

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM KERSHAW COUNTY  
Court of Common Pleas  
J. Derham Cole, Circuit Court Judge

Case No. 2014-CP-28-00703

George S. Branham, II, .....Petitioner,

v.

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

**MOTION FOR THIS COURT TO RETAIN THIS CASE FOR CONSIDERATION**

Rule 243(l), SCACR allows this Court to transfer a petition for a writ of *certiorari* in a post-conviction relief (“PCR”) case to the Court of Appeals. This Court regularly exercises this discretion. George Branham moves this Court to retain his petition for consideration because his petition for a writ of *certiorari* asks this Court to require judges the draft the final orders in PCR cases. Recognizing this rule would require this Court to overrule or modify its holdings in *Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019), *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004), *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992), and *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991). The Court of Appeals “lacks the authority to rule against prior published precedent from our supreme court, but is bound by the decisions of the supreme court.” *State v. Cheeks*, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App. 2012), *affirmed as modified by State v. Cheeks*, 408 S.C. 198, 758 S.E.2d 715 (2014); *see also* S.C. Const. Art. V, § 9.

## ARGUMENT

In this case, the PCR judge requested the State and George Branham submit proposed orders. The PCR court signed the proposed order of dismissal, drafted by the Attorney General's Office, without making a single substantive change, other than the formatting. *Compare* A. 505-27 *with* A. 669-95.<sup>1</sup> In his Rule 59(e), SCRPC motion, Mr. Branham called attention to certain legal errors. A. 592-609. The PCR court denied the Rule 59(e) motion, without making any changes to the order of dismissal. A. 528. Despite drafting the order of dismissal for the PCR judge, the Attorney General's Office makes no effort to defend significant portions of its order in its return to Mr. Branham's petition for a writ of *certiorari*. For example, in response to Question II, the State acknowledged:

Petitioner argues Counsel was ineffective for failing to object when the forensic interviewer testified "My conclusion was that [Victim] had been chronically sexually abused by [Petitioner]." and, "I felt that she was telling the truth.", because it bolstered and vouched for the credibility of the child's statements. Although the PCR court found Petitioner failed to establish Counsel was deficient because allowing forensic interviewers to testify at the time of Petitioner's trial was common practice and arguments that this testimony was bolstering were generally ineffective, Respondent concedes that it is abundantly clear from the case law in this area that Counsel's failure to object was deficient. *See State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); *Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001).

State's Return, at 8. Mr. Branham's reply to the State's return points out the State either directly or implicitly conceded deficient performance under the first prong of *Strickland*<sup>2</sup>—contrary to the conclusions of law in order of dismissal drafted by the Attorney General's Office—when responding to Questions I, II, IV, V, and VI raised by his petition for a writ of *certiorari*.

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<sup>1</sup> At first glance, the order of dismissal appears to be different than the State's proposed order; however, the PCR judge merely changed the formatting of the document, such as line spacing and style of page numbering.

<sup>2</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

The petition for a writ of *certiorari*, at 25, argues the procedure followed by the PCR court denied Mr. Branham his right to have his PCR claims adjudicated by a judicial officer. “S.C. Code Ann. § 17-27-80 (1976), requires the PCR court to ‘make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.’” *McCray*, 305 S.C. at 330, 408 S.E.2d at 241. *See also Pruitt*. Addressing section 17-27-80 in the context of a capital post-conviction relief case, this Court “strongly encourage[d] PCR judges to draft their own findings of fact and conclusions of law.” *Hall*, 360 S.C. at 365, 601 S.E.2d at 341. Section 17-27-80, however, makes no distinction between capital and non-capital cases.

