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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

\_\_\_\_\_  
Certiorari to Beaufort County

Brooks P. Goldsmith, Circuit Court Judge

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MYKEL JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001684

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RETURN TO PETITION FOR REHEARING

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On February 5, 2020, this Court reversed and remanded the lower court's denial of Petitioner's application for post-conviction relief in an unpublished opinion. Johnson v. State, Op. No. 2020-UP-033 (S.C. Ct. App. filed Feb. 5, 2020). Subsequently, the state filed a petition for rehearing asking this court to "issue a new opinion specifically stating the purpose and scope of the remand." On March 23, 2020, this Court ordered Petitioner to file a return to the state's petition for rehearing. Pursuant to this Court's order, Petitioner files this return.

Petitioner opposes the state's request because this Court's opinion is clear and requires no clarification. In its opinion issued on February 5, 2020, this Court explained that Petitioner appealed the denial of his post-conviction relief application "arguing the PCR court erred in denying his petition on procedural grounds." After reviewing the briefs and hearing oral

argument, this Court reversed and remanded the case. As noted by this Court in its opinion, the state conceded in its briefing and at the oral argument that the PCR judge erred and that the error was due, at least in part, to the state's legally erroneous argument to the PCR judge. No additional clarification is necessary for the lower court and all parties to understand the purpose and scope of the remand.

At Petitioner's trial, the state questioned Investigator Joshua Dowling regarding his investigation of Petitioner. During this examination, Investigator Dowling informed the jurors that he was unable to develop any information "from the defendant's side" because Petitioner did not want to speak with police and requested the assistance of counsel. App. 102, l. 24 – App. 103, l. 16. It was undisputed that trial counsel did not object. Appellate counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 320-331. The issue raised on appeal was whether the trial judge erred in failing to strike testimony by the investigator that Petitioner "did not want to talk and wanted the representation of any attorney because the testimony constituted an improper comment on [his] constitutional right to remain silent and right to an attorney." App. 320-331. Finding no *preserved* issues with potential merit, this Court dismissed the appeal and relieved appellate counsel on April 2, 2014. App. 332-333; State v. Johnson, 2014-UP-134 (S.C. Ct. App. filed April 2, 2014).

Thereafter, Petitioner filed a PCR application, which was later amended to include a claim that trial counsel was ineffective for not objecting to Dowling's testimony on Petitioner's exercise of his right to silence and counsel. App. 335-341; App. 365, ll. 16-20. During the PCR hearing, the state objected to the presentation of evidence related to trial counsel's failure to object to Dowling's testimony. According to the state, the issue was "improper for a PCR forum." Because this was "the exact issue raised at the Court of Appeals through an Anders

versus California brief. The Court of Appeals affirmed his conviction. That was dealt with on direct appeal.” App. 373, ll. 10-16. “[T]he fact that this issue was briefed on direct appeal” was proof, according to the state, “that this [issue was] not proper for PCR forum” as the issue had “already been addressed because an Anders brief [was filed] ... [and] the Court is presumed to have reviewed the entire record and ma[d]e an opinion - - or issued an opinion based on they reviewed the entire record.” App. 378, ll. 12-18. Thus, the issue was procedurally barred as “not proper ... for the PCR forum.” App. 374, ll. 24-25.

The PCR judge agreed with the state’s argument. In the order denying relief, the PCR judge found Petitioner’s claim that trial counsel “was ineffective for failing to [object to Officer] Dowling’s testimony that when [Petitioner] was arrested, he invoked his right to remain silent” was “without merit.” App. 402. According to the PCR judge, the issue raised a “direct appeal issue that [was] procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003).” App. 402. Although the PCR court correctly noted that “[p]ost-conviction relief is not a substitute for a direct appeal” and that “[a] post-conviction relief application cannot assert any issues that could have been raised ... on direct appeal,” the PCR court erred in holding that because this issue was raised on direct appeal, the issue was “not proper for the PCR forum.” See App. 402.

In its return to the petition for writ of certiorari and its brief of respondent, the state candidly admitted the PCR court erred in finding Petitioner’s claim that trial counsel provided ineffective assistance by failing to object to an officer’s improper comment on his silence was procedurally barred because the issue was raised in a brief pursuant to Anders. Ret. at 6-8. The state requested this Court reverse the PCR court’s dismissal of Petitioner’s allegation. Ret. at 8. Further, during the oral argument before this Court, the state conceded the PCR court erred when it relied upon the argument made by the state that the issue presented was procedurally barred.

All agree that PCR is the proper forum for Petitioner's claim for relief – trial counsel's ineffective assistance in failing to object to the officer's improper testimony – because the issue was not decided, and could not have been decided on direct appeal. All agree that the PCR judge erred as a matter of law when he concluded Petitioner's claim was procedurally barred on collateral review. Finally, all agree that the remedy for the error is a remand to the PCR court for a hearing. This Court's opinion makes this abundantly clear; therefore, it is unnecessary for this Court to issue a new opinion.

*s/Susan B. Hackett*

Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of April, 2020.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

\_\_\_\_\_  
Certiorari to Beaufort County  
Brooks P. Goldsmith, Circuit Court Judge

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MYKEL JOHNSON,

PETITIONER

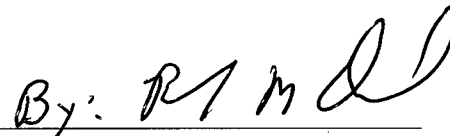
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

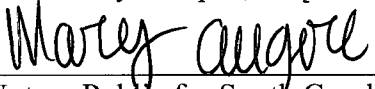
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CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Return to Petition for Rehearing in the above referenced case has been served upon Benjamin Limbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Mykel Johnson, #351916, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 1st day of April, 2020.

By: 

\_\_\_\_\_  
Susan B. Hackett  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 1st day of April, 2020.

 (L.S)  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: May 12, 2027

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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Honorable Jenny Abbot Kitchings  
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