

STATE OF SOUTH CAROLINA  
In The Supreme Court

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MAY 13 2015

CERTIORARI TO SUMTER COUNTY  
Court of Common Pleas

S.C. Supreme Court

The Honorable George C. James, Jr., Circuit Court Judge  
Case No. 2013-CP-43-0037

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Appellate Case No. 2014-001566

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RUSSELL EARLEY.....RESPONDENT,

v.

STATE OF SOUTH CAROLINA.....PETITIONER.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

1. The PCR Court correctly found that trial counsel was ineffective in failing to object and requesting a mistrial when Respondent was impeached by his comments posted on the Victim's Facebook page.

## STATEMENT OF THE CASE

Respondent is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. The Respondent was true bill indicted at the July 2009 term of the Sumter County Grand Jury for Criminal Solicitation of a Minor. (2009-GS-43-712). Charles T. Brooks, III, Esquire, represented Respondent. Respondent proceeded to trial and on July 19, 2012, Respondent was found guilty. The Honorable Benjamin H. Culberston, sentence Respondent without negotiations and recommendations to eight years imprisonment.

A Notice of Appeal was filed with the South Carolina Court of Appeals. An Order of Dismissal was issued on September 21, 2012, after Respondent notified the Court of his desire to withdraw the appeal. The Remittitur was issued on October 8, 2012.

Petitioner filed an application for PCR on January 7, 2013 (2013-CP-43-37). The State made its Return on or about April 9, 2013, and the matter was scheduled for an evidentiary hearing before the Honorable George C. James, Jr., on February 24, 2014. Petitioner was present and represented by Tommy Thomas, Esq. The State was represented by Daniel Gourley of the Office of the South Carolina Attorney General. In a written order signed June 30, 2014, Judge James granted Petitioner's Application. The State Appealed Judge James' Order.

## STANDARD OF REVIEW

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

For an Respondent to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984).

If there is any evidence to support finding of Post Conviction Relief, then those findings must be upheld. Holland v. State 322 S.C. 111, 470 SE 2<sup>nd</sup> 378 (1996).

## ARGUMENT

**The PCR Court correctly found that trial counsel was ineffective in failing to object and requesting a mistrial when Respondent was impeached by his comments posted on the Victim's Facebook page.**

In the original trial the Respondent testified in his own defense. On cross-examination, the solicitor asked the Respondent if he had had any direct contact with the victim from the day of the incident up to the time of the trial, a period of almost four years. (App. p. 182, line 5-19). The Respondent, under oath, stated that he had not had any contact with the Victim since the date of the incident. (App. p. 182, lines 5-21). However, the solicitor had a copy of victim's Facebook page illustrating that Petitioner had posted a message on the Victim's Facebook wall the week before the trial. The message simply stated "see ya." (App. p. 182, lines 5-21). After petitioner denied having had any contact with the Victim, the solicitor impeached his with his message. (App. p. 182, lines 20-23).

Trial counsel testified that he was aware that the victim's Facebook page had a cartoon of a man with a caption reading "Smoke weed all day" and that the Respondent was aware of that (App. p.331, Lines 6-16). He testified that unbeknownst to him, the Respondent had posted a message on the victim's Facebook page the week prior to trial saying something to the effect of "See ya"(App. p. 314, lines 2-12). He summarized the solicitor's cross-examination of the Respondent about any communication with the victim, and that the Respondent denied any communication. However, the solicitor then brought out the Facebook posting and the Respondent admitted that communication. (App. p. 314, lines 10-21) Trial counsel testified that the Respondent did not tell him about the Facebook posting. He testified that the cross-examination on that issue was

devastating because the Respondent was caught in a blatant lie and the sole issue in the case was the credibility of the victim and the Respondent. He testified that if he had known about it, he would have advised the Respondent to either not testify or to not deny communicating with the victim.

The PCR Court found that the comment posted on the Victim's Facebook page was a "statement" made by the Respondent, the existence of which was known to the State under Rule 5 (a)(1)(A). (App. p. 346). In finding that the comment was a "statement" the PCR Court concluded that comment was typed by the Respondent and electronically transmitted to the victim. (App. 346-347). The PCR Court further found that the "statement" was relevant, as used by the State for the purpose of attacking the Respondent's credibility and for the purpose of establishing the inference that the Respondent was attempting to intimidate the victim. (App. p. 346-347). The PCR Court concluded that the Facebook comment made by Respondent was ultimately relevant to the issue of credibility. (App. p. 349). The PCR Court further found that the Facebook comment was material to the preparation of Respondent's defense. In support of his finding, the PCR Court noted Trial Counsel's testimony that had he known about the comment, he would have counseled Respondent to be truthful under oath when questioned about the Facebook comment. (App. p. 317, line 4-25 – p. 318, lines 1-25)

Additionally, the PCR Court found the Respondent was prejudiced because had Trial Counsel objected and moved for a mistrial, the Trial Court would have been required to grant a mistrial. (App. p. 349). The PCR Court found curative instruction would not have been sufficient to cure the prejudice resulting from the State's failure to disclose the statement. (App. p. 348). The PCR Court concluded that trial Counsel's

failure to move for a mistrial left Petitioner's credibility severely damaged with little room for rehabilitation.

