THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Honorable Doyet A. Early, Circuit Court Judge

Appellate Case No.: 2018-000065

David Lee Meggett, Petitioner,

vs.

State of South Carolina, Respondent.

REPLY BRIEF OF PETITIONER

Tricia A. Blanchette
Post Office Box 2147
Leesville, SC 29070
(803) 908-3266
Attorney for Petitioner

TABLE OF CONTENTS

Table of Contents.....i

Table of Authorities.....ii

Statement of Issues in Reply.....1

Statement of the Case.....2

Argument.....6

Respondent's Preservation Argument is in Error and Must Fail.....6

Respondent's Argument Regarding Overwhelming Evidence of Guilt is Improperly Made in the Statement of Facts" and Should Not Be Considered. If Considered, the Argument Fails Based Upon the Record.....10

Conclusion.....12

TABLE OF AUTHORITIES

CASES

Allen v. United States, 164 U.S. 492, 17 S.Ct. 154 (1896).....11, 12

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986).....5-6, 11

Bryson v. State, 328 S.C. 236, 493 S.E.2d 500 (1997).....9

Contra Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018).....10

Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019).....8

Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004).....9

Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007).....7-9

McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991).....9

McCullough v. State, 320 S.C. 270, 464 S.E.2d 340 (1995).....9

Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992).....8-9

Ramirez v. State, 419 S.C. 14, 795 S.E.2d 841 (2017).....8

Reese v. State, 425 S.C. 108, 820 S.E.2d 376 (2018).....8-9

Simmons v. State, 416 S.C. 584, 788 S.E.2d 220 (2016).....8

Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).....8, 10

Tappeiner v. State, 416 S.C. 239, 785 S.E.2d 471 (2016).....8

COURT RULES AND STATUTES

Rule 208, SCACR.....10

Rule 243, SCACR.....10

Rule 59, SCRCP.....5-9

S.C. Code Ann. § 17-27-80.....7, 9

STATEMENT OF ISSUES IN REPLY

I. WHETHER RESPONDENT'S PRESERVATION ARGUMENT IS IN ERROR AND MUST FAIL.

II. WHETHER RESPONDENT'S ARGUMENT REGARDING OVERWHELMING EVIDENCE OF GUILT IS PROPERLY MADE IN THE "STATEMENT OF FACTS" AND SHOULD BE CONSIDERED. IF CONSIDERED, THE ARGUMENT FAILS BASED UPON THE RECORD.

STATEMENT OF THE CASE

During the June 2009 term of the Charleston County Grand Jury, Petitioner was indicted for Burglary, First Degree, and Criminal Sexual Conduct, First Degree (2009-GS-10-4829, 4830). App. p. 848. On November 8, 2010, a trial was held in front of the Honorable Kristi L. Harrington and a jury. App. p. 1. Petitioner was represented by Beattie Butler, Esquire. On November 10, 2010, Petitioner was found guilty as indicted and sentenced to a term of thirty (30) years concurrently on both charges. App. p. 848.

A timely Notice of Appeal was filed, and the appeal was perfected by Breen Stevens, Esquire. The following issues were briefed on behalf of Petitioner:

1. The trial court erred by refusing Meggett's request for time to have a comforter examined for DNA, upon which he asserts a prior consensual encounter occurred between him and the complaining witness, and which, if positive, would have discredited the complaining witness's testimony regarding their relationship and prior sexual encounters.

2. The State's reference during closing argument to a lack of evidence supporting the interpretation of the defense's theory impermissibly shifted the burden upon Meggett as an indirect comment on the defendant's right to remain silent.

3. The trial court should have directed a verdict of not guilty for the offense of first degree burglary based upon the lack of evidence regarding Meggett's intent to commit a crime at the time he entered the dwelling.

App. p. 474. On June 5, 2012, an oral argument was conducted. An Opinion affirming Petitioner's convictions and sentences was entered on June 27, 2012. *State v. Meggett*, Op. No. 4994 (S.C. Ct. App. June 27, 2012). App. p. 544. The remittitur was issued on July 13, 2012.

