

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM CHESTERFIELD COUNTY  
The Honorable J. Michael Baxley, Circuit Court Judge

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Appellate Case No. 2012-208587

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THE STATE

APPELLANT,

RECEIVED

JUL 12 2013

SC Court of Appeals

V.

GRAHAM FRANKLIN DOUGLAS,

RESPONDENT.

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RESPONSE IN OPPOSITION TO RESPONDENT'S MOTIONS TO DISMISS

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Comes now Appellant, above named, by and through the Attorney General of South Carolina, and hereby opposes Respondent's Motion to Dismiss Appeal filed on June 18, 2013. The notice of appeal filed by Appellant was timely.

This appeal stems from the grant of a Motion to Dismiss under the Protection of Persons and Property Act filed by Respondent on April 23, 2012. An evidentiary hearing on the motion was conducted before the Honorable J. Michael Baxley, Circuit Court Judge on October 2-3, 2012. Respondent was present and was represented by S. Jahue Moore, Esquire, M. Brooks Biediger, Esquire, and M.W. Cockrell, III, Esquire. Appellant, the State, was represented by Solicitor Ernest A. Finney, III and Assistant Solicitor Tyler B. Brown, both of the Solicitor's Office of the Third Judicial Circuit.

On November 5, 2012, Judge Baxley filed a letter with the Chesterfield County Clerk of Court indicating that he planned to grant immunity under the Persons and Property Act in this case. In the letter, Judge Baxley requested defense counsel prepare a proposed Order, send the proposed Order to the Solicitor to review for misstatement of facts and ensure the State's position was accurately reflected; and then to the judge for review.

Counsel for Respondent provided Judge Baxley with a proposed Order on or around November 8, 2012. By letter filed November 14, 2012, the State requested Judge Baxley reconsider his decision and his request for a proposed order from Respondent. On December 18, 2012, Judge Baxley provided counsel for both parties a copy of his final proposed Order granting immunity in this case. In the email containing the proposed Order, the judge requested further comments and argument be provided on December 27, 2012.

On January 4, 2013, Judge Baxley filed the signed Order Granting Immunity and Dismissing Criminal Charges. The Third Circuit Solicitor's Office received a copy of the filed Order on January 7, 2013. The State served and filed its Notice of Appeal on January 14, 2013.

Appellant has filed two motions to dismiss in this appeal. The first, filed by S. Jahue Moore and Brooks Biediger asserts the filing of the notice of appeal was untimely; Appellant alleges the notice could only be timely filed if filed in response to Judge Baxley's November 5, 2012 letter.

The second motion asserts two arguments. First, Appellant again contends the Notice of Appeal was untimely because it should have been filed in response to the

November 5, 2012 letter. Second, Appellant contends the appeal should be dismissed because Mr. Cockrell was not served with the Motions for Extension and the Initial Brief of Appellant, and because the initial request for an extension was untimely.

**I. The November 5, 2012 letter did not constitute a ruling or order.**

Respondent contends the letter filed by Judge Baxley on November 5, 2012 constituted the ruling being appealed in this case. This assertion is without merit.

On November 5, 2012, the hearing judge informed to parties how he intended to rule on the Motion for Immunity. In the letter, the judge specifically stated that he did not intend for the letter to constitute his order on the motion:

Because this decision is directly appealable, rather than having judgment rendered by this letter, Attorneys Cockrell and Moore are requested to prepare a proposed formal Order within thirty (30) days of the date of this letter detailing the decision stated herein, containing appropriate facts in evidence and supporting legal citations, and forward the same to opposing counsel. Solicitor Finney is not asked to agree or consent to this proposed Order, but is requested to review it for mistake of fact or misstatement of the State's position. Thereafter, Attorney Moore is asked to forward the proposed Order electronically to this office in Word format for signature, which will then be reviewed, finalized, signed, and returned to Attorney Cockrell for filing and formal service on the parties.

(November 5, 2012 Letter at pp. 3-4). The trial court's later correspondence regarding the proposed order further indicate that the November 5, 2012 letter was not the court's final ruling on the Motion for Immunity. In the December 18, 2012 email to counsel in the immunity hearing proceedings, the judge's law clerk requests counsel send any comments, proposed revisions, or other information by December 27, 2012 for the judge to consider before issuing his final Order. Clearly, the November 5, 2012 letter was not a final, appealable order from which an appeal could be sought. Thus, the

State's notice of appeal was not untimely because it was not filed in response to the November 5, 2012 letter.

