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Mar 17 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Certiorari to Spartanburg County

Honorable Grace Gilchrist Knie, Circuit Court Judge

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CALVIN TERRELL WILLIAMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001839

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RETURN TO STATE'S PETITION TO FILE A  
SECOND SUPPLEMENTAL APPENDIX

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Petitioner respectfully requests that this Court deny Respondent's untimely Petition to File a Second Supplemental Appendix, because Respondent cannot establish that the records were before the lower court. Additionally, the records contained in the Second Supplemental Appendix, including a voir dire request, a checklist for magistrate's judges, a continuance request, and discovery affidavits, are irrelevant and do not aid in the disposition of the appeal.

The underlying Petition for Writ of Certiorari and accompanying Appendix were filed in this appeal on May 6, 2019, nearly four years ago.<sup>1</sup> Following the filing of the state's return

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<sup>1</sup> The state's motion to supplement comes over 1,400 days after the filing of the Petition and Appendix.

(September 20, 2019), a grant of certiorari (September 27, 2021), the filing of both the Brief of Petitioner and the Brief of Respondent, and an oral argument, the state now seeks to provide this Court with additional materials that were likely not examined by the PCR court. Moreover, given the opportunity to provide these documents to the undersigned during the preparation of the Appendix, the state failed to mention their existence until March 2023.

In gathering documents to be included in the Appendix in this case, Sean Flynn, the Administrative Coordinator with the South Carolina Commission on Indigent Defense contacted a legal assistant in the PCR division in October 2018 (See Exhibit A, e-mail exchange). Carson Kirk, a Legal Assistant, e-mailed Mr. Flynn four documents: the Order of Dismissal, the state's Return, the PCR application, and a six-page PDF entitled Clerk's Records which contained sentence sheets and indictments only.

It was not until March 2023, nearly four-and-a-half years later, that the undersigned was ever advised of these additional clerk's records. Critically, it is impossible to verify that these records were ever provided to the PCR court. The contemporaneous records fail to affirmatively establish that these documents were before the lower court pursuant to Rule 243.

These records were not referenced at the PCR hearing, as can be seen by the transcript. Despite the fact that the Order of Dismissal is nearly a carbon copy of the state's post-hearing memorandum (App. 513)<sup>2</sup>, neither the state nor the PCR judge noted what documents were actually before the PCR court. Furthermore, given the opportunity to make any sort of "packet" a Court's Exhibit, the state did not do so. Alternatively, the state could have provided to the PCR

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<sup>2</sup> The majority of the Order of Dismissal, in particular pages 529 – 536 of the Appendix, is a mirror image to the state's post-hearing memorandum. It stands to reason, therefore, if the state was tasked with drafting a proposed order of dismissal, it could have included a section on what documents were before the PCR court.

judge a written cover letter advising the contents of any “packet” that was sent; this was not done, either.

In Jones v. Builders Inv. Group, LLC, this Court received a motion to supplement the record pursuant to Rule 212(a), SCACR. 415 S.C. 321, 781 S.E.2d 737 (Ct. App. 2015). According to footnote 7, the appellant “did not submit [evidence to the circuit court] prior to the court’s order granting JNOV, [so] the court refused to consider it.” Id. at 330, 781 S.E.2d at 742, n. 7. Eight days before the oral argument in Jones, this Court received a motion pursuant to Rule 212(a), SCACR, wherein the appellant sought to include a letter documenting payments he made on the loan in dispute. Id. This Court denied the motion.<sup>3</sup> Id.

In addition, Rule 210, SCACR also serves as a bar to the inclusion of the extraneous documents in Records on Appeal. The relevant portion provides “[t]he Record *shall not, however, include matter which was not presented to the lower court or tribunal.*” Rule 210(c), SCACR (emphasis added).

An abundance of law supports Petitioner’s position. “This Court does not sit as a trial court to receive evidence on disputed issues of fact; [this Court’s] function is to review the judgment of the circuit court for reversible error based on the issues and evidence presented to that court.” Sanders v. Salley, 283 S.C. 458, 460, 322 S.E.2d 829, 830 (Ct. App. 1984). This Court can derive guidance from numerous cases which interpret Rule 210, SCACR consistent with the rule’s plain language.

