STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

PETITIONER,

V.

MARSHELL HILL,

RESPONDENT

APPELLATE CASE NO 2019-000233

RETURN TO PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT

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QUESTIONS PRESENTED

1. Did the Court of Appeals apply the correct standard of review and properly find that the pre-Miranda statement was the result of a custodial interrogation and should have been suppressed?

2. Did the Court of Appeals correctly find that the recorded statement made following Miranda warnings was in violation of Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004)?

STATEMENT OF THE CASE

In March of 2014, the Greenville County Grand Jury indicted Respondent Hill for murder, indictment #2014-GS-23-2209. On April 11, 2016, Respondent proceeded to jury trial before the Honorable Perry H. Gravely. Amanda Wicker and Teal Johnson represented Respondent at trial. Howard Steinberg prosecuted the case. The jury found Respondent guilty of the lesser included offense of voluntary manslaughter. Judge Gravely sentenced Respondent to twenty-two (22) years in prison. A timely notice of intent to appeal was served on April 21, 2016, and the direct appeal perfected. On November 28, 2018, after oral argument, the South Carolina Court of Appeals reversed the conviction and sentence. State v. Hill, 425 S.C. 374, 822 S.E.2d 344 (Ct. App. 2019). The State filed a petition for rehearing on December 13, 2018, which was denied on January 17, 2019. On February 19, 2019, the State filed a petition for writ of certiorari. This return follows.

STATEMENT OF FACTS

On the morning of August 14, 2013, Respondent found the deceased, Billy Patterson, in Respondent's backyard. The deceased appeared to be dead and Respondent asked his roommate, Michael Barksdale to call 911. (R. p. 188, lines 8-25). Officers Brandon Napolitano and Michael Downey were some of the first officers who arrived on the scene and spoke with Respondent. (R. pp. 208-223). Two deputy coroners, Jeff Fowler and Mike Ellis also spoke with Respondent at the scene. (R. pp. 199-207). The investigators involved in the case, Michael Fortner and Antonio Bailey did not interview Respondent at the scene on August 14, 2013, because he was extremely intoxicated. (R. p. 351, lines 17-21; p. 311, lines 11-17). Respondent and the deceased were drinking buddies. (R. p. 9, lines 19-25).

The next day, August 15, 2013, Investigators Fortner and Bailey attended the autopsy of the deceased and learned that the deceased had been struck with a cylindrical type object similar to a broom or cane. (R. p. 312, line 8 – p. 313, lines 1-3; p. 352, line 25 – p. 353, lines 1-19). The investigators executed a search warrant of Respondent's house and seized a walking stick from Respondent's bedroom. (R. p. 312, lines 5-19; p. 354, line 1 – p. 355, 356, lines 1-6). The investigators drove Respondent from his house to the law enforcement center for an interview. (R. pp. 356-359; pp. 326-332). Investigators Fortner and Bailey admitted that Respondent told them that he had been drinking on August 15th when the officers took him to the law enforcement center for the interview. (R. p. 380, lines 16-20; p. 345, lines 18-24). Investigator Fortner typed Respondent's statements from the interview and labeled it as a victim/witness statement. (R. p. 332, lines 13-23). This statement was referenced by the State

but not admitted in evidence at trial. [1] (R. p. 362, lines 17-24). The statement is included in the record on appeal. (R. pp. 522-523).

After the statement was typed the two investigators stepped out of the room to discuss discrepancies between Respondent's statement and statements made by Barksdale, Respondent's roommate. (R. p. 360, lines 14-22; p. 333, lines 13-16). Barksdale told Investigator Bailey that Respondent was afraid of the deceased stealing from him. (R. p. 346, lines 14-22). The investigators returned to the room and Investigator Fortner asked Respondent if he hit the deceased because the deceased tried to steal Respondent's television. (R. p. 361, lines 18-20). According to Investigator Bailey, Respondent stated that he became angry when he saw the deceased with the television under his arm. (R. p. 333, lines 20-24). According to Investigator Fortner, Respondent admitted that, "I tapped him twice." (R. p. 361, lines 24-25). At this point the investigators moved Respondent to the City interview room across the hall and advised Respondent, for the first time, of his Miranda rights. (R. p. 338, line 3 – p. 339, 340, lines 1-23; p. 366, line 13 – pp. 367-370). According to Investigator Bailey, Respondent agreed to talk with the investigators but refused to sign the waiver of rights form. (R. p. 340, line 16 – p. 341, 342, lines 1-14). The interview was video recorded and admitted in evidence, over objection, at trial. (R. p. 375, line 12 – p. 376, line 1). Respondent challenged the admission of the oral statements made prior to Miranda in issue one and the admission of the video recorded statements made post Miranda in issue two. The Court of Appeals found that the trial court erred by not excluding both statements, reversed and remanded the case for new trial.

