

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Lee County  
Court of Common Pleas  
George C. James, Jr, Circuit Court Judge

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2010-CP-31-0052  
Appellate Case No. 2014-001349

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**RECEIVED**

JUN - 1 2015

**S.C. Supreme Court**

UNULA ABEBE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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Attorney General

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## **ISSUES PRESENTED**

- I. Whether any probative evidence supports the PCR court's finding that the solicitor did not commit a Brady violation by failing to turn over any favorable evidence?
- II. Can a Brady claim be raised on direct appeal if it was not preserved for appellate review by the trial court?
- III. Can a Brady, selective prosecution and prosecutorial misconduct claim, not preserved for appellate review via direct appeal be raised in a P.C.R. application?
- IV. Did the State commit the act of selective prosecution?
- V. Did the Solicitor commit prosecutorial misconduct?

## STATEMENT OF THE CASE

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lee County Clerk of Court. The Applicant was indicted at the March 2009 term of the Lee County Grand Jury for Assaulting a Correctional Officer (2009-GS-31-0023). Applicant proceeded *pro-se* at trial. Following a jury trial before the Honorable Howard P. King, Applicant was found guilty. Judge King sentenced Applicant to two years imprisonment, to be served consecutively to the sentence being served. The Applicant did not appeal his guilty plea or sentence.

Petitioner filed an application for post-conviction relief on March 4, 2010. Respondent filed a Return February 25, 2011. An evidentiary hearing into the matter was convened at the Sumter County Courthouse on February 25, 2014, before the Honorable George C. James, Jr. Petitioner was present at the hearing and proceeded *pro-se*. Judge James dismissed Petitioner's post-conviction relief application by Order on April 15, 2014. Petitioner filed a Rule 59(e) motion to alter or amend judgment on or about March 10, 2014. Judge James denied Petitioner's motion on May 16, 2014. Petitioner filed his Petition for Certiorari on or about March 31, 2015.

This Return to the Petition for Writ of Certiorari 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 court’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an application alleges ineffective assistance of counsel as a ground for relief, the petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether Petitioner’s attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, at 668. The petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney’s performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

## ARGUMENT

### **I. Whether any probative evidence supports the PCR court's finding that the solicitor did not commit a Brady violation by failing to turn over any favorable evidence?**

Petitioner argues the PCR court erred in finding the Solicitor failed to turn over various documents pursuant to Brady. However, this allegation is meritless as ample probative evidence supports the PCR courts finding that the Solicitor did not commit a Brady violation.

The PCR court found it was clear that no Rule 5 motion was ever made by Applicant. As a result the State had no duty to respond to a nonexistent motion. The PCR Court further found "that the State must turn over exculpatory evidence even without a written Brady motion." The Court found that the Solicitor credibly testified that there was no exculpatory information to turn over to Petitioner.

An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268.

In the instant case, the Solicitor credibly testified that he had no exculpatory information. (p 14). Furthermore, Applicant failed to present any evidence in support of his arguments. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had

any possible effect on the result at trial); See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense).

**II. Can a Brady claim be raised on direct appeal if it was not preserved for appellate review by the trial court?**

Petitioner argues that “a Brady claim cannot be raised on direct appeal if it is preserved by an objection or other motions made to the trial court and actually ruled on.” Petitioner further argues “there is nothing on the record that shows the issues I raised were preserved for direct appellate review.” However, Petitioner failed to raise any claim that his Brady motion could not be raised on direct appeal in his post-conviction relief application, at his evidentiary hearing, or in a Rule 59(e) motion. “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). It is clear from the record that this issue was never even discussed at the PCR evidentiary hearing let alone ruled upon by the PCR court.

**III. Can a Brady, selective prosecution and prosecutorial misconduct claim, not preserved for appellate review via direct appeal be raised in a P.C.R. application?**

Petitioner argues that since his “issues were not properly be raised on direct appeal, because they were not preserved for review through that forum. The issues are proper in a PCR.” However, Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973)

(A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal). If these issues were not properly preserved for direct appeal, it is because Petitioner failed to make the timely objections necessary to preserve them. See *State v. Thomas*, 331 N.C. 671, 677, 417 S.E.2d 473, 477 (1992) (“If a defendant chooses to proceed pro se, he cannot on appeal claim ineffective assistance of counsel”).

#### **IV. Did the State commit selective prosecution?**

Petitioner argues the State committed selective prosecution by failing to prosecute the victim in Petitioner’s case. However, this issue is not proper in a PCR. Post-conviction relief is not a substitute for an appeal. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974); *Ashley v. State*, 260 S.C. 436, 196 S.E.2d 501 (1973) (A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal). This issue could have been raised at trial or in a direct appeal.

To the extent that this issue is proper for PCR, Applicant failed to present any documents or evidence to support his claim. See *Skeen v. State*, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial); See *Palacio v. State*, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (holding that, since the contents of challenged documents were not presented at the PCR hearing, the Applicant could not demonstrate how the failure of counsel to obtain these documents prejudiced the defense).

#### **V. Did the Solicitor commit prosecutorial misconduct?**

Petitioner argues that the solicitor committed prosecutorial misconduct by failing to turn over various documents. However, Petitioner failed to raise any claim of prosecutorial misconduct in his post-conviction relief application, at his evidentiary hearing, or in a Rule 59(e)

motion. “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). It is clear from the record that this issue was never even discussed at the PCR evidentiary

### CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON  
Attorney General

DANIEL GOURLEY  
Assistant Attorney General  
Bar No. 100934

By:   
ATTORNEYS FOR RESPONDENT

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June 1, 2015

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Lee County  
Court of Common Pleas  
The Honorable George C. James, Jr., Circuit Court Judge

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UNULA ABEBE,

PETITIONER,

v.

THE 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:

**Unula Abebe, #285447  
Charleston County Detention Center  
3841 Leeds Avenue  
Charleston, South Carolina**

This 1<sup>st</sup> day of June, 2015

  
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CAROLINE COLLINS  
LEGAL ASSISTANT



ALAN WILSON  
ATTORNEY GENERAL

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S.C. Supreme Court

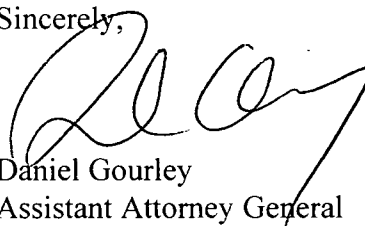
The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

***Re: Unula Abebe v. State of South Carolina***  
***Appellate Case No. 2014-001349***  
***Lower Court Case No. 2010-CP-31-0052***

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,



Daniel Gourley  
Assistant Attorney General  
SC Bar No. 100934

DG/cc  
Enclosures

cc: Unula Abebe, #285447