STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

JAMES ALLEN JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000600

BRIEF OF PETITIONER

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ISSUE 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?

STATEMENT OF THE CASE

A Greenville County Grand Jury indicted Petitioner on September 13, 2011 for the offense of homicide by child abuse. App. 711-712. Petitioner's case was called to trial on June 13, 2013 before the Honorable G. Edward Welmaker, and a jury. App. 1. Assistant Solicitor Kris Hodge represented the state, and Dorothy Manigault represented Petitioner. App. 1. The jury found Petitioner guilty as indicted. App. 624, ll. 1-16. He was sentenced to sixty-two years' imprisonment. App. 631, ll. 23-25.

Petitioner filed a timely notice of appeal which was perfected by the Division of Appellate Defense. On appeal, Petitioner challenged the admissibility of his statement to law enforcement arguing the 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). The Court of Appeals affirmed Petitioner's conviction holding the issue was not preserved for appellate review where one ground was raised below and another ground was raised on appeal. State v. Johnson, Op. No. 2015-UP-378 (Ct. App. filed July 29, 2015); App. 776-777.

Petitioner filed a petition for rehearing on August 12, 2015. App. 693. The Court of Appeals denied the petition by order filed December 16, 2015. App. 693. Petitioner filed a petition for writ of certiorari with the Supreme Court on January 29, 2016. App. 693. The Supreme Court granted the petition by order filed December 2, 2016. In an unpublished opinion filed May 24, 2017, the Supreme Court affirmed the opinion of the Court of Appeals. State v. Johnson, Op. No. 2017-MO-009 (S.C. Sup. Ct. filed May 24, 2017); App. 690-691.

On June 13, 2017, Petitioner filed an application for post-conviction relief (PCR) raising the claim argued in this brief. App. 643-646. The state filed a return to this application dated October 24, 2017. App. 648-656. An evidentiary hearing was held on December 12, 2017 before the

Honorable Robin B. Stilwell. App. 657. Assistant Attorney General Deshawn Mitchell represented the state, and Rodney Richey represented Petitioner. App. 657.

By order dated March 21, 2018, the PCR judge denied Petitioner relief. App. 692-710. On November 20, 2018, Petitioner filed a petition for writ of certiorari with the Supreme Court. The state filed a return to this petition on January 4, 2019. By order filed January 15, 2019, the Supreme Court transferred this appeal to the Court of Appeals pursuant to Rule 243(l), SCACR. This Court granted the petition for writ of certiorari and ordered further briefing by order filed September 18, 2020.

This brief of petitioner follows.

STATEMENT OF FACTS

Petitioner Johnson was twenty-eight years old at the time of trial. The state prosecuted him for the death of his girlfriend's child. The trial judge held a pretrial hearing pursuant to State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981) regarding Johnson's mental competency. Dr. Richard Frierson testified that Johnson was intellectually disabled. Johnson's IQ was below seventy. App. 48, ll. 8-18. Frierson found that Johnson's ability to use the word "prosecute" was "pretty surprising given his intellectual functioning." App. 51, ll. 2-10. The doctor stated that Johnson's mental disability prevented him from maintaining competitive employment and speculated that "he might be able to go pick up trash somewhere, but he's not going to be able to support himself with work." App. 51, ll. 1-25. Johnson took two medications for major depression. App. 47, ll. 10-15. Dr. Frierson opined Johnson was competent to stand trial. App. 50, ll. 1-6.

Petitioner's codefendant, Georgia Ann Sprouse, was Minor's mother. App. 283, ll. 6-10. She was thirty-two years old at the time of trial. App. 282, ll. 10 – 12. She had three children by three different fathers. App. 282, l. 22 – 283, l. 23. She was charged with homicide by child abuse, aiding and abetting, and accessory after the fact. App. 282, ll. 19-21. From her testimony, it was apparent that Sprouse had a long history with the Department of Social Services (DSS), with "at least three different" investigations. App. 341, ll. 5-14. Minor was taken from Sprouse immediately upon birth because Minor tested positive for marijuana. App. 287, ll. 4-21. Sprouse also testified that every time her children had been removed from her custody it was related to her drug addiction. App. 289, ll. 5-21. Sprouse eventually got custody of Minor and her other daughter back after spending nine months at a drug rehabilitation facility. App. 288, ll. 1-17.

