

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Orangeburg County  
Edgar W. Dickson, Jr., Circuit Court Judge

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Appellate Case No: 2015-001637

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**RECEIVED**

AUG 24 2015

**S.C. Supreme Court**

THE STATE,

Respondent,

vs.

HEYWARD CECIL DEMPSEY,

Petitioner.

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**MOTION TO DISMISS OR REJECT “PETITION FOR WRIT OF CERTIORARI”  
“WRIT OF CERTIORARI ON BRIEF,” AND “SECOND REQUEST FOR  
PRODUCTION RULE (5)”**

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Respondent, through its undersigned counsel, moving this Court to dismiss or reject  
Petitioner’s documents, would respectfully show unto this Court as follows:

I.

Petitioner proceeded to trial on April 20-21, 1998, before then circuit court judge Donald  
W. Beatty, and a jury. Petitioner was convicted of criminal sexual conduct with a minor in the  
first degree and was sentenced to imprisonment for thirty (30) years. Petitioner appealed and the  
conviction and sentence were affirmed by the South Carolina Court of Appeals. State v. Cecil

Heyward Dempsey, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000).

Petitioner thereafter was unsuccessful in challenging his conviction and sentence in five (5) post-conviction relief actions beginning in 2000 and continuing as recently the last which ended in 2013 (2000-CP-38-1289 [Cecil Heyward Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005)]; 2007-CP-38-0442; 2009-CP-38-1035; 2011-CP-38-1238; 2012-CP-38-0507).<sup>1</sup> Petitioner was also unsuccessful in a habeas corpus relief action he pursued in the United States District Court in 2005.

## II.

Petitioner thereafter filed an Application for Forensic DNA Testing pursuant to S.C. Code Ann. § 17-28-10 (2014) et seq. A hearing into the matter was held on November 14, 2013. After due consideration by the presiding judge, Petitioner's Application for Forensic DNA Testing was denied by order dated January 30, 2014. It is this order that is the subject of the "Petition for Writ of Certiorari," "Writ of Certiorari on Brief," and "Second Request for Production Rule (5)" now pending before this Court. The order denying the Application for Forensic DNA Testing was also the subject of an earlier appeal. A review of the procedural background of Petitioner's earlier appeal from the order denying his Application for Forensic DNA Testing is necessary to an understanding of Respondent's motion to dismiss or reject the documents now pending before this Court for consideration.

## III.

Relating to the earlier appeal, Petitioner forwarded a notice of appeal to this Court from

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<sup>1</sup> Petitioner's name appears as "Heyward Cecil Dempsey" and as "Cecil Heyward Dempsey" depending on the action.

the circuit court order denying his Application for Forensic DNA Testing. The notice of appeal from that order was undated but, according to the South Carolina Appellate Case Management System, was sent to this Court in an envelope bearing a post-mark of February 18, 2014. **No proof of service accompanied the notice of appeal.** By order dated February 26, 2014, this Court transferred the case to the South Carolina Court of Appeals. (The appellate case number appearing on this Court's February 26, 2014, order transferring the appeal is 2014-000333).

Pursuant to this Court's order, the appeal was transferred and was also assigned appellate case number 2014-000333 by the Court of Appeals. By letters dated December 4, 2014, and January 29, 2015, the Court of Appeals notified Petitioner that his appeal was deficient in that he failed to provide a proof of service showing Respondent was served with the notice of appeal and failed to provide a copy of the order or judgment on appeal. The Court of Appeals provided Petitioner ten (10) days to correct the deficiencies to avoid dismissal of the appeal. By order filed February 13, 2015, the Court of Appeals dismissed Petitioner's appeal for failure to provide a copy of the order on appeal and failure to provide proof of service showing Respondent was timely served with the notice of appeal.

