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Feb 27 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
General Sessions Court
The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2019—001570

State of South Carolina……………………………………………………………Respondent,

vs.

Devin Zachary Elijah Ruttle…………………………………………………………Appellant.

RETURN TO MOTION TO STRIKE MATTER FROM DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

On February 6, 2023, Respondent filed a Motion to Strike Items from Appellant's Designation of Matter to be Included in the Record on Appeal ("Motion"). Appellant files this Return responding to Respondent's Motion.

Although Respondent urges the Court to strike from the Record on Appeal various court records from Spartanburg and Greenville counties, an obituary concerning Mr. Charles Rosemond, a 2016 graduation announcement for Spartanburg High School, and a news article and video segment concerning the death of Mr. Rosemond, Respondent's Motion to Strike is based on an incorrect and overly narrow interpretation of the South Carolina Appellate Court Rules, which would encourage a decision in this case not on the merits of the case but rather on technicalities. As the Supreme Court has repeatedly intoned, the rules of court "shall be

construed to secure the just, speedy, and inexpensive determination of every action," Rule 1, SCRCP, and "should not be written or interpreted to create a trap for the unwary lawyer or party…or [to] deprive [a party] of [an] adjudication on the merits…." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 25, 602 S.E.2d 772 (2004) (citing Gamble v. State, 298 S.C. 176, 379 S.E.2d 118 (1989)); see also U.S. v. Wallace, 515 F.3d 327, 333 n.9 (4th Cir. 2008) (citing Fed.R.Crim.P. 2 for the proposition that [t]he rules [of criminal procedure] are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.") and State v. Miller, 289 S.C. 316, 345 S.E.2d 489 (1986) (noting that in construing South Carolina's rule of criminal procedure the courts look for guidance to cases interpreting the federal rules). In light of the Supreme Court's direction, this Court has also noted that it is "South Carolina's policy favoring the disposition of issues on their merits rather than on technicalities." Mictronics v. SDOR, 345 S.C. 506, 511, 548 S.E.2d 223 (Ct. App. 2001). Thus, it is against these canons of interpretation and with due consideration to the liberty interests that are at stake in criminal prosecutions that the South Carolina Appellate Court Rules concerning the generation of the Record on Appeal must properly be construed.

Specifically, Rules 209 and 210, SCACR, provide broad direction as to the creation of the Record on Appeal, instructing that the Record "shall include all matter designated to be included by any party under Rule 209…." The broad discretion of the parties to include portions of the transcript, pleadings, orders, exhibits, or other materials is limited only by the requirement that the designated matter be "relevant to the appeal" and have been "presented to the lower court or tribunal." See Rules 209 and 210, SCACR (emphasis added). Respondent's Motion does not

appear to challenge any of the matter sought to be struck on the grounds that it is not relevant to the appeal, but rather because "Judge Cole did not mention the proposed pieces of evidence in his Order denying the motion, and counsel…is unsure whether Judge Cole considered them at all." See Respondent's Motion, p.1 (emphasis added). However, the standard for the inclusion of material in the record on appeal is not whether the lower court mentioned or considered matter, but merely whether the matter was "presented to the lower court."[1] Rule 210(c), SCACR (emphasis added); see Ex Party Morris, 367 S.C. 56, __, 624 S.E.2d 649, 651 n.1 (2006) (noting and not rejecting from inclusion in the record on appeal affidavits, written evaluations and reports that "apparently were submitted to the court" despite the fact that "[n]one of the attorneys moved to submit any written documents into evidence during their descriptions of the case, although they mentioned some documents."); see also Bowman v. Richland Mem. Hosp., 335 S.C. 88, 90 n.1, 515 S.E.2d 259 (Ct. App. 1999) (discussing proposed orders submitted by the parties and noting that "[t]he record on appeal indicates that after the hearing, both parties submitted proposed orders for the circuit court judge to sign.") (emphasis added); Gates at