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[1] The transcript incorrectly notes that State's Exhibit #3, the victim/witness statement was admitted in evidence. (Tr. p. 3).

ARGUMENTS

1. **The Court of Appeals applied the correct standard of review and properly found that the pre-Miranda statement was the result of a custodial interrogation and should have been suppressed.**

Prior to trial the judge held a Jackson v. Denno hearing in regard to several statements made by Respondent. (R. pp. 7-69; pp. 133-200). Counsel for Respondent moved to suppress the statements made to law enforcement prior to Miranda warnings and moved to suppress the video recorded statements made after Miranda warnings pursuant to Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) and State v. Navy, 386 S.C. 294, 302, 688 S.E.2d 838, 841 (2010). (R. pp. 147-163). The video recorded statement is addressed in issue two below. As to the statements made prior to Miranda warnings, the trial judge refers to a typed victim/witness statement, State's Exhibit #3, as statement number three and stated:

> All right. As to statement number three. I have reviewed State's Exhibit 3 and I don't believe that Missouri v. Seibert applies. For one thing, he does not really incriminate himself. He doesn't go, 'well I killed him' or something like that. I mean, I think that was merely a, you know, it's my understanding from the testimony that sometime afterwards, after he gave the statement the officers got together and said 'there's some inconsistencies here.' And that's when they turned it into a custodial interrogation. So I think statement number three was merely a witness statement, that he was not in custody and I'm going to allow that one in.

(R. p. 163, line 18 – p. 164, lines 1-9). The trial judge correctly found that the interrogation became custodial after the officers consulted with one another about the discrepancies and returned and continued to question Respondent. The judge erred, however, in refusing to suppress the oral statement obtained as a result of the custodial interrogation.

After State's exhibit #3 was typed investigators Fortner and Bailey stepped out of the room to discuss discrepancies between Respondent's statement and statements made by

Barksdale, Respondent's roommate. (R. p. 360, lines 14-22; p. 333, lines 13-16). The investigators returned to the room and Investigator Fortner asked Respondent if he hit the deceased because the deceased tried to steal Respondent's television. (R. p. 361, lines 18-20). According to Investigator Fortner, Respondent admitted that, "I tapped him twice." (R. p. 361, lines 24-25). At this point the investigators moved Respondent to the City interview room and advised Respondent, for the first time, of his Miranda rights. (R. p. 338, line 3 – p. 339, 340, lines 1-23; p. 366, line 13 – pp. 367-370). The interview became a custodial interrogation when Investigator Fortner asked Respondent if he hit the deceased because the deceased tried to steal Respondent's television. At this point in time the officers had attended the autopsy of the deceased and knew that the fatal injuries had been caused by a symmetrical object, possibly a broom or cane, they had executed a search warrant at Respondent's home and seized a walking stick from Respondent's bedroom and Respondent had given a statement inconsistent with the statement of the roommate. Respondent was not free to leave at this point.

During the trial Respondent renewed the objection to the statement. (R. p. 313, lines 7-8). At this point the judge expressed some concern about the admission of the statement. The judge stated:

> I'm having some real concerns here because now the facts have come out a little bit different I guess than I recognized before. In that all of the statements were given after, you know, specifically statement number three, there was no Miranda warning given. Is that correct?

(R. p. 313, lines 18-25). After the prosecutor affirmed that Miranda warnings were not given prior to both the typed statement and the oral statement, the judge stated:

> You know, and I guess – and during lunch I read the State v. Navy case. I mean, what I have a concern here is you have – somebody's seen the autopsy. They see a stick they seized from the Defendant's room, which they assume is the murder weapon.