Sprouse met Johnson through her sister. App. 292, l. 17-18. The same day she met Johnson, she invited him to move in with her and they began a romantic relationship. App. 293, ll.

1-13. Sprouse depended upon government assistance and child support. App. 294, l. 23 – 295, l. 4. She was abusing drugs before she met Johnson. App. 293, ll. 22-24. She knew that Johnson received a disability check because of his intellectual disability. App. 295, ll. 5-7; App. 517, ll. 10-14. Because of Johnson's intellectual disability, he had to have a payee for his disability payments. App. 517, ll. 10-14. Johnson's brother testified that Johnson is not allowed to live by himself. App. 120, ll. 5-7.

At the end of April 2011, Johnson, Sprouse, and Sprouse's two daughters, including Minor, moved in with Sprouse's friend, Crystal Inman. App. 560, ll. 3-23. Inman was married and had three children. App. 209, l. 15 – 210, l. 8. Inman and Sprouse had been "childhood friends forever." App. 211, ll. 5-9.

On the afternoon of May 25, 2011, Inman asked Sprouse to ride with her to pick up her children from school, but Sprouse declined because she "was too high and [she] was tired." App. 305, ll. 3-11. Sprouse and Johnson were home alone with Minor and Sprouse's older daughter. App. 521, ll. 1-5. Minor was approximately one and a half years old and her sister was approximately two and a half years old. App. 283, ll. 6-10.

Sprouse gave several different versions of what happened to Minor that afternoon, but she told the first police officer who arrived at the scene that Minor "was drinking tea and she started choking and she threw up." App. 192, l. 24 – 193, l. 10. The police found a spot on the rug that they suspected was vomit. App. 428, l. 19 – 429, l. 4. Johnson told the same police officer, "I don't know what happened. I was in the bathroom." App. 193, ll. 5-7. Johnson was the one who called 911. App. 526, ll. 7-12.

Johnson testified that the children were playing in the living room when he went to the bathroom. App. 521, ll. 6-20. While he was in the bathroom, Sprouse yelled to him that Minor was

not breathing. App. 521, ll. 6-20. When Johnson got to the living room, he saw Minor was "already discolored." App. 521, ll. 6-20. Sprouse originally wanted to attempt to revive Minor themselves because she was afraid that if they called 911, the authorities would find marijuana and she would lose her children. App. 524, l. 16 – 526, l. 12. Johnson called 911 while Sprouse hid the marijuana. App. 524, ll. 16-20. A firefighter was the first to arrive and saw Sprouse performing chest compressions and Johnson "doing mouth-to-mouth rescue breathing on the child." App. 140, ll. 10-15. Emergency personnel took Minor to the hospital. App. 150, ll. 6-16.

The paramedics were able to regain a pulse. App. 188, l. 22 – 189, l. 10. At the hospital, Minor was placed on a ventilator. App. 360, ll. 22-24. Tragically, Minor suffered a "severe neurologic injury." App. 362, ll. 9-14. She was taken off life support on May 27, 2011 and died thereafter. App. 280, ll. 6-8.

Dr. Mary Fran Croswell, "a child abuse pediatrician," examined Minor while she was on life support. App. 360, ll. 13-17. She testified that the child had multiple bruises on her body. App. 362, l. 9 – 367, l. 6. Dr. Croswell opined that the location of some of the bruises raised "red flags for an abusive injury." App. 367, ll. 7-16.

The pathologist who performed the autopsy, Dr. Michael Ward, also found numerous bruises. App. 488, l. 5 – 489, l. 25. Despite the bruises, the autopsy revealed "no trauma" to any of the child's internal organs. App. 499, ll. 11-18. The pathologist opined that the child died of lack of oxygen to the brain. App. 496, ll. 1 - 19. There was no direct trauma to the brain. App. 496, ll. 1 - 19. Dr. Ward determined that the cause of death was anoxic brain injury due to suffocation and the manner of death was homicide. App. 592, ll. 10-16.

Sprouse gave three versions of what happened to Minor. Sprouse told the first police officer who arrived at the scene that Minor "was drinking tea and she started choking and she threw up."

