

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**S.C. SUPREME COURT**

Supreme Court Case No.: 2012-213692

Appellate Case No.: 2008-111046

Opinion No.: 5038

Howard P. King, Circuit Court Judge

The State of South Carolina,

Petitioner,

v.

Jeremy McMillan,

Respondent.

**REPLY TO STATE'S RESPONSE MOTION FOR BOND PENDING PETITION FOR  
WRIT OF CERTIORARI**

The Respondent, Jeremy McMillan, by and through undersigned counsel, submits his Reply to State's Response Motion for Bond Pending Petition for Writ of Certiorari. For the reasons set forth below, McMillan should be granted bond:

**MEMORANDUM OF LAW**

- I. The State's response motion is untimely and the arguments set forth therein should not be considered by this Court.**

Rule 240(e) of the South Carolina Appellate Court Rules states the following:

Any party opposing a motion or petition shall have **ten (10) days** from the date of service thereof to file an original and six (6) copies of his return with the clerk and serve on all parties a copy of the return. . . . The court may in its discretion enlarge or limit the time for filing the return. The provisions of Rule 240(c) shall apply to a return. **Failure of a party to timely file a return may be deemed a consent by that party to the relief sought in the motion or petition.**

Rule 240(e), SCACR (emphasis added).

Respondent's Motion for Bond was served by U.S. mail on December 18, 2014 to Petitioner. Petitioner admits in its response that the motion was received on December 22, 2014. (Pet'r. Resp. Mot. Bond at 2.) This would make Petitioner's return due on or before January 2, 2015. However, Petitioner's return is dated January 5, 2015, three days following the deadline prescribed under Rule 240(e). Notably, Petitioner did not file a motion for an extension of time to file its return to Respondent's Motion for Bond. Therefore, Respondent would respectfully request that Petitioner's return not be considered as it failed to comply with the requirements of Rule 240(e). Furthermore, Petitioner requests that the failure of the Petitioner to timely file its return serve as consent to Respondent's Motion for Bond. *See* Rule 240(e), SCACR.

## **II. Respondent is entitled to bond.**

Factors to be considered in admitting a person to bail pending appeal are (a) the existence of the probability of reversal; (b) the enormity of the charge; (c) the danger that if freed the accused will commit a crime of like character; (d) the probability of a forfeiture of the bail and escape; and (e) the character and reputation of the accused and his surrounding circumstances. *Nichols v. Patterson*, 202 S.C. 352, 353, 25 S.E.2d 155, 156 (1943).

First, Petitioner contends in its return that McMillan failed to show that he would likely prevail on appeal. (Pet'r. Resp. Mot. Bond at 3.) This argument is completely contrary to the findings of the South Carolina Court of Appeals. *See State v. McMillan*, 400 S.C. 298, 734 S.E.2d 171 (Ct. App. 2012). As McMillan set forth in his Motion for Bond, his conviction has already been reversed by the Court of Appeals. The Court of Appeals found that the trial court erred in granting the State's *Batson* challenge and that such prejudiced McMillan. The Court of Appeals remanded the case for a new trial on October 17, 2012. *See McMillan*, 400 S.C. 298, 734 S.E.2d

171. Therefore, Petitioner's initial argument has no merit and McMillan clearly satisfies the first factor under *Nichols*.

Second, while Petitioner reiterates arguments made in its brief to the South Carolina Court of Appeals in arguing that there is substantial evidence showing that McMillan was involved in the April 29<sup>th</sup> shootings, the Court of Appeals has reversed his conviction and remanded the case for a new trial. This reinstates the presumption of innocence standard and Petitioner cannot now attempt to circumvent the role of the jury which is the sole fact finder. *See State v. Aleksey*, 343 S.C. 20, 33, 538 S.E.2d 248, 255 (2000) (recognizing jury's role as the ultimate fact finder). However, McMillan does find it necessary to respond to Petitioner's arguments regarding the testimony of co-defendant, Toby Fulmore. In particular, Petitioner argues that Fulmore testified—*without objection*—about a prior altercation involving McMillan that allegedly occurred a month before the April 29<sup>th</sup> incident. (Pet'r. Resp. Mot. Bond at 4.) This testimony was **not** made without objection. The issue was brought to the trial court's attention in a pretrial motion and defense counsel argued that the act was not relevant and did not tend to show motive, identity, a common scheme or plan, or absence of mistake. (R. 30, lines 1-11.) The trial court took the motion under advisement, but never made a ruling prior to the start of trial. (R. 30, lines 19-20.) When Fulmore began testifying about the previous incident, defense counsel objected and the trial court suggested that it had already made a ruling regarding the admissibility of the prior bad act. (R. 128, lines 2-129, line 10.) In fact, the trial court never made a ruling and this was one of the issues included in McMillan's appeal to the South Carolina Court of Appeals. (App. 39-41.) Specifically, McMillan argued that the testimony regarding prior bad acts was only used to tarnish McMillan's character and enrage the jury. (App. 41.) It is McMillan's position that since the trial court failed to make

an evidentiary ruling, the evidence was improperly admitted as argued before the South Carolina Court of Appeals and that Petitioner's reliance on it is misplaced.

Third, Petitioner argues that McMillan may pose a danger to the community if released. Petitioner fails to reference McMillan's prior criminal record. As McMillan noted in his Motion for Bond, prior to the instant case, McMillan did not have an extensive criminal record. In fact, he only had two (2) prior convictions, both of which were misdemeanors. Therefore, there is no indication that McMillan would pose a risk or danger to the safety of the community if released on bond. To ease any concerns this Court may have, McMillan would consent to any bond conditions that this Court deems appropriate.

Fourth, Petitioner makes no assertion that McMillan would be likely to abscond nor do the surrounding circumstances present such a concern. McMillan was a lifelong resident of Lake City, South Carolina prior to his conviction. His family and friends reside in Lake City, South Carolina. Therefore, he has close ties to the community and does not pose a risk of flight if released.

Finally, Petitioner makes no mention of McMillan's character other than its broad assertion that his "character has proven to be harmful." (Pet'r. Resp. Mot. Bond at 9.) Petitioner presumably relies solely on its interpretation of the facts surrounding McMillan's conviction in making this statement. As previously set forth above, McMillan's conviction was reversed by the South Carolina Court of Appeals and the case was remanded for a new trial. He does not have an extensive criminal record. His two (2) prior convictions were misdemeanors. McMillan also has the support of his friends and family and is prepared to abide by any conditions this Court deems appropriate if granted bond.

CONCLUSION

Based on the foregoing, Respondent would respectfully request this Court to disregard Petitioner's Response to Motion for Bond Pending Petition for Writ of Certiorari based on its untimely filing. Respondent also requests a reasonable bond and release until the conclusion of the appellate process. Alternatively, Respondent would request transfer to a county jail pending resolution of this matter.

Respectfully Submitted,

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*Attorney for Respondent*

January 8, 2015

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**Supreme Court Case No.: 2012-213692**

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The State of South Carolina,

Petitioner,

v.

Jeremy McMillan,

Respondent.


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**CERTIFICATE OF SERVICE**

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The undersigned attorney hereby certifies that a true copy of the Reply to State's Response Motion for Bond Pending Petition for Writ of Certiorari in the above-referenced case has been served upon the following via United States mail this 8th day of January, 2015:

Donald J. Zelenka, Esq.  
Office of the Attorney General  
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The Honorable Daniel E. Shearouse  
Clerk, Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

**RECEIVED** January 8, 2015

JAN 12 2015

VIA U.S. MAIL

**S.C. SUPREME COURT**


RE: State of South Carolina v. Jeremy McMillan  
Case No.: 2012-213692

Dear Clerk:

Please find enclosed the original and seven (7) copies of the *Reply to State's Response Motion for Bond Pending Petition for Writ of Certiorari* in the above-referenced matter. Please return a clocked copy of the same in the self-addressed stamped envelope provided.

Thank you for your assistance in this matter. If you should need any additional information, please do not hesitate to contact me.

Sincerely,

  
Amy K. Raffaldt, Esq.  
AKR/yt  
Enclosure

cc: Donald J. Zelenka, Esq.