroom because it is not open to the public. (App. p. 462.) As a policy, non-employees are not allowed to go to the employee restroom unescorted. (App. p. 462.)

After returning from the bathroom, Miller asked Petitioner if he was being truthful. (App. p. 463.) Petitioner “continued talking about how he wanted the child to have help, he wanted to help, wanted peace.” (App. p. 64; p. 396.) Petitioner then bent over in his chair and started crying. (App. p. 463.) Petitioner said, “accidents happen” and he wished that “she never went away.” (App. p. 65; p. 398; p. 463.) Miller asked Petitioner, “Tell me what you’re talking about.” (App. p. 463.) Petitioner then told Investigator Miller that he got angry at Victim and threw a toy across the room at her. (App. p. 65; p. 398; p. 463.) Petitioner then stated that he tried to get Victim to stop crying but she would not. (App. p. 463.) 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. (App. pp. 463-464.) Petitioner said when Victim stopped crying, she also stopped breathing. (App. p. 464.) Petitioner then demonstrated covering the victim’s mouth and nose. (App. p. 464.) 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. (App. p. 65; p. 398.)

Miller testified that at this point, Petitioner was no longer free to leave, and Miller read Petitioner his *Miranda* rights. (App. pp. 65-68; p. 89; pp. 398-404; p. 464.) Approximately one and a half hours had passed prior to Petitioner’s admission and rights warning. (App. p. 74; pp. 407-408; p. 410; p. 458; p. 467; p. 476.) Miller followed his normal procedure for advising

Petitioner of his rights. (App. p. 464.) Miller advised Petitioner of each line, one at a time, and that it was his choice to waive his rights or not. (App. p. 89; p. 465.) Petitioner initialed each line on the form saying he understood the rights and then signed the waiver of rights form saying that he wished to talk to investigators even though he was not required to do so. (App. p. 466.) Investigators then began drafting the defendant's statement. (App. p. 467.) Petitioner was read his rights again. (App. p. 467.) Petitioner then provided a written statement. (App. p. 69; pp. 404-406.)

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. (App. p. 467.) After Petitioner's statement was typed, Petitioner had an opportunity to read over it. (App. p. 468.) Petitioner initialed at the beginning and end of each paragraph before signing the statement. (App. p. 468.) Miller estimated that it took an additional hour to complete the written statement. (App. p. 480.) Petitioner was in custody at this point. (App. p. 468.) Following this statement, a warrant was obtained for Petitioner's arrest. (App. p. 408; p. 469.) 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. ..." (App. p. 469.)

Petitioner recalled speaking with Miller on May 25, and recalled giving a statement that day. (App. pp. 528-530; p. 542-543.) However, Petitioner maintained he could not remember the entire interaction with officers on June 2. (App. p. 103; pp. 530-531.) 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." (App. p. 104; pp 531-532.) 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.<sup>1</sup> (App. pp. 104-105.) 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. (App. pp. 105-108; pp. 110-111; pp. 114-115; pp. 530-531; p. 533-539; 554-555.) 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. (App. p. 539-540.)

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. (App. p. 521-522; p. 524.) Petitioner testified he called 911 and attempted to help with CPR. (App. pp. 522-523.) Petitioner also reported that at the time he and Sprouse smoked marijuana on a daily basis, and Sprouse was hiding marijuana while he called 911. (App. p. 521; pp. 524-525.)

### **TESTIMONY AT THE PCR HEARING**

Petitioner James Johnson testified he asked to go to trial for homicide by child abuse and received a sentence of sixty-two years' imprisonment. (App. p. 663.) Johnson said he was convicted, in part, because of a statement he gave to police. (App. p. 664.) Johnson said he did not recall giving the statement to the police, and he argued it should have been suppressed. (App. p. 664.) Johnson said he told counsel he was taking medication when he gave the statement, and he did not remember talking to the police. (App. p. 668.) Johnson said counsel was ineffective

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<sup>1</sup> Miller accompanied Petitioner to the restroom but noted no unusual actions. (App. p. 462.)

for failing to preserve the issue for his appeal. (App. p. 665.) Johnson also said he had nothing to do with the child's death, and he was not guilty. (App. p. 668.)

On cross-examination, Johnson said he met with counsel to discuss the case, but claimed the statement was the only evidence the State had against him. (App. p. 669.) Johnson said they did discuss multiple plea offers, but he elected not to plead because he was innocent. (App. p. 670.) Johnson admitted his co-defendant, the mother of the child, testified against him. (App. p. 671.)

Johnson's mother, Rebecca Parker, testified Johnson was offered fifteen years in exchange for a guilty plea. (App. pp. 672-673.) Parker said her son was not capable of understanding the conversations with his attorney. (App. pp. 673-674.) Parker acknowledged, however, that she was not present during the meetings between Johnson and counsel. (App. pp. 674-675.)

