

STATE OF SOUTH CAROLINA ) IN THE COURT OF GENERAL SESSIONS  
 )  
COUNTY OF YORK ) SIXTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA )

VS. )

MEMORANDUM IN SUPPORT OF APPEAL

KEVIN PRIVETTE, )  
DEFENDANT. )

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FEB 22 2017

SC Court of Appeals

Defendant moves, by and through his attorney, Melissa A. Inzerillo of the Public Defender Office, this honorable court to consider hearing Mr. Privette's case on appeal despite no final disposition being entered. Mr. Privette is incompetent and unlikely to be restored. A trial court judge declined to dismiss his charges.

#### PROCEDURAL HISTORY

Mr. Privette was initially arrested on June 19, 2015, on two counts of Criminal Sexual Conduct Third Degree and one count of Throwing Bodily Fluids. He was evaluated by Dr. Monica Wright and determined to be incompetent and unlikely to stand trial. He was again evaluated in a joint evaluation by the Department of Mental Health (hereinafter DMH) and the Department of Disabilities and Special Needs (hereinafter DDSN) in accordance with Section 44-23-410 et seq, S.C. Code of Laws. Both evaluators determined that he was incompetent to stand trial and unlikely to be restored due to an anxiety disorder and intellectual disability. These findings were adopted by the State, the Defense and the presiding judge<sup>1</sup>. Judge Burch ordered Mr. Privette to probate in accordance with S.C. Code Section 44-17-510 through 44-17-610. The probate judge determined that Mr. Privette would not be eligible for services from DMH and dismissed the petition.

In the meantime, Mr. Privette was arrested on an unrelated unlawful use of 911 charge<sup>2</sup>. Both parties were aware of Mr. Privette's deficiencies, and petitioned Judge Daniel Hall for Mr. Privette to be committed to probate for DDSN services. Judge Hall signed the order on October 16, 2016. The probate judge determined that Mr. Privette would not be eligible for services through DDSN and dismissed the petition on January 17, 2017.

On January 23, 2017, the Defense moved before Judge Hall to dismiss the charges or, in the alternative, set a bond. Judge Hall denied the motion to dismiss but set a bond. Mr. Privette is currently out of jail.

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<sup>1</sup> Judge Burch's order also set a bond and Mr. Privette was released from jail for the pendency of the probate proceedings.

<sup>2</sup> Mr. Privette was also arrested on a trespass charge but it was dismissed.

## ARGUMENT

The defendant is entitled to consideration by the Court of Appeals because he has exhausted the motions he can make and can do nothing further to attain a final disposition of his case. Because Mr. Privette is incompetent and unlikely to be restored, he cannot be tried. Therefore the usual motions that would be afforded a defendant, such as speedy trial, are unavailable. Moreover, the defendant cannot ultimately attain a final disposition from trial or plea because of incompetence. Therefore, a denial of a motion to dismiss could be a final disposition sufficient enough for consideration of the Court.

## SUPPORT

Under South Carolina law, a prosecutor is vested with authority to prosecute or dismiss cases. State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012). However, this power is not absolute, and can be abrogated by a judge in certain circumstances. State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998). In this case, the state cannot pursue the charges against Mr. Privette due to his incompetence and has not provided a reason as to why they should stand. It is important to note that the State did not provide any opposition to the Defendant's motion or any reasons the charges should stand, other than its belief that the Defendant is a danger. This is not an acceptable reason to pursue a case that cannot be tried, and, therefore, runs afoul of the exceptions outlined in Needs. In cases such as this, the judiciary should step in and provide proper oversight.

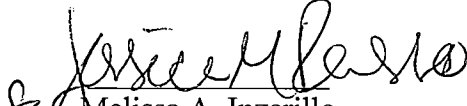
Moreover, the statute governing competency evaluations and the referral to probate is silent as to a remedy for the Defendant when neither agency will provide services. *See* Section 44-23-430. Although case law holds that the prosecutor has sole discretion to dismiss a case where a statute is silent, it pertains only to properly drawn indictments that have been true billed by the grand jury. *See Needs*, 333 S.C. at 146, 508 S.E.2d at 863. At the time of the motion to dismiss, the State had not indicted any of the Defendant's charges. Therefore, as the court did have the authority to dismiss but did not, and no other remedy is available to the Defendant, the motion to dismiss must be viewed as a final disposition.

The inability of the Defendant to attain a dismissal in his case and the failure of the state to dismiss a case that cannot be tried results in prejudice to the Defendant. Defendant has yet to be indicted, but is under a bond that makes him beholden to a court that can't try his case. It also makes him susceptible to the constant threat of being incarcerated for a charge that can't be prosecuted. Also, the Defendant lives under the cloud of having pending criminal charges.

## CONCLUSION

For these reasons, the Court of Appeals should consider the motion to dismiss a final disposition and hear his case.

I SO MOVE:

  
Melissa A. Inzerillo  
Attorney for Defendant

**Sixteenth Circuit  
Public Defender  
Office**

Moss Justice Center  
1675-1E York Highway  
P.O. Box 691  
York, S.C. 29745



**Harry A. Dest**  
Sixteenth Circuit Defender

**Bryson J. Barrowclough**  
Deputy Public Defender

**Stacey D. Coleman**  
Juvenile Division

**Melissa A. Inzerillo**  
**Philip L. Smith**  
Sr. Assistant Public Defenders

Assistant Public Defenders  
**Monier Abusaf**  
**Walter Dusky**  
**Raiah Hirsch**  
**Mindy Lipinski**  
**Mark McKinnon**  
**Devon Nielson**  
**Jessica Russo**

Magistrate Court Division  
**Sherril Alford**  
**Toni Johnson**  
**Harris Kauffman**

February 17, 2017

The Honorable Jenny Abbott Kitchings  
Clerk of the South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, South Carolina 29211

Union County Public Defender  
**Erik D. Delaney**  
**Jenny Williams**

Re: Kevin C. Privette (Appellate Case No.: 2017-000204)

Dear Ms. Kitchings:

Enclosed please find the Memorandum in Support of Appeal in the above captioned cases. If you need any further information, please do not hesitate to contact me.

Sincerely,

Melissa A. Inzerillo  
Assistant Public Defender  
Sixteenth Judicial Circuit

Cc: File

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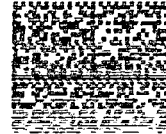
16<sup>th</sup> JUDICIAL CIRCUIT  
PUBLIC DEFENDER OFFICE  
Moss Justice Center  
P.O. Box 691  
1675-1E York Highway  
York, South Carolina 29745

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