(R. p. 314, lines 5-11). Despite the judge's concern, after hearing arguments from both sides the Judge ruled stating, "No, I think, I mean, I thought it was a –I think it's a very close call but I think State v. Williams does sway me that –the fact that it was not a custodial statement, so I'm going to stand by my previous ruling." (R. p. 327, lines 16-21). Respondent renewed the objection during Investigator Bailey's testimony (R. p. 328, lines 18-20) and during Investigator Fortner's testimony. (R. p. 356, lines 14-15; p. 361, lines 5-6). Respondent renewed the objection at the directed verdict stage and post-trial. (R. p. 387, lines 18-21; p. 432, lines 17-19). Respondent additionally renewed the objection after the jury returned the verdict. (R. p. 514, lines 7-9).

The trial judge's finding that Respondent was not in custody when the investigators returned to the room and asked Respondent if he hit the deceased because the deceased tried to steal Respondent's television is not supported by the record. Appellate review of whether a person is in custody is confined to a determination of whether the ruling by the trial judge is supported by the record. State v. Easler, 322 S.C. 333, 342, 471 S.E.2d 745, 751 (Ct.App.1996) aff'd as modified, 327 S.C. 121, 489 S.E.2d 617 (1997).

In State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 409–10 (2003), the South Carolina Supreme Court wrote:

> The purpose of the Miranda warnings is to apprise the defendant of her constitutional privilege to not incriminate herself while in the custody of law enforcement. Miranda, 384 U.S. at 444, 86 S.Ct. at 1612. Law enforcement must state the Miranda warnings "after a person has been taken into custody or otherwise deprived of his freedom of action in any way." Id. 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. Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984); United States v. Helmel, 769 F.2d 1306, 1320 (8th Cir.1985); Robert Kaupp v. Texas, 538U.S. 626, 123 S.Ct. 1843, 155 L.Ed.2d 814, 2003 WL

> 2010974 (2003). The custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody. Bradley v. State, 316 S.C. 255, 257, 449 S.E.2d 492, 493–494 (1994); State v. Sprouse, 325 S.C. 275, 282, 478 S.E.2d 871, 875 (Ct.App.1996).

Viewing the totality of the circumstances, the investigators placed Respondent in a custodial interrogation setting requiring Miranda warnings. The failure to provide Miranda warnings required suppression of the statement, "I tapped him twice." As the judge noted earlier, "I mean, I think that was merely a, you know, it's my understanding from the testimony that sometime afterwards, **after** he gave the statement the officers got together and said 'there's some inconsistencies here.' **And that's when they turned it into a custodial interrogation.**" (R. p. 163, line 24 – p. 164, lines 1-6) (emphasis added).

As to the factors discussed in Evan, the interrogation took place at the law enforcement center. The investigators drove Respondent from his house to the law enforcement center for an interview. (R. pp. 319-322; pp. 292-295). During the suppression hearing Investigator Fortner testified that he did not mirandize Respondent "because he was not in custody and I was interviewing him more as a witness, as somebody that might be able to provide some information as to what had taken place." (R. p. 41, line 24 – p. 42, lines 1-3). The purpose of the interview, however, changed when Investigator Fortner returned to the room and questioned Respondent about hitting the deceased. At this point in time the interview became a custodial interrogation. Respondent had been in a room at the law enforcement center with two investigators for approximately two hours. (R. p. 119, lines 1-11). Respondent was not free to leave. A reasonable person would have concluded that he was in police custody.

In State v. Navy, 386 S.C. 294, 298–99, 688 S.E.2d 838, 840 (2010), the South Carolina Court wrote:

> After he gave this first statement, the crying and upset respondent was informed, for the first time, that the child had been suffocated and that there was evidence of

> broken ribs. According to Investigator Smith, respondent was shocked and surprised by this information. Respondent asked if he were under arrest, and was told "No, we are just trying to get some answers." The officers engaged in follow-up questioning, asking specifically how respondent had comforted the crying child. At 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. In response to these follow-up questions, respondent told the officers he had "popped" the child on the back rather than simply patted him, and that he may have "patted" the child on its mouth to stop the crying.