Trial counsel Dorothy Manigault testified she recalled that one of the statements Johnson gave was incriminating, and she attempted to get the statement suppressed. (App. pp. 675-676.) Counsel agreed she did not preserve the issue for appeal because she did not object to the statement pursuant to *Missouri v. Seibert*.<sup>2</sup> (App. p. 678.) Counsel did believe Johnson understood their conversations about his case, however, and testified she conveyed all the plea offers from the State and Johnson appeared to understand them. (App. pp. 676-677.) Counsel said Johnson "flip flopped back and forth" on his guilt, at times saying he did not intend to hurt the child and then at other times accusing the mother of hurting her. (App. p. 677.) Counsel said Johnson's mother advised him to go to trial. (App. p. 677.) Counsel said the State offered a plea

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<sup>2</sup> 542 U.S. 600 (2004).

with a thirty-five year cap, but they could argue for a sentence less than thirty-five years. Counsel advised Johnson the offer was a good one and he might receive less time. (App. p. 678.)

Counsel said she had been practicing criminal law for thirty-five years. (App. p. 678.) Counsel met with Johnson several times before trial and read the discovery to him. Counsel also explained the State's theory of the case to him, and they discussed possible defenses. (App. p. 680.) Counsel said she was aware Johnson was being treated for ADHD, depression, and anxiety, but he stopped seeking treatment the prior year. Counsel asked for an evaluation, and Johnson was determined to be competent to stand trial. (App. pp. 680-681.) Counsel said Johnson was indecisive on pleading guilty, saying he did not want to take a chance, then electing to go to trial after discussions with his family. (App. p.682.)

Counsel said it was the defense's position the statement was not voluntary. (App. pp. 682-683.) Counsel said she relied on Johnson's disclosures to her that he did not remember giving the statement, which was the basis of her argument the statement should be suppressed. (App. pp. 683-684.)

After argument from both parties on the merits of the *Missouri v. Seibert* issue and the applicable standard of review, Judge Stilwell took the matter under advisement. (App. pp. 686-687.)

## **RELEVANT LAW**

### ***Standard of Review***

The standard of review in PCR cases depends on the specific issue before the Supreme Court of South Carolina. The Court will defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013) ).

The Court reviews questions of law *de novo*, with no deference to trial courts. *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018).

***Ineffective Assistance Regarding the Preservation of the Issue for Appeal***

“The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding.” *Lafler v. Cooper*, 566 U.S. 156, 165 (2012). To be entitled to relief, a convicted defendant must show ineffective assistance of counsel pursuant to the test in *Strickland v. Washington*, 466 U.S. 668, 673 (1984). *Id.* That is, he must show “counsel’s performance was deficient, and that the deficiency prejudiced the defense.” *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland*, 466 U.S. at 673). To prove trial counsel’s performance was deficient, an applicant must show “counsel’s representation fell below an objective standard of reasonableness.” *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). A PCR “applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.” Rule 71.1 (e), SCRPC.

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 find a reasonable probability that it would have resulted in reversal and a new trial.

When the question presented is analyzed within the proper legal framework as outlined above, and in light of the record before the PCR court, the denial of relief is well supported by the record.

### **ARGUMENT**

In the order of dismissal, the PCR court found Petitioner did not meet his burden to prove ineffective assistance of counsel for failing to preserve the issue for appeal because Petitioner could not prove the issue would have been successful on appeal. (App. p. 706.) The PCR court noted counsel did move to suppress the statement at the *Jackson v. Denno* hearing on the basis it was involuntary, and although counsel did not argue a *Seibert* violation, the trial court issued a ruling admitting the statement as freely and voluntarily given. (App. p. 707.) The PCR concluded Petitioner was unable to prove prejudice from counsel’s representation. A review of the record shows the PCR court’s finding is proper.

Initially, it should be noted that although the PCR court did not make a finding on the deficiency prong of *Strickland* concerning counsel’s failure to make a *Missouri v. Seibert* argument for suppression, the evidence supports a finding counsel was not deficient, because she

made what she believed to be the stronger argument for suppression, in light of the testimony by Petitioner at trial and at the PCR hearing about his recall of the statement to police. At the evidentiary hearing, counsel did not deny that she failed to argue a *Seibert* violation, but counsel did appear to explain her rationale for not doing so, saying, “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.” (App. p. 683.) Counsel then explained, “So when you look at the statement, the statement 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.” (App. p. 683.) Petitioner confirmed at the PCR hearing he did not recall giving the last statement to police. (App. p. 664.) Thus, it appears counsel articulated a strategy for arguing the statement was not voluntary due to Petitioner’s consumption of marijuana during the day and thirteen Xanaxes at some point before and during the interview, not because his will was overcome by police interrogation tactics. If Petitioner did not recall giving the statement, then he could not testify he was pressured into confessing to harming the child, either before or after his *Miranda* rights were given. Counsel’s decision to argue the statement was involuntary due to intoxication was reasonable and should be accorded a favorable presumption. *See Strickland*, 466 U.S. at 690 (holding a reviewing court proceeds from the rebuttable presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment); *see also Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (“where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.”) Petitioner has not overcome his burden of proving counsel was deficient in her representation.

