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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals

The Honorable G. Edward Welmaker, Trial Judge
The Honorable Robin B. Stilwell, PCR Judge

Appellate Case No. 2022-000427

JAMES A. JOHNSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

ALAN WILSON
Attorney General

TAYLOR ZANE SMITH
Assistant Attorney General
S.C. Bar No. 103282

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-0904

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON CERTIORARI

PETITIONER'S ISSUE 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 a 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?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE

Did the Court of Appeals correctly affirm the PCR court's finding that Petitioner failed to prove that trial counsel was constitutionally ineffective for not moving to suppress Petitioner's statement to law enforcement officers in reliance upon Missouri v. Seibert, 542 U.S. 600 (2004), when Petitioner was not in custody during the first part of the officers' interview of Petitioner and when the officers gave the warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), once Petitioner made an incriminating statement about his role in the victim's death?

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). On June 3, 2013, Petitioner proceeded to a jury trial with the Honorable G. Edward Welmaker (“trial court”) presiding. Petitioner was represented at that trial by Dorothy A. Manigault (“trial counsel”). 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 (“appellate counsel”) represented Petitioner on appeal. Appellate counsel argued before the South Carolina Court of Appeals that the trial court erred in admitting Petitioner’s statement to law enforcement officers 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, the Court of Appeals affirmed Petitioner’s conviction and sentence. State v. Johnson, Op. No. 2015-UP-378 (S.C. Ct. App. filed July 29, 2015) (per curiam). Appellate counsel filed a petition for rehearing, arguing that the Court of Appeals’ finding that the Seibert issue had not been preserved for direct appellate review created an incentive for trial courts not to take argument on the issue before issuing rulings and that the circumstances of the officers’ interview of Petitioner resembled those present in State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010). The Court of Appeals denied appellate counsel’s petition.

Appellate counsel filed a petition for a writ of certiorari in this Court, arguing: (1) that the Court of Appeals erred in finding that the Seibert issue had not been preserved for appellate review;

and (2) that the Court of Appeals erred in upholding the admission of Petitioner's statement to the officers. This Court granted appellate counsel's petition, but affirmed after oral argument in an unpublished opinion, finding that the Seibert issue had not been preserved for review. 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 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 denying the application and dismissing it with prejudice. Petitioner's notice of appeal followed. On November 20, 2018, Petitioner filed a petition for a writ of certiorari with this Court, arguing that the PCR court erred in finding that trial counsel was not ineffective for not raising a Seibert objection to the admission of Petitioner's statement to the officers. This Court transferred the appeal to the Court of Appeals, which then granted a writ of certiorari. After hearing oral argument, the Court of Appeals affirmed in an unpublished, per curiam opinion. Supp. App. 1-3. The Court of Appeals also denied Petitioner's petition for rehearing. Supp. App. 4-19.

STATEMENT OF FACTS

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 ("the victim"). App. 55. At the home, Petitioner spontaneously and without any prompting told Deputy Mathias that Petitioner was in

the bathroom when the incident occurred and that he did not know what happened. App. 56-57. Investigator Jennings Autrey, who was an investigator looking into the victim's death, spoke at the hospital with Georgia Ann Sprouse, the victim's mother, and Petitioner, once the victim had been transported there. App. 59. Investigator Autrey asked Petitioner to explain what happened, and Petitioner told him that he had been in the bathroom at the time of the choking incident and had called 911 for help when he heard Sprouse yelling for him to do so, and that the only thing he saw was Sprouse on the floor performing CPR on the victim. App. 60-61.

Sergeant Christopher Miller was the lead investigator into the victim's death. App. 78. He spoke with Petitioner at the hospital, and Petitioner agreed to ride with Sgt. Miller to the Law Enforcement Center ("the 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, Sgt. Miller did not read the Miranda rights to Petitioner. App. 81. Petitioner gave a verbal statement about 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 Sgt. Miller to know what had happened to the victim, and he was treating Petitioner as a witness. App. 84-85. After the meeting ended, Sgt. Miller returned Petitioner to the hospital. App. 85.

