

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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NOV 17 2015

SC Court of Appeals

APPEAL FROM YORK COUNTY  
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

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Appeal Case No. 2013-002580

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Christopher A. Wellborn, ..... Petitioner,

v.

The City of Rock Hill, ..... Respondent.

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PETITION FOR A WRIT OF CERTIORARI

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## CERTIFICATE OF COUNSEL

The Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 23, 2015.

### QUESTIONS PRESENTED

- I. **THE COURT OF APPEALS ERRED IN FINDING THAT THE CIRCUIT COURT PROPERLY FOUND THAT THE MUNICIPAL COURT JUDGE DID NOT ERR IN HOLDING THE PETITIONER IN CRIMINAL CONTEMPT WHEN THERE WAS NO RECORD OF THE MUNICIPAL COURT PROCEEDINGS.**
- II. **THE COURT OF APPEALS ERRED IN FINDING THAT THE MUNICIPAL COURT JUDGE WAS NOT REQUIRED TO RECUSE HIMSELF.**
- III. **THE COURT OF APPEALS ERRED IN FINDING THAT THE PETITIONER'S CONDUCT WAS NOT REQUIRED TO VIOLATE SECTION 22-3-950 OR SECTION 40-5-510 BECAUSE THE MUNICIPAL JUDGE HAD THE INHERENT AUTHORITY TO PUNISH CRIMINAL CONTEMPT.**

### STATEMENT OF THE CASE

The Petitioner is an attorney licensed in the State of South Carolina. On January 16, 2013, the Petitioner represented David H. Cullen on a charge of reckless driving in a jury trial in the Rock Hill Municipal Court. The day before the trial date, the Petitioner was assured by the Solicitor that if Mr. Cullen's case was going to be called to trial the next day, that the Solicitor would call the Petitioner by the end of the day and let him know. The Petitioner did not receive any call from the Solicitor. The next day, having received no call or any other form of communication from the Solicitor, and relying upon the assurance of the Solicitor, the Petitioner drove to Charlotte, North Carolina to have his car serviced. While waiting on his car, the Petitioner received a telephone call from the Solicitor telling him that the Court was selecting a

jury in Mr. Cullen's case and the trial would commence after jury selection. The Petitioner managed to arrive in court as quickly as he was able to obtain his car, calling Mr. Cullen en route. At the time the Petitioner arrived, a jury had already been selected. Mr. Cullen was not able to arrive until later.

According to the Verified Petition filed by Judge Lenzi, the Petitioner asked for permission to advise the jury during his opening statement as to why neither he nor his client were present for jury selection. According to the Verified Petition, the Court denied that request and instructed the Petitioner not to make any comment concerning his or his client's tardiness in appearing for Court in any manner in the jury's presence.<sup>1</sup> The Verified Petition alleges that, "as he was leaving the Courtroom, Mr. Wellborn in the jury's presence, once again stated he wanted to explain to the jury why he and his client were late in arriving to Court".<sup>2</sup> Prior to the contempt hearing of this matter, the Petitioner filed a Motion for Recusal on March 20, 2013. The matter came for a hearing on March 25, 2013. The Motion for Recusal was denied. The trial Judge presided over the hearing, but did not testify or subject himself to cross-examination. During the hearing, the Petitioner testified that at the time of the trial, Judge Lenzi ruled that neither parties were to go into any detail or explanation as to why the Petitioner or his client were late or not present during the time of jury selection. The Petitioner testified that he asked after opening statements that he be allowed to go out into the hall to see if his client had arrived. The Petitioner's testimony was that he made no further comment regarding his lateness to court during the entire course of the trial either in the jury's presence. The trial Judge found the Petitioner in criminal contempt of court for requesting, in the presence of the jury, permission to explain to the jury why he and his client were late for court and fined the Petitioner \$500.00.

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<sup>1</sup> A.19, R. p. 18

<sup>2</sup> A.20, R. p. 19.

Judge Lenzi issued a written Order on March 28, 2013, in which the Petitioner was held in criminal contempt of court on two of the five allegations alleged in the Petition that had been filed by the Judge. The Petitioner timely filed an appeal to the Court of Common Pleas in York County, South Carolina. The appeal was heard on August 3, 2013, by the Honorable John C. Hayes, III. Judge Hayes issued a written Order dated September 25, 2013, that was filed October 2, 2013. In Judge Hayes' Order the Court reversed one of the findings of contempt against Petitioner and upheld the other finding of contempt. The Petitioner timely filed a Motion to Reconsider. The Court issued an Order dated November 6, 2013, that was filed on November 13, 2013, denying the Motion to Reconsider. On November 29, 2013, the Petitioner filed a Notice of Appeal to the South Carolina Court of Appeals. The Court of Appeals issued its decision on August 12, 2015, upholding the decision of the lower court. The Petitioner filed a Petition for Rehearing on August 26, 2015, which was denied on October 23, 2015. The Petitioner seeks a Writ of Certiorari to review that decision.

