

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO CHEROKEE COUNTY  
Court of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge

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**RECEIVED**

SEP 12 2013

**S.C. Supreme Court**

Jimmy Littlejohn,.....Petitioner,

v.

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

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**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Did the PCR judge err in refusing to grant relief when counsel, who was relieved well prior to trial, did not turn over the Petitioner's discovery file before trial, where he was not required by the Rules of Professional Conduct to do so, and Petitioner had ample time to file his own discovery request?

## STATEMENT OF THE CASE

The Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to the Cherokee County Clerk of Court's orders of commitment. The Petitioner was indicted at the November 2004 term of the Cherokee County Grand Jury for arson- 2<sup>nd</sup> degree (2004-GS-11-0975) and burglary- 1<sup>st</sup> degree (2004-GS-11-0976). Seven months prior to trial, Don A. Thompson, Esquire, was relieved as counsel at the Petitioner's request. The Petitioner proceeded to represent himself at trial, with Mr. Thompson acting as stand-by counsel upon the Court's request. On May 26, 2005, a jury convicted the Petitioner on all charges. The Honorable John C. Hayes III sentenced the Petitioner to confinement for concurrent terms of twenty-five years on each charge.

A timely notice of Appeal was filed on the Petitioner's behalf and an Anders brief was submitted. On September 12, 2008, the South Carolina Court of Appeals requested that the parties brief the issue of whether or not the Petitioner was adequately warned of the dangers of self-representation, and if not, did the record reflect whether the Petitioner was aware of his rights from another source or from his background. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Littlejohn, Op. No. 2010-UP-199 (filed March 12, 2010). The Remittitur was sent on March 31, 2010.

The Petitioner filed an application for post-conviction relief on March 7, 2011. The State filed its return on February 23, 2012. An evidentiary hearing was convened on June 11, 2012 at the Spartanburg County Courthouse. The Petitioner was represented by Thomas A. Killoren, Jr., Esquire. The State was represented by Ashleigh R. Wilson of the South Carolina Office of the Attorney General. The Honorable Roger L. Couch denied relief in an order dated September 24,

2012 and filed September 26, 2012. (App. p. 343-53).

## STANDARD OF REVIEW

The proper standard for review of 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, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

## ARGUMENT

- 1. The PCR judge did not err in refusing to grant relief because relieved counsel was under no obligation to hand over the discovery file within any specific period of time, and Petitioner had ample time to file his own discovery requests.**

Petitioner argues the PCR judge erred in denying relief “based on trial counsel’s refusal to provide Petitioner with discovery material provided to counsel by the State, when counsel was later relieved from representation, Petitioner proceeded to jury trial *pro se* and without the benefit of the discovery material and former counsel was appointed as stand by counsel during the trial.” (Cert. Pet., p.4). This argument is without merit.

On October 27, 2004, Petitioner appeared before the Honorable J. Mark Hayes II, and requested that his appointed trial counsel, Don Thompson, be relieved. Petitioner assured the court that he would hire a new attorney to represent him within thirty (30) days. The court asked Petitioner if he could have new counsel hired within thirty (30) days, and Petitioner responded affirmatively. (App. p. 7). The court further explained to Petitioner that if he did not hire new counsel, he may have to proceed *pro se*. Petitioner acknowledged that he understood this. (App. p. 7). The court told Petitioner that after thirty (30) days the State would be able to call the case

for trial. Petitioner again acknowledged that he was aware of the consequences. (App. p. 8). The court granted Petitioner's request. (App. p. 8).

The case was not called to trial until May 25, 2005, at which point Petitioner appeared before the Honorable John C. Hayes III. In the intervening seven (7) months, Petitioner neglected to hire another attorney to represent him. (App. p. 26). At the beginning of the trial, Judge Hayes asked the Petitioner, "So you understand that you are waiving your right to have an attorney because you fired the one the State appointed and you haven't obtained one on your own. Do you understand that?" Petitioner responded, "Yes sir." (App. p. 26). Judge Hayes then asked Petitioner if he would like to have Mr. Thompson appointed as stand-by counsel, should Petitioner need any help. Petitioner agreed to this arrangement. (App. p. 27). Judge Hayes asked Petitioner if he was ready to proceed, and Petitioner responded, "Yes sir." (App. p. 28). Judge Hayes explained how the trial would proceed and asked Petitioner if he had any questions. Petitioner responded, "No sir." (App. p. 30).

