VOLUME II OF II

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Colleton County

Honorable William H. Seals, Circuit Court Judge

MAURIO D. RIVERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2025-000508

APPENDIX

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(App. p. 193, line 25 – p. 124, lines 1-8). In the PCR application Petitioner alleged that trial counsel was ineffective for failing to object to the example given by the trial judge. (App. pp. 283-284). In the amended application Petitioner also alleged that trial counsel was ineffective in failing to object to the example given. (App. p. 295).

During the PCR hearing Petitioner testified, "And the jury basically inferred from another – she gave an example of a burglary and a getaway driver as the example of the hand of one is the hand of all in her jury instruction." (App. p. 328, lines 12-15). Petitioner testified that trial counsel did not object to the example and then testified, "And I think that was pretty much what prejudiced me the most because it made the jury think that they only thing I had to do to be guilty of attempting to harm the officers was trying to get away driving. And I think that was the most prejudicial thing in the instruction was that." (App. p. 328, lines 17-22). Trial counsel did not recall objecting to the example. (App. p. 369, lines 9-14). When asked about the burglary/getaway driver example trial counsel testified that he believed the jury would have made the distinction. (App. p. 378, line 25 – p. 379, lines 1-2). The judge's instruction, however, repeated what the prosecutor argued in closing argument. (App. p. 169, line 25 – p. 170, lines 1-11). While the prosecutor was free to argue the examples in closing argument, the trial judge should not have included the examples in her instruction to the jury. Unlike a get away driver or look out example where there is a prior agreement, the high speed chase and fleeing from the car fail to establish a prior agreement between Petitioner and the passenger to shoot at the officers.

In the order of dismissal the PCR judge wrote, "Applicant alleges counsel was deficient for failing to object to the Solicitor giving an illustration of a burglary and a getaway car as an example of accomplice liability." (App. p. 417). The PCR judge discussed the law in regard to comments made by a prosecutor and then wrote:

> Applicant testified that counsel should have objected to the example being used by the Solicitor. Counsel testified he did not object to the example and did not feel the need to do so. This Court finds that counsel is given latitude in remarks made during closing argument and that the court corrected any potential error by charging on the law of accomplice liability. This Court also finds that even if counsel did err in failing to object, the error would have been harmless and would not have prejudiced Applicant. This Court finds that Applicant has failed to meet his burden and this allegation is dismissed.

(App. p. 418).

While the prosecutor provided examples of accomplice liability/ the hand of one is the hand of all in his closing argument, (App. p. 169, line 23 – p. 170, lines 1-11), the allegation during the PCR hearing involved the **judge's** example provided during her jury instruction. In the motion to alter or amend pursuant to Rule 59(e), Petitioner wrote, "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). Her example shifted the burden of proof to the applicant inferring that to be guilty of the murder attempt, only the evidence of Rivers' flight was necessary." (App. p. 422). The PCR judge denied the motion to alter or amend despite the factual error. The PCR judge erred.

The PCR judge should have corrected the factual error in the order, found trial counsel ineffective for failing to object to the example given by the judge and granted relief. Petitioner was prejudiced by the deficient performance. The evidence at trial showed that Petitioner was the driver, making the charge given an improper charge on the facts that unconstitutionally diluted the State's burden of proof.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117,

386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was ineffective in failing to object to the jury instruction that included a getaway driver example that became an improper charge on the facts. "Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21. See also Pantovich v. State, 427 S.C. 555, 562, 832 S.E.2d 596, 600 (2019) ("The modern trend, however, has cast doubt upon the validity of charges instructing juries on how to interpret and use evidence."); State v. Cartwright, 425 S.C. 81, 93, 819 S.E.2d 756, 762 (2018) (stating "the trial court shall not provide a limiting instruction or otherwise comment to the jury on" suicide-attempt evidence because such a charge may be an improper charge on the facts).

In State v. Burdette, 427 S.C. 490, 502, 832 S.E.2d 575, 582 (2019), the South Carolina Supreme Court wrote:

> We have held in other settings that it is improper to give examples of conduct the jury may consider when determining whether the State has proven an element of a crime or when determining whether certain other facts have been proven or disproven. See, *e.g.*, State v. Grant, 275 S.C. 404, 407-08, 272 S.E.2d 169, 171

> (1980) (holding it was improper for the trial judge to charge the jury that the defendant's flight may be considered as evidence of guilt); State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) (holding, in a voluntary manslaughter case, the trial court correctly refused the defendant's request to charge the jury specific examples of conduct that might be considered as evidence of legal provocation, as the giving of such examples would be an impermissible charge on the facts), overruled on other grounds by Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009); State v. Cheeks, 401 S.C. 322, 328-29, 737 S.E.2d 480, 484 (2013) (holding, in a drug trafficking case, that the trial court must not charge the jury that actual knowledge of the presence of a drug is strong evidence of a defendant's intent to control its disposition or use).

