

2013 WL 5666867 (Mo.App. W.D.) (Appellate Brief)
Missouri Court of Appeals, Western District.

Harrell L. JOHNSON, Appellant,
v.
STATE OF MISSOURI, Respondent.

No. WD76012.

October 7, 2013.

Appeal from the Circuit Court of Jackson County, Missouri 16th Judicial Circuit
The Honorable John M. Torrence, Judge
Division 14

Appellant's Statement, Brief, and Argument

[Susan L. Hogan](#), #33194, Appellate Defender, Office of the State Public Defender, Western Appellate/Pcr Division, 920 Main Street, Suite 500, Kansas City, Missouri 64105, Tel: (816) 889-7699, Fax: (816) 889-2001, Susan.Hogan@mspd.mo.gov, Counsel for Appellant.

***1 INDEX**

Table of Authorities	2
Jurisdictional Statement	5
Statement of Facts	6
Point Relied On	12
Argument	13
Conclusion	25
Certificate of Compliance and Service	26
Appendix	electronically filed

***2 TABLE OF AUTHORITIES**

CASES

Aaron v. State , 81 S.W.3d 682 (Mo. App. 2002)	15
Argersinger v. Hamlin , 92 S.Ct 2006 (1972)	14
Bram v. United States , 168 U.S. 532 (1897)	15
Brown v. Illinois , 422 U.S. 590 (1975)	15
Edwards v. Arizona , 451 U.S. 477 (1980)	12, 17
Evitts v. Lucey , 105 S.Ct. 830(1985)	14
Gideon v. Wainwright , 83 S.Ct. 752 (1963)	14
Hall v. State , 16 S.W.3d 582 (Mo. banc 2000)	15
Mallett v. State , 769 S.W.2d 77 (Mo. banc 1989)	15
Malloy v. Hogan , 378 U.S. 1 (1964)	15
Miranda v. Arizona , 384 U.S. 436 (1966)	16
North Carolina v. Butler , 441 U.S. 369 (1979)	16
Powell v. Alabama , 53 S.Ct 55 (1932)	14
Rhode Island v. Innis , 446 U.S. 291 (1980)	16
State v. Fakes , 51 S.W.3d 24 (Mo. App., W.D. 2001)	16
State v. Greer , 159 S.W.3d 451 (Mo. App., E.D. 2005)	12, 17
State v. Johnson , 316 S.W.3d 491 (Mo. App. 2010)	10
*3 State v. Mitchell , 2 S.W.3d 123 (Mo. App., S.D. 1999) .	15
State v. O'Toole , 619 S.W.2d 804 (Mo. App., E.D. 1981)	16
State v. Simmons , 944 S.W.2d 165 (Mo. banc 1997)	12, 17
Strickland v. Washington , 104 S.Ct 2052 (1984)	15

<i>Zink v. State</i> , 278 S.W.3d 170 (Mo. banc 2009)	14
STATUTES	
Section 477.070, RSMo 2000	5
Section 565.020, RSMo 2000	5, 6
Section 568.045, RSMo 2000	5, 6
Section 568.080, RSMo 2000	5, 6
UNITED STATES CONSTITUTION	
U.S. Const., Amend. V	12, 14, 15, 16
U.S. Const., Amends. VI and XIV	12, 13, 14, 15, 16
MISSOURI CONSTITUTION	
Mo. Const., Art. I, Sections 10 and 18(a)	12, 13, 14
Mo. Const., Art. I, Section 19	12, 14, 15, 16
Mo. Const., Article V, Section 3	5
*4 RULES	
Missouri Supreme Court Rule 29.15	5, 6, 10, 12, 13, 14

***5 JURISDICTIONAL STATEMENT**

Harrell L. Johnson appeals the denial, after an evidentiary hearing, of his [Rule 29.15](#) motion for postconviction relief by the Honorable John M. Torrence, Judge of Division 14, Circuit Court of Jackson County. The judgment sought to be vacated was for one count each of murder in the first degree, [Section 565.020 RSMo 2000](#), endangering the welfare of a child in the first degree, [Section 568.045 RSMo 2000](#), and child abuse resulting in death, [Section 568.080 RSMo 2000](#). Mr. Johnson was sentenced to consecutive terms of life in prison without probation or parole for murder in the first degree, four years in prison for endangering the welfare of a child, and twenty-five years in prison for child abuse. Following denial of his [Rule 29.15](#) motion, Mr. Johnson filed a timely notice of appeal on January 10, 2013.

