STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Greenville County
Robin B. Stilwell, Circuit Court Judge

Opinion No. 2022-UP-075 (S.C. Ct. App. filed February 16, 2022)
Lower Court Case No. 2017-CP-23-3817

JAMES ALLEN JOHNSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2022-000427

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on March 9, 2022.

QUESTION PRESENTED

Did the Court of Appeals err by affirming the post-conviction relief (PCR) court's finding that 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) and Miranda v. Arizona, 384 U.S. 436 (1966), where the statement was the result of a two phase interrogation of an intellectually disabled suspect who was in custody and was not advised of his Miranda rights until after he made incriminating statements, and when Petitioner was prejudiced by counsel's deficient performance because if counsel had properly objected, the trial judge would have excluded the statement and the outcome of Petitioner's trial would have been different, or if the trial judge erroneously admitted the statement, Petitioner 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.

During trial, the state admitted Petitioner's incriminating statement to law enforcement. While a pretrial hearing was held pursuant to Jackson v. Denno, 378 U.S. 368 (1964), Petitioner's counsel made no argument that his statement was inadmissible. In a conclusory manner, the judge found the statement was freely and voluntarily given. App. 121, ll. 18-24. When the state sought to admit Petitioner's statement during trial, Petitioner's counsel stated, "Subject to my previous objections in the Jackson v. Denno hearing, although she had never made any objections. App. 402, ll. 17-20. The judge admitted the statement "subject to objection." App. 402, ll. 21-22.

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 this Court on January 29, 2016. App. 693. This Court granted certiorari by order filed December 2, 2016. On May 24, 2017, after further briefing and oral argument, this Court affirmed holding Petitioner's argument that the trial court erred in admitting his incriminating statement was not preserved for appellate review. State v. Johnson, Op. No. 2017-MO-009 (S.C. Sup. Ct. filed May 24, 2017); App. 690-691.

The state prosecuted Petitioner for homicide by child abuse related to the death of his girlfriend's eighteen month old child, Minor. During a pretrial hearing pursuant to State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981), Dr. Richard Frierson explained that Petitioner is intellectually disabled. His IQ is below seventy. App. 48, ll. 8-18. Dr. Frierson remarked that Petitioner's ability to use the word "prosecute" was "surprising given his intellectual functioning." App. 51, ll. 2-10. Frierson concluded that Petitioner's intellectual disability prevented him from maintaining competitive employment. He maintained that while Petitioner "might be able to go pick up trash somewhere," he was not "able to support himself with work." App. 51, ll. 1-25. Petitioner was prescribed two medications for major depression. App. 47, ll. 10-15. Dr. Frierson concluded Petitioner, who was then twenty-eight years old, 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 placed in emergency protective custody immediately upon birth because she 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 received custody of Minor and her older daughter after spending nine months at a drug rehabilitation facility. App. 288, ll. 1-17.

Sprouse met Petitioner through her sister. App. 292, l. 17-18. The same day Sprouse met Petitioner, she invited him to move in with her and they began an intimate relationship. App. 293, ll. 1-13. Sprouse depended financially upon government assistance and child support. App. 294, l. 23 – 295, l. 4. She knew Petitioner received a monthly disability payment because of his intellectual disability. App. 295, ll. 5-7; App. 517, ll. 10-14. Because of Petitioner's intellectual disability, he had to have a payee for his disability payments. App. 517, ll. 10-14. Petitioner's brother testified that Petitioner is not allowed to live by himself. App. 120, ll. 5-7.

At the end of April 2011, about two months after the couple met, Petitioner, Sprouse, and Sprouse's two daughters, including Minor, moved in with Sprouse's childhood friend, Crystal Inman. App. 211, ll. 5-9; App. 560, ll. 3-23. Inman was married and had three children. App. 209, l. 15 – 210, l. 8. Neither Sprouse nor Petitioner had a car. In fact, Petitioner has never had a driver's license. They depended on Inman for transportation. App. 520, ll. 16-25.

