

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO YORK COUNTY  
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

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**RECEIVED**

MAY 30 2014

**S.C. Supreme Court**

Appellate Case No.: 2013-001800

Jimmy Charles Kendall, III..... Petitioner,

v.

State of South Carolina ..... Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Is Petitioner's argument that the PCR court erred by summarily dismissing his post-conviction relief application preserved for appeal where the PCR judge's order did not specifically address Petitioner's allegation and where there was no motion pursuant to SCRCP 59(e) filed?

## STATEMENT OF THE CASE

Jimmy Charles Kendall, III, (Petitioner), was indicted at the July 2011 term of the York County Grand Jury for Murder (2011-GS-46-2217). On November 2, 2011, Petitioner appeared before the Honorable John C. Hayes, III for a hearing during which Phillip Smith, Esquire was relieved as counsel upon Petitioner's request. On November 29, 2011, Petitioner appeared pro se and pled pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) to murder before the Honorable Lee S. Alford. On January 23, 2012, the Honorable Lee S. Alford sentenced Petitioner to a term of imprisonment for thirty (30) years. Petitioner did not appeal his conviction or sentence.

Petitioner subsequently filed an application for post-conviction relief (PCR) on February 29, 2012 alleging, *inter alia*, "Judge misconduct." Respondent made its Return and Motion to Dismiss on May 15, 2012. The Honorable John C. Hayes, III issued a Conditional Order of Dismissal on May 21, 2012. Petitioner, represented by Julia M. Bass, Esquire, filed a response to the Conditional Order of Dismissal on May 9, 2013<sup>1</sup>. The Honorable John C. Hayes, III issued a Final Order of Dismissal dated July 22, 2013.

A timely notice of appeal from the Order of Dismissal was filed on Petitioner's behalf. Petitioner subsequently filed a Petition for Writ of Certiorari. This Return to the Petition for Writ of Certiorari follows.

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<sup>1</sup> Petitioner, through Counsel, requested and received an extension to file a response to the Conditional Order of Dismissal.

## 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 their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

## ARGUMENT

- I. **Petitioner's argument that the PCR court erred by summarily dismissing his post-conviction relief application is not preserved for appeal where the PCR judge's order did not specifically address Petitioner's allegation and where there was no motion pursuant to SCRCP 59(e) filed.**

Petitioner asserts the PCR court erred "in summarily dismissing Petitioner's post-conviction relief application on the ground that Petitioner's allegation was procedurally barred by the Uniform Post-Conviction Procedure Act where Petitioner's assertion that he did not knowingly and intelligently waive his Sixth Amendment right to counsel is expressly permitted under the Act which permits any person who claims his "conviction or sentence was in violation of the Constitution of the United States" to institute a proceeding." (Pet. Brief p. 7). This argument is not preserved for appeal.

"To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. If the issue is raised but not ruled on, it is not preserved for appeal." State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996); see also State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("The issue which is not properly preserved cannot be raised for the first time on appeal). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). "A Rule 59(e) motion must be filed if issues are not adequately addressed in order to preserve the issues for appellate review." Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007).

Additionally, allegations of trial court error are not cognizable on PCR. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997). In PCR cases, a defendant asserting a constitutional

violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999).

The PCR judge ruled that Petitioner's allegation that the trial judge erred by not conducting a hearing pursuant to Faretta v. California, 422 U.S. 806 (1975):

[R]aise[d] a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised this issue at trial or on appeal. His failure to do so has waived this allegation as a ground for relief. Once the Applicant decided to represent himself, there cease[d] to exist a claim for ineffective assistance of counsel. Accordingly, this Court finds no reason why the Conditional Order of Dismissal should not become final.

(App. p. 69).

In this case, while Petitioner raises the issue that "Petitioner's assertion that he did not knowingly and intelligently waive his Sixth Amendment right to counsel is expressly permitted under the Act which permits any person who claims his "conviction or sentence was in violation of the Constitution of the United States" to institute a proceeding" in his response to the Conditional Order of Dismissal (App. p. 64-67), the PCR Court did not address it in the Final Order of Dismissal. The PCR court's order only addressed the fact that Petitioner's claim of judicial error was not proper for PCR as it was an issue for direct appeal. Further, Petitioner filed no motion to alter or amend the judgment pursuant to Rule 59(e) SCRPC. Therefore, pursuant to Gee and Marlar, this issue is not preserved.

**CONCLUSION**

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON  
Attorney General

J. RUTLEDGE JOHNSON  
Assistant Attorney General  
SC Bar # 78871

By:

  
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ATTORNEYS FOR RESPONDENT

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May 30, 2014

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to York County

The Honorable John C. Hayes, III, Circuit Court Judge

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JIMMY CHARLES KENDALL, III, 319409

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

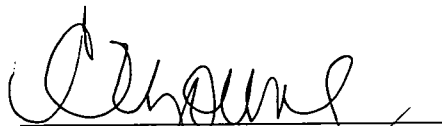
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**PROOF OF SERVICE**  
\_\_\_\_\_

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani  
SC Commission of Indigent Defense  
1330 Lady Street; Suite 401  
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 30<sup>th</sup> day of May 2014.

  
\_\_\_\_\_  
CHANDRA E. YOUNG  
Legal Assistant  
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Columbia, SC 29211  
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ALAN WILSON  
ATTORNEY GENERAL

May 30, 2014

**RECEIVED**

MAY 30 2014

**S.C. Supreme Court**

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

**RE: Jimmy Charles Kendall, III, 319409 v. State of South Carolina  
2013-001800**

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above case.

Sincerely,

J. Rutledge Johnson  
Assistant Attorney General

JRJ:cey  
Enclosures

cc: Carmen V. Ganjehsani, Esquire  
Trisha Allen, Victim Services