

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Colleton County

Honorable William H. Seals, Circuit Court Judge

MAURIO D. RIVERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-001106

**Return in Opposition to Motion to Strike
and Require Filing of Amended Appendix and Brief of Petitioner**

Counsel for Petitioner, Maurio D. Rivers, opposes the State's motion to strike and require filing of amended appendix and brief of petitioner. Certiorari was granted in part on November 28, 2023, and the brief of petitioner was filed on December 14, 2023. Counsel respectfully submits that the proper remedy at this stage in the appellate proceedings is to file a supplemental appendix to include the two documents that were not provided to counsel for Petitioner, and not included in the appendix - the filed motion to alter or amend the judgment pursuant to Rule 59(e), S.C.R.Civ.P. submitted by PCR counsel, and the State's return. Counsel respectfully requests that this Court deny the motion to strike.

1. Petition for Writ of Certiorari and Appendix

Counsel for Petitioner filed the appendix and petition for writ of certiorari on February 22, 2021. In January of 2021, prior to filing and while preparing the appendix, counsel for Petitioner requested a copy of the Rule 59(e) motion from the Attorney General's Office. The *pro se* Rule 59(e) motion, dated January 10, 2020, included in the appendix is the motion provided to counsel for Petitioner from the Attorney General's Office. Counsel for Petitioner reasonably believed that the Rule 59(e) motion provided by the State had been filed. The filed motion to alter or amend pursuant to Rule 59(e) submitted by PCR counsel, and the State's return were not provided to counsel for Petitioner. As a result, these documents were not included in the appendix.

2. Pro se Rule 59(e) Motion

On January 15, 2020, the South Carolina Attorney General's Office received the *pro se* Rule 59(e) motion, dated January 10, 2020, and included in the appendix, as reflected on the stamped document. (App. p. 421). It is unclear if the *pro se* Rule 59(e) motion was forwarded to PCR counsel, by the Attorney General's Office, as is the standard practice. It is unclear why the *pro se* Rule 59(e) motion does not appear in the Colleton County Fourteenth Judicial Circuit Public Index. A *pro se* motion to amend and a *pro se* motion to withdraw attorney appear in the Public Index as being filed November 27, 2017. While there is no constitutional right to hybrid representation, the clerk does not have the authority to refuse to file a *pro se* filing. As the South Carolina Supreme Court wrote in Barnes v. State, 433 S.C. 399, 402–03, 859 S.E.2d 260, 261–62 (2021):

We take this opportunity to remind the clerks of court of their ministerial duty to docket filings irrespective of potential procedural flaws that may

exist. Miller v. State, 377 S.C. 99, 102, 659 S.E.2d 492, 493 (2008) (“[I]t is not within the Clerk of Court's authority to refuse to perform her duty based on her opinion that a filing lacks legal merit or is untimely.”). This duty is not discretionary. See 21 C.J.S. *Courts* § 335 (2021). Unless specifically authorized by statute² or a court rule, a clerk of court may not exercise any judicial power reserved for a judge. Id. (“The clerk cannot, without express constitutional or statutory authority, exercise any judicial functions.”). This includes the prohibition of performing any action contingent on deciding a question of law. Id. (“It follows that a clerk of court cannot ordinarily determine questions of law.”). Accordingly, a clerk of court does not have the authority to reject a filing based on ostensible or perceived failures, including whether the document is contained on the proper form. Because the clerk's role is ministerial in this respect, the clerk shall not be “concerned with the merit of the papers or with their effect and interpretation” Id. § 337. Stated differently, “[a] clerk of court may not reject a pleading for lack of conformity with requirements of form; only a judge may do that.” Hooker v. Sivley, 187 F.3d 680, 682 (5th Cir. 1999); see also Gorod v. Tabachnick, 428 Mass. 1001, 696 N.E.2d 547, 548 (1998) (“In the absence of an order from a judge, [clerks] may not refuse to accept a notice of appeal, even if they believe that no appeal is available or that the notice is untimely or otherwise defective.”). Instead, the clerk shall accept the filing, thereby permitting the court to decide any issues the parties may have with it.

