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April 2, 2018

The Honorable Daniel E. Shearouse
Clerk of Court
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RECEIVED

APR 05 2018

S.C. SUPREME COURT

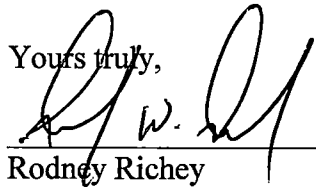
Re: James Allen Johnson v. State of South Carolina
Case No: 2017-CP-23-3817

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please clock and file the copies and return them to me. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,



Rodney Richey

RWR/
enclosures

cc: DeShawn H. Mitchell, Esquire

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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APR 05 2018

S.C. SUPREME COUI

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

HONORABLE ROBIN B. STILWELL

2017-CP-23-3817

JAMES ALLEN JOHNSON, SCDC# 355670

APPELLANT,

against

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

James Allen Johnson appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Robin B. Stilwell, Circuit Judge on December 12, 2017 an Order issued on March 21, 2018 and filed on March 26, 2018. The Appellant received notice of the judgment on April 2, 2018.

Rodney W. Richey, Esquire
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Attorney for Applicant

Other Counsel of Record:
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Post Office Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

HONORABLE ROBIN B. STILWELL

2017-CP-23-3817

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S.C. SUPREME COURT

JAMES ALLEN JOHNSON, SCDC# 355670

APPELLANT,

against

STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on April 2, 2018, addressed to their attorney of record, DeShawn Mitchell, Esquire Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: April 2, 2018

Rodney W. Richey, Esquire
Attorney for the Appellant
33 Market Point Drive
Post Office Box 10916
Greenville, South Carolina 29603
(864) 467-0503
Attorney for Applicant

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
James Allen Johnson, #355670, Applicant,	)	2017-CP-23-3817
v.	)	**ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	ENTERED COMPUTER

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This matter comes before the Court by way of an application for post-conviction relief filed on June 13, 2017 by James Allen Johnson (Applicant). Respondent made its Return on or about October 24, 2017. An evidentiary hearing into the matter was convened on December 12, 2017, at the Greenville County Courthouse in Greenville, South Carolina. Applicant was present and represented by Rodney W. Richey, Esquire. Respondent was represented by DeShawn H. Mitchell, Esquire of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Applicant's Trial Counsel Dorothy A. Manigault, Esquire also testified as did Applicant's mother, Rebecca Parker. This Court had before it a copy of the records of the Greenville County Clerk of Court regarding the Applicant's convictions, the transcript from Applicant's trial, the PCR application, Respondent's Return, Applicant's records from the Department of Corrections and Applicant's appellate records. After reviewing the record and everything presented, this Court finds Applicant has failed to establish any constitutional deprivations entitling him to post-conviction relief and denies this application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. In September 2011, the Greenville County Grand Jury indicted Applicant for homicide by child abuse (2011-GS-23-

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7262). The charge resulted from Applicant's abuse of a twenty-month-old baby girl which culminated in Applicant causing the baby's death by suffocation. Dorothy Manigault, Esquire represented Applicant. Kris Hodge, Esquire prosecuted the case. On June 3, 2013, Applicant proceeded to trial before the Honorable G. Edward Welmaker. The jury found Applicant guilty as indicted. On June 5, 2013, Judge Welmaker sentenced Applicant to imprisonment for sixty-two years for homicide by child abuse.

Applicant filed a timely notice of appeal. David Alexander, Esquire, of the Office of Appellate Defense represented Applicant throughout the appellate process. The South Carolina Court of Appeals affirmed Applicant's conviction on July 29, 2015. State v. Johnson, Op. No. 2015-UP-378 (Ct. App. 2015). Applicant filed a petition for rehearing on August 12, 2015. The South Carolina Court of Appeals denied the petition for rehearing by order filed December 16, 2016.

