

**RECEIVED**

**MAY 30 2017**

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Pickens County  
Court of Common Pleas  
The Honorable R. Knox McMahon, Circuit Court Judge

---

Appellate Case No. 2016-001753

---

ELI JAMES TORRENCE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

---

**RETURN TO PETITION FOR WRIT OF CERTIORARI**

---

ALAN WILSON  
Attorney General

DESHAWN H. MITCHELL  
Assistant Attorney General  
SC Bar No. 101813

Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

ATTORNEYS FOR RESPONDENT

**INDEX**

RESPONDENT’S QUESTIONS PRESENTED .....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW .....4

ARGUMENT .....5

    I. Trial Counsel should not have objected as Petitioner’s second degree burglary charge is a lesser included charge of first degree burglary. ....6

    II. Petitioner did not preserve the issue of presentment waiver for appellate review in that defendant failed to file a rule 59(e) motion asking trial court to make specific findings of fact and conclusions of law on his allegations.. ....9

CONCLUSION.....13

## **RESPONDENT'S QUESTIONS PRESENTED**

- I. Did Trial counsel's failure to object prejudice the Petitioner?
- II. Did Petitioner preserve the issue of presentment waiver for appellate review?

## STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Pickens County Clerk of Court. During its December 2012 term, the Pickens County Grand Jury indicted Petitioner for three counts of first-degree burglary (2012-GS-39-2704, -2705, -2712) and grand larceny (2012-GS-39-2713). During its January 2013 term, the Pickens County Grand Jury also indicted Petitioner for two counts of second-degree burglary (2013-GS-39-0065, -0068) and two counts of grand larceny (2013-GS-39-0066, -0067). John W. DeJong, Esquire represented the Petitioner. On July 29, 2013, Petitioner appeared before the Honorable Letitia H. Verdin and pled guilty to three counts of second-degree burglary (non-violent), two counts of second-degree burglary (violent), three counts of grand larceny (\$2000-\$10,000), escape, and willful injury to courthouse or jail. Petitioner also waived presentment to the Grand Jury on the charges of escape (2013-GS-39-2052) and willful injury to courthouse or jail (2013-GS-39-2053). Judge Verdin sentenced the Petitioner to ten years on each count of second-degree burglary (non-violent), fifteen years on one count of second-degree burglary (violent),<sup>1</sup> five years on each count of grand larceny (\$2000-\$10,000), ten years for escape, and three years for willful injury to courthouse or jail, all to be served concurrently. Additionally, Judge Verdin sentenced Petitioner to fifteen years suspended with five years of probation for the second count of second-degree burglary (violent) and ordered it to be consecutive to the sentence for the first count of second-degree burglary (violent). The Petitioner did not appeal.

Petitioner filed a PCR application April 2, 2014 alleging ineffective assistance of counsel and involuntary guilty plea. The Respondent made its return on August 25, 2014, requesting an

---

<sup>1</sup> 2012-GS-39-2705.

evidentiary hearing. An evidentiary hearing was held April 18, 2016 at the Pickens County Courthouse before the Honorable R. Knox McMahon. Petitioner was present and represented by Bobby G. Frederick, Esquire. Patrick Schmeckpeper, Esquire of the South Carolina Office of the Attorney General represented the Respondent. Testimony was taken from the Petitioner and his trial counsel, John W. DeJong. Following the evidentiary hearing, Judge McMahon denied and dismissed the PCR application by written order filed August 8, 2016.

Petitioner filed a timely notice of appeal. Petitioner submitted a petition for writ of certiorari and appendix on December 12, 2016. This return follows.

## STANDARD OF REVIEW

The proper standard for reviewing a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a PCR proceeding, the petitioner bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, at 441, 334 S.E.2d at 814.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, at 689. An applicant must overcome this presumption in order to receive relief. Cherry, at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief. Strickland, at 687. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, at 688. Second, counsel's deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to

guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial.

Hill v. Lockhart, 474 U.S. 52 (1985).

## ARGUMENT

### **I. Trial Counsel should not have objected as Petitioner's second degree burglary charge is a lesser included charge of first degree burglary.**

Petitioner asserts Trial Counsel was ineffective for failing to object to Petitioner's first degree burglary charge being amended to burglary second degree. This argument is without merit.

