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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Supreme Court of South Carolina
Appeal from Richland County
Honorable G. Thomas Cooper, Circuit Court Judge
Appellate Case No. 2013-000615

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S.C. SUPREME COURT

THE STATE,

Petitioner,

vs.

CHRISTOPHER BROADNAX,

Respondent.

BRIEF OF PETITIONER ON REHEARING

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TABLE OF CONTENTS

	Page
Table of Contents.....	i
Table of Authorities	ii
Issues Presented.....	1
Statement of the Case.....	2
Argument:	
This Court may deny Respondent Broadnax’s request to remand his appeal to the court of appeals for consideration of issues not ruled upon by that court where Broadnax waived or abandoned the issues by failing to pursue the issues in his return to the State’s petition for writ of certiorari and/or failing to include the issues or request a remand in his brief after certiorari was granted but presented the request for the first time in the petition for rehearing to this Court?.....	4
Conclusion.....	10

TABLE OF AUTHORITIES

Cases:

Anonymous v. State Bd. Of Medical Examiners, 329 S.C. 371, 496 S.E.2d 17 (1998).....7

Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234 (1933).....6

Bochette v. Bochette, 300 SC 109, 386 SE2d 475 (Ct App 1989).....7

Bonaparte v. Bonaparte, 317 S.C. 256, 452 S.E.2d 836 (1995).....7

Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 529 S.E.2d 11 (2000).....9

Camp v. Springs Mortgage Corp., 310 S.C. 514, 426 S.E.2d 304 (1993).....7

Gold Kist, Inc. v. Citizens of Southern National Bank of South Carolina, 286 S.C. 272, 333 S.E.2d 67 (Ct App 1985)8

Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011).....6, 7

Kennedy v. S.C. Retirement Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001).....6

S.C. Farm Bureau Mut. Ins. Co. v. Oates, 356 S.C. 378, 588 S.E.2d 643 (2003).....7

State v. Broadnax, 401 S.C. 238, 736 S.E.2d 688 (Ct. App. 2013).....2

State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005).....9

State v. Grovenstein, 335 S.C. 347, 517 S.E.2d 216 (1999).....8, 9

State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999).....6

State v. Lockhart, 275 S.C. 160, 267 S.E.2d 270 (1980).....9

State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000).....8, 9

Law v. S.C. Dept. of Corrections, 368 S.C. 424, 629 E.E.2d 642 (2006).....8

Statutes:

Rule 221 (a), SCACR.....4, 5

Rule 242 (d)(2), SCACR..... 8

Rule 242 (i), SCACR.....7

Rule 609 (a)(2), SCRE.....2, 3

ISSUE PRESENTED

May this Court deny Respondent Broadnax's request to remand his appeal to the court of appeals for consideration of issues not ruled upon by that court where Broadnax waived or abandoned the issues by failing to present the issues or request a remand in his return to the State's petition for writ of certiorari and/or in his brief after certiorari was granted but presented the request for the first time in the petition for rehearing to this Court?

STATEMENT OF THE CASE

On June 16, 2010, Respondent Christopher Broadnax was found guilty of one count of armed robbery and four counts of kidnapping. Judge G. Thomas Cooper sentenced respondent to the mandatory sentence of life without the possibility of parole based on Respondent's three prior armed robbery convictions. Respondent subsequently filed a timely appeal on June 23, 2010.

After full briefing and oral argument, the court of appeals issued an opinion in which it reversed Respondent Broadnax's conviction and sentence and remanded the case for a new trial. State v. Broadnax, 401 S.C. 238, 736 S.E.2d 688 (Ct. App. 2013). On February 1, 2013, the State served a petition for rehearing. Broadnax did not submit a petition for rehearing or return to rehearing. On February 22, 2013, the court of appeals issued an order denying the State's petition for rehearing.

The State subsequently filed and served a petition for writ of certiorari on March 25, 2013, requesting this Court to grant certiorari review and reverse the opinion of the court of appeals respecting the trial court's finding that armed robbery was a crime of dishonesty under Rule 609 (a) (2), SCRE, the court of appeal's refusal to remand for a balancing test, and the court of appeals' failure to find harmless error. On May 21, 2013, Broadnax made return to the petition, arguing that the court of appeals correctly held that armed robbery was not a crime of dishonesty, the court of appeals correctly performed the balancing test pursuant to Rule 609, SCRE, and the court of appeals was correct in not applying the harmless error standard to the case. On June 12, 2014, this Court issued an order granting the State's Petition for Writ of Certiorari to "review the Court of Appeals' decision" On July 8, 2015, this Court affirmed in part and reversed in part the decision of the Court of Appeals. Respondent Broadnax did not

petition for rehearing and the remittitur was issued on July 24, 2015. On July 29, 2015, this Court recalled the remittitur and issued a second opinion also affirming in part and reversing in part the decision of the court of appeals. While this Court agreed with the court of appeals' determination that armed robbery is not a crime of dishonesty or false statement for purposes of impeachment under Rule 609(a) (2), this Court upheld Respondent Broadnax's conviction, finding that the admission of the prior conviction was harmless error.