App. 192, l. 24 – 193, l. 10. She told another deputy at the scene that "the child walked over to the table where there was a glass of tea, took a drink of tea, started choking, threw up" and then they called 911. App. 201, ll. 8-17. This deputy released Sprouse and Johnson from the scene and they went to the hospital. App. 203, ll. 9-15. Sprouse again told an investigator at the hospital that the child choked on tea and gave a written statement. App. 316, ll. 7-9. In her statement, she described the cup from which the child drank, described Minor throwing up and holding her until Sprouse realized Minor was not breathing, and described yelling for Johnson who was on the toilet. App. 326, l. 12 – 328, l. 16.

The next day, Sprouse changed her story. App. 316, ll. 10-16. This interview also took place at the hospital. App. 428, ll. 15-22. Sprouse told the police that she was in the kitchen when the child began choking. App. 323, l. 15 – 324, l. 3. She also now placed Johnson in the room with Minor when she started choking instead of in the bathroom. App. 448, l. 23 – 449, l. 5.

Between Sprouse's second and third versions, the child died and the autopsy was performed. App. 449, ll. 23-24; App. 450, l. 22 – 454, l. 14. Christopher Miller was the lead investigator on the case. App. 78, ll. 17-20. He attended the autopsy on May 28, 2011 and learned the pathologist's preliminary finding that Minor's death was a homicide resulting from suffocation. App. 450, l. 22 – 451, l. 22.

On June 2, 2011, Investigator Miller and two other officers located Sprouse at the mortuary and took her to the law enforcement center for questioning. App. 454, l. 10 – 455, l. 5. They told Sprouse the results of the autopsy and that her story was "just not making sense." App. 455, ll. 1-5. Miller told Sprouse, "We need the truth," and "pressed her pretty hard." App. 455, l. 4; App. 455, ll. 19-22. Sprouse then spun her third version of events—that she was asleep from smoking marijuana and was awakened by Johnson who told her that Minor was not breathing. App. 455, ll.

10-18. Sprouse used this third version as her trial testimony. App. 305, l. 3 – 306, l. 15. After the interview, the police gave her a ride back to the mortuary. App. 456, ll. 16-19.

On June 2, 2011, the police likewise took Johnson to the police station and three officers questioned him for an indeterminate amount of time, no shorter than one and a half hours, and possibly for as long as four or five hours. App. 410, ll. 15-25; App. 477, ll. 10-13; App. 586, l. 23 – 587, l. 3.

Before a bathroom break, Investigator Miller confronted Johnson with Sprouse's statement from earlier in the day. App. 88, ll. 4-13. Miller escorted Johnson to the bathroom. App. 88, l. 4 – 89, l. 11. When they returned, Miller told Johnson "that there was things that just didn't make sense, that I, you know, I needed the truth to come out." App. 88, ll. 20-22. He told Johnson that "sometimes accidents happen" and "that we do things sometimes that we don't intend to happen." App. 92, l. 12 – 93, l. 4. "I explained that I have kids and, you know, that I know what it's like to have a kid that's crying that just will not stop. And, you know, and that I understood where he was—why he was so frustrated." App. 92, l. 12 – 93, l. 4.

Johnson then supposedly told the three officers in the room that he threw a toy at Minor's head which caused her to cry. App. 88, l. 4 – 89, l. 11. Minor would not stop crying and fearing that it would awaken Sprouse, Johnson told the officer that "he held his hands over her nose and mouth to make her be quiet, and then she became unresponsive." App. 88, l. 4 – 89, l. 11. Investigator Miller then read Johnson his Miranda rights for the first time. App. 88, l. 4 – 89, l. 11. Johnson initialed and signed a waiver of rights form. App. 89, l. 5 – 93, l. 19; App. 463, l. 20 – 466, l. 25. After waiving his rights, Miller had Johnson repeat what he had said before he was advised of his rights. Miller typed a statement for Johnson, which Johnson initialed and signed. App. 467, l. 19 – 468, l. 12.

Defense counsel requested a pretrial hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964) regarding the admissibility of Johnson's statements. App. 43, ll. 10-20. During the Jackson v. Denno hearing, Investigator Miller told the trial judge that he started speaking to Johnson "probably sometime right before ten o'clock" on the night of June 2, 2011. App. 86, l. 21 – 87, l. 4. Johnson was already at the station when Miller returned from dropping Sprouse off at the mortuary. App. 96, ll. 10-23. Miller described Johnson as making incriminating statements after returning from a bathroom break and once these statements were made, Miller then read Johnson his rights. App. 88, l. 4 – 89, l. 11. During cross-examination, Miller testified that they had "been talking for about forty-five minutes to an hour" before the bathroom break. App. 98, ll. 13-18.

