RECEIVED
Oct 25 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Writ of Certiorari to the Court of Common Pleas
Appeal from Colleton County
Honorable William H. Seals, Jr., Circuit Court Judge
Appellate Case No. 2020-001106

MAURIO D. RIVERS,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Deputy Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Cases:

United States Supreme Court Cases:

Constitutional Provisions and Statutes:

Other Authorities:

STATEMENT OF ISSUE ON CERTIORARI

"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?"

COUNTER-STATEMENT OF ISSUE ON CERTIORARI

Should Rivers's case be remanded to the PCR judge for the limited purpose of issuing a supplemental order addressing Rivers's claim defense counsel was constitutionally ineffective for failing to object to the trial judge's use of an illustrative example during her jury instructions when Rivers clearly raised that claim in his PCR application and evidence was presented in connection to that claim but it has nevertheless not yet been addressed on the merits by the PCR judge due to the fact it appears to have been mistakenly overlooked at the circuit court level, including by counsel for both Rivers and the State?

STATEMENT OF THE CASE

In July of 2011, Petitioner Maurio D. Rivers was arrested following a high-speed vehicle chase that ended in a crash and an unsuccessful attempt to flee on foot. In August of 2011, the Colleton County Grand Jury indicted Rivers for two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime. On December 12, 2012, a jury trial was commenced in the Colleton County Court of General Sessions with the Honorable Diane Schafer Goodstein, circuit court judge, presiding. At the conclusion of the two-day trial, the jury convicted Rivers of one count of attempted murder and acquitted him of the remaining charges. Following the verdict, the trial judge sentenced Rivers to a thirty-year term of imprisonment. Rivers then timely filed and perfected an appeal.

On appeal, the Court of Appeals—following briefing and oral argument—issued an unpublished opinion in which it unanimously affirmed Rivers's conviction.[1] State v. Rivers, Op. No. 2014-UP-441 (S.C. Ct. App. filed Dec. 3, 2014). Rivers—while represented by appellate counsel—then submitted a pro se petition for rehearing in the Court of Appeals and a pro se notice of appeal in the Supreme Court. In response, the Supreme Court construed Rivers's notice of appeal as a petition for a writ of certiorari and dismissed it without prejudice as premature.[2] Meanwhile, the Court of Appeals rejected Rivers's pro se petition as an improper pro se filing and issued the remittitur on December 31, 2014. However, a short time later, the

[1] The records from the appellate proceedings in the Court of Appeals in connection to Rivers's direct appeal are presently available through the South Carolina Appellate Court Public Index. Appellate Records for State v. Maurio Daetrel Rivers, South Carolina Appellate Court Public Index, https://ctrack.sccourts.org/public/caseView.do?csIID=52872.

[2] The records from the premature appellate proceedings in the Supreme Court are presently available through the South Carolina Appellate Court Public Index. Appellate Records for State v. Maurio Daetrel Rivers, South Carolina Appellate Court Public Index, https://ctrack.sccourts.org/public/caseView.do?csIID=58306.

Court of Appeals recalled the remittitur and issued an order relieving Rivers's appellate counsel. Rivers then again submitted a pro se petition for rehearing along with a suggestion for rehearing en banc, and, this time, the petition was denied. Thereafter, Rivers filed a pro se petition for a writ of certiorari in the Supreme Court, and that petition was likewise denied.[3] On December 7, 2015, the remittitur was issued.

Subsequent to the final issuance of the remittitur, Rivers timely filed an application for post-conviction relief ("PCR"), and, in response, the State filed a return requesting an evidentiary hearing.[4] Rivers then moved to file a pro se amendment to the PCR application. On April 3, 2019, an evidentiary hearing was conducted in the Colleton County Court of Common Pleas with the Honorable William H. Seals, Jr., circuit court judge, presiding. At the conclusion of the hearing, the PCR judge took the matter under advisement. Shortly after the hearing concluded, Rivers—despite being represented by PCR counsel and despite no final ruling having yet been issued—filed a pro se notice of appeal in the Court of Appeals, and the matter was transferred the Supreme Court.[5] The Supreme Court then dismissed the appeal as improper, and the remittitur was issued on May 3, 2019. Thereafter, through an order filed on January 2, 2022, the

[3] The records from the appellate proceedings in the Supreme Court in connection to Rivers's direct appeal are presently available through the South Carolina Appellate Court Public Index. Appellate Records for State v. Maurio Daetrel Rivers, South Carolina Appellate Court Public Index, https://ctrack.sccourts.org/public/caseView.do?csIID=59380.

[4] The official records from the PCR proceedings are presently available through the Colleton County Public Index. Records for Maurio D. Rivers, Colleton County Fourteenth Judicial Circuit Public Index, https://publicindex.sccourts.org/colleton/publicindex.

