

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

AUG 04 2016

R. Lawton McIntosh, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2015-002614

The State of South Carolina Respondent,

v.

John Garvin Appellant.

Petitioner

PETITION FOR WRIT OF CERTIORARI

John Garvin, Pro-se
990 Wisacky Hwy.
Bishopville, S.C. 29010
A Party Unrepresented
By Counsel

Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIFICATE OF A PARTY UNREPRESENTED BY COUNSEL

Petitioner as a party unrepresented by counsel certifies that the petition for rehearing was made and finally ruled on by the court of appeals on July 7, 2016 and respectfully petition for a writ of certiorari to review the judgment order of the South Carolina Court of Appeals in State v. Garvin, Appellate Case No. 2015-002614 (Lockemy, Thomas, and McDonald).

QUESTIONS PRESENTED

This is a case that involves questions of exceptional importance, concerning the violation of Rule 506, S.C.A.C.R., Staff Attorney and Law Clerk Conduct and the court of appeals abuse of discretion in overlooking question of facts as it applies to question of law and as both the finder of fact and finder of law on the merit of appellant's motion to reinstate his appeal. The question(s) are presented as followed below:

1. Whether can an order denying a motion for a new trial pursuant to Rule 29(b), S.C.R.Crim.P., Based Upon Newly Discovered Evidence. Whereas the appeal of that motion is dismissed by the Clerk of The South Carolina Court of Appeals for the violation of Rule 203(b)(2), S.C.A.C.R., for the respondent, to whereas the respondent never filed for a motion to dismiss the appeal. Did performed duties of partiality that conflict with court duties and has created the appearance of impropriety in violation of Rule 506, S.C.A.C.R., Staff Attorney and Law Clerk Conduct, S.C.A.C.R. and has violated petitioner's Fourteenth Amendment right to due process?

2. Whether did the Court of Appeals err in holding that petitioner's Motion to Reinstate the Appeal, which was construed as a petition to rehear the dismissal of the appeal overlooked questions of facts presented by the petitioner of which he manifested to the courts that apply to questions of law that he actually did timely

served the Notice of Appeal on respondent, was an abuse of discretion by the court of appeals?

STATEMENT OF THE CASE

Petitioner, John Garvin and his Co-Defendant, Jonathan Perez was arrested on July 17, 2012 and was charged with Trafficking in Heroin (S.C. Code Ann. § 44-53-370(e)). On December 6, 2012, the Spartanburg County Grand Jury indicted Garvin in Indictment No.: 2012-GS-42-5978 and 2012-GS-42-5979. However, at trial, the state elected to proceed only with Indictment No.: 2012-GS-42-5979 and choosing to try the appellant at a later date on Indictment No.: 2012-GS-42-5978.

Petitioner was convicted as charged on Indictment No.: 2012-GS-42-5979 after a jury trial that was held on May 21-23, 2013, in Spartanburg County General Session Court and was sentenced on May 23, 2013 to a term of twenty-five (25) years in prison and fined \$200,000.00 (McIntosh, L. at trial and Sentence).

A notice of appeal was timely filed; On June 6, 2013 the court of appeals granted petitioner permission to appeal. And on October 10, 2013, Indictment No.: 2012-GS-42-5978 was nolle prosequi. On November 26, 2014 the Court of Appeals affirmed petitioner's conviction.

On June 15, 2015, Petitioner inadvertently discovered evidence that is actually relevant and relates to his case. On August 25, 2015, petitioner filed a motion for new trial, based on after – discovered evidence with supporting affidavit in the Spartanburg County General Sessions Court, which was filed September 2, 2015.

On November 9, 2015, the Honorable R. Lawton McIntosh denied petitioner's Motion for a New Trial. On November 20, 2015, petitioner filed his Notice of Appeal with the Court of Appeals and with Spartanburg County General Sessions Court, whereas it was returned to him clock stamped dated November 30, 2015 (see Appx. pg. 53) enclosed with that clock stamped Notice of Appeal was a notice letter that had advised him to 'send a copy of [his] notice of appeal to the Attorney Generals Office dated December 2, 2015. (see Appx. pg. 48). On December 8, 2015, petitioner mailed copies of his Notice of Appeal and Certificate of Service to respondent.

