

**RECEIVED**

**Apr 23 2024**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Charleston County

Honorable Jennifer B. McCoy, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

EMERIC HAMILTON,

APPELLANT.

APPELLATE CASE NO. 2023-001884

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MOTION FOR ABEYANCE AND REMAND OF APPELLANT'S TRIAL

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Pursuant to Rule 240 of the South Carolina Appellate Court Rules, undersigned counsel requests an order holding this appeal in abeyance and remanding this matter to the trial court with an order requiring the parties to reconstruct portions of appellant's trial from November 27-29, 2023.

Appellant was indicted for criminal sexual conduct with a minor, second degree, by the Charleston County grand jury on September 12, 2023. Ex.1. On November 27, 2023, appellant proceeded to trial before the Honorable Judge Jennifer B. McCoy and a jury. Appellant was represented by Mary Ford of the Ninth Circuit Public Defender's Office. Assistant Solicitors

Lauren Frierson and Nick Harris prosecuted the case. On November 29, 2023, Appellant was found guilty and sentenced to a term of twenty years' incarceration. Ex. 2. Appellant has been unable to obtain a true and complete transcript of this trial, as will be discussed below.

This case was not assigned to a live court reporter, but was recorded by the Digital Court Reporter Project (DCRP). The first 271-page transcript delivered on or about February 29, 2024, by subcontractor Legal Eagle and transcribed by Natasha Barrientos<sup>1</sup>, contained more than 240 instances of "inaudible" testimony. Ex. 3. On March 4, 2024, the undersigned submitted a transcript challenge to Court Administration and to Ms. Barrientos along with a nine-page *errata*. Ex. 4. On March 8, 2024, a corrected trial transcript was delivered to Appellate Defense by Legal Eagle, still containing more than 200 instances of "inaudible" testimony. Ex. 5. Upon additional investigation of inconsistencies between portions of the trial transcript, exhibit list, and witness list, it was discovered that larger portions of the trial were not transcribed for the proceedings on November 27, November 28, and November 29, 2024. Ex. 6. Court Administration was additionally informed of the missing portions of testimony on March 8, 2024. Ex. 10.

Appellate counsel reached out to appellant's trial attorney to confirm court proceedings occurred after the lunch breaks shown on the transcript. The transcript shows a break following jury selection on November 27, 2023, at 1:34 p.m. with no further activity transcribed until the next day, November 28, 2023. Based upon notes from trial counsel, several pretrial rulings occurred during this break, including on the competency of the minor witness, scope of testimony

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<sup>1</sup> The certificate of transcriber lacks the appropriate designation listed in Section III of the Court Reporter Manual for South Carolina  
<https://www.sccourts.org/courtreporter/CourtReporterManual.pdf>

regarding prior incidents of sexual assault involving the minor witness and third-parties, and the admissibility of the forensic interview of the minor witness. Ex. 8.

On November 28, 2023, the transcript shows a break for lunch beginning at 12:08 p.m. with instructions from the trial court to return at 1:30 p.m. Tr. 137. However, the transcript then jumps to the afternoon of November 29, 2023, with the charge conference and the jury charge. Tr. 139 – 158.

According to the witness list contained in the transcript, the only witness to testify were Minor, Patrick Norwood, Joseph Magrane, Michael Cardaronella, and Sarah Fortier. Tr. 3 – 4. However, the transcript does include testimony from witnesses Christie Harley, Marianne Boehm, and Verona Herrera, whose trial testimony was “read back” to the jury but whose testimony does not appear in the transcript before the matter was submitted to the jury. Tr. 191-256. These witnesses are not listed in the Index. While the testimony of these three witnesses is transcribed when the testimony is replayed for the jury, the replay is unlikely to have captured any objections or issues raised outside the presence of the jury during the testimony of those three witnesses.

In comparing the produced transcripts with the contemporaneous notes of appellant’s trial counsel, it is evident that the testimony of ten witnesses is absent from the transcript. This includes the above referenced Harley, Boehm, and Herrera, along with Kathy Fabrizio (pediatric sexual assault nurse examiner), Lauren Santos (chain of custody regarding SANE kit), Sgt. Ledford (chain of custody regarding SANE kit), Tiffany Crider (investigator assigned to case), Jackie Harrison (minor’s mother), Mattie Dodds (conducted forensic interview), Tiffani Wilcome (evidence collection witness).

