

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to the Court of Appeals
Appeal from Beaufort County
Brooks P. Goldsmith, Post-Conviction Relief Judge
Appellate Case Number 2016-001684
Unp. Op. No. 2020-UP-033 (Feb. 5, 2020)

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FEB 20 2020
SC Court of Appeals

Mykel Johnson..... Petitioner,

v.

State of South Carolina,.....Respondent.

RESPONDENT’S PETITION FOR REHEARING

Through its unpublished, *per curiam* opinion issued on February 5, 2020, this Court reversed and remanded this matter back to the post-conviction relief court. In this unpublished opinion, this Court indicated the remand was based, at least in part on a concession made by Respondent. However, the opinion issued by this Court does not indicate the scope of the remand, leading to confusion as to what actions the lower court and all parties should take. Respondent requests this Court issue a new opinion specifically stating the purpose and scope of the remand.

Looking to what occurred in the case, Petitioner filed a post-conviction relief application and an evidentiary hearing was held before the Honorable Brooks P. Goldsmith. At that hearing, Respondent improperly argued Petitioner’s claim that counsel was ineffective for failing to object to Officer Dowling’s statement was procedurally barred because the potential *Doyle v.*

Ohio, 426 U.S. 610 (1976) violation issue was raised in a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). In the order of dismissal, the post-conviction relief court agreed with Respondent's argument and erroneously found:

This allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. *Ashlev v. State*, 260 S.C. 436, 196 S.E.2d 501 (1973). This was the exact issue raised in Applicant's direct appeal. (See *Anders* Brief of Appellant pp. 5-6). As such, this issue is not proper for the PCR forum. Therefore, this allegation is denied.

App. 402.

On appeal, Petitioner raised the issue that the PCR court erred in concluding as a matter of law that Petitioner's claim that trial counsel rendered ineffective assistance by failing to object to an officer's improper comment on his silence was procedurally barred pursuant to Section 17-27-20(B) of South Carolina Code because the unpreserved issue regarding the officer's improper comment was raised in a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), on direct appeal. Respondent conceded in its brief that the decision of the post-conviction relief court was erroneous and the proper relief was to remand the case to the lower court for a limited hearing as to this issue. Respondent made the same concession and request for relief during oral argument before this court on December 10, 2019.

At argument, the concession made by Respondent was specifically limited to this issue and the requested relief was to remand the case to the post-conviction relief court for a limited hearing to develop the record as to counsel's alleged failure to object to Officer Dowling's testimony. Respondent recognizes that this Court appears to have granted the requested relief, however, the issued opinion does provide leave for ambiguity and interpretation. This Court

certainly appreciates the potential issues posed if this case were to be remanded to the post-conviction relief court with limited guidance as to the scope of the hearing to be held.

Conclusion

Based on the foregoing ambiguity and the State's limited concession in oral argument, it is respectfully submitted that this Court should issue a new opinion specifically finding that the case is to be remanded to the post-conviction relief court for a hearing limited to the allegation that counsel was ineffective for failing to object to Officer Dowling's testimony.

Respectfully submitted,

ALAN WILSON
Attorney General

BENJAMIN LIMBAUGH
Assistant Attorney General

BY: *Benjamin Limbaugh*
Benjamin Limbaugh
S.C. Bar No. 103334
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-5844

ATTORNEYS FOR RESPONDENT

February 20, 2020
Columbia, South Carolina

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MYKEL JOHNSON,

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RESPONDENT

CERTIFICATE OF SERVICE

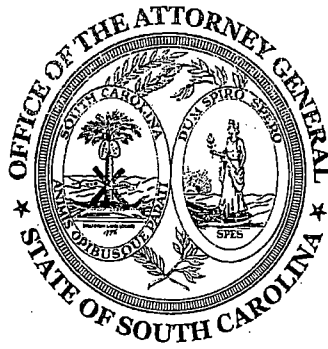
The undersigned hereby certifies that a true copy of the **Respondent's Petition for Rehearing** has been served upon the applicant by placing two copies in Interagency Mail addressed to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

This the 20th day of February, 2020.



Jennifer Jennison
Administrative Coordinator for Respondent



ALAN WILSON
ATTORNEY GENERAL

February 20, 2020

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SC Court of Appeals

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

**RE: Mykel Johnson v. State of South Carolina
Appellate Case No.: 2016-001684**

Dear Mr. Shearouse:

Enclosed please find the original and six copies of Respondent's Petition for Rehearing in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Benjamin H. Limbaugh
Assistant Attorney General
S.C. Bar # 103334

BHL/jaj
Enclosures

cc: Susan B. Hackett, Esquire
Victim Advocacy Division