

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Honorable Kristi L. Harrington, Circuit Court Judge

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Roshod M. Baker .....Petitioner,

v.

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

Appellate Case No. 2016-000657

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Did the PCR court err in finding that trial counsel rendered effective assistance of counsel where trial counsel failed to investigate and cross-examine witness Smith regarding his pending burglary charge, which could have been used to show bias and for impeachment?
2. Did the PCR court err in denying PCR counsel's motion to amend the PCR application to include an allegation of prosecutorial misconduct where it was not until trial counsel testified at the PCR hearing that PCR counsel learned that the solicitor never notified trial counsel of witness Smith's pending burglary charge, which could have been used to show bias and for impeachment?
3. Did the PCR court err in denying PCR counsel's request that the record be left open so that PCR counsel could submit certified records regarding Smith's burglary charge to the PCR court?

## STANDARD OF REVIEW

In a post-conviction relief action, the proper standard of review 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). "This Court gives great deference to the post-conviction relief (PCR) courts findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). On review, this Court "gives great deference to a PCR judge's findings where matters of credibility are involved." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). "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).

## STATEMENT OF FACTS

### Procedural History

A Horry County Grand Jury indicted Petitioner in May 2002 for murder. Johnny Gardner, Esq., represented Petitioner on the charge. A joint jury trial was held November 13-16, 2006, before the Honorable Steven H. John. The jury convicted Petitioner, and codefendant Telly D. Manning, of the murder charge. App. p. 378. Judge John sentenced Petitioner and his codefendant to thirty years imprisonment. App. p. 391. Petitioner appealed.

Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Petitioner on appeal. On December 28, 2007, appellate counsel filed a Final *Anders* Brief of Appellant in the South Carolina Court of Appeals.

The South Carolina Court of Appeals dismissed the appeal in an unpublished opinion issued on September 8, 2009. Petitioner did not file a petition for rehearing. The Court of Appeals issued the remittitur on September 24, 2009.

On August 24, 2010, Petitioner filed an application for post-conviction relief claiming:

- (a) Ineffective assistance of counsel;
- (b) due process of law.

At the evidentiary hearing, Tristan M. Shaffer, Esq., represented Petitioner in the action. By Order filed November 19, 2014, Judge Harrington denied relief and dismissed the application. Petitioner did not appeal the denial of relief.

On January 21, 2015, Petitioner filed a second PCR action seeking an opportunity to appeal the prior PCR action ruling. Judge Craig Brown signed an order granting a belated appeal of Petitioner's PCR action on March 7, 2016.

### Pertinent Trial Testimony

Ernest Smith testified he drove a vehicle to buy drugs with Petitioner, Telly Manning, and Derrick Bowens. App. p. p. 121-122. While driving, Petitioner told Smith to follow a vehicle. App. p. p. 124. Petitioner and codefendant Telly Manning got out of their vehicle and walked to the stopped vehicle they had been following. App. p. p. 126. Petitioner and Telly Manning got into the vehicle. They both had guns when they got in. App. p. p. p. 127. Smith didn't hear anything other than his own radio while they were in the vehicle. App. p. 128. When they got back out of the vehicle they came back to Smith's vehicle. Petitioner told Smith to drive. App. p. 129. On direct examination, the solicitor brought out Smith's prior marijuana charges and that Smith was arrested for murder concerning the incident in question and agreed to testify in return for not being prosecuted. App. p. 131-132.

During the codefendant counsel's cross-examination of Smith, he testified he did not have a job at the time of the incident and had never been employed. App. p. 136. He testified he originally lied to law enforcement and stated someone else was driving the vehicle. App. p. 136. Manning, Petitioner, and he were driving around trying to find a 'big 8' of cocaine. App. p. 136.

Trial counsel's cross-examination of Smith brought out the following testimony: He went 'down there' to buy drugs. App. p. 145. He wanted to buy a 'big 8.' App. p. 145. A 'big 8' is too much cocaine for one person and costs roughly two thousand dollars. App. p. 146. Smith's first statement to law enforcement was that he was not at the scene of the crime. App. p. 157-158. Smith provided law enforcement with a false alibi witness to go with his first statement. App. p. 158. Smith struck a deal with the solicitor that in exchange for Smith's testimony he would not be charged with murder of the incident in question. App. p. 150-153.

### Post-conviction Relief Hearing

On September 12, 2012, Petitioner's first PCR attorney, Charles Brooks, Esq., was relieved upon Petitioner's motion after expressing displeasure with Mr. Brooks' representation. John Y. Ahn, Esq., was subsequently appointed on November 2, 2012. Petitioner's motion for appointment of new counsel, based on his displeasure with Mr. Ahn's representation, was granted. On July 18, 2013, Daniel A. Selwa, II, Esq., was appointed to Petitioner's case. Petitioner's motion to relieve Mr. Selwa was also granted. Mr. Shaffer was appointed on May 30, 2014.

