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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Common Pleas
Appeal from Colleton County
Honorable William H. Seals, Jr., Circuit Court Judge
Appellate Case No. 2025-000508

MAURIO DAETREL RIVERS,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Deputy Attorney General

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

ATTORNEYS FOR RESPONDENT

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The PCR judge correctly determined Rivers failed to establish trial counsel was constitutionally ineffective because: (1) there was nothing improper about the trial judge's use of the illustrative example as part of her accomplice liability jury instructions and, thus, trial counsel could not have been deficient for failing to raise a baseless objection to an appropriate jury instruction; and (2) there was no reasonable likelihood of a different outcome even if trial counsel had objected to the trial judge's use of the illustrative example under the circumstances involved. 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

Did the PCR judge somehow err by correctly determining Rivers failed to establish trial counsel was constitutionally ineffective when: (1) there was nothing improper about the trial judge's use of the illustrative example as part of her accomplice liability jury instructions and, thus, trial counsel could not have been deficient for failing to raise a baseless objection to an appropriate jury instruction; and (2) there was no reasonable likelihood of a different outcome even if trial counsel had objected to the trial judge's use of the illustrative example under the circumstances involved?

STATEMENT OF THE CASE

In July of 2011, Petitioner Maurio Daetrel 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

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[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.

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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.

Thereafter, through an order filed on January 2, 2022, the 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. Thereafter, following briefing, the Court of Appeals issued an unpublished decision remanding the matter to the PCR judge for the limited purpose of issuing a supplemental order. State v. Rivers, Op. No. 2025-UP-040 (S.C. Ct. App. filed Feb. 5, 2025).

On remand, appellate counsel for both Rivers and the State submitted proposed orders at the PCR judge's request. Thereafter, through a supplemental order filed on March 6, 2025, the PCR judge again denied and dismissed Rivers's PCR application. Rivers then filed another timely notice of appeal.

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[6] In his original 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 last 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

[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 trial 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).

lieutenant had done so, Rivers'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, 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).

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,

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

> 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). The trial judge did so in response, 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 Relevant Details from the PCR Proceedings

Following an 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 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, Rivers 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, Rivers alleged trial 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 trial counsel. (App'x pp. 323-338; pp. 343-379).

Notably, as part of his testimony, Rivers 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, 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, 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). Importantly though, as to why, trial 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 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, PCR counsel timely filed a motion to alter or amend on Rivers's behalf. (App'x pp. 427-428). 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. (App'x pp. 427-428).

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] Records for Maurio D. Rivers, 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; pp. 429-432). Upon doing so, he declined to alter or amend his judgment. (App'x pp. 425-426). Rivers then appealed.

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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").

On appeal, Rivers raised several issues, including one alleging the PCR judge erred by "refusing" to find trial counsel was constitutionally ineffective for failing to object to the trial judge's use of the illustrative example concerning accomplice liability. (App'x pp. 433-457). Rivers's case was transferred to the Court of Appeals, and the Court of Appeals granted Rivers's petition for a writ of certiorari in part. (App'x p. 489). Thereafter, following briefing, the Court of Appeals remanded the matter to the PCR judge for a supplemental order addressing Rivers's claim related to the the trial court's accomplice liability charge, which Rivers contended constituted an improper comment on the facts.[12] (App'x pp. 556-557).

On remand, the PCR judge complied with the appellate mandate and issued a supplemental order addressing the outstanding claim related to the accomplice liability charge. (App'x pp. 558-566). Through that order, the PCR judge again denied and dismissed Rivers's PCR application. (App'x pp. 558-556). In doing so, the PCR judge found the trial judge's illustrative example was neither improper nor a prohibited comment on the facts. (App'x p. 565). Based on that finding, the PCR judge determined Rivers failed to meet his required burden and had established neither deficiency nor prejudice. (App'x pp. 565-566).

[12] In its appellate brief, the State specifically asked the Court of Appeals to issue such a limited remand. (App'x p. 539).

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); see also Strickland v. Washington, 466 U.S. 668, 698 (1984) (recognizing the question of whether defense counsel was constitutionally ineffective "is a mixed question of law and fact"). 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

The PCR judge correctly determined Rivers failed to establish trial counsel was constitutionally ineffective because: (1) there was nothing improper about the trial judge's use of the illustrative example as part of her accomplice liability jury instructions and, thus, trial counsel could not have been deficient for failing to raise a baseless objection to an appropriate jury instruction; and (2) there was no reasonable likelihood of a different outcome even if trial counsel had objected to the trial judge's use of the illustrative example under the circumstances involved.