On December 29, 2015, petitioner received a letter from the deputy clerk of Court for The South Carolina Court of Appeals dated December 23, 2015, indicating to petitioner about deficiency or deficiencies with his proof of service that was not in compliance with South Carolina Appellate Court Rule in the format shown by Form 7 in Appendix C to the rules.

On January 5, 2016, petitioner re-submitted his notice of appeal and a corrected proof of service on the respondent, which involved every party in the appeal. On May 4, 2016, the Deputy Clerk of Court issued an order of dismissal for failure to timely serve the notice of appeal upon the respondent. On May 13, 2016, Petitioner filed a motion to reinstate his appeal. On May 26, 2016, the respondent filed a return to petitioner's motion. On June 7, 2016, the respondent filed a reply/response to respondent's return. On July 7, 2016, the court of appeals issued an order dismissing petitioner's motion to reinstate the appeal, which was construed as a petition for rehearing.

ARGUMENT

I.

THE CLERK OF THE SOUTH CAROLINA COURT OF APPEALS SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS/HER QUASI-JUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH ITS OFFICIAL DUTIES.

Petitioner contends that his appeal should not have been "dismissed based on allegation that [his] notice of appeal was not timely served" on the respondent (The State's Attorney General) by the Clerk of Court, for the respondent are therefore actions that improperly favors the respondent. See Bowen v. Bowen, 287 S.C.188, 377 S.E.2d 1 (1985)("The Supreme Court, held that appeal would not be dismissed based on allegation that notice of appeal was not timely served.")

Here in petitioner's case the respondent would allege that petitioner has failed to timely serve a notice of appeal within ten (10) days of petitioner's receipt of Judge McIntosh's written notice of entry order of dismissal of petitioner's Motion for

A New Trial, Based on After-Discovered Evidence before the Court of General Sessions upon the respondent.

The clerk would then issue an order of dismissal pursuant to Rule-260(a), S.C.A.C.R., on allegation that notice of appeal was not timely served in violation of Rule-203(b), S.C.A.C.R. without the filing of a motion to dismiss by the respondent's (The State's Attorney general) is conduct that reasonably appears to conflict with court duties. The law clerk and the respondent have engaged in activities that would put into question the propriety of the law clerk's conduct in carrying out the duties of its office. The clerk's office has allowed its relationship with the respondent's to influence its official conduct and judgment. And it has lended the prestige of its office to advance the interest of the respondent's (The State's Attorney general) in violation of Rule-506, S.C.A.C.R., Staff Attorney and Law Clerk Conduct, Canon-2; and in violation of petitioner's Fourteenth Amendment right to due process.

The dismissal of petitioner's appeal by the Clerk of The South Carolina Court of Appeals was done in violation of Rule-506, S.C.A.C.R., Staff Attorney and Law Clerk Conduct, Canon-1, 2, 3(D)(E)(2), and 5(D)(3). The clerk's quasi-judicial acts are acts that were undertaken to perform a legal service, and that of an advisor, and that of the appellant court. The clerk office has performed the duties of its office partially. "[The] law clerk should never perform any discretionary or ministerial function, ... in a manner which improperly favors any litigant or attorney." See Rule 506, S.C.A.C.R., Staff Attorney and Law Clerk Conduct, Canon - 3; for the clerk to serve as an advisor, a lawyer, and that of the appellant court for the respondent, does "reasonably appear to conflict with [it's] court duties ... [and] create[s] the appearance of impropriety." See Rule-506, S.C.A.C.R., Staff Attorney and Law Clerk Conduct, Canon-5 (D)(3). This conduct has prejudice petitioner and has deprived him of his right to appeal the order denying his motion for a new trial, to prove his actual innocence on allegation that his notice of appeal was not timely served. The Supreme Court should not affirm the erroneous decision of the Court of Appeals. To do so would be a miscarriage of justice and not in the interest of justice.

II.

THE COURT OF APPEALS ERROR OF FACTS IS AN ABUSE OF DISCRETION OF THE COURT'S FAILURE TO EXERCISE SOUND, REASONABLE, AND LEGAL DECISION-MAKING CONCERNING QUESTIONS OF FACT AND QUESTION OF LAW ABOUT THE TIMELY FILING OF HIS NOTICE OF APPEAL.