Petitioner's PCR hearing was scheduled to take place on August 26, 2014. Petitioner moved for a continuance based on Petitioner's desire to relieve PCR counsel and the desire to investigate a new allegation. App. p. 421-422. The issue that Petitioner wished to add and investigate was trial counsel's failure to impeach Smith about a pending burglary charge. App. p. 423. The PCR court indicated it was hesitant to grant a continuance due to the case's age. App. p. 434. However, The PCR court continued the case to give PCR counsel the opportunity to fully question trial counsel and amend the application to allege trial counsel was ineffective for failing to further impeach Smith. App. p. 440

On August 28, 2016, Petitioner amended the application to add an allegation and asked for an additional continuance. App. p. 437. The PCR court denied Petitioner's motion for continuance and the hearing commenced. At the hearing, PCR counsel asked trial counsel if he was aware that Smith had a pending burglary charge at the time of trial. App. p. 464. Trial counsel testified he was unaware of Smith's pending burglary charge, but that the existence of such a charge would have made no difference to him. App. p. 467. Based on that testimony, PCR counsel moved to amend the allegations to include allegations of: due process, *Brady* violation, and prosecutorial misconduct. App. p. 478

The PCR court asked why that allegation was not raised prior to the hearing. App. p. 479. PCR counsel stated it was due to a miscommunication between himself and trial counsel during his pre-hearing interview. App. p. 479. The PCR court opened the record back up and obtained more specific testimony on the issue. App. p. 482-485. Petitioner requested time to obtain a certified conviction to supplement the record if the amendment was allowed. App. p.483-484. The PCR court denied Petitioner's motion to further amend the application and, therefore, did not address Petitioner's request to supplement the record. App. p. 485. The PCR court ruled that counsel had been given additional opportunity to investigate the issue and could have prepared the amendment earlier. The PCR court stated the case was an older case on the docket and counsel had "presented enough that... is in accordance with the applicant's position." App. p. 485.

## ARGUMENT

- I. **The record contains probative evidence to support the PCR court's finding trial counsel was not ineffective and Petitioner was not prejudiced by trial counsel's failure to further impeach Ernest Smith on his burglary charge.**

This Court should not grant certiorari because trial counsel was not ineffective for failing to impeach Smith on his pending burglary charge for three reasons:

1. Petitioner was not prejudiced by trial counsel's failure to impeach Smith with a pending burglary charge because trial counsel thoroughly impeached Smith.

Trial counsel thoroughly impeached Smith on the basis of his deal with the State, drug dealing, and false statements he made to law enforcement concerning the case at trial. Smith made a deal with the State to testify against Petitioner and Petitioner's co-defendant at trial in exchange for the State dismissing his pending murder charge for the same incident. App. p. 112-113. Trial counsel also impeached Smith on his attempt the day of the incident to acquire an amount of drugs "that's not just for one person" worth roughly \$2000.00. App. p. 145-146. Trial counsel also impeached Smith on his false statements to law enforcement about the incident in question and his presentation of a false alibi witness to law enforcement. App. p. 158. The PCR court found that any further impeachment would have been cumulative. App. p. 494. Trial counsel's cross-examination of Smith showed Smith was a heavily biased drug-dealer who had lied on multiple occasions to law enforcement about the incident in question. Trial counsel's failure to impeach Smith on a pending burglary charge would not have changed the result of the proceeding.

The PCR court found trial counsel thoroughly cross-examined and impeached Smith. App. p. 494. The PCR court also ruled any further impeachment by trial counsel on the pending burglary charge would have been cumulative and, therefore, not prejudicial. App. p. 494. Trial counsel testified to the same effect at the PCR hearing, "I just want to emphasize that I wouldn't

have done anything with that.” App. p. 468. The impeachment value of the burglary charge was negligible compared to the immense bias created by Smith’s deal with the State. No evidence was introduced at trial or the PCR hearing indicating the burglary charge was contemplated as part of Smith’s deal with the State. Trial counsel thoroughly impeached Smith on the deal and the bias it created. App. p. 150-153. Based on trial counsel’s cross-examination, the PCR court found Petitioner was not prejudiced by trial counsel’s failure to impeach Smith on his pending burglary charge. App. p. 494.

Petitioner failed to prove he was prejudiced because the impeachment information was less indicative of bias and was cumulative in nature compared to the impeachment material used by trial counsel. Any deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland v. Washington, 466 U.S. 668, 686 (1984). Probative evidence exists in the record to support the PCR court’s finding that Petitioner was not prejudiced by trial counsel’s failure to impeach Smith on his recent pending burglary charge.

