

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY  
Frank R. Addy, Jr., Circuit Court Judge

**RECEIVED**

OCT 17 2016

Opinion No. 2016-UP-158  
(S.C. Ct. App. filed April 6, 2016)

S.C. SUPREME COURT

Raymond Carter, ..... Petitioner,

v.

Donnie Myers, Solicitor, Lexington County, Tracey Carroll,  
Assistant Solicitor Lexington County, Brian Buck, Irmo Police Department,  
Scott Franklin, Irmo Police Department, Timothy E. Stephenson, SC Law  
Enforcement Division (SLED), the Estate of George D. White, Ex father-in-  
law, Tammy Scrogam, Ex wife, Barbara Keadle (AKA: Diane Hinkle)  
Investigator LDSS, Francis Ross, LDSS, Paulette Jolly, Guardian ad litem,  
in her official and individual capacities,, ..... Defendants,

Of whom Donnie Myers, Solicitor, Lexington County, Tracey Carroll,  
Assistant Solicitor Lexington County, Brian Buck, Irmo Police Department,  
Scott Franklin, Irmo Police Department, Timothy E. Stephenson, SC Law  
Enforcement Division (SLED), the Estate of George D. White,  
Ex father-in-law, are, ..... Respondents.

**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## STATEMENT OF THE CASE

This action for prospective relief and money damages was brought by the Petitioner Raymond W. Carter pursuant to the South Carolina Tort Claims Act. Carter named numerous Defendants, including the Respondent Donald V. Myers, who has been the Eleventh Circuit Solicitor during all periods of time relevant to this action.

Based on the allegations of his complaint, the Petitioner Carter was accused of criminal sexual conduct committed against one or more of his minor daughters. The criminal charges were prosecuted by the Eleventh Circuit Solicitor's Office including Solicitor Myers and former Assistant Solicitor Tracey Carroll. On May 13, 2002, Carter pled guilty to one count of Committing or Attempting a Lewd or Lascivious Act on a Minor. He was sentenced to fifteen years in prison by the late Circuit Judge Marc Westbrook. No direct appeal was filed. In 2003, Carter filed a petition for post-conviction relief, but he voluntarily dismissed that petition with prejudice.

Carter completed his sentence and was released from the South Carolina Department of Corrections on or about August 1, 2007. He alleges that he was transferred to Lexington County Detention Center to stand trial pursuant to Section 44-48-90 to determine whether he qualified as a "sexually violent predator." A trial was conducted on November 3-4, 2008, at which time he was adjudicated a sexually violent predator, and he was civilly committed to the South Carolina Department of Mental Health for treatment. Carter has not alleged any further involvement by Solicitor Myers in any proceedings held under the Sexually Violent Predator Act. That civil action was handled by the Attorney General on behalf of the State of South Carolina. Carter alleges that he was released from the Sexually Violent Predator Program on June 30, 2011.

On August 22, 2012, the Petitioner Carter filed this civil action in the Lexington County Court of Common Pleas. In a voluminous, 41-page Complaint, Carter alleged four causes of

action against Solicitor Myers: (1) malicious prosecution, (2) wrongful conviction arising from his guilty plea on May 13, 2002, (3) wrongful adjudication under the Sexually Violent Predator Act, and (4) false imprisonment resulting from his civil commitment under the Sexually Violent Predator Act.

Solicitor Myers filed a Rule 12(b)(6) motion to dismiss. That motion was heard by Circuit Judge Frank R. Addy, Jr. on February 7, 2013. The Petitioner Carter received notice of the hearing but did not appear at the call of the case. Judge Addy heard and granted Solicitor Myers' motion as well as the dispositive motion filed by the Irmo Respondents (Brian Buck and Scott Franklin) from the bench. Carter did appear after the motion hearing was completed and defense counsel had been dismissed.

Judge Addy issued a Form Order filed February 8, 2003, granting the motions to dismiss filed by the Respondents. Specifically, he ruled that the employees of the Eleventh Circuit Solicitor's Office, including Solicitor Myers, were entitled to absolute prosecutorial immunity. He also ruled that the all claims were barred by the statute of limitations. Finally, Judge Addy denied Carter's attempt to hold other Defendants in default, finding that they had not been properly served. (R. 2-3).<sup>1</sup>

Carter did not file a Rule 59(e) motion to reconsider, and instead he filed an appeal to the South Carolina Court of Appeals.