**II. Respondent's contention that the November 5, 2012 letter was analogous to a form Order does not support dismissal of the appeal**

In the second Motion to Dismiss, Respondent contends that the initial letter filed by Judge Baxley was akin to a form Order, and the State had to appeal from the letter to be timely. Appellant submits this assertion is without merit.

In making this argument, Respondent relies upon Leviner v. Sonoco Products Co., 339 S.C. 492, 530 S.E.2d 127 (2000), to support this contention. In Leviner, the South Carolina Supreme Court found that a notice of appeal was untimely when the notice was not filed to the form order, but was instead filed when a more complete order was filed one month later. The Supreme Court noted that the more complete order was untimely because the court did not reserve jurisdiction over the case and neither party had filed Rule 59(e) motions. In so doing, the Supreme Court noted

Under Rule 59(e), SCRPC, the trial judge has only ten days from entry of judgment to alter or amend an earlier order on his own initiative absent a "reservation" of jurisdiction in the form order. Cf., Rule 203(b)(1), SCACR, "when a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment."

Id. at 494, 530 S.E.2d at 128.

In Coker v. Cummings, 381 S.C. 45, 671 S.E.2d 383 (2008), this Court found the filing of a notice of appeal was timely, distinguishing the case before from Leviner in finding that the appellant did not receive notice until he received the final order and finding that the lower court had reserved jurisdiction to enter the more full, final order by instructing one of the attorneys to draft the longer order. Id. at 53, 671 S.E.2d at 387.

Appellant submits that if the November 5, 2012 letter was considered to be analogous to a form Order, the Notice of Appeal would be timely because the trial judge here reserved jurisdiction to enter the fuller order that was filed on January 4, 2013. As was the case in Coker, the trial judge here included specific instructions for counsel for Respondent to draft a proposed Order for review. Thus, if this Court were to apply the same reasoning that was utilized in both Leviner and Coker, then the notice of appeal was timely.

### III. Respondent has misconstrued Rule 203(b)(2), SCACR.

Respondent contends that the appeal was untimely because under Rule 203(b)(2), SCACR, the State had ten days from actual notice of the trial court's grant of immunity to file its notice of appeal. Appellant submits that Respondent's argument applies the wrong section of Rule 203(b)(2), SCACR.

Rule 203(b)(2), SCACR, states:

After a plea or trial resulting in conviction or a proceeding resulting in revocation of probation, a notice of appeal shall be served on all respondents within ten (10) days after the sentence is imposed. **In all other cases, a notice of appeal shall be served on all respondents within ten (10) days after receipt of written notice of entry of the order or judgment.** When a timely post-trial motion is made under Rule 29(a), SCRCrimP, the time to appeal shall be stayed and shall begin to run from receipt of written notice of entry of an order granting or denying such motion. **In those cases in which the State is allowed to appeal a pre-trial order or ruling, the notice of appeal must be served within ten (10) days of receiving actual notice of the ruling or order; provided, however, that the notice of appeal must be served before the jury is sworn or, if tried without a jury, before the State begins the presentation of its case in chief.**

(emphasis added).

In South Carolina, the State's right to appeal is defined by our judicial decisions, not statutory law. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846-47 (2005)

(citing State v. McKnight, 353 S.C. 238, 577 S.E.2d 456 (2003)). Thus, the State's right to appeal in a criminal case is a judicially created right. Pichardo, 367 S.C. at 96, 623 S.E.2d at 847 (citing State v. Belviso, 360 S.C. 112, 600 S.E.2d 68 (Ct.App.2004)).

Our Supreme Court has recognized limited situations where the State may appeal. State v. Holliday, 255 S.C. 142, 177 S.E.2d 541 (1970). A pre-trial order granting the suppression of evidence which significantly impairs the prosecution of a criminal case is directly appealable. State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991); State v. McKnight, 287 S.C. 167, 337 S.E.2d 208 (1985); State v. Henry, 313 S.C. 106, 432 S.E.2d 489 (Ct.App.1993); see also S.C.Code Ann. § 14-330(2)(a) (1977) ("The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal ... [a]n order affecting a substantial right made in an action when such order ... in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action."). The State has the right to immediately appeal a trial court's suppression of evidence which significantly impairs the prosecution of the case. Belviso, 360 S.C. at 115, 600 S.E.2d at 70.

Pichardo, 367 S.C. at 96-7, 623 S.E.2d at 847.