Applicant filed a petition for writ of certiorari on January 29, 2016. The Supreme Court of South Carolina granted the petition by order filed December 2, 2016. The Supreme Court of South Carolina affirmed the court of appeals' opinion by a memorandum opinion filed May 24, 2017. State v. Johnson, Op. No. 2017-MO-009 (2017). The remittitur was returned to the circuit court on June 9, 2017.

FACTUAL HISTORY

On May 25, 2011, Emergency Services received a call stating that someone was choking. (Tr. p. 138.) A team of firefighters were the first responders to the scene. (Tr. p. 139.) When the firefighters arrived, there was a child lying on the floor, twenty-month old Victim. (Tr. p. 140.) The child's mother was doing chest compressions with the heel of her palm and Applicant was performing mouth-to-mouth rescue breathing on the child. (Tr. p. 140.) The firefighters

immediately noticed bruising on the child's body and forehead. (Tr. p. 140, p. 158.) The child was pale, not breathing, and without a pulse. (Tr. p. 140.) They assembled a bag valve mask and started breathing for the child as well as performing chest compressions. (Tr. p. 145.) Applicant told the firefighters, "you can't go to the bathroom without watching your kids anymore," claiming the child had taken a drink, choked, and then vomited. (Tr. p. 145-146.) James Clardy, an EMS operator, also noted that the child had some very large bruises in various stages of healing on her face, bruises on the torso, and bruises on her legs and arms. (Tr. p. 185.) Responders noted that cardiac arrest was not normally an outcome for a child choking on tea. (Tr. pp. 170-171; p. 181.) Once the ambulance arrived, the responders moved the child to the ambulance and departed for the hospital. (Tr. p. 150; pp. 160-161; pp. 172-173.) The paramedics made the decision to take the child to the hospital in Greer because it was the closest facility. (Tr. p. 173-174.) The child was subsequently transferred by helicopter to Greenville Memorial Hospital. (Tr. p. 177.)

Dr. Mary Croswell, an expert in pediatrics with a specialty in child abuse, examined Victim while she was hospitalized and described in detail the bruises on Victim's body, a total of twenty-eight bruises. (Tr. p. 371.) Victim had suffered five bruises on her forehead. (Tr. p. 363.) She was also bruised in the abdominal area, with one bruise consistent with a bite mark. (Tr. p. 364.) Victim had a cluster of four bruises on her back and two bruises on her buttock. (Tr. p. 364.) Her arm was bruised and there was extensive bruising on her legs. (Tr. pp. 364-365.) Victim further had a bruise on her ear. (Tr. p. 364.) The bruising to Victim's ear, buttock, cheeks, nasal bridge, and abdomen was noted as atypical for accidental injury. (Tr. pp. 367-369.) Dr. Croswell further opined that the explanation given for the Victim's forehead bruises, that her two-year-old half-sister had hit her with Mardi Gras beads, was "atypical and unusual." (Tr. p.

371.) When Dr. Crosswell saw Victim the following day, Victim had been declared brain dead. (Tr. p. 372.)

The child was taken off life support on May 27, 2011, and died. (Tr. p. 280.) Dr. Michael Ward performed the autopsy on Victim. (Tr. pp. 485-486.) Dr. Ward testified as to the extensive bruises the child suffered. (Tr. pp. 488-489; pp. 493-495; pp. 498-500.) Dr. Ward also noted a torn frenulum inside the child's mouth, an injury indicating pressure had been applied to the mouth. (Tr. pp. 490-492.) Dr. Ward opined the cause of Victim's death was suffocation. (Tr. p. 496.) Dr. Ward elaborated that an object, most likely a hand, was placed over the mouth and nose, obstructing the airway which eventually caused an anoxic brain injury. (Tr. p. 496-497.) Dr. Ward explained the airway would have to be occluded for at least a minute for this injury and cardiac arrhythmia to occur. (Tr. p. 497.) It would be medically impossible for Victim to present in her condition if she took a sip of tea, choked and vomited. (Tr. p. 503; p. 506.) Dr. Ward noted that vomiting or spitting up fluid from the lungs is common when someone is suffocated, and in Victim's case she may have spit up blood from the torn frenulum in her mouth.[1] (Tr. pp. 503-504.) Dr. Ward's final conclusion was the cause of death was anoxic brain injury due to suffocation, and the manner of death was homicide. (Tr. p. 502.)

