

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

Certiorari to Anderson County
In the Court of Common Pleas
Hon. Eugene C. Griffith, Jr.

Appellate Case No. 2022-001682

BILLY RAY SMITH.....PETITIONER

Versus

STATE OF SOUTH CAROLINA.....RESPONDENT

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Pursuant to the S.C. Supreme Court's opinion in the case of Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), counsel for the Petitioner submits that the issue before the court is the following:

1. Did the trial court commit reversible error in denying the Petitioner's Post-Conviction Relief petition, and are there any arguable or non-frivolous legal arguments to further in this Honorable Court based on the entire record of this case?

STATEMENT

Petitioner was indicted in July, 2014, by the Anderson County Grand Jury for attempted murder (2014-GS-04-1278), possession of a firearm during the commission of a violent crime (2014-GS-04-1278), and obstruction of justice (2014-GS-04-1276). (Appendix p. 1; pp. 77-90) Petitioner was also indicted in September, 2015, for unlawful possession of a pistol (2015-GS-04-1382). (Appendix p. 1; pp. 91-92.) Hervery B. O. Young represented the Petitioner at the trial of this matter on November 16-18, 2015. Following the presentation of evidence, the jury found the Petitioner guilty as indicted on all charges. Honorable R. Scott Sprouse sentenced the Petitioner to imprisonment for twenty (20) years for attempted murder, and for five (5) years for possession of a weapon during the commission of a violent crime, unlawful possession of a pistol, and obstruction of justice -- all sentences to run concurrently. (Appendix p. 2.) Trial counsel filed a notice of appeal and subsequently the Petitioner was represented on appeal by the South Carolina Commission on Indigent Defense. Appellate counsel filed a petition to be relieved as counsel, and a brief pursuant to the case of *Anders v. California*, 386 U.S. 738 (1967), briefing arguable points of merit. (Appendix p. 2.) The petition to be relieved as appellate counsel was granted by the S.C. Court of Appeals, the appeal was dismissed, and the remittitur issued on July 14, 2017. (Appendix, p. 2.)

On or about August 28, 2017, the Petitioner filed a *pro se* application for Post Conviction Relief raising multiple issues of the alleged constitutional ineffectiveness of trial counsel. (Appendix pp. 15-23.) The State filed a Return on November 29, 2017. (Appendix pp. 24-31.) At the trial of this matter, PCR counsel informed Judge Griffith that he would only proceed as to two issues: 1) That trial counsel was constitutionally ineffective for not conducting an adequate investigation, and 2) that trial counsel was constitutionally ineffective for not properly advising

the Petitioner regarding a plea offer. (Appendix p. 3; p. 5, lines 1-18.) Following the receipt of testimony and evidence at the PCR trial, Judge Griffith denied the Petitioner's motion and dismissed the matter with prejudice. (Appendix p. 14.)

ARGUMENT

Pursuant to the procedures set forth in Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), which references the seminal case of Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, undersigned counsel cannot identify any legally non-frivolous issues presented by the record of this matter.

Undersigned counsel cannot identify any legally non-frivolous issues presented by the record of this matter as contained the Appendix, attached by reference to this Petition. Counsel has carefully examined the facts and matters contained in the record of this case, has researched the law in connection therewith including the law relative to ineffective assistance of trial and appellate counsel, and has concluded that the appeal does not present a non-frivolous legal question upon which relief can be granted in favor of the Petitioner Billy Ray Smith which would justify this Court granting to the Petitioner a new trial or other further relief. In reaching this conclusion, counsel has thoroughly reviewed the record of this case, and other materials contained in the Appendix to this Petition. Specifically, counsel has reviewed the order of Judge Griffith and the basis for his rulings denying the Petitioner's PCR application. Counsel is unable to find any meritorious violations of the Constitution, state statutes, the S.C. Rules of Criminal Procedure, nor the S.C. Rules of Evidence. Therefore, counsel finds no merit to this appeal, and respectfully requests permission to withdraw from representation of Mr. Billy Ray Smith.

Pursuant to the procedure outlined in *Johnson*, which references *Anders*, counsel is required to address any "arguable" issues raised by the record of this case, even if counsel determines that those issues are wholly frivolous. The applicable law that courts apply to address the issues of ineffective assistance of trial counsel, which issue was raised by Petitioner, are addressed by Judge Griffith in his final order and incorporated herein. (Appendix pp. 1-14.)

Although undersigned counsel cannot identify any non-frivolous nor meritorious issues to present to this Court in brief, the “arguable” issue raised by the record of this case involves the trial attorney’s decision not to call the Petitioner’s brother, Nathan Smith, as a witness at the criminal trial. At the PCR trial, Mr. Smith testified that he talked to the Petitioner less than thirty (30) minutes before the incident occurred. (Appendix p. 55, lines 22-25.) Mr. Smith testified that the Petitioner asked him about the value of a Smith & Wesson .22 revolver, because he was considering getting one for his wife for her protection because she worked at Walmart and had to leave the store late at night. (Appendix p. 56, lines 3-15.) Mr. Smith testified that the Petitioner had the call on speaker phone, and could hear the Wife in the background with both of them “laughing and cutting up about it.” (Appendix p. 56, lines 16-18.) Mr. Smith testified that the Wife joked that, “Yeah you going to give me something I can shoot you with if I catch you cheating on me.” (Appendix p. 56, line 25; p. 57, lines 1-2.) PCR counsel furthered the notion that there was no animosity between the Petitioner and his Wife during that call, which was close in proximity to the discharge of the firearm. (Appendix p. 57, lines 6-8; p. 58, lines 1-6.) Mr. Smith testified that he did not have any contact with criminal trial counsel. (Appendix p. 58, lines 7-18.) Mr. Smith further testified that he had talked to the Wife after this one time, and asked her what happened – to which she replied that she did not know, they were having a good day. (Appendix p. 5, lines 8-13.)

Although counsel has presented to this Honorable Court an “arguable” point of law as applied to the facts of this case, it is the opinion of counsel that the point would not prevail on appeal and would be frivolous.

CONCLUSION

Pursuant to *State v. Johnson*, as the case references *Anders v. California*, as both cases are cited supra, undersigned counsel has examined the record of this case and has not identified any legally non-frivolous issues to brief on appeal. Therefore, counsel respectfully moves to withdraw from this case, in accordance with *Johnson*, and requests that this Honorable Court rule on the appeal of Petitioner Billy Ray Smith accordingly.

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July 3, 2023.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Billy Ray Smith states:

1. Undersigned counsel was appointed to represent petitioner in his appeal of the denial of his Post-Conviction Relief Petition.
2. Undersigned counsel has reviewed the record of petitioner’s post-conviction relief hearing before Judge Eugene Griffith, which was held on August 14, 2019, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. That pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), counsel requests that the Court relieve her as counsel for Billy Ray Smith.

Respectfully Submitted,

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This 3rd day of July, 2023

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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of her 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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This 3rd day of July, 2023