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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Anderson County

Honorable R. Scott Sprouse, Circuit Court Judge

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ROBERT FROST,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000604

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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## **ISSUE PRESENTED**

Whether appellate counsel provided ineffective assistance of counsel, in derogation of the Sixth Amendment, by briefing an unpreserved issue pursuant to Anders v. California, 386 U.S. 738 (1967) where a very meritorious preserved issue of whether a directed verdict should have been granted on the burglary charge existed since petitioner either still lived in the home where his stepfather was killed or he regularly visited there and still received his social security check there because petitioner was denied his right to effective appellate representation under these circumstances?

## STATEMENT

Petitioner was indicted at the April 16, 2013 term of the Anderson County grand jury for the offenses of murder, attempted murder, burglary in the first degree, and robbery\armed robbery, robbery while armed, or allegedly armed. App. 761-768. Petitioner represented himself at trial with Gregory Lee Cole as standby counsel. The jury trial was held before the Honorable R. Lawton McIntosh in the Anderson County Court of General Sessions. App. 1. Assistant Solicitor Lauren Price prosecuted the case. App. 1.

Petitioner was found guilty on all counts. App. 688. He was sentenced to life imprisonment. App. 696.

He was represented on appeal by Appellate Defender Kathrine Hudgins. Supp. App. 1. After the submission of a brief pursuant to Anders v. California, 386 U.S. 738 (1967), his convictions were affirmed by the Court of Appeals. Supp. App. 13-14.

Petitioner then filed for post-conviction relief in the Anderson County Court of Common Pleas. App. 700-707. The state filed a partial motion to dismiss and a motion to make more definite and certain. App. 708-717. Petitioner's PCR counsel, Linda Whisenhunt, then filed a supplemental application for post-conviction relief raising, inter alia, the directed verdict on the burglary in the first-degree ground for relief. App. 718-720.

An evidentiary hearing was convened on February 18, 2020 before the Honorable R. Scott Sprouse. Linda Whisenhunt represented petitioner. Lillian Meadows was the Assistant Attorney General. App. 721. Petitioner and appellate counsel, Kathrine Hudgins, testified.

An order of dismissal was filed on April 6, 2020. App. 747-760. This petition for a writ of certiorari follows.

## ARGUMENT

Appellate counsel provided ineffective assistance of counsel, in derogation of the Sixth Amendment, by briefing an unpreserved issue pursuant to Anders v. California, 386 U.S. 738 (1967) where a very meritorious preserved issue of whether a directed verdict should have been granted on the burglary charge existed since petitioner either still lived in the home where his stepfather was killed or he regularly visited there and still received his social security check there because petitioner was denied his right to effective appellate representation under these circumstances.

### **Relevant Facts**

The alleged burglary, murder, and attempted murder occurred on July 15, 2012 at the East Front Street address in Iva, South Carolina. App. 766. The victim of the murder was petitioner's stepfather, James Davenport. App. 762. The victim of the attempted murder was petitioner's mother, Faye Davenport. App. 764.

Thomas Miller was the Police Chief and Assistant Chief of the Iva Rescue Squad. App. 549, ll. 5-11. He supervised over twelve employees. App. 549, l. 12 – 550, l. 2.

Miller remembered being dispatched on July 15, 2012 to an assault in progress at the Davenport home on East Front Street in Iva. App. 550, ll. 3-11. When Miller arrived there, he went to the front door and observed EMS and paramedic Bill Cross “working on Mr. Davenport.” Mr. Davenport had been stabbed repeatedly. App. 550, ll. 7-24. This was occurring in a little bedroom off of a hallway. App. 550, l. 25 – 551, l. 4.

Miller also saw Mrs. Davenport nearby. She was very upset. “There was a lot of blood in the hallway there.” App. 551, ll. 5-25. Miller assisted EMS in placing Mr. Davenport on a stretcher, and they carried him to the ambulance. App. 551, ll. 13-20.