[5] The records from Rivers's premature PCR appeal are presently available through the South Carolina Appellate Court Public Index. Appellate Records for Maurio D. Rivers v. State, South Carolina Appellate Court Public Index, https://ctrack.sccourts.org/public/caseView.do?csIID=69664.

PCR judge denied and dismissed Rivers's PCR application.[6] Following that, Rivers—through PCR counsel—submitted a timely motion to alter or amend that was filed on January 23, 2020, and the State subsequently submitted a return.[7] Through a Form 4 order filed on July 30, 2020, the PCR judge denied the motion. Rivers then timely filed a notice of appeal.

After initiating his appeal, Rivers filed a petition for a writ of certiorari with the Supreme Court, and the Supreme Court transferred the matter to the Court of Appeals.[8] Subsequently, on November 28, 2023, the Court of Appeals granted the petition as to a single issue and denied it as to all the remaining issues.

[6] In his order denying relief, the PCR judge inaccurately stated Rivers's case was affirmed on appeal after a brief was filed pursuant to Anders v. California, 386 U.S. 738 (1967). (App'x p. 411). The same misstatement was also made in the State's return to Rivers's PCR application. (App'x p. 285).

[7] For reasons unclear, the State's return appears to have been submitted directly to the PCR judge but was not also filed with the Colleton County Clerk of Court. Records for Maurio D. Rivers, Colleton County Fourteenth Judicial Circuit Public Index, https://publicindex.sccourts.org/colleton/publicindex. Nevertheless, that return was before the PCR judge and considered by him as reflected in the PCR judge's Form 4 order. (App'x p. 425).

[8] The records from Rivers's current PCR appeal are presently available through the South Carolina Appellate Court Public Index. Appellate Records for Maurio D. Rivers v. State, South Carolina Appellate Court Public Index, https://ctrack.sccourts.org/public/caseView.do?csIID=72534.

STATEMENT OF FACTS

Summary of Rivers's Crimes

Around 7:00 p.m. on July 12, 2011, Deputy Justin Eaches of the Dorchester County Sheriff's Office was monitoring Interstate 95 when he observed a black Acura partially enter the emergency lane and then shift lanes without using a turn signal. (App'x pp. 63-65; p. 72). In response, Deputy Eaches began following the vehicle, and, when he did, he spotted a man with a ponytail—Rivers—in the vehicle's driver's seat along a man with shorter hair in its passenger's seat. (App'x p. 64). Deputy Eaches then activated his patrol vehicle's blue lights and siren in an effort to initiate a routine traffic stop. (App'x pp. 66-67).

Initially, Rivers responded to the deputy's lights and siren in an appropriate fashion by turning on his vehicle's turn signal and moving over to the emergency lane like he was going to pull over. (App'x p. 67). However, instead of slowing down and stopping, Rivers continued to maintain a constant speed. (App'x p. 67). Rivers then suddenly changed lanes in an erratic manner and took off at a high rate of speed.[9] (App'x p. 67). At that point, a high-speed chase ensued, and Deputy Eaches quickly requested assistance from other officers due to the poor condition of his patrol vehicle. (App'x pp. 67-68; p. 78).

Shortly thereafter, Lieutenant Joseph Burnette of the Dorchester County Sheriff's Office joined the pursuit and got into position behind Rivers's vehicle, which reached speeds over 100 miles per hour as it sped down the roadway. (App'x pp. 67-68; pp. 77-78; p. 84). Once the lieutenant had done so, Rivers's passenger—Bronson Shelley—shockingly fired a volley of

[9] Although not revealed to the jury during trial, the vehicle Rivers was driving at the time of the incident had recently been stolen in Charlotte, North Carolina, by—according to Rivers's defense counsel—Rivers himself. (App'x p. 376). And, by his own candid admission, Rivers was at least aware the vehicle was stolen. (App'x p. 321). Nevertheless, Rivers insisted he was not the one that stole it, and he further claimed he did not even know the identity of his passenger in that stolen car. (App'x p. 321; pp. 324-325).

gunshots that struck the front bumper and windshield of Lieutenant Burnette's pursuing vehicle on the driver's side near where he was seated. (App'x p. 73; pp. 89-90; p. 99). Lieutenant Burnette responded by ramming the Acura, which caused it to spin around and begin travelling backwards. (App'x p. 84; p. 87; p. 100). As the Acura did so, someone inside it fired another volley of gunshots through its windshield on its driver's side. (App'x p. 87; p. 100; p. 124; p. 127; p. 129). The Acura then crashed and flipped over onto its roof. (App'x p. 70; p. 84; p. 106).

After the crash, Rivers and Shelley rapidly exited the vehicle and immediately fled into a nearby wooded area in different directions. (App'x p. 70). Several officers pursued Shelley, and he was quickly captured. (App'x p. 73). Meanwhile, Lieutenant Burnette deployed his police dog, and the dog promptly chased Rivers down and apprehended him by biting his groin. (App'x pp. 84-86; p. 93). Lieutenant Burnette and another officer then took Rivers into custody and arrested him. (App'x p. 86; pp. 150-151).