[1] Although the rules of issue preservation for purposes of appellate review require that an issue be raised and ruled on below, this Court's opinion in State v. White implicitly acknowledges the distinction between issue preservation and presentation of material to the lower court for purposes of being included in the record on appeal. 372 S.C. 364, ___, 642 S.E.2d 607, 618-19 (Ct. App. 2007). In discussing the defendant's motion for new trial and the written statement upon which the new trial motion was based in White, this Court intentionally separated and addressed individually the grounds for denying motion and the the preclusion of the written statement from the record on appeal. In doing so this Court acknowledged that issue preservation and the question of whether material was "presented to the lower court" were subject to different standards. Whereas for an issue to be reviewed on appeal it must have been both "raised to and ruled on by the trial court," inclusion of material in the record on appeal requires only that the material be "presented to the lower court or tribunal." Id.; see also State v. Passmore, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct. App. 2005) ("The general rule of issue preservation states that if an issue was not raised and ruled upon below, it will not be considered for the first time on appeal.")

Williams-Brice Condo. Ass'n v. DDC Constr., Inc., 418 S.C. 282, 792 S.E.2d 240 (Ct. App. 2016) ("Further, Developer's proposed order granting the motion to strike, submitted to the circuit court upon request and included in the record on appeal, specifically addressed the validity of the Second Amendment. Therefore, we find Developer clearly raised this argument to the circuit court.") (emphasis added), vacated on other grounds, 420 S.C. 181, 801 S.E.2d 400 (2017).

Though no South Carolina caselaw defines "presented" or "to present" in an applicable context, as noted by Justice Clearance Thomas in his dissenting opinion in Stewart v. Martinez-Villareal, "[t]o 'present' is 'to bring or introduce into the presence of someone' or 'to lay (as a charge) before a court as an object of inquiry.'" 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998) (quoting Webster's Ninth New Collegiate Dictionary 930 (1991)); see also State v. Shands, 424 S.C. 106, 123, 817 S.E.2d 524, 533 (Ct. App. 2018) (relying on usual dictionary meaning to provide the meaning of a word not defined in the South Carolina court rules). Consistent with the meaning attributed to "present" by Justice Thomas, Merriam-Webster provides a "legal definition" of "present" as to "to lay before a court as an object of consideration." See Present, Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/present. Accessed 24 Feb. 2023; see also In re Jacobs, 630 S.W.3d 822, 827-28 (Mo. App. 2021) (defining "present" in the context of whether a matter was presented to a probate trustee as "to offer to view:show…to bring to one's attention…to lay (something, such as a charge) before a court as an object of inquiry" and holding that a "creditor sufficiently 'presents' its claim to a trustee when the creditor brings the claim – or 'presents a problem' – to the trustee's attention").

As acknowledged by Respondent's Motion itself and the transcript attached thereto, the materials that Respondent now seeks to strike from the Record on Appeal were brought to the Judge Cole's attention during both the hearing on the Motion for New Trial and by way of undersigned counsel's email on May 25, 2021 in which the materials in question were not only submitted to Judge Cole, but also their relevance and the appropriate grounds for their consideration by Judge Cole were addressed. See Motion for New Trial Tr., p. 112, ll. 22-23 ("And I did want to raise that [speaking of the documents submitted post-hearing] to the Court's attention."). Whether Judge Cole gave proper consideration to the materials and information that were presented to him is immaterial concerning the question of whether the materials were in fact presented to him.

Moreover, "principles of fairness and equity" dictate that the materials that were discussed during the hearing on the Motion for New Trial and that were presented to Judge Cole by way of undersigned counsel's May 25, 2021 email be included in the Record on Appeal given that it was the lower court's actions that necessitated submission of the additional materials to Judge Cole following the hearing on the Motion for New Trial. Specifically, Judge Cole informed counsel for the parties by way of emails at 4:17 p.m., 4:50 p.m. and 7:20 p.m. on May 11, 2021, the day before the hearing in question, that the May 12 hearing scheduled for 10:00 a.m. was cancelled due to Judge Cole not having a court reporter, which directly caused undersigned counsel to stop the printing and copying of materials to be submitted during the hearing and to focus on attempting to reschedule Appellant's witnesses to a time at which Judge Cole would have a court reporter available and the hearing could proceed. See May 11, 2021 Email chain with Judge Cole and Counsel. Despite informing counsel for the parties that the

