ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

R. Knox McMahon, Circuit Court Judge

STANLEY OLIVER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002211

PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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Was appellate counsel ineffective in failing to raise on direct appeal the trial judge's admission at trial, over objection and in violation of Bruton, of statements made by a non-testifying jointly tried co-defendant, Dominic Gallman, to his girlfriend, Leticia Jones, implicating Appellant?

STATEMENT

In November of 2005, the Richland County Grand Jury indicted Petitioner Oliver for burglary first degree, kidnapping, three counts of armed robbery and three counts of murder, indictments 2005-GS-40-11411 – 11417, 11582. On December 3, 2007, Petitioner proceeded to jury trial with co-defendants, Dominic Gallman and Kenneth Joy before the Honorable G. Thomas Cooper, Jr. Douglas Strickler and Mary Lafave represented Petitioner. Jonathan Milling represented Gallman. John Delgado represented Joy. John Meadors and David Ross prosecuted the case. At the close of the State's case Judge Cooper granted both Petitioner's and Gallman's motions for a directed verdict of acquittal as to the one count of armed robbery involving Desiree Felder. Judge Cooper directed verdicts of acquittal as to several of co-defendant Joy's accessory charges. The jury acquitted Joy of the remaining accessory charges. The jury acquitted both Petitioner and Gallman of the one count of armed robbery involving Kevin Miller. The jury returned verdicts of guilty on the remaining counts. Judge Cooper sentenced Petitioner to thirty (30) years for armed robbery, thirty (30) years concurrent for kidnapping and life without parole for the three counts of murder and for burglary first degree. A timely notice of intent to appeal was filed and the direct appeal perfected. Joseph L. Savitz, III represented Petitioner on direct appeal. On December 21, 2010, the South Carolina Court of Appeals affirmed the sentences and convictions. State v. Oliver, Op. No. 2010-UP-553 (S.C.Ct.App. filed December 21, 2010).

On March 31, 2011, Petitioner filed an application for post conviction relief. The State filed a return on February 1, 2012. On August 13, 2012, an evidentiary hearing was held before the Honorable R. Knox McMahon. David Belding represented Petitioner at the PCR hearing. Rob Corney was present on behalf of the State. In a written order signed September 25, 2013, Judge

McMahon denied relief and dismissed the application. A timely notice of intent to appeal was served on October 14, 2013. This petition for writ of certiorari follows.

ARGUMENT

Appellate counsel was ineffective in failing to raise on direct appeal the trial judge's admission at trial, over objection and in violation of Bruton, of statements made by a non-testifying jointly tried co-defendant, Dominic Gallman, to his girlfriend, Leticia Jones, implicating Appellant.

Petitioner and his co-defendant, Dominic Gallman, were found guilty in the robbery and shooting deaths of George Batie, Desiree Felder and Kevin Miller. Batie was a drug dealer. Felder lived with Batie and at times assisted him in the drug business. Miller was also a drug dealer. Batie and Miller were shot to death during a robbery at Batie's house. The State's evidence showed that Felder was taken from the house and shot in the woods at another location. A large amount of money and a large amount of cocaine was stolen during the robbery.

During pre-trial motions there was lengthy discussion about various statements posing Bruton[1] problems. (App. pp. 147-309). The judge ruled that the Bruton problems could be cured by redacting the co-defendant's name from the statement and replacing the name with "somebody else." Counsel for Petitioner objected to the redaction arguing that it did not cure the Bruton problem. (App. p.192 – 196). The trial judge overruled the objection. (App. p. 194, lines 3-5). During the pre-trial hearing there were no motions made in regard to the statement of Leticia Jones.