Following that, a member of the Dorchester County Sheriff's Office processed the scene and examined the crashed Acura. (App'x pp. 103-106). Underneath the vehicle, he located a .38-caliber revolver with five fired cartridge cases in its cylinder. (App'x pp. 106-108). In addition to that, he found another .380-caliber pistol inside the vehicle that also had been used to fire all its ammunition along with another pistol inside the vehicle's glovebox. (App'x pp. 108-109; pp. 111-112; pp. 133-134). Furthermore, he found a number of spent cartridge cases nearby along with several bullet fragments. (App'x p. 116). Subsequent analysis determined the recovered cartridge cases had been fired by the .380-caliber pistol and the bullet fragments were fired by the revolver.[10] (App'x pp. 144-146).

[10] None of the deputies involved in the incident ever discharged their firearms. (App'x p. 151).

Relevant Details from Rivers's Trial

Toward the outset of Rivers's ensuing trial on charges of attempted murder and possession of a weapon during the commission of a violent crime, the trial judge presented some preliminary remarks to the jury. (App'x p. 8; pp. 48-59). As part of those remarks, the trial judge emphasized: (1) she had no opinion on the facts and the law did not permit her to have such an opinion; (2) anything she said regarding the facts should be disregarded; and (3) a trial judge in South Carolina could not tell jurors what the facts are. (App'x pp. 51-52).

As the trial proceeded forward, Deputy Eaches, Lieutenant Burnette, and the others involved in the response to the incident recounted the terrifying details of the high-speed chase, shooting, crash, and subsequent apprehension of Rivers and his passenger. (App'x pp. 63-75; pp. 77-100; pp. 103-129; pp. 132-139; pp. 141-147; pp. 149-151). Likewise, testimony and evidence was presented about the multiple fired guns recovered from in and around the crashed vehicle Rivers had been driving and about the gunshot damage to the windshield near the driver's seat of that vehicle that had resulted from someone inside it firing out through the windshield. (App'x pp. 103-129).

After all that testimony and evidence was presented, the trial judge conducted a charge conference with the parties in her chambers. (App'x p. 166). Following that, the parties presented their closing arguments to the jury. (App'x pp. 168-179). Notably, as part of the State's closing argument, the solicitor made the following remarks:

> Another principle is called the hand of one is the hand of all. It's sort of like if one commits an act and the other one is participating, even though he didn't commit that particular act, he's guilty also. I'll give you a couple of examples.
>
> You drive a car -- I drive the car to a convenience store and the fellow with me has a weapon and he's going in to rob the convenience store. He says: Keep the car running.

> I never go into the store, but I'm as guilty as he is for robbing the store with a weapon.
>
> Another example is I go with my friend. He says: I'm going into the convenience store. You stand outside and be my lookout.
>
> I'm as guilty as he is. That's called the hand of one is the hand of all. Even though I didn't go inside, I didn't point the gun at the clerk, I'm as guilty as he is.
>
> Now, mere presence, just because you're at the scene of a crime doesn't mean that you're guilty, but if you understand the plan, you understand what's going on, you're participating, aiding, assisting in some form or fashion, you're not there just as a result of mere presence. You're participating in the event.

(App'x pp. 169-170).

Following the closing arguments, the trial judge instructed the jury on the applicable law. (App'x pp. 182-207). As part of those instructions, the trial judge explained the State bore the burden of proving Rivers's guilt beyond a reasonable doubt and Rivers was presumed innocent of the charged crimes unless and until the State met its burden of proof. (App'x pp. 183-184). Additionally, the trial judge reiterated to the jurors they were the sole judges of the facts while she could not as the trial judge comment on the facts. (App'x p. 187). Furthermore, the trial judge instructed the jury on the law concerning "the hand of one is the hand of all" and accomplice liability while further emphasizing neither a defendant's mere presence at the scene of a crime, a defendant's mere knowledge a crime was going to be committed, nor a defendant's association with a person who commits a crime would be alone sufficient to establish guilt or "make a defendant an accomplice or an aider or abettor of the person committing the crime." (App'x pp. 193-196). Beyond that, as part of her explanation of accomplice liability, the trial judge presented—without objection—the following illustrative example to the jury:

> For example, ladies and gentlemen, two people can be responsible and can be guilty of burglary if one -- only one person went into the house and one person was the lookout and driving the car or the getaway car and the lookout but only one person actually went into the house at night. Ladies and gentlemen, although only one person went into the house, both people are guilty of burglary in the first degree because they acted *together in concert to commit* a burglary.

(App'x pp. 193-194; p. 207) (emphasis added).