The Victim's mother, Georgia Ann Sprouse ("Sprouse"), gave several different accounts of what happened. (Tr. p. 449.) Sprouse admitted giving investigators three different accounts of the events leading to Victim's hospitalization. (Tr. pp. 315-317.) Sprouse initially claimed her daughter choked while drinking a glass of tea. (Tr. p. 316.) Sprouse told Officer Carl Mathias ("Mathias") that her daughter was drinking tea, started choking, and threw up. (Tr. p. 193.)

[1] It was also noted that Victim had worn an outfit with a green bow earlier in the day, Victim was wearing only a diaper when paramedics arrived. (Tr. p. 171; pp. 232-233.) The clothing was later found in the home and was stained. (Tr. p. 428-431; p. 433-434.) There was also a small stain on the carpeting. (Tr. p. 193-194; 232.)

Sprouse also told Officer Kevin Azzara that the Victim walked to a table where there was a glass of tea, took a drink, and started choking. (Tr. p. 201.) Sprouse maintained that story while at the hospital, telling doctors, DSS workers, and law enforcement officers that Victim choked on tea. (Tr. p. 316.) In this initial version of events, Sprouse placed Applicant in the bathroom when Victim began choking. (Tr. p. 313; p. 411.) Sprouse's story changed slightly the following days, May 26-27. (Tr. p. 316; p. 384-385.) Sprouse amended her story to say she was in the kitchen at the time Victim allegedly started choking on the tea. (Tr. p. 316; pp. 323-324; pp. 384-385; p. 449.) Sprouse also claimed Applicant was in the living room with Victim at the time she allegedly started choking on the tea. (Tr. p. 449.) On June 2, Sprouse was confronted by investigators who stated that Sprouse's story was not making sense and that she needed to tell the truth. (Tr. p. 392, p. 455.) Sprouse told the investigators that on the day of the incident, she smoked marijuana and went to sleep. (Tr. pp. 389-392; p. 455.) She was then awoken by Applicant who told her that Victim was not breathing. (Tr. pp. 389-392; p. 455.) Following her statement, officers gave Sprouse a ride back to the mortuary. (Tr. p. 456.) Sprouse testified at trial that this third account of the events of May 25th was in fact the truth. (Tr. pp. 305-311, pp. 315-317.) Sprouse also claimed that the story about choking on tea was Applicant's. (Tr. p. 309; p. 311.) Sprouse was ultimately arrested for homicide by child abuse and accessory after the fact. (Tr. p. 470.)

Applicant also spun a variety of tales for law enforcement. Mathias arrived on scene as a first responder on May 25. He arrived as the child was being moved to the ambulance. (Tr. p. 192.) Mathias encountered Sprouse in the front yard and came inside with her. Applicant was in the living room. When Mathias asked Sprouse what happened, Applicant volunteered that he was

in the bathroom and did not know what had happened. Sprouse explained that Victim had choked on tea. (Tr. pp. 55-57; pp. 192-194.)