This appeal does not involve any matters reserved for the exclusive jurisdiction of the Missouri Supreme Court. Jurisdiction over this cause lies with the Missouri Court of Appeals, Western District. [Mo. Const., Article V, Section 3](#); [Section 477.070, RSMo 2000](#).

***6 STATEMENT OF FACTS**

The state charged Appellant, Harrell Johnson, in the Circuit Court of Jackson County with one count each of murder in the first degree, [Section 565.020, RSMo 2000](#), endangering the welfare of a child in the first degree, [Section 568.045, RSMo 2000](#), and child abuse resulting in death, [Section 565.080, RSMo 2000](#) (L.F. 43-44).¹ The state alleged that on April 28, 2001, Mr. Johnson, after deliberation, caused the death of Erica Green by causing a closed [head injury](#) and failing to seek medical attention for her (L.F. 43-44). The case went to trial on October 1, 2008 (Tr. 2-3). Evidence adduced at trial was as follows.

Erica Green's remains were found on April 28 and May 1, 2001 (Tr. 137, 146-147, 170, 280-281). Erica's mother, Michelle Johnson, pleaded guilty to murder in the second degree and testified against Mr. Johnson (Tr. 280, 282).

Erica Green was born to Michelle Johnson² while Michelle was in prison in Oklahoma in 1997 (Tr. 286). Erica's father was Larry Green (Tr. 285-286). Shortly after Erica's birth, Michelle entrusted Erica to Betty Brown, a friend who lived in Oklahoma ***7** (Tr. 287). Erica lived with Michelle for a time after Michelle was released from prison, but Michelle took Erica back to Ms. Brown after several months (Tr. 287-288)

Michelle became involved with Mr. Johnson and moved with him from Oklahoma to Kansas City in 2001 (Tr. 289). In Kansas City, they stayed with their infant daughter Markeshia in the back room at the home of Mr. Johnson's cousin, at 4101 E. 59th

Street (Tr. 288-291). After they had been in Kansas City for some time, Michelle travelled to Oklahoma and brought Erica back with her to Kansas City (Tr. 291-292).

On the night of Erica's injury, Mr. Johnson had been using PCP (Tr. 294, 357). Michelle told Erica to go to bed (Tr. 295). Michelle then left the room and took a bath (Tr. 295). When she came back, Erica was standing up (Tr. 296). Michelle again told Erica to lie down (Tr. 296). Michelle was sitting on the bed, and Erica was standing a few feet from her, with Mr. Johnson behind her (Tr. 296-297).

Michelle said that Mr. Johnson raised his foot up and kicked Erica in the head (Tr. 298). Erica immediately lost consciousness (Tr. 300-301). Michelle took Erica to the bathroom and tried to revive her with cold water (Tr. 299). Michelle said that they both were aware that something was seriously wrong with Erica, but neither called 911 or made any effort to seek treatment for her, because they had outstanding warrants (Tr. 300-301, 303, 305-306).

For some time, between ten hours and three days, Erica remained unresponsive (Tr. 302). Michelle testified that Mr. Johnson was aware that Erica was unlikely to regain consciousness on her own, and that she thought that Erica would die without *8 medical attention (Tr. 306, 333). Michelle testified that Erica died without ever regaining consciousness or responding in any way (Tr. 301-302, 304).

After Erica died, Mr. Johnson climbed out the window and Michelle passed him Erica's body, then Michelle climbed out the window herself (Tr. 308). Mr. Johnson carried Erica's body to the woods at 59th and Kensington (Tr. 308-309). They undressed her body; Michelle returned to the house at that point and rejoined Mr. Johnson later (Tr. 310-311). Mr. Johnson used hedge clippers he had brought from the house to cut off Erica's head (Tr. 309, 310). He put her body in the woods and put her head into two trash bags he found on the way (Tr. 310-311, 360). He put her head into a dumpster outside a church (Tr. 310-311). Michelle retrieved Erica's head from the dumpster, then they walked up the street and Mr. Johnson put Erica's head in the woods (Tr. 310-312).