Thereafter, the jury began its deliberations. (App'x p. 209). A little over an hour later, the jury asked to—amongst other things—be instructed again on "the hand of one is the hand of all." (App'x pp. 209-210). In response, the trial judge did so, and, as part of her supplemental instructions, she stated the following:

> A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable or natural consequence of the acts done in carrying out the common plan and purpose. For example, two people can be guilty of burglary when only one of the people goes into the house and the other person sits in the car as the lookout and is the getaway driver.
>
> If two or more people are together, acting together, assisting each other in committing the offense, the act of one is the act of all, or as it is sometimes said, the hand of one is the hand of all.
>
> In the example that I gave you, only one person went into the house and actually committed the going into the house, the burglary; however, both are responsible, both are guilty if they are acting together, assisting each other in committing the offense.

(App'x p. 211). Furthermore, in addition to that, the trial judge again emphasized prior knowledge and mere presence would not alone be sufficient to establish guilt. (App'x pp. 211-212).

Following that, the jury resumed its deliberations. (App'x p. 213). Just under two hours later, the jury returned with its verdict, convicted Rivers of one count of attempted murder, and acquitted him of the remaining charges. (App'x pp. 215-216).

Summary of the PCR Proceedings

Following his unsuccessful appeal, Rivers sought relief through the filing of a pro se PCR application. (App'x pp. 271-284). Amongst the claims raised in that application, Rivers alleged his defense counsel was constitutionally ineffective for: (1) failing to object to the trial judge's jury instruction concerning "the hand of one is the hand of all"; and (2) failing to object to the "inclusion of a criminal offense" for which he was not indicted as part of the explanation of accomplice liability and "the hand of one is the hand of all." (App'x p. 278). More specifically, Rivers alleged defense counsel should have objected to a "hand of one is the hand of all" jury instruction because that theory of criminal liability was not specifically mentioned in the indictment and was purportedly not supported by the evidence presented during trial. (App'x pp. 279-280). Likewise, while referencing portions of the trial transcript containing the trial judge's jury instructions, Rivers alleged defense counsel should have objected to the illustrative example presented to the jury that explained someone acting as a lookout and getaway driver for a burglar would also be guilty of the burglary to the same extent as the burglar because it somehow created a "mandatory presumption" that unconstitutionally shifted the burden of persuasion to him and was confusing to the jury since he had not been charged with burglary. (App'x pp. 283-284). Rivers later included similar claims through a pro se motion to amend his PCR application. (App'x pp. 293-297).

In response to Rivers's filings, PCR counsel was appointed, and an evidentiary hearing was conducted on the matter. (App'x pp. 302-305). At the outset of the hearing, PCR counsel

indicated she wished to raise additional claims beyond those identified in the PCR application, and the PCR judge delayed the matter until later in the week to give counsel for the State time to prepare to respond to the belated claims. (App'x p. 305). Thereafter, when the hearing resumed later that week, testimony was presented from Rivers and Rivers's defense counsel. (App'x pp. 323-338; pp. 343-379).

Notably, as part of his testimony, Rivers complained about defense counsel failing to object to the *trial judge's* use of an example. (App'x p. 328). And, as to why he believed that example usage was problematic, Rivers noted he was charged with attempted murder while the example used by the trial judge involved burglary and a getaway driver, which he contended was "very prejudicial" and supposedly improperly influenced the jury. (App'x pp. 337-338).

In addition to that, defense counsel also offered testimony about that particular matter and acknowledged he did not object to the burglary example provided by the trial judge as a "flawed example." (App'x pp. 368-369). Importantly though, as to why, defense counsel explained he believed the jury would have plainly understood the difference between that example and what was being alleged in Rivers's case. (App'x p. 349).

At the conclusion of the hearing, the PCR judge took the matter under advisement and, upon giving it consideration, declined to grant relief. (App'x p. 392; pp. 411-420). In declining to grant relief, the PCR judge—in part—concluded Rivers failed to establish defense counsel's performance was constitutionally ineffective because: (1) the trial judge's "hand of one is the hand of all" jury instruction was supported by the evidence presented; and (2) the trial judge's jury instructions corrected any conceivable error that could have occurred as the result of the *solicitor*'s use during his closing argument of an example involving a burglary and a getaway driver. (App'x pp. 416-418).

Subsequent to that, PCR counsel timely filed a motion to alter or amend on Rivers's behalf. (Supp. App'x pp. 1-2). However, through that motion, PCR counsel did *not* allege the PCR judge erred by failing to address Rivers's claim regarding the illustrative example used by the trial judge as part of her jury instructions. (Supp. App'x pp. 1-2).