In his application, Petitioner alleged trial counsel was ineffective for failing to object to the amendment of Petitioner's charges to burglary second degree under subsection (B), where Petitioner had no prior notice of the change and did not waive indictment as to burglary second degree, subsection (B), and trial counsel was ineffective for failing to communicate with Petitioner to explain that he was pleading guilty to un-indicted offenses that was [sic] not a lesser-included offense of the charges for which he had been indicted. (App.p.5-6). In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner had failed to show any actual deficiency or otherwise meritorious reason for objecting to the indictment. (App.p.7). The court concluded Petitioner was not required to waive indictment with respect to his guilty plea for burglary second degree, because it was a lesser included offense of burglary first degree – for which he was validly indicted. (App.p.8). Furthermore, in addressing the issue of the escape charge, the court noted the sentencing sheet for escape clearly stated what the sentence is, and is signed by the judge, counsel and Petitioner. (App.p.9). The court concluded the sentencing sheet clearly memorializes the judge's intent to sentence Petitioner to ten years, concurrent to his other offenses, for escape. (App.p.9-10).

The PCR judge did not err in his ruling Petitioner failed to meet his burden entitling him to post-conviction relief. In this case, Petitioner argues the PCR court should have granted relief because Petitioner's trial counsel failed to object to the amendment of Petitioner's charges to burglary second degree under subsection (B), where Appellant had no prior notice of the charge and did not waive indictment as to burglary second degree subsection (B), as it is not a lesser-included offense of the charges for which he had been indicted.

A circuit court has subject matter jurisdiction to convict a defendant of an offense if there is an indictment that sufficiently states the offense, the defendant waives presentment, or the offense is a lesser-included offense of the crime charged in the indictment. State v. Wilkes, 353 S.C. 462, 464-465, 578 S.E.2d 717, 719 (2003) (citing Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001)). Here, Petitioner was originally indicted for three counts of burglary, first degree. However, upon agreeing to plead guilty, the state reduced Petitioner's first degree burglary charges to burglary second degree charges. (App.p.39-40).

Second-degree burglary, is a lesser included offense of first-degree burglary, because it has traditionally been considered a lesser included offense of the greater offense charged. See State v. Wright, 354 S.C. 48, 54, n.2, 579 S.E.2d 538, 541, n.2 (Ct. App. 2003) overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); see also State v. Burton, 356 S.C. 259, 264, 589 S.E.2d 6, 8 (2003) (when an offense has traditionally been considered a lesser included offense of the greater offense charged, it will continue to be construed as a lesser included offense). Additionally, the statutory scheme of the various levels of burglary clearly indicates that each second degree offense is a lesser included of the first degree offense. At its most basic and least serious version, a third degree burglary occurs when a person "enters a building without consent and with the intent to commit a crime therein." S.C. Code § 16-11-

313(A). From there, the legislature provided that where two additional factors are present: 1) that the building happens to be a dwelling; and 2) the existence of one of roughly seven statutorily defined aggravating circumstances – the offense is elevated to burglary in the first degree. § 16-11-311. Where only one of the two enhancing factors is present, the offense is categorized as burglary second degree. The nonviolent offense occurs where only entry of a dwelling is the enhancing factor. § 16-11-312(A). The violent offense occurs where one separate, statutorily defined aggravating circumstances are present as the enhancing factor. § 16-11-312(B). Petitioner’s argument appears to be that whether burglary, second degree, is a lesser included offense of burglary, first degree depends on which of those two enhancements is present. In support, Petitioner cites to Weinhauer v. State, 334 S.C. 327, 513 S.E.2d 840 (1999) (overruled by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)). Weinhauer, however, does not address whether and to what extent the different types of second degree burglary are lesser included offenses to first degree burglary. Rather, it merely holds that the two different versions of second degree burglary outlined in sections (A) and (B) are distinct offenses. Id. at 332. Respondent concedes that section (B) is not a lesser included offense of section (A).

In Weinhauer, Petitioner’s trial attorney did not object when the solicitor orally amended his burglary, second degree subsection (A) charge to burglary, second degree subsection (B) during the trial. Weinhauer v. State, 334 S.C. 327, 513 S.E.2d 840 (1999) overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). In Weinhauer, the solicitor did not orally amend the charge of burglary, first degree, to burglary, second degree under subsection (B). Rather, the solicitor improperly amended a second degree *non-violent* offense into a second degree *violent* offense. Id. at 329. Contrary to Petitioner’s assertion, the takeaway

from Weinhauer is simply that sections (A) and (B) are not interchangeable – not whether (B) is a lesser included offense of burglary, first degree.

Furthermore, Petitioner was informed of the maximum sentence for both types of burglary second degree. (App.p.39-40). He said that he had discussed the charges with his attorney, and that he was happy with what counsel had done for him. (App.p.40). Counsel testified he and Petitioner were concerned with the prospect of fifteen years to life in prison, which was “where the plea negotiation really came into effect.” (App.p.82). Counsel explained the elements of first degree burglary to the Petitioner. (App.p.83).