### **ARGUMENTS**

**I. THE COURT OF APPEALS ERRED IN FINDING THAT THE CIRCUIT COURT PROPERLY FOUND THAT THE MUNICIPAL COURT JUDGE DID NOT ERR IN HOLDING THE PETITIONER IN CRIMINAL CONTEMPT WHEN THERE WAS NO RECORD OF THE MUNICIPAL COURT PROCEEDINGS.**

Before a person may be held in criminal contempt the record must be clear and specific as to the acts or conduct upon which such finding is based. State v. Harper, 297 S.C. 257, 376 S.E.2d 272 (1989). Contemptuous conduct must be clearing and specifically reflected in the record. State v. King, 306 S.C. 335, 412 S.E.2d 375 (S.C. 1991); Brasington v. Shannon 288 S.C. 183, 341 S.E.2d 130 (S.C. 1986). There was no record made of the proceedings in which

the Petitioner was representing his client therefore no records of those proceedings exist.<sup>3</sup> The Court of Appeals found that, “the Municipal Judge did not err in holding the Petitioner in criminal contempt for conduct not recorded in a trial transcript because the Municipal Judge’s Contempt Order clearly and specifically stated how the Petitioner’s conduct violated the court Order”.

While the Municipal Judge’s Contempt Order stated how the Petitioner’s conduct allegedly violated a court order, there was no record of the trial in which the alleged criminal contempt occurred. Since there was no record of the trial in which the alleged criminal contempt occurred there was no way a reviewing court could determine if in fact the Petitioner’s conduct was contemptuous. It is important for the reviewing court to be able to review the record because there was a factual dispute as to the alleged contemptuous conduct. Without a record there is no way that a reviewing court could determine if the trial judge abused his discretion in holding the Petitioner in criminal contempt. The case of Carly v. Hallie, 277 S.C. 377, 382, 287 S.E.2d 915, 918, (1982) cited in the decision, involves a case in which the Petitioner violated a Family Court custody order. In that case, the conduct did not occur in court but occurred outside the presence of the court. In that situation, a hearing can be held to determine if contempt occurred. In the present case, the alleged contempt occurred in the presence of the Court, no witnesses testified as to the contempt. Therefore, it was incumbent upon the Court that the Court have a record of the proceedings.

There was a factual dispute between the trial judge and Petitioner as to what actually occurred. According to the Verified Petition filed by Judge Lenzi, he instructed the Petitioner not to make any comment about he or his client’s tardiness in appearing for Court in any manner in the jury’s presence. Judge Lenzi alleged in his Verified Petition that the Petitioner made a

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<sup>3</sup> A.118, R. p. 117, line 10-18.

request in the jury's presence to explain to the jury why he and his client were late in arriving to Court. The Petitioner denied the allegation of the Petition.<sup>4</sup> In the present case the judge holding the contempt hearing and making a factual finding was the same judge who was making the allegation. There is no trial record which substantiates allegations made by Judge Lenzi. Judge Lenzi held the contempt proceedings. Judged the credibility of the Petitioner's testimony and prosecuted the allegations of criminal contempt against the Petitioner. The lack of a record of the trial proceedings was needed to ensure due process and afford the Petitioner his 6<sup>th</sup> Amendment Right to confrontation as well as afford him the opportunity to be fully heard in his defense. (Art. I, Sec. 4, S.C. Constitution)

**II. THE COURT OF APPEALS ERRED IN FINDING THAT THE MUNICIPAL COURT JUDGE WAS NOT REQUIRED TO RECUSE HIMSELF.**

At the beginning of the contempt proceedings, the petitioner's Counsel moved that the Judge recuse himself. The motion for recusal was denied. The factual allegations which allegedly constituted the contempt were made by the Municipal Judge by way of a Verified Petition. The Petitioner denied the factual allegations of the Petition. The Court of Appeals cited Rule 501, Canon 3.E(1)(d)(IV) of the SCARC, which requires the Judge to disqualify himself or herself in a proceeding in which the Judge's impartiality might reasonably be questioned, including incidences where he or she is likely to be a material witness. The nature of this case required the finder of fact to make a determination as to which version of the events occurred. There was a conflict as to the allegations made by the trial Judge in the Verified Petition and the testimony of the Petitioner. There was no record of the proceedings in the Municipal Court so there is no record of what actually occurred. This is precisely the situation which Rule 501, Canon 3.E(1)(d)(IV) of the SCARC contemplates. The Petitioner's credibility

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<sup>4</sup> A. 97, R. p. 96, line 12-23.

as a witness was judged by the same individual who made the allegations. Obviously, the individual making the allegations cannot fairly and impartially make a ruling on whether or not the allegations are true. This is a clear case in which a Judge was required to recuse himself.

