STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Petition for Writ of Certiorari to Greenville County
The Honorable G. Edward Welmaker, Trial Judge
The Honorable Robin B. Stilwell, PCR Judge

Appellate Case No. 2018-000600

JAMES ALLEN JOHNSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF REPSONDENT

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PETITIONER'S QUESTION PRESENTED

Did the PCR court err by finding trial counsel was not ineffective when counsel failed to object to the admission of Petitioner's statement to law enforcement pursuant to Missouri v. Seibert, 542 U.S. 600 (2004), where the United States Supreme Court precluded the use of midstream 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), and when Petitioner was prejudiced because the outcome of his trial would have been different if counsel had properly objected or he would have prevailed on appeal?

RESPONDENT'S QUESTION PRESENTED

Did the post-conviction relief court err by finding Petitioner failed to prove that trial counsel was constitutionally ineffective for failing to raise a Seibert issue when moving to suppress Petitioner's statement to law enforcement officers when the officers were not required to give Miranda warnings to Petitioner during the first part of the interview because Petitioner was not in custody at that time and when they did give the warnings once Petitioner made an inculpatory statement and was taken into custody?

STATEMENT OF THE CASE

James Allen Johnson ("Petitioner"), is presently imprisoned in the South Carolina Department of Corrections. During its September of 2011 term, the Greenville County Grand Jury indicted Petitioner for homicide by child abuse (2011-GS-23-007262). Petitioner was represented by Dorothy A. Manigault ("trial counsel"), Esquire, and Assistant Solicitor Kristie Bjorndal Hodge of the Thirteenth Circuit Solicitor's Office prosecuted the case. On June 3, 2013, Petitioner proceeded to a jury trial with the Honorable G. Edward Welmaker ("trial court") presiding. At the conclusion of trial, the jury found Petitioner guilty as indicted, and the trial court sentenced Petitioner to imprisonment for sixty-two years. Trial counsel filed a timely notice of appeal. Appellate Defender David Alexander of the South Carolina Commission on Indigent Defense represented Petitioner on appeal. Alexander argued before this Court the trial court erred in admitting Petitioner's statement to police because the statement was allegedly the product of a two-phase interrogation of a mentally retarded suspect who was not given Miranda warnings until after he made incriminating statements. Following oral argument, this Court affirmed Petitioner's conviction and sentence. State v. Johnson, Op. No. 2015-UP-378 (S.C. Ct. App. filed July 29, 2015) (per curiam), reh'g denied, State v. Johnson, S.C. Ct. App. Order filed December 16, 2015, aff'd, State v. Johnson, 2017-MO-009 (S.C. Sup. Ct. filed May 24, 2017) (per curiam). The remittitur was issued on June 9, 2017.

Petitioner filed his application for post-conviction relief on June 13, 2017. Respondent made its return on October 24, 2017, requesting that the courts convene an evidentiary hearing regarding Petitioner's claims. An evidentiary hearing was held before the Honorable Robin B. Stilwell ("PCR court") on December 12, 2017, at the Greenville County Courthouse. On March

21, 2018, the PCR court issued an Order of Dismissal, denying the application and dismissing it with prejudice. This appeal followed.

STATEMENT OF FACTS

Pre-trial Jackson v. Denno hearing

The trial court conducted a pre-trial hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964), concerning four statements that Petitioner made to law enforcement officers. App. 54. Deputy Carl Mathias, who was a school resource officer at a high school near Petitioner's home, testified that he responded to a 911 call about a choking child. App. 55. At the home, Petitioner spontaneously and without any prompting told him that Petitioner was in the bathroom when the incident occurred and that he did not know what happened. App. 56-57.[1] Investigator Jennings Autrey, who was an investigator looking into victim's death, spoke with Georgia Ann Sprouse ("victim's mother") and Petitioner at the hospital once victim had been transported there. App. 59. Autrey asked Petitioner to explain what happened, and Petitioner told him that he was in the bathroom at the time of the incident and called 911 for help when he heard victim's mother yelling for him to do so, and that the only thing he saw was victim's mother performing CPR on victim on the floor. App. 60-61.

