STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Williamsburg County
Michael G. Nettles, Circuit Court Judge

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SC Court of Appeals

THE STATE,

Appellant,

v.

RONALD HAKEEM MACK,

Respondent.

Appellate Case No. 2017-002441.

RETURN TO MOTION TO DISMISS APPEAL AS INTERLOCUTORY AND MOTION TO HOLD TIMELINES IN ABEYANCE PENDING COURT'S RULING ON MOTION TO DISMISS APPEAL

Appellant, in making its return to respondent's motion, submits the decision by the lower court vacating respondent's sentence and ordering a new sentencing proceeding pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014) is immediately appealable because the rights of the State would be substantially impaired if the appeal was not heard.

Appellant would respectfully show the Court:

I.

Respondent admitted to killing seventeen-year-old Kenyon Dorsey at the victim's home in Williamsburg County on April 5, 2009. (Plea Tr.pp.8-9; pp.12-13).[1] Respondent and three co-defendants participated in the crimes. (Plea Tr.pp.10-13). Respondent walked up behind the

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[1] Cites to transcripts or other relevant documents refer to the bound volume of exhibits attached to respondent's motion.

victim while he slept in a chair and shot him three times while a co-defendant shot him a fourth time, believing he was not dead. (Plea Tr.p.12).

Respondent was seventeen-years-old at the time. (Plea Tr.p.20). He pled guilty before the Honorable Clifton Newman to murder and first-degree burglary on August 24, 2010. (Plea Tr.p.2; p.4). Judge Newman sentenced respondent to concurrent terms of fifty years for murder and thirty years for burglary. (Plea Tr.p.33).

II.

On April 20, 2015, respondent filed a motion for resentencing pursuant to *Aiken*, arguing his fifty-year sentence was a *de facto* life sentence. (Motion for Resentencing). In a response filed April 28, 2015, the State argued respondent was not part of the class who should be granted relief because he was not sentenced to life without parole. (State's Response). Further, the State maintained the sentencing court took into account the features of youth and the circumstances of the crime when determining a proper sentence. (State's Response). Respondent filed a reply on May 15, 2015. (Defense Reply).

The State filed a motion to dismiss respondent's motion for resentencing on October 5, 2016. (State's Motion to Dismiss). Respondent filed a response in opposition, and a hearing was scheduled. (Defense Response).

A hearing was held on the State's motion on February 17, 2017 before the Honorable Michael G. Nettles. (Motion Hrg. Tr.p.113). An expert for respondent testified regarding life expectancies for male inmates. (Defense Notice of Expert; Motion Hrg. Tr.pp.11-174; Supp. Affidavit of Expert).

On June 14, 2017, Judge Nettles signed an order denying the State's motion to dismiss, which vacated respondent's previous sentence and ordered a new sentencing proceeding pursuant

to *Aiken*. (*Aiken* Order, p.34). In his order, Judge Nettles extended current South Carolina precedent to find respondent's sentence of fifty years for murder was the functional equivalent of a life without parole sentence, found such an interpretation of *Aiken* was not an expansion of its holding, but "an effectuation of its intent," and further found respondent's original sentencing hearing did not sufficiently take into account the "hallmark features of youth." (*Aiken* Order, pp.26-34). Judge Nettles ruled respondent was entitled to resentencing pursuant to *Aiken*. (*Aiken* Order, p.34).

The State filed a motion to reconsider and requested a new hearing on the matter, which respondent opposed. (Motion to Reconsider; Defense Response). The State subsequently filed a memorandum waiving a hearing, and in support of reconsideration. (State's Hearing Waiver and Memorandum). Judge Nettles denied the State's motion by order signed November 15, 2017. (Order Denying Motion to Reconsider). The State, as appellant, served its notice of appeal on November 22, 2017.

III.

Respondent moves this Court to dismiss the appeal asserting the decision by Judge Nettles does not constitute a final order. Respondent argues the ruling is an interlocutory order that is not immediately appealable because it does not involve the merits, does not affect a substantial right, or prevent appellant from raising any issue in a future appeal after final sentencing. Respondent asserts, until he is resentenced, no final judgment has been rendered and any appeal from Judge Nettles's ruling is an improper interlocutory appeal.