On June 25, 2013, an Application for Post Conviction Relief was filed. App. p. 554. The State submitted a Return on December 11, 2013. App. p. 562. On September 8, 2014, Tricia A. Blanchette filed a Motion for Discovery, which was heard by the

Honorable G. Thomas Cooper, Jr., on that same date at the Charleston County Courthouse. App. p. 567. On September 29, 2014, the Honorable G. Thomas Cooper, Jr. issued an Order Substituting Counsel and Authorizing Discovery in Post Conviction Relief. App. p. 572.

On December 21, 2015, Petitioner, through counsel, amended his Application by adding the following specific allegations to his original claim of ineffective assistance of trial counsel and added the claim of ineffective assistance of appellate counsel:

1. Ineffective assistance of trial counsel for failing to properly prepare and conduct a reasonable investigation into Applicant's case prior to going to trial.

2. Ineffective assistance of trial counsel for failing to communicate with Applicant adequately and timely prior to trial regarding the State's case, specifically the DNA evidence, which resulted in counsel's failure to obtain a DNA expert and the denial of a continuance motion for the testing of "critical" evidence.

3. Ineffective assistance of trial counsel for failing to consult with Applicant on and articulate a clear defense strategy prior to and during trial. Ineffective assistance for providing the jury with the following alternate and incomplete defense theories that lead to confusion and prejudice to Applicant: 1) Applicant engaged in consensual sex with the victim, and 2) the DNA and physical evidence does not establish that sexual intercourse took place between Applicant and victim on the date in question.

4. Ineffective assistance of trial counsel for informing the court that Applicant would testify to prior sexual encounters and informing the jury during opening and closing argument that Applicant engaged in a consensual sexual encounter with victim, yet advising Applicant to not take the stand at trial to testify to such.

5. Ineffective assistance of trial counsel for failing to question victim about her knowledge of Applicant's prior profession and possible motive for the allegations.

6. Ineffective assistance of trial counsel for failing to make a reasonable argument for a directed verdict on the burglary charge.

7. Ineffective assistance of trial counsel for failing to put up a defense through witnesses and evidence.

8. Ineffective assistance of trial counsel for failing make the arguments made on direct appeal regarding the State's closing argument; thus, failing to properly preserve the issues for appeal.

9. Ineffective assistance of trial counsel for arguments made to the jury during opening and closing arguments that interjected consensual sex into the trial, help support the State's theory of the case and provided the jury with two conflicting defense theories.

10. Ineffective assistance of appellate counsel for failing to argue that Applicant had consent to be in the dwelling he was charged with burglarizing.

11. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

App. p. 576.

On April 1, 2016, Petitioner filed a Motion for Indigent Funds. App. p. 579. On April 18, 2016, a hearing was held at the Charleston County Courthouse in front of the Honorable Doyet A. Early. App. p. 594. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by J. Rutledge Johnson, Assistant Attorney General. At the conclusion of the hearing, Judge Early took the matter under advisement. Thereafter, Judge Early informed both parties that he intended to deny the motion and requested that the State submit a proposed Order. As was addressed on the record at the evidentiary hearing, a signed Order was not issued until November 30, 2016 and was filed on December 7, 2016. App. p. 622.

On December 7, 2016, an evidentiary hearing was conducted at the Charleston County Courthouse in front of the Honorable G. Thomas, Cooper, Jr. App. p. 624.

Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Alicia Olive, Assistant Attorney General.

At the start of the evidentiary hearing, Petitioner's counsel made a motion to verbally amend the Application to include a claim of ineffective assistance of counsel for failure to make a *Batson* challenge at trial.[1] App. p. 632. Respondent objected. App. p. 633. After hearing from both parties and inquiring of defense counsel, the motion was granted. App. p. 634

During the evidentiary hearing, Petitioner took the stand and called the following witnesses: Bernard Kelly, Beattie Butler, Esquire, and Breen Stevens, Esquire. The State called Chad Simpson, Esquire. At the conclusion of the hearing, the court took the matter under advisement and requested proposed Orders from both parties.

On September 18, 2017, an Order of Dismissal was issued by the Honorable G. Thomas Cooper, Jr. App. p. 770. Petitioner, through counsel, filed a timely Motion, Pursuant to Rule 59, SCRCP. App. p. 832. Respondent filed a Response. App. p. 839. On December 12, 2017, an Order Denying Applicant's Motion to Alter or Amend the Judgment was issued. App. p. 847.