Navy was then mirandized and provided two additional written statements. The South Carolina Supreme Court found the second and third statements should have been suppressed pursuant to Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004). Respondent's video recorded statement, made after Miranda warnings is addressed in issue two, and is analogous to the second and third statements the Court found should have been suppressed in Navy. Respondent's statement, "I tapped him twice," is analogous to Navy's statement that he had "popped" the child on the back and that he may have "patted" the child on its mouth to stop the crying. Investigator Fortner's question about whether Respondent hit the deceased because the deceased tried to steal Respondent's television began an unwarned custodial interrogation designed to elicit incriminating information.

The present case is distinguished from State v. Williams, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013). In Williams the South Carolina Court of Appeals found that the defendant was not in custody at the time he provided a statement to police prior to Miranda warnings. The Court in Williams noted:

> The trial court determined that based on "the method of arrival, the voluntary arrival, the agreement to participate, the accidental explanations, [and] the officer's testimony that the Defendant was free to leave," the oral statement was admissible because Williams was not in custody and therefore Miranda warnings were not required. The court noted it was making that decision based on an objective standard and not just the officer's subjective testimony that Williams was free to leave. The trial court found that "a reasonable person arriving voluntarily in a private vehicle, never requests any help, not under the influence,

> cooperating with the officers, wanting to clear it up, that a reasonable person would believe they were free to leave."

405 S.C. at 270–71, 747 S.E.2d at 198. In contrast, Respondent did not arrive at the law enforcement center in a private vehicle but instead was picked up at his home by the investigators. Respondent advised the investigators that he had been drinking. (R. p. 380, lines 16-20; p. 345, lines 18-24). There is no indication in the record that Respondent expressed an intention of "clearing things up" as Williams had. In the present case a reasonable person would have believed that he was in custody and not free to leave. The trial judge erred in finding that Respondent was not in custody. The statement, "I tapped him twice," should have been suppressed.

In finding that the statement should have been suppressed because obtained as the result of a custodial interrogation, the Court of Appeals applied the correct standard of review writing, "We review a trial court's custody ruling to determine if it is supported by the record. See State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 409 (2003)." State v. Hill, 425 S.C. 374, 380, 822 S.E.2d 344, 348 (Ct. App. 2018). The Court of Appeals objectively considered the circumstances of the interrogation to determine if a reasonable person – faced with the same circumstances confronting Respondent – would have felt free to leave. The Court wrote:

> Hill testified he believed he was not free to leave, but his subjective view is as weightless as the Investigator's conclusory testimony that Hill was not in custody. See J.D.B, 564 U.S. at 271, 131 S.Ct. 2394 (the subjective views of investigating officers and person being questioned are irrelevant). Our inquiry is objective, centering on whether one in Hill's position would have believed he was free to stop the questioning and depart. See id. It entails reconstructing the circumstances of the interrogation, such as the time, place, purpose, and length of the questioning. Evans, 354 S.C. at 583, 582 S.E.2d at 410. Other factors include the use or absence of physical restraints, the statements made by the police, and whether the defendant was released at the end of the encounter. Howes v. Fields, 565 U.S. 499, 509, 132 S.Ct. 1181, 182 L.Ed.2d 17 (2012).

425 S.C. at 381, 822 S.E.2d at 348.

The Court of Appeals properly considered the fact that the investigators drove Respondent to the police station where the interrogation took place. The Court discussed how an interrogation can change when the police imply that the defendant is a suspect, citing Stansbury v. California, 511 U.S.318 (1994). Investigator Fortner's asking Respondent if he hit the deceased because the deceased tried to steal Respondent's television implies that Respondent was a suspect. The Court properly considered the fact that there was no evidence the investigators told Respondent he could end the questioning at any time. Early in the post-Miranda video Respondent stated, "This whole thing kind of baffling me and you tell me that I can't go home." The Court of Appeals wrote, "Bailey's testimony that Hill was told several times he could stop the questioning at any time was unspecific and appears to refer to the statements he made to Hill to that effect on the video after Miranda warnings were administered. In the video, Bailey also mentions an earlier, pre-Miranda exchange with Hill, stating 'we didn't tell you you couldn't go home; we told you we could not make that decision until we find out what you have to tell us.' From this statement alone, it can be inferred a reasonable person would have concluded he was not free to leave." Hill, 425 S.C. at 382, 822 S.E.2d at 348–49.

