

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Barnwell County  
Doyet A. Early, III, Circuit Court Judge

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TUNZY A. SANDERS,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2014-001970

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**MOTION TO STRIKE PETITION FOR  
WRIT OF CERTIORARI, APPENDIX, AND  
SUPPLEMENTAL APPENDICES  
FOR FAILURE TO COMPLY WITH  
RULE 210(c), SCACR, MOTION  
TO HOLD TIMELINES IN ABEYANCE**

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Respondent now moves for this Court to strike Petitioner's petition for writ of certiorari, appendix, and two supplemental appendices for presenting and arguing matters outside the record. Petitioner Sanders sought and was denied post-conviction relief for his murder conviction from trial occurring February 5-8, 2001. At trial, Petitioner was represented by local counsel and Petitioner's sister, Brenda Sanders, an attorney licensed in Michigan. Sanders later became a summary court judge. She testified at the PCR hearing as a witness for her brother in the instant case on August 20, 2013.

Petitioner's PCR application was denied by order dated August 18, 2014. Petitioner appealed the denial of the PCR application. Petitioner was represented by Tara Shurling, Esquire for the PCR hearing. Ms. Shurling was relieved of counsel after filing the notice of appeal and Petitioner was represented by appellate defense when Ms. Shurling sent a letter to this Court dated December 16, 2014 attesting to Brenda Sanders' disciplinary problems in Michigan, including mental health concerns, and claiming she did not know about them at the time of the PCR hearing. In response, undersigned counsel filed a motion to strike the correspondence and further requested the letter and attachments be returned to Ms. Shurling. This Court denied the motion, but ruled as follows:

The State moves to strike from the record in this case a letter dated December 16, 2014, from petitioner's former counsel to the Clerk of this Court. The motion is denied. **The letter may not be included in the appendix in this matter, as it was not part of the record before the lower court, and will not be considered by this Court in ruling on petitioner's petition for a writ of certiorari.**

Order dated January 23, 2015 (emphasis added).

On July 24, 2015, Sanders' appellate counsel filed a motion to remand the case for a new evidentiary hearing based on "after-discovered evidence" relying on a formal complaint filed by an investigative body in Michigan on September 19, 2014. The State filed a return in opposition to this motion. That motion was denied by this Court on November 5, 2015.

Despite this Court's January order, Sanders' appellate counsel filed a petition for writ of certiorari with numerous references to Judge Sanders' disciplinary record and an appendix including approximately 100 pages (Appendix pp. 302-404) of materials not included in the record below referencing the very topic of the December 16 letter from Ms. Shurling: Brenda Sanders' disciplinary proceedings and her mental health issues. Further, Sanders' counsel filed two

supplemental appendices, the entirety of each containing matter not in the record below and again pertaining to the proceedings against Brenda Sanders in Michigan concerning her judicial conduct and mental health concerns. Finally, Sanders' counsel **included the December 16 letter from Shurling** that this Court ordered shall not be part of the appendix in the first supplemental appendix.

## II.

The referenced materials in the appendices and references to the materials in the petition for writ of certiorari are clearly not proper for inclusion in the record. Rule 210(c), SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal"); Rule 208 (b)(4), SCACR ("The brief shall contain references to the transcript, pleadings, orders exhibits, or other materials which may be properly included in the Record on Appeal."); Rule 243(f), SCACR (providing the appendix shall contain the entire lower court record).

Quite simply, Petitioner is impermissibly attempting to put facts before this Court that were not made available to the PCR court. 1'On v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("Imposing preservation requirements on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments" (emphasis added)).

Assertions not supported by the record cannot appropriately be embodied in an appellate brief pursuant to our appellate court rules. See Williamsburg Rural Water & Sewer Co., Inc. v. Williamsburg County Water & Sewer Auth., 367 S.C. 566, 571, 627 S.E.2d 690, 693 (2006) ("Nothing in the appellate court rules permits a party to unilaterally add after-created evidence to the record."); South Carolina State Highway Dep't v. Meredith, 241 S.C. 306, 311, 128 S.E.2d

179, 182 (1962) (“[C]ounsel is prohibited from embodying in their briefs any fact which does not appear in the record.”); see also Rule 210(h), SCACR (“[T]he appellate court **will not consider any fact** which does not appear in the Record on Appeal.” (emphasis added)).

Since the petition for writ of certiorari and appendices are not in compliance with the Appellate Court Rules and are in derogation of this Court’s January 2015 order, they should be struck, and Petitioner should be required to amend both accordingly.

III.

Respondent also moves to hold all time-lines in abeyance until this Court rules on the State’s motion.

IV.

WHEREFORE, Respondent prays that this Court strike the petition for writ of certiorari and appendices and require Petitioner to submit a new petition for writ of certiorari and appendix in compliance with Rules 209 and 210, SCACR. Respondent further requests 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.

[SIGNATURE BLOCK APPEARS ON FOLLOWING PAGE]

Respectfully submitted,

ALAN WILSON  
Attorney General

DAVID SPENCER  
Senior Assistant Attorney General  
Bar # 68571

BY: 

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ATTORNEYS FOR RESPONDENT

April 6, 2016

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Barnwell County  
Court of Common Pleas  
The Honorable Doyet A. Early, Circuit Court Judge

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TUNZY A. SANDERS,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

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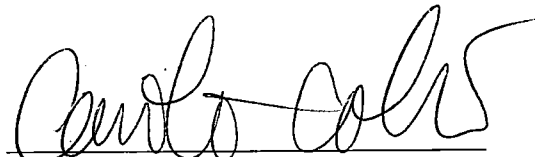
**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the **Motion to Strike Petition for Writ of Certiorari, Appendix, and Supplemental Appendices for Failure to Comply with Rule 210(c), SCACR, Motion to Hold Timelines in Abeyance** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

John H. Strom, Esquire  
South Carolina Commission on Indigent Defense  
Post Office Box 11589  
Columbia, South Carolina 29211

This 6<sup>th</sup> day of April, 2016

  
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CAROLINE COLLINS  
LEGAL ASSISTANT