

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Richland County  
Court of Common Pleas  
The Honorable R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2013 – 002211

**RECEIVED**

NOV 17 2014

**S.C. Supreme Court**

STANLEY OLIVER, #192110,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## PETITIONER'S QUESTION PRESENTED

- I. 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 OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Petitioner was indicted at the November 2005 term of the Richland County Grand Jury for First Degree Burglary, two (2) counts of Kidnapping, two (2) counts of Armed Robbery and three (3) counts of Murder (2005-GS-40-11411 through -11417; 11582). (App. p. 2355-66). Petitioner was represented by Douglas Strickler, Esquire, and Mary LaFave, Esquire. On December 3, 2007, Petitioner proceeded to trial before the Honorable G. Thomas Cooper, Jr. After a twelve (12) day trial, the trial judge granted Petitioner's motion for direct verdict on one (1) count of Kidnapping. Petitioner was thereafter convicted by the jury of the remaining charges as indicted and was sentenced as follows: thirty (30) years imprisonment for Armed Robbery, thirty (30) years imprisonment for the remaining Kidnapping charge, and life without parole for each Murder and First Degree Burglary charge, all to run concurrently. (App. p. 2367-72).

A notice of appeal was filed, which was perfected by Joseph L. Savitz, III, Esquire, of the South Carolina Commission on Indigent Defense. The court of appeals affirmed Petitioner's conviction. State v. Oliver, Unpublished Op. No. 2010-UP-553 (S.C. Ct. App. filed December 21, 2010). The remittitur was sent on January 24, 2011.

Petitioner filed an application for post-conviction relief (PCR) on March 31, 2011. (App. p. 2373-78). An evidentiary hearing convened on August 13, 2012, before the Honorable R. Knox McMahon. David Belding, Esquire, represented Petitioner, and the State was represented by Robert D. Corney, Esquire. Judge McMahon denied Petitioner relief by order filed on October 9, 2012. (App. p. 2506-30). Petitioner filed a notice of appeal and a Petition for Writ of Certiorari. This Return follows.

## STANDARD OF REVIEW

The proper standard of review of a post-conviction relief 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 post-conviction relief 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

### **Certiorari is not warranted where the allegation of ineffective assistance of appellate counsel was not raised before the PCR Court and was not ruled upon in the order of dismissal.**

Petitioner asserts that appellate counsel was ineffective in his representation. Petitioner argues that appellate counsel was deficient in not raising and making an argument that testimony from Leticia Jones was admitted in violation of Bruton v. United States, 391 U.S. 123 (1968). Petitioner concedes that this argument is not preserved for this Court's review as PCR counsel did not raise this issue to the PCR Court. (PWC p. 10). PCR counsel also failed to file a Rule 59(e), SCRCF, when the order of dismissal failed to address the allegation of ineffective assistance of appellate counsel. After conceding that the issue is not preserved, Petitioner then argues that PCR counsel was ineffective in not raising this issue. Petitioner argues that this Court has not yet had the opportunity to address the continued validity of Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991), in light of the United States Supreme Court opinion in Martinez v. Ryan, 566 U.S. \_\_\_, 132 S. Ct. 1309, 182 L.Ed.2d 272 (2012). This issue is without merit as it is clearly not preserved for this court's review and is at odds with this Court's opinion in Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013).

The PCR Court found trial counsel was not deficient in any aspect of their representation. The PCR Court ruled that trial counsel properly objected to Jones's testimony by making a motion *in limine* to exclude the testimony based on potential confrontation clause issues that were anticipated. It further held that Petitioner did not raise any allegation that appellate counsel was ineffective. (App. p. 2515). It is of note that appellate counsel, Savitz, did not testify at the PCR hearing. The record is also devoid of any allegation of ineffective assistance of appellate counsel.

**A. The issue of ineffective assistance of appellate counsel is not preserved for review.**

It is well settled that an issue that has not been presented to or passed upon by trial judge will not be considered on appeal. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). If an issue is raised but not ruled upon, it is not preserved for appeal. State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (1996). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. Gee, 262 S.C. 373, 204 S.E.2d 727. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (“It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.”); State v. Sheppard, 391 S.C. 415 --, 706 S.E.2d 16, 20 (2011) (“Our law is clear that an issue may not be raised for the first time on appeal.”); Ion, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding an appellate must present both his issues and arguments to the lower court and obtain a ruling before presenting issues and arguments on appeal). Issue preservation rules are meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. Herron v. Century BMW, 395 S.C 461, 719 S.E.2d 640 (2011).