Like the examples above, the getaway drive example given in the instruction in this case was improper. Under the facts of this case, where the evidence shows that Petitioner was the driver and the passenger shot at the police, the getaway driver example given by the trial judge became an improper charge on the facts. Petitioner was prejudiced by the deficient performance because the charge additionally diluted the State's burden of proof by omitting the requirement that in order for the jury to find Petitioner guilty of attempted murder, the State had to prove that the passenger and Petitioner had an agreement, a pre-arranged plan to attempt to murder the police officer. Based on the example included in this charge, the jury could have found liability based solely on Petitioner driving the car and failing to stop for police. In finding Petitioner not guilty of the weapon charge, the jury appears to have rejected the State's argument that Petitioner was the shooter of the second round of shots. The jury's verdict reflects that the jury found Petitioner guilty based on accomplice liability, "the hand of one is the hand of all."

In State v. Harry, 420 S.C. 290, 299, 803 S.E.2d 272, 276–77 (2017), the South Carolina Supreme Court wrote:

> " 'Under the hand of one is the hand of all theory [of accomplice liability], one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.' "State v. Thompson, 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct. App. 2007) (alteration in original) (quoting State v. Condrey, 349

> S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002)) (internal quotation marks omitted). "Mere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt." Id. at 262, 647 S.E.2d at 705. "However, 'presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a [principal].' " Id. (alteration in original) (quoting State v. Hill, 268 S.C. 390, 395–96, 234 S.E.2d 219, 221 (1977)).

The getaway driver example diluted the State's burden of presenting evidence of a pre-arranged common design or purpose between Petitioner and the co-defendant for some illegal purpose of which the attempt to murder the police officers was incidental or a natural or probable consequence.[2] This case is different from most other cases dealing with the hand of one hand of all accomplice liability charge where the parties pre-arrange to meet for some illegal act, usually a burglary or a robbery, and in the process someone is shot or killed. Petitioner was the driver of the car that failed to stop for a minor traffic violation. The co-defendant was a passenger in Petitioner's car who shot at police. There was no evidence of a pre-arranged plan. Even if the driver, with control of the car, and the passenger could have developed a plan to flee from the police, the shooting is not incidental or a natural or probable consequence of any assumed plan to evade law enforcement.

There is a reasonable probability that, but for trial counsel's failure to object to the improper example in the jury instruction, the result of the proceeding would have been different. In reviewing an alleged error in jury instructions, an appellate court will not reverse the circuit court's decision absent an abuse of discretion. See Cole v. Raut, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (applying an abuse of discretion standard of review to an alleged error in jury instructions). In reviewing jury charges for error, the appellate court must consider the circuit court's jury charge as a whole in light of the evidence and issues presented at trial. Welch

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[2] There is mention of a stolen car during the PCR hearing but this was not discussed at trial. (App. p. 304, lines 8-9; p. 355, lines 3-8).

v. Epstein, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct.App.2000). If the charges are reasonably free from error, isolated portions that might be misleading do not constitute reversible error. Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999). Viewing the charge as a whole in light of the evidence presented, the charge was an improper charge on the facts that diluted that State's burden of proof.

Respondent argues that the judge's example was not an improper comment on the facts and even if it is, Petitioner was not prejudiced by the error because it is undisputed that Petitioner was the driver of the car. (Return to Petition for Writ of Certiorari p. 9). The example constitutes an improper comment on the facts because Petitioner was the driver. While it is undisputed that Petitioner was the driver, his role in the attempted murder as the driver is disputed. Based on the example given by the judge, the jury could have found liability for the attempted murder based solely on Petitioner driving the car and failing to stop for police.

Respondent's reliance on State v. Norris, 270 S.C. 552, 243 S.E.2d 440 (1978), is misplaced. In Norris the South Carolina Supreme Court wrote:

> In his instructions on assault and battery of a high and aggravated nature, the judge noted several of the facts in the case such as the disparate weights and ages of the appellant and the victim. Appellant asserts this violated Article V, Section 17 of the South Carolina Constitution which prohibits a judge from charging juries on matters of fact. We disagree.
>
> The constitutional provision was designed to preserve inviolate the jury's fact finding function. All questions of fact are to be decided exclusively by the jury, uninfluenced by any expressions of opinion by the judge. State v. White, 15 S.C. 381 (1881); State v. Pruitt, 187 S.C. 58, 196 S.E. 371 (1938); State v. Thorne, 237 S.C. 248, 116 S.E.2d 854 (1960).
>
> However, where the facts stated in a charge are not in dispute, the instruction is not erroneous. Turner v. Lyles, 68 S.C. 392, 48 S.E. 301 (1904); Riser v. Southern Ry., 67 S.C. 419, 46 S.E. 47 (1903).
>
> The weights and ages of the appellant and the victim were not questions of fact for the jury. Appellant admitted his age and weight on cross-examination.