On April 28, 2001, a Kansas City Missouri police officer was in the area of 59th and Kensington looking for an **elderly** man who had wandered away (Tr. 136, 139-140). As the officer was walking down a gravel road in the woods, he saw Erica's body about seven or eight feet off the road (Tr. 136, 140, 146-147, 148). There was very little blood around her body (Tr. 156). On May 1, 2001, Erica's head was found in two trash bags in a nearby wooded area, close to 59th and Cypress (Tr. 170, 175).

A month or two after Erica's death, Mr. Johnson and Michelle moved to Chicago; they later returned to Oklahoma (Tr. 313).

In May 2005, Kansas City Missouri Police Department detectives travelled to Muskogee, Oklahoma, in response to a tip from Mr. Johnson's grandfather (Tr. 343). Detectives spoke to Michelle, who gave a statement and also asked to see Mr. Johnson *9 (Tr. 348-349). With detectives in the room, Michelle told Mr. Johnson "that she had come clean, she had told the truth, and he should do the same" (Tr. 350). Michelle and Mr. Johnson were seated in front of each other, face-to-face and knee-to-knee, and were not handcuffed (Tr. 349). Mr. Johnson spoke to the detectives shortly thereafter and gave a videotaped statement later that night (Tr. 353, 360-361). Over defense counsel's objection, the detective who interviewed Mr. Johnson summarized what Mr. Johnson told him, and the videotaped statement was played for the jury (Tr. 355, 357-361, 365).

Mr. Johnson told the police that he and Michelle had been staying in the back room of his cousin's house with Erica and their young daughter Markeshia (Tr. 357). On the night of the incident, Mr. Johnson was using PCP (Tr. 357). Mr. Johnson admitted that he got agitated with Erica and grabbed Erica's shoulder and kicked her at the same time, and that Erica hit the floor with her head and became unconscious (Tr. 358). Mr. Johnson admitted that he and Michelle stayed with Erica for about ten hours before she died, and then after she died they waited until it got dark outside before they moved her body (Tr. 358-359). Mr. Johnson told the police that they dressed Erica in clothes to take her out of the house, that he and Michelle took her body into the woods and disrobed her, and that he cut off her head with a pair of hedge clippers (Tr. 359). Mr. Johnson at first put the head in a nearby dumpster, but then moved it further into the wooded area (Tr. 360).

Dr. Thomas Young performed the autopsy on Erica's body before her head was found (Tr. 227-228, 231). Erica's body was at "the very, very early stages of decomposition," consistent with having been placed in the woods late on April 27, 2001 *10 or early on April 28, 2001 (Tr. 232-233). Because there was no evidence of blood loss, Dr. Young was certain that Erica had already died by the time she was decapitated (Tr. 235-237).

On May 1, 2001, Dr. Young examined Erica's head and found hemorrhaging in the deep scalp tissues on the front, the top, the back, and the right side (Tr. 238-239, 240-242). Dr. Young also observed a [subdural hematoma](#) and large areas of [subarachnoid hemorrhage](#), which indicated bleeding under the membranes surrounding the brain (Tr. 243-246). Dr. Young concluded that the act of kicking a child in the head could have caused the injuries he saw, and that the cause of Erica's death was a closed [head injury](#) (Tr. 248-249).

Mr. Johnson was convicted on all three counts charged (Tr. 474-475), and was sentenced to consecutive terms of life in prison without probation or parole for murder, four years in prison for endangering the welfare of a child, and twenty-five years in prison for child abuse (L.F. 787).

On direct appeal, this Court affirmed Mr. Johnson's convictions and sentences and issued its mandate on September 2, 2010 (PCR L.F. 95); *State v. Johnson*, 316 S.W.3d 491 (Mo. App. 2010).

Mr. Johnson filed a timely pro se [Rule 29.15](#) motion on November 12, 2010 (PCR L.F. 2, 3-89). Appointed postconviction counsel filed a timely amended motion on February 28, 2011 (PCR L.F. 2, 90, 92, 94-142). The amended motion alleged that Mr. Johnson received ineffective assistance of appellate counsel when his attorney on direct appeal failed to argue that the trial court erred in overruling Mr. Johnson's motions to *11 suppress the statement Mr. Johnson made to the police after his arrest in Muskogee, Oklahoma (PCR L.F. 95-106).

An evidentiary hearing was held on September 15, 2011 (PCR L.F. 1; PCR Tr. 34). Evidence adduced at the hearing will be set forth where relevant in the Argument section of this brief.