The Court of Appeals also properly considered the change in purpose after the investigators discussed the discrepancies and then returned and continued to question Respondent without the benefit of Miranda warnings, comparing the case to Navy. The Court discussed the fact that when the investigators returned after discussing the discrepancies they knew from the autopsy that the cane seized form Respondent's home could be the murder weapon. The Court of Appeals also properly considered the more than two hour unwarned questioning. The Court correctly found that Respondent was in custody writing, "Viewing all these circumstances together and considering how a reasonable person would have perceived

their impact on his freedom of movement, we conclude they add up to a finding that Hill was in custody when he stated he "tapped" Patterson twice. See J.D.B., 564 U.S. at 270-71, 279, 131 S.Ct. 2394." Hill, 425 S.C. at 383, 822 S.E.2d at 349.

Respondent's reliance on the "any evidence" standard from State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001), and State v. McClure, 312 S.C. 369, 440 S.E.2d 404 (Ct.App. 1994), is misplaced because both of those cases involved solely a determination of voluntariness. Neither case involved statements obtained as the result of a custodial interrogation without Miranda warnings. The issue in the present case involved a determination of whether Respondent's pre-Miranda statement was the result of a custodial interrogation. Appellate review of whether a person is in custody is confined to a determination of whether the ruling by the trial judge is supported by the record. State v. Easler, 322 S.C. 333, 342, 471 S.E.2d 745, 751 (Ct.App.1996) aff'd as modified, 327 S.C. 121, 489 S.E.2d 617 (1997); State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 409 (2003). The Court of Appeals correctly found that the trial judge's determination that Respondent was not in custody at the time he made the statement was not supported by the record and noted, "Here, we agree with the trial court's initial instinct: when the Investigators realized Hill's statements conflicted with Barksdale's, 'that is when they turned it into a custodial investigation.'" Hill, 425 S.C. at 383, 822 S.E.2d at 349.

The Court of Appeals applied the correct standard and properly found that the pre-Miranda statement was the result of a custodial interrogation and should have been suppressed. The record does not support the trial judge's finding that Respondent was not in custody. The error was not harmless. The petition for writ of certiorari should be denied.

2. **The Court of Appeals correctly found that the recorded statement made following Miranda warnings was in violation of Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004).**

As discussed above, Counsel for Respondent moved to suppress the statements made to law enforcement prior to Miranda warnings and moved to suppress the video recorded statements made after Miranda warnings pursuant to Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) and State v. Navy, 386 S.C. 294, 302, 688 S.E.2d 838, 841 (2010). (R. pp. 147-163). Based on the trial judge's ruling that Respondent was not in custody prior to Miranda warnings (although he stated that "I mean, I think that was merely a, you know, it's my understanding from the testimony that sometime afterwards, **after** he gave the statement the officers got together and said 'there's some inconsistencies here.' **And that's when they turned it into a custodial interrogation.**" (R. p. 163, line 24 – p. 164, lines 1-6)(emphasis added)), the trial judge found that Seibert did not apply. Respondent additionally argued that the video recorded statement, referred to by the trial judge as statement number four, State's Exhibit #81, should be suppressed because investigators knew Respondent had been drinking and Respondent refused to sign the waiver of rights form. (R. p. 158, lines 1-7). The trial judge refused to suppress the video recorded statement on these grounds as well. (R. p. 164, line 10 – p. 194, lines 1-4). The video recorded statement, State's Exhibit #81, should have been suppressed because it was obtained in violation of the rule announced in Seibert and Navy.

Respondent renewed the objection to the video recorded statement in the middle of the trial after the judge revisited his earlier ruling. (R. p. 328, lines 18-20). Respondent renewed the objection during Investigator Fortner's testimony. (R. p. 370, lines 17-18; p. 375, lines 23-25). Respondent renewed the objection at the directed verdict stage and post- trial. (R. p. 387, lines 18-21; p. 432, lines 17-19). Respondent additionally renewed the objection after the jury returned the verdict. (R. p. 477, lines 7-9).