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 Petitioner were home alone with Minor and Sprouse's older daughter, who was roughly two and a half years old. App. 521, ll. 1-5; App. 283, ll. 6-10.

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

At trial, Petitioner testified 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 that Minor was not breathing. App. 521, ll. 6-20. When Petitioner reentered the living room, he saw Minor was "already discolored." App. 521, ll. 6-20. Sprouse wanted to try to revive Minor herself because, if they called 911, she was afraid law enforcement would find marijuana and she would lose custody of her children. App. 524, l. 16 – 526, l. 12. Petitioner called 911 while Sprouse hid the marijuana. App. 521, ll. 18-20; App. 524, ll. 16-20. A firefighter was the first to arrive and saw Sprouse performing chest compressions and Petitioner "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 Minor's internal organs. App. 499, ll. 11-18. Dr. Ward concluded that Minor died from lack of oxygen to the brain. App. 496, ll. 1-19. He determined 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. She told the first officer who arrived at the residence that Minor "was drinking tea and she started choking and she threw up." App. 192, l. 24 – 193, l. 10. She told another officer at the house 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 officer allowed Sprouse and Petitioner to leave the residence and go to the hospital. App. 203, ll. 9-15. Sprouse again told an investigator at the hospital that Minor had choked on tea. She gave a written statement. App. 316, ll. 7-9. In her statement, Sprouse said that while Minor was playing in the living room, she walked to the coffee table and grabbed a plastic cup containing tea. Minor opened her mouth, "turned the plastic cup up and started drinking." Sprouse claimed Minor choked while drinking. In response, Sprouse raised Minor's arms up and patted her back. She claimed Minor threw up. Sprouse then held Minor until she realized Minor was not breathing. Sprouse described yelling for Petitioner who was in the bathroom. App. 326, l. 12 – 328, l. 16.

The next day, May 26, 2011, Sprouse changed her story. App. 316, ll. 10-16. This interview also took place at the hospital. Sprouse told the police that she was in the kitchen when Minor began choking. App. 323, l. 15 – 324, l. 3; App. 384, l. 11 – 385, l. 20. She now placed Petitioner in the living 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, Minor 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, along with Investigator Jennings Autrey and Deputy Jim Wilson, located Sprouse at the mortuary and took her to the law enforcement center for questioning. App. 390, l. 9 – 391, l. 2; 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. 390, ll. 20-23; 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 Petitioner who told her Minor was not breathing. App. 391, ll. 13-19; 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. 392, ll. 9-11; App. 456, ll. 16-19. By then, it was "late afternoon, evening time." App. 392, ll. 18-21.

On June 2, 2011, the police likewise took Petitioner 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 Petitioner with Sprouse's statement from earlier in the day. App. 88, ll. 4-13. Miller escorted Petitioner to the bathroom and followed him inside. App. 88, l. 4 – 89, l. 11. When they returned, Miller told Petitioner "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 Petitioner 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.

Petitioner 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 the

noise would awaken Sprouse, Petitioner told Miller 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. Miller then read Petitioner his Miranda rights for the first time. App. 88, l. 4 – 89, l. 11. Petitioner 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 Petitioner repeat what he had said before he was advised of his rights. Miller typed a statement for Petitioner, which Petitioner initialed and signed. App. 467, l. 19 – 468, l. 12. Petitioner was then placed under arrest and taken to jail. App. 94, l. 14 – 95, l. 21.

While a pretrial hearing was held pursuant to Jackson v. Denno, 378 U.S. 368 (1964), Petitioner's counsel made no argument that his statement was inadmissible. On June 13, 2017, Petitioner filed an application for post-conviction relief (PCR) alleging his trial counsel was ineffective for failing to object to the admissibility of his incriminating statement pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) and Missouri v. Seibert, 542 U.S. 600 (2004). 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.

Petitioner alleged during his evidentiary 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.