Later that day, Investigator Jennings Autrey ("Autrey") and Investigator Christopher Miller ("Miller") proceeded to the hospital for an update on Victim's medical condition. (Tr. p. 59; p. 377.) They spoke with Applicant and the others present to collect personal information and get a preliminary understanding of the events. (Tr. p. 60; pp. 380-384; 437.) When Autrey asked Applicant what happened, Applicant replied that he was in the bathroom and heard Sprouse call for help and tell him to call 9-1-1. (Tr. p. 60; pp. 380-382.) Applicant stated he then saw Victim lying on the floor with Sprouse attempting CPR. (Tr. p. 61; p. 381.) At the hospital, Applicant agreed to ride with Miller to the law enforcement center. (Tr. pp. 437-438.) He was not in custody and was being treated as a witness. (Tr. pp. p. 81; p. 84; pp. 437-438; p. 475.) Applicant spoke casually with Miller in his office and ultimately provided a statement. (Tr. pp. 438-440.) Applicant maintained that he went to the bathroom, leaving Sprouse, Victim, and two other children in the living room. He then heard Sprouse yelling that Victim was not breathing. Applicant stated that when he came out of the bathroom, Victim was on her back and Sprouse was attempting CPR. Applicant claimed Sprouse told him Victim choked on tea, and while he performed CPR on Victim tea came up. (Tr. pp. 440-442.) In this statement, Applicant also explained the bruises on Victim's face as the result of falls and being struck with Mardi Gras beads by her half-sister. (Tr. p. 443-444.) In response to additional questions from Miller, Applicant also stated that both children were fussy and that there were also toys in the room which Victim could have choked on. (Tr. pp. 444-445.) Applicant also noted an incident a week earlier in which law enforcement came to the house because Victim's half-sister was outside unsupervised. Applicant claimed to have been in the bathroom during this incident as well. (Tr.

p. 446.) After providing the statement, Miller drove Applicant back to the hospital. (Tr. p. 85; p. 448.) The interview lasted around an hour and a half to two hours including the ride. (Tr. p. 85.)

Applicant next spoke to police a week later, on June 2. (Tr. p. 61.) Two deputies transported Applicant to the law enforcement center, and Autrey and Miller met Applicant there. (Tr. p. 62; p. 392-393; pp. 456-457.) Officers advised Applicant that they were "interviewing everybody that was associated with the case,"[2] and he did not have to come with them.[3] (Tr. p. 479; pp. 586-587.) Miller testified that Applicant was not in custody at this time. (Tr. pp. 457-458.) Applicant appeared to recognize Miller from their previous conversation. (Tr. p. 458.) Applicant was present freely and voluntarily and was advised that he was there because the police needed more information to determine what happened. (Tr. p. 458.) Applicant did not appear to be under the influence of drugs or alcohol at the time of the interview, and Applicant himself denied any drug use at the time. (Tr. pp. 71-72; p. 74; p. 394-395; p. 405; p. 459; p. 467; p. 479.) Officers did not notice any smell of alcohol on Applicant's breath, nor did they notice the dilated pupils or bloodshot eyes that would indicate drug use. (Tr. p. 413, p. 459; p. 479.) Applicant was not slurring his speech nor was he unsteady on his feet. (Tr. p. 413; p. 459.)

The initial conversation was casual. (Tr. p. 87; p. 460.) Officers informed Applicant that Sprouse now claimed Applicant was the one in the den with the child at the time of the incident. (Tr. p. 88; p. 461.) Applicant repeated his prior story, calmly relating that he was in the bathroom when he heard Sprouse's cries for help. (Tr. p. 63-64; p. 395; p. 461.) Applicant and Miller talked for a while about his dislike for Victim's father. (Tr. p. 461.) After an hour, Miller asked

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[2] The same day Miller also obtained additional statements from Crystal Inman, the woman Applicant and Sprouse lived with at the time, and Sprouse. (Tr. p. 452-p.456.)

[3] Applicant claimed police said he had to go with them. Applicant testified that his brother was in the yard when this occurred and could have given him a ride, but officers insisted he come with them. (Tr. pp. 552-553.) However, Applicant's brother denied that he was present when police arrived, stating he was at the store at the time. (Tr. p. 580.)

Applicant if he would like anything to eat or drink. (Tr. p. 461.) Applicant refused Miller's offer. (Tr. p. 461.) Miller asked Applicant if he would like to use the restroom, and Applicant replied that he would. (Tr. p. 461.) Miller testified that the only public restroom is downstairs and is a long walk, so he took Applicant to the employee restroom. (Tr. p. 461-462.) Miller accompanied Applicant to the employee restroom because it is not open to the public. (Tr. p. 462.) As a policy, non-employees are not allowed to go to the employee restroom unescorted. (Tr. p. 462.)