In State v. Navy, 386 S.C. 294, 302, 688 S.E.2d 838, 841–42 (2010) the South Carolina Supreme Court wrote:

> In Seibert, the Court dealt with the police practice of questioning a suspect until incriminating information is elicited, then administering Miranda warnings. Following the warnings, the suspect is again questioned and the incriminating information re-elicited. The post-warning statement is then sought to be admitted. The factors to be considered in determining whether a constitutional violation occurred in this setting, according to the Seibert plurality opinion, are:
>
> 1) the completeness and detail of the question and answers in the first round of interrogation;
> 2) the timing and setting of the first questioning and the second;
> 3) the continuity of police personnel; and
> 4) the degree to which the interrogator's questions treated the second round as continuous with the first.

The Court in Navy found that the officer's actions violated Seibert writing:

> 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. Once those incriminating answers were given—i.e. after respondent admitted he had popped the child on the back and "patted" his mouth—respondent was permitted a supervised cigarette break, then given Miranda warnings, with interrogation by the same officer resuming immediately. Thus the four elements outlined in Seibert were met here. Moreover, none of the curative measures suggested by Justice Kennedy, i.e. an additional warning that the answers given after the first statement but before the administration of Miranda warnings may not be admissible,[4] a substantial break in time, or change of circumstances, occurred here.
>
> 386 S.C. at 303, 688 S.E.2d at 842.

In the present case investigators questioned Respondent until incriminating information was elicited. Investigators then administered Miranda warnings and again questioned Respondent about the incriminating information. Investigator Fortner began an unwarned custodial interrogation when he asked Respondent if he hit the deceased because the deceased tried to steal Respondent's television. The investigator asked the question knowing that a

walking stick consistent with the murder weapon had been seized from Respondent's bedroom. Additionally, the investigators learned from Respondent's roommate that Respondent was afraid the deceased was stealing from him. (R. p. 346, lines 14-22). After Respondent admitted that he "tapped him twice" he was taken to a different room, mirandized and then re-interrogated immediately by the same investigators, Fortner and Bailey. There were no additional warnings. There was not a break in time or change of circumstance. As in Navy, the investigators' actions in the present case violate Seibert. The trial judge erred in refusing to suppress the video recorded statement, State's Exhibit #81. The error was not harmless.

The Court of Appeals correctly considered the Seibert factors and wrote:

> The first and second interrogations of Hill were similar. The same Investigators conducted the second round, which was held in a room across the hall from where the first round had just ended. The Investigators treated the rounds as continuous, even telling Hill they only wanted him to tell them "no more than what you've already said." See id. at 616-17, 124 S.Ct. 2601 ("The impression that the further questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already given. It would have been reasonable to regard the two sessions as part of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before."); see *also* id. at 621, 124 S.Ct. 2601 (Kennedy, J., concurring) ("Reference to the prewarning statement was an implicit suggestion that the mere repetition of the earlier statement was not independently incriminating. The implicit suggestion was false."). We cannot suspend reality and find the Miranda warnings effective at the late stage they were given.

Hill, 425 S.C. at 384, 822 S.E.2d at 349–50. The Court of Appeals distinguished Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985) and found nothing occurred to cure the Miranda breach writing:

> Here, we do not have a Miranda mistake made in the heat of arrest but a calculated investigatory interview structured by veteran homicide investigators who at times pitched Hill doubletalk. Justice Kennedy's concurrence in Seibert ventured such a Miranda breach could be cured if there was a substantial break in the time and environment of the first and second interviews, or if the defendant

> was advised his first confession could not be used against him. Seibert, 542 U.S. at 622, 124 S.Ct. 2601. Neither occurred here.

Hill, 425 S.C. at 384–85, 822 S.E.2d at 350. The Court properly found that Seibert required exclusion of the recorded statement writing, "We therefore hold Seibert requires exclusion of Hill's post-Miranda statements. See Berkemer v. McCarty, 468 U.S. 420, 437, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) ('Fidelity to the doctrine announced in Miranda requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated.')." Hill, 425 S.C. at 385, 822 S.E.2d at 350.