hearing scheduled for 10:00 a.m., May 12, 2021 needed to be rescheduled due to Judge Cole's lack of a court reporter, Judge Cole's office then called undersigned counsel at approximately 9:40 a.m. on the morning of the 12th and informed me that Judge Cole now did have a court reporter and would be moving forward with the hearing and that I needed to report to the court as quickly as possible. Had the lower court not informed undersigned counsel erroneously that the May 12, 2021 hearing would not proceed for the lack of a court reporter, all materials would have been presented to Judge Cole during the hearing. In light of the impossible situation in which the lower court's actions placed undersigned counsel, I respectfully brought to Judge Cole's attention the additional material that I desired to present to the court for its consideration and requested the ability to submit additional materials via a post-hearing email. After unsuccessfully attempting to confer with counsel for the State regarding the submission of the additional materials, the materials were presented to Judge Cole in accordance with his instructions. See Motion for New Trial Tr., p. 126, ll. 10-20 ("Well, I understand. Here's the thing, you all can agree or disagree, object or consent. That's what I need you to do…And if there needs to be any additional proof, Mr. Bulsa, send me a note. But if the exhibits do come in and you need additional time to present something else in response to it or reply to it, that'll be fine. You all discuss it and let me know."). Given the unusual situation created by counsel being informed by the lower court that the hearing was being rescheduled and then twenty (20) minuets before the hearing was originally scheduled to commence that the hearing would be moving forward, and undersigned counsel's compliance with Judge Cole's instruction for the presentation of additional materials to the court, it would be inequitable to strike the materials in question from the Record. See Bowman, 335 S.C. at 92-93, 515 S.E.2d at ___ (holding that

"principles of fairness and equity" "mandated" that "the trial judge erred in holding that appellants failed to amend their complaint within the time frame specified in the order" because the trial judge's act of waiting four days to file the order "left appellants with only six days to accomplish what the order stated they had ten days to do…").

Furthermore, even assuming arguendo that Judge Cole was required to consider and/or mention the materials sought to be struck for them secure a place in the Record on Appeal, the court and judicial records from Spartanburg and Greenville counties, the obituary, graduation announcement, and the news submissions are all appropriate for judicial notice by this Court at this time pursuant to Rule 201, SCRE. Specifically, with regard to the court and judicial records, "[a] court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records." Freeman v. McBee, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984); see also Rector v. Warden of Greenville Cnty. Det. Ctr., C/A No. 8:23-cv-0011-HMH-JDA, *1 n.1 (D.S.C. Jan. 18, 2023) ("The undersigned takes judicial notice of the documents in Petitioner's pending criminal actions in the state court. See Philips v. Pitt Cnty. Mem. Hosp., 572 F.3d 176, 180 (4th Cir. 2009) (explaining that courts 'may properly take judicial notice of matters of public record'); Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1239 (4th Cir. 1989) ('We note that 'the most frequent use of judicial notice is in noticing the content of court records.')"); Sanders v. S.C. Dep't of Motor Vehicles, 431 S.C. 374, 387 n.3, 848 S.E.2d 768, 775 n.3 (2020) (responding positively to DMV's request for court to take judicial notice of "publicly verifiable information that is readily available on…[a] government website" and holding that the "information is obviously compelling" but unnecessary for the court to rely upon because of other evidence in the record establishing the same information); see e.g.,