On December 11, 2012, the hearing court issued findings of fact and conclusions of law denying Mr. Johnson's motion for postconviction relief (PCR L.F. 1, 143-148). This appeal follows (PCR L.F. 1, 149).

***12 POINT RELIED ON**

The hearing court clearly erred in denying Appellant's [Rule 29.15](#) motion for postconviction relief, because Appellant has established that appellate counsel failed to act as a reasonably competent attorney, in violation of Appellant's rights to due process of law and to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by [Article I, Sections 10 and 18\(a\) of the Missouri Constitution](#), when counsel failed to challenge on direct appeal the trial court's decisions to overrule Appellant's motions to suppress Appellant's statement to the police and to admit the statement into evidence. The record reflects that Appellant's statement was obtained by the use of physically and psychologically coercive measures, prior to advising Appellant of his right to remain silent. As a result of appellate counsel's failure to raise this issue on direct appeal, Appellant was denied the opportunity to present the issue of the voluntariness of his statement to this Court on direct appeal. A reasonable probability exists that the result of the appeal would have been different if counsel had raised this issue on direct appeal.

Edwards v. Arizona, 451 U.S. 477 (1980);

State v. Greer, 159 S.W.3d 451 (Mo. App., E.D. 2005);

State v. Simmons, 944 S.W.2d 165 (Mo. banc 1997);

U.S. Const. Amends. V VI and XIV;

Mo. Const., Art. I, Sections 10, 18(a), and 19; and

Missouri Supreme Court Rule 29.15.

*13 ARGUMENT

The hearing court clearly erred in denying Appellant's [Rule 29.15](#) motion for postconviction relief, because Appellant has established that appellate counsel failed to act as a reasonably competent attorney, in violation of Appellant's rights to due process of law and to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by [Article I, Sections 10 and 18\(a\) of the Missouri Constitution](#), when counsel failed to challenge on direct appeal the trial court's decisions to overrule Appellant's motions to suppress Appellant's statement to the police and to admit the statement into evidence. The record reflects that Appellant's statement was obtained by the use of physically and psychologically coercive measures, prior to advising Appellant of his right to remain silent. As a result of appellate counsel's failure to raise this issue on direct appeal, Appellant was denied the opportunity to present the issue of the voluntariness of his statement to this Court on direct appeal. A reasonable probability exists that the result of the appeal would have been different if counsel had raised this issue on direct appeal.

The hearing court clearly erred in denying Harrell Johnson's [Rule 29.15](#) motion for postconviction relief. Mr. Johnson has established that appellate counsel Ruth Sanders provided ineffective assistance of counsel when she failed to challenge on direct appeal the trial court's decisions to overrule Harrell Johnson's motions to suppress Mr. Johnson's statement to the police, and to admit the statement into evidence. The record [*14](#) reflects that Mr. Johnson's statement was obtained by the use of physically and psychologically coercive measures prior to advising Mr. Johnson of his right to remain silent. As a result of appellate counsel's failure to raise this issue on direct appeal, Mr. Johnson was denied the opportunity to present the issue of the voluntariness of his statement to this Court on direct appeal. A reasonable probability exists that the result of the appeal would have been different if counsel had raised this issue on direct appeal. Mr. Johnson has been denied his rights to remain silent, to the effective assistance of appellate counsel, to a fair trial, and to due process of law, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and by [Article I, Sections 10, 18\(a\), and 19 of the Missouri Constitution](#).

Appellate review of a hearing court's decision in a [Rule 29.15](#) proceeding is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. [Rule 29.15\(j\)](#). A hearing court's rulings are deemed clearly erroneous only if a review of the entire record leaves the appellate court with a definite and firm impression that a mistake has been made. [Zink v. State](#), 278 S.W.3d 170, 175 (Mo. banc 2009).

The right to the effective assistance of counsel is mandated by the Sixth Amendment to the United States Constitution and is a fundamental right guaranteed to state defendants through the Fourteenth Amendment. *Gideon v. Wainwright*, 383 U.S. 303 (1966); *Powell v. Alabama*, 392 U.S. 51 (1968); *Argersinger v. Hamlin*, 409 U.S. 30 (1972). Harrell Johnson was entitled to the effective assistance of counsel on his direct appeal. *Evitts v. Lucey*, 453 U.S. 392 (1981).

