

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2014-002026

Gary W. Bennett,Respondent,

v.

State of South Carolina, Petitioner.

**REPLY TO
RETURN TO PETITION FOR WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

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S.C. Supreme Court

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ARGUMENT

I. The post-conviction relief judge did not find trial counsel “ineffective in failing to attack the credibility of the co-defendant with evidence in addition to the prior felony conviction.”

Respondent argues the post-conviction relief judge “found trial counsel ineffective in failing to attack the credibility of the co-defendant with evidence in addition to the prior felony conviction.” (Ret. to Pet. for writ of Cert. p. 8). Throughout Respondent’s return, he makes reference to: trial counsel’s failure to cross-examine the pathologist about the dominant hand of the murderer (Id. p. 6; p. 8; p. p. 14); trial counsel’s failure to failure to cross-examine the general manager of the Taco Bell about the combination to the safe (Id. p. 6; p. 8; p. 14); and trial counsel’s failure to cross-examine the co-defendant with his prior statements (Id. p. 7; p. 8). Respondent also alleges trial counsel failed to investigate the prior record and plea agreement of the co-defendant’s girlfriend and Respondent’s girlfriend. (Id. p. 14). Finally, he argues trial counsel’s opening statement undermined his defense. (Id. p. 16).

However, the post-conviction relief judge’s order does not mention any of these alleged deficiencies. The order specifically finds trial counsel’s “performance as [Respondent’s] attorney fell well below the ‘professional norms’” because: he “never met with [Respondent] personally until the day of trial[;] never conducted any investigations into the case, never contacted any alibi witnesses[;] never reviewed pre-trial discovery[;] never sought suppression of the phone records introduced into evidence[;]” and because his “entire strategy was to impeach the State’s key witness with the witness’ prior criminal record.” (App. p. 416-417). Because the post-conviction relief judge made no findings with respect to the pathologist, the Taco Bell manager, the co-defendant’s statements, the co-defendant’s and Respondent’s girlfriends, or trial counsel’s opening statement,

Petitioner cannot now attempt to argue these deficiencies warrant relief. See, e.g., State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 913 (2004) (issue must be “ruled upon by the trial court” to be preserved for review (quoting Jean Hoefer Toal, et al., Appellate Practice in South Carolina 57 (2d ed. 2002))); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (“A party may not argue one ground at trial and an alternate ground on appeal.” (citations omitted)).¹

II. The post-conviction relief judge ruled on the issue of whether trial counsel’s performance prejudiced Respondent.

Respondent argues “[t]he order granting relief does not specifically discuss prejudice” regarding the finding trial counsel was ineffective in failing to further meet with Respondent prior to trial. (Ret. to Pet. for Writ of Cert. p. 14). He also argues [t]he order granting relief does not specifically discuss prejudice” regarding the finding trial counsel ineffective for failing to investigate an alibi witness. (Ret. to Pet. for Writ of Cert. p. 22). Petitioner submits the post-conviction relief judge’s order absolutely addresses the prejudice prong of the Strickland v. Washington, 466 U.S. 668, 687 (1984), standard. After declaring trial counsel deficient for various reasons, the post-conviction relief judge specifically stated “the more difficult question is whether a reasonable probability exists that the result of [Respondent’s] criminal trial would be different but for [trial counsel’s] deficient performance.” (App. p. 416-417). The post-conviction relief judge’s almost verbatim recitation of the Strickland standard regarding prejudice clearly preserves this issue for review. See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985)

¹ Petitioner notes Respondent also conceded trial counsel’s trial strategy to discredit the co-defendant was valid. (Ret. to Pet. for Writ of Cert. p. 9). Petitioner submits this concession is dispositive of this issue. Sallie v. N.C., 587 F.2d 636, 640 (4th Cir. 1978) (“Marzullo [v. Maryland], 561 F.2d 540 (4th Cir. 1977),] was not intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.”).

(defining the prejudice prong as a “reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.”).

III. Respondent’s argument that trial counsel failed to subject the State’s case to a meaningful adversarial testing is not preserved for this Court’s review.