After returning from the bathroom, Miller asked Applicant if he was being truthful. (Tr. p. 463.) Applicant "continued talking about how he wanted the child to have help, he wanted to help, wanted peace." (Tr. p. 64; p. 396.) Applicant then bent over in his chair and started sobbing. (Tr. p. 463.) Applicant stated, "accidents happen. He said he wishes that she never went away." (Tr. p. 65; p. 398; p. 463.) Miller asked Applicant, "Tell me what you're talking about." (Tr. p. 463.) Applicant then told Investigator Miller that he got angry at Victim and threw a toy across the room at her. (Tr. p. 65; p. 398; p. 463.) Applicant then stated that he tried to get Victim to stop crying but she would not. (Tr. p. 463.) Applicant told Miller he was afraid the crying was going to wake Sprouse so he held his hand over the victim's mouth until she stopped crying. (Tr. pp. 463-464.) Applicant stated when she stopped crying is when Victim stopped breathing. (Tr. p. 464.) Applicant then demonstrated covering the victim's mouth and nose. (Tr. p. 464.) Upon this admission, Applicant confessed Sprouse was in bed at the time, and he made up the story about Victim choking on tea because he was scared. (Tr. p. 65; p. 398.)

Miller testified that at this point, Applicant was no longer free to leave, and Miller read Applicant his Miranda rights. (Tr. pp. 65-68; p. 89; pp. 398-404; p. 464.) Approximately one and a half hours had passed prior to Applicant's admission and rights warning. (Tr. p. 74; pp. 407-408; p. 410; p. 458; p. 467; p. 476.) Miller followed his normal procedure for advising Applicant

of his rights. (Tr. p. 464.) Miller advised Applicant of each line, one at a time, and that it was his choice to waive his rights or not. (Tr. p. 89; p. 465.) Applicant initialed each line on the form saying he understood the rights he had been advised of. (Tr. p. 465; R. p. ___, Court's Exhibit 1.) Applicant then signed the waiver of rights form saying that he wished to talk to investigators even though he didn't have to. (Tr. p. 466.) Conversation resumed. (Tr. p. 467.) Investigators then began drafting a suspect defendant's statement. (Tr. p. 467.) Applicant was read his rights again. (Tr. p. 467.) Applicant then provided a written statement. (Tr. p. 69; pp. 404-406.)

Applicant gave Autrey permission to type his statement. (Tr. p. 467.) In his statement, Applicant went through the events of the day, including his confession to holding his hands over Victim's mouth until she stopped breathing. (Tr. p. 467.) After Applicant's statement was typed, Applicant had an opportunity to read over it. (Tr. p. 468.) Applicant initialed at the beginning and end of each paragraph before signing the statement. (Tr. p. 468.) Miller estimated that it took an additional hour to complete the written statement. (Tr. p. 480.) Applicant was in custody at this point. (Tr. p. 468.) Following this statement, a warrant was obtained for Applicant's arrest. (Tr. p. 408; p. 469.) During arrest and booking, Applicant "continued to say things...about wishing God had never created him, that he did not deserve to live...that he would never kill himself, but he knew someone in jail would kill him because of what he'd done. ..." (Tr. p. 469.)

Applicant recalled speaking with Miller on May 25 and recalled giving a statement that day. (Tr. pp. 528-530; p. 542-543.) However, Applicant maintained he could not remember the entire interaction with officers on June 2. (Tr. p. 103; pp. 530-531.) Applicant claimed that on June 2, before officers came to pick him up, he "was smoking a little bit of reefer, and I had some Xanaxes." (Tr. p. 104; pp 531-532.) Applicant claimed to have taken about ten Xanax

before police arrived and to have taken three more while in the bathroom at the police station.[4] (Tr. pp. 104-105.) Applicant seemed to remember certain things about the interview (e.g., leaving marijuana at his friend's house before going to the police station, the ride to the police station, being told that Sprouse had resumed a relationship with someone else, going to the bathroom) but was consistently hazy on receiving Miranda warnings and providing incriminating details. (Tr. pp. 105-108; pp. 110-111; pp. 114-115; pp. 530-531; p. 533-539; 554-555.) Applicant speculated that if he had said such incriminating things he must have done so to defend Sprouse since she could be pregnant with his child. (Tr. p. 539-540.)