The *pro se* Rule 59(e) motion notes, “The PCR Courts order also states it was the solicitor (S. Knight) who used the example of the getaway car driver and the burglary defining Accomplice Liability when it was in fact the judge (D. Goodstein)” (App. p. 422). The *pro se* Rule 59(e) motion also states, “Let the court please note that on November 15, 2017, I the Applicant submitted a Motion to Amend the PCR application raising all the above unaddressed issues. And now am requesting this court address all issues adequately. (Marlar v. State 375 S.C. 407, 410-653 SE.2d 266, 267 (2007))” (App. p. 423). As a result of the Attorney General’s Office receiving the *pro se* Rule 59(e) motion on January 15, 2020, the State was on notice that the order of dismissal focused

on the solicitor's closing argument instead of the issue raised during the PCR hearing involving the judge's instruction to the jury.

3. Rule 59(e) Motion filed by PCR Counsel

PCR counsel filed a motion to alter or amend pursuant to Rule 59(e) on January 23, 2020. The filed motion did not challenge the order of dismissal for failing to address the issue raised during the PCR hearing involving trial counsel's failure to object to the judge using the example of a getaway driver during the accomplice liability instruction to the jury.

4. Second *Pro se* Rule 59(e) Motion

It appears that on March 30, 2020, Petitioner wrote to PCR counsel in reference to the Rule 59(e) motion filed by PCR counsel dated January 15, 2020, and filed January 23, 2020. In the letter Petitioner noted, "I have a concern however. I see you still did not address all of the issues included in the hearing and the amended PCR application filed Nov. 27th, 2017." A copy of the letter is attached and made a part of the Return. It appears that a second *pro se* Rule 59(e) motion was attached to the letter. A copy of the second *pro se* Rule 59(e) motion is attached and made a part of the Return. The second *pro se* Rule 59(e) motion notes, "The judgement does not address the applicants assertion that, the Trial Court erred, and thereby violated petitioner's right to due process of law by defining the hand of one is the hand of all with a example of a burglary and a getaway driver, where petitioner was on trial for a murder attempt and the difference had a prejudicial impact, shifting the burden of proof to the applicant." (Part V.)

The second *pro se* Rule 59(e) motion also notes, “The judgement does not address applicants assertion that Trial Counsel was ineffective assistance, and thereby violated petitioners right to due process of law by failing to object to the trial courts instruction defining the hand of one is the hand of all with the non-charged offense of a burglary and a getaway driver.” (Part VI.). Importantly, the second *pro se* Rule 59(e) motion includes a certificate of service indicating that the motion was mailed to the Office of the Attorney General, just as the first *pro se* Rule 59(e) motion did.

5. State’s Return to Rule 59(e) Motion

As noted in footnote 7 of the State’s motion, the State’s return to PCR counsel’s Rule 59(e) motion was not filed. The return is dated July 21, 2020. Although the Attorney General’s Office was on notice, since January 15, 2020, that the order failed to address the issue raised during the PCR hearing involving trial counsel’s failure to object to the judge using the example of a getaway driver during the accomplice liability instruction to the jury, the return states, “Respondent submits this Court fully ruled on all issues presented through Applicant’s post-conviction relief application and Applicant’s ‘Motion to Amend and Alter Judgment Pursuant to Rule 59(e), SCRC’P’ should be denied. As each properly raised allegation was addressed fully in the order, Respondent submits Applicant’s assertions are without merit.” Contrary to the State’s position in the unfiled return, the order of dismissal did not address all issues raised at the PCR hearing, incorrectly limiting the issue to the solicitor’s closing argument, as correctly noted in the *pro se* Rule 59(e) motion. The State was on notice of the error in the order of dismissal at the time the return was submitted and failed to correct the error. The State and PCR counsel are equally at fault in failing to correct the order of

dismissal. The State appears to concede that it contributed to the error. (Motion p. 9). Petitioner, acting *pro se*, was the only party to correctly point out the error in the order of dismissal.

6. Failure to Object

The State failed to object when the petition for writ of certiorari and appendix were filed on February 22, 2021. The State failed to object when the return was filed on June 10, 2021. The State failed to object when the reply was filed on June 21, 2021. The State failed to object when certiorari was granted in part on November 28, 2023. The State failed to object when the brief of petitioner was filed on December 14, 2023. The State, on notice since January of 2020 that the order of dismissal contained a factual error with regard to the issue actually raised at PCR, waited until June of 2024 to object to the *pro se* Rule 59(e) motion that was provided to counsel for the Petitioner by the Attorney General's Office.