Petitioner responded to the Court of Appeals' order of dismissal by filing a notice of appeal to this Court and proof of service, both dated February 24, 2015. He also served Respondent with a Petition for Rehearing on the same date and forwarded the Petition for Rehearing to this Court for consideration. The documents were assigned appellate case number 2015-000393 by this Court. By order dated March 2, 2015, this Court construed Petitioner's February 24, 2015, notice of appeal from the Court of Appeals' order of dismissal as a petition for writ of certiorari and dismissed it as premature because the Court of Appeals had not acted

upon a petition for rehearing or reinstatement. This Court forwarded Petitioner's petition for rehearing and for an extension of time to the Court of Appeals for its consideration.

By order filed April 3, 2015, the Court of Appeals construed documents filed by Petitioner as a request to reconsider its dismissal of his appeal and noted Petitioner's argument that, because Chief Appellate Defender Robert Dudek was copied with the letters outlining deficiencies in the appeal, Petitioner thought Robert Dudek would respond. The Court of Appeals' order indicated that the Office of Indigent Defense did not represent Petitioner, again notified Petitioner that he must provide a copy of the order on appeal and proof of timely service of the notice of appeal from the circuit court's order denying his Application for Forensic DNA Testing, and indicated it would act upon the petition for rehearing when the documents were received or at the expiration of ten (10) days. (Appellate Case Number 2014-000333).

On April 7, 2015, Petitioner moved the Court of Appeals for an extension of time to obtain a copy of the order, which was granted until April 30, 2015. On April 14, 2015, Petitioner forwarded a copy of the order on appeal and a new notice of appeal dated April 14, 2015. These documents were served on Respondent on April 14, 2015, as indicated by Petitioner's proof of service. On April 23, 2015, Petitioner forwarded a "Request for Disclosure Rule 5" to the Court of Appeals.

By order filed June 4, 2015, the Court of Appeals construed documents received from Petitioner as a petition for rehearing and denied Petitioner's request for rehearing. In the order, the Court noted that Petitioner provided a copy of the order on appeal but failed to provide proof that he **timely** served Respondent with the notice of appeal from the circuit court order. The order also indicated that the Court of Appeals was unable to discover any fact or principle of law

overlooked or disregarded. The Court of Appeals also declined to rule on the “Request for Disclosure” because rehearing was denied.

#### IV.

Petitioner thereafter filed and served Respondent with a notice of appeal to this Court seeking review of the decision of the Court of Appeals. This Court assigned appellate case number 2015-001396 and issued an order on June 30, 2015, construing the notice of appeal as a petition for certiorari pursuant to Rule 242, SCACR, and dismissing the matter based upon Petitioner’s failure to submit a petition for writ of certiorari and appendix containing the content specified by Rule 242 (d) and (e), SCACR. The remittitur for the appeal from the order denying the Application for Forensic DNA Testing was properly issued on July 15, 2015, ending appellate court jurisdiction.

#### V.

However, Petitioner thereafter forwarded to this Court an undated “Petition for Writ of Certiorari,” a “Writ of Certiorari on Brief,” “Second Request Motion for Production Rule (5)”, and other documents that this Court may consider an Appendix. These documents were assigned appellate case number 2015-001637 and are presently pending before this Court for resolution. In the request for production, Petitioner asks this Court to compel Respondent to produce documents for his inspection to enable him to supplement his appeal. The petition and brief challenge the circuit court order denying Petitioner’s Application for Forensic DNA Testing and the propriety of the Court of Appeals’ orders dismissing his appeal and denying rehearing as outlined above. The documents were accompanied by undated proofs of service. Respondent and this Court received the documents on August 3, 2015. Petitioner lists the Court of Appeals’

appellate case number from the appeal of the order denying his Application for Forensic DNA Testing which was dismissed and remitted on July 15, 2015. (Appellate Case Number 2014-000333).

VI.

Respondent moves this Court to dismiss or reject Petitioner's documents now assigned appellate case number 2015-001637 as being an improper attempt by Petitioner to revisit the appeal of the same orders of the circuit court and Court of Appeals that has already been resolved adversely to Petitioner and remitted. The appeal from the order of the circuit court denying Petitioner's Application for Forensic DNA Testing was dismissed by the Court of Appeals because Petitioner failed to comply with the requirements of Rule 203, SCACR, and the Court of Appeals' request for proof that Petitioner timely served Respondent with that notice of appeal. The dismissal was proper and this Court lacks jurisdiction to consider any documents or motions related to the order denying his Application for Forensic DNA Testing because, as was already determined, Petitioner failed to establish that he timely served the notice of appeal from the order denying the Application for Forensic DNA Testing and because the remittitur respecting the matter has been sent ending the appeal.