> Accordingly, we affirm, concluding the trial judge's reference to undisputed facts did not violate Article V, Section 17 of the South Carolina Constitution.

270 S.C. at 552–53, 243 S.E.2d at 440. In contrast, in the present case Petitioner never admitted to being a getaway driver. Petitioner was fleeing from the police when the passenger in his car started shooting. Petitioner's role in the attempted murder as a driver was in dispute. There was no evidence of a pre-arranged plan to attempt to murder the officer.

The PCR judge erred in failing to correct the factual error in the order of dismissal and refusing to find trial counsel ineffective for failing to object to the example given by the judge in her charge on accomplice liability. Petitioner was prejudiced by the deficient performance. The example allowed the jury to find Petitioner guilty of attempted murder solely for fleeing from the police and driving the car from which the co-defendant shot at police.

CONCLUSION

Based on the above argument this Court should reverse the conviction and remand the case for a new trial.

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This 14th day of December, 2023.

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.

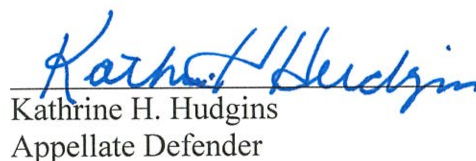
STATE OF SOUTH CAROLINA,

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 Brief of Petitioner in the above-referenced case has been served upon Mark 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 14th day of December, 2023.



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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

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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. 15

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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

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[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.

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[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,

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[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

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

REPLY BRIEF OF PETITIONER

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ATTORNEY FOR PETITIONER

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ARGUMENT IN REPLY

Under the unusual procedural facts of this case, this Court, without a remand to the PCR judge, should find that trial counsel was ineffective for failing to object to the example given by the trial 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, resulting in prejudice requiring reversal.

A. Procedural History – Remand Not Required

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 original appendix.

The State filed a return on June 10, 2021. Petitioner filed a reply brief on June 21, 2021. On November 28, 2023, this Court granted the petition for writ of certiorari as to question two but denied certiorari as to questions one and three. The brief of petitioner was filed on December 14, 2023. On June 17, 2024, the State filed a motion to strike and require filing of amended appendix and brief of petitioner. Petitioner filed a reply on July 10, 2024. On August 26, 2024, this Court denied the motion to strike but ordered the filing of a supplemental appendix to include the Rule 59(e) motion filed by PCR counsel and the State's return. Petitioner filed the supplemental appendix on September 24, 2024. The State filed the brief of respondent on October 25, 2024, moving for the first time for a remand to the PCR judge. This reply brief is filed in opposition to

a remand. Petitioner submits that this Court can and should decide the merits of the issue without a remand.

1. *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 statute[2] 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.

2. 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.

3. 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 was attached and made a part of the return to the State's motion to strike. 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 was 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.

4. State's Return to Rule 59(e) Motion

As noted in footnote 7 of the State's motion to strike, 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), SCRCP' 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 to Strike p. 9). Petitioner, acting *pro se*, was the only party to correctly point out the error in the order of dismissal.

5. Failure to Object or Move for Remand

The State failed to object or move for a remand when the petition for writ of certiorari and appendix were filed on February 22, 2021. The State failed to object or move for a remand when the return was filed on June 10, 2021. The State failed to object or move for a remand when the reply was filed on June 21, 2021. The State failed to object or move for a remand when certiorari was granted in part on November 28, 2023. The State failed to object or move for a remand when the brief of petitioner was filed on December 14, 2023. The State, on notice since January of 2020 that the order of dismissal failed to address 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. The State waited until the filing of the brief of respondent to move for a remand.

6. 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 argued 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.

7. Remand Not Required

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.

B. Trial counsel was ineffective for failing to object to the example given by the trial 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, resulting in prejudice requiring reversal.

During the instruction on accomplice liability/hand of one is the hand of all the trial judge gave the following example:

> 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.