7. Objection Abandoned

This Court should find that the State abandoned any objection to the inclusion of and reference to the *pro se* Rule 59(e) motion by repeatedly failing to object. See S.C. Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 659, 667 S.E.2d 7, 15 (Ct. App. 2008) (Issues not argued in the brief are deemed abandoned and will not be considered on appeal). In its motion to strike, the State now argues for the first time, "Critically, because the pro se motion to alter or amend that is contained in the appendix as presently filed was *not* actually presented to or considered by the PCR judge, that matter could not and cannot appropriately be included in the appendix just as

it cannot properly be embodied in the appellate briefs.” (Motion to Strike p. 8, citations omitted).

In the return to the petition for writ of certiorari, however, the State asserted, “The post-conviction relief judge properly denied relief for the allegation that trial counsel was ineffective for failing to object to the example given by the trial judge to the jury of accomplice liability because the example was not an improper comment on the facts, and even if it were, it was uncontroverted that Petitioner was the driver of the vehicle.” In both the petition for writ of certiorari and the return the parties addressed the issue of whether trial counsel was ineffective in failing to object to the judge using the example of a getaway driver during the accomplice liability instruction to the jury. The State did not argue in the return, as it does now for the first time, that the *pro se* Rule 59(e) motion, received by the State and provided by the State to counsel for Petitioner was not presented to the PCR judge.

In preparing the petition for writ of certiorari counsel for Petitioner reasonably believed that the *pro se* Rule 59(e) motion, provided by the State, had been filed and presented to the PCR judge, and counsel crafted the arguments to be presented to the appellate court based on that reasonable belief. The State should not be able to use an error created in part, by the State, to now claim a procedural default on an issue that was litigated at the PCR hearing but incorrectly addressed in the order of dismissal.

8. Question of Law

While it is unclear if the *pro se* Rule 59(e) motion was presented to the PCR judge, under the unusual circumstances of this case, this Court should decide the case without a remand pursuant to Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019).

First, the State shares in the blame for the order of dismissal failing to address trial counsel's failure to object to the judge's improper example. When the State presented the return to the Rule 59(e) motion, the State was aware of the error in the order and failed to correct the error. The State should not be able to complain now about an error the State could have prevented.

Second, the question presented to this Court in the brief of petitioner is, "Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the example given by the judge to the jury of accomplice liability because, under the facts of this case, the example was an improper comment on the facts that diluted the State's burden of proof?" (BOP, p. 1). The question of whether the charge given is an improper charge on the facts is a question of law that is reviewed by this Court de novo. The order is not missing factual findings that would require a remand. Rather, the order is missing a legal conclusion. "We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014) ." Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018). Under the very narrow and specific facts of this case and because the review of the issue in this case is de novo, a remand is not necessary. The State suffers no prejudice by this Court deciding a matter of law that was litigated before the PCR court.

9. Remand

Counsel respectfully submits that this Court should deny the motion to strike and, after briefing submitted by the State and possible oral arguments, decide the issue presented. Alternatively, and at the very least, Petitioner is entitled to a remand pursuant

to Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019), based on the unusual circumstances of this case with the State sharing in the blame for the order of dismissal failing to address trial counsel’s failure to object to the judge using the example of a getaway driver during the accomplice liability instruction to the jury. In Fishburne, the South Carolina Supreme Court wrote, “However, because the United States Constitution's Sixth Amendment guarantee to a defendant's right to effective assistance of counsel is engrained in PCR cases, we cannot continue to permit a party's procedural shortcoming—such as the failure to file a Rule 59(e) motion—to prevent this Court from remanding claims of ineffective assistance of counsel when the PCR court's order does not comply with section 17-27-80.” 427 S.C. at 516, 832 S.E.2d at 589. As correctly noted in the *pro se* Rule 59(e) motion, the order of dismissal does not comply with section 17-27-80. The shortcoming in PCR counsel’s Rule 59(e) motion – failing to challenge the order of dismissal because the order did not address trial counsel’s failure to object to the judge using the example of a getaway driver during the accomplice liability instruction to the jury and instead addressed the solicitor’s use of the example in closing argument - does not prevent this Court from remanding.

Again, as the issue presented is an issue of law, this Court should decide the case without remand. See Smalls. A remand would, at best, only accomplish a legal ruling to which this Court would pay no deference. If, however, this Court is inclined to allow the State to seek a procedural default that the State was, in part, responsible for creating, then Petitioner is at least entitled to a remand. As the Court noted in Fishburne:

When counsel for either side prepares the proposed order, the order must include findings of fact and conclusions of law as to all issues raised by an applicant. A copy of the proposed order should be transmitted to opposing counsel. Opposing counsel should promptly review the proposed order and alert preparing counsel and the PCR court as to any deficiencies in the proposed order. Because the PCR judge will ultimately be signing the order, the PCR judge must carefully review the proposed order to ensure it includes appropriate findings of fact and conclusions of law as to all issues raised. Once a proposed order is finalized, signed by the PCR judge, filed, and served upon the parties, the parties should thoroughly review the final order to make sure all issues raised were adequately addressed as required by section 17-27-80 and Rule 52(a); if they were not, a timely Rule 59(e) motion should be filed, requesting the PCR court to address the appropriate issues. When these steps are ignored on the front end, we find ourselves having to remand a case, as we do today.