The PCR Court further found that in State v. Lawton, S.C. 122, 675 S.E. 2d 454 (Ct. App. 2009), the Court of Appeals considered whether a letter written by the defendant to his ex-wife was a "statement" under Rule 5, SCRCrP. Before trial, he wrote his ex-wife a letter in which he stated, "I know that my story is full of lies, but no more than hers, mine just have to be better than hers." The letter was not disclosed to the defense. The Defendant testified and the solicitor produced the letter on cross-examination, and the defendant objected based on the State's failure to disclose in violation of Rule 5 (a)(1)(A). The State argued Rule 5 did not apply because the statement was used on cross-examination. The trial judge overruled the objection on that basis. The Trial Court further stated that the letter involved Lawton's credibility, which the trial court viewed as merely collateral, thereby rendering the letter not "relevant" within the meaning of Rule 5(a)(1)(A). On Appeal, the Court of Appeals held that the letter should have been disclosed to the defense because it was "clearly relevant". The Court also ruled that the statement was also material to the preparation of Lawton's defense under Rule 5 (a)(1)(C) (App. p. 345).

The PCR Court in considering the Lawton case decision found that the Lawton Court held the State must produce statements relevant to the issue of credibility. Though Lawton's letter in and of itself raised direct issues of credibility, the Facebook posting made by the Respondent was ultimately relevant to the issue of credibility.

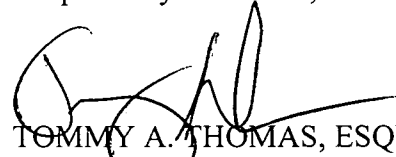
The PCR Court concludes that "The trial Judge would have been compelled, upon proper motion, to grant a mistrial. A curative instruction would not have been sufficient

to cure the prejudice resulting from the State's failure to disclose the statement. Again, victim/defendant credibility was the paramount, if not the sole, issue for the jury to determine. Trial counsel's failure to move for a mistrial left the Applicant's credibility severely damaged with little room for rehabilitation. (App. p. 348-349)

### CONCLUSION

For the reasons stated above, this Court should affirm the PCR Court's ruling and deny the Petition for Writ of Certiorari. If this Court grants certiorari, the Respondent asks permission under the rules to brief the issue discussed above fully.

Respectfully submitted,



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May \_\_, 2015

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

The Honorable George C. James, Jr., Circuit Court Judge

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Appellate Case No.: 2014-001566

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Russell Earley, ..... Respondent,

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State of South Carolina, .....Petitioner.

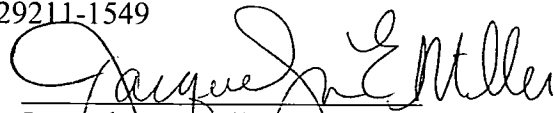
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CERTIFICATE OF SERVICE

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I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Applicant hereby certify that I placed in the United States Mail, a copy a Return to Petition for Writ of Certiorari with postage prepaid and the return address clearly shown on said envelope to Daniel Gourley, Esq. of the Attorney General's Office, at:

Daniel Gourley, Esq.  
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P.O. Box 11549  
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May 11, 2015  
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May 11, 2015

The South Carolina Supreme Court  
Daniel E. Shearouse, Clerk of Court  
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MAY 13 2015

RE: Russell Earley #199848 v. State  
Appellate Case No.: 2014-001566

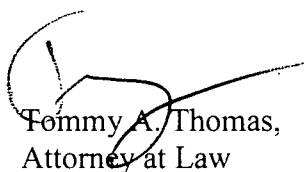
**S.C. Supreme Court**

Dear Sir or Madam:

Enclosed please find for filing, an original and a copy of a Return to Petition for Writ of Certiorari and Certificate of Service by Mail in the above referenced matter. Kindly return a clocked copy to me in the enclosed envelope.

Thank you and should you have any questions, please feel free to contact me.

Yours truly,

  
Tommy A. Thomas,  
Attorney at Law

TAT/jem  
cc: Daniel Gourley, Esq.  
Russell Early #199848