Meanwhile, around the same time, Rivers—despite being represented by counsel—improperly attempted to submit his own pro se "Motion to Amend and Alter Judgement Rule 59(e)" raising additional claims, including one related to the PCR judge's failure to rule on his claim related to the trial judge's use of an example as part of her jury instructions on accomplice liability. (App'x pp. 421-424). Critically though, as reflected in the Colleton County Fourteenth Judicial Circuit Public Index, that pro se motion was *not* actually filed in Rivers's case and was not actually before the PCR judge for his consideration.[11] [12] Records for Maurio D. Rivers,

[11] Significantly, the likely and legitimate reason for its absence was Rivers was represented by PCR counsel during the circuit court proceedings and, as a result, the Colleton County Clerk of Court could *not* validly accept any substantive pro se filings from Rivers himself due to South Carolina's prohibition on hybrid representation. See Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002) ("There is no constitutional right to hybrid representation either at trial or on appeal."); Foster v. State, 298 S.C. 306, 307, 379 S.E.2d 907, 907 (1989) (ordering the Clerk of Court to return a substantive pro se document filed while the petitioner was represented by counsel); cf. Miller v. State, 388 S.C. 347, 347, 697 S.E.2d 527, 527 (2010) (holding a pro se "59(E)/60(B) Motion" filed by a PCR applicant while that applicant was represented by counsel was "not proper, should not have been accepted, and should not have been ruled upon" and classifying that improper pro se motion as "essentially a nullity").

[12] Because Rivers's improper pro se motion was not before the PCR judge, it cannot properly be and should not now be given any consideration on appeal. See State v. Williams, 439 S.C. 620, 623, 889 S.E.2d 562, 563 (2023) (emphasizing appellate courts are courts of review as opposed to of first view and declining to consider a matter "[t]he trial court never had the chance to consider" when conducting appellate review); Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014) (explaining a PCR appendix can only contain matter that was presented to the PCR court); Roche v. South Carolina Alcoholic Beverage Control Comm'n, 263 S.C. 451, 455, 211 S.E.2d 243, 244 (1975) ("[A] trial judge will not be reversed for failing to act on a matter that was not submitted to him."); Tant v. Guess, 37 S.C. 489, 512-513, 16 S.E. 472, 480 (1892) (instructing an appellate court reviewing a lower court decision has long been prohibited from considering matter not before the lower court when resolving the appeal); Morris v. Tidewater

Colleton County Fourteenth Judicial Circuit Public Index, https://publicindex.sccourts.org/colleton/publicindex.

Ultimately, the PCR judge considered the matter that was properly before him, including the State's return. (App'x pp. 425-426; Supp. App'x pp. 3-6). Upon doing so, he declined to alter or amend his judgment. (App'x pp. 425-426).

Land & Timber, Inc., 388 S.C. 317, 333 n. 16, 696 S.E.2d 599, 608 n. 16 (Ct. App. 2010) (explaining appellate courts may not consider facts not in the record); cf. State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007) ("Morris' statement was not presented to the lower court and cannot properly be included in the Record on Appeal.").

STANDARD OF REVIEW

In PCR cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a PCR judge's factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings."). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter de novo and is not required to give deference to the PCR judge's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Ultimately, if the PCR judge's decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

Rivers's case should be remanded to the PCR judge for the limited purpose of issuing a supplemental order addressing Rivers's claim defense counsel was constitutionally ineffective for failing to object to the trial judge's use of an illustrative example during her jury instructions because Rivers clearly raised that claim in his PCR application and evidence was presented in connection to that claim but it has nevertheless not yet been addressed on the merits by the PCR judge due to the fact it appears to have been mistakenly overlooked at the circuit court level, including by counsel for both Rivers and the State.

On appeal, Rivers contends the PCR judge reversibly erred by failing to address one of his asserted ineffective assistance of counsel claims and by failing to find defense counsel's performance was constitutionally ineffective. As support for that contention, Rivers maintains: (1) he raised an ineffective assistance of counsel claim related to defense counsel's failure to object to an illustrative example used by the trial judge as part of her jury instructions; (2) the PCR judge failed to rule on that particular claim and, instead, addressed a claim related to the solicitor's usage of a similar example in his closing argument; (3) he purportedly called that mistake to the PCR judge's attention by filing a motion to alter or amend; and (4) the PCR judge denied that motion without correcting the "factual error" or addressing the claim related to the example used by the trial judge. Beyond that, Rivers—instead of a seeking a remand so the PCR judge can actually rule on the so-far-unaddressed claim—argues this Court should address the claim in the first instance, functionally take over the PCR judge's role, find he was entitled to a grant of relief based on defense counsel's failure to object to the trial judge's use of the example, reverse the order denying relief, and remand his case for a new trial. Although Rivers is incorrect the matter was called to the PCR judge's attention through the filing of a motion to alter or amend, Rivers is correct the PCR judge mistakenly failed to address one of the claims raised during the PCR proceedings. And, under the unique and specific circumstances involved in Rivers's case, that mistake does, in fact, now warrant a grant of relief on appeal. However, as

this Court is a court of review as opposed to one of first view, the appropriate relief is *not* the relief now requested by Rivers but, instead, is solely a limited remand to allow the PCR judge to issue a supplemental order addressing the previously-unaddressed claim Rivers raised concerning defense counsel's failure to object to the illustrative example used during the trial judge's jury instructions. Accordingly, this Court should now grant such relief—and such relief alone—and order a *limited* remand in Rivers's case.