George Branham, therefore, advocates for a rule that requires the presiding judge to draft the final order in PCR cases. Petition for Writ of *Certiorari*, at 25, and Reply, at 13-15. The State urges this Court to continue the “common practice for judges to ask a party to draft a proposed order for the sake of efficiency.” State’s Return, at 23 (citing *Hall*). The State even argues, “[T]he procedures employed by the PCR Court were proper and ***the final order issued reflects thoughtful and deliberate consideration and review of the record and evidence*** presented by the Court and comports with statutory and constitutional requirements.” *Id.* (emphasis added). How can the final order ***reflect thoughtful and deliberate consideration and review of the record and evidence*** when the drafter of the order—the Attorney General’s Office—concedes on appeal that the order contains so many errors? How does a final PCR order containing so many errors contribute to “efficiency?” In reality, the order on appeal does not reflect thoughtful and deliberate consideration and review of the record and the evidence; rather, it is an advocacy pleading. In reality, there was nothing efficient about the procedures followed by the PCR court in this case. Over three years—1104 days to be exact—transpired between the conclusion of the evidentiary hearing on February 4, 2016 and when the PCR judge signed the State’s order on February 12, 2019. Almost fifteen

months—450 days to be exact—transpired between Mr. Branham’s Rule 59(e), SCRCPC motion on February 25, 2019 and the PCR Court’s order denying the Rule 59(e) motion on May 20, 2020, even though none of the now acknowledged legal errors was corrected.

This Court recently expressed its ongoing frustration with the validity of final orders in PCR cases during the oral argument in *Kevin S. Epting v. State*, Appellate Case No. 2017-000696, on November 21, 2019, at 11:17 – 13:05.<sup>3</sup> One Justice referred to the Attorney General’s Office drafting the final PCR order as “the classic case of the fox guarding the henhouse,” observed PCR applicants have the right to have their issues litigated, and called on the criminal defense bar “to fix this problem.” Another Justice stated the entire Court shares these concerns.

In *Fishburne v. State*, decided while Mr. Branham’s Rule 59(e) motion was pending, this Court recognized the significant issues involved in drafting PCR orders:

[B]ecause the United States Constitution’s Sixth Amendment guarantee to a defendant’s right to effective assistance of counsel is engrained in PCR cases, we cannot continue to permit a party’s procedural shortcoming—such as the failure to file a Rule 59(e) motion—to prevent this Court from remanding claims of ineffective assistance of counsel when the PCR court’s order does not comply with section 17-27-80.

427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019). *Fishburne* set a lofty goal for “[t]he preparation and finalization of a PCR order [to be] a collaborative effort.” 427 S.C. at 516, 832 S.E.2d at 589 (2019). The final order in this case was not a “collaborative effort.” Although Mr. Branham engaged in the process endorsed by *Fishburne*—submitting a proposed order, reviewing the final order, and filing a Rule 59(e) motion—the final order is an advocacy position drafted by “the fox guarding the henhouse,” rather than true judicial findings of fact and conclusions of law.

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<sup>3</sup> <http://media.sccourts.org/videos/2017-000696.mp4> (last viewed June 22, 2020). *Epting* involved the Attorney General’s Office drafting the final order, the PCR judge signing the order that failed to address all the issues, and the applicant’s attorney not filing a Rule 59(e), SCRCPC motion. On December 4, 2019, this Court dismissed *certiorari* as improvidently granted.

George Branham’s PCR case illustrates exactly why a PCR court should not delegate the judicial function of drafting final PCR orders to an advocate. The time has arrived for this Court to require judges to draft the final orders in PCR cases. The procedure followed in this case is not fair to Mr. Branham, who has a right to have his PCR claims adjudicated by a judicial officer, pursuant to section 17-27-80. The procedure followed in this case is not fair to the PCR court, who the State misled in its role of “safeguard[ing] the rights of litigants.” *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012). The procedure followed in this case “does not serve justice nor instill public confidence when” this Court is required to review “errors such as these.” *State v. Jones*, 343 S.C. 562, 578, 541 S.E.2d 813, 822 (2001).

### CONCLUSION

George Branham respectfully requests this Court retain for consideration his petition for a writ of *certiorari* in this PCR case.

IT IS SO MOVED.

Respectfully submitted,

By s/E. Charles Grose, Jr.

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