At the PCR hearing, Petitioner testified that he repeatedly asked Mr. Thompson to turn over his discovery materials prior to trial. (App. p. 254). He sent Mr. Thompson a letter dated December 21, 2004, which stated, "I want every piece of paper you have on me and my jacket now and I have asked you for this before, and don't make me have to make your people make you do the right thing." (App. p. 256). Petitioner also testified that he knew Mr. Thompson no longer represented him at the time of trial. (App. p. 271-72). Petitioner testified that he cross-examined witnesses based off their statements they gave prior to trial. (App. p. 273). However, Petitioner testified that he did not receive the files from the solicitor until the day of the trial. (App. p. 282).

Don Thompson testified at the PCR hearing that he did not receive the Petitioner's full Rule 5 discovery materials because he was only on the case for two or three months. (App. p. 289). He further testified that he believed he sent Petitioner what he had received, with the caveat that it was not the full discovery. (App. p. 289). Thompson testified he did not turn over his file once he'd been relieved. He testified it was standard practice to retain the file, and that if Petitioner had requested the file, Thompson would have first made a copy of it and then turned the file over to Petitioner. (App. p. 289-90). Thompson testified that he had not received any discovery from the State at the time of Petitioner's preliminary hearing on October 5, 2004, and he was relieved on October 27, 2004. (App. p. 290). He testified he was not aware at what point in the intervening twenty-two (22) days the discovery materials came into his possession. (App. p. 290). He testified that the only requests from Petitioner that Thompson was aware of after he was relieved were for bond reductions. Thompson testified that he responded to Petitioner that he no longer represented him, and Petitioner needed to handle those issues himself. (App. p. 298).

The United States Supreme Court has established a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687, 104 S.Ct. 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant 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, 466 U.S. 668 at 674 (1984). Under the second prong, the PCR applicant "must show that there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). This Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them, and will reverse the decision of the PCR judge when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007). Vasquez v. State, 388 S.C. 447, 456, 698 S.E.2d 561, 565 (2010).

As a threshold matter, the State avers this Petition should be dismissed for failing to put forth a cognizable ground for post-conviction relief. It is axiomatic that in order to prevail on a claim of ineffective assistance of counsel, the Petitioner must actually have been represented by counsel at trial. Here, Mr. Thompson was relieved as counsel seven (7) months prior to trial, and the Petitioner elected to proceed *pro se*. Mr. Thompson was asked by the trial judge on the day of the trial to act as standby counsel. In fact, the trial judge specifically advised Mr. Thompson not to sit at counsel’s table with the Petitioner so there would be no confusion among the jury as to whether the Petitioner was, in fact, proceeding *pro se*. (App. p. 30-31). The Petitioner certainly had enough time in the intervening seven (7) months to both file his own discovery motions and hire another attorney if he chose to do so. Once Mr. Thompson was relieved as trial counsel, he no longer owed the Petitioner any duties related to the preparation of his defense. As such, this claim should be dismissed. However, the State has fully responded to Petitioner’s allegations of ineffective assistance of counsel below.