The present case is distinguished from United States v. Gonzales-Lauzan, 437 F.3d 1128 (11th Cir. 2006), which also involved a two-step interrogation but during the first pre-Miranda step the officers did not ask any questions and instead told Gonzalez-Lauzan to just listen. Despite the instruction to just listen, as officers outlined the evidence, without asking questions, Gonzalez-Lauzan suddenly stated, "okay, you got me." He was then immediately mirandized and agreed to speak with the officers. The Court found that the "midstream Miranda warnings" functioned effectively and wrote:

> In summary, during their presentation of evidence to Gonzalez–Lauzan, the officers repeatedly informed Gonzalez–Lauzan that he should just listen and that they were not asking him any questions. Because the officers had yet to ask Gonzalez–Lauzan a single question, the Miranda warnings they provided—advising Gonzalez–Lauzan that he need not answer questions—were not inconsistent with the first phase of the interview where they told him just to listen. Nothing in the record suggests that Gonzalez–Lauzan's waiver of his rights was uninformed, coerced or involuntary. We conclude that the midstream Miranda warnings offered by the officers did not fail to offer Gonzalez–Lauzan or a reasonable suspect "a genuine choice whether to follow up on [his] earlier admission." Id. at 616, 124 S.Ct. at 2612 (plurality opinion).

United States v. Gonzalez-Lauzan, 437 F.3d 1128, 1139 (11th Cir. 2006). In the present case the investigators, during the pre-Miranda interrogation, asked questions and sought to elicit incriminating statements. The "midstream Miranda warnings" in the present case did not

function effectively to cure the earlier Miranda breach because there was no genuine choice whether to continue after the first unwarned statement. This is precisely the type of statement addressed and excluded in Seibert and Navy.

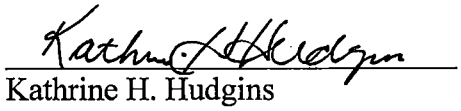
The present case can also be distinguished from United States v. Terry, 400 F.3d 575 (8th Cir. 2005). Terry was arrested for domestic violence. At the jail a special agent asked Terry, without giving Miranda warnings, if Terry had previously been convicted of domestic violence. Terry confirmed that he had been convicted of domestic violence. The agent did not ask any other questions because Terry appeared intoxicated. The following day the agent returned and advised Terry of his Miranda rights. Terry waived his rights and provided a statement about the domestic violence incident from the night before. In finding that the district court properly allowed the second statement the Eight Circuit wrote, " . . . [W]e believe that a reasonable person in Mr. Terry's shoes would have understood the Miranda warnings that he was given as conveying a message that he retained a genuine choice about continuing to talk." United States v. Terry, 400 F.3d 575, 582 (8th Cir. 2005). First, the question about the prior conviction is far different from the pre- Miranda questioning in the present case, designed to elicit an incriminating response about the murder not merely a question about a prior conviction. Second, the break in time over- night may have cured the Miranda breach. There was no break in the present case. The trial judge erred in not excluding the second recorded statement. The error was not harmless.

In the present case the investigators took a statement from Respondent, marked as State's Exhibit #3, then, after consulting about inconsistencies with knowledge about the autopsy, the murder weapon and the TV, began an unwarned custodial interrogation springing the attempted stolen TV theory. This questioning was designed to elicit incriminating information and it did.

The Miranda warnings that immediately followed were not effective as there was no genuine choice about continuing to talk at this point. The second statement was taken by the same investigators, in a room just across the hall and the investigators treated the interrogations as continuous. The Court of Appeals correctly found that the trial court erred by not excluding both the pre-Miranda oral statement and the post-Miranda video recorded statement writing, "As the trial court conscientiously recognized, the issues here are close, and they were not presented to the trial court in the most ideal or conspicuous form. From our perspective, however, the trial court's rulings find insufficient support in the record. We therefore hold the trial court erred by not excluding Hill's first and second confessions from evidence." Hill, 425 S.C. at 385, 822 S.E.2d at 350.

CONCLUSION

Based on the above arguments, this Court should deny the petition for writ of certiorari.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of April, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

PETITIONER,

V.

MARSHELL HILL,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari in the above referenced case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Marshell Hill, #367847, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 9th day of April, 2019.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me this 9th day of April, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.