In Fishburne the Court remanded to the PCR court for the issuance of a supplemental order setting forth findings of fact and conclusions of law on the PCR ground that was not addressed in the original order. As discussed above, the issue that was not addressed in the order of dismissal in this case involved a conclusion of law, not findings of fact.

Remand is not necessary in this case.

10. Conclusion

This Court should deny the State's motion to strike and require filing of an amended appendix and brief of petitioner. This Court can order the filing of a supplemental appendix to include the two documents that were not provided to counsel for Petitioner, and not included in the appendix - the filed motion to alter or amend the judgment pursuant to Rule 59(e), S.C.R.Civ.P. submitted by PCR counsel, and the State's return. For the reasons stated above, striking the portion of the appendix and brief of petitioner that references the *pro se* Rule 59(e) motion is not the correct remedy, especially at this stage of the appellate proceeding. Instead, as discussed above, this Court should decide the issue of law presented without remand. Alternatively, this

Court should, pursuant to Fishburne, remand the case to the PCR court for a ruling on the issue.

Respectfully submitted,



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 27th day of June, 2024.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Colleton County

Honorable William H. Seals, Circuit Court Judge

MAURIO D. RIVERS,

PETITIONER

V.

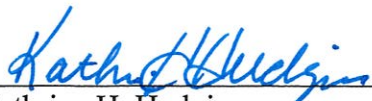
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-001106

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Return in Opposition to Motion to Strike in the above-referenced case has been served upon Mark R. Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Maurio D. Rivers, #232669, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 27th day of June, 2024.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

ATTACHMENT 1

March 30th, 2020

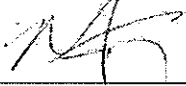
Dear Mrs. Sarji,

I hope you are doing well, I am ok, all things considered. I'm writing you to inform you that I received the 59(e) motion which you filed with the court of common pleas on my behalf on Jan. 15th, 2020. Let me first say, thank you & I am grateful. I have a concern however. I see you still did not address all of the issues included in the hearing and the amended PCR application filed on Nov. 27th, 2017.

Therefore, for your convenience, I have now drafted a 59(e) motion including all relevant issues which should have been properly preserved for review.

If you would at your earliest convenience submit the filings to the court. on my behalf explaining the circumstances, and again thank you for all the assistance.

Respectfully,



M. D. Rivers

#232669

**State of South Carolina
County of Colleton**

**In The Court of Common Pleas
Fourteenth Judicial Circuit
Case no. 2016-CP-15-00647**

**MAURIO RIVERS,
*Applicant***

V.

**STATE OF SOUTH CAROLINA,
*Respondent.***

**Motion to Alter or Amend The Judgment
Pursuant to Rule 59(e), S.C.R.C.P.**

**Maurio Daetrel Rivers
SCDC No. 232669
Lee County Correctional Inst.(F2-1112)
990 Wisacky Highway
Bishopville, SC. 29010**

Applicant, representing himself pro se' now moves this Court to Alter or Amend the judgement filed on January 2nd, 2020 to include rulings on all issues raised by applicant in his amended application filed Nov. 27th, 2020, and during the hearings of this matter.

The grounds for this motion are as follows:

- I. The judgement does not address the applicants assertion that the Trial Court erred, and thereby violated petitioners right to due process of law by instructing the jury on general criminal intent and not specific intent, a necessary element of Attempted Murder.**
- II. The judgement does not address the applicants assertion that the Trial Court erred, by instructing the jury that malice in regards to the attempted murder charge could be inferred from petitioners recklessness in driving and disregard for human life in failing to stop for law enforcement.**
- III. The judgement does not address the applicants assertion that the trial court erred, and thereby violated petitioners right to due process of law by instructing the jury on the law as it relates to accomplice liability, where there was no evidence adduced at trial which tended to establish that the petitioner/driver acted in concert with the co-defendant/passenger in the crime charged and where only a showing of petitioners flight was presented by the State.**
- IV. The judgement does not address the applicants assertion that the Trial Court erred, and thereby violated petitioners right to due process of law in refusing to explain the terms natural and probable consequences to the jury as requested by Trial Counsel, where the law would not hold petitioner responsible for the murder attempt unless the murder attempt was a natural and probable consequence of acts agreed upon by petitioner and the passenger.**