The appellate court rule governing initiation and perfection of an appeal requires, in pertinent part, that an appellant serve notice of appeal from the court of general sessions on all respondents no later than ten (10) days after receipt of written notice of entry of the order. Rule 203(b) (2), SCACR. The appellate court rules also require that when the notice of appeal is filed, it must be accompanied by a copy of the order being appealed and proof of service showing all respondents were served with the notice of appeal. Rule 203 (d) (1) (B), SCACR. The

requirement of timely service of the notice of appeal is jurisdictional. If an appellant misses the deadline for serving the notice of appeal, the appellate court lacks jurisdiction to consider the appeal and has no discretion to extend or ignore the deadline for serving the notice of appeal. USAA Property and Cas. Ins. Co. v. Clegg, 377 S.C. 643, 661 S.E.2d 791 (2008); State v. Hinson, 303 S.C. 92, 399 S.E.2d 422 (1990); Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985); Miller v. State, 269 S.C. 113, 236 S.E.2d 422 (1977).

The Court of Appeals properly dismissed Petitioner's earlier appeal for failing to provide proof of timely service of the notice of appeal. Moreover, the Court of Appeals properly denied the petition for rehearing when Petitioner was given another opportunity to provide the proof of service showing respondent was **timely** served with notice of appeal from the circuit court order but Petitioner again failed to establish that he timely served the notice of appeal. The Court of Appeals' orders of dismissal and denial of rehearing were proper when Petitioner failed to comply with the requirements of the appellate court rules. See Rule 231 (a), SCACR; see also Rule 260, SCACR ("Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal . . . ."); Henning v. Kaye, 307 S.C. 436, 415 S.E.2d 415 S.E.2d 794 (1992) (appellate court rules are not technicalities but provide for orderly processing of appeals). Thereafter, this Court denied Petitioner's petition for writ of certiorari for Petitioner's failure to comply with the appellate court rules governing the content of a petition for writ of certiorari and appendix. See Rules 242 (d) and (e), SCACR. The remittitur was issued as provided by Rule 221, SCACR. With the issuance of the remittitur, appellate jurisdiction ended and the documents subsequently submitted by Petitioner and currently pending before this Court as appellate case number 2015-001637 are

not proper for consideration.

“The final disposition of a[n appellate] case occurs when the remittitur is returned by the clerk of the appellate court and filed in the lower court. Until that time the case is pending on appeal.” Christy v. Christy, 317 S.C. 145, 151, 452 S.E.2d 1,4 (Ct. App. 1994); see also McDowell v. S.C. Dep’t of Soc. Servs., 300 S.C. 24, 386 S.E.2d 280 (Ct. App. 1989). Until return of the remittitur, the case is still pending on appeal; however, after the remittitur is issued, the lower court then acquires jurisdiction to enforce the judgment. Martin v. Paradise Cove Marina, Inc., 348 S.C. 379, 559 S.E.2d 348 (Ct. App. 2001); Muller v. Myrtle Beach Golf & Yacht Club, 313 S.C. 412, 438 S.E.2d 248 (1993). “Jurisdiction vests in the circuit court upon receipt of the remittitur from the appellate court.” Brackenbrook North Charleston, LP v. County of Charleston, 366 S.C. 503, 508, 623 S.E.2d 91, 93 (2005); see also State v. Wise, 33 S.C. 582, 582, 12 S.E. 556, 557 (1891)(stating that the “effect of the remittitur . . . as has often been held, [the appellate] court loses its jurisdiction, and the same is restored to the circuit court.”). Pursuant to Rule 221(b), SCACR, the appellate court shall issue the remittitur to the lower court containing a copy of the judgment of the appellate court when fifteen days have elapsed after the filing of the opinion, order or decree finally disposing of the appeal. Rule 221(b), SCACR. The return and filing of the remittitur constitutes the final appellate disposition of the case. Christy v. Christy, 317 S.C. 145, 452 S.E.2d 1 (Ct. App. 1994). “When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and **no motion can be heard thereafter**” by the appellate court. Wise v. South Carolina Department of Corrections, 372 S.C. 173, 642 S.E.2d 551 (2007) (emphasis added) citing Mickle v. Blackmon, 255 S.C. 136, 177 S.E.2d 548 (1970); Thomas v. Lynch, 87 S.C. 44, 68 S.E. 817