Miller confronted Johnson with Sprouse's statement from earlier in the day. App. 88, ll. 4-13. Miller then escorted Johnson to the bathroom. App. 88, l. 4 – 89, l. 11. When they returned, Miller told Johnson "that there was things that just didn't make sense, that I, you know, I needed the truth to come out." App. 88, ll. 20-22. He used the "sympathy" technique to question Johnson. App. 92, l. 12 – 93, l. 4. He told Johnson that "sometimes accidents happen" and "that we do things sometimes that we don't intend to happen." App. 92, l. 12 – 93, l. 4. "Sometimes we lose our temper." App. 92, l. 12 – 93, l. 4. "I explained that I have kids and, you know, that I know what it's like to have a kid that's crying that just will not stop. And, you know, and that I understood where he was—why he was so frustrated." App. 92, l. 12 – 93, l. 4.

It was then that Johnson began to make incriminating statements. Johnson supposedly told the officers that he threw a toy at Minor's head which caused her to cry. App. 88, l. 4 – 89, l. 11. Minor would not stop crying so "he held his hands over her nose and mouth to make her be quiet, and then she became unresponsive." App. 88, l. 4 – 89, l. 11. Miller then advised Johnson of his Miranda rights. App. 89, ll. 5-11. Johnson initialed and signed a waiver of rights form. App. 89, l.

5 – 91, l. 16. After waiving his rights, Miller had Johnson repeat the incriminating statements he made before he was advised of his rights. Miller typed a statement for Johnson, which Johnson initialed and signed. App. 467, l. 19 – 468, l. 12. Johnson was then placed under arrest and taken to jail. App. 94, l. 14 –App. 95, l. 21.

Investigator Jennings Autrey was also present during the interrogation. App. 61, ll. 15-19. Autrey confirmed that Johnson was already at the station when Autrey and Miller returned from driving Sprouse to the mortuary. App. 62, ll. 3-13. During his pretrial testimony, Autrey estimated the interview with Johnson lasted an hour and a half to two hours. App. 74, l. 20 – 75, l. 2. He conceded that Johnson "was a possible suspect at that time." App. 75, ll. 20-22. Autrey confirmed that Johnson was not advised of his Miranda rights until after he made incriminating statements. App. 75, l. 23 – 76, l. 8. During his testimony before the jury, Autrey estimated they had been with Johnson for an "[h]our, hour and a half" before Miranda warnings were given. App. 410, ll. 15-25.

The trial judge ruled that Johnson's statements were freely and voluntarily given and would be admitted. App. 121, ll. 18-25. Defense counsel renewed her objection to the admissibility of Johnson's statement when the officer testified concerning the interrogation during trial. App. 396, ll. 1-22. She again objected when the waiver of rights form and statement were admitted as State's Exhibits Nos. 40 and 41. However, counsel stated no basis for the objection and never mentioned Missouri v. Seibert, 542 U.S. 600 (2004). App. 402, ll. 17-25; App. 409, ll. 14-19.

Petitioner Johnson testified at his PCR hearing that his trial counsel did not properly represent him at trial. App. 663, ll. 1-25. He said his statement to the police should have been suppressed. Johnson acknowledged that the statement was an important part of the state's case against him. However, he did not remember giving the statement. App. 664, ll. 1-25.

Johnson testified that the Supreme Court held the issue concerning the admissibility of his statement was not preserved for appellate review because his trial counsel failed to object. Johnson asserted that this failure was why trial counsel was ineffective in representing him. He was prejudiced or hurt by counsel not preserving the issue because he believed the outcome of his trial would have been different if the statement had been suppressed. App. 665, l. 1 – 667, l. 1.

Petitioner Johnson told the PCR judge that he had nothing to do with the child's death. He declared that he was not guilty. App. 668, ll. 5-13.

Dorothy Manigault, Johnson's trial counsel, testified that she sought to suppress Johnson's incriminating statement to law enforcement pretrial. However, she admitted the issue was not preserved for appellate review because she failed to challenge the admissibility of the statement pursuant to Missouri v. Seibert, 542 U.S. 600 (2004). She agreed that the Supreme Court held the issue was not preserved. App. 676, ll. 1-20. Manigault further testified that Johnson insisted on going to trial in spite of the plea offers he received. App. 677, ll. 1-24.