On January 17, 2018, Petitioner, through counsel, filed a Notice of Intent to Appeal. A Petition for Writ of Certiorari and Appendices were filed on August 24, 2018. Respondent filed a Return on September 24, 2018. On April 2, 2021, the South Carolina Court of Appeals issued an Order granting certiorari as to Question 1 and denying as to Question 2 and 3.

[1] *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986).

On May 28, 2021, the Brief of Petitioner was filed. On June 7, 2021, the Brief of Respondent was filed, from which this Reply Brief timely follows.

ARGUMENT

I. Respondent's Preservation Argument is in Error and Must Fail.

Respondent has argued that "Petitioner's argument that the PCR judge's 'findings fail to address the testimony offered and the evidence available in the transcript regarding the jurors that were struck and sat on the jury' is not properly before this Court because Petitioner did not present it to the PCR judge, it was not argued in his proposed order, and he did not include this argument in his Rule 59 (e), SCRCP, motion." Brief of Respondent pp. 4, 10-11. Petitioner submits that this argument is erroneous and must fail for the reasons discussed below.

As is addressed above, Petitioner's counsel made a motion at the beginning of the evidentiary hearing to verbally amend the Application to include a claim of ineffective assistance of counsel for failure to make a *Batson* challenge at trial. App. p. 632. Respondent objected. App. p. 633. After hearing from both parties and inquiring of defense counsel, the motion was granted. App. p. 634. Thereafter, testimony that is addressed in the Brief of Petitioner was elicited regarding this issue from the following witnesses: Beattie Butler, Esquire, Breen Stevens, Esquire, Chad Simpson, Esquire, and Petitioner. The lower court addressed "Counsel's failure to make a *Batson* motion" in the Order of Dismissal. App. pp. 823-826.

Following the issuance of the Order of Dismissal on September 18, 2017, Petitioner timely filed a Rule 59 (a) & (e), SCRCP, Motion on October 10, 2017.[2] App. p.

[2] The Brief of Respondent erroneously references only a Rule 59 (e), SCRCP, Motion.

770, 831-832. Respondent filed a Response on October 26, 2017. App. p. 839. On December 12, 2017, the lower court issued an Order Denying Applicant's Motion, which stated: "After careful consideration of the Applicant's motion and the record in this case, this Court is unable to find any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered." App. p. 847. The lower court reached this sweeping conclusion without conducting a hearing in reliance upon Rule 59(f), SCRCP. App. p. 847.

By way of the Rule 59, SCRCP, Motion, Petitioner urged the court to "ensure that specific findings of fact and conclusions of law are entered and that the arguments and testimony of each witness is properly addressed" pursuant to South Carolina Code Section 17-27-80 and *Marlar v. State*, 375 S.C. 407, 653 S.E.2d 266 (2007) (Holding a post conviction relief judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented). App. p. 836. Specifically, Petitioner, through counsel, identified an issue that was omitted from the Order of Dismissal and identified testimony from the evidentiary hearing transcript that was either omitted or in conflict with the Order. App. pp. 836-837. In conclusion, Petitioner requested that the court "review the evidentiary hearing transcript to ensure completeness, reconsider Applicant's proposed Order and the standing Order of Dismissal, and/or rehear Applicant's case pursuant to Rule 59(a) and (e), SCRCP." App. p. 837.

Now, Respondent is asking this Court to improperly extend *Marlar* and preservation requirements to find that every available appellate argument regarding an issue ruled upon in a final order must be raised in a Rule 59, SCRCP, Motion to be preserved for appeal. Respondent's position regarding preservation is disingenuous to

*Mar*lar and its progeny that have resulted from the lower courts' repeated failure to adequately address issues raised at an evidentiary hearing in final orders or failure of counsel to file a Rule 59, SCRCP, motion. *See Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992) (Remanding and explaining the Court's concern with PCR orders that fail to address the issues raised at a PCR hearing, which result in depriving parties of rulings on the issues, make review by the appellate court and the workload of the appellate court more difficult, and require remand for new hearings and/or orders.); *Reese v. State*, 425 S.C. 108, 820 S.E.2d 376 (2018) (Granting the request for remand by both parties as result of the "patent inadequacies" of the PCR court's order.); *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019) (Remanding for the PCR court to make adequate findings of fact and conclusions of law regarding an unaddressed PCR claim despite a Rule 59, SCRCP, motion not being filed.).