The getaway driver example was an improper charge on the facts. The example in the present case is easily distinguished from the example given in the case cited by the State of State v. Young, 238 S.C. 115, 127, 119 S.E.2d 504, 510 (1961), overruled by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). In Young the judge gave the following example:

> Relative to the question if there be any testimony in a given case showing that more than one person may have been involved therein, I charge you that all persons who are present, concurring and participating by some overt act in any crime are principals therein and the act which caused such crime is regarded in the law as the act of each and all so present and participating and concurring. There is no distinction in law under such circumstances in the degree of their guilt or the nature of their offense founded on the nearness or remoteness of their personal agency. One who is present, helping, aiding and abetting another or others in the execution of an agreement between them with a common purpose to commit a crime would be responsible for the act of any one of the party provided that such act was done pursuant and incidental to such common purpose. Just to illustrate, gentlemen, I happened to be looking last night at a comedy on television where the Kingfish and Andy, I believe, were trying to get out of the telephone slot an old nickel. Well, I believe the Kingfish was outside the telephone booth and Andy was inside the telephone booth. The Kingfish was watching, the other was trying to get the nickel out. Well, the mere fact that the one on the outside was not inside would make no difference in their degree of guilt because in such an instance the act of one would be the act of both if it was in the minds of both when they went there to get the

> nickel. So that's what the law means by saying that when two or more parties are engaged in the commission of a crime, the one watches, the other shoots, the law says it makes no difference who fired the fatal shot.

Young, 238 S.C. at 127, 119 S.E.2d at 510. Young was charged with murder, not taking a nickel out of a telephone slot. The charge in Young was not an improper comment on the facts. In contrast, the evidence in the present case showed that Petitioner was the driver and the passenger shot at the police. The getaway driver example given by the trial judge was an improper charge on the facts.

In State v. Quick, 141 S.C. 442, 140 S.E. 97, 99 (1927), another case cited by the State, Quick was charged with violation of the prohibition law for whiskey found in his house. The judge gave an example of possession involving his car. The Court found the example given was not an improper comment on the facts writing, "Oftentimes juries can be made to understand the law of the case easier if they are given helpful illustrations. **In giving such illustrations, however, a trial judge should avoid the facts of the case on trial.** There was no evidence in this case to show that the whisky found was in the appellant's automobile. The language last quoted from the charge, and the illustration made by the circuit judge, contained a correct statement of the law. We do not think it was a charge on the facts." Quick, 140 S.E. at 99, (emphasis added). The getaway driver example in the present case failed to avoid the facts of the case on trial where the Petitioner was the driver of the car and the passenger shot at police. The example in the present case was an improper comment on the facts.

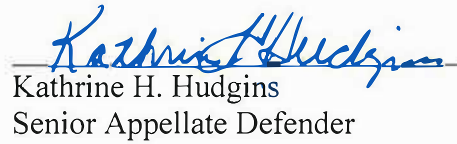
The example given involving the getaway driver in the present case is analogous to the requested examples of legal provocation refused in State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000), overruled by Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009). In Hughey the Court wrote, "The requested examples constitute a direct charge on the facts because Hughey

alleges that a knife was pulled on him, Jackson spit in his face, and there was sudden mutual combat. The requested jury charge elevates the specific facts of the case, such as spitting in a person's face, to an acceptable act of legal provocation." 339 S.C. at 452, 529 S.E.2d at 728. The getaway driver example constituted a direct charge on the facts. The example in the present case improperly elevated driving the car/fleeing from the police to accomplice liability for murder. Trial counsel was deficient in failing to object to the example.

Petitioner was prejudiced by the deficient performance. The getaway driver example diluted the State's burden of presenting evidence of a pre-arranged common design or purpose between Petitioner and the co-defendant for some illegal purpose of which the attempt to murder the police officers was incidental or a natural or probable consequence. Petitioner was fleeing from the police when the passenger in his car started shooting. Petitioner's role in the attempted murder as a driver was in dispute. There was no evidence of a pre-arranged plan to attempt to murder the officer. The example allowed the jury to find Petitioner guilty of attempted murder solely for fleeing from the police and driving the car from which the co-defendant shot at police.

CONCLUSION

Based on the above argument, this Court should reverse the conviction and remand for a new trial.



Kathrine H. Hudgins
Senior Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of November, 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.

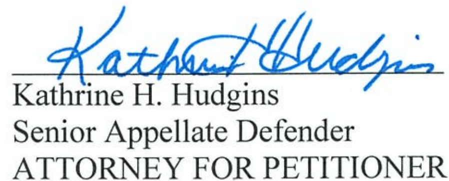
STATE OF SOUTH CAROLINA,

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 Reply Brief of Petitioner 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 7th day of November, 2024.



Kathrine H. Hudgins
Senior Appellate Defender
ATTORNEY FOR PETITIONER

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Maurio Daetrel Rivers, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2020-001106

Appeal From Colleton County
William H. Seals, Jr., Circuit Court Judge

Unpublished Opinion No. 2025-UP-040
Submitted January 1, 2025 – Filed February 5, 2025

REMANDED

Senior Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Mark Reynolds Farthing, both of Columbia, for Respondent.

