

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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JAN 26 2017

S.C. SUPREME COURT

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

S.C. Ct. App. Orders filed May 4, 2016, & July 7, 2016

Appellate Case No: 2016-001615

The State,Respondent,

v.

John Garvin,Petitioner.

RETURN AND MOTION TO STRIKE PETITIONER'S "SUPPLEMENTAL
INITIAL BRIEF OF PETITION FOR WRIT OF CERTIORARI"

For the reasons set for the below, Respondent (the State) submits Petitioner's January 11, 2017, "Supplemental Initial Brief of Petition for Writ of Certiorari" is an attempted filing that is neither contemplated nor allowed under the South Carolina Appellate Court Rules and therefore, must be stricken from this appeal. The State, through undersigned counsel and making Return to the Supplemental Initial Brief, would respectfully show unto this Court.

John Garvin (Petitioner) was convicted in Spartanburg County on May 23, 2013, and was sentenced to twenty-five (25) years' imprisonment. On August 25, 2015, Petitioner filed a motion in the Spartanburg County Court of General Sessions for a new trial pursuant to Rule 29(b), SCRCrimP, based upon an allegation of newly discovered evidence. In an Order dated

November 9, 2015, the Honorable R. Lawton McIntosh denied Petitioner's motion, without the necessity of a hearing, as both untimely and without merit. (App.p.50-p.51).

On November 20, 2015, Petitioner filed a Notice of Appeal from the November 9, 2015, order of dismissal with the Clerk of Court for Spartanburg County and the Clerk of Court for the South Carolina Court of Appeals. At the time of filing, Petitioner did not serve the Notice of Appeal on the State, either by serving the Solicitor or serving the Attorney General's Office. (App.p.47-p.49). In a letter dated December 8, 2015, and received by the Attorney General's Office on December 10, 2015, Petitioner subsequently mailed copies of his original Notice of Appeal and Certificate of Service to Respondent.

In a letter dated December 23, 2015, the Court of Appeals advised Petitioner it had received his notice of Appeal and assigned it Appellate Case No. 2015-002614. (App.p.44-p.45). The same day, the Court of Appeals issued a deficiency letter advising Petitioner that his proof of service was not in compliance with the appellate court rules. (App.p.42-p.43).

On January 5, 2016, Petitioner submitted a new Notice of Appeal and a Proof of Service to the Court whereby he served the State by mailing copies of the Notice of Appeal to both the Solicitor and the Attorney General. (App.p.38-p.41).

In an Order dated May 4, 2016, the Court of Appeals dismissed Petitioner's Appeal because he had failed to timely serve the notice of appeal upon the respondent, as required by Rule 203(b)(2) of the South Carolina Appellate Court Rules. (App.p.37).

On May 13, 2016, Petitioner submitted a "Motion to Set Aside Dismissal and to Reinstate Action" and a Memorandum of Law in support of his motion, in which he asked the Court of Appeals to reinstate his appeal. (App.p.14-p.36). The Motion was received by the State on May 19, 2016. On May 26, 2016, the State submitted a Return arguing Petitioner's May 13, 2016,

pro se motion was a nullity and that by responding to said motion, the State was NOT acknowledging its legitimacy or the legitimacy of any future *pro se* filings. The State noted, however, that in the interest of judicial economy it was making Return to the Motion. (App.p.9-p.13). On June 7, 2016, Petitioner submitted a Reply to the State's Return. (App.p.3-p.8).

In an Order filed July 7, 2016, the Court of Appeals construed Petitioner's motion to reinstate the appeal as a petition to rehear the dismissal of the appeal, found there was no basis for granting a rehearing, and denied the petition. (App.p.1-p.2).

On August 3, 2016, Petitioner submitted a Petition for a Writ of Certiorari to this Court and on September 2, 2016, the State submitted a Return. On September 12, 2016, Petitioner submitted a "Reply to Respondent's Return to Petition for a Writ of Certiorari." He has now submitted a *pro se* "Supplemental Initial Brief of Petition for Writ of Certiorari." This Return and Motion to Strike follows.¹

The South Carolina Appellate Court Rules set forth the procedures a party must follow when moving this Court to exercise its discretion to issue a writ of certiorari to review a final decision of the Court of Appeals. Rule 242, SCACR. The rule provides for a petition for writ of certiorari, a return to that petition, and a reply to return prior to a decision by this Court to grant or deny certiorari. Here, Petitioner filed a petition and a reply and now seeks to file a supplemental initial brief. The State respectfully submits that no further filings or briefs are appropriate unless and until this Court grants the petition for certiorari. In the event certiorari is granted, Petitioner will have the opportunity to prepare a brief addressing the questions to be

¹ As with the return to Petitioner's motion to reinstate in the Court of Appeals, and the Return to Petition for a Writ of Certiorari filed with this Court, the State continues to maintain that Petitioner's August 3, 2016, *pro se* petition for writ of certiorari is a nullity and that by responding to this motion or any other filings, the State is NOT acknowledging its legitimacy or the legitimacy of any future *pro se* filings. The State notes, however, that in the interest of judicial economy it is making return and motion to strike Appellant's latest *pro se* filing captioned as a Supplemental Initial Brief.

considered. Rule 242(i), SCACR. At this time, his supplemental initial brief is premature and should be stricken.

For the reasons set forth in its return to the petition for a writ of certiorari, the State requests that Petitioner's petition for a writ of certiorari be denied and dismissed. The Court of Appeals properly dismissed Petitioner's attempt to appeal the denial of his post-trial motion and that dismissal should be affirmed. For the reasons set forth above, the State respectfully requests that Petitioner's "Supplemental Initial Brief of Petition for Writ of Certiorari" be stricken.

WHEREFORE, having made Return and Motion to Strike, the State opposes Appellant's attempt to submit a Supplemental Initial Brief and respectfully moves this Court to strike the same.

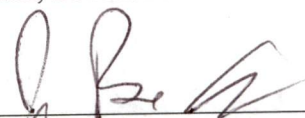
Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
January 26, 2017

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PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Return to Petition for a Writ of Certiorari*, dated January 26, 2017, on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

John D. Garvin, 355509
Lee Correctional Inst.
990 Wisacky Highway
Bishopville, SC 29010

I further certified that all parties required by Rule to be served have been served.
This 26th day of January, 2017.



Angela Bennett
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