[*15](#) The standard for assessing appellate counsel's performance is the same as that for trial counsel. *Mallett v. State*, 769 S.W.2d 77, 83 (Mo. banc 1989). A post-conviction litigant must show that his attorney failed to exercise the level of skill and diligence that a reasonably competent attorney would in a similar situation and that he was prejudiced by that failure. *Strickland v. Washington*, 476 U.S. 661 (1986). "To succeed on an ineffective assistance of appellate counsel claim, 'strong grounds must exist showing that counsel failed to assert a claim of error which would have required reversal had it been asserted on appeal and which was so obvious from the record that a competent and effective lawyer would have recognized it and asserted it.'" *Aaron v. State*, 81 S.W.3d 682, 697 (Mo. App. 2002), quoting, *Hall v. State*, 16 S.W.3d 582, 587 (Mo. banc 2000).

Mr. Johnson has established that appellate counsel Ruth Sanders provided ineffective assistance of counsel when she failed to challenge on direct appeal the trial court's decisions to overrule Mr. Johnson's motions to suppress his statement to the police and to admit the statement into evidence.

No person “shall be compelled in any criminal case to be a witness against himself.” *Bram v. United States*, 168 U.S. 532, 542 (1897); U.S. Const., Amend. V. The freedom from self-incrimination under the Fifth Amendment applies to the states through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964); U.S. Const., Amends. V, XIV; see also, Mo. Const., Art. I, §19. On a motion to suppress, the state bears the burden of showing by a preponderance of the evidence that the motion should be denied. *Brown v. Illinois*, 422 U.S. 590, 504 (1975); *State v. Mitchell*, 2 S.W.3d 123, 124 (Mo. App., S.D. 1999).

***16** To protect an individual's privilege against self-incrimination, certain warnings must be given before a statement made during custodial interrogation can be admitted in evidence. *Miranda v. Arizona*, 384 U.S. 436, 478-479 (1966); U.S. Const., Amend. V, XIV; Mo. Const., Art. I, §19. Under *Miranda*, any confession made by an accused in connection with an in-custody interrogation will be presumed to be involuntary in violation of the Fifth Amendment, unless the accused is first informed that he has a right to remain silent, that anything said can and will be used against him, that he has the right to consult a lawyer, and that if he is indigent a lawyer will be appointed to represent him. *Miranda v. Arizona*, 384 U.S. at 444; *State v. Fakes*, 51 S.W.3d 24, 27 (Mo. App., W.D. 2001); U.S. Const., Amend. V.

“Custodial interrogation” means “questioning initiated by law enforcement officers.” *Miranda v. Arizona*, 384 at 444. “Custodial interrogation” occurs either when a suspect is formally arrested or under any other circumstances where the suspect is deprived of his freedom of action in any significant way. *Id.* “Interrogation” for purposes of Miranda warning is “either express questioning or its functional equivalent.” *Rhode Island v. Innis*, 446 U.S. 291, 301-302 (1980); *State v. O'Toole*, 619 S.W.2d 804, 810 (Mo. App., E.D. 1981).

After initially being advised of the Miranda rights, an accused may himself validly waive his rights and respond to interrogation. *North Carolina v. Butler*, 441 U.S. 369, 372-376 (1979). “[W]aivers of counsel must not only be voluntary, but also must constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case ‘upon the particular facts and ***17** circumstances surrounding that case, including the background, experience, and conduct of the accused.’” *Edwards v. Arizona*, 451 U.S. 477, 483 (1980). Whether a confession is voluntary depends on “whether the totality of the circumstances created a physical or psychological coercion sufficient to deprive the defendant of a free choice to admit, deny or refuse to answer the examiner's questions.” *State v. Greer*, 159 S.W.3d 451, 457 (Mo. App., E.D. 2005), quoting, *State v. Simmons*, 944 S.W.2d 165, 173 (Mo. banc 1997). To determine whether a confession resulted from improper mental coercion, the court considers the defendant's age, experience, intelligence, gender, education, and any infirmity or unusual susceptibility to coercion. *Greer*, 159 S.W.3d at 457.

The state charged Mr. Johnson with one count each of murder in the first degree, endangering the welfare of a child in the first degree, and child abuse resulting in death (L.F. 43-44). Mr. Johnson file a *pro se* motion to suppress the statement that he made to Kansas City Police Department detectives in Muskogee, Oklahoma (L.F. 97-98), and Mr. Johnson's appointed trial attorneys filed two more motions to suppress the statement (L.F. 178-203, 322-328).