PER CURIAM: Maurio Daetrel Rivers appeals the post-conviction relief (PCR) court's order denying his application for PCR. On appeal, Rivers argues the PCR court erred in failing to find his trial counsel was ineffective for failing to object to the trial court's accomplice liability charge, which he contends constituted an

improper comment on the facts of his case. Because the PCR court did not make specific findings of fact and conclusions of law on this issue, we remand the matter to the PCR court for a supplemental order addressing the issue. *See* S.C. Code Ann. § 17-27-80 (2014) (stating a PCR court must "make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented"); *Fishburne v. State*, 427 S.C. 505, 512, 832 S.E.2d 584, 587 (2019) ("The PCR court's general denial of all claims not specifically addressed in the PCR court's order 'does not constitute a sufficient ruling on any issues since it does not set forth specific findings of fact and conclusions of law.'" (quoting *Simmons v. State*, 416 S.C. 584, 592, 788 S.E.2d 220, 225 (2016))); *id.* at 517, 832 S.E.2d at 590 (remanding the matter "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"); *id.* at 516, 832 S.E.2d at 589 (explaining that "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 . . . 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"). 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.

REMANDED.[1]

WILLIAMS, C.J., and KONDUROS and GEATHERS, JJ., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

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SC Court of Appeals

STATE OF SOUTH CAROLINA COUNTY OF colleton	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT
Maurio Daetrel Rivers, #232669, Applicant, v. State of South Carolina, Respondent.	Case # 2016-CP-15-0647 **SUPPLEMENTAL ORDER OF DISMISSAL**

INTRODUCTION

This matter is currently before the Court by way of a remand from the South Carolina Court of Appeals. Through its decision remanding the matter, the Court of Appeals instructed this Court to issue a supplemental order addressing a single allegation raised by Mauio Daetrel Rivers ("Applicant") that was not previously addressed in the original order of dismissal issued in connection to his application for post-conviction relief. State v. Rivers, Op. No. 2025-UP-040 (S.C. Ct. App. filed Feb. 5, 2025). Specifically, the Court of Appeals has directed this Court to make specific findings of fact and conclusions of law on Applicant's claim "his trial counsel was ineffective for failing to object to the trial court's accomplice liability charge, which he contends constituted an improper comment on the facts." Id. Consistent with that appellate mandate, this Court—after reviewing the record from the trial proceedings conducted in Applicant's case, the testimony and evidence presented during the original post-conviction relief evidentiary hearing, the appellate records from Applicant's post-conviction relief appeal, and proposed orders submitted by counsel for both parties—finds Applicant has failed to meet his requisite burden of proof as to the lone allegation currently at issue. Therefore, for all the reasons that follow, Applicant's application for post-conviction relief is again denied and dismissed with prejudice.

PROCEDURAL HISTORY

In July of 2011, Applicant 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 Applicant 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. During that trial, Applicant was represented by John D. Bryan, Esquire, and the case was prosecuted by Assistant Solicitor Steven Knight of the Fourteenth Judicial Circuit Solicitor's Office. At the conclusion of the two-day trial, the jury convicted Applicant of one count of attempted murder and acquitted him of the remaining charges. The trial judge sentenced Applicant to a thirty-year term of imprisonment. At present, Applicant is incarcerated and serving that sentence in the custody and control of the South Carolina Department of Corrections.

Following his convictions, Applicant timely appealed. On appeal, the Court of Appeals —following briefing and oral argument—issued an unpublished opinion in which it unanimously affirmed Applicant's conviction. State v. Rivers, Op. No. 2014-UP-441 (S.C. Ct. App. filed Dec. 3, 2014). Applicant—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 Applicant's notice of appeal as a petition for a writ of certiorari and dismissed it without prejudice as premature. Meanwhile, the Court of Appeals rejected Applicant's pro se petition as an improper pro se filing and issued the remittitur on December 31, 2014. However, a short time later, the Court of Appeals recalled the remittitur and issued an order relieving Applicant's appellate counsel. Applicant 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, Applicant filed a pro se petition for a writ of certiorari in the Supreme Court, and that petition was likewise denied. On December 7, 2015, the remittitur was issued.

Subsequent to the final issuance of the remittitur, Applicant timely filed an application for post-conviction relief, and, in response, the State filed a return requesting an evidentiary hearing. Applicant then moved to file a pro se amendment to the post-conviction relief

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. Applicant was present at the hearing and represented by Leslie T. Sarji, Esquire. Assistant Attorney General Benjamin Limbaugh from the South Carolina Attorney General's Office appeared on behalf of the State. During the course of the hearing, both Applicant and Applicant's trial counsel testified, and several exhibits were introduced, including some proposed jury charges from Applicant's trial. At the conclusion of the hearing, this Court took the matter under advisement.