Appellant submits the order is immediately appealable.

IV.

Without recourse to the appellate court, the State will be precluded from correcting the

error of law in the trial court's ruling, the error will become the law of the case, and the State will be left without a remedy.

The right to appeal is controlled by statute. *State v. Wilson*, 387 S.C. 597, 600, 693 S.E.2d 923, 924 (2010). Only final orders are generally appealable, absent a statute or rule permitting the immediate appeal of an interlocutory order. *Culbertson v. Clemens*, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996). An order is interlocutory and not final when "there is some further act which must be done by the court prior to a determination of the rights of the parties . . ." *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993). The purpose of this practice is to prevent piecemeal appeals. *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 94, 529 S.E.2d 11, 13 (2000).

The right to an immediate appeal of an interlocutory order in South Carolina is found in S.C. Code Ann. § 14-3-330, which delineates the categories of interlocutory decisions subject to immediate appeal. *See also* Rule 201, SCACR ("Appeal may be taken, as provided by law, from any final judgment, appealable order or decision."); *State v. Miller*, 289 S.C. 426, 427, 346 S.E.2d 705, 706 (1986) ("In both state and federal court, the right to appeal is conferred by statute or rule, S.C. Code Ann. § 14-3-330."). Specifically, § 14-3-330(2) confers jurisdiction upon our appellate courts for the correction of errors of law when the order or ruling affects "a substantial right when such order . . . in effect determines the action and prevents a judgement from which an appeal might be taken . . . ." An order affecting a "substantial right" is defined as one which discontinues an action, prevents an appeal, grants or refuses a new trial, or strikes an action or defense. *Mid-State Distrib., Inc.*, 310 S.C. at 334 n.4, 426 S.E.2d at 780 n.4; *see also Breland*, 339 S.C. at 93, 529 S.E.2d at 13 (stating immediate appeals are permitted where a substantial right could not be vindicated on appeal). An immediate appeal of an interlocutory

order is permitted when no appellate review is available to correct the trial court's error after the final judgment. *Id.* at 93, 529 S.E.2d at 13 (citing *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985)).

In the context of State's appeals in criminal cases, and based upon double jeopardy considerations, this language has been construed to prohibit appeals after an acquittal based on insufficiency of the evidence. *State v. McWaters*, 246 S.C. 534, 535, 144 S.E.2d 718, 718 (1965). However, the State may appeal orders and rulings that significantly impair the prosecution before final judgment or when the jury's guilty verdict is set aside based on an error of law. *State v. Thompson*, 348 S.C. 152, 157, 558 S.E.2d 917, 919 (Ct. App. 2001) (noting the State may appeal an order setting aside a jury's guilty verdict when the order is based upon an error of law); *Reed v. Becka*, 333 S.C. 676, 681, 511 S.E.2d 396, 399 (Ct. App. 1999) ("Because it so significantly impairs the prosecution of a criminal case, an order which prohibits the State from withdrawing a plea offer is directly appealable by the State under § 14-3-330(2)(a)."); *State v. Saunders*, 324 S.C. 314, 319, 476 S.E.2d 711, 713-14 (Ct. App. 1996) (finding the State may appeal an order quashing an indictment on double jeopardy grounds); *State v. Dasher*, 278 S.C. 395, 396, 400, 297 S.E.2d 414, 414, 417 (1982) (holding the State may appeal an order setting aside a conviction where the order is based upon an error of law); *State v. Holliday*, 255 S.C. 142, 142, 177 S.E.2d 541, 542-43 (1970) ("[T]he State has no right of appeal from a judgment of acquittal . . . unless the verdict of acquittal was procured by the accused through fraud or collusion . . . or from a judgment reversing or setting aside a conviction on purely legal grounds.").