Next, to satisfy the second prong of *Strickland*, Petitioner must show he was prejudiced by counsel's failure to preserve the issue on appeal by proving the issue would have been meritorious. This determination requires an examination of the underlying facts and circumstances of Petitioner's statement to law enforcement following the death of the child. As Respondent will show, when Petitioner gave the statement at issue, he was not in custody nor was the statement made as a result of an interrogation. Petitioner's statement was given 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. The *Seibert* case 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 out something incriminating.

For purposes of *Miranda*, "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. *State v. Easler*, 327 S.C. 121, 128 (1997.).

Additionally, Petitioner was 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, 301 (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.

Examining the totality of the circumstances, Petitioner was not subjected to a 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. (App. p. 587.) 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. (App. pp. 99-100.) Petitioner was expressly advised that the purpose of the interview was to get more information, “that it was just another questioning.” (App. p. 86; p. 458.) 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 crying. Petitioner then said that “accidents happen sometimes.” (App. p. 463.) Investigator Miller said, “tell me what you're talking about.” (App. p. 463.) At this point Petitioner gave Investigator Miller a lengthy account of the events leading up to the child'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 the child. 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. (App. pp. 463-464.) 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 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. (App. pp. 590-591.) 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, another interview Petitioner does not argue to be an unconstitutional encounter. In both instances, 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]." (App. p. 461.) 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's case is distinguishable from South Carolina case law in which the state Supreme Court determined a *Seibert* violation occurred. For example, in *State v. Evans*, 354

S.C. 579 (2003), law enforcement conducted an extensive three-hour unwarned interview in which agents repeatedly told Evans they did not believe her version of events, and Evans was reduced to sobbing. At that point agents “determined the interview was bearing fruit” and decided to have another agent, a female, come in to talk to Evans. The agent then interviewed Evans for an additional forty-five minutes to an hour, sympathizing with her on topics such as “female problems,” her deceased mother, and religion. *Id.* at 581-582. 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.

Petitioner’s circumstances were vastly dissimilar. 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*, 566 U.S. 499 (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’ intent in Petitioner’s case is also much different than the team effort in *Evans*. 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).

Petitioner's case is also distinguishable from *State v. Navy*, 386 S.C. 294 (2016). 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 Supreme Court of South Carolina 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, whereas in *Navy* the officers followed the surprise 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.” (App. p. 463.) 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 (App. p. 89). Miller’s single sympathetic response to Petitioner’s doleful expression that “accidents happen sometimes,” is more human than tactical. (App. p. 463.) Petitioner’s experience certainly did not amount to a coercive, police-dominated encounter.

As the record reflects, even if the issue had been properly preserved for appeal, Petitioner has not shown, by a preponderance of the evidence, the issue was meritorious and he would have prevailed in the appellate courts. Accordingly, he cannot show he was prejudiced by counsel’s failure to specifically argue the statement should be suppressed pursuant to *Missouri v. Seibert*. In sum, the record fully supports the PCR judge’s ruling. The petition for writ of certiorari should be denied as there is no cause to disturb the well-reasoned and well-supported ruling.

**CONCLUSION**

For the reasons stated above, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

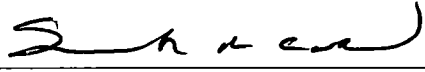
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ATTORNEYS FOR RESPONDENT

January 4, 2019  
Columbia, South Carolina

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas (PCR)

The Honorable Robin B. Stilwell, Post-Conviction Relief Judge

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James Allen Johnson,

Petitioner,

v.

State of South Carolina,

Respondent.

Appellate Case No. 2018-000600

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**PROOF OF SERVICE**

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I, Susannah R. Cole, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari on the Petitioner by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record at the following address:

LaNelle Cantey DuRant, Appellate Defender,  
South Carolina Commission on Indigent Defense  
Post Office Box 11589  
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 4<sup>th</sup> day of January, 2019.

  
\_\_\_\_\_  
SUSANNAH R. COLE

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ATTORNEY FOR RESPONDENT



RECEIVED

JAN 04 2019

S.C. SUPREME COURT

ALAN WILSON  
ATTORNEY GENERAL

January 4, 2019

The Honorable Daniel E. Shearouse  
Clerk of Court — SC Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re: James Allen Johnson v. State of South Carolina**  
**Appellate Case No. 2018-000600**  
**Lower Court Case No. 2017-CP-23-3817**

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Susannah R. Cole  
Assistant Attorney General  
SC Bar #68383

SRC/jacc  
Enclosures

cc: LaNelle C. DuRant, Esquire  
Victim Advocacy Division (without enclosure)