Shortly after the hearing concluded, Applicant—despite being represented by post-conviction relief 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. 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, this Court denied and dismissed Applicant's post-conviction relief application. Following that, Applicant—through post-conviction relief counsel—submitted a timely motion to alter or amend that was filed on January 23, 2020, and the State subsequently submitted a return. Through a Form 4 order filed on July 30, 2020, this Court denied the motion. Applicant then timely filed a notice of appeal.

After initiating his appeal, Applicant filed a petition for a writ of certiorari with the Supreme Court, and the Supreme Court transferred the matter to the Court of Appeals. 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. Thereafter, following briefing, the Court of Appeals issued an unpublished decision remanding the matter to this Court for the issuance of a supplemental order. State v. Rivers, Op. No. 2025-UP-040 (S.C. Ct. App. filed Feb. 5, 2025). At present, the matter remains pending in this Court as a result of that remand.

SUMMARY OF INCIDENT GIVING RISE TO APPLICANT'S CONVICTION

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—Applicant—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, Applicant 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, Applicant continued to maintain a constant speed. (App'x p. 67). Applicant then suddenly changed lanes in an erratic manner and took off at a high rate of speed. (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 Applicant'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, Applicant's passenger—Bronson Shelley—shockingly fired a volley of 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, Applicant 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 Applicant down and apprehended him by biting his groin. (App'x pp. 84-86; p. 93). Lieutenant Burnette and another officer then took Applicant 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. (App'x pp. 144-146).

SUMMARY OF POST-CONVICTION RELIEF PROCEEDINGS PRIOR TO REMAND

After he was convicted by a jury of attempted murder in connection to the incident and following an unsuccessful appeal, Applicant sought relief through the filing of a pro se post-conviction relief application. (App'x pp. 271-284). Amongst the claims raised in that application, Applicant alleged his trial 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, Applicant alleged trial 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, Applicant alleged trial counsel should have objected to an 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). Applicant later included similar claims through a pro se motion to amend his post-conviction relief application. (App'x pp. 293-297).

In response to Applicant's filings, post-conviction relief counsel was appointed, and an evidentiary hearing was conducted on the matter. (App'x pp. 302-305). At the outset of the hearing, post-conviction relief counsel indicated she wished to raise additional claims beyond those identified in the application, and this Court 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 Applicant and Applicant's trial counsel. (App'x pp. 323-338; pp. 343-379).

Notably, as part of his testimony, Applicant complained about trial 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, Applicant 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, trial 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). He further indicated he could not remember precisely why he did not do so. (App'x pp. 378-379). Importantly though, trial counsel explained he believed the jury would have understood the difference between that example and what was being alleged in Applicant's case. (App'x p. 379).

At the conclusion of the hearing, this Court 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, this Court—in part—concluded Applicant failed to establish trial 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, post-conviction relief counsel timely filed a motion to alter or amend on Applicant's behalf. (Supp. App'x pp. 1-2). However, through that motion, post-conviction relief counsel did *not* allege this Court erred by failing to address Applicant'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, Applicant—despite being represented by counsel—attempted to submit his own pro se "Motion to Amend and Alter Judgement Rule 59(e)" raising additional claims, including one related to this Court'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 Applicant's case and was never actually before this Court for its consideration. Records for Maurio D. Rivers, Colleton County Fourteenth Judicial Circuit Public Index, https://publicindex.sccourts.org/colleton/publicindex.

Ultimately, this Court considered the matter that was actually presented to it for consideration, including the State's return. (App'x pp. 425-426; Supp. App'x pp. 3-6). Upon doing so, this Court declined to alter or amend its judgment. (App'x pp. 425-426).

NATURE OF ALLEGATION ON REMAND

In his application for post-conviction relief, Applicant raised a number of allegations, and most of those allegations have previously been ruled upon and rejected in this Court's original order of dismissal. (App'x pp. 411-420; pp. 425-426). However, one issue remains for this

Court to address on remand. Specifically, that issue is:

> Was trial counsel constitutionally ineffective for failing to object to the trial judge's jury charge on accomplice liability?

State v. Rivers, Op. No. 2025-UP-040 (S.C. Ct. App. filed Feb. 5, 2025).

STANDARD APPLICABLE TO ALLEGATION RAISED

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). Pursuant to that right, the defendant is entitled to effective assistance of trial counsel. McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."). Significantly though, effective assistance of trial counsel does not mean perfect or mistake-free representation. See Weaver v. Massachusetts, 582 U.S. 286, 300 (2017) ("[A] defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.'" (citation omitted)); Burt v. Titlow, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]"); Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland, 466 U.S. at 687-688. Meanwhile, trial counsel's assistance is considered to be constitutionally ineffective only when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686; see Harrington v. Richter, 562 U.S. 86, 110 (2011) ("Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial." (citation and internal quotations omitted)).

