

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Horry County

Honorable Roger E. Henderson, Circuit Court Judge

---

JOHN HENRY SMITH,

 ORIGINAL

RECEIVED

MAR 14 2018

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001550

---

JOHNSON PETITION FOR WRIT OF CERTIORARI

---

Kathrine H. Hudgins  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

**INDEX**

INDEX ..... i

ISSUE PRESENTED ..... 1

STATEMENT ..... 2

ARGUMENT ..... 3

CONCLUSION ..... 6

PETITION TO BE RELIEVED AS COUNSEL ..... 7

**ISSUE PRESENTED**

Did the PCR judge err in refusing to find trial counsel ineffective, during the armed robbery trial, for failing to object to the prosecutor asking leading questions in order to obtain additional testimony from the eye-witness that he believed that Petitioner was armed, a critical factor to be determined by the jury?

## STATEMENT

In February of 2012, the Horry County Grand Jury indicted Smith for armed robbery, indictment #2013-GS-26-469.<sup>1</sup> On April 17, 2013, Smith proceeded to jury trial before the Honorable Larry B. Hyman. Attorney Jonathan Eric Fox represented Smith at trial. Attorneys George H. DeBusk Jr. and Heather T. Von Herrmann prosecuted the case on behalf of the State. The jury returned a verdict of guilty and Judge Hyman sentenced Smith to twenty five (25) years. A timely notice of intent to appeal was filed and the direct appeal perfected. On February 25, 2015, the South Carolina Court of Appeals affirmed the conviction and sentence. State v. John Henry Smith, Op. No. 2015-UP-095 (Ct. App. filed Feb. 25, 2015).

On June 2, 2015, Petitioner, John Henry Smith, filed an application for post-conviction relief [PCR]. The State filed a return on February 1, 2016. On March 24, 2017, an evidentiary hearing was held before the Honorable Roger E. Henderson. James Falk represented Petitioner at the PCR hearing. Megan Harrigan Jameson represented the State. In a written order signed June 26, 2017, Judge Henderson denied relief and dismissed the application. A timely notice of intent to appeal was served on July 17, 2017. This petition for writ of certiorari follows.

---

<sup>1</sup> The trial transcript notes indictment #2013-GS-26-876. This appears to be a typographical error.

## ARGUMENT

**The PCR judge erred in refusing to find trial counsel ineffective, during the armed robbery trial, for failing to object to the prosecutor asking leading questions in order to obtain additional testimony from the eye-witness that he believed that Petitioner was armed, a critical factor to be determined by the jury.**

On December 12, 2011, a little after 2:00 AM, the Walgreen's pharmacy in Conway was robbed. The clerk on duty at the time of the robbery, Hilton Fryar, testified:

I had Mr. Smith over there come in. When he came in he went straight to the ziplock bags [sic] were on the aisle, he brought back a box to the register, he asked what the price was of it, I told him what it was and then after that he proceeded to tell me to give him the money out of the register and to be quiet and not make any noise because he said he had a gun.

(R. p. 27, lines 12-19). The clerk testified that one of Smith's hands was in his pocket. (R. p. 27, lines 20-21). The clerk admitted that he never saw a weapon. (R. p. 41, lines 16-20). The State, over objection, introduced a video, marked State's exhibit #2, of the robbery filmed by the store's surveillance camera. (R. p. 34, lines 17-19). The clerk never testified that Smith made any gestures with his hand to indicate that he had a gun or the physical representation of a gun.

Smith was stopped by the police shortly after the robbery and, through a show-up identification procedure, the clerk identified Smith as the person who robbed the Walgreen's. (R. pp. 30-31). The police found no weapons on Smith at the time of his arrest. (R. p.59, line 20 – p. 60, lines 1-13). No weapon was ever recovered in relation to the Walgreen's robbery.

During the direct examination of the clerk the prosecutor asked, "At that time did you fear he had a gun like he said?" The clerk answered, "Uh-huh." (App. p. 65, lines 9-11). Trial counsel did not object. The main factor to be determined by the jury in the armed robbery trial was whether or not Petitioner was armed during the commission of the robbery of the Walgreen's.

During closing argument counsel for Petitioner conceded guilt on strong arm robbery, arguing that Petitioner was guilty of the lesser included offense because Petitioner was not armed. (App. pp. 139-145).

During the PCR hearing trial counsel admitted that the question asked by the prosecutor was leading and admitted that he did not object. (App. p. 217, lines 6-18; p. 218, line 1). When asked if the failure to object was part of a trial strategy, trial counsel answered, "Not specifically. Sometimes – Mr. DeBusk, the Solicitor, is a very experienced solicitor. I believe if there had been an objection, he would have easily rephrased the question and gotten the same information." (App. p. 217, lines 21-24).

Addressing the leading questioning in the order of dismissal the PCR judge wrote:

This Court finds this allegation is without merit and must be denied and dismissed. As trial counsel testified, Fryar testified earlier that Applicant told him he had a gun and his hands were in his pocket. See Tr. 63. Therefore, Applicant is unable to glean any possible prejudice from these allegedly improper questions. This Court also finds trial counsel responded in accordance with professional standards required of a criminal defense attorney when he elected not to object, as such an objection would not likely have been sustained or the State would have rephrased its question to Fryar. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

(App. p. 254). The PCR judge erred.

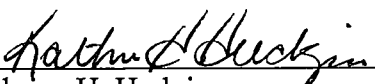
The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at

687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Id. at 693, 104 S.Ct. at 2052.

Counsel was deficient in failing to object to the leading questioning by the prosecutor. Petitioner was prejudiced by the deficient performance. As a result of the improper questioning the prosecutor was able to bolster the witness's prior testimony that he believed Petitioner was armed, the critical factor in the trial. There is a reasonable probability that, but for counsel's error, the jury would have returned a verdict of guilty of strong arm robbery rather than armed robbery.

**CONCLUSION**

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of March, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Horry County

Honorable Roger E. Henderson, Circuit Court Judge

---

JOHN HENRY SMITH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

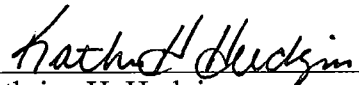
PETITION TO BE RELIEVED AS COUNSEL

---

Counsel for John Henry Smith states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
  2. She has reviewed the record of petitioner's trial before Judge Roger E. Henderson, which was held on May 24, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
  3. She 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 her as counsel for John Henry Smith.

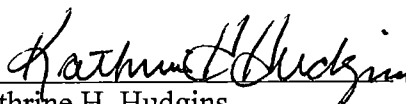
Respectfully Submitted,

  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 14th day of March, 2018.

**CERTIFICATE OF COUNSEL**

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."



Kathrine H. Hudgins  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

This 14th day of March, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Horry County

Honorable Roger E. Henderson, Circuit Court Judge

---

JOHN HENRY SMITH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

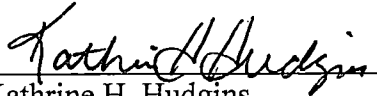
RESPONDENT

---

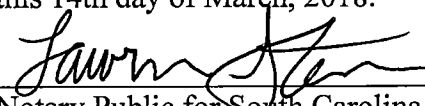
CERTIFICATE OF SERVICE

---

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 Megan Harrigan Jameson., 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 John Henry Smith, #211679, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 14th day of March, 2018.

  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 14th day of March, 2018.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 5, 2027.