In *Reese*, the South Carolina Supreme Court addressed the ruling in *Pruitt* twenty-six years prior regarding the failure of orders to address the issues raised by applicants and noted the following cases that had been decided on this matter in a string cite, as follows:

> *[S]ee also Smalls v. State*, 422 S.C. 174, 195, 810 S.E.2d 836, 847 (2018) (holding "the PCR court ... did not make specific findings"); *Ramirez v. State*, 419 S.C. 14, 21 n.6, 795 S.E.2d 841, 845 n.6 (2017) (finding error because "there are no findings of fact contained within the PCR court's order to support its conclusion"); *Simmons v. State*, 416 S.C. 584, 592, 788 S.E.2d 220, 225 (2016) (holding, "The PCR court's general denial of all claims not specifically addressed in the PCR court's order 'does not constitute a sufficient ruling on any issues since it does not set forth specific findings of fact and conclusions of law.' " (quoting *Marlar*, 375 S.C. at 409, 653 S.E.2d at 266)); *Tappeiner v. State*, 416 S.C. 239, 249 n.5, 785 S.E.2d 471, 476 n.5 (2016) (reiterating "the PCR court is required to 'make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented' " (quoting section 17-27-80)); *Marlar*, 375 S.C. at 408, 653 S.E.2d at 266 (holding, "Pursuant to S.C.

> Code Ann. § 17-27-80..., the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented."); *Marlar*, 375 S.C. at 410, 653 S.E.2d at 267 ("reiterat[ing] our admonition" from *Pruitt*); *Hall v. Catoe*, 360 S.C. 353, 364-65, 601 S.E.2d 335, 341 (2004) (repeating our admonition from *Pruitt*); *Bryson v. State*, 328 S.C. 236, 236-37, 493 S.E.2d 500, 500 (1997) ("remand[ing] this matter to the post-conviction relief judge to make specific findings of fact and conclusions of law as to each issue"); *McCullough v. State*, 320 S.C. 270, 272, 464 S.E.2d 340, 341 (1995) (repeating our admonition from *Pruitt*, and finding it "necessary to vacate the order and remand this matter to the circuit court" and further "admonish[ing] all those involved in future PCR matters to be meticulous in preparing and reviewing proposed orders so that the final order sets forth the required findings any reasons for those findings"); *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991) (finding "[t]he PCR court's conclusions regarding ineffective assistance are insufficient for appellate review and fail to meet the standard set forth in [section 17-27-80]").

Reese, 425 S.C. at 110-111, 820 S.E.2d at 377-378. Clearly, these cases have resulted from the failure of the lower courts to address issues raised at evidentiary hearings in final orders, which has required the appellate courts to remand and/or rule upon issues not properly addressed in a final order or in a Rule 59, SCRCP, motion. In contrast to Respondent's argument, the controlling precedent does not require an applicant to raise every available appellate argument in a Rule 59, SCRCP, motion, but the controlling precedent addresses the longstanding issue of inadequate orders issued by the lower courts that require remand when an issue raised at the evidentiary hearing is not addressed in final order.[3] Therefore, Petitioner submits that Respondent's preservation argument is overreaching and erroneous. As a result, it must fail.

[3] As stated, Petitioner's Rule 59, SCRCP, Motion addressed the following issue raised at the evidentiary hearing that was omitted form the Order of Dismissal: "the denial of the request for expert funds and the renewal of said request for preservation purposes at the evidentiary hearing." App. p. 836.

II. Respondent's Argument Regarding Overwhelming Evidence of Guilt is Improperly Made in the "Statement of Facts" and Should Not be Considered. If Considered, the Argument Fails Based Upon the Record.