In comparing the receipt for exhibits on file with the Charleston County Clerk of Court with the produced transcripts, it is evident that the entry of eight Court’s Exhibits and twelve State’s Exhibits are excluded from the record. Ex. 7

In accordance with Rule 240(c), SCACR, Counsel submits under seal<sup>2</sup> the following documents to support this motion:

<b>Exhibit Number</b>	<b>Description</b>
#1	Indictment 2023-GS-10-4605
#2	Sentence sheet
#3	Original Trial Transcript
#4	Transcript Challenge
#5	Corrected Transcript
#6	Corrected Transcript Errata
#7	Charleston County Clerk of Court Receipt for Exhibits
#8	Trial Notes of Mary Ford
#9	Email Communication with Legal Eagle Re: Corrected Transcript
#10	Email Communication with Court Administration

The trial court has the authority to set the record for appeal. State v. Ladson, 373 S.C. 320, 324, 644 S.E.2d 271, 273 (Ct. App. 2007). “[T]he inability to prepare a complete verbatim transcript, in and of itself, does not necessarily present a sufficient ground for reversal.” Id. (internal citations omitted). “Where a trial transcript has been lost or destroyed, a court may remand to have the record reconstructed.” Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004); *see also* Whitehead v. State, 352 S.C. 215, 221, 574 S.E.2d 200, 203 (2002) (holding that when a transcript has been lost or destroyed, an appellate court may remand to have the record reconstructed).

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<sup>2</sup> Pursuant to Rule 41.2, SCRCP, or *In re Revised Ord. Concerning Pers. Identifying Info. & Other Sensitive Info. in App. Ct. Filings*, 407 S.C. 607, 607, 757 S.E.2d 421 (2014). These exhibits are submitted in their true and original form for the Court’s review.

In order for the record to be reconstructed, it must be done in a manner that provides for meaningful appellate review and complies with the constitutional guarantees of procedural due process. Ladson, 373 S.C. at 325, 644 S.E.2d at 273-274; *see also* Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E.2d 9 (Ct. App. 2012). Moreover, a “new trial is therefore appropriate if the appellant establishes that the incomplete nature of the transcript prevents the appellate court from conducting a meaningful appellate review.” Ladson, 373 S.C. at 325, 644 S.E.2d at 274 (internal quotations omitted).

In Ladson, after the reconstruction hearing, the Court was “left with a bare bones summary of the evidence (with more remaining unknown than known) from a lengthy multi-day and fact-intensive trial that resulted in a non-parolable, twenty-five-year person term.” Id. at 327, 644 S.E.2d at 274. The record before the Ladson Court contained only “a few gratuitous references to generic motions and objections” without any information concerning “the context of the motions, the specific nature of the motions, and whether the challenged evidence was cumulative to other unchallenged evidence.” Id. In concluding the record was insufficient for meaningful appellate review, this Court also noted the record “would effectively foreclose any collateral challenge through post-conviction relief or otherwise.” Id. at 327, 644 S.E.2d at 275. Thus, this Court concluded, Ladson had demonstrated “clear prejudice.” Id.

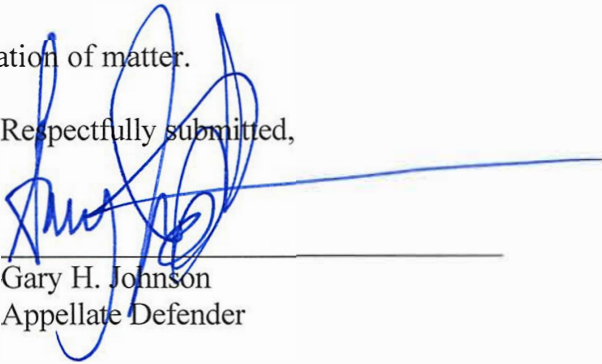
In Deaton v. Leath, 279 S.C. 82, 84, 302 S.E.2d 335, 336 (1983), the defendant’s convictions were set aside, and a new trial had where the court reporter’s equipment malfunctioned and there was no transcript of the trial court proceedings in the case from which to base an appeal. Citing Deaton, the Court of Appeals denied a request for reconstruction in State v. Serrette, 375 S.C. 650, 652-653, 654 S.E.2d 554, 555 (Ct. App. 2007) where the reason for the lack of transcript was due to the defendant’s absence for a ten-year period, which this Court explained was “not a