On August 6, 2015, Respondent Broadnax filed a petition for rehearing respecting the issue of harmless error and, alternatively, requested a remand to the court of appeals to rule on the three issues not reached in the court of appeals' decision. By order dated September 8, 2015, this Court denied Broadnax's petition for rehearing with respect to the harmless error issue and granted rehearing with respect to whether it "should remand this case to the court of appeals to consider the arguments the court of appeals did not reach because it found the prior conviction issue was dispositive." In the order, this Court also directed the parties to specifically "address the question of the propriety of a remand to the court of appeal in light of [Broadnax's] failure to address those arguments in his brief to this Court."

ARGUMENT

This Court may deny Respondent Broadnax's request to remand his appeal to the court of appeals for consideration of issues not ruled upon by that court where Broadnax waived or abandoned the issues by failing to present the issues or request remand in his return to the State's petition for writ of certiorari and/or in his brief after certiorari was granted but presented the request for the first time in the petition for rehearing to this Court.

In a petition for rehearing, Respondent Broadnax asked this Court to remand his appeal to the court of appeals to consider three arguments the court of appeals did not reach because it found that a prior conviction issue was dispositive. This Court granted rehearing and requested briefs on the issue whether it should remand this case to the court of appeals to consider the arguments the court of appeals did not reach. This Court specifically asked the parties to "address the question of the propriety of a remand to the court of appeals in light of [Broadnax's] failure to address those arguments in his brief to this Court." Broadnax contends in his brief on rehearing that this Court should remand his case to the court of appeals because a failure to do so would constitute a violation of his due process rights and would run contrary to legal precedent.

First, the State submits that Respondent Broadnax's request for a remand to the court of appeals for that court to consider three arguments that court did not reach may be denied by this Court because Broadnax failed to timely pursue the petition for rehearing and because the issues cannot be raised for the first time in a petition for rehearing. Rule 221 (a), SCACR, requires that "[p]etitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court." The original opinion of the Court in this case was filed on July 8, 2015. Respondent did not pursue a petition

for rehearing. This Court issued the remittitur on July 24, 2015. This Court subsequently recalled the remittitur and simultaneously re-filed its opinion on July 29, 2015. This subsequent opinion omitted a footnote respecting a matter unrelated to the remand issue and left the opinion and mandate otherwise unaltered. Broadnax filed a petition for rehearing for the first time on August 6, 2015. The petition for rehearing did not address the footnote but, rather, took issue with the harmless error analysis that appeared in the original opinion and, for the first time, asked this Court to remand the appeal to the court of appeals. This Court might conclude that Broadnax should not be allowed to pursue an untimely petition for rehearing simply because of the serendipitous occurrence of the re-filed opinion to omit a footnote. The issues presented in the petition for rehearing were presented outside the proper fifteen-day window required by our appellate court rules. Broadnax was required under our appellate court rules to file his petition for rehearing on or before July 23, 2015. The arguments advanced by Respondent Broadnax in the petition for rehearing are arguments he should have pursued in response to the original opinion of this Court. The petition for rehearing does not address the alteration in the second opinion. Therefore, this Court could consider Respondent Broadnax's failure to file the petition in accordance with the rules and deny the relief requested in the petition for rehearing.

Second, this Court might determine that Respondent's use of a petition for rehearing to advance issues and a request for remand for the first time is contrary to our appellate court rules and decisions applying those rules. Our appellate court rules require that the petition for rehearing "state with particularity the points supposed to have been overlooked or misapprehended by the appellate court." Rule 221(a), SCACR. "The purpose of a petition for rehearing is to aid the court in deciding correctly a case heard by it. The petition must show, according to the rule, 'the points supposed to have been overlooked or misapprehended by the

court.” Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234, 237 (1933). “The purpose of a petition for rehearing is not to have presented points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of a petition for rehearing to have the case tried in the appellate court a second time.” Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011); see also Kennedy v. S.C. Retirement Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001); Accordingly, an issue may not be raised by a party for the first time in a petition for rehearing and an attempt to do so will be considered by this Court as untimely and improper. Id. at 466, 719 S.E.2d at 643, citing Kennedy v. S.C. Retirement Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). Respecting the remand issue, Respondent Broadnax does not contend this Court overlooked or misapprehended arguments presented for this Court’s certiorari review as an “aid to the Court in deciding correctly a case heard by it.” Arnold v. Carolina Power & Light Co., 168 S.C. at 163, 167 S.E. at 234. Instead, he appears to use the petition for rehearing to advance arguments he failed to make to this Court in his brief in order to have his appellate case “tried a second time.” Id.