- V. The judgement does not address the applicants assertion that, the Trial Court erred, and thereby violated petitioners right to due process of law by defining the hand of one is the hand of all with a example of a burglary and a getaway driver, where petitioner was on trial for a murder attempt and the difference had a prejudicial impact, shifting the burden of proof to the applicant.
- VI. The judgement does not address applicants assertion that Trial Counsel was ineffective assistance, and thereby violated petitioners right to due process of law by failing to object to the trial courts instruction defining the hand of one is the hand of all with the non-charged offense of a burglary and a getaway driver.
- VII. The judgement does not address applicants assertion that Trial Counsel was ineffective assistance, and thereby violated applicants right to due process of law by failing to object to the Trial Courts instruction that malice in regards to the attempted murder charge could be inferred from applicants recklessness (in driving) and disregard for human life in failing to stop for law enforcement vehicle.
- VIII. The judgement does not address the assertion that Trial Counsel was ineffective assistance, and thereby violated applicants right to due process of law, for requesting a accomplice liability instruction, where no evidence of (a) a specific intent to kill, (b) expressed malice, or (c) a plan to possess or facilitate the use of a weapon was presented by the State.

In the present case, Bronson Shelley the passenger and alleged co-defendant of Rivers, was convicted of Attempted Murder nearly one month prior to the applicants trial, Shelley pled guilty, and was sentenced to fifteen years for Attempted Murder. Rivers was also convicted and sentenced to thirty years for the Murder Attempt.

IX. The judgement does not address the allegation that Trial Counsel was ineffective assistance for failing to object to the disparity in the two sentences.

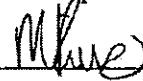
X. The judgement also does not address the allegation that Trial Counsel was ineffective assistance for failing to motion to require the state to elect a theory of criminal liability, (Principle/ or Accomplice).

Additionally the Court, its order of dismissal, erroneously refers to the statements made (concerning the burglary and getaway driver example as having been said by Mr. Steve Knight "the solicitor" when in fact they were said by Mrs. Dianne Goodstein, "the Judge" prior to and during deliberations while defining the hand of one is the hand of all to the jury and directly effected the jury's decision in finding the applicant guilty of the murder attempt based solely upon his recklessness and disregard for human life in failing to stop for law enforcement vehicles.

Applicant requests this court alter or Amend the judgement in this case to include specific rulings on each of the issues raised.

Mar. 31st , 2020.

Respectfully submitted,



Maurio Daetrel Rivers, #232669
Lee County Correctional Inst./ F2-1112
990 Wisacky Highway
Bishopville SC. 29010

RECEIVED

Jun 27 2024

SC Court of Appeals

State of South Carolina
County of Colleton
Fourteenth Judicial Circuit

Maurio Rivers, #232669

Applicant,

v

State of South Carolina,

Respondent.

C/A NO: 2016-CP-15-0647

CERTIFICATE OF SERVICE

I, Maurio Rivers, representing myself (Pro se'), do hereby certify that on this 31st day of March 2020, I served a copy of the "**Motion to Alter or Amend the Judgement**" pursuant to Rule 59(e) of the S.C.R.C.P. on the Attorney's of the Respondents by mailing a copy in the manner prescribed by the applicable Rule of Civil Procedure addressed to:

**OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 11549
COLUMBIA, SC 29211**

From: [Stock, Chris](#)
To: mfarthing@scag.gov; [SC - COLLINS CAROLINE](#)
Cc: [Hudgins, Kathrine](#)
Subject: Rivers, Mauro - 2020-001106 - Return in Opposition to Motion to Strike
Date: Thursday, June 27, 2024 3:54:37 PM
Attachments: [Rivers, Mauro - 2020-001106 - Return in Opposition to Motion to Strike.pdf](#)
[Rivers, Mauro - 2020-001106 - Return in Opposition to Motion to Strike - AG Cover Letter.pdf](#)

Mr. Farthing,

Please find attached for service the Return in Opposition to Motion to Strike for Mauro D. Rivers' appeal which will be filed today with the Court of Appeals.

Thank you.
Chris

Chris Stock
Administrative Assistant
Commission on Indigent Defense
Appellate Division
(803) 734-1330