Petitioner explained that this Court held the issue concerning the admissibility of his statement was not preserved for appellate review because trial counsel failed to object. Petitioner asserted that this failure was why trial counsel was ineffective in representing him. He believed he

was prejudiced by counsel's deficient performance because the outcome of his trial would have been different if the statement had been suppressed. App. 665, l. 1 – 667, l. 1. Petitioner told the PCR judge that he had nothing to do with Minor's death and maintained his innocence. App. 668, ll. 5-13.

Dorothy Manigault, Petitioner's trial counsel, testified that she sought to suppress Petitioner's incriminating statement to law enforcement pretrial. She requested a Jackson v. Denno hearing because she believed Petitioner's statement was not voluntary. However, Manigault 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 recognized that this Court held the issue was not preserved. App. 676, ll. 1-20; App. 682, l. 2 – 684, l. 4.. Manigault further testified that Petitioner insisted on proceeding to trial in spite of the plea offers he received. App. 677, ll. 1-24.

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

By order dated March 21, 2018, the PCR judge denied Petitioner relief. App. 692-710. He found law enforcement did not employ the "question first" technique prohibited by Missouri v. Seibert and, therefore, Petitioner was not prejudiced by his counsel's failure to challenge the admissibility of his statement. The PCR judge's ruling was based in large part on the fact that the officers who interrogated Petitioner did not admit to employing the "question first" technique like the interrogating officer in Seibert. App. 708. However, this reasoning was rejected by this Court in State v. Navy, 386 S.C. 294, 304, 688 S.E.2d 838, 842 (2010). Moreover, trial counsel did not

specifically question Investigator Miller, or the other interrogating officers, about whether they were using this strategy since she failed to object pursuant to Seibert.

The PCR judge further found that Petitioner was not under arrest and was involved in a "voluntary conversation" with the officers. However, importantly, the judge emphasized that law enforcement's claim that Petitioner "was engaged in a voluntary conversation with the officers" was "dubious." See App. 708. Consequently, the judge concluded Petitioner failed to show the underlying claim was meritorious and would have resulted in reversal on appeal. App. 708.

On November 20, 2018, Petitioner filed a petition for writ of certiorari with this Court seeking review of the PCR judge's decision. The state filed a return to this petition on January 4, 2019. By order filed January 15, 2019, this Court transferred the appeal to the Court of Appeals pursuant to Rule 243(l), SCACR. The Court of Appeals granted the petition for writ of certiorari and ordered further briefing by order filed September 18, 2020. After briefing and oral argument, the Court of Appeals affirmed the ruling of the PCR court holding counsel was not ineffective for failing to object to the admissibility of Petitioner's statement pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) and Missouri v. Seibert, 542 U.S. 600 (2004) because Petitioner was not in custody and, consequently, the police were not required to advise Petitioner of his Miranda rights. Johnson v. State, 2022-UP-075 (S.C. Ct. App. filed February 16, 2022).

On March 3, 2022, Petitioner filed a petition for rehearing with the Court of Appeals. Six days later, by order dated March 9, 2022, the Court of Appeals denied rehearing. This petition for writ of certiorari to the Court of Appeals follows.

ARGUMENT

The Court of Appeals erred by affirming the post-conviction relief (PCR) court's finding that 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) and *Miranda v. Arizona*, 384 U.S. 436 (1966), where the statement was the result of a two phase interrogation of an intellectually disabled suspect who was in custody and was not advised of his *Miranda* rights until after he made incriminating statements, and when Petitioner was prejudiced by counsel's deficient performance because if counsel had properly objected, the trial judge would have excluded the statement and the outcome of Petitioner's trial would have been different, or if the trial judge erroneously admitted the statement, Petitioner would have prevailed on appeal.

Reason to Grant Certiorari

This Court should grant certiorari to review the decision issued by the Court of Appeals because this case involves substantial constitutional issues. See Rule 242(b)(4), SCACR. Pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, a criminal defendant is entitled to the effective assistance of counsel. Here, counsel performed deficiently by failing to object to the admission of Petitioner's incriminating statement pursuant to Missouri v. Seibert, 542 U.S. 600 (2004) and Miranda v. Arizona, 384 U.S. 436 (1966). Had counsel properly objected, the outcome of Petitioner's trial would have been different—the trial court would have suppressed Petitioner's incriminating statement and, without this damning evidence, there is a reasonable probability Petitioner would have been acquitted. Had counsel properly objected and the trial court erroneously admitted Petitioner's statement, there is a reasonable probability Petitioner would have prevailed on appeal. This Court should grant certiorari to review this substantial constitutional issue.

