

# The Supreme Court of South Carolina

Octavia Middleton, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2013-001713

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## ORDER

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Petitioner has filed a *pro se* petition for a late appeal. This document, which was served on respondent's counsel on July 30, 2013, has been construed as a notice of appeal.

Counsel for petitioner has advised this Court that he received written notice of entry of the order on appeal on or about February 25, 2012. Accordingly, the notice of appeal has not been timely served and the notice of appeal is dismissed. Rule 263(b), SCACR; *Elam v. South Carolina Dept. of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004) (“The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to ‘rescue’ the delinquent party by extending or ignoring the deadline for service of the notice.”).

This dismissal is without prejudice to whatever right petitioner may have to seek relief pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991) by filing an application for post-conviction relief in the circuit court. See *King v. State*, 308 S.C. 348, 417 S.E.2d 868 (1992) (discussing appellate procedure to be followed depending on findings of PCR judge on the *Austin* claim). The remittitur will be

sent as provided by Rule 221, SCACR.

  
C.J.  
FOR THE COURT

Columbia, South Carolina  
September 3, 2013

cc: Salley W. Elliott, Esquire  
Robert Cleland FitzSimons, Esquire  
Mr. Octavia Middleton, #253919