

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Court of Common Pleas
Honorable William P. Keesley, Circuit Court Judge
1990-GS-32-0056

RECEIVED

JAN 28 2016

SC Court of Appeals

ALFONSO WARE, JR.,

Petitioner,

v.

THE STATE,

Respondent.

Appellate Case No. 2014-001470


**RESPONDENT'S SECOND MOTION TO EXTEND TIME TO FILE
RETURN TO PETITION FOR WRIT OF CERTIORARI**

The Respondent, above-named, hereby make a second motion to the Court to extend the time of filing the Return to Petition for Writ of Certiorari until February 29, 2016 which is due this date.

Respondent is actively preparing a Return in this matter. During the preparation, it has been determined that the appendix before the Court contains matters that this Court expressly denied the Petitioner the right to include in its order of May 15, 2015 and does not include any material from the lower court record, including the application, response and any of the orders of Judge Keesley which are on appeal in this matter.¹ A review of the appendix attached to the

¹ The Petitioner filed a document styled "Leave to Make Motion" pursuant to Rule 60(B) on March 19, 2014. Petitioner contended in his motion that on February 4, 2015, he had received 10 pages of materials from the South Carolina Law Enforcement Division which he claimed was evidence that was not previously before the

Petition made on November 24, 2014 is non-compliant because it includes no material from the “lower court record” as required under SCACR Rule 247 (E). It does not include the application for forensic DNA Testing filed July 29, 2013; the initial “Order Regarding DNA testing” filed July 29, 2013; the Response to the Application for Forensic DNA Testing by the Eleventh Circuit Solicitor’s Office filed October 22, 2013; the Order of Intention to Summarily Dismiss the Application for Forensic DNA Testing dated May 21, 2014; Petitioner Ware’s written Reply to Proposed Order of Dismissal filed June 13, 2014; and the Order of Summary Dismissal filed June 20, 2014.

 Petitioner Ware includes none of the lower records in his Appendix to the Petition. The Petitioner has only included in his Appendix to the Petition for Writ of Certiorari which Respondent received on November 25, 2015: 1) a copy of the letter from the Clerk of Court dated October 19, 2015 concerning the October 16, 2015 order denying his motion to dismiss and directing the filing of the petition and appendix within 30 days and 2) the materials from a Freedom of Information Act request of December 3, 2014 after the lower court decision that this Court directed not be included in the Appendix by Order dated May 15, 2015.

Respondent are preparing a Supplemental Appendix to include the lower court records and orders as an attachment to the Return which we will be asking the Court to dismiss and/or deny the appeal for jurisdictional and other reasons. In addition, it appears that the only question

hearing judge and asserted that “the custodian of the evidence in pleading stated there was no evidence, however, this evidence supports petitioner’s claims of innocence.” On May 15, 2015, the Court, through Associate Justice Stephanie McDonald entered an order denying the request and directing that a copy of the appendix and petition of writ of certiorari within twenty (20) days of the order (by June 4, 2015). In particular, the Court stated:

After carefully considering Petitioner’s March 19, 2015 “Leave to Make Motion,” it appears Petitioner requests permission to include ten pages in the appendix that were not presented to the circuit court during its review. Petitioner’s request is denied. . .

Ware v. The State, Appellate Case No. 2014-001470, Order (S.C. CT. App. May 15, 2015). However, in violation of the May 15, 2015 Order, the Petitioner has included the 10 pages in his Appendix at Appendix pages 4-15.

being raised in the Petition is whether the Court of Appeals correctly denied his request to dismiss the appeal without prejudice in its order of October 16, 2015 and no issue pertaining to the Order of Judge Keesley entered on June 18, 2014 which is the matter on appeal.²

The argument that the Respondent intends to raise are the following:

- Ms. #3.
- I. The Court of Appeals did not err when it denied the motion to dismiss without prejudice the appeal from the denial of the application to for DNA testing based upon the post-order receipt of materials from the South Carolina Law Enforcement Division consisting of ten pages.
 - a. The Court of Appeals should dismiss the appeal for lack of jurisdiction because the notice of appeal was belatedly served upon the Solicitors Office beyond the 10 days period after knowledge of the entry of the order and service upon the Attorney General who was not a party representative below is not proper service.
 - b. When the Petitioner fails to comply with SCACR Rule 247 and fails to include any materials from the lower court record, including the orders appealed, in the Appendix to the Petition for Writ of Certiorari and instead includes material which the Court of Appeals ruled on May 15, 2015 cannot be included in the Appendix because they were not part of the lower court record, the certiorari petition must be dismissed as failing to comply with SCACR Rule 247.
 - c. The Petitioner fails to raise any issue in the petition concerning the correctness of the Order of Summary Dismissal filed June 20, 2014.