Singletary v. Aiken Cnty. Code Enf't Div., 1:22-cv-04147-BHH-MGB, *1 n.1 (D.S.C. Jan. 5, 2023) (taking judicial notice of records and factual information in an underlying state court proceedings available via the Aiken County Public Index and citing Tisdale v. South Carolina Highway Patrol, No. 0:09-cv-1009-HFF-PJG, 2009 WL 1491409, at *1 n.1 (D.S.C. May 27, 2009), aff'd, 347 Fed.Appx. 965 (4th Cir. Aug. 27, 2009) for the proposition that "the court may also take judicial notice of factual information located in postings on government web sites"); Vanzant v. Carolina Ctr. for Occupational Health, C/A No. 8:14-cv-03725-RBH, *4 n.7 (D.S.C. Aug. 25, 2015) (taking judicial notice of plaintiff's arrest and booking records that were available online via the Charleston County Public Index and Charleston County Inmate Search); Davis v. Richland Cnty., No. 4:12-CV-3429-RMG, 2013 WL 5797739, at *2 n.1 (D.S.C. Oct. 24, 2013) (taking judicial notice of a plaintiff's arrest records because they were available on the Richland County Fifth Judicial Circuit Public Index), adopted by 2013 WL 6068880 (D.S.C. Nov. 18, 2013).

In addition to the court and judicial records, and frankly given the corroboration provided thereby, it is also appropriate for this Court to take judicial notice of the obituary and news reports that undersigned counsel has designated for inclusion in the Record on Appeal. Although the courts of South Carolina have not had the opportunity to pass on whether an obituary and news reports that are corroborated by online court records, including the Greenville County Probate Search that confirms Charles Rosemond Sr.'s name, date of death, and relation to Thomas Lamont Rosemond, other states have found obituaries and corroborating news reports appropriate material for judicial notice. Cnty. of El Paso v. Navar, 584 S.W.3d 73 (Tex. App. 2018) (citing approvingly the case of In re Estate of Hemsley, 460 S.W.3d 629, 632 (Tex.App.

2014) and concluding that "[w]hile acknowledging the record was devoid of any reference to the burial, our Court took judicial notice of the obituary published in the El Paso Times and took notice of televised news reports that Hemsley had been buried in El Paso…[and] [h]aving taken judicial notice of the reports, we dismissed the issue as moot."). Given the notoriety, circumstances, and numerous court records that corroborate Mr. Charles Rosemond, Sr.'s death, the facts presented in the obituary and news reports concerning the familial connections to Nysha Jefferies, the juror in question in this appeal, provide the accuracy and reliability required for judicial notice thereof.

WHEREFORE, based on the foregoing Appellant hereby requests that the Court deny Respondent's Motion to Strike. However, to the extent that the Court does have any question regarding whether the materials in question were "presented" to the lower court, Appellant does not object to remand to the lower court for Judge Cole to make an explicit determination as to whether the materials in question were "presented." Moreover, given that this Motion and the Court's decision to allow the inclusion of or strike the materials in question impacts the arguments that Appellant may make on reply to Respondent's Brief, Appellant would respectfully request that the deadline for Appellant's Reply Brief be held in abeyance until the Court renders a decision on this Motion.

Respectfully Submitted,

s/Christopher T. Brumback

Christopher T. Brumback
Brumback & Langley, LLC
531 South Main Street, Suite 307
Greenville, SC 29601
(864) 414-9097
chris@brumbacklangley.com

From: **Chris Brumback** chris@brumbacklangley.com
Subject: Re: state v. ruttle
Date: May 11, 2021 at 7:43 PM
To: Cole, J. Derham JColeJ@sccourts.org
Cc: Bulsa, Derrick dbulsa@spartanburgcounty.org, Spencer Langley spencer@brumbacklangley.com

Here is the contact information for the gentleman in the Office of General Counsel who has been able to assist me with transport issues/questions for Mr. Ruttle:

Eckstrom.Jonathan@doc.sc.gov
Jonathan R. Eckstrom, Office Manager
Office of General Counsel
South Carolina Department of Corrections
Post Office Box 21787
Columbia, South Carolina 29221-1787
(803)896-4513 (Office)
(803)896-1766 (Fax)

Brumback & Langley, LLC
Attorneys and Counselors at Law
Christopher T. Brumback
531 South Main Street, Suite 307
Greenville, SC 29601
Phone: 864-414-9097
Fax: 866-728-1205
www.BrumbackLangley.com

