

STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

CERTIORARI TO SPARTANBURG COUNTY
Court Of Common Pleas

The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No.: 2019-001319

Taiwan J. Hardy,

Petitioner,

v.

State of South Carolina,

Respondent.

**RETURN OPPOSING WITHDRAWAL OF THE ORIGINAL PETITION FOR WRIT OF
CERTIORARI AND ENTRANCE OF THE AMENDED PETITION FOR WRIT OF
CERTIORARI**

ALAN WILSON
Attorney General

CHELSEY F. MARTO
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ATTORNEYS FOR RESPONDENT

NOW COMES, Respondent, by and through the undersigned counsel, issuing its return to Petitioner's motion requesting substitution of counsel, the withdrawal of the original Petition for Writ of Certiorari, and permission to file the Amended Petition for Writ of Certiorari. Respondent respectfully requests this Court deny Petitioner's motion for the following reasons:

I.

Petitioner filed its original Petition for Writ of Certiorari and the accompanying Appendix on March 30, 2020. Respondent filed its Return to the Petition for Writ of Certiorari on May 6, 2020. No reply was filed thereafter by Petitioner. The matter was ready for consideration by the Supreme Court of South Carolina. The Supreme Court of South Carolina transferred the case to the South Carolina Court of Appeals. This matter remains pending before the South Carolina Court of Appeals.

II.

After the matter was transferred to this Court, Petitioner filed an amended petition for a writ of certiorari on July 24, 2020. The amended petition raised two new issues and substantially changed the analysis substantiating the third issue, adding two new bases for the issue in addition to Counsel Gilliam's initial basis. Additionally, Petitioner also included two documents identified as certificates of service. One of those certificates certified Petitioner's "Motion to Allow Substitution of Counsel and to Allow the Petitioner to File an Amended Petition for Writ of Certiorari" had been served on Respondent and Petitioner's current counsel. The other document appears to be a motion seeking for substitution of counsel, for the petition for certiorari originally filed on Petitioner's behalf to be withdrawn, and for this Court to permit the filing of an amended petition raising new issues.

III.

On August 25, 2020, the South Carolina Court of Appeals sent a letter to Respondent and Petitioner's current counsel on record, construing the certificate of service as a motion to be substituted as counsel, request to withdraw the original Petition for Writ of Certiorari, and request the court accept the Amended Petition for Writ of Certiorari, while giving Respondent ten days to file a return to the motion. This Return Opposing the Withdrawal of the Original Petition and Entrance of the Amended Petition for Writ of Certiorari follows.

IV.

Petitioner's request to withdraw the original petition and replace it with the amended petition is untimely. Petitioner has had his bite at the apple in that qualified and experienced appellate counsel has already submitted a petition on his behalf. *See Jones v. Barnes*, 463 U.S. 745, 751-752 (1983) ("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues."). Respondent has already responded with its return to the petition. Respondent should not have to respond with a second return because Petitioner has now decided he would rather have someone else represent him and new issues presented on appeal after having the opportunity to fully review Respondent's response to the original petition and the transferring of the case to the South Carolina Court of Appeals. At this point, the request to essentially start the appellate process over again is untimely and will inherently lead to a waste of time and resources. *See generally State v. Roberts*, 364 S.C. 583, 589, 614 S.E.2d 626, 629 (2005) (finding that 1. Applicant's request to proceed *pro se*, go back to the beginning, and start over by raising new substantive arguments and issues not initially identified by Appellate Counsel in the original petition was untimely after the State had already submitted its initial return and 2. appellate

counsel is not required to raise all non-frivolous issues on appeal).

Respondent further submits that restarting the process and requiring Respondent to draft an entirely new response to the petition after the case officially entered the briefing stage of the appellate process is inherently unfair and prejudicial. This is particularly true in light of how substantively different the amended petition for writ of certiorari is from the original. In the amended petition, two entirely new issues are raised and addressed that were not mentioned in the previous petition. Additionally, though the failure to object issue was previously raised, Attorney Wilkes—after having an opportunity to review the return to submitted to the original petition for certiorari—has altered the argument originally raised and now alleges the evidence of prior bad acts were inadmissible based upon irrelevance, as per Rule 402, SCRE, because it is unfair Rule 403, SCRE, and because evidence of other bad acts are inadmissible absent limited exceptions, as per Rule 404(b), SCRE. Conversely, when this issue was raised in the original petition, Counsel Gilliam stated this testimony was inadmissible based upon Rule 404(b) alone. Thus, to respond, Respondent would have to address two entirely new issues as well as substantially alter their response to the issue previously raised in the original petition, as the analysis on this issue is substantially different between the two petitions.