Sergeant Christopher Miller was the lead investigator into victim's death. App. 78. He spoke with Petitioner at the hospital, and Petitioner agreed to ride with Miller to the Law Enforcement Center ("LEC") to give a statement. App. 78-79. He told Petitioner that Petitioner was not in custody and did not have to go with him to give a statement. App. 80-81. At the LEC, Miller did read to Petitioner his Miranda rights. App. 81. Petitioner gave a verbal statement about

[1] Rank Mathias testified again during the State's case-in-chief. App. 191-99.

what happened and then agreed to give a written statement. App. 82. The written statement was made on a witness statement form, not a suspect form, because it was too early in the investigation for Miller to know what happened to victim and he was treating Petitioner as a witness only. App. 84-85. After the meeting ended, he returned Petitioner to the hospital. App. 85.

On June 2, 2011, Sergeant Miller asked two other officers to find Petitioner and take him to the LEC for a second meeting because Petitioner's initial story did not add up and the coroner had since ruled victim's death a homicide. App. 85, 88, 95. Miller had interviewed victim's mother multiple times and did not know whether Petitioner or victim's mother was lying. App. 99. Petitioner was not under arrest at that time and voluntarily rode with the officers to the LEC. App. 86. Investigator Autrey witnessed the statement that Petitioner gave at that meeting. App. 61.[2] At the outset of the meeting, Petitioner was not in custody and was not given Miranda warnings initially; he was only a "possible suspect" or person of interest when the interview began. App. 62-63, 75, 86-87, 98. Petitioner did not appear to be under the influence of anything at that interview, which lasted for about one-and-a-half to two hours. App. 74, 85, 96-97. Petitioner told the officers that he was in the bathroom at the time of the incident and he heard victim's mother yell for him to call 911, he had never seen victim's mother be mean to victim, he did not like victim's biological father, and victim's mother was scared to call 911 when victim was choking because the mother had drugs in the house and did not want her kids to be removed from the home. App. 63, 88. As Petitioner kept talking, his statement changed. App. 64. Petitioner said he wanted victim and himself to have peace, he did not hurt victim "that he knows of," he picked up victim and saw that she was not breathing, he thought victim was sleeping and wanted everyone to leave

[2] Investigator Autrey testified again during the State's case-in-chief. App. 376-419.

so that he could have victim, accidents happen sometimes, he hit victim in the head with a toy and then covered her mouth to keep her from crying, and he concocted the story about victim's choking on tea. App. 64-65, 88. At that point, the officers gave Miranda warnings to Petitioner, took his sworn, written statement based off what he had told them, and then arrested him. App. 65-73, 88-91.

Petitioner testified during the pre-trial hearing that he did not remember his conversations with Sergeant Miller, especially the one on June 2, 2011. App. 103. He claimed to have been smoking marijuana and prescription drugs shortly before the officers showed up that day to transport him to the LEC and that he took Xanax while on a bathroom break at the LEC.[3] App. 103-04. He claimed that he was not given a choice about whether to go to the LEC with the officers. App. 103. He admitted that he signed the written statement but denied that he remembered doing so and many of the particulars of the interview. App. 105-111. The trial court found by a preponderance of the evidence that Petitioner's statements to law enforcement were freely and voluntarily given and left it to the jury to make the ultimate determination. App. 121.

Testimony from State's case-in-chief

Firefighter Phillip Reynolds was dispatched to victim's home in response to a 911 call about a child who was choking. App. 138. The people he saw standing around at the home were not helpful in directing him to the child, but he saw that victim's mother and Petitioner were performing CPR on the child. App. 140. He did not see another child around victim. App. 161. He observed bruises on the child's body but denied that the CPR performed by the first responders caused the bruises on victim's body. App. 144, 162. Petitioner spontaneously told him that he had

[3] Petitioner's brother testified during the pre-trial hearing and during Petitioner's case-in-chief that Petitioner had been at his home earlier on June 2 and was heavily intoxicated. App. 117, 577-79.

been in the bathroom when victim choked on tea. App. 145. He did not see any ice or vomit around victim but did see some tea in a cup. App. 163-64. After the ambulance left with victim, one of the adults at the home said that victim choked on tea. App. 163.