On June 2, 2011, Sgt. 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 because the coroner had since ruled that the victim's death was a homicide. App. 85, 88, 95. Sergeant Miller had already interviewed Sprouse on multiple occasions and did not know whether Petitioner or Sprouse 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 that interview and the statement that Petitioner gave during it. App. 61. At the beginning of the second meeting, the officers did not give the Miranda warnings because they considered Petitioner only a “possible suspect” or person of interest at that time. 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 had been in the bathroom at the time of the choking incident and that he had heard Sprouse yell for him to call 911, that he had never seen Sprouse be mean to the victim, that he did not like the victim’s biological father, and that Sprouse was scared to call 911 when the victim was choking because Sprouse had 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 the victim and himself to have peace, that he did not hurt the victim “that he knows of,” that he picked up the victim and saw that she was not breathing, that he thought that the victim was sleeping and that he wanted everyone to leave so that he could have the victim, that accidents happen sometimes, that he hit the victim in the head with a toy and then covered her mouth to keep her from crying, and that he concocted the story about the victim’s choking on tea. App. 64-65, 88. At that point, the officers gave the 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 Sgt. Miller, especially the one on June 2, 2011. App. 103. He claimed to have been smoking marijuana and taking 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.¹ 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 other particulars of the interview. App. 105-111. The trial court found by a preponderance of the evidence that Petitioner's statements to the officers were freely and voluntarily given and left it to the jury to make the ultimate determination. App. 121.

Testimony from the State's case-in-chief

Firefighter Phillip Reynolds was dispatched to the 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 victim, but he saw that Sprouse and Petitioner were performing CPR on the victim. App. 140. He did not see another child near the victim. App. 161. He observed bruises on the victim's body but denied that the CPR performed by the first responders caused them. App. 144, 162. Petitioner spontaneously told Reynolds that he had been in the bathroom when the victim choked on tea. App. 145. Reynolds did not see any ice or vomit near the victim but did see some tea in a cup. App. 163-64. After the ambulance left with the victim, one of the adults at the home said that the victim choked on tea. App. 163.

First responder Joseph Alexander Key responded to the scene, too, though he arrived after the firefighters did so. App. 165-67. He also noticed that the crowd at the home was not helpful in directing him to the victim and were smoking cigarettes. App. 168-69. He was suspicious because the adults at the home were unhelpful and seemed unconcerned, and because the victim's family

¹ 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 had been heavily intoxicated. App. 117, 577-79.

members declined to ride to the hospital in the back of the ambulance with the victim when asked if they wished to do so. App. 171-73. The 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 victim's body and that the intubation would have torn her frenulum. App. 174-75. The victim regained her heartbeat near the destination hospital but had to be airlifted to another hospital. App. 176.

First responder James Clardy was at the victim's home, too. App. 180. An adult male outside the home, cigarette in hand, flippantly waived him inside; the victim's family members were not helpful to Clardy, either. App. 182-83 He did not see anyone who appeared to be one of the victim's parents, only adults standing around outside. App. 184. He described the bruising on the victim's body and testified that the victim's airway had been clear. App. 185-87. He denied that the intubation would have torn the victim's frenulum. App. 187. He thought it strange that the victim's family members did not want a ride to the hospital. App. 186.

Deputy Kevin James Azzara testified that he arrived at the home after the victim had been taken away in the ambulance. App. 200. Those at the scene told him that the victim choked on tea, and Petitioner said that he believed that he and Sprouse were going to be in trouble. App. 201. Sprouse wanted to go to the hospital, and Deputy Azzara believed that Sprouse said that she and Petitioner had been in the living room when the victim choked. App. 201, 206.

Crystal Inman, a childhood friend of Sprouse, with whom the victim, Sprouse, the victim's sister, and Petitioner lived, testified that Petitioner favored the victim's sister over the victim, and that Petitioner had blamed the victim's sister for a bruise on the victim and said that the victim fell down some stairs. App. 209-11, 224-26. Inman noticed bruises appearing on the victim's body not

long before her death. App. 226-28. After the victim stopped breathing, Inman saw that her lips had turned blue, that Sprouse 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. Sprouse and Petitioner stayed in the basement while the officers were at the home and did not appear to be upset; she felt that Sprouse was insufficiently upset. App. 236, 247.²