(1910); Carpenter v. Lewis, 65 S.C.400, 43 S.E. 881 (1903); State v. Keels, 39 S.C. 553, 17 S.E. 802 (1893); see also State v. Barnes, 2015 WL 4002389 (2015) (stating there is no authority that permits the remittitur to be recalled because of the post-remittitur conduct by a party to enable the court to consider an issue after the remittitur is sent); Pringle v. Sizer, 3 S.C. 335, 336, 1872 WL 4868 (1872)(stating that were the remittitur is issued, the appellate court loses jurisdiction); State v. Hawkins, 121 S.C. 290, 114 S.E. 538 (1922) (“After the remittitur of the Supreme Court is sent down, that court has no further jurisdiction.”). “The only exception is when the remittitur is sent by mistake, error, or inadvertence of the appellate court.” Id. citing Keels, *supra*. An appellate court cannot recall a remittitur due to excusable neglect on the part of the appellant in failing to perfect his appeal. Keels, at 553, 17 S.E. at 802. The time for correction by an appellant is before the remittitur is sent. Id.

## VII.

The remittitur for Petitioner’s appeal from the circuit court order denying his Application for Forensic DNA Testing and the order dismissing that appeal was not sent down by mistake, error, or inadvertence on the part of the appellate court. Rather, the remittitur was correctly sent after fifteen day elapsed from the date of this Court’s order denying Petitioner’s petition for writ of certiorari. Therefore, this Court does not have jurisdiction to act on the documents submitted by Petitioner. Wise v. South Carolina Department of Corrections, at 174, 642 S.E.2d at 551; see also Thomas v. Lynch, 87 S.C. 44, 68 S.E.2d 817 (1910) (stating that when appeal is dismissed for an appellant’s failure to comply with the appellate court rules and order of the appellate court and remittitur is issued, the appellate court loses jurisdiction and noting that to hold otherwise would lead to never ending litigation). The documents must be dismissed or rejected for lack of

appellate jurisdiction.

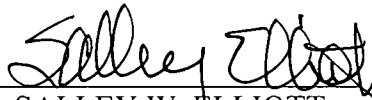
WHEREFORE, Respondent respectfully prays that this Court dismiss or reject the documents bearing appellate case number 2015-001637 and entitled “Petition for Writ of Certiorari,” a “Writ of Certiorari on Brief,” “Second Request Motion for Production Rule (5)”, and other documents that this Court may consider an Appendix on the ground the Court lacks appellate jurisdiction of the matter as set forth above; that the time limits for this appeal be held in abeyance until this Court’s disposition of this motion; and for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

August 24, 2015

STATE OF SOUTH CAROLINA  
IN THE SUPRME COURT

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Appeal from Orangeburg County  
The Honorable Edgar W. Dickson, Jr., Presiding Judge

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Appellate Case No: 2015-001637

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THE STATE,

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**PROOF OF SERVICE**

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I, Angela Bennett, certify that I have served the Motion to Dismiss or Reject "Petition for Writ of Certiorari," "Writ of Certiorari on Brief," and "Second Request for Production Rule (5) on petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney Heyward C. Dempsey, #134171, MacDougall Correctional Inst., 1516 Old Gilliland Road, Ridgeville, South Carolina 29472.

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

This 24<sup>th</sup> day of August, 2015.

  
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ANGELA BENNETT  
Administrative Assistant

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