Before the jury, Applicant reverted to his original story. Applicant testified that he was in the bathroom for two to three minutes when Sprouse called out for help, and he emerged to find Victim laying in the living room, already discolored. (Tr. p. 521-522; p. 524.) Applicant testified he called 9-1-1and attempted to help with CPR. (Tr. pp. 522-523.) Applicant also reported that at the time he and Sprouse smoked marijuana on a daily basis, and Sprouse was hiding marijuana while he called 9-1-1. (Tr. p. 521; pp. 524-525.)

In addition to statements given to police, Applicant and Sprouse were placed together for transport from prison to Family Court on one occasion. During that transport, after the court appearance, Applicant told Sprouse, "he was sorry for what he had did. That he did not mean to... he was sorry and that he hoped [she] would forgive him and so on and so on." (Tr. pp. 346-347.)

The State also presented evidence from Crystal Inman, the woman they lived with at the time, who felt Applicant favored Victim's older half-sister. (Tr. p. 223-224.) She recalled Applicant at the hospital saying that Victim would "just fall and fall, all the time." (Tr. p. 239.) Sprouse described a series of bruises Victim sustained while in Applicant's care which Applicant

[4] Miller accompanied Applicant to the restroom but noted no unusual actions. (Tr. p. 462.)

attributed to various incidents – being hit by her 2-year-old sister, falling on a stepping stone or tripping in a bedroom. Sprouse also believed Applicant tended to favor Victim's older half-sister. (Tr. p. 303.) Sprouse revealed that Applicant did not get along with Victim's father. (Tr. p. 347.)

ALLEGATIONS

In his application, Applicant alleges he is being held in custody unlawfully for the following reasons (quoted verbatim):

1. "Ineffective Assistance of Trial Counsel," in that:

    a. "The Supreme Court has ruled that my trial lawyer failed to preserve the arguments regarding the admissibility of my statement for appeal. The failure to preserve an issue constitutes deficient performance. In my opinion, my case differs in no material respect from State v. Navy."
    b. "It is also possible that a false confession expert may have been needed in the event the confession was admissible."
    c. "The other significant issue I saw was regarding the doctor's opinion that the child was suffocated because of a torn frenulum – the little piece of skin between the upper lip and gum. This child was intubated at least twice in the back of a moving ambulance on a rough rural road. My attorney failed to have a doctor testify that the frenulum could have been torn during intubation, and that would have called the State's doctor's testimony into doubt."
    d. "The common sense view of this tragic ordeal is that there was a mentally retarded [*sic*] father with an IQ of less than 70 attempting to perform CPR on his unconscious child while being given instructions over the phone by a 911 operator while in a state of panic and anxiety to a point he could barely talk to 911. Is it possible that the child swallowed an ice cube that melted away?"
    e.

2. "Ineffective Assistance of Appellate Counsel"

    a. "My appellate defender never once suggested that my trial counsel could have been below standard.
    b. "I did file a motion to remove my trial lawyer from my case. The motion was heard on May 17, 2014 in the Greenville County Court of General Sessions, 13th Circuit heard by the Honorable Deadra L. Jefferson, and quoting from the transcript of page 7, line 16 of

this proceeding Judge Jefferson states: 'I've known [Trial Counsel] not to be prepared."

c. "I was charged with homicide. I never felt my attorney was competent."