Sprouse testified that 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. The victim had been removed from Sprouse's care by the Department of Social Services in the past. App. 287. Sprouse, 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 the victim on the back. App. 296. Petitioner provided Sprouse with explanations for the bruises that started appearing on the victim's body about one week before the victim's death. App. 298-300. Sprouse did not see Petitioner abuse the children, but she knew that Petitioner preferred the victim's sister over the victim, and that Petitioner would even push the 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 had been sleeping when Petitioner woke her to say that the victim was not breathing, she saw that the 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

² Tina Collins was Sprouse's mother and the victim's grandmother; she testified that the victim's sister told her on the day after the incident, without being prompted to do so, that the victim choked on tea and that Petitioner covered the victim's nose and mouth and "boom, boom, boom." App. 256-57, 269-70, 277. The trial court found that that spontaneous statement was not admissible.

was disconnected, Petitioner delayed his second call so that he could hide marijuana that he and Sprouse had been smoking in the home. App. 307-08. Vomit started coming out of the victim's mouth. App. 308. Petitioner told her that the victim choked on tea and told her to repeat the story so that others would not think that Sprouse was a bad mother. App. 309-11. She admitted to lying to first responders and police initially because she had been 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 had 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 that he "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 the victim at the hospital. App. 354. The victim did not have a disorder that caused her to bruise easily. App. 359. Dr. Croswell saw bruising on the 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 had been explained adequately by the victim's family members. App. 367-69, 371. She testified that the victim's torn frenulum indicated that the victim suffered from blunt force trauma or was suffocated, and she thought that it would have been "atypical and unusual" for the bruises to have been caused by a two-year-old child. 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.

Sergeant 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 the victim choked, blamed others for the victim's injuries, and speculated that the victim choked on a bracelet. App. 440-46.

Sergeant Miller did not have plans to arrest Petitioner after that interview. App. 448. He became suspicious of Sprouse after meeting with her again the following day. App. 448-49. After the pathologist reached the preliminary conclusion that the victim had been strangled, Sgt. Miller interviewed Sprouse again at the LEC. App. 450-455. The officers' second interview of Petitioner at the LEC took place after Sgt. Miller's meeting with Sprouse. 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. Sergeant Miller considered Petitioner a person of interest when that second interview began. App. 475. After the officers confronted Petitioner with the statement from Sprouse, Petitioner's story changed: he gave a verbal statement and demonstrated how he had held his hand over the victim's nose and mouth. App. 463-64, 474. Sergeant Miller stopped the interview and gave the Miranda warnings to Petitioner, at which point Petitioner waived his rights and gave another verbal statement. App. 464-67. 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 the victim's head that was in the pattern of a beaded necklace, saw that the victim's frenulum had been torn and her lip had been bruised, and believed that pressure had been applied upward against the victim's mouth, an injury which could not have been caused by the performance of CPR. App. 488-92. He determined that the victim was brain dead before life support was withdrawn, a condition that had been caused by a lack of oxygen supplied to the 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 the victim's sides were caused when someone squeezed her.

App. 498-99. He opined that the victim's death was not caused by her 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 the 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 Sprouse told him that the victim was not breathing. App. 521, 564-65. He estimated that he had been in the bathroom for two to three minutes when Sprouse shouted out. App. 524. He claimed that he had to convince Sprouse to call 911 because he, Sprouse, 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 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 had been intoxicated at the time, but he recognized the signature on the waiver form as his own and remembered speaking to Sgt. Miller. App. 530-40, 545, 553. He claimed to have taken more drugs during a bathroom break during the interview on June 2, although Sgt. Miller had not seen 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 case-in-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 had not been under arrest at the time and had not appeared intoxicated, and had been able to 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)). The PCR court's findings regarding prejudice are based on a thorough review of the record as a whole, and, accordingly, are inherently fact-based and must be afforded deference by a reviewing appellate court. See Briggs v. State, 421 S.C. 316, 334, 806 S.E.2d 713, 723 (2017) ("The PCR court found the case 'came down to the victim's believability and credibility.' The PCR court found the most damaging testimony to Briggs . . . was not reliable because [the witnesses'] 'credibility is highly suspect.' Finally, the PCR court found 'there is a reasonable probability that the result of the Applicant's trial would have been different' if Singleton had not allowed Arroyo-Staggs to improperly bolster the victim. Giving to the factual findings by the PCR court the deference we are required by law to give, we affirm the court's finding that Briggs proved prejudice, satisfying the second prong Strickland."). 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 Court of Appeals correctly affirmed the PCR court's finding that Petitioner failed to prove that trial counsel was constitutionally ineffective for not moving to suppress Petitioner's statement to law enforcement officers in reliance upon Missouri v. Seibert, 542 U.S. 600 (2004), because Petitioner was not in custody during the first part of the officers' interview of Petitioner and because the officers gave the warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), once Petitioner made an incriminating statement about his role in the victim's death.