First responder Joseph Alexander Key responded to the scene, too, though he arrived after the firefighters. App. 165-67. He also noticed that the crowd at victim's home was not helpful in directing him to victim and were smoking cigarettes. App. 168-69. He was suspicious because the adults at the home were unhelpful and seemed unconcerned and victim's family declined to ride to the hospital in the back of the ambulance with victim when asked if they wished to do so. App. 171-73. Victim's body was wet, pale, and cool, covered in bruises, and did not have any choking hazards or drink around it. App. 170-71, 174. He denied that the performance of CPR would have caused the bruising on the body and that the intubation would have torn victim's frenulum. App. 174-75. Victim regained her heartbeat near the destination hospital but had to be airlifted to another hospital. App. 176. First responder James Clardy was at victim's home, too. App. 180. An adult male outside the home, cigarette in hand, flippantly waived him inside; victim's family was not helpful to Clardy, either. App. 182-83 He did not see anyone who appeared to be one of victim's parents, only adults standing around outside. App. 184. He described the bruising on victim's body and testified that victim's airway was clear. App. 185-87. He denied that their intubation of victim would have torn her frenulum. App. 187. He thought it strange that victim's family did not want a ride to the hospital. App. 186.

Deputy Kevin James Azzara testified that he arrived at victim's home after victim had been taken away in the ambulance. App. 200. Those at the scene told him that victim choked on tea and Petitioner said that he believed that he and victim's mother were going to be in trouble. App. 201.

Victim's mother wanted to go to the hospital and he believed that she said that she and Petitioner were in the living room when victim choked. App. 201, 206.

Crystal Inman, a childhood friend of victim's mother with whom victim, victim's mother, victim's sister, and Petitioner lived, testified that Petitioner favored victim's sister over victim and had blamed victim's sister for a bruise on victim and said that victim fell down some stairs. App. 209-11, 224-26. She noticed bruises appearing on victim's body not long before her death. App. 226-28. After victim stopped breathing, she saw that the victim's lips had turned blue, that victim's mother and Petitioner were performing CPR, and that a puddle of vomit was on the floor. App. 232, 245-46. She noticed too that the victim had been wearing clothes before the incident. App. 232. Victim's mother and Petitioner stayed in the basement while law enforcement officers were at the home and did not appear to be upset; she felt victim's mother was insufficiently upset. App. 236, 247. Tina Collins, victim's maternal grandmother, testified at trial that victim's sister made a spontaneous statement the day after the incident and that she relayed this information to the law enforcement officers. App. 256-57, 277.[4]

Victim's mother testified Petitioner was not the biological father to her two children and that Petitioner moved in with her as a romantic partner on the day they met. App. 282-93, 334. Victim had been removed from her care by the Department of Social Services in the past. App. 287. She, Petitioner, and the two children moved in with Inman when they had to move out of their old apartment after a neighbor fought with Petitioner because Petitioner slapped victim on the back. App. 296. Petitioner provided her with explanations for the bruises that started appearing on

[4] Judge Stilwell found that spontaneous statement was not admissible. Victim's sister told Collins that victim choked on tea and that Petitioner covered victim's nose and mouth and "boom, boom, boom." App. 269-70.

victim's body about one week before victim's death. App. 298-300. She did not see Petitioner abuse the children, but she knew Petitioner preferred victim's sister over victim and would even push victim away when the child tried to be near them. App. 298, 302-03. She related the events on the day of the incident by saying that she was taking a nap when Petitioner woke her to say that victim was not breathing, she saw that victim was turning purple, and that she began performing CPR. App. 305-07. She testified that Petitioner did not help her with CPR, but made two calls to 911; after the first call was disconnected, Petitioner delayed his second call so that he could hide marijuana that he and victim's mother had been smoking in the home. App. 307-08. Vomit started coming out of victim's mouth. App. 308. Petitioner told her that victim choked on tea and told her to repeat the story so that others would not think her a bad mother. App. 309-11. She admitted to lying to first responders and police initially because she was scared that the children would be taken from her. App. 313-14, 334, 340. She acknowledged that she had since pleaded guilty to accessory after the fact because she was actually asleep at the time of the incident. App. 316-19, 344. Petitioner told her when they were both being transported in a van by officers post-arrest that he was sorry for what he did and "did not mean to" and asked for forgiveness. App. 346-47.

Dr. Mary Fran Croswell testified as an expert in pediatrics with a specialty in child abuse pediatrics. App. 350-54. She examined victim in the hospital. App. 354. Victim did not have a disorder that caused her to bruise easily. App. 359. She saw bruising on victim's head and body and a bite mark. App. 362-64. The placement of the twenty-eight bruises raised red flags in her mind and she did not think that they were adequately explained by victim's family. App. 367-69, 371. She testified that a torn frenulum indicates that victim suffered from blunt force trauma or was suffocated and thought it would have been "atypical and unusual" for the bruises to have been

caused by a two-year-old. App. 369-71. She did not think that the bruises—or at least not any of them except for one—could have been caused by the performance of CPR. App. 373-75.