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). The key purpose of those requirements is "to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Through their enforcement and application, the trial court is guaranteed a chance "to rule properly after it considered all relevant facts, law, and arguments[,]" and the appellate court is provided with everything needed to properly review whatever ruling is made within the limits of the applicable standard of review. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); see State v. Stone, 376 S.C. 32, 36, 655 S.E.2d 487, 488-489 (2007) ("If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call."); Queen's Grant, 368 S.C. at 373, 628 S.E.2d at 919 ("The rationale for the [error preservation] rule is that until the trial court considers the matter and makes a ruling, an appellate court is unable to find error.").

For an issue to be properly preserved for appellate review pursuant to our issue preservation requirements, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court

with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see also Jean Hoefer Toal et al., Appellate Practice in South Carolina 185 (3rd ed. 2016) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). Thus, based on those requirements, an issue—including even a constitutional one—cannot ordinarily be raised or considered on appeal unless it was first presented to and ruled upon by the trial judge. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005); see State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); State v. Gee, 262 S.C. 373, 379, 204 S.E.2d 727, 729 (1974) ("Only matter that has been ruled on below can be reviewed[.]"); In re Care and Treatment of Corley, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) ("Constitutional issues, like most others, must be raised to and ruled upon by the trial court to be preserved for appeal.").

Generally speaking, South Carolina's issue preservation requirements *are* applicable in the context of PCR cases. See Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (recognizing "the general rule that issues which are not properly preserved will not be addressed on appeal" is applicable in a PCR case). Accordingly, in *most* PCR cases in which a party fails to properly preserve an issue or ensure a ruling is obtained, the issue will be unpreserved for appellate review and will not be addressed on appeal. See Fishburne v. State, 427 S.C. 505, 518, 832 S.E.2d 584, 590 (2019) (Hearn, J., concurring) ("[I]n most instances where a party fails to file a Rule 59(e) motion when required to do so, we will find the issue unpreserved and decline to address the merits."); Reese v. State, 425 S.C. 108, 109, 820 S.E.2d 376, 376-377 (2018) (explaining "the law requires" the filing of a proper motion to alter or amend when "a PCR order does not contain specific findings of fact and conclusions of law"). Nevertheless, even when a

party fails to file a needed post-ruling motion, our Supreme Court has recognized a limited remand may be appropriate due to the constitutional guarantee of the right to effective assistance of counsel that is "engrained in PCR cases" when a PCR order fails to contain the requisite findings of facts and conclusions of law as to all issues raised by an applicant. Fishburne, 427 S.C. at 516, 832 S.E.2d at 589; see Simmons v. State, 416 S.C. 584, 591, 788 S.E.2d 220, 224 (2016) (recognizing "our jurisprudence permits a remand under such extraordinary circumstances"); see also Moses v. State, 442 S.C. 263, 271, 898 S.E.2d 174, 178 (Ct. App. 2024) ("Only under extraordinary circumstances—such as when a PCR court fails to make sufficiently specific findings of fact—do the interests of justice permit a court to reach unpreserved issues.").

In the case sub judice, Rivers unquestionably raised a PCR claim alleging his defense counsel should have objected to the trial judge's use of an illustrative example as part of her jury instructions on accomplice liability. That claim appeared in Rivers's pro se PCR application with specific citations to the portion of the trial transcript containing the jury instructions and was likewise included in a pro se motion seeking to amend his PCR application. Similarly, relevant testimony was elicited during the ensuing evidentiary hearing from both Rivers and defense counsel in connection to that claim. Cf. Mangal v. State, 421 S.C. 85, 101-101, 805 S.E.2d 568, 576 (2017) (declining to excuse a procedural default in a PCR case when the claim was not properly raised through the PCR application and was not presented or sufficiently explored at the evidentiary hearing). Unfortunately though, both counsel for Rivers and the State—perhaps due to its substantial similarity to another of Rivers's claims—overlooked that particular claim both before and after the PCR judge issued his ruling, and, as a result, the PCR judge inadvertently failed to rule upon the claim on the merits. See Fishburne, 427 S.C. at 516,

832 S.E.2d at 589 (instructing the attorneys for both sides in a PCR case have an obligation to thoroughly review both the proposed order and the finalized order so any deficiencies can be called to the court's attention).