Third, as to this Court’s question respecting the propriety of remand in this case where Broadnax failed to present the three unresolved arguments in his brief to this Court, the State submits that our appellate court rules and decisions applying those rules provide some general guidance. Our appellate court rules and decisions generally indicate that in order for an issue to be considered by this Court on certiorari review of a decision of the court of appeals, the issue must have been presented in the initial arguments to the court of appeals and in a petition for rehearing to the court of appeal. See Rule 242(d)(2), SCACR (“Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.”); State v. Johnson, 334 S.C. 78 n. 1,

512 S.E.2d 795 (1999) (stating this Court will decline to consider an issue the Court of Appeals did not address and that was not raised by the defendant-respondent in petition for rehearing) (citing Anonymous v. State Bd. Of Medical Examiners, 329 S.C. 371, 496 S.E.2d 17 (1998); Bonaparte v. Bonaparte, 317 S.C. 256, 452 S.E.2d 836 (1995), overruled on other grounds [stating that where the court of appeals fails to address an issue, a petitioner cannot argue the merits of the issue in a petition for writ of certiorari because the issue was not preserved for review but, instead, must argue the court erred in failing to rule if the issue was raised in the petition for rehearing]); see also Camp v. Springs Mortgage Corp., 310 S.C. 514, 426 S.E.2d 304 (1993)(the Supreme Court will decline to address an issue where the court of appeals does not address it and appellant fails to petition for rehearing for the court of appeals to consider it). The petition for writ of certiorari may be granted or denied on any question presented. Rule 242 (i), SCACR. If granted, this Court will issue an order specifying the issue or issues upon which certiorari review is granted and the parties shall thereafter submit briefs addressing the issue or issues as directed by this Court. Rule 242 (i), SCACR.

As to Respondent Broadnax's failure to include the three issues the court of appeals declined to address in the brief to this Court or to request remand, the State notes that "[o]rdinarily, no point will be considered on appeal which is not set forth in the statement of the issues on appeal" unless the issue is reasonably clear from an appellant's arguments. Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011). Every ground upon which relief is requested should be specifically stated such that the reviewing court will know what is at issue. Id. An issue is deemed abandoned and will not be considered on appeal if the argument is not included in his brief. Bochette v. Bochette, 300 SC 109, 386 SE2d 475 (Ct App 1989); see also S.C. Farm Bureau Mut. Ins. Co. v. Oates, 356 S.C. 378, 588 S.E.2d 643 (2003)(stating that

issues not appealed are abandoned); Gold Kist, Inc. v. Citizens of Southern National Bank of South Carolina, 286 S.C. 272, 333 S.E.2d 67 (Ct App 1985)(stating that exceptions not argued in the brief are deemed abandoned).

This Court might consider that the three issues and remand were abandoned or waived by Broadnax because he failed to address them in his return to the petition for certiorari and/or in his brief to this Court, or even incorporate the arguments he made to the court of appeals in some fashion for this Court's consideration. Respondent Broadnax made no request for remand at any time prior to the petition for rehearing. The issues and remand request are not subsidiary questions comprised within the issue of the admission of Respondent's prior convictions ruled upon by the Court of Appeals and upon which rehearing and certiorari review was sought by the State. See Rule 242 (d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court. A question presented will be deemed to include every subsidiary question fairly comprised therein."). This Court did not reference the issues in its grant of certiorari. Arguably the issues and the remand request are not before the Court. To the extent Broadnax might argue the appellate court may affirm on any ground appearing in the record, the State submits that the rule allows the appellate court to affirm the **trial court** on any ground appearing in the record, not reverse the trial court's ruling. Law v. S.C. Dept. of Corrections, 368 S.C. 424, 629 E.E.2d 642 (2006); Rule 220(c), SCACR.

Respondent heavily relies on State v. Grovenstein, 335 S.C. 347, 517 S.E.2d 216 (1999) and State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000) in his brief. The State acknowledges that in both Grovenstein and Pinckney, this Court expressed its intention to remand the case to the court of appeals for consideration of issues not resolved when the appeal

was considered by that court. The State notes that, in Pinckney, counsel for Pinckney pursued a petition for rehearing asking the court of appeals to rule on unaddressed issues in the event certiorari review by this Court ultimately resulted in reversal of the court of appeals and affirmance of the conviction. Nevertheless, it does not appear the opinions in Grovenstein and Pinckney are controlling because the question of the propriety of remand was not before the Court. See Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 529 S.E.2d 11 (2000) (where the question of appealability was not an issue raised by any party, the fact that an appellate court may have decided an appeal of a particular type or order on the merits is not dispositive of whether the order is appealable); State v. Lockhart, 275 S.C. 160, 267 S.E.2d 270 (1980) (same).

To the extent Respondent Broadnax contends in his brief on rehearing that this Court should remand his case to the court of appeals because a failure to do so would constitute a violation of his due process rights, this Court may conclude that Respondent Broadnax cannot complain of error his own conduct induced. State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005).

Regardless of this Court's ultimate conclusion, all appellate practitioners will benefit from guidance provided by this Court as to the proper procedure to follow when the court of appeals finds one of several issues dispositive and declines to address the remaining issues.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that this Court consider and deny Respondent's request to remand his case to the court of appeals and affirm the judgment of conviction.

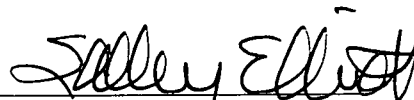
Respectfully submitted,

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Brief of Petitioner on Rehearing on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record LaNelle C. DuRant, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

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

This 2nd day of October, 2015.


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