3. "Improper Judicial Posture"

a. "When Judge Welmaker made his ruling on competency, he ruled without any argument from either the defense or the opposition.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTARY HEARING

Applicant's Testimony

Applicant testified he met with his attorney multiple times and asked her to get him a plea offer. He testified he ended up getting a sixty-two year sentence. Applicant testified he had given an incriminating statement to the police regarding the case. However, he believed the statement should have been suppressed because he was under the influence of drugs when he gave it. He testified he believed the outcome of the trial would have been different had his statement been suppressed and that he was prejudiced because of the statement's inclusion in his trial. He testified at some point there were two different plea offers from the State that included a thirty-five year cap plea offer and also another plea offer of twenty years to life. Applicant testified he went over the discovery with his attorney in the case and told her he was under the influence of drugs when he gave the incriminating statement. He testified he was not guilty and told Trial Counsel that. Applicant testified he had a hard time understanding the conversations he had with Trial Counsel.

Applicant's Mother's Testimony

Applicant's mother, Rebecca Parker, testified there was a fifteen year plea offer made to her son in his case. She testified she did not believe Trial Counsel effectively represented her son. On cross-examination, Ms. Parker testified she was never present at any meetings or talks

between her son and Trial Counsel.

Trial Counsel's Testimony

Trial Counsel when called by Applicant testified they had a hearing on the admissibility of Applicant's statement prior to trial. She testified she tried to get the statement suppressed but admitted she did not make a proper motion pursuant to Missouri v. Seibert 542 U.S. 600 (2004). She testified she agreed the issue was not properly preserved for appellate review. Trial Counsel testified she conveyed all plea offers from the State to Applicant.

On cross-examination, Trial Counsel testified she had been practicing law for over thirty-five years. She testified she was appointed to represent Applicant. Trial Counsel testified she met with Applicant to discuss his charges on several occasions and read all of his discovery to him as he had issues understanding or reading it. Trial Counsel testified she discussed with Applicant his constitutional rights, the State's burden of proof and the possible sentences he was facing in his case. Trial Counsel testified she entered into plea negotiations on behalf of Applicant and she received an offer from the State for Applicant to plead guilty to an open plea with a cap of thirty-five years. She testified Applicant did not want to take the plea so they went to trial. She testified prior to trial she had Applicant evaluated and the results were he was competent to stand trial. Trial Counsel testified there were incriminating statements made by Applicant to the police that were problematic because he confessed. She testified prior to trial she conducted a Jackson v. Denno hearing to try and suppress his confession as involuntary however the trial judge allowed the statement in.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the

witnesses presented at the hearing, and can weigh their testimony and credibility accordingly. These credibility findings have been applied to the Court's findings and conclusions set forth below. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel 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 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland v. Washington, 466 at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable

probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 (1985).

After careful review of the entire record, including the testimony presented at the evidentiary hearings, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel discussed below.

Failure to Preserve Issue for Appeal

Applicant alleged in his application ineffective assistance of counsel for failure to preserve the argument regarding the admissibility of his statement for appeal. This Court finds that Applicant cannot show that he was prejudiced by Counsel's failure to preserve the issue for appeal because he has failed to prove the issue would have been successful on appeal. Our courts have previously held an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a post-conviction relief 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); Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). However, to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam, 404 S.C. at 475–76, 746 S.E.2d at 47 ("Since the Fourth Amendment 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 in McHam's PCR claim.") (citing Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is **meritorious** and that the verdict would have been different absent the evidence

that should have been excluded." (emphasis in McHam)). Therefore, before a post-conviction relief court can find an applicant has prevailed on a claim of ineffective assistance of trial counsel for failing to preserve a ground for appellate review, the court must determine the underlying claim was meritorious and a reasonable probability that it would have resulted in reversal and a new trial.