Thus, in Rivers's case, the PCR judge's order as filed has failed to address all properly-raised claims as was required. See S.C. Code Ann. § 17-27-80 ("The court shall make specific findings of fact, and state expressly its conclusions of law, relating to *each issue presented*." (emphasis added)). Accordingly, under the unique and specific circumstances involved, a limited remand is necessary and warranted to permit the PCR judge to issue a supplemental order addressing Rivers's so-far-unaddressed ineffective assistance of counsel claim despite any procedural defects that have occurred up to this point, and just such a remand should now be ordered by this Court. See Simmons, 416 S.C. at 591, 788 S.E.2d at 224 (recognizing a remand in a PCR case may be warranted in the "interests of justice" even when it is "technically correct" an issue was not properly preserved for appellate review); cf. Fishburne, 427 S.C. at 517, 832 S.E.2d at 590 ("We remand 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. The supplemental PCR order shall be entered within forty-five days of this Court's mailing of the remittitur. Following the issuance of the supplemental PCR order (and a ruling on any post-hearing motions that may thereafter be filed), the aggrieved party may serve and file a new notice of appeal.").

Despite the logicalness of a remand based on the nature of the error that has occurred in Rivers's case, Rivers nonetheless seeks different relief and now argues this Court should eschew its role as an appellate court and consider his previously-unaddressed claim in the first instance as opposed to simply remanding the matter to give the PCR judge an opportunity to issue a

supplemental order. Rivers further argues this Court should rule—for the very first time on appeal—defense counsel was constitutionally ineffective for failing to object the trial judge's use of an illustrative example in her jury instructions, reverse his conviction based on that ruling, and remand his case for a new trial. For several different reasons, this Court should reject Rivers's appellate arguments in that regard.

First, Rivers's arguments should be rejected because—as previously noted—this Court is a court of review instead of a court of first view. See Stanley v. S. States Police Benevolent Ass'n, Inc., 435 S.C. 524, 528, 868 S.E.2d 412, 414 (Ct. App. 2021) ("As an appellate court, we are a court of review, not of first view." (citation and internal quotations omitted)); see also Moses, 442 S.C. at 268-269, 898 S.E.2d at 177 ("South Carolina appellate courts do not follow the 'plain error' standard when sitting in review of a trial court's decision."). Based on that and the very nature of the appellate review process, this Court's role is different from the PCR judge's, and, resultantly, this Court cannot for the first time on appeal properly make the factual findings and other rulings inherent in deciding a PCR claim in the first instance. See Strickland v. Washington, 466 U.S. 668, 698 (1984) (explaining "both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact"); cf. Love v. State, 428 S.C. 231, 243, 834 S.E.2d 196, 202 (2019) ("The PCR court, not this Court, should make the initial factual and legal findings on Love's claim for relief. Our decision to remand this issue to the PCR court is purely procedural and should in no way be construed as a suggestion to the PCR court as to how it should rule on the merits.").

Second, even if this Court could somehow properly resolve Rivers's ineffective assistance of counsel claim now on appeal despite it not yet having been ruled upon by the PCR judge, Rivers did not and could not establish defense counsel was constitutionally ineffective for

failing to object to the illustrative example employed by the trial judge during her jury instructions. Critically, that is true because there was, in fact, nothing improper about the trial judge's use of that example.

Demonstrating that fact, while it is unquestionably true a trial judge cannot properly make a comment on the facts when instructing the jury on the law in South Carolina, the usage of illustrative examples as part of a jury charge has *for more than a century* been recognized as proper in our state and not violative of the constitutional prohibition on comments on the facts. See S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); State v. Young, 238 S.C. 115, 135, 119 S.E.2d 504, 514-515 (1961) ("[A] judge does not violate this provision of the Constitution [prohibiting a jury charge on the facts] by the use of hypothetical or supposed facts for the purpose of illustrating some principle of law."), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); Norris v. Clinkscales, 47 S.C. 486, __, 25 S.E. 797, 806-808 (1896) (explaining an impermissible comment on the facts occurs when a trial judge "expresses in his charge his own opinion upon the force and effect of the testimony, or of any part of it, or intimates his views of the sufficiency or insufficiency of the evidence in whole or in part" and instructing "statements used in illustration of some principle of law" do not violate the constitutional prohibition on a trial judge commenting on the facts); see also State v. Quick, 141 S.C. 442, __, 140 S.E. 97, 99 (1927) ("Oftentimes juries can be made to understand the law of the case easier if they are given helpful illustrations."). Indeed, that principle has even been recognized as being so settled citation to authority is no longer needed to support it. See State v. Duncan, 86 S.C. 370, __, 68 S.E. 684, 686 (1910) ("It has been decided too often to require citation of cases that a hypothetical statement of the facts with a statement of the legal result following thereupon, is *not a charge*