When the State called Leticia Jones as a witness counsel for co-defendant Gallman objected based on Crawford[2] and Bruton. (App. p. 1021, line 16 – p. 1022, lines 1-12). When asked by the trial judge if there were any Crawford or Bruton issues the prosecutor responded, "There potentially could be. I have instructed her – the testimony that she is going to give is information related to her by Mr. Gallman about Mr. Gallman and Mr. Oliver. I've instructed her not to refer to Mr. Oliver by name just like we've had other witnesses say Mr. Gallman and someone else." (App. p. 1-22, lines

[1] Bruton v. United States, 391 U.S. 123 (1968).
[2] Crawford v. Washington, 541 U.S. 36 (2004).

16-22). Counsel for Petitioner joined in the objection to Jones' testimony. (App. p. 1022, line 23 – p. 1023, lines 1-8).

Jones testified that she had been engaged to marry the co-defendant Dominic Gallman. (App. p. 1027, lines 6-16). Jones testified that she met Petitioner through Gallman. She testified that on Sunday morning September 4, 2005, Gallman came to the house, woke her up and was very upset. (App. p. 1030, line 1 – p. 1031, lines 1-14). Jones testified that Gallman told her:

> That I was right about his friend, that he had gotten him into trouble and that – said, Leticia, listen to me. He said that – he said that he had gotten him into trouble and that he made him do something that he didn't want to do and that he didn't know what to do. He couldn't – he just was upset and that he didn't know how to handle it.
>
> He said that his – his friend had – had some idea to make someone and that he didn't really know what was involved but he went with him and it just turned out to be not what he thought it was. He said they went to the house and that his friend, that they knocked on the door and somebody opened the door and his friend shot the guy that opened the door. And then they – that the guy he was with shot the other guy that was in the house and that then they were trying to rob the man and that the man wouldn't tell him where his – his money was, And so the guy he was with just flipped out and got really mad and angry and just shot the man. There was a lady there. I don't know if she was there or if she showed up later on.

(App. p. 1031, line 15 – p. 1032, lines 1-11). Counsel for Petitioner immediately objected based on Crawford. (App. p. 1032, lines 12-18). The judge overruled the objection. (App. p. 1032, line 19).

Jones went on to testify:

> The person that he was with said they had to take her because she probably knew where – where the money was. And so he put her in the car and they drove with the lady. And I don't – I don't know what happened. But that person that he was with told him that he had gotten his hands dirty and he had to do the same thing and the was like crazy and he tried to hurt the lady and the Dominic had to stop him from him – from attacking the lady, from like raping her and stuff. But that he put the gun to his head and told him that if he didn't shoot the lady that he would shoot him. So Dominic said he didn't know what to do. And he just closed his eyes and pulled the trigger. And that was it.

(App. p. 1033, line 16 – p. 1034, lines 1-4).

At the conclusion of Jones' testimony counsel for Petitioner moved for a mistrial based on the fact that they did not have the opportunity to raise the Crawford and Bruton issues in regard to

this witness' testimony because they were unaware of her statement. (App. p. 1056, line 23 – p. 1057, lines 1-19). In her initial statements to police Jones denied any knowledge of the crimes. (App. p. 1043, lines 11-25). Counsel only became aware of Jones' new statement on Friday, December 7, 2007, after pre-trial hearings had been held on Monday December 3, 2007. (App. p. 1022, lines 4-12; p. 1008, line 1). The judge denied the mistrial motion based on the fact that his rulings in regard to the present witness were consistent with his rulings earlier in the trial in regard to other witness statements. (App. p. 1057, line 20 – p. 1058, lines 1-12). Counsel renewed the objection specifically as to Bruton stating, "Thank you, sir. And I understand your ruling. I'm not arguing with it. And I just – frankly, it's been now six days, and I forget what our discussion consisted of back when we discussed Bruton, Crawford as it related to what Your Honor has said just now as far as not identifying anyone. I hope I was on the record at that point in time as indicating that did not satisfy Bruton." (App. p. 1058, lines 13-20). The trial judge erred in admitting the redacted statement co-defendant Gallman made to Jones. The admission of the co-defendant's statement violated the Confrontation Clause pursuant to Bruton; State v. Henson, 407 S.C. 154, 754 S.E.2d 508 (2014); State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009); United States v. Truslow, 530 F.3d 257 (4th Cir. 1975); United States v. Richards, 241 F.3d 335 (3d Cir. 2001).

