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JUL 28 2017

S.C. SUPREME COURT

ALAN WILSON  
ATTORNEY GENERAL

July 28, 2017

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re: George Cleveland, III v. State of South Carolina**  
**Appellate Case No. 2017-001419**  
**Lower Court Case No. 2014-CP-37-00718**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Motion to Dismiss Appeal for Lack of Jurisdiction. By copy of this letter we are serving the Pro Se applicant today.

Sincerely,

Lindsey A. McCallister  
Assistant Attorney General  
SC Bar No. 79054

LAM/dgr  
Enclosures

cc: George Cleveland, III

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM OCONEE COUNTY  
Court of Common Pleas  
The Honorable R. Scott Sprouse, Circuit Court Judge

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Appellate Case No. 2017-001419

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S.C. SUPREME COURT

GEORGE CLEVELAND, III,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

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**MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION**

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The State hereby moves this Court to dismiss Petitioner's PCR appeal based upon a lack of jurisdiction and further requests this Court hold the time period for the filing of the Petition for Writ of Certiorari and Appendix in abeyance pending the resolution of this motion. The basis for this motion is explained below.

Background Facts

Petitioner was indicted at the October 2012 term of the Court of General Sessions for Oconee County for two counts of possession of a stolen vehicle (2012-GS-37-0814; -0802) and one count of receiving or selling a vehicle with a falsified VIN number (2012-GS-37-0815). Petitioner was represented by R. Daniel Day, Jr., Esquire. On October 13, 2014, Petitioner pleaded guilty as indicted before the Honorable Roger L. Couch. Judge Couch sentenced

Petitioner to a term of five years' imprisonment suspended upon the service of seventy-five days with five years' probation for each count of possession of a stolen vehicle, and a term of five years' imprisonment suspended upon the service of seventy-five days with five years' probation for receiving or selling a vehicle with a falsified VIN number. The sentences were to be served concurrently, but also consecutive to any sentence received from Petitioner's then-pending charges in Greenville County.<sup>1</sup> Petitioner did not appeal his guilty plea or sentences.

Petitioner filed an application for post-conviction relief (PCR) on December 2, 2014. Respondent made its return on July 30, 2015. An evidentiary hearing on the matter was convened on March 1, 2017, at the Oconee County Courthouse before the Honorable R. Scott Sprouse. Petitioner was present at the hearing and proceeded *pro se*. Lindsey A. McCallister, Esquire, of the South Carolina Office of the Attorney General represented Respondent. By order filed April 14, 2017, Judge Sprouse denied and dismissed Petitioner's application for PCR. Petitioner filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRPC, on April 17, 2017, which was denied by an order filed April 28, 2017. Petitioner then filed a second Motion to Alter or Amend the Order of Dismissal on May 10, 2017. Judge Sprouse denied Petitioner's second motion by order filed May 30, 2017. Petitioner filed a notice of appeal of the April 14, 2017 Order of Dismissal on June 23, 2017, stating he had not received a copy of that order until June 22, 2017.

#### Discussion

Rule 203(b)(1) of South Carolina's Appellate Court Rules states, in pertinent part:

A notice of appeal shall be served on all respondents within thirty (30) days after

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<sup>1</sup> On November 5, 2013, Petitioner pleaded guilty to several Greenville County charges. Petitioner challenged those guilty pleas in a separate, Greenville County PCR application which was subsequently dismissed with prejudice (2014-CP-23-1895). Petitioner's Petition for Writ of Certiorari was denied on June 15, 2016, and the Remittitur issued on August 4, 2016.

receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion.

Pursuant to this rule, a notice of appeal shall be filed within thirty days after receipt of written notice of the order or judgment. The time for appeal shall be stayed by a timely post-trial motion and shall run from the receipt of written notice of entry of the order granting or denying such motion.

In Coward Hund Const. Co. v. Ball Corp., the Court of Appeals held a second motion for reconsideration pursuant to Rule 59(e), filed after a first motion for reconsideration was denied, did not stay the time for filing a notice of appeal from judgment and, thus, Coward Hund's notice of appeal, filed more than thirty days after the denial of its first motion for reconsideration, was untimely. 336 S.C. 1, 518 S.E.2d 56, 59 (Ct. App. 1999). As the Court of Appeals noted, Coward Hund was not challenging a new ruling with its second motion. Id. at 4, 518 S.E.2d at 58. Similarly, in Collins Music Co., Inc. v. IGT, 353 S.C. 559, 564, 579 S.E.2d 524, 526 (2002), the South Carolina Court of Appeals stated as follows:

[A]lthough a successive post-trial motion for relief is permissible, the subsequent motion must seek relief on issues coming to light as a result of an order following an initial post-trial motion that alters or amends the judgment. The successive motion cannot be a motion to alter or amend that merely recites arguments in a previous Rule 59(e) motion. . . .