Pertinent to the issue raised in the certiorari petition before this Court, the Petitioner made a motion to dismiss the appeal without prejudice and with leave to appeal again dated July 28, 2015. On August 14, 2015, Respondent, through undersigned counsel responded to the motion in opposition. Petitioner made a Reply on August 27, 2015. On October 16, 2015, the Court of Appeals, through Chief Judge John Few entered an order that the motion to dismiss without prejudice was denied. See App.p. 3.

² In his petition for writ of certiorari, he sets forth the following issue:

Did the South Carolina Court of Appeals err when the Court denied Appellant's motion to dismiss without prejudice?

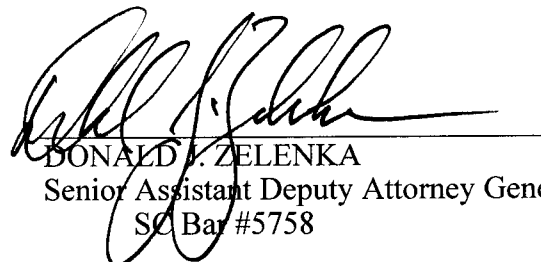
Subsequently, on October 19, 2015, the Clerk of Court wrote Petitioner and advised him that pursuant to the October 16, 2015 order the matter was to proceed and directed that Petitioner file and serve the petition for writ of certiorari within thirty days (November 15, 2015) or it would be dismissed. App.p. 3. The Petition apparently seeks reconsideration of the October 16,2015 order and addresses no issue concerning the June 2014 order of Judge Keesley dismissing the application. Respondent will be requesting this Court to dismiss the appeal with prejudice based upon his abandoning any issues related to the June 2014 Order dismissing the application for forensic DNA testing.

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By copy of this pleading, we are advising Mr. Ware who is acting pro se of this extension request. Respondents have been unable to complete this matter due to intervening issues in state and federal court. Particularly, below-signed counsel is filing this date an Initial Brief of Respondent in State v. Quanell McIlwain which has been extended previously by this Court four times and is a higher priority.

WHEREFORE, Respondent respectfully requests this grant to allow an extension to file the Return up to and including February 29, 2016.

Respectfully submitted,


DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
SC Bar #5758

ATTORNEY FOR RESPONDENT

January 28, 2016

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IN THE COURT OF APPEALS**

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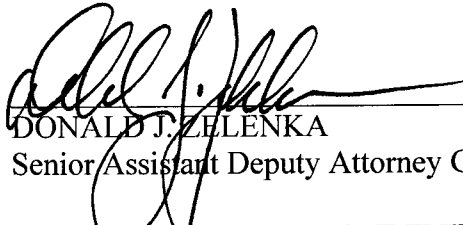
Respondent.

Appellate Case No. 2014-001470

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I served copy of Respondent's Second Motion to Extend Time to File Return to Writ of Certiorari on Petitioner by depositing same in the United States Mail, first class, postage prepaid, addressed as follows:

Alfonso Ware, Jr., #168464
Broad River Correctional Institution
Monticello 242
4460 Broad River Road
Columbia, South Carolina 29210


DONALD J. ZELENIKA
Senior Assistant Deputy Attorney General
ATTORNEY FOR RESPONDENT

January 28, 2016



ALAN WILSON
ATTORNEY GENERAL

January 28, 2016

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JAN 28 2016

SC Court of Appeals

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Alfonso Ware, Jr.
Appellate Case No. 2014-001470

Dear Ms. Kitchings:

Enclosed please find a Respondent's Second Motion to Extend Time to File Return to Petition for Writ of Certiorari in the above-captioned matter for filing in your office. By copy of this letter, I am serving the Petitioner with same.

Sincerely,

Lonetta B. Brawley
Legal Assistant to Donald J. Zelenka
Senior Assistant Deputy Attorney General

/lbb
Enclosure

cc: Alfonso Ware, Jr., #168464