A. The Courts Erred in Construing A Motion to Reinstate Appeal As A Petition for Rehearing

The purpose of a rehearing is to call to the appellate court's attention any errors of fact, as well as of law, and to provide the court with a final opportunity to see that justice is done. In this regard, a properly drawn petition for a rehearing in the [state] appellate courts serves a very limited purpose; it must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition." See 5 Am. Jur.2d Appellate Review § 821(July 2016 update).

For the Court of Appeals to construe petitioner's Motion to Reinstate Appeal as a Petition for Rehearing is an abuse of discretion. South Carolina Appellant Court Rules State that, "Whenever it appears that an appellant has failed to comply with the requirement of the S.C.A.C.R., an order of dismissal shall be issued.... The Clerk of Court shall remit the case to the lower court in accordance with Rule-221, S.C.A.C.R., unless a motion to reinstate the appeal has been actually received by the court ~~with~~^{within} fifteen (15) days of filing of the order of dismissal." (See Rule-260(a), S.C.A.C.R.) ;(Wise v. South Carolina Dept. of Corrections, 372 S.C. 173, 642 S.E.2d 551 (2007)).

Here, the petitioner's motion was the first time he presented his issues to the courts, about the timely filing of his notice of appeal issue before the court of appeals. To call his motion to reinstate appeal, a petition for rehearing means that the timely filing of his notice of appeal issue was already heard in the courts. A petition for rehearing is "a court's second or subsequent hearing of a case, a motion,

or an appeal, usually to consider an alleged error or omission in the court's judgment or opinion." See Black Law Dictionary 1476 (Deluxe 2014 10th Ed.).

Petitioner's motion to reinstate appeal was his first opportunity to even present his arguments and evidence about the timely filing of his notice of appeal to the court of appeals, when the clerk and the respondent's made the allegation that the petitioner's notice of appeal was ^{not} timely served. By making such an erroneous decision, the courts has overlooked and misapprehended petitioner's motion to reinstate appeal in violation of his Fourteenth Amendment right to due process and under S.C. Const. Art. I § 3.

B. The Timely Filing of Petitioner's Notice of Appeal

Pursuant to Rule-203(b)(2), S.C.A.C.R., in a criminal case an appellant must serve a notice of appeal on all respondent within ten(10) days after the sentence is imposed, or within ten(10) days after receipt of written notice of entry of the order or judgment. The South Carolina Supreme Court has held that an "appeal would be dismissed as untimely based on lack of jurisdiction, and timely service would remain a jurisdictional requirement." see Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985).

In this case, the Clerk of South Carolina Court of Appeals, and the respondent would allege that petitioner has failed to timely serve a notice of appeal within ten (10) days of petitioner's receipt of Judge McIntosh's written notice of entry order of dismissal of petitioner's motion for a new trial, based on after discovered evidence before the court of general sessions upon the respondent. And that the Court of Appeals has no jurisdiction over petitioner's case.

The Clerk of the South Carolina Court of Appeals would than dismissed petitioner's appeal pursuant to Rule-260(a), S.C.A.C.R., without the filing of a motion to dismiss by the respondent for the failure to timely serve a notice of appeal upon petitioner. Their actions are acts that are in violation of Rule-506, S.C.A.C.R., Code of Conduct for Staff Attorneys and Law Clerks. And to has deprived petitioner of his right to appeal the judge's erroneous order.

This court has determined that an appeal would not be dismissed based on allegation that notice of appeal was not timely served and that strict adherence to supreme court rule which requires that notice of appeal contain, if appropriate in determination of timeliness of appeal, a statement of when appellant received notice of court order being appealed from, would be required. Compliance with this provision would eliminate motion to dismiss appeal. See Bowen v. Bowen, 287 S.C. 188, 337 S.E.2d 1 (1985)

To show quo animo, petitioner offered into evidence the filing of his Notice of Appeal, whereas it was determined that it was submitted timely and in good faith and was clock stamped dated on November 30, 2015, (see Appx. pg. 49). Enclosed with that clock stamped Notice of Appeal was a notice letter that had advised him to “send a copy of his notice of appeal to the Attorney Generals Office dated December 2, 2015.” (See Appx. pg. 48).

On December 8, 2015, Appellant mailed copies of his notice of appeal and certificate of service that was within ten (10) days of Spartanburg County Clerk of Court notice letter, to respondent. To whereas, the respondent has admitted to having received on December 10, 2015. Well within the ten (10) days as required by Rule-203(b)(2), S.C.A.C.R.