The reasons alleged in the second motion filed by trial counsel included the fact that Mr. Johnson was in custody on a warrant from Wagoner County, Oklahoma, and was transported from Wagoner County to Muskogee County for questioning, even though there was no warrant for his arrest issued by Muskogee County (L.F. 322-328). This motion alleged that the Oklahoma authorities colluded with the Kansas City Police Department to transfer Mr. Johnson to Muskogee County, without a warrant or any legal ***18** authority to do so, in order to remove him from access to the attorney who had been appointed to represent Mr. Johnson in Wagoner County (L.F. 322-328).

The motion to suppress filed by Mr. Johnson's first team of attorneys alleged the same matters set forth above, and also included a claim that the Oklahoma and Kansas City law enforcement officers used psychologically coercive techniques to get Mr. Johnson to talk about the circumstances surrounding the death of Erica Green (L.F. 178-203). This motion alleged that the officers first "softened up" Mr. Johnson by having his wife, and later co-defendant and state's witness, Michelle Johnson, talk to Mr. Johnson about Erica's death before the Kansas City officers gave him the Miranda warnings and before the detectives asked whether he would speak to them about Erica's death and what happened thereafter (L.F. 193-196).

The court held a two-day hearing on the motions to suppress, and later Mr. Johnson also testified in support of the motions (Supp. Tr. I 2; Supp. Tr. II 2). Evidence adduced at the hearing and at trial established that Muskogee County law enforcement officers arrested Mr. Johnson on a warrant out of Wagoner County, Oklahoma (Supp. Tr. 112-13, 54, 70-71, 115-119, 121-122; Supp. Tr. II 6-9, 13-14, 28; Tr. 369). Mr. Johnson was taken to Wagoner County, where he went to court and an attorney was appointed on the Wagoner County case (Supp. Tr. II 52). Officers later transported Mr. Johnson back to Muskogee County to meet with the detectives from the Kansas City Police Department (KCPD) (Supp. Tr. 170-71, 98, 130-132). The KCPD detectives did not have a warrant for the arrest of either Michelle or Harrell Johnson (Supp. Tr. 1179).

***19** Mr. Johnson testified at the suppression hearing that when he was questioned by the KCPD detectives, he told Detective Danny Phillips over twenty times that he wanted to speak with an attorney (Supp. Tr. II 38-39, 43, 45-46). Despite these repeated requests, Detective Phillips did not cease his attempts to question Mr. Johnson, and did not honor his request for a lawyer (Supp. Tr. II 43-46, 64-65). Additionally, Mr. Johnson testified that the detectives took him to a separate room, where he was crying and concerned about what was happening to Michelle Johnson; while they were in that room, Detective Phillips put his hand on the back of Mr. Johnson's head and slammed Mr. Johnson's head against the table (Supp. Tr. II 39-41, 43-45, 63). Mr. Johnson testified that he was scared and that he was forced into giving a statement (Supp. Tr. II 40, 43, 66).

Regarding the allegation that the police tried to "soften up" Mr. Johnson, evidence presented at the suppression hearing established that Michelle Johnson asked to be allowed to meet with and talk to Mr. Johnson (Supp. Tr. 118-19, 81-83; Tr. 348-349). The detectives agreed to let her meet with Mr. Johnson, after she finished speaking with the detectives (Supp. Tr. I 19-20, 85-87, 92; Tr. 349). Michelle gave a statement to the detectives (Tr. 348-349).

After Michelle gave her statement, she was allowed to meet with Mr. Johnson (Supp. Tr. I 21, 92, 94-95; Supp. Tr. II 40, 57). Michelle and Mr. Johnson were not handcuffed, and they were allowed to embrace and talk at close quarters (Supp. Tr. I 21-22, 148; Tr. 349-350). According to the officers, Michelle urged Mr. Johnson to "come ***20** clean" and tell the truth (Supp. Tr. 1151, 158; Tr. 349-350). Mr. Johnson started to cry (Supp. Tr. 1150, 158; Tr. 352-353).

The meeting between Michelle and Mr. Johnson lasted for about 20 minutes (Supp. Tr. I 22; Tr. 353). Immediately following the meeting, Mr. Johnson was taken to an interrogation room, where he signed a *Miranda* waiver and made a videotaped statement, in which he admitted to striking Erica Green around the head, not seeking medical treatment for her, and ultimately disposing of her body after she died (Supp. Tr. I 25-28, 99-100; Tr. 353-361).

