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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

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

JAMES ALLEN JOHNSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2022-000427

SUPPLEMENTAL APPENDIX

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James Allen Johnson, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2018-000600

Appeal From Greenville County
Robin B. Stilwell, Circuit Court Judge

Unpublished Opinion No. 2022-UP-075
Heard January 25, 2022 – Filed February 16, 2022

AFFIRMED

Appellate Defender Lara Mary Caudy, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Taylor Zane Smith, of Columbia, for Respondent.

PER CURIAM: James Johnson argues the post-conviction relief (PCR) court erred in finding his trial counsel was not ineffective when she did not object to the admission of Johnson's statement to law enforcement because Johnson asserts his

statement was the result of a two-phase interrogation in violation of *Missouri v. Seibert*, 542 U.S. 600 (2004), and *Miranda v. Arizona*, 384 U.S. 436 (1966). Johnson also argues he was prejudiced because the outcome of his trial would have been different if his counsel had objected. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *Chappell v. State*, 429 S.C. 68, 74, 837 S.E.2d 496, 499 (Ct. App. 2019) ("When reviewing a claim for ineffective assistance of counsel, the 'court proceeds from the rebuttable presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" (quoting *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (internal quotations omitted))); *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) ("In [PCR] proceedings, the burden of proof is on the applicant to prove the allegations in his application."); *Thompson v. State*, 423 S.C. 235, 239, 814 S.E.2d 487, 489 (2018) ("To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance."); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (stating if "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel"); *State v. Williams*, 405 S.C. 263, 273, 747 S.E.2d 194, 199 (Ct. App. 2013) ("To determine whether a suspect was in custody for the purposes of *Miranda*, the Supreme Court has asked whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."); *State v. Kennedy*, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App. 1996) ("The special procedural safeguards outlined in *Miranda* are not required if a suspect is simply taken into custody, but only if a suspect in custody is subjected to interrogation. Interrogation is either express questioning or its functional equivalent. It includes words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response."); *Williams*, 405 S.C. at 275, 747 S.E.2d at 200 ("Simply because an interview takes place at a law enforcement center and at the initiation of police investigators does not render it a 'custodial interrogation.'" (quoting *State v. Doby*, 273 S.C. 704, 708, 258 S.E.2d 896, 899 (1979))); *California v. Beheler*, 463 U.S. 1121, 1125 (1983) ("*Miranda* warnings are not required 'simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.'" (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977))); *Hagood v. Sommerville*, 362 S.C. 191, 199, 607 S.E.2d 707, 711 (2005) (finding it unnecessary to address remaining issues when the resolution of a prior issue is dispositive).

AFFIRMED.

THOMAS and GEATHERS, JJ. and HUFF, A.J., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

JAMES ALLEN JOHNSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2018-000600

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

Opinion No. 2022-UP-075

PETITION FOR REHEARING

On February 16, 2022, this Court affirmed the circuit court's denial of Petitioner's application for post-conviction relief. Johnson v. State, 2022-UP-075 (S.C. Ct. App. filed February 16, 2022). Pursuant to Rule 221(a), SCACR, Petitioner respectfully requests this Court rehear the matter based upon the significant points overlooked and/or misapprehended by this Court in reaching its decision.

Petitioner was convicted of homicide by child abuse. During his jury trial, the state admitted his incriminating statements to law enforcement. While a pretrial hearing was held pursuant to Jackson v. Denno, 378 U.S. 368 (1964), Petitioner's counsel made no argument that his statement

was inadmissible. On appeal, Petitioner challenged the admissibility of his statement to law enforcement arguing the statement was the result of a two phase interrogation in violation of Miranda v. Arizona, 384 U.S. 436 (1966) and Missouri v. Seibert, 542 U.S. 600 (2004). This Court affirmed Petitioner's conviction holding the issue was not preserved for appellate review where one ground was raised below and another ground was raised on appeal. State v. Johnson, Op. No. 2015-UP-378 (Ct. App. filed July 29, 2015). Our Supreme Court granted certiorari and, after oral argument, affirmed holding Petitioner's argument that the trial judge erred in admitting his incriminating statement was not preserved for appellate review. State v. Johnson, Op. No. 2017-MO-009 (S.C. Sup. Ct. filed May 24, 2017).