Accordingly, Petitioner was not required to waive indictment with respect to his guilty plea for burglary second degree, because it was a lesser included offense of burglary first degree – for which he was validly indicted. See State v. Myers, 313 S.C. 391, 393, 438 S.E.2d 236, 237 (1993) (waiver of indictment not required where the charge is a lesser included offense of the crime charged in the indictment). Petitioner has therefore failed to show counsel was deficient in failing to challenge the sufficiency of the indictment, where there was no reasonable basis on which to base an objection. The post-conviction relief court properly denied and dismissed this allegation.

**II. Petitioner did not preserve the issue of presentment waiver for appellate review in that defendant failed to file a rule 59(e) motion asking trial court to make specific findings of fact and conclusions of law on his allegations.**

Pursuant to S.C. Code Ann. § 17-27-80 (2003), the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. The

failure to specifically rule on the issues precludes appellate review of the issues. Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992). In the present case, the PCR court did not address whether Petitioner properly waived presentment to his escape charge on the record. Accordingly, the issue is not preserved for this Court's review.

In Marlar v. State, this court held the Applicant's failure to file a Rule 59 (e), SCRPC, motion asking post-conviction relief judge to make specific findings of fact and conclusions of law as to rejected post-conviction challenges rendered those challenges waived for appellate review, precluding further review on the merits. Marlar v. State 375 S.C. 407, 653 S.E. 2d 266 (2007).

This Court in Marlar concluded by stating “[c]ounsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it. Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRPC, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by 17-27-80 and Rule 52(a), SCRPC.” Marlar, at 410, 653 S.E. 2d at 267. In the current case appellant failed to make the proper motion under Rule 59. Accordingly, the issue is not preserved for appellate reviewed and should be dismissed.

The current case is similar to Marlar because Petitioner did not make a Rule 59(e) motion. One of Petitioner's arguments to this Court is that he did not waive presentment on the record as to his escape charge. However, in the order from the PCR judge, the only issues ruled on where the sufficiency of the indictment and whether there was an unlawful sentence, both of which the judge found to have no merit (App.p.39-40). Additionally, Petitioner did not make a 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on

his current allegation he now raises for appellate review. Therefore, under Marlar's holding the current issue raise was not preserved for appellate review.

Notwithstanding any preservation concerns, Petitioner has still failed to meet his burden of proof regarding this allegation. Petitioner alleges he did not waive presentment on the record to the Pickens County Grand Jury on his escape charge.

At the post-conviction hearing, the Petitioner testified that he initialed the sentencing sheet for a waiver of the escape charge. (App. p.62). Additionally, when the Petitioner was pleading guilty in front of the trial judge, he was asked if he was there to plead guilty to several charges among them being escape and his response was yes. (App.p.39).

In State v. Smalls, this Court held that signing a sentencing sheet for a charge to which a defendant has pled guilty constitutes a written waiver of presentment. State v. Smalls 364 S.C. 343, 613 S.E. 2d 754 (2005). Petitioner cites to Boan v. State 388 S.C. 272, 695 S.E.2d 850 (2010) and alleges that his situation is more similar to Boan than Smalls. This argument is without merit as there are no conflicting sentences between what the judge said from the bench and what the sentencing sheet said. Moreover, it is clear that the sentencing judge never actually orally pronounced a sentence for the escape charge when she handled down the other sentences. (App.p.54). However, Petitioner did sign the sentencing sheet waiving presentment to the escape charge and when asked if he was pleading guilty to escape responded in the affirmative. Therefore, Petitioner's argument that he did not waive presentment is without merit.

Accordingly, even if Petitioner has proved the first prong of the Strickland test he has failed to prove the second prong of the Strickland test that counsel's deficient performance prejudiced him such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386

S.E.2d at 625. Additionally with respect to guilty plea counsel, the Petitioner has failed to show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985). As Petitioner failed to meet his burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

## **CONCLUSION**

For the foregoing reasons, the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

*[Signature follows]*

Respectfully submitted,

ALAN WILSON  
Attorney General

DESHAWN H. MITCHELL  
Assistant Attorney General  
SC Bar No. 101813

By:   
ATTORNEYS FOR RESPONDENT

Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

May 30, 2017

STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**

MAY 30 2017

S.C. SUPREME COURT

APPEAL FROM PICKENS COUNTY  
Court of Common Pleas

The Honorable R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2016-001753

Eli James Torrence,..... Petitioner,

v.

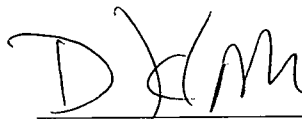
State of South Carolina,..... Respondent.

**CERTIFICATE OF SERVICE**

I, DeShawn H. Mitchell, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in inter-agency mail and addressed to:

Lacey M. Thompson, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.  
This 30<sup>th</sup> day of May, 2017.



DESHAWN H. MITCHELL  
S.C. Bar # 101813  
Office of Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3737  
ATTORNEY FOR RESPONDENT