

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO GREENWOOD COUNTY  
Court of Common Pleas

**SC SUPREME COURT**

The Honorable Clifton Newman, Circuit Court Judge

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Appellate Case No. 2014-000650

Charles N. Vandross, ..... Petitioner,

v.

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

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

- I. Did the PCR court properly find Counsel was not ineffective and Petitioner failed to prove prejudice for not obtaining funding for expert witnesses where Petitioner failed to present the expert witnesses at the PCR hearing?
- II. Did Petitioner fail to meet his burden of proof that he was denied due process by Counsel and PCR Counsel not securing funds for expert witnesses where said expert witnesses did not testify at the PCR hearing? Additionally, is ineffective assistance of PCR counsel proper claim in state PCR cases?
- III. Is Ineffective Assistance of PCR counsel a claim that is proper for the state PCR forum?
- IV. Is the issue that the solicitor committed misconduct when he struck Asia Seigler properly preserved? Nevertheless, does it have merit?
- V. Is the issue that Counsel rendered ineffective assistance of counsel when he failed to “properly object to the improper photographs showing a Bible next to the Decedent..” properly preserved?

## STATEMENT OF THE CASE

Charles N. Vandross, ("Petitioner"), was indicted at the December 2004 term of the Greenwood County Grand Jury for Burglary, 1st Degree; Murder; Kidnapping; and Possession of a Firearm or Knife During the Commission of a Violent Crime (2004-GS-24-1187). Adam S. Bacot, Esquire, and Christopher L. Sheek, Esquire, represented the Applicant on these charges. Petitioner proceeded to trial and was convicted by a jury of all charges on June 21, 2006. The Honorable Wyatt T. Saunders sentenced Petitioner to confinement for the balance of his natural life for both Murder and Burglary 1st Degree, thirty (30) years for Kidnapping, and five (5) years for Possession of a Firearm or Knife During Commission of a Violent Crime.

A Timely Notice of Appeal was filed and an appeal was perfected on Petitioner's behalf by Joseph L. Savitz, III, Esquire. The South Carolina Court of Appeals affirmed Petitioner's convictions. State v. Vandross, Op. No. 2009-UP-192 (S.C. Ct. App. filed May 5, 2009). The Remittitur was issued on May 22, 2009.

Petitioner subsequently filed an application for post-conviction relief (PCR) on February 26, 2010. The Respondent made its Return on July 29, 2010. On March 13, 2013, an evidentiary hearing was held at the Greenwood County Courthouse. Petitioner was present and represented by David E. Belding, Esquire. Respondent was represented by J. Rutledge Johnson of the South Carolina Attorney General's Office. On March 11, 2014, the Honorable Clifton Newman denied and dismissed the Petitioner's application with prejudice by written Order. The Petitioner subsequently filed a Petition for Writ of Certiorari on February 9, 2016. This Return to the Petition for Writ of Certiorari follows.

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

## ARGUMENTS

**I. The PCR court properly found Counsel was not ineffective and Petitioner failed to prove prejudice for not obtaining funding for expert witnesses where Petitioner failed to present the expert witnesses at the PCR hearing.**

The Petitioner asserts the PCR court erred in finding that Counsel was not ineffective for not obtaining funding for expert witnesses because he did not realize he could request the funds because of Petitioner's status as an indigent defendant. However, Petitioner failed to meet his burden of proof as to this argument.

Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). Petitioner's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). A Petitioner must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

Petitioner did not present any of these "expert witnesses" at the PCR hearing. Under Bannister, he can prove no prejudice for Counsel's failure to interview or call these "expert witnesses" at trial. The PCR Court properly made this finding. (App. p. 1158).

Accordingly, there is clear "evidence of probative value" to support the PCR judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Therefore, the Petitioner has failed to meet his burden of proof as to this argument.

**II. Petitioner failed to meet his burden of proof that he was denied due process by Counsel and PCR Counsel not securing funds for expert witnesses where said expert witnesses did not testify at the PCR hearing. Additionally, ineffective assistance of PCR counsel is not a proper claim in state PCR cases.**

The Petitioner asserts he was denied due process when counsel and PCR counsel failed to secure funding for experts. However, petitioner failed to meet his burden of proof as to this issue.

Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). Petitioner's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). A Petitioner must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

Additionally, Petitioner's contention that he received ineffective assistance of counsel on his prior post-conviction relief application is not a ground for relief. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Further, this Court held in Kelly that initial review of PCR counsel's conduct is not applicable in state court, but rather more appropriate for a federal habeas corpus action. Kelly v. State, 404 S.C. 365, 365-66, 745 S.E.2d 377 (2013)

(“Like other states, we hereby recognize that the holding in *Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions”).

Petitioner failed to present any expert witnesses at the PCR hearing. As such, Petitioner can prove no resulting prejudice. Lastly, a review of PCR counsel’s conduct is not proper for this forum. Therefore, Petitioner has failed to meet his burden of proof as to this argument.

**III. Ineffective Assistance of PCR counsel is not a claim that is proper for the state PCR forum.**

Petitioner asserts PCR counsel abandoned him during his PCR proceeding and denied him one full bite at the apple. This issue is without merit.

As stated above, there is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Further, this Court held in *Kelly* that initial review of PCR counsel’s conduct is not applicable in state court, but rather more appropriate for a federal habeas corpus action. Kelly v. State, 404 S.C. 365, 365-66, 745 S.E.2d 377 (2013) (“Like other states, we hereby recognize that the holding in *Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions”).

Furthermore, this issue is not properly 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). 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).

This issue was never raised at the PCR hearing nor was it addressed in the order of dismissal. As such, is not properly preserved for appeal.

**IV. The issue that the solicitor committed misconduct when he struck Asia Seigler is not properly preserved. Nevertheless, this claim is without merit.**

Petitioner asserts the solicitor committed misconduct when he struck Asia Seigler from being selected on the jury. This issue is not properly preserved.

As stated above, "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). 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). "Because [Petitioner] did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review." Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007).

The issue that the solicitor committed misconduct was never raised nor ruled upon at circuit court level. Petitioner never alleged that there was misconduct on the part of the solicitor in this case. This issue cannot be raised for the first time on appeal. Therefore, this issue is not properly before this Court.

Nevertheless, this claim is without merit. The PCR court properly addressed the issue concerning the Batson v. Kentucky challenge. 476 U.S. 79 (1986) (App. p. 1161). Petitioner never raised race as a reason Counsel should be held ineffective based on a Batson motion at the PCR hearing. Only on appeal does Petitioner claim Counsel was ineffective for failing to

challenge the juror based on race an issue. As stated above, this issue cannot be raised for the first time on appeal. Additionally, PCR counsel's conduct cannot be challenge in this action.

As such, there is clear "evidence of probative value" to sustain the PCR judge's findings. Cherry, supra. Therefore, the Petitioner has failed to meet his burden of proof as to this argument.

**V. The issue that Counsel rendered ineffective assistance of counsel when he failed to "properly object to the improper photographs showing a Bible next to the Decedent.." is not properly preserved.**

Petitioner asserts Counsel failed to properly object photographs which were introduced at the trial. This issue is not properly preserved for appeal.

Once again, as stated above, "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). 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). "Because [Petitioner] did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review." Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007).

This issue was not ruled upon by the PCR court. Specifically, there was no credible evidence or testimony presented at the PCR hearing to support this allegation. Once again, PCR counsel's conduct cannot be challenged in this action. Therefore, Petitioner has failed to meet his burden of proof as to this claim.

**CONCLUSION**

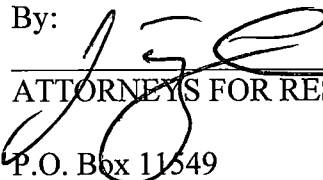
For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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June 20, 2016

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenwood County  
The Honorable Clifton Newman, Circuit Court Judge

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CHARLES N. VANDROSS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Elizabeth A. Franklin-Best, Esquire  
Blume Norris & Franklin-Best LLC  
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This 20<sup>th</sup> day of June, 2016.

  
\_\_\_\_\_  
JOCELYN BAKER  
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