The PCR court found that Petitioner failed to prove that trial counsel was constitutionally ineffective for not preserving a Seibert argument for direct appellate review because, even if trial counsel had specifically cited the case in her argument regarding the issue, Petitioner failed to prove that he would have resulted in a reversal of his conviction on appeal. App. 707-08. The Court of Appeals agreed with the PCR court, as its citations indicate that it also found that no Seibert violation occurred during the officers' interview of Petitioner due to the fact that Petitioner was not in custody during the first part of his statement to the officers. App. 2. Petitioner argues that the Court of Appeals erred in affirming the PCR court's findings because Petitioner was subjected to an unwarned, custodial interrogation just as was the defendant in Navy. Petitioner's argument fails because Petitioner was not in custody when he started giving the relevant statement to the officers, and the officers immediately gave the Miranda warnings once Petitioner 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 the Miranda warnings were given when the interviewing law enforcement officers had employed a protocol of custodial interrogation that involved their not giving the 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 in the home. Id. Seibert's young

son had 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 when they set it ablaze a (living) mentally ill teenager, who had been staying with the family, so that he would burn up with the body of Seibert's already deceased son. Id. Police arrested Seibert five days later but intentionally did not notify her of the Miranda rights at the time. Id. They took Seibert to the police station and left her alone in the interview room for 15 to 20 minutes, and then questioned her, still without giving the warnings, until such time as 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 the Miranda warnings, obtained a signed waiver of Seibert's rights, and elicited a second confession by confronting Seibert with the statements that she made in the first part of the interview. Id. The officer acknowledged for the trial court that he had intentionally withheld the warnings because he had been employing an interrogation technique in which he would question a defendant first, then issue the warnings, and then repeat the questions until he received the answer that the defendant had already provided before the warnings had been given. 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 after the warnings were given. 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 have been 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 the 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.

If trial counsel had made a Seibert argument to the trial court and preserved the issue for direct appellate review, Petitioner's conviction would have been affirmed regardless because Petitioner was not in custody when he began giving the relevant statement to the officers. 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). 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). “Our cases make clear, in no uncertain terms, that any inquiry into whether the interrogating officers have focused their suspicions upon the individual being questioned (assuming those suspicions remain undisclosed) is not relevant for purposes of Miranda.” Stansbury v. California, 511 U.S. 318, 326 (1994) (citation omitted). “The initial determination of whether an individual was in custody

depends on the objective circumstances of the interrogation, not the subjective views harbored by either the interrogating officers or the person being questioned.” State v. Easler, 327 S.C. 121, 128, 489 S.E.2d 617, 621 (1997) (citation omitted), overruled on other grounds by State v. Greene, 423 S.C. 263, 814 S.E.2d 496 (2018). “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 (Ct. App. 2013) (quotation omitted). A questioning is not custodial merely because it took place at a police station, “even if police view the person questioned as a suspect.” State v. Hill, 425 S.C. 374, 381, 822 S.E.2d 344, 348 (Ct. App. 2018) (citations omitted).

On June 2, 2011, Sgt. Miller asked two other officers to find Petitioner and take him to the LEC for a second interview at Sgt. Miller’s office, with the first having occurred on May 25, 2011. App. 85. Even though Sgt. Miller had questioned Petitioner and Sprouse already, it was too early for him to know what happened to victim. App. 85. He had compared Sprouse’s statement given to Sgt. Jones at the hospital to his inspection of the home to see if her statement matched the evidence. App. 435-36. The day after Sprouse gave a statement at the hospital, Sgt. 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 the victim had been strangled to death, Sgt. Miller confronted Sprouse with that fact at the LEC, and Sprouse gave a statement that sounded more truthful to him and implicated Petitioner; this caused him to want to speak to

Petitioner again. App. 451-56. Thus, Sgt. Miller asked the other officers to bring Petitioner to the LEC. App. 456-57.