Appellant submits that the provision in 203(b)(2) that applies to all other cases applies to appeals from orders in Duncan hearings. In State v. Duncan, the Supreme Court found "an order granting or denying a motion to dismiss under the Act is immediately appealable, as it is in the nature of an injunction. See S.C.Code Ann. § 14-330(4) (Supp.2010) ("The Supreme Court ... shall review upon appeal ... an interlocutory order or decree ... granting, continuing, modifying, or refusing an injunction....")" Duncan, 392 S.C. 404, 407 n.2, 709 S.E.2d 662, 663 n.2 (2011). First, in granting the right to appeal orders from Duncan hearings, the Supreme Court clearly created the right for both a defendant and the State. The right for a defendant to appeal would clearly fall under the "all other cases" provision as generally, a criminal defendant may not appeal until sentence is imposed. State v. Miller, 289 S.C. 426, 346 S.E.2d 705 (1986). The

same holds true for the State. The Supreme Court's determination that the orders in Duncan hearings were immediately appealable was not based upon the same reasoning as typically given in those cases recognizing the State's right to appeal pre-trial rulings in other contexts. Instead, the Supreme Court noted that a ruling in a Duncan case was of the nature of an injunction. Further, the Supreme Court specifically noted that orders granting or denying immunity were appealable, clearly indicating that final determinations on the applicability of the Protection of Persons and Property Act in a particular case were expected to be resolved by an order. In light of those circumstances, Appellant submits that appeals from those orders falls within the "all other cases" provision of Rule 203(b)(2).

#### **IV. The request for a first extension was timely filed**

In the second motion to dismiss, Respondent contends that the request for the first extension was untimely because the brief was due to be served within thirty days of receipt of the transcript, which was received by the State prior to the filing of the notice of appeal. Appellant submits this argument is without merit.

Rule 208(a)(1), SCACR, states "[w]ithin thirty (30) days after receiving the transcript or, if no transcript is ordered, within thirty (30) days after serving the notice of appeal, appellant shall serve one copy of his brief on all parties to the appeal, and file with the clerk of the appellate court one copy of the brief with proof of service." The timing for ordering a transcript of a lower court proceeding for an appeal is outlined in Rule 207(a)(1), SCACR. Under that rule, if a transcript must be ordered in an appeal from a general sessions case, it must be ordered within thirty days of the filing of the notice of appeal.

In this case, a transcript did not need to be ordered for the appeal. A transcript of the evidentiary hearing had been ordered and received by the State prior to issuance and filing of the Order Granting Immunity and Dismissing Criminal Charges. Thus, the initial brief of appellant was due thirty days after the filing of the notice of appeal. The letter requesting the first extension was timely filed.

**V. Appellant did properly serve the opposing party in this action**

In the second Motion to Dismiss, Respondent contends that the appeal should be dismissed because one of the attorneys of record was not served. Appellant disagrees. Appellant submits that counsel of record, Mr. Moore, was properly served in this case.

As noted by counsel for Respondent, all of the attorneys who represented Respondent at the hearing along with Mr. Robert Dudek with the Commission on Indigent Defense, Division of Appellate Defense were served with the letter requesting Appellant's first extension. (Attachment No. 1). Counsel for Appellant received correspondence from this Court dated February 20, 2013 requesting further information regarding the status of the transcript in this case. (Attachment No. 2). Mr. Moore and Mr. Dudek were copied on that correspondence by the Court. Based upon that correspondence and later correspondence received from the Commission on Indigent Defense, counsel for Appellant believed Mr. Moore had been designated the sole counsel of record for this appeal. (Attachment No. 3). That was why Mr. Cockrell was not served with any other filings by Appellant after the initial request for an extension.

Appellant submits that any error in not serving Mr. Cockrell was harmless. The party in this action is Mr. Douglas. At least one counsel of record of Mr. Douglas has been served with all of the filings throughout this appeal.

Wherefore, premises considered, for the reasons stated above, Appellant respectfully requests this Court deny Respondent's Motions to Dismiss. Appellant further requests any other relief this Court deems appropriate.

Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

DONALD J. ZELENKA  
Senior Assistant Deputy Attorney General

ALPHONSO SIMON JR.  
Assistant Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-6305

**ATTORNEYS FOR APPELLANT**

By:   
ALPHONSO SIMON, JR. (Bar No. 74713)

Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-6305

July 8, 2013.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

RECEIVED  
JUL 12 2013  
SC Court of Appeals

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Appeal from Chesterfield County  
The Honorable J. Michael Baxley, Circuit Court Judge  
Appellate Case No. 2013-000148

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THE STATE OF SOUTH CAROLINA,  
APPELLANT,  
v.  
GRAHAM FRANKLIN DOUGLAS,  
RESPONDENT.