On appeal, Rivers contends the PCR judge reversibly erred by failing to find trial counsel was constitutionally ineffective for not objecting to the trial judge's jury instructions on accomplice liability. As support for that allegation, Rivers maintains 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 objectionable and improper comment on the facts.[13] To the

[13] In his latest petition for a writ of certiorari, Rivers also appears to be contending trial counsel should have objected to the trial judge's presentation of *any* jury instructions on accomplice liability regardless of whether they included an illustrative example or not because there was purportedly no evidence presented that could have supported such an instruction. (Pet. for Cert. pp. 11-12; pp. 17-18). Notwithstanding the fact the trial judge properly instructed the jury on accomplice liability, there are multiple problems with Rivers now advancing that particular argument on appeal. First, it has already been finally litigated in Rivers's case since Rivers raised it as one of the grounds in his original petition for a writ of certiorari and the Court of Appeals denied his petition on that ground. (App'x pp. 438-445; p. 489). Second, it was neither properly before nor addressed by the PCR judge on remand since the remand in Rivers's case was limited to addressing Rivers's previously-unaddressed claim trial counsel should have objected to the trial judge's illustrative example as an "improper comment on the facts of his case." (App'x pp. 556-566). Third, Rivers did not even raise such an argument to the PCR judge on remand. (Supp. App'x pp. 1-13). Therefore, to the extent Rivers is now contending trial counsel was constitutionally ineffective for failing to object to any jury instructions on accomplice liability due to the purported complete absence of any evidence supporting such a charge, that particular argument cannot now appropriately be considered or addressed on appeal under the circumstances involved. See Ackerman v. McMillan, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct. App. 1996) ("Matters decided by the appellate court cannot be reheard, reconsidered, or relitigated in the trial court, even under the guise of a different form. The decision of the appellate court is final as to all questions decided. It is the duty of the trial court to follow the decision of the appellate court. It was therefore error for the trial court to reconsider the issue of liability in this case in view of the fact this court remanded the case for a determination of damages only." (citations omitted)); see also 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

contrary, the PCR judge correctly determined Rivers failed to establish trial counsel was constitutionally ineffective because: (1) there was nothing improper about the trial judge's use of the illustrative example as part of her accomplice liability jury instructions and, thus, trial counsel could not have been deficient for failing to raise a baseless objection to an appropriate jury instruction; and (2) there was no reasonable likelihood of a different outcome even if trial counsel had objected to the illustrative example. Rivers's petition for a writ of certiorari should be denied.

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

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preserved will not be addressed on appeal" is applicable in a PCR case); 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[.]").

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 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 Rivers's case. Demonstrating that fact, Rivers's case primarily involved an attempted murder charge that stemmed from a factual scenario in which the driver of a vehicle—Rivers—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, Rivers's passenger began firing on the pursuing law enforcement officers as Rivers 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 Rivers's case, which ensured it could

not have been misconstrued by the jurors as an improper comment on the facts.[14] 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

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[14] Indeed, Rivers previously appeared to *agree* the circumstances of his case were far different from the circumstances involved in the trial judge's illustrative example as Rivers—through the proposed order he submitted—encouraged the PCR judge to directly find "[t]here was no evidence of a pre-arranged plan" in his case, which was "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." (Supp. App'x p. 12) (emphasis added).

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, trial 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 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." (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 Rivers 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, Rivers's ineffective assistance of counsel claim necessarily had to fail and was correctly rejected by the PCR judge. 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 have been deemed deficient performance, Rivers nevertheless was not and could not have been prejudiced by trial counsel's performance in that regard because—just as the PCR judge found—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 Rivers'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 v. State, 419 S.C. 370, 383, 798 S.E.2d 561, 568 (2017) ("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, Rivers was not entitled to any relief because he could not possibly and did not 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, the PCR judge correctly found Rivers failed to meet his 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 correctly denied and dismissed Rivers's PCR application. Rivers's latest petition for a writ of certiorari should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the petition for a writ of certiorari should be denied.

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

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