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**Apr 07 2021**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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On Petition for Writ of Certiorari to Anderson County

The Honorable Thomas W. Cooper, Jr., Trial Judge  
The Honorable Alexander S. Macaulay, First PCR Judge  
The Honorable Eugene C. Griffith, Jr., Second PCR Judge

Appellate Case No. 2020-001619

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**APR 08 2021**

HERMAN BELTON,

Petitioner, **S.C. SUPREME COURT**

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**AMENDED MOTION TO DISMISS AND MOTION TO FILE OUT OF TIME**

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The State (“Respondent”) hereby moves before this Court to dismiss this appeal or, in the alternative, to allow Respondent to file a return to Herman Belton’s (“Petitioner”) petition for a writ of certiorari out of time and to require Petitioner to supplement the appendix. In support of this motion, the undersigned shows the following:

1. On February 5, 2007, Petitioner was convicted of trafficking in crack cocaine (2006-GS-04-1844), and the Honorable Thomas W. Cooper, Jr., sentenced Petitioner to imprisonment for twenty-five years.
2. This Court affirmed Petitioner’s conviction and sentence. State v. Belton, Op. No. 2009-UP-526 (S.C. Ct. App. filed November 19, 2009) (per curiam).

3. Petitioner filed an application for post-conviction relief (2010-CP-04-0678) on February 24, 2010, challenging the conviction and sentence.
4. The Honorable Alexander S. Macaulay denied Petitioner's application with prejudice in an order issued on November 7, 2011.
5. This Court, after the resulting appeal was transferred to it by the South Carolina Supreme Court, denied Petitioner's petition for a writ of certiorari. Belton v. State, S.C. Ct. App. Order filed July 3, 2014.
6. On February 4, 2019, Petitioner filed a motion for relief from judgement in the circuit court, pursuant to Rule 60(b), SCRCP, praying for relief from Judge Macaulay's order denying the application for post-conviction relief.
7. On October 21, 2020, Petitioner and the undersigned appeared before the Honorable Eugene C. Griffith, Jr., for a WebEx hearing on Petitioner's motion for relief from judgment.
8. Judge Griffith issued an order on October 26, 2020, denying Petitioner's motion; that order is, in part, the subject of Petitioner's present appeal.
9. Petitioner filed his notice of appeal with the Supreme Court on December 10, 2020.
10. The undersigned was notified on April 1, 2021, by an employee of the Clerk's Office of the Supreme Court that Respondent's deadline for filing a return to Petitioner's petition for a writ of certiorari had passed and that Respondent would have to file a motion out of time if it wanted to respond to the petition.
11. Upon review, the South Carolina Appellate Case Management System indicates that Petitioner filed his petition for a writ of certiorari and appendix in this appeal on February 4, 2021.

12. The undersigned and six other employees of the South Carolina Attorney General's Office reviewed their open files for Petitioner and the mail logs dating back to February of this year and can find no indication that Respondent ever received a copy of the petition and appendix from Petitioner.
13. Petitioner was required to serve a copy of the petition for a writ of certiorari and the appendix on Respondent within thirty days of his receipt of the transcript from the hearing on his Rule 60(b) motion. Rule 243(d), SCACR.
14. The undersigned's review of the appendix, as accessed from the Case Management System, shows that Petitioner has not included in his appendix a copy of the transcript from the October 21, 2020, hearing before Judge Griffith.
15. It is Petitioner's obligation to file the appendix in this appeal. Rule 243(d), SCACR.
16. Rule 243(f)(1), SCACR, requires that an appendix filed with a petition for a writ of certiorari to review a final decision entered under the Uniform Post-Conviction Procedure Act contain "[t]he entire lower court record."
17. A petitioner seeking a writ of certiorari for review in a post-conviction relief case is required to "obtain from the court reporter a transcript of the proceedings in the lower court" "[i]n the same manner and under the same time limitations as provided for appeals from the Court of Common Pleas in Rules 203 and 207 . . . ." Rules 243(b), SCACR.
18. Rule 207(a)(1), SCACR, requires that an appellant make timely arrangements with a court reporter for ordering a necessary transcript, order the transcript from the court reporter within ten days of the service of the notice of appeal, and contemporaneously furnish all parties, the Office of Court Administration, and the

- clerk of the appellate court with copies of correspondence with the court reporter.
19. Petitioner has not provided this Court or Respondent with any information indicating that Petitioner has ordered the transcript from the October 21, 2020, hearing before Judge Griffith.
  20. On the contrary, the letter filed with the Supreme Court by Petitioner on January 13, 2021, relates that Petitioner is including a copy of the record from his previous appeal in lieu of ordering any transcript. Because the hearing before Judge Griffith took place after the conclusion of Petitioner's previous appeal, the transcript of that hearing would necessarily be omitted from the previous record.
  21. This Court has the authority to dismiss an appeal whenever a petitioner fails to comply with the requirements of the South Carolina Appellate Court Rules. Rule 260(a), SCACR.
  22. The 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." Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992) (acknowledging that the Court would have been justified in dismissing the appeal but deciding instead to require a party to file a brief complying with the Rules within fifteen days).
  23. Because Petitioner did not serve Respondent with the petition for a writ of certiorari and appendix, because Petitioner did not include in the appendix the transcript from the hearing before Judge Griffith, and because Petitioner has given no indication that he has ordered the transcript from the hearing before Judge Griffith, Respondent moves for the dismissal of this appeal.

24. In the alternative, if this Court decides not to dismiss the appeal, Respondent moves for the opportunity to file its return to the petition for a writ of certiorari out of time and moves for an order requiring Petitioner to supplement the appendix with the transcript from the hearing before Judge Griffith.
25. “The time prescribed by these Rules for performing any act except the time for serving the notice of appeal under Rules 203 and 243 may be extended by the appellate court, or by any judge or justice thereof.” Rules 263(b), SCACR.
26. It is Petitioner’s obligation to supplement the appendix when documents that should have been included were not. See 212(b), SCACR (providing the method whereby the record can be supplemented).
27. The undersigned has not consulted with Petitioner about this motion because Petitioner is a pro se party and because the undersigned believes that such consultation would serve no useful purpose.

**WHEREFORE**, Respondent prays that this Court will dismiss the appeal due to Petitioner’s failure to serve Respondent with the petition for a writ of certiorari and appendix, failure to include in the appendix the transcript from the hearing before Judge Griffith, and failure to prove that Petitioner has ordered the transcript from the hearing before Judge Griffith. In the alternative, if this Court declines to grant the aforementioned relief, Respondent prays that the Court will allow Respondent to file its return to the petition out of time and require Petitioner to supplement the appendix with the transcript

from the hearing before Judge Griffith. Respondent also prays that this Court will stay any deadlines until it has ruled upon this motion.

Respectfully submitted,

ALAN WILSON  
Attorney General

TAYLOR ZANE SMITH  
S.C. Bar. No. 103282  
Assistant Attorney General

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April 6, 2021

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S.C. SUPREME COURT

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CERTIFICATE OF SERVICE BY MAILING

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Amended Motion to Dismiss and Motion to File Out of Time** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Herman Belton, #256396  
Allendale C.I. (HAB-0010-B)  
1057 Revolutionary Trail  
Fairfax, SC 29827

DATED this the 7<sup>th</sup> day of April, 2021



Hannah Bradham  
Legal Assistant for Respondent