

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Newberry County  
Honorable Frank R. Addy, Circuit Court Judge

Appellate Case No: 2013-000196  
\_\_\_\_\_

**RECEIVED**

JUL 14 2014

**SC Court of Appeals**

THE STATE,

Respondent,

vs.

JAMES E. WISE,

Appellant.

\_\_\_\_\_  
**RETURN TO PETITION FOR REHEARING EN BANC**  
\_\_\_\_\_

As requested by this Court, the State hereby responds to Appellant's *pro se* Petition for Rehearing En Banc. The State submits that this Court did not overlook or misapprehend factual or legal points in this appeal and that the decision affirming Judge Addy's ruling was correct. Moreover, Appellant fails to present any issue of exceptional importance or argue that en banc consideration is necessary to secure uniformity pursuant to Rule 219 (a), SCACR. Rehearing and Rehearing En Banc should be denied. In support of its position, Respondent would show unto this Court as follows:

I.

In his *pro se* Petition for Rehearing En Banc, James E. Wise reasserts the same arguments presented in his brief and contends the entire Court should consider his claims but fails to offer a persuasive reason to support his request. The State incorporates and reiterates herein its Final Brief of Respondent and all arguments made therein in support of its contention that this Court

properly reviewed the facts and correctly applied the law in this matter.

The State submits this Court correctly concluded that the motion to arrest judgment was not timely made which rendered the matter moot. First, a motion to arrest judgment must be made to prevent entry of the judgment – or the sentence – in a criminal case. Appellant was sentenced in 1998. The request to stay entry of judgment fourteen (14) years later comes too late. As this Court properly concluded, judgment has been entered and the matter is moot.

Second and even if the motion can be made after sentencing, a motion for arrest of judgment must be heard by the trial judge who only retains jurisdiction to receive post-trial motions for ten (10) days after sentencing. See Rule 29, SCRCRimP. The court of general sessions in this case lacked jurisdiction to consider the merits of Appellant's motion because it was not filed to prevent entry of the judgment or within the requisite ten (10) day time frame after sentencing. Instead, Appellant waited fourteen (14) **years** later to bring his complaint to the attention of the court of general sessions. Respondent submits that Appellant attempted to use an untimely motion to arrest judgment to circumvent the statute of limitations and bar against successive post-conviction relief filings as well as the time bar of Rule 29, SCRCrimP. He could have raised this issue before trial or sentencing, within the requisite time frame after trial or possibly in the two prior post-conviction relief proceedings he pursued but did not do so. He should not be permitted to use the motion to circumvent statutory provisions and court rules setting forth the proper and orderly procedure for motion presentation and challenges to convictions. See Rule 29, SCRCrimP; S.C. Code Ann. Sections 17-27-45 & -90 (2014). This Court properly affirmed the lower court's ruling in this regard.

## II.

Additionally, Appellant's claim that his conviction for burglary in the first degree constitutes

a double jeopardy violation, is directly refuted by the record before this Court. The record from Appellant's trial reflects that Appellant was originally indicted for first degree burglary and assault and battery of a high and aggravated nature (ABHAN) in one two-count indictment (1997-GS-36-479) but that after Appellant entered a guilty plea in magistrate's court to simple assault and battery to resolve the ABHAN charge, the prosecutor obtained an indictment charging Appellant only with the remaining charge of first degree burglary. (ROA p. 20 -21; p. 21, lines 13-17; 237; 173 – 175; 237 – 241; 240; 258, line 17 – 259, line 13) Before the presentation of evidence at trial for first degree burglary, Appellant moved the trial court to dismiss the first degree burglary charge arguing his plea in magistrate's court to simple assault and battery precluded the prosecution for first degree burglary. (ROA pp. 20 – 22). The State properly responded that a comparison of the elements for the two offenses reveal that no double jeopardy issue existed. (R. p. 20, lines 7 – 24). Appellant's motion was denied by the trial court. (R. p. 21, lines 20 – 23). Appellant did not similarly challenge the first degree burglary prosecution on the ground his prior guilty plea in magistrate's court to malicious injury to property prevented prosecution on the first degree burglary charge on double jeopardy grounds. In fact, Appellant, through counsel, admitted that his magistrate's court guilty plea to malicious injury to property guilty plea resolved only the damage to a storm door at the victim's home and not the burglary charge. (See R. pp. 258, line 17 – 259, line 13). The magistrate's court plea was not considered by anyone as disposing of the first degree burglary charge and is a matter Appellant should have raised before trial when he was re-indicted for first degree burglary after the magistrate's court guilty plea. Appellant pursued the issue of double jeopardy respecting first degree burglary and ABHAN on direct appeal, in his two post-conviction actions, and on appeal from PCR. (R. pp. 188; 194 – 196; 261, line 21 – 269, line 3; 305, line 1 – 306, line 16; 387 –

411; 456-460). The PCR court noted that there were two instances of physical contact between Appellant and the victim and that another aggravating circumstance for first degree burglary existed. (R. p. 328, line 22 – p. 3230, line 2). Appellant had multiple opportunities to present this issue in a timely and proper manner but did not do so. He waited until after making several challenges to the conviction on other grounds before pursuing this untimely motion. The motion to arrest judgment was properly denied.