During this time, Miller also contacted the Anderson County Sheriff's Office to assist with the crime scene. App. 552, ll. 4-20. Miller then went back on the porch, where he spoke again with Mrs. Davenport. He asked Mrs. Davenport to go to the hospital. Although Mrs. Davenport did not want to go to the hospital at first, EMS finally made her aware she had been stabbed, and she eventually went to the hospital. App. 553, l. 1 – 554, l. 5.

During this time period, however, the on-call doctor at the emergency room told EMS to stop life-saving efforts on Mr. Davenport. Miller was then informed by EMS that Mr. Davenport had died. Miller made sure the coroner's office was notified. App. 554, ll. 6-17.

As stated, petitioner represented himself during the trial. He asked Miller on cross-examination, "What happened with your job there at the Town of Iva?" App. 567, ll. 2-12. The solicitor objected, and petitioner was allowed to proffer the proposed cross-examination. App. 567, l. 1 – 568, l. 13.

During the proffer, Miller said he resigned for personal reasons. He denied he resigned after being arrested. Petitioner at this point said, "Never mind. We got to bring the jury back." App. 568, l. 14 – 569, l. 5.

On further cross-examination before the jury, Miller denied that he tampered with the crime scene, and he also denied that he killed Mr. Davenport, petitioner's stepfather. App. 572, ll. 14-21.

Petitioner's mother, Fayette Davenport, testified she had been living at the East Front Street address for about sixteen years at the time of the fatal incident. App. 361, ll. 4-21. Mrs. Davenport described the house as a five-bedroom, two-story house with seven entrances. App. 362, ll. 1-8.

Mrs. Davenport related that her first husband died at her hands as a result of “justifiable homicide.” She had been married to her second husband, the decedent, for forty-one years on July 15, 2012. App. 363, ll. 1-13. She identified a photograph of her husband without objection. App. 363, l. 18 – 364, l. 14. See State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999); State v. Livingston, 327 S.C. 17, 488 S.E.2d 313 (1997) (error to admit a photograph of the decedent while he or she was alive during a homicide trial.)

Mrs. Davenport remembered on July 15, 2012, “[W]e had been getting some very bad calls from my son, Robert. So we’d taken the phone off the hook.” App. 365, ll. 10-14. Mrs. Davenport called 911 about the telephone calls from petitioner, and “They sent Officer Richey to my house and I had some stuff on the recording that he listened to. And then he said: ‘Where is Robert calling you from?’ I said a neighbor’s house. So he called that house and Robert answered.” Mrs. Davenport recalled that petitioner claimed to Officer Richey to be Jack Davenport, who was his deceased brother. App. 365, l. 1 – 366, l. 1.

Mrs. Davenport testified that Officer Richey told petitioner if he came to Iva that he would be “locked up.” Officer Richey then told Mrs. Davenport if petitioner came to the house, to hide and call the police. App. 366, ll. 2-15. Mrs. Davenport related that petitioner in the recordings of these phone calls was threatening to kill her and her husband. App. 367, ll. 1-3. She noted that petitioner had been calling them for two days and making threats. Mrs. Davenport took the phone off the hook and assured that all of the doors in the house were locked. App. 367, l. 1 – 368, l. 17.

A little later, petitioner telephoned and said “‘Mama, I’m sorry. I love y’all’ and hung the phone up.” Mrs. Davenport heard this on the recording since the phone was off the hook.

App. 369, ll. 5-22. While Mrs. Davenport was relieved that petitioner had apparently calmed down, she kept the doors locked to be safe.

A short while later, Mrs. Davenport claimed that petitioner kicked the door in and entered the house. Petitioner allegedly told her, "I need some money." App. 370, ll. 3-19. He was carrying a knife. App. 371, ll. 13-17. Mrs. Davenport said petitioner put the knife to her throat while demanding money. She told petitioner where her billfold was and to get the money out of the billfold, which contained several hundred dollars. App. 372, ll. 9-17. Mrs. Davenport claimed instead petitioner told her, "I'm going in there and kill that son of a bitch, James. And he started to the bedroom. I started screaming to the top of my voice, 'James, Robert's in the house.'" App. 372, l. 9 – 373, l. 4.

