

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Mar 22 2022

S.C. SUPREME COURT

FROM SPARTANBURG COUNTY
Court of Common pleas
J. Derham Cole, Circuit Court

Lower Court Case No.: 2015-CP-42-4699
Appellate Case No. 2020-001418

John Garvin..... Petitioner-Appellant,

v.

The State of South Carolina..... Respondent-Appellee.

MOTION TO RECALL REMITTITUR
WITH SUPPORTING POINTS AND AUTHORITIES

To: The Honorable Justices of The South Carolina Supreme Court

Petitioner-Appellant, John Garvin, proceeding as pro-se, respectfully moves this Court for an Order recalling the *remittitur* and permitting him to properly file a petition for rehearing and for this Court to properly rule on the merits of Petitioner-Appellant's actual innocence claim pursuant to *Schlup v. Delo, supra.*, 513 U.S. 298, 115 S.Ct. 851 (1995).

This motion is based upon the below following points and authorities and the attached affidavit seeking the recalling of the *remittitur* that was issued by mistake or inadvertence on March 17, 2022.

STANDARD OF REVIEW

"The *remittitur* shall contain a copy of the judgment of the appellate court, shall be sealed with the seal and signed by the clerk of court, and ... shall not be sent to the lower court ... until [the] fifteen (15) day[] [time limit] ha[s] elapsed (the day of filing being excluded) since the filing

of the opinion, order, judgment, or decree of the court finally disposing of the appeal. If a petition for rehearing is received before the *remittitur* is sent, the *remittitur* shall not be sent pending disposition of the petition by the court.” See Rule – 221(b), SCACR.

ARGUMENT

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO RECALL REMITTITUR

Following the Order and *remittitur* that was entered on March 15, and on March 17, 2022, in Appellate Case No.: 2020-001418, denying Petitioner-Appellant’s Motion for Reinstatement of Appeal and a Subsequent Application for Relief. The Clerk of the South Carolina Supreme Court has issued the *remittitur* by mistake or inadvertence on March 17, 2022, not as pursuant to Rule – 221(a)(b), SCACR. Thus, denying Petitioner-Appellant the opportunity to properly file a petition for rehearing in this Court within the fifteen (15) day time limit, after the Order was issued, as is required pursuant to Rule – 221(a)(b), SCACR.

“When the *remittitur* has been properly sent, the appellate court no longer has jurisdiction over the matter and motion can be heard thereafter.” *Wise v. S.C. Dept. of Corrections*, 372 S.C. 173, 174, 642 S.E.2d 551 (2007) (citations omitted). “The only exception to this rule is when the *remittitur* is sent down by mistake, error or inadvertence of the Court.” *Id.* (citing *State v. Keels*, 39 S.C. 553, 17 S.E. 802 (1893)).

“In order to justify[,] this Court in exercising the unusual power of recalling the *remittitur* after it has been sent down, a very strong showing would be required that the *remittitur* was sent down through some mistake or inadvertence on the part of this Court or it’s officer” *State v. Barnes*, 413 S.C. 1, 4, 774 S.E.2d 454 (2015) (citation omitted).

Here in this case, the *remittitur* has not been properly sent. Petitioner-Appellant received the Court’s Order denying his Motion for Reinstatement of Appeal and an Subsequent Application for Relief, from the South Carolina Appellant Defense via Ridgeland Correctional Institution’s

mailroom staff member, on March 21, 2022. The *remittitur* was sent on March 17, 2022, two days after the March 15, 2022, Order denying Petitioner-Appellant's Motion for Reinstatement of Appeal and a Subsequent Application for Relief.

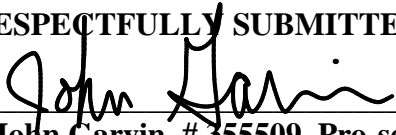
The Clerk of the South Carolina Supreme Court has issued and/or mistakenly or inadvertently issued and entered the *remittitur* to the lower court on March 17, 2022, and stated that "no petition for rehearing was filed" on the Court's website for Appellant Case No.: 2020-001418. Petitioner-Appellant states that after the filing of the *remittitur*, that was issued by the Clerk of Court before the fifteen (15) day time limit had elapsed for him to file his Petition for Rehearing, pursuant to Rule – 221(a)(b), SCACR. Petitioner-Appellant would file in this Court by e-mail via his brother, Bernard Garvin, his Petition for Rehearing on the same day as the *remittitur* was issued and filed.

Petitioner-Appellant states that the Clerk of Court has issued the *remittitur* before the fifteen (15) day time limit had elapsed for the filing of Petitioner-Appellant's Petition for Rehearing, is in violation of Rule – 221(a)(b), SCACR.

CONCLUSION

For the reasons set out above, Petitioner-Appellant respectfully request that this Honorable Court to grants this Motion to Recall *Remittitur*, due to the Clerk mistakenly or inadvertently issuing the *remittitur* before the fifteen (15) day time limit has elapsed, pursuant to Rule – 221(a)(b), SCACR.

DATED: March 22, 2022

RESPECTFULLY SUBMITTED,


John Garvin, # 355509, Pro-se
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