After briefing by the parties, the Court of Appeals issued an unpublished opinion which affirmed the dismissal of Carter's Complaint based upon the expiration of the statute of limitations. *See, Carter v. Myers*, Op. No. 2016-UP-158 (S.C. Ct. App. filed April 6, 2016). The

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<sup>1</sup> The Defendant Tracey Carroll, the former Assistant Solicitor and current Magistrate Judge, was never served with the Complaint and thus never entered a formal appearance. Judge Addy's order, however, granted absolute prosecutorial immunity to all employees of the Solicitor's Office, which included Carroll.

Court of Appeals found that Carter's argument that the statute of limitations had been "tolled" as abandoned. Finally, the Court of Appeals did not find it necessary to reach Solicitor Myers's prosecutorial immunity defense.

Carter filed a petition for rehearing that was denied by the three-judge panel on August 18, 2016.

## ARGUMENTS

### **I. The decision of the South Carolina Court of Appeals does not warrant the issuance of a writ of certiorari.**

Rule 242(b), SCACR, sets forth general factors considered by this Court in determining whether issues require review on certiorari. Solicitor Myers submits that, aside from the merits which are addressed below, there are several factors that demonstrate that a writ of certiorari is entirely unwarranted in this case.

First, the decision of the three-judge panel in the Court of Appeals was unanimous; there was no dissenting opinion.

Second, the opinion of the Court of Appeals was unpublished and a *per curiam* opinion issued in accordance with Rule 220(b)(1), SCACR, and thus the opinion has no precedential value.

Third, the decision of the Court of Appeals does not conflict with any existing decisions of this Court.

Finally, this case does not involve any issue of first impression nor any issue of great public interest or importance. The *per curiam* opinion has no precedential value, and as a result, the Court of Appeals' decision will have no application to other cases.

Based upon these considerations, there is simply no need for this Court to review the decision of the Court of Appeals.

### **II. The Petitioner has improperly raised new issues in his Petition for Writ of Certiorari.**

Rule 226(d)(2), SCACR, governs the issues that may properly be raised in a petition for writ of certiorari. Rule 226(d)(2) provides that "[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question

presented to the Supreme Court." Rule 226(d)(2), SCACR. Moreover, it is well settled that "[a]n issue not raised to or addressed by the trial court or the Court of Appeals is not properly preserved for review by the Supreme Court on certiorari." *Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218, 221 (2000).

A comparison of Carter's petition for rehearing with what he has now filed as a petition for writ of certiorari reflects that Carter is raising new issues in the current petition to this Court. On this additional basis, the Court is urged to deny a writ of certiorari.

**III. The Court of Appeals correctly ruled that all claims are barred by operation of the two-year statute of limitations under the South Carolina Tort Claims Act.**

The Court of Appeals correctly affirmed the decision of the Circuit Court to dismiss all claims based upon the expiration of the statute of limitations under the South Carolina Tort Claims Act. The Petitioner Carter's action is brought pursuant to the Tort Claims Act, which provides that "an action for damages under this chapter may be instituted at any time within two years after the loss was or should have been discovered." *See*, S.C. Code Ann. § 15-78-100(a).

"[T]he statutory period of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto." *Abba Equipment, Inc. v. Thomason*, 335 S.C. 477, 517 S.E.2d 235, 239 (Ct. App. 1999). "The rule requires an injured party to act promptly when the facts and circumstances of the injury would place a reasonable person on notice that a claim against another party might exist." *Id.* "The test is whether a person should have known the operative facts is objective, rather than subjective." *Republic Contracting Corp. v. South Carolina Dept. of Highways and Public Transportation*, 332 S.C. 197, 503 S.E.2d 761, 767 (1998). "The statute of

limitations begins to run when a plaintiff knows or should know of a potential claim against another party, not when the plaintiff develops a full-blown theory of recovery." *Id.*

Carter's complaint was filed on August 22, 2012. (R. 7). Consequently, if Carter knew or should have known that a claim might exist prior to August 22, 2010, then his claims are statutorily barred.