She followed petitioner, screaming and hollering, and asked him to sit down and talk about what was happening. When petitioner agreed to talk, and he turned around "and started towards the living room. I slammed the bedroom door. I thought I had locked it both locks on it. It has a night lock and then a small lock. And next thing I knowed he'd kicked it open. And he was coming like that (demonstrating) with the knife at James, so James hit him with the ball bat." App. 373, l. 23 – 374, l. 8.

Mrs. Davenport testified that petitioner then began stabbing her husband, his stepfather. He also grabbed Mrs. Davenport and told her, "I'm going to kill you now." App. 376, ll. 1-14. Mrs. Davenport told petitioner, "Robert there's some more [money] in there in billfold..." noting there were several hundred dollars and her credit cards for petitioner to take. App. 376, l. 23 – 377, l. 8.

At this time, Mrs. Davenport noticed a police car in the backyard, and she yelled for the police officer to help her. App. 377, ll. 9-15. The police officer arrested petitioner as he was sitting on his motorcycle outside the house after the stabbing.

Mrs. Davenport admitted that petitioner received his social security check at the house. She acknowledged that petitioner apparently came by regularly to pick up his check and visit. However, she denied petitioner was still living with her and her husband at the time of the stabbings. App. 387, ll. 13-15.

Mrs. Davenport also testified without objection that there had been a prior violent incident in Mississippi, after petitioner had not been out of prison long, where he cut her decedent husband with a knife. This happened several years before this fatal incident. App. 388, ll. 6-23. This was an inadmissible prior bad act under Rule 404 (b), SCRE.

On cross-examination by the pro se petitioner, Mrs. Davenport admitted petitioner's social security check came to the house and that petitioner came by the house whenever he wanted to pick up his check or otherwise. App. 404, l. 2 – 405, l. 10. Mrs. Davenport denied on cross-examination to petitioner that her decedent husband had ever been in a motorcycle gang. She admitted she served two years in prison for apparently dealing in methamphetamines. App. 403, l. 20 – 407, l. 3. She also admitted her decedent husband had been a member of the Ku Klux Klan. App. 407, ll. 7-10. At the end of cross-examination of his mother, Mrs. Davenport told petitioner she was seventy-five years old and that she was prescribed medication by her psychiatrist. App. 431, ll. 12-21.

At the close of the state's evidence, standby counsel Cole moved for a directed verdict on the burglary charge, noting that the state had failed to prove the address where the incident

occurred was not also petitioner's residence. Counsel noted that petitioner's money was sent to the house, in addition to the other evidence. App. 576, l. 9 – 577, l. 4.

The judge said he had been inclined to direct the verdict on the burglary charge. However, based solely on Mrs. Davenport's claim that petitioner was not still living in the house, he denied the directed verdict motion. App. 577, l. 12 – 578, l. 7. As argued below, that was error.

On appeal, defense counsel Kathrine Hudgins filed an Anders brief. The issue she raised was: "Did the trial judge err in instructing the jury that a specific intent to kill is not an element of attempted murder?" Supp. App. 4.

As stated above, on February 18, 2020, an evidentiary hearing was convened before the Honorable R. Scott Sprouse. App. 721. Petitioner testified that the burglary charge should not have been allowed to go to the jury. He noted that his social security check had gone to the residence for thirteen years. "My money was going there to the residence." App. 730, ll. 10-24.