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<sup>3</sup> Although not referenced in the opinion, the Order denying the motion found “the motion to be an untimely request and is not evidence which should be considered on appeal.” See Order dated September 4, 2015, available at <https://ctrack.sccourts.org/public/caseView.do?csIID=55512> (last accessed April 22, 2022). Appellate Case No. 2013-002673.

In State v. Gordon, 408 S.C. 536, 759 S.E.2d 755, n. 2 (Ct. App. 2014), this Court noted how “the record does not indicate whether the circuit court reviewed the recording [of a DUI arrest] or not.” This Court noted “[t]he State did not put on the record the fact that the circuit court allegedly did not view the recording or raise any objection to the court allegedly not reviewing the recording.” Id. Citing Rule 210(h) SCACR, this Court concluded “we cannot consider the state’s assertion the circuit court did not review the recording.” Id.

“It is simply not the proper role of an appellate court to create a record for the parties and then search through it... attempting to identify the critical information necessary to make the case for a litigant.” Groveland Water & Sewer, Dist. v. City of Blackfoot, 505 P.3d 722, 727 (Idaho 2022) (citing Bach v. Bagley, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (Idaho 2010)). An appellate court has no jurisdiction to review evidence that is not in the record on appeal, and it cannot receive new evidence. Niemann v. Crosby Dev. Co., 2011-1337 (La. App. 1 Cir. 5/3/12), 92 S.o.3d 1039, 1044. “It is the responsibility of the parties ... to ensure that all documentation relevant to the disposition of an appeal are duly filed with the clerk of court before the issuance of [an] appellate decision.” Williams v. Food Lion, 213 Ga.App. 865, 868, 446 S.E.2d 221 (1994).

In the case at bar, the state brought to this Court’s attention these records *for the first time* after oral argument. The principle of Rule 210, SCACR, has been consistently applied to appellate parties in South Carolina for decades. “The transcript of record is the source of our information as to what occurred in the trial of the case below; its very object is to inform the Court authoritatively of the legal questions contested below and of the facts pertaining thereto.” South Carolina State Highway Dept. v. Meredith, 241 S.C. 306, 128 S.E.2d 179 (1962) (citing Sawyer, Wallace & Co. v. Macaulay, 18 S.C. 543 (1883)). “This Court will not consider any fact which does not appear in the transcript of record nor will any fact stated in an exception be considered

unless it appears from the record that it is true. Likewise, counsel is prohibited from embodying in their briefs any fact which does not appear in the record.” Meredith, supra, at 311, 128 S.E.2d at 182.

In State v. Bonilla, this Court cited Rule 210(h) and noted its scope of review was limited by the evidence in the Record on Appeal. 429 S.C. 253, 274, 838 S.E.2d 1, 11 (Ct. App. 2019) (“Thus, this court’s review is limited to the testimony provided by Bonilla and his attorney, who took care not to reveal the substance of his confidential discussions with Bonilla. Without more information regarding what Bonilla and his attorney actually discussed, this court cannot find that the circuit court’s determination regarding informed consent was ‘clearly wrong.’”).

Just two years ago in Fountain v. Fred’s, Inc., this Court maintained the integrity of Rule 210, SCACR, when it refused to allow evidence not presented to the circuit court to be included on the Record on Appeal:

On November 29, 2017, this court issued an order striking the settlement agreement from the record on appeal in this case based on Rule 210(c), SCACR because the settlement agreement was never presented to the circuit court. Because the parties failed to present the settlement agreement to the circuit court and the settlement agreement is not part of the record on appeal, we find this argument is not preserved for this court’s review. *See Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) (“Issues and arguments are preserved for appellate review only when they are raised and ruled on by the [circuit] court.”).

429 S.C. 553, 554, 839 S.E.2d 475, 486 n. 18 (Ct. App. 2020).<sup>4</sup>

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<sup>4</sup> The appellant in Fountain argued (unsuccessfully) that the settlement agreement should remain in the Record on Appeal *even though it was not entered into evidence*. See “Appellant’s Response to Respondent Wildevco, LLC’s Motion to Strike Matter and Exclude Matter from Record on Appeal” dated October 25, 2017 available at <https://ctrack.sccourts.org/public/caseView.do?csIID=64457> (last accessed April 22, 2022). In granting the motion to strike, this Court noted “the agreement was not actually presented to the lower court.”