On cross-examination, Manigault said she requested a Jackson v. Denno hearing because she believed Johnson's statement was not voluntary. However, she failed to raise Missouri v. Seibert when she argued the statement should be suppressed. App. 682, l. 2 – 684, l. 4.

Johnson's mother, Rebecca Parker, testified that Johnson's educational level was "low." She explained that he has issues with reading and understanding. She believed that Johnson's trial lawyer did not effectively represent him. App. 672, l. 20 – 674, l. 21.

In the order denying Johnson relief, the PCR judge found Johnson could not show he was prejudiced by trial counsel's failure to preserve the objection to the admissibility of his statement pursuant to Missouri v. Seibert for appellate review because Johnson failed to prove the issue would have been successful on appeal. Citing to McHam v. State, 404 S.C. 465, 746 S.E.2d 41, 47

(2013), the PCR judge found that when an issue was raised on direct appeal but found to be unpreserved, the applicant must prove the "underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability" in order to be entitled to relief. App. 706.

The judge concluded that Johnson's case is distinguishable from Missouri v. Seibert because in Seibert, the interrogating officer testified he made a conscious decision to withhold Miranda warnings. The officer said that he had been taught to question first, give the warnings, and then repeat the questions until he got the answer that the suspect had already provided once. App. 708.

However, in Johnson's case, the PCR judge found that Johnson was not under arrest and was involved in a "voluntary conversation" with the officers. When Johnson began to provide "inculpatory" information, the officer immediately stopped and advised Johnson of his Miranda rights. The judge determined this was not a case of "question first" as used in Seibert. Therefore, the judge found Johnson failed to show that the underlying claim was meritorious and would have resulted in reversal on appeal. App. 708.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). The Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). The Court reviews questions of law de novo, with no deference to trial courts. Id. at 180-181, 810 S.E.2d at 839-840 (citing Sellner, 416 S.C. at 610, 787 S.E.2d at 527).

ARGUMENT

The PCR court erred by finding trial counsel was not ineffective when she 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.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra.*

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

Our Supreme "Court has previously held that an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a PCR 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) and Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). In this case, trial counsel was undoubtedly ineffective for failing to object to the admissibility of Petitioner's statement pursuant to Missouri v. Seibert, 542 U.S. 600 (2004), thereby failing to preserve the argument for appellate review. See S.C. Dept. of Transport. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903, 907 (2007) (holding that in order to preserve an issue at trial for appellate review, the issue must be raised to and ruled upon by the trial court, raised by the appellant, raised in a timely manner, and raised to the trial court with sufficient specificity.)

"Since the 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." McHam, 404 S.C. at 475, 746 S.E.2d at 47; See 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.)

In Missouri v. Seibert, 542 U.S. 600 (2004), the United States Supreme Court held that Miranda warnings given mid-interrogation, after the defendant gave an unwarned confession, were ineffective, and thus confession repeated after warnings were given was inadmissible at trial. The Court also held that pursuant to Miranda, admissibility at trial of any custodial confession is conditioned on warning suspect of his rights; failure to give prescribed warnings and obtain waiver of rights before custodial questioning generally requires exclusion of any statements obtained.

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

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

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

> The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating potential left unsaid. The warned phase of questioning proceeded after a pause of only 15 to 20 minutes, in the same place as the unwarned segment.

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

In this case, three officers interrogated Johnson. App. 87, l. 23 – 88, l. 3. Investigator Miller admitted using the subtle tactic of sympathy to interrogate Johnson. App. 92, l. 12 – 93, l. 4. The police confronted Johnson with Sprouse's contention that he was alone in the room with Minor when she stopped breathing. App. 88, ll. 4-16. The police knew the findings from the autopsy. App. 450, l. 22 – 451, l. 22. If Investigators Miller and Autrey are to be believed, the pre-Miranda interrogation lasted approximately two hours.[1] App. 477, ll. 10-13; App. 410, ll. 15-25. However, if Deputy Wilson's testimony is to be believed that it "wasn't late, late afternoon" when he brought Johnson to the law enforcement center, then it is possible that the pre-Miranda interrogation lasted for more than three or four hours. App. 586, l. 23 – 587, l. 3. Deputy Wilson's testimony is consistent with the fact that Investigator Miller dropped Sprouse off at a place of business—the mortuary—and then returned directly to the station house where Johnson and Deputy Wilson were waiting. App. 392, l. 9 – 393, l. 7. Finally, unlike Siebert, Johnson is intellectually disabled. The facts of this case demonstrate that the three officers used "question-first" and Johnson's statements should have been suppressed under Seibert.