Appellate counsel Hudgins also testified at the PCR hearing. Appellate counsel said she raised in her Anders brief the issue of whether the judge erred by instructing the jury that a specific intent to kill was not an element of attempted murder. App. 737, ll. 2-4. Counsel offered that she raised that issue because it was "a good legal issue" and she stated that although there was not an objection preserving the issue, she thought the appellate court might overlook preservation issues since petitioner proceeded pro so. She was aware of the directed verdict issue on the burglary charge but chose not to raise it. App. 738, ll. 1-7; app. 742, ll. 4-15.

## **Discussion**

A defendant is entitled to the effective assistance of his appellate counsel on direct appeal. Evitts v. Lucey, 469 U.S. 387 (1985); Southerland v. State, 317 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). However, "appellate counsel is not required to raise every non-frivolous

issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990), citing Jones v. Barnes, 463 U.S. 745 (1983).

Though appellate counsel is not required to raise every non-frivolous issue presented by the record; here, the only issue appellate counsel raised in this case on appeal in an Anders brief was unpreserved. Further, the state presented no testimony at PCR indicating counsel made a tactical decision not to appeal the directed verdict burglary issue. See Wilds v. State, 407 S.C. 432, 440, 756 S.E.2d 387, 391 (Ct. App. 2014). Evitts v. Lucey, 469 U.S. 387 (1985).

In this case, appellate counsel raised an unpreserved issue in an Anders brief. At the same time, it is undisputed that the directed verdict motion on the burglary charge was a preserved issue.

Critically, the trial judge erred by not directing a verdict on the burglary charge since petitioner had the license or privilege to enter the house under the totality of the circumstances. It is apparent from the record that petitioner received his social security check at the house and went by the house at least once monthly to retrieve the check or money. This record disclosed that petitioner was welcome in his parent’s home. How the tragic, psychotic episode in this case happened will probably always be a mystery.

However, it is clear petitioner had the license and privilege to go by this house and one cannot be guilty of committing a burglary by breaking into his own home. See State v. Singley, 392 S.C. 270, 409 S.E.2d 603 (2011), citing State v. Trapp, 17 S.C. 467, 470, 43 Am. Rep. 614 (1882). Petitioner had lived in this house, and he still had the license and privilege to come by and enter as a loved family member. In fact, petitioner and his mother still professed their love for one another at the trial after petitioner cross-examined her at trial. App. 434, ll. 2-4.

Thus, there was no direct or substantial circumstantial evidence petitioner committed the crime of burglary in this case. The judge erred by focusing solely upon whether he believed petitioner lived in the house. The proper test was whether by a totality of the circumstances petitioner had the license or privilege to enter the house, and he did. Therefore, the judge had the duty to direct a verdict of acquittal on the charge of burglary. See State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011). Consequently, appellate counsel was ineffective for failing to raise this profoundly meritorious issue for petitioner on direct appeal. See Sutherland v. State.

**CONCLUSION**

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on this issue.

*s/ Robert M. Dudek*  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of November, 2020.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Anderson County

Honorable R. Scott Sprouse, Circuit Court Judge

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ROBERT FROST,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Robert Joe Frost states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
  2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge R. Scott Sprouse, which was held on February 18, 2020, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
  3. He 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 him as counsel for Robert Joe Frost.

Respectfully Submitted,

*s/ Robert M. Dudek*

Robert M. Dudek

Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of November, 2020.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of his 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.”

*s/ Robert M. Dudek*

Robert M. Dudek

Chief Appellate Defender

South Carolina Commission on Indigent  
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This 20th day of November, 2020.

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CERTIFICATE OF SERVICE

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Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Johnson Petition for Writ of Certiorari, a copy of the Appendix, and a copy of the Supplemental Appendix in the above-referenced case has been served upon Lillian Meadows, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 20th day of November, 2020; and a copy of the Johnson Petition for Writ of Certiorari, a copy of the Appendix, and a copy of the Supplemental Appendix have been served on Robert Joe Frost, #171218, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 20th day of November, 2020.

s/ Robert M. Dudek  
Robert M. Dudek  
Chief Appellate Defender  
ATTORNEY FOR PETITIONER