Interestingly, our state Supreme Court also referenced Rule 210, SCACR, in its opinion in the same case:

Although the trial court concluded Fred's conducted periodic inspections, the evidence to support this finding is not included in the record on appeal, and under our de novo standard of review, we are unable to reach the same conclusion. *See* Rule 210(h), SCACR (providing an appellate court will not consider any fact which does not appear in the record on appeal).

Fountain v. Fred's, Inc. Op. No. 28086 (S.C. Sup. Ct. filed March 2, 2022) (Howard Adv. Sh. No. 8 at 15).

Respondent is attempting to introduce new evidence into the record. This is improper:

A reviewing court must generally consider only those issues that the record shows were presented and considered by the district court in deciding the matter before it, and is limited to consideration of the evidence in the record, as it existed at the time the trial court rendered its judgment. Thus, the appellate court will not take into account evidence presented for the first time on appeal, and will not consider new facts, testimony, exhibits, or other factual materials relating to the merits of an appeal that were not presented to the trial court and included in the trial court record.

5 AM. JUR. 2d *Appellate Review* § 413 (footnotes omitted).

Based on the lack of clarity in the record, created in part through the state's actions at the circuit court level, it is unclear whether these records were part of the lower court record or ever reviewed by the PCR court. There is no reference to these records in the Order of Dismissal, and the PCR transcript does not establish the complete contents of any packet that may or may not have been provided to the PCR judge.

In addition, and adding to the confusion, is an apparent disparity in page numbers. The state's proposed second supplemental appendix is 244 pages long. The clerk of court records located at the hyperlink found in the state's petition to supplement total 231 pages. It is unclear which of the additional thirteen pages were never even a part of the clerk of court's records at the General Sessions level.

It is unfair to supplement with new records that may not have even been viewed by the PCR judge, particularly where the undersigned is unable to respond. Additionally, these records are irrelevant based on the elements test as discussed in the briefs and at oral argument. In State v. Phillips, our Supreme Court wrote “trial judges can **look to the elements of the prior offenses** to determine if they are equivalent to the elements of an offense found in the statute for purposes of sentence enhancement.” 400 S.C. 460, 462, 734 S.E.2d 650, 651 (2012) (emphasis added). The relevant inquiry is purely a legal analysis wherein this Court can look to the statutory elements of the two offenses. This Court’s opinion in Phillips recognized the same: “When a prior conviction is for an offense not contemplated by section 17-25-45, the trial court should **examine the elements of the offense and determine whether they are equivalent to any current offenses** classified as ‘serious’ or ‘most serious.’ ” State v. Phillips, 393 S.C. 407, 415, 712 S.E.2d 457, 461 (Ct. App. 2011) (emphasis added). A second supplemental appendix is unnecessary to aid in the disposition of this appeal.

In Bowers v. McFadden, the state argued that the sentencing court could have considered extrinsic evidence to determine whether the crime to which that petitioner pled constituted criminal sexual conduct first or second degree. 153 F.Supp.3d 857, 881 (D.S.C. 2015). The District Court judge noted that the content of the arresting officer’s affidavit “has never been considered by the South Carolina Supreme Court in any of the cases in which it has reviewed the application of convictions for common law crimes to the state two strike law.” Id. at 882. The opinion also points out how the United States Supreme Court has “strictly delineated the types of court records which may be relied upon on Sixth and Fourteenth Amendment grounds.” Id.; see also n. 5. The state seeks to circumvent this notion with a motion to supplement records that were never referenced by the PCR judge.

The state’s contention that the undersigned “improperly omitted” these records—despite not having been provided them at the appropriate time—is the latest in a series of disputes perpetuated by the state in PCR appeals.

First, in McCants v. State, Appellate Case No. 2019-001436, counsel for the state filed a Motion to Compel Petitioner to Supplement the Appendix with irrelevant direct appeal documents.<sup>5</sup> After the undersigned filed a return, the state withdrew its motion to compel.

Second, in Rogers v. State, Appellate Case No. 2017-002116, counsel for the state alleged in a footnote that the undersigned committed an ethical infraction:

**Petitioner’s counsel deliberately omitted** Petitioner’s records from his direct appeal (appellate case no. 2011-201326), which were attached to the return and before the PCR court, from the appendix, **in violation of Rule 243**, SCACR. Respondent contacted Petitioner’s Counsel about this concern on August 19, 2020, but Petitioner’s Counsel refused to submit a supplemental documents [sic] containing the documents. As a result, Respondent requests the Court take judicial notice of these records.