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**CERTIFICATE OF SERVICE**

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I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Response in Opposition to Motions to Dismiss on Respondent by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, S. Jahue Moore, Sr., Esq., Moore, Taylor & Thomas, P.A., P.O. Box 5709, West Columbia, South Carolina 29171; M. Brooks Biediger, Esq., Moore, Taylor & Thomas, P.A., P.O. Box 5709, West Columbia, South Carolina 29171; and M.W. Cockrell, III, Esq.; Cockrell Law Firm, P.C., Olde Towne Centre, Barrister Building, 159 Main Street, Chesterfield, SC 29709.

I further certify that all parties required by Rule to be served have been served.

This 8<sup>th</sup> day of July, 2013.

  
ALPHONSO SIMON, JR.

Office of Attorney General  
P. O. Box 11549  
Columbia, South Carolina 29211  
(803) 734-6305

ATTORNEY FOR APPELLANT

# Attachment No. 1



ALAN WILSON  
ATTORNEY GENERAL

February 12, 2013

The Honorable Jenny A. Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

Re: *State v. Graham Franklin Douglas*  
Appeal from Chesterfield County  
Appellate Case No. 2013-000148

Dear Ms. Kitchings:

I am writing to respectfully request an extension of thirty (30) days in which to file the Initial Brief of Appellant and Designation of Matter in the above-referenced case. I will be handling the appeal on behalf of the Appellant, the State. The Initial Brief is currently due to be served and filed on Wednesday, February 13, 2013. However, because of my involvement in other matters in state and federal court, I have been unable to timely complete the Initial Brief.

Therefore, I am requesting this extension within which to serve and file the Initial Brief of Appellant and Designation of Matter. I am informing opposing counsel of my request by copy of this letter. Please let me know if you have any questions.

Sincerely,

Alphonso Simon, Jr.  
Assistant Attorney General

AS/dmd

cc: Tyler Bryant Brown, Esq., Assistant Solicitor, 3<sup>rd</sup> Circuit  
S. Jahue Moore, Esq.  
M. Brooks Biediger, Esq.  
Melvin Wayne "Trey" Cockrell, III, Esq.  
Robert Dudek, Esq.

**Attachment No. 2**



# The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

POST OFFICE BOX 11629  
COLUMBIA, SOUTH CAROLINA 29211  
1015 SUMTER STREET  
COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE: (803) 734-1890  
FAX: (803) 734-1839  
[www.sccourts.org](http://www.sccourts.org)

February 20, 2013

~~Mr. Alphonso Simon, Jr.~~  
PO Box 11549  
Columbia SC 29211-1549

Re: State v. Graham Franklin Douglas  
Appellate Case No. 2013-000148

Dear Counsel:

This Court is in receipt of your extension request received February 12, 2013. However, this Court has not received information regarding the transcript. Please provide this Court with the date the transcript was ordered and received. If there was not a transcript, please provide this Court with correspondence stating such within ten (10) days of the date of this letter.

Very truly yours,

*V. Claire Allen, Deputy*

CLERK

cc: S. Jahue Moore  
Robert M. Dudek

**Attachment No. 3**



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

March 18, 2013

S. Jahue Moore, Esquire  
1700 Sunset Blvd.  
West Columbia, SC 29171

Re: The State v. Graham Franklin Douglas, Appellate Case No. 2013-000148

Dear Mr. Moore:

Since I have not received any response from you to my letter of February 12, 2013, I must assume you will be handling the appeal for Mr. Douglas. Therefore, I am closing my file and by copy of this letter advising the Court of Appeals and the Attorney General's Office that all future correspondence should be directed to you.

Please do not hesitate to contact me if you have any questions.

Sincerely,

  
Lorienne French  
Legal Services Coordinator

cc: S. C. Court of Appeals



ALAN WILSON  
ATTORNEY GENERAL

July 8, 2013

RECEIVED

JUL 12 2013

State Court of Appeals

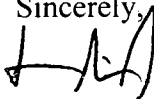
The Honorable Jenny A. Kitchings  
Clerk, South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, South Carolina 29201

Re: *State v. Graham Franklin Douglas*  
Appeal from Chesterfield County  
Appellate Case No. 2013-000148

Dear Ms. Kitchings:

Enclosed please find an original and six (6) copies of Appellant's Response to Motions to Dismiss Appeal in the above-referenced matter.

Thank you for your assistance in this matter.

Sincerely,  


Alphonso Simon, Jr.,  
Assistant Attorney General

AS/dmd

Enclosures

cc: S. Jahue Moore, Sr., Esq. (w/two copies of encls.)  
M.W. Cockrell, III, Esq. (w/two copies of encls.)  
M. Brooks Biediger, Esq. (w/two copies of encls.)