Petitioner submits that Respondent's argument regarding overwhelming evidence of guilt is improperly made in the "Statement of Facts" and should not be considered by this Court. Rule 243 (g), SCACR, provides that a Respondent may "rephrase the questions, offer additional sustaining grounds and present a concise counter statement" in the Return of Respondent. Here, in the Brief of Respondent, Respondent has included an argument regarding overwhelming evidence of guilt under the heading "Statement of Facts," as follows:

> Respondent accepts the PCR judge's discussion of the facts for purposes of this Return. App. 773-78. Yet, Respondent would add that, unlike other PCR cases where the South Carolina Supreme Court has criticized PCR judges' findings of no prejudice because of overwhelming evidence of guilt, here the overall strength of the properly admitted evidence of Petitioner's guilt overcomes the individual impact of each instance of counsel's allegedly deficient performance. *Contra Thompson v. State*, 423 S.C. 235, 245, 814 S.E.2d 487, 492 (2018) *reh'g denied* (June 12, 2018) ("As we explain below, the overall strength of the properly admitted evidence of Petitioner's guilt does not overcome the individual impact of each instance of trial counsel's deficient performance"); *Smalls v. State*, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018), reh'g denied (March 29, 2018).

Brief of Respondent pp. 1-2.

First, Petitioner submits that is improper for Respondent to make such an argument under the guise of being the "Statement of Facts." Petitioner acknowledges that Rule 208(d), SCACR, provides:

> A party may also include a separate statement of facts relevant to the issues presented for review, with reference to the record on appeal, which may include contested matters and summarize the party's contentions.

Yet here, Respondent is making a legal argument regarding evidence of guilt, which is only found in the Statement of Facts. Petitioner submits that this argument should not be considered by the Court as it is not contained in the Counterstatement of Issue Presented or argued in the Argument section of the Brief.

Secondly, Petitioner cannot properly respond to this argument due to how it is improperly raised on appeal and since it was not addressed by the lower court. In the Order of Dismissal, the lower court addressed the *Batson* issue and did not make a finding that overwhelming evidence or the evidence of Petitioner's guilt defeated a finding of prejudice. App. pp. 823-826.

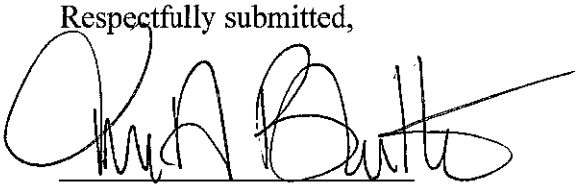
Finally, if this argument is to be considered, Petitioner submits that his case is not "unlike other PCR cases where the South Carolina Supreme Court has criticized PCR judges findings of no prejudice because of overwhelming evidence of guilt" because such a finding was not made by the lower court. Furthermore, if it was made, it would have been erroneous. As the trial and post conviction relief record demonstrate, the conflicting defense strategy was consensual sex and lack of DNA evidence. App. pp. 656-657, 673, 680-681, 683-684, 732-734. Based upon the weakness of the State's case, trial counsel, along with several colleagues, advised Applicant to not testify. App. pp. 654-655, 691-692, 734-738, 740-745. Also as addressed in Petitioner's Brief, trial counsel informed the court at sentencing that Petitioner would not be speaking under his advice since "there's always the chance of an appeal," and he testified at the evidentiary hearing he found the Petitioner's version of events to be believable and credible. App. p. 467, lns. 11-14, pp. 669-670. After the case was sent to the jury, the jury had to receive an *Allen* instruction

before reaching a guilty verdict.[4] App. p. 454. Even though Respondent's argument regarding the weight of the evidence is not properly argued, Petitioner submits that even if properly argued a finding of overwhelming evidence of guilt that overcomes counsel's deficiency would be in error based upon the record.

CONCLUSION

Based upon the foregoing and in conjunction with the Brief of Petitioner, Petitioner would respectfully request that this Court reverse the denial of relief by the lower court.

Respectfully submitted,



Tricia A. Blanchette – Bar # 74904
Post Office Box 2147
Leesville, South Carolina 29070
(803) 908-3266
Attorney for Petitioner

This 15 day of June 2021.

[4] *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154 (1896).