

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable R. Lawton McIntosh, Circuit Court Judge

Case No.: 2011-CP-32-0402
Appellate Case No.: 2013-002473

Timothy J. Wilson,.....Respondent-Petitioner,

vs.

State of South Carolina,.....Petitioner-Respondent.

RETURN TO MOTION TO DISMISS
CROSS-APPEAL OF RESPONDENT/PETITIONER

On October 31, 2014, Respondent-Petitioner, through counsel, received notice of the State's Motion to Dismiss Cross-Appeal. R-P submits that this Motion should be denied as undersigned counsel was in regular communication with and acting in compliance with the dates given by the assigned clerk (Della White) and the State failed to raise any concerns with filing deadlines to undersigned counsel or the assigned clerk prior to filing the Motion to Dismiss. Additionally, R-P submits that the dismissal of the cross-appeal would be premature as R-P never received any written notice from this Court that the appeal was not being perfected properly and was given an extension to file the Petition for Writ of Certiorari until November 20, 2014. Finally, R-P submits that he would greatly prejudiced by the dismissal of the cross-appeal and the Petition for Writ of Certiorari, filed on November 3, 2014.

R-P does not dispute the procedural history provided by the P-R, but would add the following information for the Court's consideration:

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As stated in the Motion to Dismiss, R-P filed a timely Notice of Cross-Appeal on November 19, 2013. Thereafter, R-P nor his counsel received any type of written notice of filing deadlines or procedure for the cross-appeal. Therefore, counsel has been in regular communication via phone call, email and visits to the Supreme Court to ensure that she was complying with all filing deadlines. It must be noted that at no time did R-P file any type of notice to abandon cross-appeal nor did counsel for R-P inform the Court or the State of any intention to not perfect the cross-appeal.

On May 12, 2014, Ben Aplin, Assistant Attorney General, contacted undersigned counsel and obtained her consent and signature for an extension request for filing the Petition for Writ of Certiorari. In June, while on maternity leave, counsel was contacted by Ben Aplin, Assistant Attorney General, and informed that he failed to properly file the Appendix. Again, while home on maternity leave, counsel gave her consent for the filing of a Supplemental Appendix. As a courtesy to counsel, P-R offered and did include a request for the Return to Petition for Writ of Certiorari to be filed thirty days from the filing of the Supplement Appendix. It must be noted that at that juncture it is apparent that even P-R did not reference the Petition for Writ of Certiorari or make any indication that P-R believed the Petition for Writ of Certiorari on the cross-appeal was due at the time of filing the Return to Petition for Writ of Certiorari.

Acting upon the information obtained from the Clerk's Office that the Return to Petition for Writ of Certiorari was due thirty days after the filing of the State's Supplemental Appendix and that the Petition for Writ of Certiorari on the cross-appeal was due thirty days after the filing of the Return, counsel requested her first continuance on August 12, 2014, only referencing the Return. Upon receiving and reviewing the extension Order that only referenced a Petition for Writ of Certiorari, counsel emailed the clerk assigned to the Appeal and asked if she was correct

that the Petition was due first then the Return thirty days later, to which the clerk responded that counsel was correct and provided the date the Return was due and stated that the Petition was not due until the Return was filed. Thereafter, counsel requested her second extension for filing the Return due to her prison visit being cancelled by Broad River Correctional Institution, which kept her from meeting with R-P. The extension request was granted by this Court.

On September 26, 2014, two weeks prior to the extended filing deadline, counsel hand delivered the Return to Petition for Writ of Certiorari to this Court and spoke with the clerk assigned to the appeal. Counsel was again informed that the Petition for Writ of Certiorari was due in thirty days since she had now filed the Return to Petition for Writ of Certiorari. On October 20, 2014, counsel received a call from the clerk informing her that the deadline for the Petition for Writ of Certiorari was incorrect and immediately due. The clerk informed counsel that she needed to submit a request for her first extension, which counsel submitted that day. This Court granted that request and set the filing deadline for November 20, 2014.

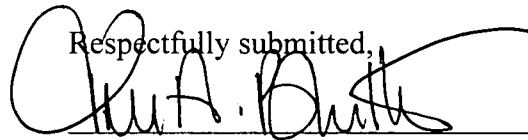
In response to the State's Motion, R-P would ask this Court to consider that counsel was constantly in communication with the Clerk's Office and was acting in accordance with the dates and/or deadlines provided by the Clerk's Office. Also, at no time did R-P receive any type of written notice from the Court that his Petition for Cross-Appeal was due, needed to be the subject of a continuance request or was in danger of dismissal. Based upon the information received from the Clerk's Office, R-P would submit that the Petition for Writ of Certiorari on the cross-appeal has not been filed untimely. If the filing information obtained from the Clerk's Office was incorrect, Respondent-Petitioner submits that his cross-appeal should not be dismissed for reliance upon said information.

Despite the professional courtesy extended to P-R by counsel in consenting to both an extension and Supplemental Appendix, Ben Aplin, Assistant Attorney General, failed to even call or email counsel about his concerns with the untimely filing of the Petition for Writ of Certiorari on the cross-appeal. As stated in the Motion to Dismiss, R-P filed the Return two weeks prior to the filing deadline. At no time during those two weeks did P-R notify the Court or counsel of his interpretation of the filing deadlines, but he waited until counsel received an extension from the Court for filing the Petition for Writ of Certiorari and only raised such concerns via the Motion to Dismiss. It seriously concerns counsel, as a matter of **civility** and **professional conduct** that P-R chose to file the Motion to Dismiss without consulting with her and giving her the opportunity to explain that she was only acting on the information she was given from the Clerk's Office. Instead of calling counsel, as P-R did when he needed an extension and misfiled the Appendix, he chose to submit a Motion to this Court and further complicate already complex litigation.

For the above stated reasons, R-P would ask this Court to find that it would be improper to dismiss the cross-appeal. Also, R-P submits that a dismissal would be highly prejudicial as he has filed a Petition for Writ of Certiorari, containing three arguments, in compliance with the deadline issued by this Court. In balancing the prejudice R-P would suffer, P-R has set forth no recognizable prejudice suffered from the time it took R-P to file the Petition for Writ of Certiorari.¹ If anything, R-P has been prejudiced from the time and effort counsel has had to invest in responding to the Motion to Dismiss.

¹ Despite the possible misinformation given by the Clerk's Office regarding the filing deadlines and maternity leave though the first week in July, it must be noted that R-P has filed both the Return and Petition in less time than the P-R took to file the Petition for Writ of Certiorari and Appendix.

Therefore, R-P would respectfully ask this Court to deny the State's Motion to Dismiss
Cross-Appeal.

Respectfully submitted,


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This 3rd day of November, 2014.