

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-60362
Conference Calendar

BILLY LEE SMITH,

Petitioner-Appellant,

versus

JAMES V. ANDERSON, SUPERINTENDENT,
MISSISSIPPI STATE PENITENTIARY; MIKE
MOORE, The Attorney General of The
State of Mississippi,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 1:96-CV-268-S-A

October 19, 1999

Before JONES, SMITH, and STEWART, Circuit Judges.

PER CURIAM:*

Billy Lee Smith, Mississippi inmate #69235, appeals from the judgment of the district court denying Smith's application for habeas corpus relief under 28 U.S.C. § 2254. The district court granted Smith a certificate of appealability on the issue whether Smith was denied the effective assistance of counsel at his robbery trial and subsequent direct appeal of his conviction and

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

15-year sentence as a habitual offender. Smith contends that his counsel was deficient for failing to challenge the habitual-offender portion of the indictment, which appeared after the phrase "against the peace and dignity of the state," in violation of Miss. Const. art 6, § 169.

Smith has not satisfied the test for postconviction relief for ineffective assistance of counsel set out in Strickland v. Washington, 466 U.S. 668 (1984). At the time of his trial in 1992 and when his direct appeal was filed in 1993, there was no clear basis for an objection to the indictment because McNeal v. State, 658 So. 2d 1345 (Miss. 1995) had not yet been decided. Therefore, the judgment of the district court must be affirmed.

AFFIRMED.