2. Trial counsel was not deficient because he was not aware of Smith’s pending burglary charge at the time of trial.

Trial counsel testified he was not aware of Smith’s burglary charge at the time of trial. App. p. 467. Petitioner failed to prove trial counsel was ineffective for failing to impeach Smith on his pending burglary charge because counsel did not know or have reason to know about the burglary charge. “[T]he record of the PCR proceeding indicates that Judge’s lawyers were not aware of these materials; rather, they thought the prosecution had given them all the materials to which they were entitled. Counsel cannot be incompetent in failing to wait to receive material

they had no reason to know existed.” Judge v. State, 321 S.C. 554, 562, 471 S.E.2d 146, 150–51 (1996) overruled on other grounds by Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000).

Petitioner failed to prove trial counsel was deficient because trial counsel had no knowledge of the impeachment material and could not have acted on information which he did not have. Probative evidence exists in the record to support the PCR court’s finding that trial counsel was not ineffective for trial counsel’s failure to impeach Smith on his recent pending burglary charge.

3. Trial counsel was not deficient because Petitioner knew of the impeachment material and failed to inform trial counsel.

Counsel cannot be deficient for failing to act on an issue if he does not know of the issue because his client failed to inform him of an issue about which the client has actual knowledge. See Lee v. State, 396 S.C. 314, 322, 721 S.E.2d 442, 447 (Ct. App. 2011) (holding defendant failed to establish that plea counsel's failure to have him evaluated for competency constituted ineffective assistance when he gave no indication to his attorney of his mental incompetence.) Petitioner testified he knew Smith, his first cousin, had recently been released from incarceration for burglary before the trial. App. p. 455. Petitioner knew of Smith’s burglary charge and failed to inform his trial counsel. Petitioner also testified he did not give trial counsel any leads or people to interview. App. p. 460.

**II. The PCR court did not err when it denied Petitioner's motion to amend his application to include allegations of prosecutorial misconduct and a *Brady* violation.**

The PCR court's denial of Petitioner's motion to amend was appropriate due to the age of Petitioner's case and his own actions that advanced the age of the case.

December 2000, Petitioner was charged for murder. App. p. 527.

November 2006, Petitioner was found guilty at trial. App. p. 377.

August 2010, Petitioner filed an application for post-conviction relief. App. p. 503.

From 2010-2014, Petitioner relieved four different appointed PCR attorneys. App. p. 426.

August 26, 2014, Petitioner made a motion to continue his case, relieve Tristan Shaffer, and amend his application with a new allegation. App. p.422, 431. The PCR court granted the motion for a continuance and delayed the case for two days. App. p. 434.

August 28, 2014, Petitioner made another motion to continue his case, which was denied. App. p. 437.

At the conclusion of the evidentiary hearing, Petitioner made a motion to amend his application to allege a *Brady* violation. App. p. 478.

1. The merits of Petitioner's claims were not subserved by the amendment because the PCR court substantively found the *Brady* evidence was not material.

The merits of Petitioner's action would not have been subserved by an amendment to his application because the PCR court's findings encompass the proposed allegations. In denying Petitioner's motion, the PCR court found the issues had been adequately presented without amending the application. App. p. 485. Civil Court Rule 15 directs the court to allow amendments "when the presentation of the merits of the action will be subserved thereby" and "the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits." SCRC 15. The Standard of Review

for a PCR court's evidentiary ruling is whether the court abused its discretion. "The decision to admit affidavits, depositions, oral testimony, or other evidence at a PCR hearing is within the PCR court's discretion and will not be reversed absent an abuse of discretion resulting in prejudice to a party." McKnight v. State, 378 S.C. 33, 56, 661 S.E.2d 354, 365 (2008).

Petitioner was not prejudiced because the alleged *Brady* evidence does not satisfy the required elements. The proposed *Brady* allegation was the State failed to furnish trial counsel with Smith's pending burglary charge. App. p. 478. "[A]n individual asserting a *Brady* violation must demonstrate the evidence was (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) suppressed by the State; and (4) material to the accused's guilt or innocence, or was impeaching. State v. McCray, 413 S.C. 76, 95-96, 773 S.E.2d 914, 924 (Ct. App. p. 2015). The alleged impeachment evidence was favorable because it could have potentially been used by trial counsel to impeach Smith. "Favorable evidence includes... evidence which may be used for impeachment." United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481, (1985). There was no evidence presented concerning the possession or suppression of the evidence by the State.