Petitioner concedes this issue is not preserved for this Court’s review. The allegation of ineffective assistance of counsel was not including in his pleadings. Nor was there any testimony presented concerning appellate counsel’s failure to raise any Bruton or Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354 (2004) issues. The Final Order of Dismissal included a footnote which stated: “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. 10, n. 2) (emphasis in original). Petitioner also failed to file a Rule 59(e), SCRCPP, in an attempt to have the PCR Court rule upon the issue. This Court should find this allegation is not

preserved.

**B. Appellate counsel was not ineffective in failing to argue that Jones's testimony was in violation of Bruton as the case is inapplicable because codefendant's statements to Jones were not testimonial.**

Assuming *arguendo* that this Court finds the issue of ineffective assistance of appellate counsel preserved, it is wholly without merit.

A defendant is entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004), citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. See Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836. See also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

“Although it is possible to bring a successful ineffective assistance of appellate counsel claim based on failure to raise a particular issue on direct appeal, the Supreme Court has reiterated that it is ‘difficult to demonstrate that counsel was incompetent.’” United States v. Mason, No. 3:06–607–CMC, 2012 WL 5845807 at \*1 (D. S.C. Nov. 19, 2012) (quoting Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000)). While appellate counsel is required to provide effective assistance of counsel, “appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990), citing Jones v. Barnes, 463 U.S. 745 (1983). “For judges to second-guess

reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . .” Jones, 463 U.S. at 754. Additionally, our Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). “‘Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.’” Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

“To establish prejudice relating to the actions of appellate counsel, Defendant must establish a reasonable probability that, but for his counsel's unreasonable failure to include a particular issue on appeal, he would have prevailed on his appeal.” United States v. Mason, 2012 WL 5845807 at \*1 (citing Smith v. Robbins, 528 U.S. at 285-86, 120 S. Ct. at 764).

#### Relevant Trial Testimony

Petitioner takes issue with the following testimony where codefendant Gallman tearfully confessed to his girlfriend, Leticia Jones, telling her:

[s]he 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 that 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 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 . . .

Codefendant Gallman also confessed to the murder of victim Felder:

The person that he was with said that they had to take her [Felder] in the car and they drove with the lady. And I don't know - - I don't know what happened. But that the person that he was with told him that he had gotten his hands dirty and he had to do the same thing and that the was like crazy and he tried to hurt the lady and that 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 know what to do. And he had just closed his eyes and pulled the trigger. And that was it.

(App. p. 1031 – 1034).

### Discussion

The Confrontation Clause of the Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” This provision bars the admission of “testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354 (2004). A statement must be “testimonial” to be excludable under the Confrontation Clause. United States v. Dargan, 738 F.3d 643, 650 (4th Cir. 2013) (citing United States v. Udeozor, 515 F.3d 260, 268 (4th Cir. 2008)). “The primary determinant of a statement’s testimonial quality is ‘whether a reasonable person in the declarant’s position would have expected his statements to be used at trial.’” Id at 651 (internal citations omitted). In Bruton v. United States, the Supreme Court held that a defendant’s rights under the Confrontation Clause of the Sixth Amendment are violated by the admission of a non-testifying co-defendant’s confession that inculcates a defendant, even if a cautionary instruction is given. State v. Holder, 382 S.C. 278, 283, 676 S.E.2d 690, 693 (2009). “Bruton is simply irrelevant in the context of nontestimonial statements. Bruton espoused a prophylactic rule designed to prevent a specific type of Confrontation Clause violation.

Statements that do not implicate the Confrontation Clause, *a fortiori*, do not implicate Bruton.” Dargan 738 F.3d at 651. See Untied States v. Clark, 717 F.3d 790, 816 (10th Cir. 2013).

“Redaction had come into play as a tool to allow admission of a codefendant’s confession against the confessor in a joint trial. The point of redaction is to permit the confession to be used against the non-testifying confessor, while avoiding implicating his codefendants.” State v. Holmes, 342 S.C. 113, 119, 536 S.E.2d 671, 674 (2000). Thus, if, in a joint trial, a non-testifying codefendant’s statement is admitted, reference to the other named defendant must be redacted for the statement to be admissible. State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987). Our case law has upheld redaction using neutral terms. See State v. Garrett, 350 S.C. 613, 620-21, 567 S.E.2d 523, 526 (Ct. App. 2002) (use of “another guy” in redaction allowed).

