

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Colleton County
Edgar Dickson, Circuit Court Judge

RECEIVED

AUG 28 2019

S.C. SUPREME COURT

DERRICK FISHBURNE,

PETITIONER,

V.

THE STATE,

RESPONDENT.

Appellate Case No. 2016-002385

Return to Petition for Rehearing

On August 15, 2019, Respondent petitioned this Court to rehear this matter. Respondent complains that this Court, “explicitly overlooked its own well-established and basic issue preservation requirements, precedent.” Petition for Rehearing, pg. 2. Petitioner asserts that this Court made a well-reasoned decision to allow remand so that the Court may properly consider an issue which was raised below but not addressed properly in the Order of Dismissal.

Respondent erroneously looks at the Court’s opinion in this case as a relaxation of preservation precedent, rather than a procedure promoting a fair and effective PCR system. The Court’s opinion in this case will allow Applicants to get their full “bite at the apple.”¹ As stated in the concurring opinion, the Court’s decision in this case does not relax issue preservation

¹ The goal of the PCR procedure in this state is to promote justice outcomes by giving Applicants their “one bite at the apple.” See *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999) (“Under the PCR rules, an applicant is entitled to a full adjudication on the merits of the original petition, or ‘one bite at the apple.’”).

requirements. This opinion does not change the long standing precedent requiring that Petitioner's issues be "raised to and ruled upon by" the lower court. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge."). The case is being remanded to ensure that the order complies with S.C. Code § 17-27-80 and Rule 52(a), SCRCP. Therefore, allowing for properly preserved appellate review of all issues which were raised below.

As noted by the Court on multiple occasion over the last three decades, the PCR court must rule on issues for them to be preserved. Despite mandates from the Court, the failure of PCR courts to address all issues is a common occurrence. As the opinion properly notes, the blame should not solely rest with any one party. However, regardless of who is to blame, the failure to address all issues in a PCR order is a problem that results in denying PCR applicants their full "bite at the apple."

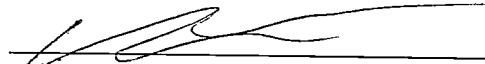
In the past, this Court has created procedures to ensure that all applicants get their full "bite at the apple. *See e.g. Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). The remand procedure given to Mr. Fishburne is a similar procedure. Allowing a case to be remanded for an order that complies with S.C. Code § 17-27-80 and Rule 52(a), SCRCP, is a fair procedure which prevents unjust results when an important issue is not ruled upon by the PCR court.

Respondent also asserts that, "This decision provides incentive for opposing counsel to allow sub-standard orders to be signed by the circuit court in an effort to have all issues, whether properly presented or preserved to be reviewed by this Court." Petition for Rehearing, Pg. 4. This view is at very least myopic; if not outright wrong. It demonstrates Respondent's mistaken view that the opinion as altering the general preservation rules.

This procedure does not incentivize any party by the filing of “sub-standard orders.” In the vast majority of cases, PCR applicants are still incarcerated while pending the appeal of their PCR cases. There is absolutely no incentive for a PCR applicant to wait until after an appeal is filed to address deficiencies in the PCR order. PCR applicants will still request that their attorney’s file motions to alter or amend. The timely motion to alter or amend would ensure that the applicant is not sitting idly in prison for months or years waiting on an order that complies with S.C. Code § 17-27-80 and Rule 52(a), SCRCP. Similarly, it is highly unlikely that the State will find any incentive in presenting the PCR court with a “sub-standard” proposed order. To the contrary, this procedure would incentivize Respondent to provide better proposed orders to avoid the potential for the extra work and time associated with a remand.

In sum, Petitioner respectfully requests that this Court allow the opinion in this case to stand. Remanding this case will give Petitioner his one full “bite at the apple.”

Respectfully submitted,



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August 26, 2019

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Certificate of Service

I certify that on this day, I have served a copy of the Return to the Petition for Rehearing in the above captioned case on Respondent by depositing it in the United States mail with postage prepaid and addressed to the Attorney for Respondent as listed below.


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