The PCR court substantively ruled on the *Brady* allegation because the standard for prejudice to an Applicant at a PCR hearing and materiality in a *Brady* violation are the same. "[T]here is a reasonable probability that, but for counsel's unprofessional errors, *the result of the proceeding would have been different.*" Strickland, at 117-18, 386 S.E.2d at 625 (emphasis added). "Materiality of evidence is determined based on the reasonable probability that *the result of the proceeding would have been different* had the evidence been disclosed to the defense." Hyman at 45, 723 S.E.2d at 380 (emphasis added). The PCR court found Petitioner was not

prejudiced by the impeachment material because trial counsel thoroughly impeached Smith on his deal with the State and the alleged impeachment material was cumulative. App. p. 494.

The PCR court found that the alleged *Brady* material would not have changed the result of the proceeding if trial counsel had used it. App. p. 494. The PCR court effectively ruled the *Brady* evidence was not material by finding it would not have changed the result of the proceeding had it been utilized by trial counsel. App. p. 493. Therefore, Petitioner was not prejudiced by the PCR court's denial of his motion because the alleged *Brady* evidence did not satisfy the elements of a *Brady* claim.

2. Due to the age of the case, the amendment of Petitioner's allegations would have prejudiced the State.

The PCR court correctly denied Petitioner's motion to amend his application, based on the prejudice caused by the case's age. App. p. 424, 485. The State was prejudiced by the case's age, which was caused in part by Petitioner's own actions firing his attorneys, and the lack of notice provided to the State of the allegations. The State was unable to call the solicitor, who prosecuted the case 8 years prior, as a witness due to the lack of notice provided by the allegation. App. p. 480. The State was not aware that this allegation would be raised at the PCR hearing and was unprepared to address the allegation, called no witnesses, and presented no evidence on the issue of the alleged *Brady* material. App. p. 480.

The PCR court's denial of Petitioner's motion prevented further delaying of the case and, thus, prevented prejudice to the State. Petitioner's continual replacing of appointed PCR attorneys and his multiple continuances evidence his intent to delay his case's prosecution. The doctrine of Laches has long held that delay of a case's prosecution prejudices the State. See Bray v. State, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005). If the PCR court had granted Petitioner's motion, the only remedy available to alleviate the prejudice to the State, caused by

Petitioner's failure to provide notice, was a continuance. "The court shall upon motion grant a continuance reasonably necessary to enable the objecting party to meet such evidence." SCRC 15. Due to concerns about the age of the case, the PCR court denied multiple continuance motions from the Petitioner. App. p. 424, 485. A continuance would have further extended a fourteen year old case. The PCR court's denial of Petitioner's motion prevented Petitioner from further prejudicing the State by delaying the prosecution of his case.

**III. The PCR court did not err in failing to rule on Petitioner's motion to hold the record open to admit a certified conviction of the alleged *Brady* material**

1. Petitioner's motion to hold the record open was contingent on the PCR court granting his motion to amend.

The PCR court did not rule on whether the record would remain open to give Petitioner time to submit a certified court document reflecting the alleged *Brady* material because the PCR Court ruled against Petitioner's amendment of the application, which rendered the issue moot. Petitioner conditioned his motion to hold the record open on if the PCR court allowed Petitioner to further amend his application. "[T]he only thing I would ask: that if you were to allow the amendment, to allow me to get a certified conviction." App. p. 483. The PCR court did not allow Petitioner to amend his application. App. p. 485. Therefore, there was no reason for the PCR court to rule on the issue.

2. Petitioner was not prejudiced by failing to have a certified conviction in the record because the PCR court substantively ruled on the merits of the allegation.

Petitioner was not prejudiced by the PCR court's failure to rule because the court considered and substantively ruled on the merits of the allegation in the order of dismissal. App. p. 485. Petitioner testified to the existence of the alleged *Brady* material. App. p. 451-452. PCR counsel represented to the PCR court that the South Carolina Public Index reflected the alleged

*Brady* material. The PCR court's findings addressed the merits of Petitioner's allegation that trial counsel should have impeached Smith with the burglary charge. The PCR court found Petitioner failed to demonstrate prejudice resulted from the alleged *Brady* material. App. p. 494. Petitioner was not prejudiced by the lack of certified record because the PCR court ruled on the merits of the alleged *Brady* material.

### CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the petition be denied. If this Court sees fit to grant the petition for writ of certiorari, Petitioner would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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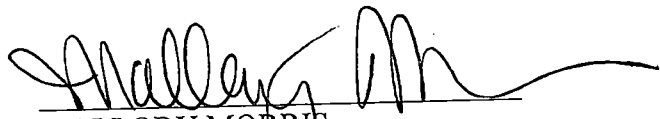
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of 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:

Ms. Laura R. Baer, Esquire  
SC Commission on Indigent Defense  
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This 10<sup>th</sup> day of April, 2017

  
MALLORY MORRIS  
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