The court overruled the motions to suppress Mr. Johnson's statement to the KCPD detectives (L.F. 283, 679-680), and Mr. Johnson's statement was admitted into evidence at trial (Tr. 350-351, 355, 361-362). Mr. Johnson was convicted of all three counts charged and was sentenced to life without probation or parole, plus twenty-nine years (L.F. 787; Tr. 474-475). Trial counsel preserved the issue in the motion for new trial (L.F. 768, 773, 775-776).

On direct appeal, appellate counsel Ruth Sanders argued only that the evidence adduced at trial was insufficient to support a finding beyond a reasonable doubt of deliberation, and that therefore the evidence was insufficient to support a guilty verdict for murder in the first degree (PCR Tr. 20, 22-23).

At the evidentiary hearing on the [Rule 29.15](#) motion, attorney Kent Hall testified that he and Christopher Slusher represented Mr. Johnson at his trial on the charges arising out of the death of Erica Green (PCR Tr. 4-5). Mr. Hall and Mr. Slusher took over

the case from prior counsel in April 2007 (PCR Tr. 5). Mr. Hall and Mr. Slusher believed *21 the most prejudicial evidence against Mr. Johnson consisted of Michelle's anticipated trial testimony, the evidence of Mr. Johnson's confession, and evidence concerning the use of drugs on the days leading up to the event (PCR Tr. 6). Trial counsel decided to pursue the defense that the death of Erica Green was the result of the lesser-included offense of involuntary manslaughter, in that there was evidence that Mr. Johnson did not deliberate, but was intoxicated and acted reflexively in the heat of the moment (PCR Tr. 5-6).

Mr. Hall and Mr. Slusher filed the second motion to suppress Mr. Johnson's statement to the police (PCR Tr. 7). Mr. Hall testified that he and Mr. Slusher believed that Mr. Johnson was being held illegally at the time he was interrogated, that Mr. Johnson did not knowingly and voluntarily waive his rights under Miranda, and that Mr. Johnson was denied access to the lawyer who had been appointed to represent him on the case in Wagoner, Oklahoma (PCR Tr. 8-9). The authorities transferred Mr. Johnson from one county, Wagoner County, to another county, Muskogee County, for the purpose of questioning him, and Mr. Hall and Mr. Slusher believed that the police did that for the sole purpose of denying Mr. Johnson the right to confer with his court-appointed attorney (PCR Tr. 9; Supp. Tr. II 52-53). The transfer also denied Mr. Johnson the opportunity to make bond, and Mr. Johnson was held in a facility in which the telephone did not work, so he could not even contact a bail bondsman (PCR Tr. 10; Supp. Tr. II 34). The Kansas City detectives also did not have a valid arrest warrant for Mr. Johnson (PCR Tr. 10-11).

Mr. Hall testified that it was apparent to him that there was collusion between the Kansas City, Missouri Police Department and the sheriffs in Muskogee County and *22 Wagoner County in Oklahoma to get Mr. Johnson into an isolated situation where he could be interrogated without any opportunity to talk to an attorney (PCR Tr. 10). Mr. Hall testified that the allegation of psychological coercion of Mr. Johnson was also part of the theory supporting the motions to suppress (PCR Tr. 11).

Mr. Hall testified that he and Mr. Slusher wanted to keep Mr. Johnson's statement out of evidence because it was highly prejudicial to Mr. Johnson's defense (PCR Tr. 12). Without Mr. Johnson's statement, the state was left with the forensic evidence concerning Erica Green's body and its discovery, and the testimony of Michelle Johnson (PCR Tr. 12). Mr. Hall described Michelle as having significant credibility issues; Mr. Hall believed that if Mr. Johnson's statement was suppressed, the defense would be able to successfully attack Michelle's credibility and raise a doubt in the minds of the jury as to whether her testimony was believable (PCR Tr. 12-13). Part of the goal of the motion to suppress was to advance the defense of the lesser-included offense (PCR Tr. 13). The court overruled the motions to suppress, and the statement was admitted into evidence at trial (PCR Tr. 13). Mr. Hall and Mr. Slusher included the issue in the motion for new trial, in order to preserve the issue for appellate review (PCR Tr. 13-14).