When faced with a claim of ineffective assistance of trial counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant raising an ineffective assistance of trial counsel claim must establish: (1) 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 counsel's deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the heavy burden of establishing both deficiency and prejudice in order to be entitled to relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); see United States v. Balzano, 916 F.2d 1273, 1292 (7th Cir. 1990) (characterizing the required showing a defendant must make in order to successfully establish an ineffective assistance of counsel claim as a "high mountain a defendant must climb"); Stone v. State, 419 S.C. 370, 380, 798 S.E.2d 561, 566 (2017) (instructing "the law requires [a reviewing court to] presume counsel rendered adequate assistance and exercised reasonable professional judgment" and only find to the contrary when the applicant has overcome that presumption by establishing both deficiency and prejudice); see also Weaver, 582 U.S. at 303 (explaining "the rules governing ineffective-assistance claims must be applied with scrupulous care" (citation and internal quotations omitted)).

Regarding the deficiency prong of the analysis, the proper measure of performance is whether counsel provided representation within the objectively reasonable range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); see Richter, 562 U.S. at 110 (instructing the proper analysis "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind"). When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for overcoming that presumption. Butler, 286 S.C. at 442, 334 S.E.2d at 814; see Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, will make every effort "to eliminate the distorting effects of hindsight," and will "evaluate the conduct from counsel's perspective at the time" in light of the then-existing circumstances. Strickland, 466 U.S. at 689. To establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687; see Dunn v. Reeves, 594 U.S. 731, 739(2021) ("[E]ven if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen." (citation, internal quotations, and

brackets in original omitted)). Thus, counsel's performance will be considered to be deficient only when it objectively amounted to incompetence under prevailing professional norms and not when it simply "deviated from best practices or most common custom." Richter, 562 U.S. at 105; see State v. Woullard, 813 N.E.2d 964, 971 (Ohio Ct. App. 2004) ("Defense counsel's strategy must have been outside the realm of legitimate trial strategy so as 'to make ordinary counsel scoff' before a conviction will be reversed on the basis of ineffective assistance." (citations omitted)).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. For that burden to be met, counsel's deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989); see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be substantial, not just conceivable." Richter, 562 U.S. at 112; see Strickland, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Through the lone allegation at issue on remand, Applicant contends trial counsel was ineffective for failing to object to the trial judge's jury instructions on accomplice liability. For all the reasons that follow, this allegation is denied.

RELEVANT FACTS

Toward the outset of Applicant'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 Applicant 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 Applicant 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

> 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 Applicant's guilt beyond a reasonable doubt and Applicant 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 Applicant of one count of attempted murder, and acquitted him of the remaining charges. (App'x pp. 215-216).

Later on during the post-conviction relief evidentiary hearing, Applicant—as part of his testimony—discussed his view on trial counsel's failure to object to the trial judge's use of an illustrative example as part of her jury instructions on accomplice liability. Specifically, he maintained the instruction was "very prejudicial" because he believed it would have led the jurors to think "if the driver [in the burglary example used by the trial judge] is just as guilty as

 the burglar then surely the driver in this vehicle is just a guilty as the murder attempted." (App'x pp. 337-338). In addition to that, Applicant's trial counsel was questioned about his failure to raise an objection to the trial judge's use of an illustrative example as part of her jury instructions on accomplice liability, and he confirmed he could not remember why he did not do so. (App'x pp. 368-369; p. 378). However, trial counsel indicated he believed the jury would have been capable of drawing a distinction between the facts of Applicant's case and the example used. (App'x pp. 378-379).

ANALYSIS

On remand, Applicant contends trial counsel was constitutionally ineffective for failing to object to the trial judge's jury instructions on accomplice liability. As support for that allegation, Applicant appears to now be maintaining trial counsel should have objected to the trial judge's use of an illustrative example as part of those instructions because doing so purportedly constituted an improper comment on the facts.

While it is unquestionably true a trial judge in South Carolina cannot properly make a comment on the facts when instructing the jury on the law, 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)).

With that law in mind, the trial judge did not violate the prohibition on comments on the facts by using an illustrative example that—just as trial counsel appeared to recognize—was highly distinct from the factual scenario involved in Applicant's case. Demonstrating that fact, Applicant's case primarily involved an attempted murder charge that stemmed from a factual scenario in which the driver of a vehicle—Applicant—suddenly fled when a law enforcement officer attempted to stop him for a simple traffic violation. Then, during the dangerous high-speed chase that spontaneously and unexpectedly ensued, Applicant's passenger began firing on the pursuing law enforcement officers as Applicant continued to try to speed away. Meanwhile, the illustrative example employed by the trial judge as part of her accomplice liability jury instructions involved a factual scenario that did *not* involve anything unexpected, spontaneous, or sudden. Instead, the trial judge's example involved a scenario in which two individuals joined with one another for the *specific purpose* of committing a *planned* criminal act and "acted together in concert to commit a burglary." And, in that example involving a jointly-planned crime, one went inside the burglarized residence while the other actively participated by waiting outside to serve both as a lookout during the crime and as the getaway driver once the other had returned to the vehicle. Thus, the easy-to-understand illustrative example employed by the trial judge involved strikingly different circumstances from the circumstances involved in Applicant's case, which ensured it could *not* have been misconstrued by the jurors as an improper comment on the facts. 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). And, that was particularly true since the trial judge *repeatedly* stressed to the jurors throughout the trial she did not have an opinion on the facts, she could not comment on the facts to them, and they as the members of the jury were the sole judges of the facts. See State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("[J]urors are presumed to follow the law as instructed to them.").