Carter has alleged four causes of action against Solicitor Myers: (1) malicious prosecution, (2) wrongful conviction arising from his guilty plea on May 13, 2002, (3) wrongful adjudication under the Sexually Violent Predator Act, and (4) false imprisonment resulting from his civil commitment under the Sexually Violent Predator Act. Each of those claims are barred by the two-year statute of limitations.

Carter pled in his complaint that the prosecution ended on May 13, 2002, which is the date of his guilty plea. (R. 8). It was by that date that any claims arising out of any alleged misconduct by Solicitor Myers or his office must have accrued. The alleged wrongful conviction occurred on that date, and all prosecutorial acts alleged by Carter in his complaint occurred prior to that date. Hence, the first two causes of action alleged against the Solicitor were clearly barred by the statute of limitations which expired by May 13, 2004, and certainly long before the filing date of August 22, 2012.

Carter has also pled additional claims arising from his civil commitment under the Sexually Violent Predator Act, S.C. Code Ann. § 44-48-10, *et seq.* He alleges that he completed his criminal sentence on or about August 1, 2007, and was transferred to Lexington County Detention Center to stand trial pursuant to Section 44-48-90 to determine whether he qualified as a "sexually violent predator." (R. 39). A trial was conducted on November 3-4, 2008, at which time he was adjudicated a sexually violent predator and he was civilly committed to the South Carolina Department of Mental Health for treatment. (R. 40). Carter has not alleged any further

involvement by Solicitor Myers in any proceedings held under the Sexually Violent Predator Act. That civil action was handled by the Attorney General on behalf of the State of South Carolina. Consequently, there is no further alleged misconduct by Solicitor Myers occurring between August 1, 2007 and November 4, 2008. Instead, Carter relies on the prior acts of prosecutorial misconduct occurring prior to May 13, 2002, which he contends resulted in the guilty plea which in turn contributed to his being adjudicated a sexually violent predator. Yet, even if that is true and a new "injury" triggers a new cause of action, which is denied, Carter's sexually violent predator-related claims would have accrued by November 4, 2008, but he did not commence his state law tort claims under the Tort Claims Act within two years of that date. Instead, the complaint was filed close to four years later on August 22, 2012.

In sum, as the Court of Appeals determined, Carter's four causes of action as pled against Solicitor Myers are all barred by the applicable two-year statute of limitations. There is simply no basis to warrant further review by issuance of a writ of certiorari.

**IV. The Petitioner cannot rely on the tolling statute to withstand the statute of limitations defense.**

The Court of Appeals found that Carter had abandoned his "tolling" argument because the issue was raised only by a short, conclusory statement with no supporting authority. Carter does not challenge that determination.

Instead, he attempts to simply re-argue the issue – again with no supporting authority. He also presents this issue differently than he did in the lower courts, including the Court of Appeals. Previously, Carter claimed "tolling" by treating his complaint as a Rule 60(b) motion for relief from an existing judgment. Now, as best as can be ascertained, Carter appears to characterize his complaint as, in essence, a post-conviction relief application which can be

brought within one year of discovering material facts that require the vacation of a conviction or sentence. For this proposition, Carter cites S.C. Code Ann. § 17-25-45(C), which he has not cited in any prior filing. Nonetheless, the complaint in this matter is clearly not a post-conviction relief application. Moreover, the record reflects that Carter had previously filed a petition for post-conviction relief in 2003, but he voluntarily dismissed that petition with prejudice. In short, there is no basis for issuing a writ of certiorari to consider this new "tolling" issue raised by Carter.

**V. As an additional sustaining ground, the Circuit Court correctly ruled that all claims against the Respondent Myers are barred by absolute prosecutorial immunity.**

The Court of Appeals did not find it necessary to reach the prosecutorial immunity defense. Nonetheless, even if this Court were to find that Carter's statute of limitations and/or "tolling" issues merited a writ of certiorari, Carter's petition should still be denied based upon Solicitor Myers' clear entitlement to prosecutorial immunity.

