

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**RECEIVED**

**DEC 20 2019**

Appeal from Williamsburg County  
Honorable George M. McFaddin, Jr., Circuit Court Judge  
Appellate Case No. 2019-001890

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**S.C. SUPREME COURT**

Levern McCrea,

Petitioner,

vs.

State of South Carolina,

Respondent.

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

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The State of South Carolina (Respondent), through its undersigned counsel, would respectfully ask this Court to dismiss the appeal initiated by Petitioner based on lack of jurisdiction for the following reasons: (1) Petitioner filed the notice of appeal prior to the final order being filed with the Williamsburg County Clerk of Court; (2) Petitioner's notice of appeal did not include a copy of the final order and was not properly notarized; and (3) Petitioner was the prevailing party in his post-conviction relief action as he was awarded a new trial by the lower court and, therefore, he is not an aggrieved party. The State has filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRPC, in this matter, and the motion is set for a hearing in the Third Circuit before the Honorable George M. McFaddin on December 30, 2019. The State would respectfully show unto this Court:

**I. PROCEDURAL HISTORY**

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. During the

September 2008 term, the Williamsburg Grand Jury indicted Petitioner for murder, possession of a weapon during a violent crime, and misprision of a felony (2010-GS-45-135). Petitioner originally retained Charles Barr, Esquire (Barr) to represent him on the charges. Petitioner eventually fired Barr due to irreconcilable differences. The court appointed Cezar McKnight, Esquire (McKnight), to represent him. McKnight filed a motion to be relieved as counsel on November 24, 2010. A hearing was held on December 6, 2010, in front of the Honorable George C. James, Jr. After hearing from both McKnight and Petitioner, the court relieved McKnight and appointed Henry M. Anderson, Jr., Esquire (Anderson). Anderson filed a motion to be relieved as counsel, citing irreconcilable differences. A hearing was held on June 22, 2011, in front of the Honorable Howard P. King. Judge King denied the motion to be relieved after hearing from Anderson, Petitioner, and the Assistant Solicitor. Judge King advised Petitioner that, if he continued his course of conduct, he would have no choice but to relieve Anderson and require Petitioner to proceed pro se.

Shortly thereafter, Petitioner wrote Anderson various letters: (1) stating Anderson was lying and would not represent him properly; and (2) explaining that he wanted Anderson relieved and he would represent himself. By order filed September 14, 2011, Judge King relieved Anderson. The Court noted that Petitioner was “very difficult if not impossible to deal with, not only as a client but as an individual. He has been abusive, vile, and profane to Anderson as evidenced by letters dated February 9, 2011 and May 17, 2011.” Petitioner proceeded pro se in his case and represented himself during his jury trial before the Honorable W. Jeffrey Young. The jury found Petitioner guilty as indicted for murder and possession of a weapon during a violent crime. On October 20, 2011, Judge Young sentenced Petitioner to life in prison for murder and five years’ imprisonment for possession of a weapon during a violent crime to run consecutively with the sentence for murder.

Petitioner subsequently filed for appeal. Petitioner failed to timely serve the notice of appeal on opposing counsel, as provided for in Rule 203, SCACR. Petitioner's pending appeal was dismissed by order dated April 20, 2012. The remittitur was issued on August 3, 2012.

Petitioner filed a timely application for post-conviction relief on July 9, 2012. An evidentiary hearing into the matter was convened on June 1, 2018, at the Sumter County Courthouse. Petitioner was present at the hearing and represented by Lance Boozer, Esquire. Assistant Attorney General Julie Coleman of the South Carolina Attorney General's Office appeared on behalf of the State. A final order granting relief on one of Petitioner's allegations was filed on November 14, 2019. Despite prevailing in the post-conviction relief action, Petitioner filed a notice of appeal prior to Respondent being able to file a motion to reconsider pursuant to Rule 59(e), SCRCP.

## **II. MOTION TO DISMISS**

The post-conviction relief court granted Petitioner relief on one of the three grounds Petitioner raised in his post-conviction relief application; the other two grounds were denied and dismissed with prejudice. In the order granting relief, the post-conviction relief court granted Petitioner relief on his allegation that he was denied his right to counsel and forced to proceed to trial pro se because the court found Petitioner was not warned of the dangers of proceeding pro se at trial. In pre- and post-hearing briefs, Respondent argued Petitioner forfeited his right to counsel and Petitioner waived his right to counsel by conduct; however, the post-conviction relief court did not provide a ruling as to either argument raised by Respondent. After the order granting relief was filed, Respondent timely filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRCP, to address the lower court's findings on Respondent's arguments. However, prior to Respondent filing its motion, Petitioner initiated his appeal.

Respondent is requesting this Court dismiss Petitioner's appeal for lack of jurisdiction since Petitioner, who is not the aggrieved party since he actually prevailed in the circuit court proceeding, initiated his appeal prior to the final order being filed with the Williamsburg County Clerk of Court.<sup>1</sup> See State v. Rearick, 417 S.C. 391, 790 S.E.2d 192 (2016) (holding "an 'aggrieved party' permitted to appeal is one who is injured in a legal sense or has suffered an injury to person or property"); see also Rule 203(b)(1), SCACR, ("A notice of appeal shall be served on all respondents within thirty(30) days **after** receipt of written notice of entry of the order or judgment." (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" (emphasis added)).

Further, Petitioner's notice of appeal did not contain the order granting relief and was not properly notarized prior to filing as required by Rule 203(d)(1)(B)(i) and (ii), SCACR. Petitioner's prematurely, and improperly, filed notice of appeal did not divest the circuit court of jurisdiction in this post-conviction relief matter and Respondent would ask this Court dismiss Petitioner's appeal for lack of jurisdiction so the circuit court may hear and rule on Respondent's motion. See, e.g., Tatnall v. Gardner, 350 S.C. 135, 137-138, 564 S.E.2d 377, 378-379 (Ct. App. 2002) (recognizing an improper appeal does not confer jurisdiction to the appellate court); see also Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992) (holding the South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court

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<sup>1</sup> The State is not asserting Petitioner does not have the right to appeal the circuit court's decision; however, the proper way for the prevailing party to appeal is by filing a cross-appeal pursuant to Rule 203(c), SCACR.

with an orderly mechanism through which to guide appeals in this State.)

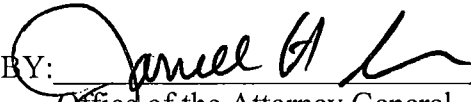
**III. CONCLUSION**

WHEREFORE, the State requests an order dismissing Petitioner's improperly-filed appeal.

Respectfully submitted,

ALAN WILSON  
Attorney General

JANELL H. GREGORY  
Assistant Attorney General

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ATTORNEYS FOR RESPONDENT

December 20, 2019

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APPEAL FROM WILLIAMSBURG COUNTY  
Court of Common Pleas  
Honorable George M. McFaddin, Jr., Circuit Court Judge

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LEVERN MCCREA,

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v.

STATE OF SOUTH CAROLINA,

Respondent.

**CERTIFICATE OF SERVICE**

I, Kaitlyn Slice, certify that I have served the within Motion to Dismiss Appeal for Lack of Jurisdiction by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

**Robert M. Dudek, Esquire  
S.C. Commission on Indigent Defense  
Post Office Box 11589  
Columbia, South Carolina 29211**

I further certify that all parties required by Rule to be served have been served. This 20th day of December, 2019.

  
KAITLYN S. SLICE  
LEGAL ASSISTANT