Appellate counsel Ruth Sanders testified at the evidentiary hearing that she raised a single issue on direct appeal, i.e., that the evidence adduced at trial was insufficient to support a finding beyond a reasonable doubt of deliberation, and that therefore the evidence was insufficient to support a guilty verdict for murder in the first degree (PCR Tr. 20, 22-23, 27). Ms. Sanders testified that she did not raise a claim alleging that the trial court erred in overruling Mr. Johnson's motions to suppress Mr. Johnson's statement *23 to the police (PCR Tr. 23-24). Ms. Sanders acknowledged that Mr. Johnson had wanted her to raise an issue challenging the trial court's decision to overrule the motion to suppress his statements (PCR Tr. 23-24). Ms. Sanders acknowledged that Mr. Johnson's statement was used against him at trial and that the statement was a significant part of the state's evidence at trial (PCR Tr. 24-25). Ms. Sanders acknowledged that Mr. Johnson was in custody when he made the statement, and that he made the statement after an emotional meeting with Michelle (PCR Tr. 25-26). Ms. Sanders testified that an appellate argument that the trial court should have sustained the motion to suppress and should have excluded the statement from evidence would not have conflicted with the issue that she did raise on the direct appeal (PCR Tr. 26).

The evidence adduced in both the suppression hearing and at trial supported suppressing the statement that Mr. Johnson made to the KCPD detectives while in custody in Muskogee, Oklahoma. There is no question that Mr. Johnson was in custody and that he was not free to leave, even though there was an issue as to the validity of his detention (Supp. Tr. 112-13, 54, 70-71, 115-122, 179; Supp. Tr. II 6-9, 13-14, 28). There is no question that the detectives interrogated Mr. Johnson immediately after he was subjected to an emotional and tearful meeting with Michelle, who repeatedly encouraged him to talk to the police (Supp. Tr. 118-19, 21-22, 81-83, 85-87, 148, 158; Tr. 349-350). Detective Danny Phillips testified at the suppression hearing that he

agreed to allow Michelle to meet with Mr. Johnson, in hopes that Mr. Johnson would see how upset Michelle was and would decide to confess (Supp. Tr. I 20-21, 94). Mr. Johnson testified that the detectives took him to a separate room, that he was crying and worrying about *24 Michelle, and that Detective Phillips slammed his head into the table and would not honor his requests for a lawyer (Supp. Tr. II 39-41, 43-46, 63-65).

The hearing court clearly erred in denying relief on this claim (PCR L.F. 146-147). Under the circumstances developed at the trial level, Ms. Sanders could have effectively argued on appeal that Mr. Johnson's custodial interrogation was not only the result of an illegal detention, but also that it was induced by physical and psychological coercion by law enforcement, by slamming Mr. Johnson's head into the table, not honoring his request for an attorney, and by **exploiting** Mr. Johnson's fear, concern, and love for Michelle to convince him to give a statement. If counsel had raised this issue on direct appeal, a reasonable probability exists that the result of the appeal would have been different and that a new trial would have been granted. In that event, a trial in which Mr. Johnson's statement was excluded would have been reasonably likely to have resulted in a conviction for a lesser included offense, such as second degree murder or involuntary manslaughter.

Appellate counsel was ineffective for failing to argue on direct appeal that the trial court erred in overruling Mr. Johnson's motions to suppress his statement to the police, and Mr. Johnson was thereby prejudiced. Mr. Johnson has been denied his rights to remain silent, to the effective assistance of appellate counsel, to a fair trial, and to due process of law. Mr. Johnson therefore respectfully requests that this Court reverse the judgment of the hearing court and remand this case for a new trial in the underlying criminal case.

***25 CONCLUSION**

Based on the foregoing Argument, Harrell L. Johnson respectfully requests that this Court reverse the judgment of the hearing court and remand this cause for a new trial in the underlying criminal case.

Footnotes

- 1 The record on appeal consists of the trial transcript (Tr.), the sentencing transcript (Sent. Tr.), the direct appeal legal file (L.F.), two transcripts from the hearing on the motion to suppress (Supp. Tr. I and II), the transcript of the [Rule 29.15](#) evidentiary hearing (PCR Tr.), and the postconviction relief legal file (PCR L.F.).
- 2 Because the Johnsons have the same last name, counsel will refer to Michelle Johnson by her first name. No disrespect is intended.