Assuming *arguendo* that Petitioner’s claim is cognizable as a ground for post-conviction

relief, Petitioner has not met his burden of proving Mr. Thompson's performance was deficient. The Petitioner argues that Mr. Thompson was deficient for failing to turn over the Petitioner's file in violation of Rule 1.16 of the South Carolina Rules of Professional Conduct. However, Mr. Thompson was not deficient for failing to turn over the Applicant's defense file after being relieved because trial counsel has no duty to automatically forward a copy of the defense file to a former client after representation is terminated. The Rules of Professional Conduct outlined in South Carolina Appellate Court Rule 407 are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. *Rule 407, Scope Section 7*. Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. *Id.* In addition, violation of a Rule does not necessarily warrant any other non-disciplinary remedy. *Id.* Although the Rules do not establish standards of conduct for lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct. *Id.* Further, South Carolina's Supreme Court has held that the Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction. *Langford v. State*, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993). Their purpose is to regulate and guide the legal profession by defining proper ethical conduct. *Id.* Nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty. *Id.*

Rule 1.16(d) provides guidance on the termination of representation by counsel. "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, [and] surrendering papers and property of which the client is

entitled". *Rule 1.16(d)*, Rule 407 SCACR.

Mr. Thompson was not deficient for failing to turn over the Petitioner's defense file as a matter of course. Rule 1.16(d) is to be used as a guidepost for lawyer conduct. The Rule does not create an affirmative legal duty that attorneys are to comply with. Rule 1.16(d) recommends that attorneys take reasonably practicable steps to protect the client's interests after the attorney-client relationship is terminated. It recommends further that counsel surrender papers and property to which the client is entitled. Although Mr. Thompson did not automatically turn over the Petitioner's defense file, he took reasonably practical steps to protect the Petitioner's interest. The Rule does not suggest that the surrender of the client's file be automatic or as a matter of course. Nor does it specify a specific timeframe for relinquishing such files.

Mr. Thompson's behavior was in compliance with Rule 1.16. He testified that the requests made by the Petitioner after he was relieved as counsel were in regard to obtaining a bond reduction for the Petitioner. Thompson testified further that it is not his general practice to turn over the contents of clients' files unless they request it. If the client requests the defense file contents, counsel testified that he sends a copy of the file to the client. Furthermore, Thompson did forward the Petitioner's file to him eventually. (App. p. 259). The Rules do not state a specific time limit which must be met in the surrender of a client's files, and they do not absolve the former client in any way of his need to continue to file the proper discovery requests. The fact that Mr. Thompson was originally assigned to represent the Petitioner and was later relieved does not remove the Petitioner's burden of obtaining discovery. Any new attorney who came on the case would certainly have been expected to file a discovery request, and there is no reason this task should not have reasonably fallen on Petitioner where he elected to proceed *pro se*. Once

Mr. Thompson was relieved as trial counsel, his duty to represent Petitioner was completed.

Counsel also protected the Petitioner's interest by insuring that he was relieved in enough time for the Petitioner to obtain new counsel prior to trial. Thompson testified that he was relieved as counsel shortly after the Petitioner's preliminary hearing. This is reflected in the record of the motion hearing where counsel was relieved. The judge gave the Petitioner thirty (30) days to obtain new counsel before his case would be set for trial. Petitioner had almost seven (7) months between the time Thompson was relieved and the time he went to trial. That is seven (7) times longer than the judge told him he would have to prepare. During this gap, he apparently took no steps to prepare for trial. He did not hire new counsel, and he did not file his own discovery requests. Petitioner's claim of lack of knowledge of legal procedures (App. p. 278) does not excuse him for his failure to adequately prepare for trial. After all, Judge Hayes warned him at the hearing where Mr. Thompson was relieved that he might have to represent himself, and the Petitioner acknowledged that he understood. (App. p. 7-8). Accordingly, Mr. Thompson acted in a professionally reasonable manner within the guidelines outlined in the Rules of Professional Conduct. As such, he was not deficient for failing to turn over the Petitioner's defense file prior to trial.