upon the facts." (emphasis added)). Therefore, the trial judge did not violate the prohibition on comments on the facts by using an illustrative example that—by Rivers's own admission—was distinct from the factual scenario involved in his case. Compare State v. Steadman, 257 S.C. 528, 541, 186 S.E.2d 712, 716 (1972) ("Neither is the charge subject to a valid criticism, as claimed, that it constituted a comment on the facts. The trial judge prefaced a comment with the statement that it was by way of illustration. The comment related to the breaking and entry on an apartment used for both business and dwelling purposes. While it was designated by the trial judge as an illustration, it was nothing more than a general statement of law and did not constitute a comment on the facts."); Harrelson v. Reaves, 219 S.C. 394, 402, 65 S.E.2d 478, 482 (1951) ("The Court merely used said hypothetical statements in an effort to clarify the applicable law without expressing or intimating any opinion as to the weight of the evidence. This is permissible."); and State v. Aughtry, 49 S.C. 285, __, 26 S.E. 619, 622 (1897) (instructing a trial judge's use of a hypothetical to help explain the law concerning alibi to the jury was neither erroneous nor an impermissible comment on the facts); with State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) (concluding the trial judge did not err by refusing to give Hughey's requested jury instruction concerning "specific examples of legal provocation" not because all jury instructions involving illustrative examples are categorically improper but, instead, because the specific examples Hughey requested related to the "specific facts of the case" and, thus, would have constituted an improper charge on the facts), overruled on other grounds by Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009).

Relatedly, since the trial judge's use of the illustrative example was neither improper nor a prohibited comment on the facts, defense counsel could not have performed in a deficient manner by failing to raise a meritless objection to an appropriate jury instruction. See State v.

Glenn, 88 S.C. 162, __, 70 S.E. 453, 453 (1911) (explaining a trial judge's use of a hypothetical statement of facts during a jury charge "is not a charge on the facts"); cf. Winkler v. State, 418 S.C. 643, 653, 795 S.E.2d 686, 692 (2016) ("One of the key circumstances a court must consider in its examination of counsel's decision not to make a particular objection is whether there was any law to support the objection."); Mayo v. State, 347 S.C. 422, 426, 556 S.E.2d 380, 382 (2001) (holding a PCR judge's grant of relief based on defense counsel's failure to raise an objection to be without factual support where "there was no sustainable objection" defense counsel could have made). Moreover, Rivers similarly could not have been prejudiced by defense counsel's performance in regard to that example because there was no reasonable likelihood of a different outcome even if an objection had been raised since: (1) the trial judge's illustrative example was not improper or objectionable; (2) the jury was otherwise properly instructed on the law concerning accomplice liability and "the hand of one is the hand of all"; and (3) the illustrative example employed a factual scenario entirely distinct from the factual scenario involved in Rivers's case such that it could not have improperly influenced the jury in any manner. See Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (an applicant—in order to prove an ineffective assistance of counsel claim—must establish: (1) trial counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability the outcome of the proceeding would have been different but for trial counsel's deficient performance). Under such circumstances, Rivers was not and is not entitled to any relief because he cannot possibly meet his burden of establishing his ineffective assistance of counsel claim. See Strickland, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."). However, as previously noted, that is a finding for the PCR judge to make as opposed to this

Court due to the nature of appellate review. See Simmons, 416 S.C. at 593, 788 S.E.2d at 225 ("We sit today in an appellate capacity and making findings of fact de novo would be contrary to this appellate setting.").

Accordingly, for all the foregoing reasons, this Court should grant a limited remand in Rivers's case to allow the PCR judge to issue a supplemental order addressing Rivers's raised-but-not-yet-ruled-upon claim of ineffective assistance of counsel based on defense counsel's failure to object to the trial judge's use of an illustrative example as part of her jury instructions. Cf. Mangal, 421 S.C. at 101 n. 10, 805 S.E.2d at 576 n. 10 ("If we were to excuse the procedural default for failing to present this claim to the PCR court, it would be necessary to remand to the PCR court for a hearing because the PCR court was not given the opportunity to make factual findings as to the reasonableness of this strategy, and if found not to be a reasonable strategy, whether the applicant suffered prejudice."). Meanwhile, because this Court is a court of review as opposed to a court of first view, this Court should reject Rivers's request for any further relief at the current stage of the proceedings and correctly decline to rule in the first instance on his ineffective assistance of counsel claim. Simmons, 416 S.C. at 593, 788 S.E.2d at 225.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted this Court should order a limited remand to allow the PCR judge to issue a supplemental order addressing the previously-unaddressed claim Rivers raised concerning defense counsel's failure to object to the illustrative example used during the trial judge's jury instructions.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Deputy Attorney General

BY:_____
Mark R. Farthing
S.C. Bar Number 76901

ATTORNEYS FOR RESPONDENT

October 25, 2024

RECEIVED
Oct 25 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Writ of Certiorari to the Court of Common Pleas
Appeal from Colleton County
Honorable William H. Seals, Jr., Circuit Court Judge
Appellate Case No. 2020-001106

MAURIO D. RIVERS,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

PROOF OF SERVICE

I, Caroline Collins, certify I have served the within Brief of Respondent on Petitioner by sending an electronic copy via email to the address listed in AIS for the following individual:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify all parties required by Rule to be served have been served.
This 25th day of October, 2024.

CAROLINE COLLINS
Administrative Support Manager
Office of the Attorney General