

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

RECEIVED

The Honorable John C. Hayes III, Circuit Court Judge ^{AUG 10 2015}

S.C. Supreme Court

Appellate Case No. 2015-000020

Nearim Blackwell-Selim, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

JOSHUA L. THOMAS
Assistant Attorney General
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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Can this Court review Petitioner's argument appellate counsel was ineffective where that issue was never presented to the lower court?

STATEMENT OF THE CASE

In July 2005, the Horry County Grand Jury indicted Petitioner for murder. (App. p. 169-70). Barbara Blain-Olds, Esquire, represented Petitioner. (App. p. 1). On January 4, 2007, Petitioner appeared before the Honorable Steven H. John and pled guilty to voluntary manslaughter. (App. p. 1). Judge John deferred sentencing to February 27, 2007, at which time he sentenced Petitioner to twenty years and denied parole eligibility pursuant to S.C. Code Ann. § 16-25-90.¹ (App. p. 15; p. 51, lines 9-23).

Petitioner appealed Judge John's finding regarding parole eligibility, and the South Carolina Court of Appeals upheld Judge John's ruling on Sept. 15, 2009. State v. Blackwell-Selim, 385 S.C. 394, 684 S.E.2d 208 (Ct. App. 2009). This Court reversed the court of appeals on March 15, 2011, remanding the case to the circuit court to make specific findings of fact with regard to the parole eligibility ruling. State v. Blackwell-Selim, 392 S.C. 1, 707 S.E.2d 426 (2011).

Petitioner appeared before Judge John again on May 11, 2011. (App. p. 56). Ronald W. Hazzard represented Petitioner at that hearing. (App. p. 56). Judge John again found Petitioner was not entitled to parole eligibility under the statute. (App. p. 119, lines 2-17). Petitioner filed a timely notice of appeal from that ruling, and Robert M. Pachak, Esquire ("appellate counsel"), perfected the appeal. (Supp. App. p. 114). The court of appeals again affirmed Judge John's ruling. State v. Blackwell-Selim, Op. No. 2012-UP-566 (S.C. Ct. App. filed October 24, 2012).

¹ "Notwithstanding any provision of Chapters 13 and 21 of Title 24, and notwithstanding any other provision of law, an inmate who was convicted of, or pled guilty or nolo contendere to, an offense against a household member is eligible for parole after serving one-fourth of his prison term when the inmate at the time he pled guilty to, nolo contendere to, or was convicted of an offense against the household member, or in post-conviction proceedings pertaining to the plea or conviction, presented credible evidence of a history of criminal domestic violence, as provided in Section 16-25-20, suffered at the hands of the household member. This section shall not affect the provisions of Section 17-27-45."

Petitioner filed an application for post-conviction relief (“PCR”) on September 5, 2013. (App. p. 122). Daniel A. Selwa II, Esquire, represented Petitioner. (App. p. 135). The Honorable John C. Hayes III (“the post-conviction relief judge”) convened an evidentiary hearing on the application at the Horry County Courthouse on October 29, 2015. (App. p. 135). The post-conviction relief judge denied relief in an order filed November 17, 2014. (App. p. 162).

ARGUMENT

I. Petitioner's argument appellate counsel was ineffective is not preserved for appellate review.

Petitioner asserts appellate counsel “erred by attacking the sufficiency of the additional early parole eligibility evidence presented during the remand hearing instead of raising the question of whether the trial judge erred in denying early parole eligibility[.]” (Pet. for Writ of Cert. p. 2). However, this issue was never raised at any point in the lower court proceedings. At no point in the pleadings or at the evidentiary hearing did Petitioner ever raise any allegations of ineffective by appellate counsel. There is no reference to appellate counsel in the transcript of the evidentiary hearing.² The only reference to appellate counsel in the post-conviction relief judge’s order is in his recitation of the procedural history of Petitioner’s case. (App. p. 163). Instead, the order only addresses the performance of Petitioner’s plea counsel. Complaints about appellate counsel’s performance were not raised to the lower court, and they cannot be raised for the first time in this appeal. See, e.g., Pauling v. State, 331 S.C. 606, 609-10, 503 S.E.2d 468, 470 (1998) (“At the PCR hearing, petitioner did not allege counsel was ineffective for failing to introduce the triage nurse's notes at trial. Accordingly, this issue is not preserved for review.” (citing Plyler v. State, 309 S.C. 408, 424 S.E.2d 477 (1992))); Hyman v. State, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (“The appellant asserts representation was ineffective because her trial counsel did not object that the sentences constituted cruel and unusual punishment. This point was not raised in her application or at the hearing and is not properly before us.” (citing State v. Newton, 274 S.C. 287, 262

² Undersigned counsel used the text recognition feature of Adobe Acrobat to search the appendix for terms related to appellate counsel. An intern and a law clerk also reviewed the appendix to attempt to find any reference to appellate counsel’s performance. These inquiries revealed absolutely no mention of this allegation being raised at any point in the record below.

S.E.2d 906 (1980)); see also State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (2004) (issue must be “raised to and ruled upon by the trial court” to be preserved for review (quoting Jean Hofer Toal, et al., Appellate Practice in South Carolina 57 (2d ed. 2002))). Accordingly, this Court cannot review the allegation of ineffectiveness levied against appellate counsel.³

³ Respondent cannot address the merits of a ruling the post-conviction relief judge did not make.

CONCLUSION


For the foregoing reasons, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

JOSHUA L. THOMAS
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By: 
ATTORNEYS FOR RESPONDENT

August 10, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

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

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S.C. Supreme Court

NEARIM BLACKWELL-SELIM,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

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:

Wanda H. Carter, Esquire
Deputy Chief Appellate Defender
SC Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

This 10th day of August, 2015.


NORMA BIGBEE
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

August 10, 2015

RECEIVED

AUG 10 2015

S.C. Supreme Court

VIA HAND DELIVERY

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

RE: Nearim Blackwell-Selim v. State of South Carolina
Appellate Case No: 2015-000020

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,

Joshua L. Thomas
Assistant Attorney General
Bar No: 100777

JLT/nb
Enclosures

cc: Wanda H. Carter, Esquire (2 copies)