

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Richland County

Honorable Jocelyn J. Newman, Circuit Court Judge

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MICHAEL K. PETERSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001816

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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S.C. SUPREME COURT

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**ISSUE PRESENTED**

Whether plea counsel provided ineffective assistance of counsel when he failed to advise Petitioner of the merits of challenging the admissibility of his statement, where Petitioner repeatedly asked the police to stop questioning him, repeatedly asked for his attorney, and questioning still continued?

## STATEMENT

During the November 2012 term, the Richland County Grand Jury indicted Petitioner for murder and kidnapping. App. 160 – 163.

On November 4, 2015, Petitioner pled guilty before the Honorable Clifton Newman. App. 1. Victor Li represented Petitioner. Id. Dolly Garfield represented the state. Id.

Judge Clifton Newman sentenced Petitioner to forty-five years' imprisonment for murder and thirty years' imprisonment for kidnapping. App. 40, l. 12 – 41, l. 20.

On July 19, 2016, Petitioner filed a post-conviction relief (PCR) application that alleged plea counsel provided ineffective assistance of counsel when he failed to advise Petitioner of his ability challenge the admissibility of the inculpatory coerced statement law enforcement took from Petitioner after he invoked his Miranda right to be silent and be afforded to an attorney, and questioning still continued. App. 44 – 50. On July 28, 2017, the state filed its return. App. 51 – 56.

Petitioner's PCR hearing was held on January 25, 2018, in front of the Honorable Jocelyn Newman. App. 58. Leah B. Moody represented Petitioner. Id. Jessica Kinard represented the state. Id.

In an order of dismissal filed on September 5, 2018 by Judge Jocelyn Newman found that, although Petitioner did invoke his Miranda rights during the audio statement, plea counsel did not provide deficient performance for failing to challenge the statement because plea counsel evaluated the recorded confession and saw no defect with it. App. 144 – 155.

This petition follows.

## ARGUMENT

Plea counsel provided ineffective assistance of counsel when he failed to advise Petitioner of the merits of challenging the admissibility of his statement, where Petitioner repeatedly asked the police to stop questioning him, repeatedly asked for his attorney, and questioning still continued.

### **Relevant Facts**

The state alleged the facts as follows: Petitioner and the decedent were married. App. 7, ll. 7 – 12. On December 19, 2011, Petitioner called the decedent’s sister and told her he just killed her sister. App. 9, l. 25 – 10, l. 5. A relative of the decedent found her dead on the floor of her bed room. App. 10, ll. 12 – 16.

Petitioner voluntarily went to the “metro headquarters.” App. 11, ll. 2 – 5. Investigator Sumter interviewed Petitioner. App. 11, ll. 10 – 11. After being up all night during the interrogation, Petitioner gave an inculpatory statement to police detailing the incident. App. 11, l. 12 – 13, l. 10.

During the plea hearing, Petitioner stated that he was provoked by the decedent’s sons repeatedly and that due to that provocation he killed the decedent in the heat of passion. App. 33, l. 1 – 37, l. 20; App. 38, l. 5 – 39, l. 8. Judge Clifton Newman accepted Petitioner’s guilty plea and sentenced Petitioner to forty-five years’ imprisonment. App. 21, ll. 14 – 15; App. 40, l. 12 – 41, l. 20.

Petitioner filed a PCR application alleging that plea counsel provided ineffective assistance of counsel where plea counsel failed to advise Petitioner he could challenge the admissibility of the inculpatory statement he gave to police. App. 44 – 50.

Petitioner testified at his PCR hearing that the state coerced his confession and plea counsel did nothing to challenge its admissibility. App. 69, ll. 6 – 11. Petitioner said he informed plea counsel that his confession was coerced. App. 70, ll. 2 – 3. Petitioner was unaware of Jackson v. Denno, 378 U.S. 368 (1964) or that challenging the confession’s admissibility was possible until after the guilty plea. App. 72, ll. 1 – 7. Petitioner did not understand what “reading his rights,” meant and he did not know the consequences of waiving his rights when the police gave him his Miranda<sup>1</sup> warnings. App. 99, ll. 6 – 24. Petitioner would not have pled guilty and proceeded to trial if he had known he could challenge the admissibility of his statement given in violation of Miranda, and the invocation of his right to counsel. App. 73, ll. 12 – 14.

During cross-examination, Petitioner testified that he, “continuously told [the police officers interrogating him]... I didn’t want to talk to them. Continuously. For ten pages...they kept badgering and badgering and badgering.” App. 99, ll. 13 – 24.