Petitioner filed an application for post-conviction relief arguing his trial counsel was ineffective for failing to challenge the admissibility of his statement pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) and Missouri v. Seibert, 542 U.S. 600 (2004). The post-conviction relief judge denied Petitioner relief finding law enforcement did not employ the "question first" technique prohibited by Seibert and, therefore, Petitioner was not prejudiced by his counsel's failure to challenge the admissibility of his statement. The PCR judge's ruling was based in large part on the fact that the officers who interrogated Petitioner did not admit to employing the "question first" technique like the interrogating officer in Seibert. See App. 708. However, this reasoning was rejected by our Supreme Court in State v. Navy, 386 S.C. 294, 304, 688 S.E.2d 838, 842 (2010). Moreover, trial counsel did not specifically question Investigator Miller, or the other interrogating officers, about whether they were using this strategy. Additionally, and importantly, in the order denying relief, the PCR judge emphasized that law enforcement's claim that Petitioner "was engaged in a voluntary conversation with the officers" was "dubious." See App. 708.

In its unpublished per curiam opinion, this Court affirmed the ruling of the PCR judge holding counsel was not ineffective for failing to object to the admissibility of Petitioner's statement pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) and Missouri v. Seibert, 542 U.S. 600 (2004) because Petitioner was not in custody and, consequently, the police were not required to advise Petitioner of his Miranda rights. Respectfully, in so holding, this Court either misapprehended, overlooked, or ignored our Supreme Court's holdings in State v. Evans, 354 S.C. 579, 582 S.E.2d 407 (2003) and State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010).[1] Additionally, the Court erroneously relied on State v. Williams, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013), which is easily distinguishable from this case.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra.*

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome

[1] In affirming the circuit court's denial of Petitioner's application for post-conviction relief and holding Petitioner was not in custody, this Court did not even cite to State v. Evans, 354 S.C. 579, 582 S.E.2d 407 (2003) or State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010), further calling into question whether this Court overlooked or ignored this controlling precedent.

of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

Our Supreme "Court has previously held that an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a PCR claim alleging ineffective assistance of counsel." McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003) and Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). In this case, trial counsel was undoubtedly ineffective for failing to object to the admissibility of Petitioner's statement pursuant to Missouri v. Seibert, 542 U.S. 600 (2004), thereby failing to preserve the argument for appellate review. See S.C. Dept. of Transport. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903, 907 (2007) (holding that in order to preserve an issue at trial for appellate review, the issue must be raised to and ruled upon by the trial court, raised by the appellant, raised in a timely manner, and raised to the trial court with sufficient specificity).

"Since the issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong." McHam, 404 S.C. at 475, 746 S.E.2d at 47; See Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded.").

In Missouri v. Seibert, 542 U.S. 600 (2004), the United States Supreme Court held that Miranda warnings given mid-interrogation, after the defendant gave an unwarned confession, were ineffective, and thus confession repeated after warnings were given was inadmissible at trial. The Court also held that, pursuant to Miranda, admissibility at trial of any custodial

confession is conditioned on warning a suspect of his rights and failure to give prescribed warnings and obtain waiver of rights before custodial questioning generally requires exclusion of any statements obtained.

The Court called this practice "question-first" and rejected the notion that the subsequent giving of Miranda warnings could transmute these confessions into admissible evidence. Id. at 610-613. "By any objective measure . . . it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content." Id. at 613. "After all, the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset." Id. "Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again." Id.

The police in Seibert were surprisingly honest and admitted they were deliberately using the two phase "question-first" strategy. Id. at 605-605. While law enforcement made no such honest admission in this case, Seibert recognized that such admissions are unnecessary: "Because the intent of the officer will rarely be as candidly admitted as it was here (even as it is likely to determine the conduct of the interrogation), the focus is on facts apart from intent that show the question-first tactic at work." Id. at 617 n.6.