### III.

Nevertheless and contrary to Appellant's contention, Appellant's double jeopardy rights were not violated. The same elements test pronounced by our United States Supreme Court in Blockburger v. U.S., 284 U.S. 299 (1932) is the only test for determining whether a government's prosecution of a defendant for more than one offense based on the same act or transaction constitutes a double jeopardy violation, in both multiple punishments and successive prosecution cases. State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997). "An indictment will sustain a conviction for a lesser offense if the lesser offense is included within the greater charged offense. The test for determining when a crime is a lesser included offense of the crime charged is whether the greater offense includes all of the elements of the lesser offense." Id. at 44-45, 448 S.E.2d at 570.

To be guilty of first degree burglary a person must enter a dwelling without consent and with intent to commit a crime therein combined with the existence of at least one aggravating circumstance of which malicious injury to property is not included. See S.C. Code Ann. Section 16 -11-311 (A) (2003); State v. Cross, 323 S.C. 41, 448 S.E.2d 569 (Ct. App. 1994). A person is guilty of malicious injury to property, in pertinent part, if he or she wilfully, unlawfully, and maliciously cuts, mutilates, defaces or otherwise injures any house. S.C. Code Ann. Section 16-

11-520 (2003 & Supp. 2013); State v. Lewellyn, 281 S.C. 199, 314 S.E.2d 326 (1984). The guilty plea in magistrate's court to destruction of the victim's storm door did not preclude Appellant's prosecution for first degree burglary. (See R. p. 39, lines 1 – p. 41, line 4; 56, lines 9 – 24; p. 58, lines 1 – 14; p. 63, lines 9 – p. 64, line 5; p. 149, lines 9 - 25). First degree burglary did not require proof of all of the elements of malicious injury to property and malicious injury to property does not require any of the elements of first degree burglary. Accordingly, there is no double jeopardy violation. Additionally, any argument by Appellant that the trial court lacked jurisdiction on the basis of a double jeopardy violation is misplaced.

IV.

This Court correctly interpreted and applied the facts and law in its review. Accordingly, Appellant's petition must be denied.

WHEREFORE, the State prays this Court will deny Appellant's Petition for Rehearing En Banc and for such other and further relief as this Court may deem just and appropriate.

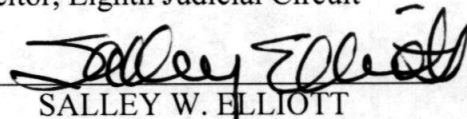
Respectfully submitted,

ALAN WILSON  
Attorney General

SALLEY W. ELLIOTT  
Senior Assistant Deputy Attorney General

DAVID M. STUMBO  
Solicitor, Eighth Judicial Circuit

BY:



SALLEY W. ELLIOTT  
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July 14, 2014

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Newberry County  
The Honorable Frank R. Addy, Presiding Judge  
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Appellate Case No: 2013-000196  
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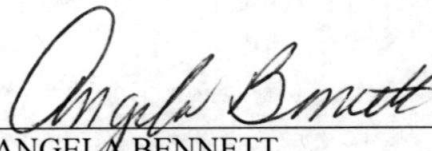
Appellant.

\_\_\_\_\_  
**PROOF OF SERVICE**  
\_\_\_\_\_

I, Angela Bennett, certify that I have served the Return to Petition For Rehearing En Banc on appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney, James E. Wise, #00250411, Lieber Correctional Inst., P.O. Box 205, Ridgeville, SC 29472.

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

This 14<sup>th</sup> day of July, 2014.

  
\_\_\_\_\_  
ANGELA BENNETT  
Administrative Assistant

Office of Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727



ALAN WILSON  
ATTORNEY GENERAL

July 14, 2014

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

Re: The State v. James E. Wise  
Appellate Case N: 2013-000196

Dear Mr. Kitchings:

Enclosed please find the original and six copies of the Return to Petition for Rehearing Enbanc along with proof of service in the above-referenced case.

Sincerely,

Salley W. Elliott  
Senior Assistant Deputy Attorney General  
S.C. Bar No: 1871

SWE/ab  
Enclosures

cc: James E. Wise, #250411  
Ms. Trisha Allen

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