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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari from the Court of Appeals
Honorable R. Lawton McIntosh, Post-Conviction Relief Judge
Honorable John C. Hayes, III, Plea Judge

Appellate Case No. 2022-000341

TRAVIS HINES,

Petitioner,

vs.

THE STATE,

Respondent.

**MOTION TO SERVE AND FILE RETURN TO MOTION TO ALLOW FILING OF A
SUPPLEMENTAL APPENDIX AND RETURN TO MOTION TO TRANSPORT
VIDEOTAPE AT ISSUE IN THIS CASE TO THE COURT FOR REVIEW OUT OF
TIME, RETURN TO MOTION TO ALLOW FILING OF A SUPPLEMENTAL
APPENDIX, RETURN TO MOTION TO TRANSPORT VIDEOTAPE AT ISSUE IN
THIS CASE TO THE COURT AND, MOTION TO STRIKE THE PETITION FOR
WRIT OF CERTIORARI**

Respondent the State of South Carolina, through its undersigned counsel, would respectfully show unto the Court as follows:

I.

Petitioner Travis Hines's post-conviction relief appeal is current pending before this Court based on the filing of a petition for writ of certiorari pursuant to Rule 242, SCACR. Petitioner served its petition for writ of certiorari and appendix on the State on March 28, 2022; however, this was served on an attorney from the criminal appeals unit of the Attorney General's Office who is not (nor has ever been) counsel of record in this post-conviction relief appeal. The State's return

to the petition for writ of certiorari is due to be served and filed tomorrow, April 27, 2022. Rule 242(f), SCACR.¹

II.

On the same date, Petitioner served a motion to allow filing of a supplemental appendix and a motion to transport the videotape at issue in this case to the Court for review, both of which were also erroneously served on an unrelated attorney from a different unit at the Attorney General's Office. The returns to these motions were due to be served and filed on April 7, 2022. Rule 240(e), SCACR. However, due to confusion with the motions being served on an unrelated attorney from a different unit and counsel of record for the State leaving the Attorney General's Office, these returns were omitted from undersigned counsel's calendar and not timely served or filed.

III.

The State respectfully asks this Court to relax the requirements of Rule 240(e) of the South Carolina Appellate Court Rules and permit the State to file and serve the return to the motion to supplement the appendix and the return to the motion to transport the videotape at issue in this case in this case nineteen days out of time. See Rule 263(b), SCACR ("The time prescribed by these Rules for performing any act except the time for serving the notice of appeal under Rule 203 and 243 may be extended or shortened by the appellate court, or by any judge or justice thereof.").

¹ Because Petitioner's petition for writ of certiorari makes arguments and cites to materials included in this proposed supplemental appendix which is **not** currently part of the record before this Court and, as will be explained more below, was **never** before the post-conviction relief court, the State respectfully requests the time limits for filing its return to the petition for writ of certiorari be held in abeyance until this Court rules on this motion to supplement and the State's motion to strike this petition, as the substance of the return and argument presented will be altered by the possible inclusion of these documents which have never been presented to the lower court or Court of Appeals.

The undersigned counsel further sincerely apologizes for any inconvenience this request has caused to the Court, the petitioner, and opposing counsel, and the undersigned counsel submits she does not believe this request will result in any prejudice to the petitioner should it be granted. Furthermore, undersigned counsel has consulted with counsel for petitioner, who expressly indicated she did not oppose the motion to serve and file the returns out of time.

IV.

A. Arguments Related to Return to Motion to Allow Filing of Supplemental Appendix

Regarding the underlying motion to allow the filing of a supplemental appendix, Petitioner seeks to supplement the appendix with two documents that were never before the lower court. See Appendix p. 3 (indicating that no exhibits were introduced at the PCR hearing), see also Appendix generally (including all matters that were before the post-conviction relief court as set forth in Rule 243(f), SCACR). These two documents were not introduced at the post-conviction relief court and arguments were not made regarding these two documents as they were not before the court. These two documents were similarly (and correctly) not before the Court of Appeals pursuant to Rule 243, SCACR, when it considered Petitioner's first petition for writ of certiorari

Rule 243(f), SCACR, provides that the appendix for a post-conviction relief appeal shall contain the "entire lower court record," as well as the final order entered following the post-conviction relief proceeding, and an index. Nothing in this rule permits the inclusion of any other matter, including matter that was not presented to the post-conviction relief court. See Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014) (noting that a post-conviction relief appendix shall only contain matter that was presented to the post-conviction relief court pursuant to Rule 243(f), SCACR).