The facts cited in Seibert showing the police strategy are present in this case. In Seibert, the Court emphasized the following:

> The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill.

> When the police were finished there was little, if anything, of incriminating potential left unsaid. The warned phase of questioning proceeded after a pause of only 15 to 20 minutes, in the same place as the unwarned segment.

Id. at 616. The police referred back to the unwarned statements after giving Miranda warnings. Id. The pre-Miranda questioning only lasted "30 to 40 minutes." Id. at 604-605. Only one officer questioned Seibert. Id.

In this case, three officers interrogated Petitioner. App. 87, l. 23 – 88, l. 3. Investigator Miller admitted using the subtle tactic of sympathy to interrogate Petitioner. App. 92, l. 12 – 93, l. 4. The police confronted Petitioner with Sprouse's contention that he was alone in the room with Minor when she stopped breathing. App. 88, ll. 4-16. The police knew the findings from the autopsy. App. 450, l. 22 – 451, l. 22. If Investigators Miller and Autrey are to be believed, the pre-Miranda interrogation lasted approximately two hours. App. 477, ll. 10-13; App. 410, ll. 15-25. However, if Deputy Wilson's testimony is to be believed that it "wasn't late, late afternoon" when he brought Petitioner to the law enforcement center, then it is possible that the pre-Miranda interrogation lasted for more than three or four hours. App. 586, l. 23 – 587, l. 3. Deputy Wilson's testimony is consistent with the fact that Investigator Miller dropped Sprouse off at a place of business—the mortuary—and then returned directly to the station house where Petitioner and Deputy Wilson were waiting. App. 392, l. 9 – 393, l. 7. Finally, unlike Seibert, Petitioner is intellectually disabled. The facts of this case demonstrate that the three officers used "question-first" and Petitioner's statements should have been suppressed under Seibert.

Miranda conditions "the admissibility at trial of any custodial confession on warning a suspect of his rights: failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained." Seibert, 542 U.S. at 608. Since Seibert prevents the late Miranda warnings from curing the earlier failure to warn, the

state argued, and this Court agreed, that Petitioner was not "in custody" when he made his incriminating statements.

"In determining whether an interrogation was "custodial" within the meaning of the Miranda rule, courts have considered the following factors: (1) whether the contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to interview; (2) whether the express purpose of the interview was to question the person as a witness or suspect; (3) where the interview took place; (4) whether the police informed the person he or she was under arrest or in custody; (5) whether they informed the person he or she could terminate the interview and leave at any time or whether the person's conduct indicated an awareness of such freedom; (6) whether there were restrictions on the person's freedom of movement during the interview; (7) how long the interrogation lasted; (8) how many police officers participated; (9) whether they dominated and controlled the course of the interrogation; (10) whether they manifested a belief that the person was culpable and they had the evidence to prove it; (11) whether the police were aggressive, confrontational, or accusatory; (12) whether the police used interrogation techniques to pressure the suspect; and (13) whether the person was arrested at the end of the interrogation. State v. Williams, 405 S.C. 263, 276-277, 747 S.E.2d 194, 201 (Ct. App. 2013) (internal citation omitted). "The custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody." State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003).

In Evans, the defendant made her own way to the police station accompanied by her relatives. Id. at 581, 582 S.E.2d at 408-409. Two police officers took Evans "into a back office to take her statement." Id. The police knew the deadly fire they were investigating started with an accelerant. Id. The police told Evans they did not believe her explanations for the fire. Id. at 581,

582 S.E.2d at 409. The two policemen left the room and sent in a female SLED agent, who used a sympathy tactic. Id. The two women were in the room for forty-five minutes. Id. The SLED agent followed Evans to the bathroom and waited outside the door. Id.