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, and his decision not to raise such an objection certainly was not one *no* competent attorney would have made under the circumstances involved. 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"); see also Reeves, 141 S. Ct. at 2410 ("[E]ven if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that *no* competent lawyer would have chosen." (emphasis added and citation, internal quotations, and brackets omitted)); 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 post-conviction relief 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). Accordingly, since Applicant could not meet his burden of establishing trial counsel's failure to object to the trial judge's use of an illustrative example constituted deficient performance as required, Applicant's ineffective assistance of counsel claim necessarily must—and does—fail. See Campbell v. State, 441 S.C. 361, 367, 893 S.E.2d 492, 495 (Ct. App. 2023) (explaining a failure to make the requisite showing of either deficient performance or sufficient prejudice is fatal to an ineffective assistance of counsel claim); see also Hillerby v. State, 431 S.C. 323, 333, 847 S.E.2d 500, 505 (Ct. App. 2020) ("Deficiency is judged by whether trial counsel failed to provide reasonably effective assistance under prevailing professional norms." (citation and internal quotations omitted)).

Furthermore, even if trial counsel's failure to object could somehow be deemed deficient performance, Applicant nevertheless was not and could not have been prejudiced by defense counsel's performance in that regard 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"; (3) the illustrative example employed a factual scenario entirely distinct from the factual scenario involved in Applicant's case such that it could not have improperly influenced the jury in any manner; and (4) the jury heard a highly-similar illustrative example from the solicitor as part of his closing argument remarks. 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); see also Strickland, 466 U.S. at 693-694 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."); cf. Stone, 419 S.C. at 383, 798 S.E.2d at 568 ("There are a variety of reasons counsel may soundly choose not to make such an objection, including the reality that not all evidence offered by the State is harmful to the defendant. Under certain circumstances, therefore, counsel may employ a strategy of not objecting—even when counsel has a good argument for exclusion—if counsel reasonably perceives the benefits of doing so are outweighed by some other consideration."). Under such circumstances, Applicant was not and is not entitled to any relief because he cannot possibly meet his burden of establishing the requisite prejudice necessary to establish 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.").

For those reasons, Applicant has failed to meet his requisite burden of establishing both deficiency and prejudice in regard to trial counsel's performance concerning the trial judge's use of an illustrative example as part of her jury instructions on accomplice liability, and, thus, Applicant did not and cannot overcome the presumption trial counsel provided adequate representation during trial. Accordingly, this allegation is denied.

CONCLUSION AND ADVISEMENTS REGARDING APPEAL

For all the foregoing reasons, this Court finds Applicant has failed to meet his burden of

proof as to the allegation advanced in this post-conviction relief action that was mistakenly not previously addressed in the original order of dismissal and has again not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, Applicant's application for post-conviction relief is once again denied and dismissed with prejudice.

As before and pursuant to the guidance provided by the Court of Appeals in its decision remanding the matter for the issuance of a supplemental ruling, Applicant must file and serve a new notice of appeal within thirty days from the receipt of this supplemental order by Applicant's counsel to secure the appropriate appellate review if so desired. Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has a right to the assistance of appellate counsel when seeking review of an order denying post-conviction relief. Rule 71.1(g) of the South Carolina Rules of Civil Procedures provides post-conviction relief counsel must serve and file a notice of appeal on an applicant's behalf in the event the applicant wishes to seek appellate review of a post-conviction relief ruling. Applicant is directed to Rule 243 of the South Carolina Appellate Court Rules for guidance on the appropriate procedures for an appeal in a post-conviction relief matter.

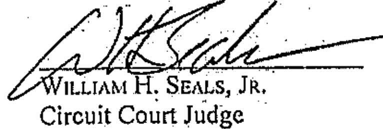
IT IS THEREFORE ORDERED:

(1) Applicant's application for post-conviction relief is again denied and dismissed with prejudice;

and

(2) Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 23 day of Feb., 2025.



William H. Seals, Jr.
Circuit Court Judge
Fourteenth Judicial Circuit

Marion, South Carolina