The State would be substantially prejudiced if it cannot appeal the ruling vacating respondent's valid sentence. Further, the grant of relief in respondent's case is premised on an

error of law. The trial court improperly extended *Aiken* to include juveniles sentenced to a term-of-years when its holding was narrowly tailored to limit it to those given a sentence of life without parole. *See Aiken*, 410 S.C. at 543, 765 S.E.2d at 577 ("In our view, whether their sentence is mandatory or permissible, any juvenile offender who receives a sentence of life without the possibility of parole is entitled to the same constitutional protections afforded by the Eighth Amendment's guarantee against cruel and unusual punishment."). *Aiken* relied on *Miller v. Alabama*, 567 U.S. 460 (2012) in which the United States Supreme Court expressly stated, "We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Miller*, 567 U.S. at 465. Respondent did not receive a life without parole sentence. The sentencing court, in its discretion, sentenced respondent to a term of years in the permissible statutory range for murder. *See* S.C. Code Ann. § 16-3-20(A) (providing murder is punishable by imprisonment of thirty years to life). The trial court's ruling in this case is premised upon legal error that invalidated in its entirety a proper sentence by Judge Newman. Judge Nettles's ruling affected a substantial right of the State, and no appellate remedy exists other than to permit an appeal pursuant to S.C. Code Ann. § 14-3-440(2).

V.

Finally, counsel for the State respectfully moves to hold in abeyance the time limit for filing the Initial Brief of Appellant pending the outcome of respondent's motion to dismiss the appeal as interlocutory. The initial brief is currently scheduled to be filed on January 22, 2018. Pursuant to Rule 240(b), SCACR, "A motion to dismiss an appeal . . . shall . . . automatically stay the time limits for perfecting the appeal until the motion is decided."

Appellant respectfully requests the time limits be held in abeyance until this Court

decides the motion.

VI.

WHEREFORE, appellant submits the motion to dismiss the appeal as interlocutory must be denied, requests to hold the time for filing the Initial Brief of Appellant in abeyance pending a ruling on respondent's motion, and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

SHERRIE BUTTERBAUGH
Assistant Attorney General

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit

BY:______________________
SHERRIE BUTTERBAUGH

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

January 2, 2018.

STATE OF SOUTH CAROLINA
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Michael G. Nettles, Circuit Court Judge

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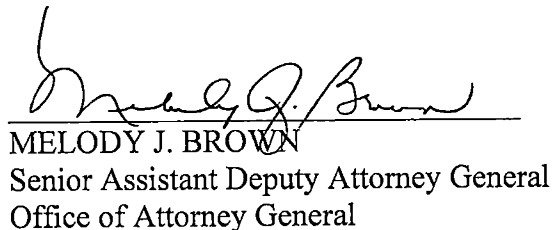
PROOF OF SERVICE

I, Melody J. Brown, do hereby certify that on this date, I served copies of the *Appellant's Return to Motion to Dismiss Appeal as Interlocutory and Motion to Hold Timelines in Abeyance Pending Court's Ruling on Motion to Dismiss Appeal*, in the foregoing action on counsel for the Respondent by depositing two (2) copies of the same in the United States mail, first-class postage prepaid, and addressed as follows:

Laura R. Baer, Appellate Defender
SCCID/ Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 2nd day of January, 2018.



MELODY J. BROWN
Senior Assistant Deputy Attorney General
Office of Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR APPELLANT

ALAN WILSON
ATTORNEY GENERAL

January 2, 2018

RECEIVED
JAN 02 2018
SC Court of Appeals

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *The State v. Ronald Hakeem Mack*
Appeal from Williamsburg County
Appellate Case No. 2017-002441

Dear Ms. Kitchings:

Enclosed for filing in your office is the original and six (6) copies of the Appellant's Return to Motion to Dismiss Appeal as Interlocutory and Motion to Hold Timelines in Abeyance Pending Court's Ruling on Motion to Dismiss Appeal, in the above-referenced case, together with Proof of Service.

Thank you for your assistance in this matter.

Sincerely,

Melody J. Brown,
Senior Assistant Deputy Attorney General

MJB/dmd
Enclosures
cc: Laura R. Baer, Appellate Defender (w/two copies of encls.)
The Honorable Ernest Finney, III, Solicitor, Third Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Advocacy Division (w/copy of encls.)