The Court in Evans held the defendant was in custody even though she was not formally arrested until shortly after making the statement. Id. at 584, 582 S.E.2d at 410. When analyzing whether the defendant was free to leave, the Court emphasized that the SLED agent accompanied her to the restroom and waited outside the door. Id. In this case, Investigator Miller did not wait outside the bathroom door like the SLED agent in Evans, but followed Petitioner inside the bathroom. App. 462, ll. 3-20. The Court in Evans emphasized that the interview took place in a back office and that it lasted three hours. Id. In this case, the interrogation was in a back office by three officers, not one, and lasted at least three hours—and perhaps as many as six hours. Finally, in Evans, the Court determined law enforcement's purpose was important and used the fact that the officers challenged Evan's story and switched officers to divine the officers' intent. Id. Here, *Petitioner was a suspect and was confronted by Sprouse's statement*. App. 463, ll. 2-13. Unlike Evans, Petitioner was brought to the police station by two officers. No one was with the intellectually disabled suspect, which shocked Petitioner's brother. Petitioner had no driver's license. He was not free to leave and was in custody.

The facts of this case eerily resemble State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010). Navy also concerns a Seibert two phase interrogation. Kenneth Navy was convicted of suffocating his two year old son. Id. at 296, 688 S.E.2d at 838. EMS responded to Navy's house and found him giving the child CPR. Id. at 297, 688 S.E.2d at 838. Navy gave an unsatisfactory statement to the police at the hospital that night. Id. The police subsequently met with the pathologist who told them the child died from suffocation. Id.

With this knowledge in hand, the police took Navy from his house to the police station. Id. He was not formally under arrest. He gave a statement that was not incriminating. Id. at 298, 688 S.E.2d at 839. Questioning continued and *police confronted Navy with information from the autopsy*. Id. at 298, 688 S.E.2d at 839-840. The Court found that "[a]t this juncture, the nature of the interrogation and respondent's status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation." Id. Without giving Miranda warnings, the police ultimately obtained a confession from Navy which they memorialized after having him sign a Miranda waiver. The Court ruled these statements violated Siebert and were inadmissible. Id. at 301-304, 688 S.E.2d at 841-843.

The police conduct in this case exceeds the transgressions of Navy. All of the factors cited by Navy were present. They "began an unwarned custodial interrogation designed to elicit incriminating information." Id. at 303, 688 S.E.2d at 842. Two officers questioned Navy. Three questioned Petitioner. Both men were picked up from their home by the police. *Both men were confronted with contradictory evidence*. Petitioner was further confronted with Sprouse's statement implicating him in the crime. See Williams, 405 S.C. at 201, 747 S.E.2d at 276 ("[A] police officer's subjective view that the person being questioned is a suspect, if undisclosed, does not bear upon the question of whether that person is in custody, and the same is true where the officer's undisclosed assessment is that the person being questioned is not a suspect. However, *an officer's knowledge or beliefs may bear upon the issue of whether the person being questioned is in custody if they are conveyed, by word or deed, to the person being questioned*; those beliefs are relevant only to the extent they would affect how a reasonable person in the position of the person being questioned would gauge the breadth of his or her freedom of action.") (emphasis added) (internal citation omitted). Both sets of officers knew the results of

an autopsy. Neither man received Miranda warnings until after they had confessed. Unlike Navy, though, Petitioner is intellectually disabled and even less capable of protecting himself from these police tactics.

In Williams, which was relied on heavily by this Court in holding Petitioner was not in custody, the defendant was convicted of first degree criminal sexual conduct with a minor and unlawful conduct toward a child. 405 S.C. at 268, 747 S.E.2d at 197. Williams had cared for his girlfriend's fifteen month old daughter for about ten hours. Id. Later that evening, the child's mother took her to the emergency room after she noticed bruises on the child's face, arms, and genital area. Id. The following day, a detective visited the hospital to investigate the child's injuries. Id. He learned Williams had cared for the child on the day her injuries were discovered. Id. The detective contacted Williams and asked him to come to the sheriff's department to talk to him. Id. Williams told the detective "he wanted to clear up the matter that night because he had a wedding to attend in Alabama the following day." Id. Williams arrived at the sheriff's department around 7:00 pm that night with his mother and daughter. Id. at 268-269, 747 S.E.2d at 197.