Plea counsel also testified during the evidentiary hearing. App. 108, l. 7. He claimed that Petitioner never mentioned to him that the confession was “coerced.” App. 110, ll. 1 – 4. Plea counsel stated that the interrogators kept Petitioner up all night before he gave the inculpatory statement. App. 114, ll. 15 – 22. Plea counsel admitted that Petitioner repeatedly asked for the police to stop questioning him and repeatedly asked for his attorney. App. 110, ll. 5 – 14.

However, plea counsel said that Petitioner also started talking again on his own after the police made “offhand” comments amongst each other as a, “law enforcement strategy,” designed to get Petitioner to start talking again. App. 110, ll. 5 – 14. Plea counsel also explained that Petitioner’s statement came after the police gave him his Miranda warnings. App. 114, ll. 15 – 22.

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 426 (1966)

Plea counsel admitted that he never brought the audio tape of his statement to Petitioner and that he should have brought it to him, played it, and discussed it with him. App. 110, ll. 19 – 23. Plea counsel further admitted that, “if the audio statement did qualify to be suppressed... then I clearly would be in the wrong,” but he concluded that he did not see anything to challenge. App. 113, l. 23 – 114, l. 5. Furthermore, plea counsel admitted that there may have been flaws in how the police obtained the statement that could have been challenged. App. 114, ll. 15 – 25. Plea counsel specifically stated, “you know [Petitioner]... might be right [that the statement was coerced] ... Maybe I should have explored [challenging the statement].” Id.

In the order of dismissal, Judge Newman stated plea counsel did not provide ineffective assistance for failure to advise Petitioner of the grounds to challenge his statement because plea counsel evaluated the statement and found no defects. App. 144 – 155.

### **Discussion**

Plea counsel failed to challenge or even advise Petitioner of the grounds his inculpatory statement to police could be challenged such that Petitioner was left unaware of his ability to challenge his statement’s admissibility. App. 72, ll. 1 – 7; App. 126, ll. 14 – 15. Had Petitioner known he could have challenged the admissibility of his inculpatory statement to police, where he invoked his Miranda right to remain silent and his right to counsel, he would not have pled guilty and proceeded to trial. App. 73, ll. 1 – 23.

“The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland, 466 U.S. at 685 (quoting Adams v. United States ex. rel. McCann, 317 U.S. 269, 275 (1942)). Additionally, a guilty plea that was entered by one fully aware of the direct consequences “must

stand *unless induced by . . . misrepresentation.*” Brady v. United States, 397 U.S. 742, 755 (1970) (emphasis added) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (1957)). Accordingly, counsel provides ineffective assistance in the adversarial system when he makes a misrepresentation that induces the defendant to plead guilty.

In Dupree v. State, 305 S.C. 285, 287, 408 S.E.2d 215, 216 (1991), this Court held that counsel’s failure to challenge the statement given by Dupree because of alleged threats made to Dupree during the interrogation was deficient performance. Id. at 287-288, 408 S.E.2d at 217. Dupree’s statement implicated him in the crime of receiving stolen goods. Prior to trial, counsel moved to suppress the statement and a hearing on the matter ensued. Id. at 286-287, 408 S.E.2d at 216.

The interrogating officer testified that no threats were made, but he admitted Dupree refused to sign an acknowledgement his statement was voluntary. At the PCR hearing, counsel admitted Dupree told him about the threats. This Court found counsel’s failure to pursue the issue in light of the Dupree’s claims and the evidence that he refused to sign the form was deficient performance. Id. As Dupree’s statement contained the only evidence about his guilty knowledge, counsel’s deficient performance prejudiced Petitioner. Id. at 287-288, 408 S.E.2d at 217.

In State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010), the police were investigating a potential death by child abuse incident, where the cause of death was suffocation. Id. at 297, 688 S.E.2d at 839. The police questioned Navy, the child’s father, at his residence. Id. Navy was not in custody for these statements. Id. at 298, 688 S.E.2d at 840. Navy admitted that he may have “popped” the child on the back rather than “patted” and he may have “patted” the child on the mouth. Id. at 298-299, 688 S.E.2d at 840.

After “eliciting answers where [Navy admitted to] hitting the child and interfering with the child’s breathing,” the officers gave Navy his Miranda warnings. Id. at 299, 688 S.E.2d at 840. Navy then gave two more statements which admitted more inculpatory information. Id. at 299-300, 688 S.E.2d at 840-841.

Navy sought to suppress all three statements, but specifically argued that the second and third statements were not voluntary because, “the second and third statements were unconstitutionally obtained since the officers conducted unwarned custodial interrogation after he gave the first oral statement, obtained incriminating evidence, and only then Mirandized him and took the official second and third statements.” Id. 300, 688 S.E.2d at 841.