In his motion to supplement the appendix, Petitioner attempts to include a York County Sheriff's Office Forensic Laboratory Services Laboratory Report and General Sessions Case File Summary that were **not** presented to the post-conviction relief court and were **not** considered by or relied upon by the post-conviction relief judge in deciding the merits of Petitioner's post-conviction relief claims. Therefore, pursuant to Rule 243(f), SCACR, it cannot be included as a part of the appellate record. See State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007) ("Morris' statement was not presented to the lower court and cannot properly be included in the Record on Appeal.").

Accordingly, as the South Carolina Appellate Court Rules limit an appellate court to considering only the matter properly presented to the lower court, the York County Sheriff's Office Forensic Laboratory Services Laboratory Report and General Sessions Case File Summary that Petitioner attempts to include in his appendix pursuant to Rule 242, SCACR, cannot properly be included in the Appendix or considered for the first time by the second appellate court² in deciding Petitioner's case on discretionary certiorari review. See Tant v. Guess, 37 S.C. 489, 512-513, 16 S.E. 472, 480 (1892) ("[I]f the purpose was to ask this court to consider facts not presented to the Circuit Court, . . . then it is clear beyond dispute that we cannot consider such facts. For, as is said by Taney, C. J., in Russell v. Southard, 12 How., at page 159: 'According to the practice of the Court of Chancery from its earliest history to the present time, **no paper not before the court below can be read on the hearing of an appeal.**' This court has, in numerous cases, recognized and affirmed this doctrine." (emphasis added)); see also Henning v. Kaye, 307 S.C. 436, 437, 415

² It is crucial to note that these documents were also not before the Court of Appeals when that court was determining certiorari pursuant to Rule 243, SCACR, or determining the propriety of the post-conviction relief court's denial of relief. Petitioner is only now attempting to present these documents to a court for the **first** to this Court on Rule 242, SCACR.

S.E.2d 794, 794 (1992) (“[T]he South Carolina 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.”).

B. Arguments Related to Return to Motion to Transport the Videotape at Issue in this Case

Additionally, the same argument applies as to why this Court should deny Petitioner’s motion to transport the videotape at issue in this case. As Petitioner readily acknowledges in his motion, the videotape was not before the post-conviction relief court. Accordingly, it cannot properly be before this Court. See Jamison, 410 S.C. at 467, 765 S.E.2d at 128 (noting that a post-conviction relief appendix shall only contain matter that was presented to the post-conviction relief court pursuant to Rule 243(f), SCACR).

Petitioner is attempting to bypass Rule 243(f), SCACR, limits on the materials properly included in the Appendix and before this Court by asking this Court to order a video never presented to the lower court to be brought to the Court for viewing and consideration in this appeal.

C. Arguments Related to Motion to Strike

Furthermore, Petitioner improperly references both documents from his motion to supplement the appendix in his petition for writ of certiorari and makes arguments in furtherance of his position based on these documents which were never before the post-conviction relief court. As discussed above, these documents cannot be properly included in the appendix pursuant to Rule 243, SCACR, and Petitioner’s petition for writ of certiorari likewise cannot properly contain references to these improper documents. See South Carolina State Highway Dep’t v. Meredith, 241 S.C. 306, 311, 128 S.E.2d 179, 182 (1962) (“[C]ounsel is prohibited from embodying in their briefs any fact which does not appear in the record.”). Accordingly, Petitioner’s petition should be

stricken, and Petitioner should be required to file an amended petition containing no improper referenced to matter not properly in the record of this appeal.

V.

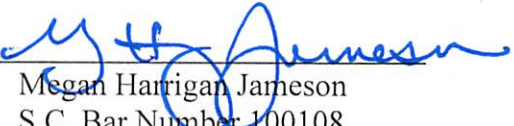
Based on the foregoing, the State respectfully asks this Court to allow it to file a return to the motion to supplement the appendix out of time and accept this return in opposition as timely filed and served. The State also respectfully asks this Court to allow it to file a return to the motion to transport the videotape at issue in this case out of time and accept this return in opposition as timely filed and served. Additionally, the State asks this Court to deny Petitioner's motion to supplement the appendix and motion to transport the video at issue in this case because both attempt to improperly insert matters that were never presented to or before the post-conviction relief court into this certiorari review pursuant to Rule 242, SCACR. The State also requests this Court grant its motion to strike and require Petitioner to file an amended petition for writ of certiorari containing no reference to improperly included matters. Furthermore, the State requests this Court to hold the time period for the filing and service of the return to the petition for writ of certiorari in abeyance until these motions have been ruled upon.

WHEREFORE, the State prays the Court relax the requirements of Rule 240(e) of the South Carolina Appellate Court Rules; permit the State to file and serve the return to the motion to supplement the appendix out of time; strike the petition for writ of certiorari and require Petitioner to file an amended petition for writ of certiorari containing no reference to improperly included matters; hold the time limits for serving and filing the return to the petition for writ of certiorari in abeyance until the motion to supplement the appendix is ruled upon; and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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By: 
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April 26, 2022