Respondent submits that Petitioner has not presented any evidence that appellate counsel was deficient. Counsel Savitz did not testify at the PCR hearing, but it can be presumed that he rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668, 104 S. Ct. at 2064. See Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998) (speculation and conjecture will not support a finding of ineffective assistance of counsel). Nevertheless, the Bruton issue had no merit on appeal. Codefendant Gallman’s oral statement to Jones is nontestimonial and, as such, Bruton is not applicable. Gallman confessed to his girlfriend the morning after the incident in the confines of her home. (App. p. 1030). Given the fact that Gallman’s statement to Jones was made outside the investigatory or judicial context, the statement is clearly nontestimonial. See State v. Davis, 371 S.C. 170, 178, 638 S.E.2d 57, 61 (2006). This testimony is also admissible under Rule 804(b)(3), SCRE, as a hearsay exception as a statement against interest. See Crawford 541 U.S. at 60 n.9 (“The Clause also does not bar the use of testimonial statements for purposes other than

establishing the truth of the matter asserted.” (citing Tennessee v. Street, 471 U.S. 409 (1985))).

Regardless, even if this Court were to find Gallman’s statement testimonial, the trial court took precautions in ensuring that Petitioner’s name was not used. Jones never referred specifically to Petitioner, but just to “his friend,” and “the person that he was with.” This avoided any Bruton violation. This is for two specific reasons, one, the neutral term itself, and two, the fact that no other information specifically identified Petitioner.

**C. Martinez is not applicable to state PCR actions.**

Martinez’s interpretation of federal laws applicable to federal habeas corpus actions has no effect on South Carolina’s interpretation and application of its Post-Conviction Relief statute. S.C. Code Ann. § 17-27-10 to –160. Therefore, the South Carolina Supreme Court’s opinion in Aice v. State is still applicable to a claim raised in a subsequent state PCR action alleging ineffective assistance of prior collateral counsel. See Aice, 305 S.C. at 451, 409 S.E.2d at 394 (“The contention that prior PCR counsel was ineffective is not *per se* a ‘sufficient reason’ warranting a successive PCR application under 17-27-90.”). The South Carolina Supreme Court has found – in a published order – that “the holding in Martinez is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.” Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013).

It is also of significant note that Martinez does not apply to ineffective assistance of appellate counsel claims. The Martinez court noted that Coleman v. Thompson, 501 U.S. 722 (1991), involved alleged ineffective assistance of appellate PCR counsel and not trial counsel; Martinez did not change the Coleman holding with regard to procedural default based on failure of appellate PCR counsel to raise an issue. Martinez, 132 S. Ct. at 1316. “The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from

initial-review collateral proceedings.” Id at 1320. So, even if this Court were to abrogate its holding in Kelly, Petitioner’s argument is at direct odds with the Supreme Court’s holding in Martinez.

Therefore, Petitioner’s argument is clearly not preserved but also lacks merit under a thorough analysis. The PCR Court’s ruling should be upheld.


**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, Respondent requests permission under the rules to fully brief the issue discussed above.

Respectfully submitted,

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Attorney General

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Assistant Attorney General

BY:   
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ATTORNEYS FOR RESPONDENT

NOVEMBER 17<sup>th</sup>, 2014

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NOV 17 2014

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

S.C. Supreme Court

\_\_\_\_\_  
Certiorari to Richland County  
The Honorable R. Knox McMahon, Circuit Court Judge  
Case No. 2011-CP-40-02140  
Appellate Case No. 2013-002211  
\_\_\_\_\_

STANLEY OLIVER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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

I, J. Clayton Mitchell, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, South Carolina 29211

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

This 17<sup>th</sup> day of November, 2014.



\_\_\_\_\_  
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NOV 17 2014

S.C. Supreme Court

ALAN WILSON  
ATTORNEY GENERAL

November 17, 2014

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

Re: Stanley Oliver v. The State of South Carolina  
Appellate Case No. 2013-002211

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of Respondent's Return to Petition for Writ of Certiorari.

Sincerely,

J. Clayton Mitchell  
Assistant Attorney General  
S.C. Bar No. 101443

JCM/sbm  
Enclosures

cc: Kathrine Hudgins, Esquire, Appellate Defense  
Trisha Allen, Victim's Services