Deputy Wilson was one of the two officers who 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.³ 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 offer 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 Sgt. Miller arrived and stayed throughout the interview. App. 590-91.

The June 2 interview took place in Sgt. 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

³ 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.

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. Sgt. 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, 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 Sgt. Miller again. Once at the LEC, just like before, Petitioner was seated comfortably in Sgt. 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 (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); Navy, at 303-04, 688 S.E.2d at 842 (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 Sprouse had told police already that the victim's death was caused by an accidental choking, Petitioner's statement that an accident happened, without more damning context, was not incriminating. Only once Petitioner admitted to covering the 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, Sgt. Miller gave the Miranda warnings. 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," Sgt. Miller was not required to inform Petitioner

of the Miranda rights until Petitioner admitted to smothering the victim. Evans, at 583, 582 S.E.2d at 409-10. The 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 (Ct. App. 2016) (quotations omitted). Petitioner's Miranda rights were not implicated until Petitioner made his confession after his restroom break, and Sgt. 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.

Petitioner contends that “[t]he facts of this case eerily resemble [Navy].” There are some similarities between the two cases, which is due to some extent to the similarities in the ways that Navy and Petitioner killed their child victims; however, the nature of the officers’ questioning in Navy can be distinguished from the officers’ actions in this case. In that case, the defendant “remained upset and crying throughout the entire period from the time the officers arrived at the home . . . until they obtained the third statement[,]” which covered a period of time of about four hours. Navy, at 297, 688 S.E.2d at 839. After the officers took Navy’s first statement, they informed him that the victim had been suffocated and had broken ribs, and then followed up with questions “specifically” about the way in which Navy had comforted the victim. Id. at 298, 688 S.E.2d at 840. After giving Navy a smoke break, the officers also asked him if he had used his hand to cover the child’s “nose area” in addition to the child’s mouth, if he had covered the child’s nose and mouth for a longer period of time than he had previously admitted to them, if the child was still breathing when he stopped covering the child’s nose and mouth, if he balled his fist when he struck the child on the back, how much force he used to strike the child’s back, the reason that

he struck the child in the back. Id. at 299-300, 688 S.E.2d at 840-41. The officers' questions of Navy were related to the injuries that the officers had just described to him, and would have been obviously so related to a reasonable person in that situation. The officers' questions were not merely questions used to gather facts, they specifically went to the child's manner of death, which they had just described to Navy. And the officers challenged Navy by asking him to admit specifically to more and more incriminating conduct related to that manner of death. By way of contrast, Sgt. Miller's questions were more open ended, were not specifically tied to a cause of death, and were not accusatory challenges to Petitioner's version of events. Furthermore, Petitioner was not as upset as Navy throughout the course of the interview. App. 64. All of these facts distinguish this case from Navy.

Additionally, the factual findings of the trial court and PCR court deserve deference. Petitioner testified during the pre-trial hearing that the officers told him on June 2 that he had to go with them to the LEC. App. 103, 113. He also testified that he had been smoking marijuana and taking Xanax before the officers arrived to take him to the LEC and that he took more Xanax during his bathroom break at the LEC. App. 103-04. Nevertheless, the trial court found that Petitioner's statements to the officers were admissible because they were given freely and voluntarily. App. 121. The trial court found the statement admissible despite hearing Petitioner's testimony, which means that the trial court must have found that Petitioner's testimony was not credible. And the trial court admitted both the first part and the second part of Petitioner's June 2 statement; since the first part of that statement was given when the Miranda warnings had not yet been given, the trial court necessarily determined that Petitioner had not been in custody at that time. The PCR court agreed with the trial court, writing, "The record reflects that [Petitioner] was

not under arrest and was engaged in a voluntary conversation with the officers.” App. 708. Thus, two circuit court judges have found that Petitioner was not in custody during the first part of his June 2 statement. Even if the question of whether a reasonable person would have believed himself to have been in custody at the time that he gives a statement to officers is debatable, a trial court’s finding that that person was not in custody should be upheld if it is supported by the record. Navy, at 301, 688 S.E.2d at 841 (citation omitted). This Court should defer to the trial court and the PCR court on this issue, as the Court of Appeals did.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

TAYLOR ZANE SMITH
Assistant Attorney General
S.C. Bar No. 103282

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

By: s/Taylor Zane Smith
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

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