Discussion

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).

This "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 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, 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 the 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 a suspect of his rights and failure to give prescribed warnings and obtain a 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. The Court exclaimed:

> 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. 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; the sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble. 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. at 613.

The police in Seibert were surprisingly honest and admitted they were deliberately using the two phase "question first" strategy. Id. at 605-606. While law enforcement made no such admission in this case, Seibert recognized that such admissions are unnecessary: "Because the intent of the officer will rarely be as candidly admitted as it was here . . . the focus is on facts apart from intent that show the question-first tactic at work." Id. at 617 n.6; See State v. Navy, 386 S.C. 294, 304, 688 S.E.2d 838, 842 (2010) (stating "the Seibert Court acknowledged that it was unlikely that law enforcement would admit it was using the 'question first' technique, and thus evidence that officers were following this protocol was not necessary in order for a Miranda violation to be found.").

Although trial counsel never asked Investigator Miller, or the other interrogating officers, about whether they were using the "question first" strategy, the facts cited in Seibert showing the "question first" strategy are present in this case. In Seibert, the Supreme 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 604-605. Only one officer questioned Seibert. Id.

In this case, three officers interrogated Petitioner. App. 87, l. 23 – 88, l. 3. Investigator Miller admitted using the subtle tactic of sympathy to interrogate Petitioner. App. 92, l. 12 – 93, l. 4. The police confronted Petitioner 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: that Minor was suffocated and the manner of death was homicide. App. 450, l. 22 –

451, l. 22. If Investigators Miller and Autrey are to be believed, the pre-Miranda interrogation lasted between one and two hours. App. 477, ll. 10-13; App. 410, ll. 15-25. However, if Deputy Wilson is correct that it was "late afternoon" when he brought Petitioner to the law enforcement center, then it is possible 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 law enforcement center where Petitioner and Deputy Wilson were waiting. App. 392, l. 9 – 393, l. 7. Moreover, Autrey earlier admitted he and Miller returned to the law enforcement center after dropping off Sprouse to interrogate Petitioner around "late afternoon, evening time." App. 392, ll. 12-21. Finally, unlike Seibert, Petitioner is intellectually disabled. The facts of this case demonstrate that the three officers used "question first" and Petitioner'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 Seibert prevents the late Miranda warnings from curing the earlier failure to warn, the state argued, and the Court of Appeals agreed, that Petitioner was not "in custody" when he made his incriminating statements.

"In determining whether an interrogation was 'custodial' within the meaning of the Miranda rule, courts have considered the following factors: (1) whether the contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to interview; (2) whether the express purpose of the interview was to question the person as a witness or suspect; (3) where the interview took place; (4) whether the police informed the person he or she was under arrest or in custody; (5) whether they

informed the person he or she could terminate the interview and leave at any time or whether the person's conduct indicated an awareness of such freedom; (6) whether there were restrictions on the person's freedom of movement during the interview; (7) how long the interrogation lasted; (8) how many police officers participated; (9) whether they dominated and controlled the course of the interrogation; (10) whether they manifested a belief that the person was culpable and they had the evidence to prove it; (11) whether the police were aggressive, confrontational, or accusatory; (12) whether the police used interrogation techniques to pressure the suspect; and (13) whether the person was arrested at the end of the interrogation." State v. Williams, 405 S.C. 263, 276-277, 747 S.E.2d 194, 201 (Ct. App. 2013) (internal citation omitted). "The custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody." State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003).