Petitioner, using substitution of counsel as an opportunity to present more issues and to expand upon the issue already articulated in the original petition, is attempting no more than a mulligan after having the opportunity to read Respondent's response to the original issues raised and develop a response to corresponding arguments. Further, Petitioner's actions constitute no more than a disregarding of the rules regarding the limited scope imposed on an otherwise belated reply to Respondent's return, which would require Petitioner to limit his reply to issues already raised. *See Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 106, 439 S.e.2d 283, 285 (1993) (“An

issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.”). Instead, Petitioner attempts to raise a second, and largely unrelated, set of arguments after petitioning has concluded, presumably in part because he is dissatisfied with his prospects after a review of both side’s arguments. This is impermissible and remains highly prejudicial to the State. *See Sloan Constr. Co. v. South Carolina Bd. of Health and Env’tl. Control*, 285 S.C. 523, 526, 331 S.E.2d 345, 347 (1985) (finding that the submission of a second brief “was improper. Our rules do not allow such a revision. The prejudice created by such a brief is obvious, and it will not be considered.”). *See also Terrell v. Better Bus. Bureau of Mobile Cty., Inc.*, 179 So.2d 750, 752 (Ala. 1965) (“We would accept a supplemental brief from appellant covering an assignment of error if the supplemental brief arrived in this court *prior to the time appellee’s brief was filed*. But no assignments of error may be argued in brief by appellant which are not argued in his brief or briefs which must be filed in this court before the appellee has answered them. To hold otherwise would mean that there would be no end of briefs. An appellant could read the appellee’s brief and then request the right to make additional assignments of error, or amend those already made, and change the entire posture of the appeal.” (emphasis added)).

Still, in the event that this Court was inclined towards granting further briefing, Respondent requests that this Court only grant the amended petition and any supplemental filings regarding issues one and two. Respondent contends that allowing supplemental filings regarding issue three would be highly prejudicial to Respondent, because Respondent has already submitted its return to petition on this issue. Thus, any second chance at addressing this issue occurs after Petitioner has read the State’s argument in response to Petitioner’s issue raised. Therefore, Respondent requests that, if this Court is inclined towards granting substitute and supplemental briefing, the Court only grant the amended petition and further supplemental filing and briefing in regards to

issues one and two, but deny Petitioner's motion in regards to issue three.

Petitioner has failed to provide a sufficient reason for why the original petition for writ of certiorari should be withdrawn and the amended petition for writ of certiorari should be allowed to replace the original filing. The State takes no position on whether counsel is substituted but objects to Petitioner being awarded a second bite at the writ-seeking stage of this appeal.

V.

WHEREFORE, Respondent respectfully asks that this Court deny Petitioner's request to withdraw the Petition for Writ of Certiorari and to file an Amended Petition for Writ of Certiorari for waste of time and because granting the motion will unfairly prejudice Respondent. Alternatively, if this Court is inclined toward permitting the subsequent filings, Respondent requests the amended petition be granted only in regards to issues one and two and denied regarding issue three.

Respectfully submitted,

ALAN WILSON
Attorney General

CHELSEY F. MARTO
Assistant Attorney General
S.C. Bar # 104191

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(803) 734-3737

By: /s Chelsey F. Marto
ATTORNEYS FOR RESPONDENT

September 1, 2020

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

CERTIORARI TO SPARTANBURG COUNTY

Sep 01 2020

The Honorable Thomas A. Russo, Circuit Court Judge
Appellate Case No. 2019-001319

SC Court of Appeals

TAIWAN J. HARDY

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PROOF OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Return Opposing Withdrawal of the Petition for Writ of Certiorari and Entrance of the Amended Petition for Writ of Certiorari has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Taylor D. Gilliam, Esquire
tgilliam@sccid.sc.gov

J. Falkner Wilkes, Esquire
jfalknerwilkes@gmail.com

This 1st Day of September, 2020.

s/ Chelsey F. Marto
Chelsey F. Marto
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
ChelseyMarto@scag.gov

From: Chelsey Marto
To: ["J. Falkner Wilkes"; Gilliam, Taylor](#)
Cc: [Seventhcircuitpcr; "Allgire, Mary"](#)
Subject: Hardy, Taiwan - Return Opposing Amended PWC (2019-001319)
Date: Tuesday, September 1, 2020 12:21:00 PM
Attachments: [HARDY Taiwan - Return Opposing Amended PWC, CL, COS \(02368525xD2C78\).PDF](#)

Good afternoon,

Attached please find the Return opposing the withdrawal of the petition for writ of cert and the submission of the amended petition in Taiwan Hardy's case (2019-001319), to be filed with the court momentarily.

Best,
Chelsey Marto

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ALAN WILSON
ATTORNEY GENERAL

September 1, 2020

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SC Court of Appeals

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

RE: Taiwan J. Hardy v. State of South Carolina
Appellate Case No. 2019-001319
Lower Court Case No. 2017-CP-42-2217

Dear Mr. Shearouse:

Enclosed for filing is the **Return Opposing Withdrawal of the Petition for Writ of Certiorari and Entrance of the Amended Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

/s Chelsey F. Marto
Chelsey F. Marto
Assistant Attorney General
S.C. Bar No. 104191

CFM/ec
Enclosures

cc: Taylor D. Gilliam, Esquire
J. Falkner Wilkes, Esquire