Miranda conditions "the admissibility at trial of any custodial confession on warning a suspect of his rights: failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained." Seibert, 542 U.S. at 608. Since Siebert prevents the late Miranda warnings from curing the earlier failure to warn, the

[1] It should be remembered that during his direct testimony at the Jackson v. Denno hearing, Miller told the trial judge that he did not start talking to Johnson until "probably sometime right before ten o'clock." App. 86, l. 21 – 87, l. 4.

state attempts to argue, and the PCR judge found, that Johnson was not "in custody" when he made his incriminating statements.

The talismanic invocation of the words "You're under arrest" does not determine whether a suspect is in custody and should receive Miranda warnings. "To determine whether a suspect is in custody, the trial judge must examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning." State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003). "The custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody." Id.

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

The Court in Evans held the defendant was in custody even though she was not formally arrested until shortly after making the statement. Id. at 584, 582 S.E.2d at 410. When analyzing whether the defendant was free to leave, the Court emphasized that the SLED agent accompanied her to the restroom and waited outside the door. Id. In this case, Investigator Miller did not wait outside the bathroom door like the SLED agent in Evans, but followed Johnson inside the bathroom. App. 462, ll. 3-20. The Court in Evans emphasized that the interview took place in a back office

and that it lasted three hours. Id. In this case, the interrogation was in a back office by three officers, not one, and lasted at least three hours—and perhaps as many as six hours. Finally, in Evans, the Court determined the police's purpose was important and used the fact that they challenged the defendant's story and switched officers to divine the officers' intent. Id. Here, Johnson was a suspect and was confronted by Sprouse's statement. App. 463, ll. 2-13. Unlike Evans, Johnson was brought to the police station by two officers. No one was with the intellectually disabled suspect, which shocked Johnson's brother. Johnson had no driver's license. Johnson was not free to leave and was in custody.

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

With this knowledge in hand, the police took Navy from his house to the police station. Id. He was not formally under arrest. He gave a statement that was not incriminating. Id. at 298, 688 S.E.2d at 839. Questioning continued and police confronted Navy with information from the autopsy. Id. at 298, 688 S.E.2d at 839-840. The Court found that "[a]t this juncture, the nature of the interrogation and respondent's status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation." Id. Without giving Miranda warnings, the police ultimately obtained a confession from Navy which they memorialized after having him sign a Miranda waiver. The Court ruled these statements violated Siebert and were inadmissible. Id. at 301-304, 688 S.E.2d at 841-843.

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

Seven years after Seibert and five years after our Supreme Court's opinion in Navy[2], the police in Greenville County were using a playbook the Courts had condemned. As in these cases, the Court should focus on the actions of these officers and ignore their many conclusory recitations that Johnson was free to leave. The refusal to give Miranda warnings in this case required suppression of Johnson's statement.

It is obvious that trial counsel was deficient for failing to object to the admission of Petitioner's statement pursuant to Missouri v. Seibert, 542 U.S. 600 (2004). Based on the foregoing argument, Petitioner has shown that he was prejudiced by counsel's deficient performance because if counsel had properly objected at trial, there is a reasonable probability the trial judge would have suppressed the statement and the outcome of Petitioner's trial would have been different. In the alternative, if counsel had properly objected at trial thereby preserving the issue for appellate review, even if the trial judge found the statement was admissible, there is a reasonable probability the appellate court would have held the statement should have been suppressed pursuant to Seibert and reversed Petitioner's conviction on appeal.

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[2] See State v. Navy, 370 S.C. 398, 653 S.E.2d 549 (Ct. App. 2006). This Court's holding that Navy was in custody and that Siebert applied was affirmed by our Supreme Court.

Respectfully, this Court should hold trial counsel was ineffective for failing to object to the admissibility of Petitioner's statement pursuant to Seibert, that Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability Petitioner's statement would have been suppressed had trial counsel properly objected, reverse Petitioner's conviction, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of December, 2020.