This Court held that the second and third statements taken by police should have been suppressed because they were obtained in violation of the rule announced in Missouri v. Seibert, 542 U.S. 600 (2004). Navy, at 302, 688 S.E.2d at 841. The rule set forth in Seibert stated that police may not question a suspect prior to giving Miranda warnings, elicit an inculpatory statement from the suspect, and then give the Miranda warnings to then re-elicite the inculpatory statement so it would be admissible in court. Id. at 303, 688 S.E.2d at 842. The factors in the Seibert test are: the completeness and detail of the question and answers in the first round of interrogation; the timing and setting of the first questioning 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. Navy, at 302, 688 S.E.2d at 841–42.

In Navy, the officers began questioning of Navy with the knowledge that the child had been suffocated and the intention of eliciting a confession from Navy. Id. at 303, 688 S.E. at 802. After the first statement, the officers “sprang” the information of the child’s injuries on Navy and began an unwarded custodial interrogation designed to elicit incriminating information. Id. Once those

incriminating answers were given, Navy was given his Miranda warnings and the interrogation restarted immediately, and by the same officer. Id. This Court held that the interrogation process in Navy violated the Seibert rule because no additional warning that the answers given before the Miranda warnings were inadmissible and no substantial break in time or change of circumstances happened between the first statement and the second two. Id.

In Jackson v. Denno, 378 U.S. 368 (1964), the United States Supreme Court held that “a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession.” Id. at 376. To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda. State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007).

To determine the admissibility of a statement, a court must examine the totality of the circumstances surrounding the custodial statement. The examining court must determine if the totality of the circumstances surrounding the custodial statement defeated the defendant’s will. State v. Moses, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010).

Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted).

Here, plea counsel’s failure to advise Petitioner regarding his ability to challenge to the voluntariness of his inculpatory statement constituted deficient performance. As plea counsel

admitted, the statement showed Petitioner was interrogated for a significant length of time where he repeatedly invoked his Miranda rights to remain silent and to be afforded an attorney, but the interrogation continued. App. 114, ll. 12 – 22; App. 110, ll. 5 – 14. Moreover, the police used “offhand” comments to each other to induce Petitioner to begin talking on his own, as a “law enforcement strategy.” App. 110, ll. 5 – 14.

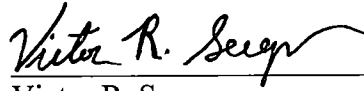
Petitioner testified that he only pled guilty because he was unaware of the possibility of challenging the admissibility of his inculpatory statement. App. 72, ll. 17 – 23. Petitioner would not have pled guilty if plea counsel informed of the grounds by which he could have challenged the admissibility of the coerced statement that he gave after repeatedly invoking his Miranda rights to silence and to counsel. App. 73, ll. 12 – 14; App. 72, ll. 1 – 7.

Furthermore, plea counsel admitted he failed to discuss the statement with Petitioner. App. 110, ll. 19 – 23. Plea counsel’s reasoning for that failure was because Petitioner’s theory of the case was that he did kill the decedent but did so under the “heat of passion” from provocation. Id. However, the only reason Petitioner was locked into that defense theory was because that was the story Petitioner gave in the coerced audio statement. App. 117, ll. 12 – 18. Accordingly, had the statement been suppressed Petitioner could have had multiple strategies of defense at trial.

Therefore, plea counsel provided ineffective assistance of counsel when he failed to advise Petitioner of his right to challenge the admissibility of the coerced statement, where during the interrogation Petitioner repeatedly invoked his Miranda rights. App. 110, ll. 5 – 14. That deficient performance prejudiced Petitioner because he would not have pled guilty and proceeded to trial but of plea counsel’s failure.

**CONCLUSION**

By reason of the foregoing arguments Petitioner respectfully requests that this Court vacate his guilty plea and grant him a new trial, or in the alternative, grant Certiorari to allow for a full briefing on this issue.



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Victor R. Seeger  
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of March, 2019.

STATE OF SOUTH CAROLINA

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MICHAEL K. PETERSON,

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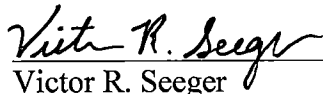
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Michael K. Peterson states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Jocelyn J. Newman, which was held on January 25, 2018, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process. Therefore, counsel requests that the Court relieve him as counsel for Michael K. Peterson.

Respectfully Submitted,



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Victor R. Seeger  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 22nd day of March, 2019.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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ATTORNEY FOR PETITIONER

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RESPONDENT

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CERTIFICATE OF SERVICE  
—————

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Michael K. Peterson, #210616, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 22nd day of March, 2019.

  
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Victor R. Seeger  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 22nd day of March, 2019.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 26, 2028