Respondent argues “trial counsel’s failure to meet with Respondent until the day of trial and complete failure to investigate the State’s evidence presents the rare occasion where this Court should presume prejudice pursuant to [United States v. Cronic, 466 U.S. 648 (1984)].” (Ret. to Pet. for Writ of Cert. p. 15). Respondent did not make this argument to the post-conviction relief judge, and his order never addresses Cronic. Accordingly, Respondent cannot now argue this new ground for relief. See, e.g., Pauling v. State, 331 S.C. 606, 609-10, 503 S.E.2d 468, 470 (1998) (“At the PCR hearing, petitioner did not allege counsel was ineffective for failing to introduce the triage nurse's notes at trial. Accordingly, this issue is not preserved for review.” (citing Plyler v. State, 309 S.C. 408, 424 S.E.2d 477 (1992))); Hyman v. State, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (“The appellant asserts representation was ineffective because her trial counsel did not object that the sentences constituted cruel and unusual punishment. This point was not raised in her application or at the hearing and is not properly before us.” (citing State v. Newton, 274 S.C. 287, 262 S.E.2d 906 (1980))); see also Rogers, 361 S.C. at 183, 603 S.E.2d at 912-13 (issue must be “raised to and ruled upon by the trial court” to be preserved for review (quoting Jean Hoefler Toal, et al., Appellate Practice in South Carolina 57 (2d ed. 2002))).

IV. Petitioner’s argument the State did not disclose the Verizon records prior to trial is preserved for this Court’s review.

Respondent argues “Petitioner did not file a Rule 59(e) motion to alter or amend the order granting relief. Any argument that the [Verizon] records may have been

disclosed in discovery is not preserved for review.” (Ret. to Pet. for Writ of Cert. p. 19). However, a motion under Rule 59(e), SCRCP, is not necessary when a court makes a specific finding regarding an issue raised at trial. Rather, it is used to ask the court to rule on arguments raised but not ruled upon. Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (“Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it.” (citing Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939))). Because the post-conviction relief judge’s order makes a finding the records were not disclosed prior to trial, Petitioner was not required to file a motion to ask the judge to change his mind.

V. Respondent’s urging of this Court to adopt a cumulative error analysis is not preserved for appellate review.

Respondent argues this Court should ignore his complete failure to present an alibi witness at the evidentiary hearing, and substitute a cumulative error analysis to support the finding of prejudice in this regard. Respondent did not make this argument at the evidentiary hearing, and the post-conviction relief judge did not grant relief on this ground. Accordingly, Respondent cannot now rely on this argument as an alternative theory of relief. Pauling, 331 S.C. at 609-10, 503 S.E.2d at 470; Hyman, 278 S.C. at 502, 299 S.E.2d at 331; Rogers, 361 S.C. at 183, 603 S.E.2d at 912-13.²

² Petitioner submits Respondent makes this novel cumulative error argument, which this Court has consistently declined to adopt, because the post-conviction relief judge’s error on this ground warrants reversal. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (applicant must produce favorable alibi witness at evidentiary hearing (citing Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995))).

CONCLUSION

For the foregoing reasons, as well as the arguments articulated in the Petition for Writ of Certiorari, Petitioner respectfully submits this Court should grant certiorari and reverse the post-conviction relief judge's decision in this case.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

August 27, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

The Honorable Benjamin H. Culbertson, Circuit Court Judge

GARY W. BENNETT,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Reply to Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Kathrine H. Hudgins, Esquire
Appellate Defender
SC Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

This 27th day of August, 2015.


NORMA BIGBEE
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

August 27, 2015

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
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Columbia, South Carolina 29211

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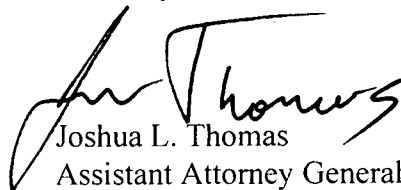
S.C. Supreme Court

RE: Gary W. Bennett v. State of South Carolina
Appellate Case No: 2014-002026

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Reply to Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,



Joshua L. Thomas
Assistant Attorney General
Bar No: 100777

JLT/nb
Enclosures

cc: Kathrine H. Hudgins, Esquire (2 copies)