

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

NOV 12 2015

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

S.C. SUPREME COURT

Court of Appeals Case No. 2015 - 002062

Dr. Cynthia Holmes, M.D.,

Petitioner,

v.

East Cooper Community Hospital, Inc.; and
Tenet HealthSystem Medical, Inc.,

Respondents.

**PETITIONER'S REPLY
TO RESPONDENT'S RETURN TO
PETITION FOR A WRIT OF CERTIORARI**

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For Petitioner

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For Respondents

The Respondent has chosen to present a response to the Petitioner's Petition for Writ of Certiorari in this case. The Petitioner hereby submits this brief reply in order to clarify the basis and focus of this Petition. The Petition seeks clarification of the procedure for the parties, the Clerk's office, and the Judiciary as to how to proceed with a motion under Rule 240(j), SCACR. The history of a Rule 240(j) motion that Petitioner filed in this underlying appeal is relevant, as it shows that there is confusion in both the judiciary and the Clerk's office as to how to proceed with this type of motion. The merits of the underlying appeal, which have been submitted to the Court and are on record in the form of the Appellant's Initial Brief are not relevant to this Petition. This Petition for Writ of Certiorari presently before the Supreme Court presents a novel issue, a constitutional due process issue, a question of State law, and a legitimate public policy concern as to the need for the establishment of the proper process and procedure for the Court, the Clerk, and the parties to address a Rule 240(j) motion.

I. The Petition presents a novel issue

The issue of how to treat a motion for review under Rule 240(j) SCACR may very well be novel. The history of how Petitioner's motion was treated by the Appellate Court and the Appellate Court Clerk's office certainly shows evidence of confusion. The Petitioner's Petition for Writ of Certiorari offers the Court an opportunity to clarify and establish the procedure for using this rule. "Rule 224(j), SCACR (renumbered Rule 240(j), SCACR). The SCACR do not specify the procedure for this review." Chief Justice Toal et al., *Appellate Practice in South Carolina* (2002), p. 259 The Appellate Court assigned the same judge who wrote the order under review to be part of the review panel. It then applied the review standard from a Petition for Rehearing to the Rule 240(j) motion. The Clerk then characterized the Rule 240(j) motion incorrectly as a Petition for Rehearing, and refused to accept a properly and timely filed Petition

for Rehearing. It seems clear that there is a lack of established procedure regarding the Rule 240(j) motion. This will be a novel issue, and one that apparently need attention.

The S.C. Appellate Clerk's letter, quoted in the Respondent's response proves that there is a need for some direction on how a Rule 240(j) motion should be treated. Petitioner submitted a motion under Rule 240(j) for review of an Order by a single judge, which dismissed an appeal. The response was an Order signed by the same judge and two other appellate Court Judges, which applied the standard appropriate for a SCACR Rule 221, not Rule 240(j). Further confusion ensued when the Clerk of the S.C. Court of appeals, apparently not understanding the difference between a Rule 240(j) motion and a Rule 221 Petition for Rehearing, considered the Rule 240(j) motion as petition for rehearing and unilaterally decided not to file the Petitioner's actual Petition for Rehearing as to the Order from the three Judges who ruled on the Rule 240(j) motion:

"We received your second petition for rehearing received September 17, 2015 in the above referenced appeal. Your petition for rehearing was denied on September 2, 2015. Accordingly, no further action will be taken on your second petition pursuant to Rule 221(c), SCACR."

II. The Petition presents a constitutional due process issue

What was denied on September 2, 2015, of course, was the Petitioner's Rule 240(j) motion, not a Rule 221 petition for rehearing. In addition to this procedural matter being a novel question appropriate for the Supreme Court, it raises significant constitutional due process issues. *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988). "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g.,

Fuentes v. Shevin, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). S.C. Const. art. I, § 2, 3, 4, 9, 10, 12, 14, 22, and 23; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, V, VII, and XIV. A Rule 240(j) motion is separate and distinct in procedure, standard of review, and in the number of Judges required to consider it from a Petition for Rehearing. Although it seems obvious to the undersigned that a Rule 240(j) motion is not the same thing as a Petition for Rehearing, it appears that both the judiciary and the Clerk's office are somewhat confused as to how to treat the motion. The result is a denial of due process. The Clerk has simply refused to file an appropriate petition for rehearing, an arbitrary action without any outlet for review, and a classic example of the denial of due process through an "arbitrary action of the government."

III. The Petition presents an issue of State Law.

The South Carolina Constitution requires the Appellate Court to act in panels. A single Judge does not, as the Petitioner reads the Constitution, have the authority to simply Order an appeal out of existence. "The Court of Appeals sits in PANELS." S.C. Const. art. 5, § 7. The Supreme Court has decided that a panel consists of three Judges. In *State v. McMillan*, 349 S.C. 17, 561 602 (2002) the Court reversed a decision of the Court of Appeals where a hearing was conducted with only two of the three panel judges present. (*see* Chief Justice Toal et al., *Appellate Practice in South Carolina* (2002), p. 10.) In the Petition for Writ of Certiorari, the Petitioner is asking the Supreme Court to address the issue of whether, when a party files a Rule 240(j) motion, asking for a review of a single Judge's Order, it is appropriate for the Judge who

wrote the Order under review to be part of the reviewing panel. If not, then there was not a full panel. This is a procedural issue which is spoken to by the South Carolina Constitution.

IV. Public Policy Considerations

While the pursuit of truth and justice are the ultimate goals of the Judiciary, the means by which we obtain and protect those precious things is through procedure, by following rules. Having a clear path set forth on how to seek justice is essential to providing the people, our State's citizens, with the means of doing so. If the process is not clear, or does not work, there can be no justice meted out on the merits of any case. In this Petition, we are pointing out, to the Court, what the Petitioner believes is a part of the procedure which needs to be addressed and clarified. The procedural history of the Petitioner's Rule 240(j) motion and its ultimate rejection by the Clerk of Court without ever being presented to the Court of Appeals is proof that guidance from the Supreme Court is needed here. In the name of the public, the Petitioner, is asking the Court to set the record straight as to the following questions:

- a) Does the Court recognize Rule 240(j) as a motion which can be filed by a party, different, separate, and distinct from a Petition for Rehearing?
- b) Should three Appellate Judges sit on the Panel to decide a Rule 240(j) motion?
- c) Should the Judge who wrote the Order under review be part of the panel reviewing an Order under Rule 240(j)?
- d) What is the standard of review that the panel should apply when considering a Rule 240(j) motion?

Respectfully, the Petitioner asks that the Court grant Certiorari so that the Judiciary, the Clerk's office, and the people can be given the proper procedure as to how each should

participate in a Rule 240(j) SCACR motion.

Respectfully submitted,

Date 11-9-15



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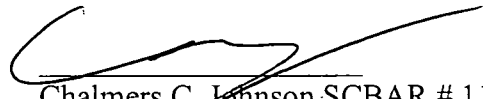
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PROOF OF SERVICE

I certify that I have served a copy of the PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI on the Respondents' counsel L. Smith-Yancey by depositing a copy of it in the United States Mail, postage prepaid, addressed at 16 Charlotte St., P.O.D. 22247, Charleston, SC 29413, on this date. I have also supplied a courtesy copy by email to Lindsay Smith-Yancey at lsy@p-tw.com

Date: November 9, 2015


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