Brief of Respondent n. 1 (emphasis added).<sup>6</sup>

It may be that clarification is needed as to the requirements of Rule 243(f)(1), SCACR. The undersigned has handled hundreds of appeals before this Court, including the filing of Johnson petitions on occasion. The state has yet to file a motion to supplement in any cases wherein the undersigned has filed a Johnson petition. It is unclear why, on occasion, these disputes have arisen.

As to the merits of the instant petition, it is patently unfair for the state to supplement the record following oral argument, considering neither side has had the opportunity to provide input or argument regarding these records. The state should not be permitted to add evidence to the

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<sup>5</sup> <https://ctrack.sccourts.org/public/caseView.do?csIID=70677> (last accessed March 17, 2023)

<sup>6</sup> <https://ctrack.sccourts.org/public/caseView.do?csIID=65980> (last accessed March 17, 2023)

record at this late stage, particularly evidence that was not before the PCR court. Appellant vehemently opposes the motion and respectfully asks this Court to deny it.

Respectfully Submitted,



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TAYLOR D GILLIAM  
Appellate Defender

This 17th day of March, 2023.

# EXHIBIT

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## Gilliam, Taylor

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**From:** Flynn, Sean  
**Sent:** Thursday, March 2, 2023 9:08 AM  
**To:** Gilliam, Taylor  
**Subject:** FW: [External] RE: Calvin Williams  
**Attachments:** WILLIAMS Calvin - Filed OOD (01753084xD2C78).pdf; WILLIAMS Calvin - Return and Letter Sending (01660707xD2C78).pdf; PCR app (01611384xD2C78).pdf; WILLIAMS Calvin Terrell - Clerk's Records REDACTED (01571794xD2C78).pdf

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**From:** Carson Kirk <CKirk@scag.gov>  
**Sent:** Wednesday, October 31, 2018 2:58 PM  
**To:** Flynn, Sean <sflynn@sccid.sc.gov>  
**Subject:** [External] RE: Calvin Williams

Good Afternoon,

I have attached the requested files. Please let me know if you may need anything else.

Thank you,

Carson Kirk  
Legal Assistant, PCR  
South Carolina Attorney General's Office  
(803)734- 3737

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**From:** Flynn, Sean <sflynn@sccid.sc.gov>  
**Sent:** Wednesday, October 31, 2018 2:42 PM  
**To:** Carson Kirk <CKirk@scag.gov>  
**Subject:** Calvin Williams

Good afternoon,

Attached is the document request for the above named individual. Thank you for your time and help regarding this matter. Please let me know if you need anything further from me to complete this request. I look forward to hearing back from you. Thank you again.

Sean Flynn  
Administrative Coordinator  
SCCID/Appellate Division  
(803) 734-1388

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**Mar 17 2023**

**SC Court of Appeals**

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CALVIN TERRELL WILLIAMS,

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RESPONDENT

APPELLATE CASE NO. 2018-001839

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CERTIFICATE OF SERVICE

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Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies that a true copy of the Return to the State's Petition to file a Second Supplemental Appendix in the above-entitled case has been served upon Megan Jameson, Esquire, at the primary e-mail address listed within the Attorney Information System (AIS); and on Calvin Terrell Williams, #218862, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 17th day of March, 2023.



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Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR APPELLANT

**From:** [Leverett, Scott](#)  
**To:** [SC - JAMESON MEGAN](#)  
**Cc:** [Gilliam, Taylor](#)  
**Subject:** Calvin T. Williams - Return to State's Petition to file a Second Supplemental Appendix - Appellate Case No. 2018-001839  
**Date:** Friday, March 17, 2023 4:58:00 PM  
**Attachments:** [Calvin T. Williams - Return to State's Petition to file a Second Supplemental Appendix - Appellate Case No. 2018-001839.pdf](#)  
[AG Coverletter.pdf](#)

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Dear Ms. Jameson,

Attached please find the Return to the State's Petition to file a Second Supplemental Appendix that is being filed today, March 17, 2023, with the Court of Appeals.

-Scott Leverett  
Admin. Asst. for Taylor Gilliam  
Appellate Defense