In this matter, the Applicant complains that Trial Counsel did not object to the introduction of his statement. The Applicant argues that the Supreme Court's ruling in Missouri v. Seibert 542 U.S. 600 (2004) precludes the use of midstream Miranda warnings in "question first" interrogations. The record indicates that Trial Counsel did specifically request a Jackson v. Denno hearing to determine the voluntariness of the statements. The testimony clearly set forth the manner and method of questioning and the circumstances surrounding the Applicant's statement. The record is clear that Trial Counsel did not object specifically to the introduction of the statement under Missouri v. Seibert. Further, the record reflects that the Trial Judge made a general ruling indicating the statements were made freely and voluntarily and did not violate Miranda. The Court of Appeals' decision is further general and does not state specifically that an objection to the introduction of the statement under Missouri v. Seibert was not preserved. Therefore, lacking clarity from the trial transcript, and the rulings of the Trial Court and Court of Appeals, the PCR Court is left to review the transcript to determine whether Applicant has shown that he was prejudiced by Trial Counsel's failure to preserve the issue for appeal. After having fully reviewed the transcript of record, this Court finds that Applicant has failed to establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. It is true and unfortunate that Trial Counsel did not state objections with clarity and specificity. However, Trial Counsel did request a Jackson v. Denno hearing and

elicited any and all information upon which the trial court could make an informed and intelligent decision regarding the voluntariness of the statements. Thereafter, the trial court did make a ruling finding that the statements were voluntary, notwithstanding the officer's having provided Miranda warnings after the Applicant began to offer his statement.

The record indicates that Applicant's case is distinguishable from Missouri v. Seibert. In Missouri v. Seibert, the interrogating officer testified that he made a 'conscious decision' to withhold Miranda warnings, thus resorting to an interrogation technique that he had been taught: question first, then give the warnings, and then repeat the questions 'until I get the answer that she's already provided once.' (citations omitted.) Based upon the trial transcript, this was clearly not the case in this instance. The record reflects that Applicant was not under arrest and was engaged in a voluntary conversation with the officers. That may be a dubious assertion by the officer; however, the Trial Court found it credible. When Applicant began to offer inculpatory information, the officer stopped immediately and administered the Miranda warnings. This Court finds this was clearly not an employment of the "question first" technique used by law enforcement in Missouri v. Seibert. Therefore, this Court finds Applicant has failed to establish the underlying claim was meritorious and would have resulted in a reversal on appeal to a reasonable probability and as such that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving Counsel failed to render effective assistance of counsel. The allegation is denied and dismissed.

Ineffective Assistance of Appellate Counsel

Applicant alleged in his application ineffective assistance of appellate counsel. Applicant did not present any evidence on this allegation at the PCR hearing. Accordingly, this Court finds

Applicant failed to prove there was any evidence of ineffective assistance of appellate counsel. This Court denies and dismisses this allegation.

Improper Judicial Posture

Applicant alleged in his application improper judicial posture. Applicant stated in his application "when Judge Welmaker made his ruling on competency, he ruled without any argument from either the defense or the opposition." Applicant did not present any evidence on this allegation at the PCR hearing. However, this Court would note Applicant was found competent to stand trial. Additionally, Dr. Richard Frierson who conducted Applicant's competency evaluation testified pre-trial after being called by Trial Counsel. (Tr. p. 45-50). Dr. Frierson testified that Applicant was competent to stand trial and that he understood the judicial process. (Tr. p.49). Moreover, the State was also able to cross-exam Dr. Frierson. Accordingly, this Court finds Applicant failed to prove there was any evidence of improper judicial posture. Accordingly, this Court denies and dismisses this allegation.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice

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of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. Reefer to Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;

2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 21st day of March, 2018.

~~ROBIN B. STILWELL~~
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

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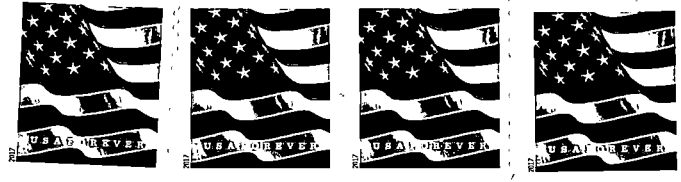

The Honorable Daniel E. Shearouse
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