

RECEIVED

SEP 07 2017

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Court of Common Pleas
Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case No. 2016-001067

Eugene D. Patterson, #321525

Petitioner,

vs.

State of South Carolina,

Respondent.

**MOTION TO STRIKE
PETITIONER'S REPLY BRIEF**

Respondent ("the State"), through its undersigned counsel, would respectfully show the Court the following:

Procedural Background

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. He was indicted during the April 2007 term of the Richland County Grand Jury for Murder (2007-GS-40-2137). He was represented by Tivis C. Sutherland, IV, Esquire (Counsel). On May 5-13, 2008, Petitioner proceeded to a jury trial before the Honorable William P. Keesley, where he was convicted as indicted. Judge Keesley sentenced Petitioner to forty-five (45) years' imprisonment.

Petitioner filed a notice of appeal. Following briefing and oral arguments, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence by unpublished opinion.

State v. Eugene D. Patterson, 2013-UP-154 (Ct. App. filed April 17, 2013). Thereafter, Petitioner petitioned the South Carolina Supreme Court for certiorari. The South Carolina Supreme Court denied Petitioner's petition by Order dated January 23, 2014. The Remittitur was issued on January 31, 2014.

Petitioner subsequently filed an application for post-conviction relief on February 25, 2014. An amended application was filed on July 9, 2015. On July 15, 2015, an evidentiary hearing was held before the Honorable G. Thomas Cooper, Jr. Petitioner testified on his own behalf. Counsel Sutherland also testified. On December 23, 2015, Judge Cooper issued an Order of Dismissal, denying relief. A Motion to Amend Judgment was filed on February 10, 2016, which was denied by Order issued on April 22, 2016.

Petitioner served and filed a notice of appeal to the South Carolina Supreme Court and filed a Petition for Writ of Certiorari on January 30, 2017. The Return was filed on June 30, 2017. Petitioner then filed a reply brief on July 24, 2017. In the reply brief, Petitioner, for the first time, argues that the case should be remanded and that the procedural bars should be disregarded.

This Court should strike Petitioner's Reply Brief because the revision of procedural bars and request for a remand are new arguments raised for the first time on reply.

Petitioner was convicted of murder under a theory of mutual combat. At the PCR hearing, Petitioner raised the issue of whether Counsel was ineffective in failing to argue that the trial court's jury instructions on mutual combat was improper. On appeal, Petitioner argues that appellate counsel was ineffective for failing to raise this issue on direct appeal. Significantly, Petitioner concedes that this issue is not preserved for review but raises the issue anyway. Petitioner agrees the issue was not raised by PCR counsel and agrees that there was no evidence presented to the PCR court. (PWC p. 7). The State, in our Return, argues that the Court should

not review this issue because it is clearly not preserved, a position that Petitioner concedes. Recognizing that review of the issue is procedurally barred, Petitioner attempts a Hail Mary pass in an attempt to have a barred claim considered after it was conceded.

This Court should strike Petitioner's Reply Brief because the procedural arguments and request for a remand are improperly raised for the first time. See Hunter v. Staples, 335 S.C. 93, 103, 515 S.E.2d 261, 267 (Ct. App. 1999) (An appellant may not use the reply brief to argue issues not argued in the initial brief.); Continental Ins. Co. v. Shives, 328 S.C. 470, 492 S.E.2d 808 (Ct.App.1997) (same). An argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief. See Jackson v. Bi-Lo Stores, Inc., 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct.App.1993); Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001).

Here, Petitioner does not merely assert a reply to the State's preservation arguments; instead he argues an entirely new position and asks for a remand to the circuit court to have an unpreserved issue fully litigated with an eye towards how the federal courts may consider the issue under their habeas procedural rules. Petitioner's argument that the procedural bars should be revised is improperly made at this juncture of the case. At this point, Petitioner has conceded the issue was improperly raised in the Petition, and this Court would be within its authority to strike the issue entirely.

The appropriate way to make this request would be by a motion to stay and remand which would allow the State an opportunity to assert its position and respond accordingly. Nonetheless, the PCR court denied Petitioner's 59(e), Motion to Alter or Amend, where Petitioner argued that there was evidence presented to support the ineffective assistance of appellate counsel in failing to raise the mutual combat issue. So, by granting a remand, this Court

would allow Petitioner a second bite at the apple by having the PCR court review its own denial of the Rule 59(e) motion. There is no precedent to support such a remand. Allowing a remand in this case could open the door to allowing applicants' cases to be reopened to supplement their cases in chief where issues are unsupported by the evidence. See Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) ("Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice.").

WHEREFORE, Respondent asks this Court to strike Petitioner's Reply Brief because it raises arguments raised for the first time and improperly asks this Court to ignore established procedural bars to cure an issue not preserved for this Court's review.

Respectfully submitted,

ALAN WILSON
Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General

By: 

J. Clayton Mitchell

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

September 7, 2017

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Certiorari to Richland County
Court of Common Pleas

SEP 07 2017

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2016-001067

EUGENE D. PATTERSON, #321525

Petitioner,

v.

STATE OF SOUTH CAROLINA,

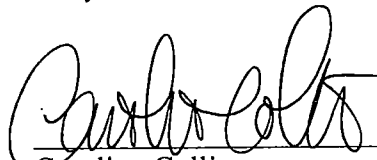
Respondent.

CERTIFICATE OF SERVICE

I, Caroline Collins, certify that I have today served the within **Motion to Strike Petitioner's Reply Brief** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

**Elizabeth Anne Franklin-Best, Esquire
Blume Norris & Franklin-Best LLC
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201**

I further certify that all parties required by Rule to be served have been served. This 7th day of September, 2017.



Caroline Collins
Administrative Coordinator, PCR
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737



ALAN WILSON
ATTORNEY GENERAL

September 7, 2017

RECEIVED

SEP 07 2017

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Eugene D. Patterson v. State of South Carolina
Appellate Case No. 2016-001067
Lower Court Case No. 2014-CP-40-01202

Dear Mr. Shearouse:

Attached are the original and six (6) copies of the *Motion to Strike Petitioner's Reply Brief* for filing in your office.

Sincerely,

J. Clayton Mitchell
Assistant Attorney General
SC Bar #101443

JCM/cc

cc: Elizabeth A. Franklin-Best