**III. THE COURT OF APPEALS ERRED IN FINDING THAT THE PETITIONER'S CONDUCT WAS NOT REQUIRED TO VIOLATE SECTION 22-3-950 OR SECTION 40-5-510 BECAUSE THE MUNICIPAL JUDGE HAD THE INHERENT AUTHORITY TO PUNISH FOR CONTEMPT.**

The Court of Appeals found that it was not necessary to address whether the Petitioner's conduct came within the preview of Section 22-3-950 or Section 40-5-510 because the Municipal Judge has the inherent authority to punish for criminal contempt. While a municipal judge does have the inherent authority to punish for contempt, the actions that may constitute the contempt are controlled by Section 22-3-950 or Section 40-5-510. The statutes control what constitutes disorderly conduct.

Section 22-3-950 provides that a magistrate may punish for contempt a person who, "shall offer an insult to the magistrate or a juror or is willfully guilty of an undue disturbance of the proceedings before the magistrate while sitting officially". There is no evidence from proceedings that the Petitioner, requesting permission to inform the jury why he and his client were late was offered an insult to the Judge or caused an undue disturbance in the proceedings. Therefore Section 22-3-950 does not apply to Petitioner's alleged conduct.

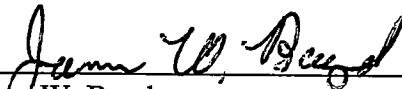
Although the Court did not make a finding as to violation of Section 40-5-510 the Court of Common Pleas found that Petitioner's alleged conduct constitutes, "an open and direct contempt of Court", in violation of Section 40-5-510 South Carolina Code of Laws. Section 40-5-510 provides for consequences for attorney's if, "in the presence of such Court, they are guilty of any disorderly conduct causing an interruption of business or amounting to an open and direct

contempt to the Court, its authority or person.” This section requires two elements. The first is that there must be disorderly conduct on the part of the attorney. The second is that the disorderly conduct must cause a disruption of business or amount to an open or direct contempt of the Court, its authority or person. While disobedience to a Court order may amount to an open and direct contempt to the Court it does not necessarily constitutes disorderly conduct. In this case, there is no evidence that the Petitioner engaged in disorderly conduct. The Petitioner is to have alleged to have made a request to the Court in the presence of the jury in violation of a Court order. There was no evidence or testimony that the alleged request caused a disruption or that the Petitioner acted in a disorderly manner in making the request. Therefore, Section 40-5-510 does not apply to this case.

#### CONCLUSION

For the reasons stated, Petitioner asks this Court to grant the petition for a Writ of Certiorari.

Respectfully submitted,



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November 12, 2015  
Rock Hill, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM YORK COUNTY  
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

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Christopher A. Wellborn, ..... Petitioner,

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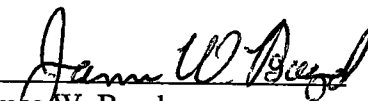
The City of Rock Hill, ..... Respondent.

PROOF OF SERVICE

I, James W. Boyd, certify that I served the within Petition for a Writ of Certiorari and Appendix on Respondent by depositing a copies of the same in the United States mail, postage prepaid, addressed to its attorney of record, Christopher Barton, Senior Solicitor and Paula Knox Brown, Assistant Solicitor, 201 E. Main Street, 3<sup>rd</sup> Floor, Rock Hill, SC 29730.

I further certify that all parties required by Rule 226(b) to be served have been served.

November 13, 2015

  
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NOV 17 2015

SC Court of Appeals

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November 13, 2015

Supreme Court of South Carolina  
Mr. Daniel Shearouse, Clerk of Court  
PO Box 11330  
Columbia, SC 29211

RE: Appeal Case No. 2013-002580

Enclosed you will find a Petition for Writ of Certiorari, Appendix and Proof of Service for the above title and matter. Thank you for your attention in this matter.

With king regards, I am

Sincerely,

  
James W. Boyd

JWB/klc  
Enclosure

cc: Rock Hill City Solicitor's Office  
South Carolina Court of Appeals

James W. Boyd  
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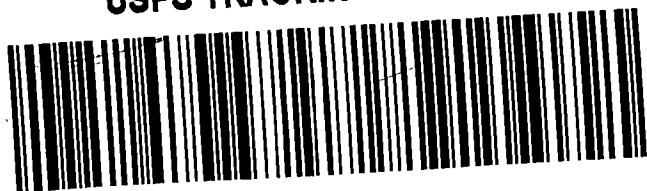
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The Honorable **Jenny Abbott Kitchings**  
Clerk of the South Carolina Court of Appeals  
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**SC Court of Appeals**

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