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> On May 11, 2021, at 19:20, Cole, J. Derham <JColeJ@sccourts.org> wrote:
>
> Do you know the best person (and an email) to contact at DOC to stop the transport?
>
> **From:** Bulsa, Derrick [mailto:dbulsa@spartanburgcounty.org]
> **Sent:** Tuesday, May 11, 2021 4:53 PM
> **To:** Cole, J. Derham <JColeJ@sccourts.org>; Christopher Brumback <chris@brumbacklangley.com>
> **Cc:** Spencer Langley <spencer@brumbacklangley.com>

Subject: RE: state v. ruttle

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Judge Cole,

I have been told by the detention center that they are not keeping any DOC inmates overnight. I had inquired about bringing a witness to Spartanburg a few days before a trial in a couple of weeks.

From: Cole, J. Derham <JColeJ@sccourts.org>
Sent: Tuesday, May 11, 2021 4:50 PM
To: Christopher Brumback <chris@brumbacklangley.com>
Cc: Bulsa, Derrick <dbulsa@spartanburgcounty.org>; Spencer Langley <spencer@brumbacklangley.com>
Subject: RE: state v. ruttle

I was in hopes that a reporter would become available but that did not happen. SCDOC may be willing to leave Ruttle here until Friday for the hearing, so let me know what you determine about witness availability.

From: Christopher Brumback [mailto:chris@brumbacklangley.com]
Sent: Tuesday, May 11, 2021 4:39 PM
To: Cole, J. Derham <JColeJ@sccourts.org>
Cc: Bulsa, Derrick (dbulsa@spartanburgcounty.org) <dbulsa@spartanburgcounty.org>; Spencer Langley <spencer@brumbacklangley.com>
Subject: Re: state v. ruttle

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Judge Cole,

I was scheduled to be out of the office on Friday, but I will be happy to change my schedule to be available—unfortunately, given that I was going to go ahead and put on at least Rick Vieth (trial counsel) and likely Travis Mims, I cannot say for certain whether my witnesses will be available on Friday without checking with them. Although I would guess that Mr. Vieth could likely adjust his schedule to appear on Friday, Mr. Mims is employed with a regular Monday through Friday 9-5 job installing security systems for Priority One Security, so I am afraid that he has already taken tomorrow off to be present and will have Friday booked with client appointments. I will reach out immediately to both Mr. Vieth and Mr. Mims and get back with an answer ASAP. Besides the witness availability question, would moving the hearing to Friday create a problem for the Order of Transport for Mr. Ruttle?

Best Regards,

Chris Brumback
Brumback & Langley, LLC
Attorneys and Counselors at Law
Christopher T. Brumback
531 South Main Street, Suite 307
Greenville, SC 29601
Phone: 864-414-9097
Fax: 866-728-1205
www.BrumbackLangley.com

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> On May 11, 2021, at 4:17 PM, Cole, J. Derham <JColeJ@sccourts.org> wrote:
>
> I am informed that I still have no court reporter available for the hearing scheduled for tomorrow. I am confident that I can have one available for this Friday. Would you be interested in moving the hearing to Friday in lieu of tomorrow?
>
> ~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and

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Appellate Case No. 2019—001570

State of South Carolina……………………………………………………………Respondent,

vs.

Devin Zachary Elijah Ruttle………………………………………………………….Appellant.

PROOF OF SERVICE

I certify that I have filed with the Court of Appeals and served Appellant's Return to Respondent's Motion to Strike on counsel for Respondent, Julianna E. Battenfield, by email, JuliannaBattenfield@scag.gov, on February 27, 2023.

Respectfully submitted,

BRUMBACK & LANGLEY, LLC

s/Christopher T. Brumback
Christopher T. Brumback / S.C. Bar No. 75410
Spencer D. Langley / S.C. Bar No. 77898
531 South Main Street, Suite 307
Greenville, SC 29601
(864) 414-9097
(866) 728-1205 (Fax)