In his Complaint, Carter alleges that Myers, acting as the Eleventh Circuit Solicitor, engaged in prosecutorial misconduct which resulted initially in his guilty plea to one count of Committing or Attempting a Lewd or Lascivious Act on a Minor and later in his civil commitment to the South Carolina Department of Mental Health under the Sexually Violent Predator Act. Specifically, Carter alleges that Solicitor Myers and his office committed misconduct by increasing the charges against him, failing to consider his professed innocence, failing to evaluate the voluntariness of his confession, procuring false testimony, concentrating on a plea bargain strategy, and failing to disclose exculpatory evidence. On appeal, in his brief to the Court of Appeals, Carter focused on his allegation that the Solicitor failed to disclose unspecified exculpatory evidence.

Circuit Judge Frank Addy granted summary judgment in favor of Solicitor Myers on the basis of absolute prosecutorial immunity. Carter sued Solicitor Myers solely in his capacity as the Eleventh Circuit Solicitor. In *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001), the South Carolina Court of Appeals held that "a prosecutor in the employ of this state is immune from personal liability under § 1983 or the South Carolina Tort Claims Act for actions relating to the prosecution of an individual as a criminal defendant -- regardless of the prosecutor's motivation -- provided the actions complained of were committed while the prosecutor was acting as an 'advocate,' as defined by *Imbler v. Pachtman* and its progeny." 553 S.E.2d at 509. The Court of Appeals in *Williams* cited extensively to the seminal case of the United States Supreme Court in *Imbler v. Pachtman*, 424 U.S. 409 (1976), wherein the Supreme Court recognized the defense of absolute prosecutorial immunity in Section 1983 litigation against state prosecutors. The Court concluded that absolute immunity applies to all prosecutorial acts that are intimately associated with the judicial phase of the criminal process. The functions included the initiation of the prosecution and the presenting of the state's case at trial as well as pre-trial and post-trial matters. 424 U.S. at 431.

The scope of absolute prosecutorial immunity extends to the very conduct as alleged by Carter against Solicitor Myers in the present case. These allegations are substantially similar, if not identical, to the allegations made by the plaintiff in *Williams* against a solicitor and the Attorney General. In that case, the plaintiff alleged prosecutorial misconduct including the failure to properly investigate the charges, collusion with defense counsel, withholding of pre-trial discovery and failure to respond to Rule 5 requests for discovery, abuse of power in scheduling, and reliance on insufficient and untruthful evidence to obtain an indictment. After the filing of a Rule 12(b)(6) motion, the Circuit Court dismissed claims for false arrest, malicious

prosecution, negligence, and violations of federal constitutional rights under Section 1983. The summary dismissal of those claims was based on absolute prosecutorial immunity.

The decision in *Williams* is controlling in the present case. As in *Williams*, Solicitor Myers filed a Rule 12(b)(6) motion to dismiss and argued that Carter's claims of prosecutorial misconduct were all barred by absolute prosecutorial immunity. Judge Addy agreed and dismissed Carter's complaint and all claims alleged against Solicitor Myers on that basis.<sup>2</sup> It is clear on this record that Carter's allegations of prosecutorial misconduct are alleged to have occurred during Solicitor Myers' prosecution of the charges against Carter. In accordance with *Imbler* and *Williams*, Solicitor Myers enjoys absolute immunity under the common law and under the Tort Claims Act for all such allegations of misconduct, and for that reason, Judge Addy's dismissal of all claims against Solicitor Myers was correct and does not merit the issuance of a writ of certiorari in this case.

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<sup>2</sup> The Fourth Circuit is also in agreement that absolute prosecutorial immunity bars a civil action seeking relief for the alleged withholding of exculpatory evidence by a prosecutor. *See, Carter v. Burch*, 34 F.3d 257, 262-263 (4th Cir. 1994), *cert. denied*, 513 U.S. 1150 (1995). *See also, Smith v. McCarthy*, 349 Fed.Appx. 851, 859 (4th Cir. 2009) ("as to his alleged actions in conspiring with police officers to present false testimony and for withholding exculpatory evidence prior to trial, [defendant prosecutor] was entitled to absolute immunity").

**CONCLUSION**

Based on the foregoing discussion, the Respondent Donnie Myers respectfully requests that this Court deny the Petitioner's petition for writ of certiorari.

Respectfully submitted,

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BY: 

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CERTIFICATE OF SERVICE

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The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent Donald V. Myers, does hereby certify that service of the **Return to Petition for Writ of Certiorari** was made upon the *pro se* Petitioner and all other counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 17th day of October 2016:

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