Homicide investigator Christopher Miller testified about the officers' first interview of Petitioner at the LEC. App. 422-24, 437-48. Petitioner said that he had been in the bathroom when victim choked, blamed others for victim's injuries, and speculated that victim choked on a bracelet. App. 440-46. Miller did not have plans to arrest Petitioner after that interview. App. 448. He became suspicious of victim's mother after meeting with her again the following day. App. 448-49. After the pathologist reached the preliminary conclusion that victim had been strangled, he interviewed victim's mother against at the LEC. App. 450-455. The officers' second interview of Petitioner at the LEC took place after that meeting with victim's mother. App. 456-57. Petitioner was not in custody at the time of the second interview and did not appear to be intoxicated. App. 457-59, 479. Miller considered Petitioner a person of interest when that second interview began. App. 475. After the officers confronted Petitioner with the statement from victim's mother, Petitioner's story changed: he gave a verbal statement and demonstrated how he held his hand over victim's nose and mouth. App. 463-64, 474. Miller stopped the interview and gave Miranda warnings to Petitioner, at which point Petitioner waived his rights and gave another verbal statement. App. 464-67. At that time, Petitioner was in custody. App. 464. The conversation continued as it had and Petitioner signed a typed version of his statement. App. 467-68. After Petitioner signed the typed statement, the officers secured an arrest warrant, handcuffed Petitioner, and took him to jail. App. 469.

Dr. Michael Ward testified as an expert in forensic pathology. App. 483-85. He discovered a bruise on victim's head that was in the pattern of a beaded necklace, saw that victim's frenulum was torn and her lip was bruised, and believed that pressure had been applied upward against

victim's mouth, an injury which could not have been caused by the performance of CPR. App. 488-92. He determined that victim was brain dead before life support was withdrawn, a condition caused by a lack of oxygen supplied to victim's brain mostly likely caused by manual strangulation over a period of minutes. App. 496-501, 502. He believed that the hand-like bruises on victim's sides were caused by someone's squeezing her. App. 498-99. He opined that victim's death was not caused by choking on tea. App. 503, 506. He noted that a brain injury caused by suffocation could have induced vomiting. App. 503-04. He believed that victim would have struggled while being strangled. App. 505.

Testimony from Petitioner's case-in-chief

When Petitioner testified at trial, he said that he put the two children in the living room to play, went to the bathroom, and called 911 when victim's mother told him that victim was not breathing. App. 521, 564-65. He estimated that he had been in the bathroom for two to three minutes when victim's mother shouted out. App. 524. He claimed that he had to convince victim's mother to call 911 because he, victim's mother, and Inman had smoked marijuana and taken prescription drugs in the home recently. App. 525-26, 566-67. He admitted to giving the written statement to the law enforcement officers at the LEC on May 25. App. 528-29. He testified that he could not remember most of the second interview, which took place on June 2, because he was intoxicated at the time, but he recognized the signature on the rights waiver form as his own and remembered speaking to Investigator Miller. App. 530-40, 545, 553. He claimed to have taken more drugs during a bathroom break during the interview on June 2, although Investigator Miller did not see Petitioner take anything. App. 554. He said that the officers who drove him to the LEC on June 2 told him that he had to go with them. App. 533, 552.

Testimony from State's reply

Deputy Jim Wilson testified as a reply witness for the State. App. 585. He went to transport Petitioner to the LEC on June 2, and testified that Petitioner agreed to be interviewed and to ride to the LEC with Wilson and his partner. App. 585-87. Petitioner was not under arrest at the time and did not appear to be on drugs and could communicate clearly with the officers. App. 587-91.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed de novo without deference to the lower court. Smalls, at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court correctly found that Petitioner failed to prove that trial counsel was constitutionally ineffective for failing to raise a Seibert issue when moving to suppress Petitioner's statement to law enforcement officers because the officers were not required to give Miranda warnings to Petitioner during the first part of the interview and did give the warnings once Petitioner made an inculpatory statement and was taken into custody.