In that case, IGT filed timely post-trial motions requesting JNOV, a new trial, or in the alternative, a new trial *nisi remittitur*. Id. at 565, 579 S.E.2d at 526. The trial court denied the motions and made no alterations or amendments to the judgment. Id. The Court of Appeals held “[t]he time for IGT to serve its notice of appeal began to run following its receipt of written notice of the judge’s denial order,” notwithstanding the fact that IGT filed a subsequent Rule

59(e) motion. Id. at 565, 579 S.E.2d at 527. The Court of Appeals noted IGT’s second motion simply repeated the grounds and case law analysis of the first motion verbatim, and found it was “not an appropriate Rule 59(e) motion; instead it was simply a successive motion for JNOV and a new trial.” Id. at 566, 579 S.E.2d at 527.

Petitioner’s untimely filing in this case is exactly the type of impermissible delay prohibited by Coward Hund and Collins Music Co. Petitioner’s first Rule 59(e) motion was timely filed on April 17, 2017, which stayed the time to file his notice of appeal pursuant to Rule 203(b)(1), SCACR. However, the trial court denied that motion on April 28, 2017, which restarted the thirty-day timeframe for Petitioner to file his notice of appeal. Instead, Petitioner chose to file a subsequent Rule 59(e) motion, which, as in Collins Music Co., did not ask the trial court to reconsider its ruling on the previous Rule 59(e) motion, but instead merely restated Petitioner’s prior motion with no additional assertions of fact or arguments of law. Petitioner’s notice of appeal states he is appealing the May 30, 2017 order denying his second Rule 59(e) motion. However, because Petitioner’s second motion was not a proper motion pursuant to Rule 59(e), it did not stay the time for filing a notice of appeal.

[A] second Rule 59(e) motion which raises the same issues and arguments made in a previous Rule 59(e) motion does not toll the time to appeal. . . . An appeal may be barred due to untimely service of the notice of appeal when a party – instead of serving a notice of appeal – files a successive Rule 59(e) motion, where the trial judge’s ruling on the first Rule 59(e) motion does not result in a substantial alteration of the original judgment.

Elam v. S.C. Dept. of Transp., 361 S.C. 9, 18, 602 S.E.2d 772, 777 (2004). Petitioner did not file his notice of appeal until June 23, 2017, well past thirty days from the denial of his first motion, thus, his appeal is time barred.<sup>2</sup>

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<sup>2</sup> Petitioner’s notice of appeal states he received the order denying his second 59(e) motion on June 22, 2017. However, because the second motion did not stay the time for filing, it makes no

Because no proper post-trial motion or notice of appeal was filed within thirty days of Petitioner's receipt of the order denying his April 17, 2017 Rule 59(e) motion, this Court has no jurisdiction over Petitioner's case and must dismiss his appeal. See Hill v. South Carolina Dept. of Health and Environmental Control, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) ("The service of a notice of appeal is *a jurisdictional requirement*, and the time for service may not be extended by this Court.") (emphasis added); Canal Ins. Co. v. Caldwell, 338 S.C. 1, 5, 24 S.E.2d 416, 418 (Ct. App. 1999) (pointing out Rule 203(b), SCACR, requires a party to serve his notice of appeal within thirty days after receiving written notice of the entry of a final order or judgment, and failure to do so divests this court of jurisdiction "and results in dismissal of the appeal"); see also Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992) ("[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State.").

### CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court dismiss Appellant's appeal for lack of jurisdiction. The State further requests that this Court hold the time period for the filing of the Petition for Writ of Certiorari and Appendix in abeyance pending the resolution of this motion.

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difference when he received that order. Petitioner's time began to run when he received written notice of the trial court's denial of his *first* Rule 59(e) motion. That order was clocked on April 28, 2017, and Petitioner filed his second motion on May 10, 2017, indicating he had received written notice of the denial of his first motion by at least that date. Therefore, the very latest Petitioner could have timely filed a notice of appeal was June 9, 2017.

Respectfully submitted,

ALAN WILSON  
Attorney General

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**ATTORNEYS FOR RESPONDENT**

July 28, 2017

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM OCONEE COUNTY  
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GEORGE CLEVELAND, III,

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THE STATE OF SOUTH CAROLINA,

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the **Motion to Dismiss Appeal for Lack of Jurisdiction**, has been served upon the Pro Se applicant by mailing two (2) copies in the United States mail, postage prepaid:

**Mr. George Cleveland, III**  
**400 Hunter Street**  
**Seneca SC 29678**

This 28<sup>th</sup> day of July, 2017



DEONNA ROGERS  
LEGAL ASSISTANT