Petitioner also offered into evidence a notice letter from the court of appeals, which had docketed petitioner’s notice of appeal and assigned it an Appellate Case No. 2015-002614 and upon reviewing petitioner’s notice of appeal, it determined that it was submitted timely and in good faith, but the proof of service did not comply with South Carolina Appellate Court Rules and that the deficiency must be corrected within ten(10) days of the date of that December 23,2015, letter or the appeal may be dismissed. (see Appx. pg. 44). On January 5, 2016, appellate re-submitted his notice of appeal with a corrected proof of service on the respondent, which involved every party in the appeal. (see Appx. pg.40)

Despite these facts that the averment is supported by proof, which has been ignorantia facti by the Court of Appeals that has stated that “there is no basis for granting a rehearing, and the petition for rehearing is denied.” (see Appx. pg. 1).

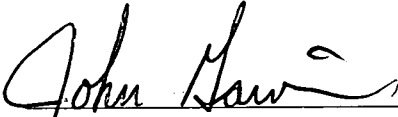
The Appeals Court has purposely overlooked these explicitly stated fact in portions of there assessment, should raise real doubts in this court's mind whether much care was given by the Appeals Court in reviewing appellant's Motion to Reinstate Appeal that was construed as a Petition for Rehearing.

The petitioner in this case hereby asks that South Carolina Supreme Court in it's original jurisdiction, to sits as both the finder of fact and the finder of law pursuant to S.C. Code Ann.§ 14-3-340 and Sanford v. S.C. State Ethics Comm'n, 385 S.C. 483, 497, 685 S.E.2d 600, 607, opinion clarified, 386 S.C. 274, 688 S.E.2d 120 (2009).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the petition for a writ of certiorari be granted in the interest of justice to prevent a miscarriage of justice.

Dated: August 3, 2016



John Garvin, # 355509, Pro-se
Lee Correction Institution
990 Wisacky Highway
Bishopville, S.C. 29010

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SC SUPREME COURT

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In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
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R. Lawton McIntosh, Circuit Court Judge

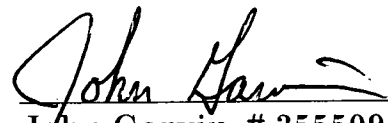
Appellate Case No. 2015-002614

The State of South Carolina Respondent,
v. Petitioner
John Garvin Appellant.

PROOF OF SERVICE

I, John Garvin, Certify that I have served a **PETITION FOR WRIT OF CERTIORARI with APPENDIX** on the respondent, The State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid on August 3, 2016, addressed to every party involved in the appeal. Daniel E. Shearouse, 1231 Gervais Street, Columbia S.C. 29201; and James E. Hunter, 180 Magnolia Street, Spartanburg, S.C. 29304-3483

Dated: August 3, 2016


John Garvin, # 355509, Pro-se
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Bishopville, S.C. 29010

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John Garvin ^{Petitioner}~~Appellant~~.

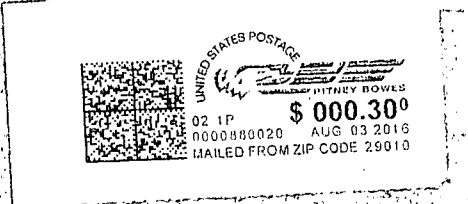
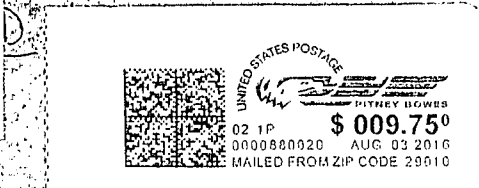
PROOF OF SERVICE

I, John Garvin, Certify that I have served a **PETITION FOR WRIT OF CERTIORARI with APPENDIX** on the respondent, The State of South Carolina by depositing a copy of it in the Institutional Mailbox to be delivered thru the Inter-Agency Mail on August 3, 2016, addressed to the respondent involved in the appeal. John B. Aplin and Alan Wilson, 1000 Assembly Street, Columbia, South Carolina 29211.

Dated: August 3, 2016


John Garvin, # 355509, Pro-se
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ATTN: Mr. Daniel E. Shearouse, Clerk of Court
The South Carolina Supreme Court
1232 Gervais Street
Columbia, S.C. 29201

LEGAL MAIL PLACED IN INSTITUTIONAL MAIL BOX ON August 3, 2016