The Confrontation Clause of the Sixth Amendment, as applied to the states through the Fourteenth Amendment, guarantees criminal defendants the right to confront and cross-examine witnesses against them. Richardson v. Marsh, 481 U.S. 200, 206 (1987). The United States Supreme Court held that admission of a non-testifying co-defendant's statement that expressly inculpates the defendant violates the defendant's Confrontation Clause in a joint trial. Bruton v. United States, 391 U.S. 123, 136-137 (1968). Additionally, a limiting instruction is not sufficient to

remove any prejudice to the defendant. Id. The Supreme Court recognized that in some cases the use of redactions may comply with Bruton. Richardson, 481 U.S. at 208-209.

Examining this issue again, the Supreme Court held that redactions that are simply replacements of the defendant's name with a blank space, a symbol, or a word such as "deleted," are not sufficient. Gray v. Maryland, 523 U.S. 185, 197 (1998). The Court explained the necessity of looking at the kind of inferences necessary to connect the defendant, not the fact of the existence of the inference, in order to determine the applicability of Bruton. Id. at 196. In Gray, the inferences drawn from the statements, even in redacted form, "obviously refer[red] directly to someone, often obviously the defendant, and which involve[d] inferences that a jury ordinarily could make immediately." Id. at 196. Such statements are forbidden under Bruton. Id. at 196-197.

In Holder, 382 S.C. at 285-286, 676 S.E.2d at 694, the South Carolina Supreme Court held a trial court erred in admitting a statement by Holder's non-testifying co-defendant concerning injuries to the victim where the statement was redacted to replace the defendant's name with "she." The "jury could readily determine that the statement referred to her as she was the only female defendant." Id. In a similar case, State v. Johnson, 390 S.C. 600, 703 S.E.2d 217 (2010), our Supreme Court held the trial court erred in admitting a redacted statement by a non-testifying co-defendant in which a nickname was blacked out with magic marker. The redaction eliminated the words "and Knock." Id. at 605, 703 S.E.2d at 219. Although no evidence was introduced to indicate the defendant was known as "Knock," the statement clearly referred to another person. Additionally, the officer testified that based on this statement, he arrested the defendant. Id. at 606, 703 S.E.2d at 220. This "effectively told the jury that [the co-defendant]'s unredacted statement named [the defendant]." Id.

In Henson, 407 S.C. at 166, 754 S.E.2d at 514 the South Carolina Supreme Court wrote, "Like Holder and these cases from other jurisdictions, here the jury could infer from the face of Reid's confession without relying on any other evidence, that the confession referred to an incriminated Henson." In the present case the jury could easily infer from the face of Gallman's statement, without relying on other evidence, that the incriminating statement referred to Petitioner Oliver. Oliver and Gallman were the only two principals on trial and the State's theory was that they acted together. The fact that the statement was made to a third person, Leticia Jones, as opposed to law enforcement is of no consequence. See United States v. Truslow, 530 F.3d 257 (4th Cir. 1975).

The trial judge erred in admitting co-defendant Gallman's statements to Jones implicating petitioner. The error was not harmless. Appellate counsel, however, did not raise the issue on direct appeal. On direct appeal appellate counsel argued that the trial court erred in admitting in evidence a written statement by Tatanisha Robinson in violation of State v. Gullege, 277 S.C. 368, 287 S.E.2d 488 (1982). State v. Oliver, Op. No. 2010-UP-553 (S.C.Ct.App. filed December 21, 2010). The South Carolina Court of Appeals found extrinsic evidence of the prior statement by Robinson was admissible because the witness admitted making the statement but denied the substance of the statement. Appellate counsel was ineffective in failing to raise the Bruton issue.

In Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009), the South Carolina Supreme Court wrote, "Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient

performance." (footnote omitted). In Southerland, 337 S.C. at 615-616, 524 S.E.2d at 836, the South Carolina Supreme Court wrote, "A defendant is constitutionally entitled to the effective assistance of appellate counsel.... First, the burden of proof is on petitioner to show that counsel's performance was deficient as measured by the standard of reasonableness under prevailing professional norms. Second, the petitioner must prove that he or she was prejudiced by such deficiency to the extent of there being a reasonable probability that, but for counsel's unprofessional errors, the result of the **proceeding** would have been different."

Appellate counsel was deficient in failing to raise the Bruton issue. Petitioner was prejudiced by appellate counsel's deficient performance. There is a reasonable probability that but for appellate counsel's deficient performance, Petitioner's conviction and sentence would have been reversed on direct appeal and the case remanded for a new trial. Petitioner seeks this relief in post conviction relief.

During the PCR hearing petitioner testified, "One bigger thing is that my – my appellate counsel didn't – he was ineffective. He was super ineffective for not even hearing my voice." (App. p. 2445, lines 11-13). Petitioner did not specifically testify that appellate counsel was ineffective in failing to raise the Bruton issue. Instead, Petitioner alleged that trial counsel was ineffective in failing to timely object to the testimony of Letisha Jones. (App. pp. 2514-2519). The order of dismissal does not address the ineffective assistance of appellate counsel claim. In footnote two of the order of dismissal the PCR judge wrote, "Applicant did not raise any allegation that appellate counsel was ineffective for failing to raise this issue on direct appeal if it were properly preserved at trial." (App. p. 2515). In the order of dismissal the PCR judge found that trial counsel timely objected to the testimony of Leticia Jones and the issue was preserved for appellate review. (App. pp. 2514-2519). The PCR judge wrote, "First, this Court finds no

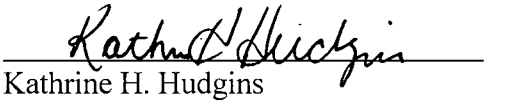
deficiency on counsel's part for failing to object to Jones's testimony in a timelier manner. Prior to Jones taking the stand, counsel presented a sufficient motion *in limine* to exclude the testimony based on potential confrontation clause issues that were anticipated. While counsel did not reiterate the specific rationale for the objection after it was presented by codefendant's counsel, it is clear from the preceding colloquy and the trial judge's comments that he was well aware of the grounds for the objection."(footnote and citations omitted) (App. p. 2515). PCR counsel failed to raise the specific ineffective assistance of appellate counsel claim for failure to raise the Bruton issue and failed to file a Rule 59(e) motion when the order of dismissal failed to address to ineffective assistance of appellate counsel claim. PCR counsel was ineffective.

While Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991) holds that a successive application for post conviction relief is not allowed on the ground that the first complete PCR application was insufficient due to ineffective PCR counsel, this Court has not yet had the opportunity to address the continued validity of Aice in light of the recently decided United States Supreme Court opinion in Martinez v. Ryan, 566 U.S. ___ , 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). Counsel submits that PCR counsel's failure to specifically raise the ineffective assistance of appellate counsel claim for failing to raise the Bruton issue and failure to file a Rule 59(e) motion when the order of dismissal failed to address to ineffective assistance of appellate counsel claim constitutes ineffective assistance of PCR counsel. Pursuant to Martinez v. Ryan, Petitioner would not be procedurally barred from raising the ineffective assistance of PCR counsel in a federal habeas proceeding. In light of Martinez v. Ryan and the very specific facts of this case, this Court should find that Petitioner is entitled to a new trial based on ineffective assistance of appellate counsel.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of July, 2014.

STATE OF SOUTH CAROLINA
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STANLEY OLIVER,

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RESPONDENT

APPELLATE CASE NO. 2013-002211

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire this 2nd day of July, 2014.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day
of July, 2014.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.