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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
In the Supreme Court

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CERTIORARI TO CHARLESTON COUNTY  
Court of Common Pleas  
Roger M. Young, Circuit Court Judge

Appellate Case No. 2018-001583

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MICHAEL DAYSE,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

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ALAN WILSON  
Attorney General

BENJAMIN LIMBAUGH  
S.C. Bar No. 103334  
Assistant Attorney General

Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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## **RESPONDENT'S ISSUES PRESENTED**

Did the post-conviction relief court properly dismiss Petitioner's application where Petitioner was not present at the evidentiary hearing and did not correspond with his appointed counsel beforehand?

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## STATEMENT OF THE CASE

Petitioner's trial, unable to extend to Friday, September 8, 2017 due to the courts being closed, lasted one day. App. 134 11. 7-10. After a note from the deliberating jury was read at 5:27 p.m., trial court brought the jury back into the courtroom to answer multiple questions. App. 242 1. 22 - App. 246 1. 16. Minutes later, the jury found Petitioner guilty as indicted. App. 246 1. 24 - App. 247 1. 19. Judge Newman sentenced Petitioner to five years' incarceration suspended after eighteen months, with three years' probation. App. 257 11. 7- 13.

Petitioner filed an application for post-conviction relief on December 14, 2017. App. 261 270. It contained allegations of ineffective assistance of counsel, including claims that trial counsel was not prepared for trial. App. 268. The state made its Return on or about March 19, 2018. App. 271 -275.

An evidentiary hearing was scheduled for May 24, 2018 before the Honorable Roger M. Young. App. 276. Christopher Murphy represented Petitioner, and Kelly Oppenheimer appeared on behalf of the state. The PCR court dismissed Petitioner's action for failure to prosecute after Petitioner did not appear. App. 277 1.2- App. 278 1. 9. An Order dismissing the case for failure to prosecute was signed on May 24, 2018. App. 280.

Petitioner then filed a pro se Notice of Appeal with this Court which indicated that he did not receive notice of the hearing date. This petition follows.

## ARGUMENT

The PCR court properly dismissed Petitioner's post-conviction relief action for failure to prosecute after Petitioner did not appear at the evidentiary hearing and had time to get in touch with his appointed counsel.

The plaintiff has the burden of prosecuting his action, and the trial court may dismiss an action for plaintiffs unreasonable neglect in proceeding with his cause. Don Shevev & Spires, Inc. v. American Motors Reality Corp., 279 S.C. 58, 301 S.E.2d 757 (1983). In those cases where this Court has affirmed dismissal of actions based on a failure to prosecute, the dismissals were imposed to maintain the orderly disposition of cases in the face of repeated warnings to the offending party or multiple opportunities to proceed with trial, and only then upon a finding of unreasonable neglect. See Small v. Mungo, 254 S.C. 438, 443, 175 S.E.2d 802, 804 (1970) (finding no abuse of discretion where counsel was apparently in his office and plaintiff and witnesses were at work when case was called for trial, and counsel informed the court that he could not appear for hours); Bond v. Corbin, 68 S.C. 294, 294-95, 47 S.E. 374, 374 (1904).

The Fourth Circuit has said that the trial court must consider four factors before dismissing a case for failure to prosecute: (1) the plaintiffs degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal. Hillig v. Comm'r, 916 F.2d 171, 174 (4th Cir. 1990). The Court of Appeals has found dismissal too harsh a sanction in a case where the plaintiff inadvertently was not present at the start of trial. McComas v. Ross, 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006). Importantly, the Court in Hillig held that the standard of review is abuse of discretion by the trial court. Hillig v. Comm'r, 916 F.2d 171, 174 (4th Cir. 1990)

Petitioner argues that his involvement throughout his case excuses his lack of appearance at the evidentiary hearing. Petitioner cites to his testimony at his trial, the filing of an in-depth post-conviction relief application, correspondence with the Charleston County clerk of court, and the filing of a pro se Notice of Appeal. Petitioner's past involvement, and even his filing of the pro se Notice of Appeal, does not excuse being inexplicably absent from his evidentiary hearing. The evidentiary hearing transcript shows that the bailiff went out into the hall and called Petitioner's name three times. App. 277 ll. 3-7. Counsel stated that he had not heard from Petitioner during his representation. App. 277 ll. 11-13. Counsel stated on the record that when an Applicant is not incarcerated he attempts to find the person using the internet or by calling probation to get an up-to-date address and that he was unable to do so throughout the representation. App. 277 ll. 14-24. The State then moved to dismiss for failure to prosecute. App. 277 l. 25 – App. 278 l. 9.

Petitioner was thoroughly involved throughout his case, but was not involved during the PCR process. The Charleston County clerk of court sends notice for the appointment of counsel to inmates, so it follows that the clerk would have sent notice to Petitioner as well. Petitioner made no effort to get in touch with counsel throughout the representation to inquire as to the status of the case or as to when a hearing may be set. Counsel stated he did not have contact information for Petitioner, however, Petitioner also made no effort to get in contact with counsel. This Court has held that Petitioner did not act with unreasonable neglect where Petitioner made numerous efforts to get in touch with counsel, including telling him why he was unable to appear. Hamilton v. State, No. 2005-MO-019, 2005 WL 7145267, at 1 (S.C. May 16, 2005). This Court has also held where a plaintiff, first on the trial docket, is absent on the first day of trial, on the afternoon of trial, and again the next morning, a dismissal for failure to prosecute is proper.

Bond v. Corbin, 68 S.C. 294, 47 S.E.374 (1904). Petitioner has failed to offer evidence, other than alleging he was not notified of the hearing, the he did not act with unreasonable neglect in this case. The PCR court did not abuse its discretion by dismissing this case for Petitioner's failure to prosecute.

### CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON  
Attorney General

BENJAMIN HUNTER LIMBAUGH  
S.C. Bar No. 103334  
Assistant Attorney General

By: *Benjamin Limbaugh*  
ATTORNEYS FOR RESPONDENT

Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

September 20, 2019

STATE OF SOUTH CAROLINA  
In the Supreme Court

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CERTIORARI TO CHARLESTON COUNTY  
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Roger M. Young, Circuit Court Judge

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Appellate Case No. 2018-001583

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MICHAEL DAYSE

PETITIONER

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

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**CERTIFICATE OF SERVICE**

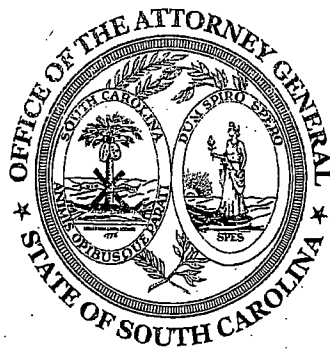
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The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by hand-delivering two copies addressed to:

**Victor R. Seeger, Esquire**  
**S.C. Commission on Indigent Defense**  
**1330 Lady Street, Suite 401**  
**Columbia, SC 29201**

This 20<sup>th</sup> day of September, 2019.

  
\_\_\_\_\_  
Jennifer Jennison  
Legal Assistant for Respondent



ALAN WILSON  
ATTORNEY GENERAL

September 20, 2019

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SEP 20 2019

S.C. SUPREME COURT

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

**RE: Michael Dayse v. State of South Carolina**  
**Appellate Case No.: 2018-001583**

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Petition for Writ of Certiorari** in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Benjamin H. Limbaugh  
Assistant Attorney General  
S.C. Bar # 103334

BHL/jaj  
Enclosures

cc: Taylor D. Gilliam, Esquire  
Victim Advocacy Division