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 officers took Evans "into a back office to take her statement." Id. Law enforcement knew the deadly fire they were investigating started with an accelerant. Id. The officers told Evans they did not believe her explanations for the fire. Id. at 581, 582 S.E.2d at 409. Ultimately, the two male officers left the room and sent in a female SLED agent, who used a sympathy tactic. Id. The two women were in the room for 45 minutes. Id. The agent followed Evans to the bathroom and waited outside the door. Id.

This Court held Evans 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 Evans was free to leave, this Court emphasized that the agent accompanied Evans to the restroom and waited outside the door. Id. In this case, Investigator Miller did not wait outside the bathroom door like the agent in Evans, but followed Petitioner 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 law enforcement's purpose was important and used the fact that the officers challenged Evan's story and switched officers to determine the officers' intent. Id. Here, *Petitioner was a suspect and was confronted by Sprouse's statement implicating Petitioner*. App. 463, ll. 2-13. Miller, like the SLED agent in Evans, used a sympathy tactic. Unlike Evans, Petitioner was brought to the law enforcement center by two officers. No one was with the intellectually disabled suspect, which shocked Petitioner's brother. Petitioner had no driver's license. He 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. 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 performing CPR on the child. 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 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. This Court found that "[a]t this juncture, the nature of the interrogation and [Navy'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. This Court ruled these statements violated Seibert 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. Police "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 Petitioner. Both men were picked up from their home by the police. *Both men were confronted with contradictory evidence. Petitioner was further confronted with Sprouse's statement implicating him in the crime.* See Williams, 405 S.C. at 201, 747 S.E.2d at 276 ("[A] police officer's subjective view that the person being questioned is a suspect, if undisclosed, does not bear upon the question of whether that person is in custody, and the same is true where the officer's undisclosed assessment is that the person being questioned is not a suspect. However, *an officer's knowledge or beliefs may bear upon the issue of whether the person being questioned is in custody if they are conveyed, by word or deed, to the person being questioned*; those beliefs are relevant only to the extent they would affect how a reasonable person in the position of the person being questioned would gauge the breadth of his or her freedom of action.") (emphasis added) (internal citation omitted). Both sets of officers knew the results of an autopsy. Neither Navy nor Petitioner received Miranda warnings until after they had confessed. Unlike Navy, though, Petitioner is intellectually disabled and even less capable of protecting himself from these police tactics.

In Williams, which was relied on heavily by the Court of Appeals in holding Petitioner was not in custody, the defendant was convicted of first degree criminal sexual conduct with a minor and unlawful conduct toward a child. 405 S.C. at 268, 747 S.E.2d at 197. Williams had cared for his girlfriend's fifteen month old daughter for about ten hours. Id. Later that evening, the child's mother took her to the emergency room after she noticed bruises on the child's face, arms, and genital area. Id. The following day, a detective visited the hospital to investigate the child's injuries. Id. He learned Williams had cared for the child on the day her injuries were

discovered. Id. The detective contacted Williams and asked him to come to the sheriff's department to talk to him. Id. Williams told the detective "he wanted to clear up the matter that night because he had a wedding to attend in Alabama the following day." Id. Williams arrived at the sheriff's department around 7:00 pm that night with his mother and daughter. Id. at 268-269, 747 S.E.2d at 197.

The detective escorted Williams to an interview room while his mother and child waited for him in the lobby. Id. at 269, 747 S.E.2d at 197. Another officer joined them after the detective had gotten some background information from Williams. Id. The detective told Williams that the child had bruises all over her body and showed Williams several photographs of the child. Id. When shown a photograph of bruising on the outside of the child's vagina, Williams said he had to put eczema cream on her vagina and did not realize how hard he was pressing. Id. at 270, 747 S.E.2d at 197. He further admitted he was angry about having to clean her and demonstrated how much force he had used. Id. The detective then stopped the interrogation and advised Williams of his Miranda rights. Id. After waiving his rights, Williams wrote a formal statement repeating the explanations he had given for the child's injuries. Id. at 270, 747 S.E.2d at 197-198. He added that he injured the child's vagina while cleaning her during a diaper change because he was angry. Id. at 270, 747 S.E.2d at 198.