The PCR court noted that trial counsel requested a Jackson v. Denno hearing in order for the trial court to determine whether Petitioner's statements to law enforcement were giving voluntarily. App. 707. The PCR court noted that neither trial counsel not the trial court specifically cited Seibert during the Jackson v. Denno hearing or when the statements were admitted during the State's case-in-chief. App. 707. Ultimately, the PCR court found that Petitioner failed to prove that trial counsel was constitutionally ineffective for failing to preserve the issue of the admissibility of Petitioner's statements for appellate review by not citing Seibert because, even if trial counsel had specifically cited the case in her argument regarding the issue at trial, Petitioner failed to prove that he would have resulted in a reversal of his conviction on appeal. App. 707-08. Petitioner's argument that the PCR court's finding was in error fails because Petitioner was not in custody initially when he started giving the relevant statement to the law enforcement officers and was immediately given the Miranda warnings once he made a statement that implicated himself in a crime.

In Seibert, a plurality of the United States Supreme Court considered the admissibility of a confession given after Miranda warnings were issued when the interviewing law enforcement officers employed a protocol of custodial interrogation that involved their not giving Miranda warnings until after the interrogation had already produced a confession. 542 U.S. 600, 604 (2004). In that case, Seibert's teenage sons—with her knowledge—set fire to their home in order to conceal her neglect of her twelve-year-old son, who had died in his sleep. Id. Seibert's young son suffered

from cerebral palsy and she did not want investigators to discover the bedsores on his body. Id. To make it appear that the son had not been left unattended at the time of his death, Seibert's other sons left inside the home a (living) mentally ill teenager who was staying with the family so that he would burn up with the body of the already deceased son. Id. Police arrested Seibert five days later but intentionally did not notify her of her Miranda rights at the time. Id. Seibert was taken to the police station and left alone in the interview room for 15 to 20 minutes, and was then questioned by an officer, still without being given Miranda warnings, until she confessed to knowing that the arsons meant for the mentally ill teenager to die in the fire. Id. at 604-05. During that portion of the interview, the interviewing officer was squeezing Seibert's arm and repeating "[The child] was also to die in his sleep." Id. at 605. Once Seibert confessed, the officer let her have a twenty-minute break to drink coffee and smoke a cigarette. Id. After the break, the officer began recording the interview, issued Miranda warnings, obtained a signed waiver of Seibert's rights, and elicited a second confession by confronting Seibert with the statements she made in the first part of the interview. Id. The officer acknowledged that he intentionally withheld Miranda warnings because he was employing an interrogation technique in which he would question a defendant first, then issue Miranda warnings, and then repeat the questions until he received the answer that the defendant had already provided before the Miranda warnings. Id. at 605-06.

During Seibert's trial for second-degree murder, the trial court suppressed Seibert's statement given before the officer gave the Miranda warnings but admitted the statements given post-warning. Id. at 606. On appeal, the United States Supreme Court recognized the attractiveness of this interrogation procedure to police officers. Id. at 609-11. Nevertheless, the Supreme Court found that the object of this question-first tactic was to render ineffective the Miranda warnings by delaying their issuance until after a suspect has already confessed during interrogation. Id. at

611. The Supreme Court reasoned that Seibert's post-warning statements should be suppressed in addition to the pre-warning statement because "it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because Miranda warnings formally punctuate them in the middle. Id. at 614. The Supreme Court provided a list of relevant facts that a reviewing court has to consider when determining whether Miranda warnings "delivered midstream" can be effective enough to accomplish their object:

> [T]he completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.

Id. at 615. After analyzing Seibert's case in light of those relevant facts, the Supreme Court determined that Seibert's post-warning statements were inadmissible because "the question-first tactic effectively threatens to thwart Miranda's purpose of reducing the risk that a coerced confession would be admitted, and because the facts . . . [did] not reasonably support a conclusion that the warnings given could have served their purpose. . . ." Id. at 617.

The PCR court correctly found that Petitioner failed to prove that he suffered prejudice from trial counsel's not preserving the Seibert issue because Petitioner was not under arrest when he began giving the relevant statement to the law enforcement officers. App. 708. When an issue was unpreserved for direct appellate review, a PCR court is to examine whether the applicant suffered prejudice from the lack of preservation by analyzing the merits of the issue and considering whether the applicant has established that the outcome would have been different had the issue been preserved. See Milledge v. State, 422 S.C. 366, 380, 811 S.E.2d 796, 804 (2018) (instructing that the PCR court is to evaluate prejudice when considering an applicant's claim that counsel failed to preserve an issue for appellate review by viewing "the trial court's ruling through

the same lens that would be applied on appeal . . . ") (citation omitted); see also McHam v. State, 404 S.C. 465, 474-82, 746 S.E.2d 41, 46-50 (2013) (holding the PCR court erred in finding counsel was not deficient in failing to preserve an issue for appellate review but agreeing with the PCR court that McHam failed to establish prejudiced because the Fourth Amendment claim failed on the merits), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). The purpose of the Miranda warnings is to apprise a defendant of his constitutional privilege not to incriminate himself while he is in the custody of law enforcement officers. State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 409-10 (2003) (citing Miranda, 384 U.S. at 444). Law enforcement officers are required to issue the Miranda warnings once they have taken someone into custody or otherwise deprived him in any way of his freedom of action. Id. at 410. In order to determine whether a suspect is in custody, a trial court has to "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." Id. (citations omitted). The determination of whether the suspect was in custody is an objective one "based on whether a reasonable person would have concluded that he was in police custody." Id. (citations omitted). "Simply because an interview takes place at a law enforcement center and at the initiation of police investigators does not render it a custodial interrogation. Rather, the fact a defendant voluntarily agreed to accompany investigators to their office and answer questions without being placed under arrest indicates a non-custodial situation." State v. Williams, 405 S.C. 263, 275, 747 S.E.2d 194, 200 (S.C. Ct. App. 2013) (quotation omitted).

On June 2, 2011, Investigator Miller asked two other officers to find Petitioner and take him to the LEC for a second interview at Miller's office, with the first having occurred on May 25, 2011. App. 85. Even though Investigator Miller had questioned Petitioner and victim's mother

already, it was too early for him to know what happened to victim. App. 85. He had compared victim's mother's statement given to Sergeant Jones at the hospital to his inspection of the victim's home to see if her statement matched the evidence. App. 435-36. The day after victim's mother gave a statement at the hospital, Miller had questioned her again and became suspicious of her when she changed her story. App. 448-49. When the pathologist issued a preliminary conclusion that victim had been strangled to death, Miller confronted victim's mother with that fact at the LEC, victim's mother gave a statement that sounded more truthful to him and implicated Petitioner; this caused Miller to want to speak to Petitioner again. App. 451-56. Thus, Miller asked the other officers to bring Petitioner to the LEC. App. 456-57.

Deputy Wilson was one of the two officers two picked up Petitioner on June 2. App. 585-87. The officers told Petitioner that they were interviewing everyone involved in the case and Petitioner agreed to be interviewed again at the LEC.[5] App. 587, 589. Petitioner informed the officers that he did not have a ride to the LEC, and they offered to drive him to the LEC in an unmarked police car and then take him back home afterwards or to let him find his own ride. App. 587-88. Petitioner accepted Wilson's officer to ride with the two officers and the trip lasted approximately twenty to thirty minutes. App. 587, 589. Wilson confirmed that Petitioner was not under arrest at that time and was not placed in handcuffs when they rode to the LEC. App. 587-88. Once they arrived at the LEC, Deputy Wilson stayed with Petitioner until Investigator Miller arrived and stayed throughout the interview. App. 590-91.

[5] Petitioner maintains that he was not given a choice about whether he would go to the LEC for questioning, but his testimony on the circumstances of the June 2 interview is not credible; he allegedly remembers only the self-serving parts of that interview and cannot remember any of the incriminating bits.

Miller confirmed that Petitioner was not under arrest when the June 2 interview began. App. 585-86. The interview took place in Miller's office. App. 459. Petitioner was sitting in a chair and was talking casually with the officers; he was not strapped to a chair or handcuffed. App. 460. Petitioner never told Miller that he did not want to be interviewed again or that, once the interview began, that he wanted to stop talking. App. 459-60. In fact, Petitioner seemed calmer to Miller at the start of the June 2 interview than he had seemed during the May 25 interview. App. 460. Miller offered free food and drink to Petitioner but Petitioner declined. App. 458, 461. Miller started the interview by saying that he wanted to go back over Petitioner's earlier statement and needed more information because Miller had spoken with victim's mother again and things "weren't adding up." App. 461. After about an hour of talking, Petitioner accepted Miller's offer to use the restroom, so Miller took him to the employee restroom because it was more convenient to their location than the public restroom. App. 461-62. Miller accompanied Petitioner to the employee restroom, as was required by the office policy. App. 462. When they returned to Miller's office, Miller talked to Petitioner about being truthful about what happened to victim and about Miller's findings from meeting again with victim's mother. App. 463. When Petitioner began sobbing and said that accidents happen, Miller told Petitioner that he understood and asked him to say "what [he was] talking about." App. 463. Petitioner told Miller that he hit victim in the head with a toy and then held his hand over victim's mother until she stopped crying to keep victim from waking up her mother and demonstrated how he held his hand over victim's mouth at Miller's request. App. 463-64. At that point, Miller took Petitioner into custody and gave him the Miranda warnings. App. 464. Petitioner went on to give a more detailed written statement after waiving his rights immediately after that.

Under the totality of the circumstances, a reasonable person in Petitioner's position would not have believed that he was in custody and would have believed that he was free to leave. Investigator Miller had questioned Petitioner at the LEC on May 25 and for that interview, had driven Petitioner to the LEC in his police car, told Petitioner that he was not under arrest, talked with Petitioner in his office at the LEC, and returned Petitioner to the hospital after the conclusion of the meeting. App. 79-85. The June 2 interview began in much the same way, and so Petitioner had no reason to doubt the officers when they told him that they just wanted to ask him questions at the LEC as part of their investigation and that they could transport him to and from the LEC. Petitioner volunteered to go to the LEC to speak with Investigator Miller again. Once at the LEC, just like before, Petitioner was seated comfortably in Miller's office. Petitioner was offered the courtesies of food, drink, and the use of the employee restroom. Petitioner was not handcuffed and was escorted to the bathroom only because such was required in the employee restroom per office policy. Investigator Miller began the June 2 interview by telling Petitioner that his statement did not match the one given by victim's mother; he did not spring that information on Petitioner right at the end in order to elicit something incriminating. See State v. Hill, 425 S.C. 374, 382, 822 S.E.2d 344, 348-49 (S.C. Ct. App. 2018) (finding Hill was in custody when he made he made an incriminating statement while noting that it was "striking" that there was a "distinct change in the purpose of the questioning" by the police when they began confronting Hill with evidence conflicting his story when police extended the interrogation after a break); State v. Navy, 386 S.C. 294, 303-04, 688 S.E.2d 838, 842 (2010) (finding an interrogation became custodial when, among other things, police "sprang" details about the victim's death on Navy confrontationally later in the interview in order to elicit an incriminating response). Even when Petitioner first told the officers that accidents happen, Petitioner was not in custody. Since both Petitioner and victim's

mother had told police already that victim's death was caused by an accidental choking, Petitioner's statement that an accident happened, without more damning context, was not inculpatory. Only once Petitioner admitted to covering victim's mouth until she stopped crying and demonstrating his hand placement over her mouth did he implicate himself in a crime. At that point, Investigator Miller considered Petitioner in custody and issued a Miranda warning. Since Petitioner was not in custody until that point, and "[t]he purpose of the Miranda warnings is to apprise a defendant of his constitutional privilege not to incriminate himself while he is in the custody of law enforcement officers, Miller was not required to inform Petitioner of his Miranda rights until Petitioner admitted to smothering victim. Evans, at 583, 582 S.E.2d at 409-10. Miranda warnings are only required for official interrogations when a suspect is in police custody or deprived of his freedom of action in a significant way. State v. Medley, 417 S.C. 18, 25, 787 S.E.2d 847, 851 (S.C. Ct. App. 2016) (quotations omitted). Petitioner's Miranda rights were not implicated until Petitioner made his confession after his restroom break, and Investigator Miller's questioning beforehand could not possibly have thwarted Miranda's purpose, which was applicable to Petitioner only after the confession. The PCR court was right to deny the application because no Seibert violation occurred.

The PCR court correctly denied Petitioner's application for post-conviction relief. This Court should affirm the PCR court's denial of relief.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the PCR court's finding that Petitioner has failed to prove that trial counsel was constitutionally ineffective for not raising and preserving a Seibert issue at trial.

Respectfully submitted,

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Petition for Writ of Certiorari to Greenville County
The Honorable G. Edward Welmaker, Trial Judge
The Honorable Robin B. Stilwell, PCR Judge

Appellate Case No. 2018-000600

JAMES ALLEN JOHNSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Brief of Respondent has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Lara M. Caudy, Esquire
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This 12th day of March, 2021.

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