Furthermore, the Petitioner has still failed to meet his burden of proving the second element of the Strickland test. Petitioner's brief argues that the facts of his case warrant presumed prejudice. This argument is unwarranted. Petitioner argues that "counsel's actions resulted in a *pro se* litigant proceeding to trial without discovery." (Cert. Pet. 8). However, Petitioner's reasoning is based on mischaracterization of the facts. Petitioner did not proceed to trial *pro se* and without discovery through any fault on Mr. Thompson's part. Petitioner had

seven (7) months to hire new counsel and file his own discovery motions. He apparently elected, instead, to use this time to write multiple threatening letters to Mr. Thompson, a strategy which ultimately did not work out in his favor. Even so, Mr. Thompson still agreed to act as standby counsel throughout Petitioner's trial. However, Petitioner elected not to consult with Mr. Thompson on any issues during the trial. (App. p. 297). As such, prejudice cannot be inferred from any action or lack thereof by Mr. Thompson.

Petitioner's second argument in support of a showing of prejudice is also meritless. Petitioner argues that "information contained in the fire department incident report, included in the discovery material provided ... by counsel after trial, could have been used to impeach the credibility of the State's witness in regard to the extent of the damage cause by the fire." (Cert. Pet. 9). However, Petitioner has failed to show how exactly the evidence would have been used to impeach the witness, other than to say she may have been exaggerating the amount of damage. (App. p. 305). However, according to the statute under which Petitioner was convicted, the amount of damage is irrelevant:

(B) A person who willfully and maliciously causes an explosion, sets fire to, burns, or causes to be burned or aids, counsels, or procures a burning that results in damage to a dwelling house, building, structure, or any property whether the property of himself or another, which results, either directly or indirectly, in serious bodily injury to a person is guilty of the felony of arson in the second degree and, upon conviction, must be imprisoned not less than three nor more than twenty-five years.

S.C. Code Ann. § 16-11-110

Therefore, the amount of damage, even if exaggerated, would have no bearing on the Petitioner's guilt or innocence. Furthermore, Petitioner was also convicted of 1st degree burglary and sentenced to a concurrent term equal to the term he received on the arson conviction. So even if

Petitioner was somehow able to persuade the jury he was not guilty of arson, he has put forth no argument as to how or if he was prejudiced on the burglary conviction. As such, Petitioner has failed to show the existence of any prejudice.

Petitioner failed to meet his burden of proving that trial counsel provided ineffective assistance of counsel. Petitioner has failed to satisfy either prong of the Strickland test: counsel's conduct was not so egregious that it fell below prevailing professional norms, nor was Petitioner so prejudiced by counsel's conduct that a different outcome would likely have occurred. As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

Clearly probative evidence exists to support the findings of the post-conviction relief judge.

## CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By:   
ATTORNEYS FOR RESPONDENT

Sept. 12, 2013

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO CHEROKEE COUNTY  
Court of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge

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Circuit Case No.: 2011-CP-11-0148  
Appellate Case No.: 2012-213169

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JIMMY LITTLEJOHN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

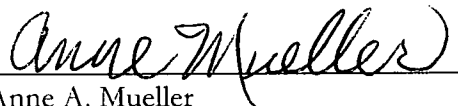
Respondent.

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**CERTIFICATE OF SERVICE**

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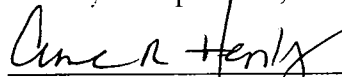
The undersigned hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari was served upon Petitioner by depositing the same in the United States mail, postage prepaid, addressed to his attorney of record, Kathrine H. Hudgins, Esquire, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina, 29211, on this the 12<sup>th</sup> day of September, 2013.



Anne A. Mueller

Legal Assistant for Respondent

SWORN to before me this  
12<sup>th</sup> day of September, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: 7/18/2017



ALAN WILSON  
ATTORNEY GENERAL

PCR DIVISION: 803.734.3737  
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September 12, 2013

**RECEIVED**

SEP 12 2013

**S.C. Supreme Court**

*Via Hand Delivery*

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

**RE: Jimmy Littlejohn v. State of South Carolina**  
**Circuit Court Case No: 2011-CP-11-0148**  
**Appellate Case No.: 2012-213169**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter I am serving opposing counsel with this return today.

With highest regards,

Suzanne H. White  
Assistant Attorney General

SHW/aam  
Enclosures

cc: Kathrine H. Hudgins, Esquire (w/enclosure)