Williams challenged the admissibility of his statement at trial and on appeal. The Court of Appeals held evidence supported the trial court's finding that Williams was not in custody before he was given his Miranda warnings. Id. at 278, 747 S.E.2d at 202. The court asserted, "He came to the Department voluntarily; his mother and young daughter were waiting for him; he wanted to get the matter taken care of before leaving the state for a wedding the following day; he talked with the detectives about [the child's] injuries for fifteen to twenty minutes before he was given Miranda warnings; he never asked if he could leave or asked for anything; and the

conversation leading to his incriminating statements included information about where he was from and his background." Id.

In contrast, in this case, Petitioner was picked up from the residence where he was staying by two officers and brought to the police station. He was not accompanied by any family members or friends. He was questioned for at least an hour and a half and confronted with his prior contradictory statements and with Sprouse's statement implicating Petitioner. Because Petitioner had previously been interviewed, none of the discussion consisted of Petitioner's background information. Petitioner's freedom of movement was restricted and he was accompanied to the bathroom by Investigator Miller, who even entered the bathroom with Petitioner. After the bathroom break, Miller began to use a sympathy tactic to elicit a confession from Petitioner. No similar techniques were used on Williams. While an objectively reasonable person in Williams's position, who again had voluntarily arrived at the sheriff's department with his mother and daughter, questioned for at most twenty minutes, and was not confronted with any contradictory statements, may have felt free to leave, the same simply cannot be said of Petitioner.

All but perhaps one of the factors used to determine whether an interrogation was custodial for purposes of Miranda cited by the Court of Appeals in Williams support the conclusion that Petitioner was in custody: (1) the contact was initiated by the police; (2) the purpose of the interview was to question Petitioner as a suspect as he was one of only two people home with Minor at the time she sustained her injuries; (3) the interrogation took place at the police station, a more restrictive environment than Petitioner's home or other location; (4) while the police did not inform Petitioner he was under arrest or in custody, a reasonable person in his position would have understood himself to be in custody; (5) the police never informed Petitioner he could terminate the interview or leave at any time; (6) there were restrictions on

Petitioner's freedom of movement demonstrated by Investigator Miller accompanying Petitioner not only to the bathroom but inside the bathroom; (7) the interrogation lasted at least an hour and a half and perhaps as long as three hours before Petitioner was advised of his Miranda rights; (8) three officers were involved in the interrogation; (9) Investigator Miller dominated and controlled the course of the interrogation; (10) Investigator Miller confronted Petitioner with his prior contradictory statements and with Sprouse's statement implicating Petitioner indicating Miller believed Petitioner was culpable; (11) as mentioned, Miller was both confrontational and accusatory as he confronted Petitioner with his prior inconsistent statements and Sprouse's statement; (12) Investigator Miller admitted to using a sympathy technique to obtain a confession from Petitioner; and lastly (13) Petitioner was arrested at the end of the interrogation. See Williams, 405 S.C. at 276-277, 747 S.E.2d at 201.

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

Respectfully, this Court should grant certiorari, hold trial counsel was ineffective for failing to object to the admissibility of Petitioner's statement pursuant to Miranda and Seibert and that Petitioner was prejudiced by counsel's deficient performance, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. If this Court grants the petition, but dispenses with further briefing, Petitioner respectfully requests this Court reverse the decision of the post-conviction relief court, reverse Petitioner's conviction, and remand for a new trial.

Respectfully Submitted,

LARA M. CAUDY
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of April, 2022.

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Apr 13 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Greenville County
Honorable Robin B. Stilwell, Circuit Court Judge

Opinion No. 2022-UP-075 (S.C. Ct. App. filed February 16, 2022)

Lower Court Case No. 2017-CP-23-3817

JAMES ALLEN JOHNSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case have been served on Taylor Z. Smith, Esquire, at the primary email address listed in the Attorney Information System (AIS), and James Allen Johnson, #355670, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201, this 13th day of April, 2022.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER