

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable Robert E. Hood, Circuit Court Judge
Appellate Case No. 2014-001366

RECEIVED

JUN 25 2015

SC Court of Appeals

THE STATE,

Respondent,

vs.

JOHN JULIUS SMITH,

Appellant.

**MOTION TO STRIKE PORTIONS OF APPELLANT'S INITIAL BRIEF
AND DESIGNATION OF MATTER TO BE INCLUDED IN THE
RECORD ON APPEAL AND TO HOLD IN ABEYANCE**

Respondent hereby moves to strike portions of the Initial Brief of Appellant as irrelevant and outside the circuit court record regarding the issue on appeal. This motion is based on the following:

1. Appellant's Statement of the Case, page 4, includes information regarding his post-conviction relief action which is irrelevant to the Motion for New Trial at issue in this appeal. No documents from the post-conviction relief proceeding were presented to the circuit court during the new trial motion hearing, and appellate counsel apparently concedes no transcript from the post-conviction relief hearing is available. (Initial Brief of Appellant, p. 10, n. 5). Appellant's *Pro Se* Motion for a New Trial makes allegations regarding what occurred at the post-conviction hearing, and his counsel briefly referenced the post-conviction proceeding during the new trial

motion hearing, but no evidence was presented in support of those allegations/statements at the hearing on the new trial motion.

2. Appellant's Statement of the Case, page 5, references a petition for writ of mandamus, and various actions by the South Carolina Supreme Court in connection with it. Appellant did not present any documents regarding the petition, which does not appear to relate to the merits of the new trial motion, during the new trial motion hearing.

3. Rule 208(b)(C), SCACR, provides the Statement of the Case "shall contain a concise history of the proceedings, **insofar as necessary to an understanding of the appeal.**" (emphasis added). Appellant's new trial motion was filed pursuant to Rule 29(b), SCRCrimP, and in ruling on it, the circuit court did not rely on Appellant's post-conviction relief proceeding or petition for writ of mandamus. Therefore, the post-conviction relief proceeding and petition for writ of mandamus are not necessary to an understanding of the pending appeal, and are extraneous matters serving only to confuse the sole issue presented on appeal - whether Appellant was entitled to a new trial based on after discovered evidence.

4. Appellant's Argument, pages 14-15 contains extensive discussion of his post-conviction relief proceeding specifically, and post-conviction relief proceedings in general. Footnotes 7 and 8 are particularly troubling because they essentially consist of speculation regarding Appellant's post-conviction relief counsel's motivation for advice to Appellant, and appellate counsel's opinions regarding what the post-conviction relief counsel should have done instead. Not only are these discussions irrelevant to the issue on appeal, they appear to be aimed at confusing the issue, and garnering sympathy for Appellant based on an unsupported inference his previous counsel was ineffective.

5. Appellant's Designation of Matter to be Included in the Record on Appeal designates

an Order dismissing Appellant's post-conviction relief petition with prejudice (No. 2). This Order was not presented to the circuit court in support of the new trial motion, and therefore, may not be included in the Record on Appeal. *See* Rule 210(c), SCACR (Record on Appeal "shall not, however, include matter which was not presented to the lower court or tribunal").

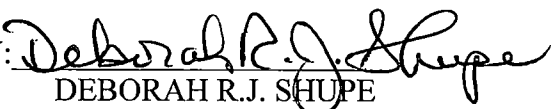
6. Exclusion of the matter referenced above will require Appellant to submit an amended Initial Brief and Designation. Respondent's arguments will be impacted if the matter is excluded or remains. Therefore, Respondent also moves to hold all timelines in abeyance until this Court rules on this Motion.

WHEREFORE, Respondent requests that this Court strike the matters set forth above from the Appellant's Initial Brief and Designation of Matter; that all filing deadlines be held in abeyance pending resolution of this Motion; and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
S.C. Bar No. 5098

BY: 
DEBORAH R.J. SHUPE

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ATTORNEYS FOR RESPONDENT

June 25, 2015

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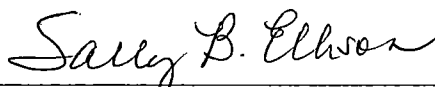
PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Motion to Strike Portions of Appellant's Initial Brief and Designation of Matter and to Hold in Abeyance on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

Laura R. Baer
Assistant Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

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

This 25th day of June, 2015.



SALLY B. ELLISON
Administrative Assistant

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ALAN WILSON
ATTORNEY GENERAL

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SC Court of Appeals

June 25, 2015

Laura R. Baer
Assistant Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

Re: The State v. John Julius Smith
Appellate Case No. 2014-001366

Dear Ms. Baer:

Enclosed are two copies of the Motion to Strike Portions of Appellant's Initial Brief and Designation of Matter and to Hold in Abeyance, with proof of service, in the above-referenced case.

Sincerely,

Deborah R.J. Shupe
Senior Assistant Deputy Attorney General

DRJS/sbe

Enclosures

cc: The Honorable Jenny A. Kitchings (original and 2 copies enclosed)
Victim Services (with enclosure)

Hand Delivery

S.C. COURT OF APPEALS

Please return extra copy to AG's Office