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

interrogation and advised Williams of his Miranda rights. Id. After waiving his rights, Williams wrote a formal statement repeating the explanations he had given for the child's injuries. Id. at 270, 747 S.E.2d at 197-198. He added that he injured child's vagina while cleaning her during a diaper change because he was angry. Id. at 270, 747 S.E.2d at 198.

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

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

his mother and daughter, questioned for at most twenty minutes, and was not confronted with any contradictory statements, may have felt free to leave, the same simply cannot be said of Petitioner.

All but perhaps one of the factors cited by this Court in Williams that are used to determine whether an interrogation was custodial for purposes of Miranda support the conclusion that Petitioner was in custody: (1) the contact was initiated by the police; (2) the purpose of the interview was to question Petitioner as a suspect as he was one of only two people home with Minor at the time she sustained her injuries; (3) the interrogation took place at the police station, a more restrictive environment than Petitioner's home or other location; (4) while the police did not inform Petitioner he was under arrest or in custody, a reasonable person in his position would have understood himself to be in custody; (5) the police never informed Petitioner he could terminate the interview or leave at any time; (6) there were restrictions on Petitioner's freedom of movement demonstrated by Investigator Miller accompanying Petitioner not only to the bathroom but inside the bathroom; (7) the interrogation lasted at least an hour and a half and perhaps as long as three hours before Petitioner was advised of his Miranda rights; (8) three officers were involved in the interrogation; (9) Investigator Miller dominated and controlled the course of the interrogation; (10) Investigator Miller confronted Petitioner with his prior contradictory statements and with Sprouse's statement implicating Petitioner indicating Miller believed Petitioner was culpable; (11) as mentioned, Miller was both confrontational and accusatory as he confronted Petitioner with his prior inconsistent statements and Sprouse's statement; (12) Investigator Miller admitted to using a sympathy technique to obtain a confession from Petitioner; and lastly (13) Petitioner was arrested at the end of the interrogation. See Williams, 405 S.C. at 276-277, 747 S.E.2d at 201.

Respectfully, this Court misapprehended the reasoning and holding in Williams as it does not support the determination that Petitioner was in custody. This Court should grant rehearing and hold Petitioner was in custody for purposes of Miranda.

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

It is obvious that trial counsel was deficient for failing to object to the admission of Petitioner's statement pursuant to Missouri v. Seibert, 542 U.S. 600 (2004). Based on the foregoing argument, Petitioner has shown that he was prejudiced by counsel's deficient performance because if counsel had properly objected at trial, there is a reasonable probability the trial judge would have suppressed the statement and the outcome of Petitioner's trial would have been different. In the alternative, if counsel had properly objected at trial thereby preserving the issue for appellate review, even if the trial judge found the statement was admissible, there is a reasonable probability the appellate court would have held the statement should have been suppressed pursuant to Seibert and reversed Petitioner's conviction on appeal.

Respectfully, this Court should grant rehearing and hold trial counsel was ineffective for failing to object to the admissibility of Petitioner's statement pursuant to Miranda and Seibert and that Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability Petitioner's statement would have been suppressed had trial counsel properly objected.

Based on the foregoing, Petitioner respectfully requests this Court rehear his case pursuant to Rule 221(a), SCACR, due to the significant legal and factual points overlooked and/or misapprehended by this Court in affirming the denial of Petitioner's application for post-conviction relief.

Respectfully submitted,

s/ Lara M. Caudy
Lara M. Caudy
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Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

This 3rd day of March, 2022.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

JAMES ALLEN JOHNSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2018-000600

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above referenced case has been served upon Taylor Z. Smith, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on James Allen Johnson, #355670, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 3rd day of March, 2022.

s/ Lara M Caudy___________________
Lara M. Caudy
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ATTORNEY FOR PETITIONER

The South Carolina Court of Appeals

James Allen Johnson, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2018-000600

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paula H. Thomas J.

John D. Geathers J.

Thomas E. Huff A.J.

Columbia, South Carolina

cc:
Lara Mary Caudy, Esquire
Taylor Zane Smith, Esquire
Alan McCrory Wilson, Esquire
James Allen Johnson, 355670

FILED
March 9, 2022