situation where the court reporter's equipment malfunctioned at trial leading to a loss of the trial transcript.”

The absence of large portions of the trial transcript in the present matter, including numerous witnesses and pre-trial argument and ruling on the admission of the forensic interview and competency of the minor to testify, prevents a meaningful appellant review absent and reconstruction of the testimony of the omitted witnesses and acknowledgement of the factual and legal basis for issues surrounding the same.

WHEREFORE, Appellant requests an order holding the present appeal in abeyance and remanding this matter to trial court for the reconstruction of the missing portions of the November 27-29, 2024 trial. While this motion is pending, Appellant asks this Court to hold the timelines for filing his initial brief of appellant and designation of matter.

Respectfully submitted,



Gary H. Johnson  
Appellate Defender

Attorney for Appellant

This 23rd day of April, 2024.

**RECEIVED**

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STATE OF SOUTH CAROLINA  
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Appeal from Charleston County

Honorable Jennifer B. McCoy, Circuit Court Judge

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THE STATE,

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EMERIC HAMILTON,

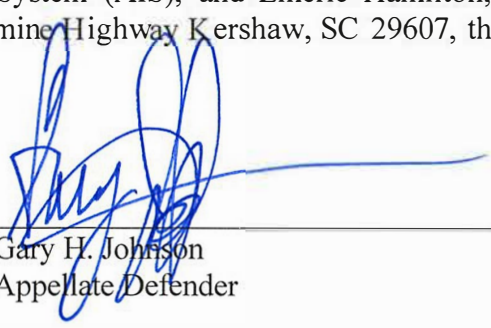
APPELLANT.

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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 a true copy of the Motion to Reconstruct the Record of Appellant's Trial, along with Exhibits 1-10, in the above-referenced case have been served upon Mark R. Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), and Emeric Hamilton, # 392687, at Kershaw Correctional Institution, 4848 Goldmine Highway Kershaw, SC 29607, this 23rd day of April, 2024.



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Gary H. Johnson  
Appellate Defender

Attorney for Appellant

**From:** [Warren, Kaylynn](#)  
**To:** [Mark Farthing](#)  
**Cc:** [Johnson, Gary](#); [Caroline Collins](#)  
**Subject:** RE: 2023-001884 The State v. Emeric Hamilton  
**Date:** Tuesday, April 23, 2024 11:02:00 AM  
**Attachments:** [2023-001884 The State v. Emeric Hamilton Motion for Abeyance and Remand of Appellant's Trial.pdf](#)

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Good Morning,

The previously submitted motion was missing page 3, attached is the full and complete motion.

Respectfully,

Kaylynn

**Kaylynn Warren**

Administrative Assistant

South Carolina Commission on Indigent Defense

Division of Appellate Defense

(803) 734-1330

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**From:** Warren, Kaylynn  
**Sent:** Tuesday, April 23, 2024 10:51 AM  
**To:** Mark Farthing <mfarthing@scag.gov>  
**Cc:** Johnson, Gary <ghjohnson@sccid.sc.gov>; Caroline Collins <CCollins@scag.gov>  
**Subject:** 2023-001884 The State v. Emeric Hamilton

Good Morning,

Attached for service in the above-referenced case are the Motion for Abeyance and Remand of Appellant's Trial and Exhibits 1-10 to this motion. Please note, these exhibits are being submitted under seal pursuant to Rule 41.2, SCRCP, or *In re Revised Ord. Concerning Pers. Identifying Info & Other Sensitive Info. in App. Ct. Filings*, 407 S.C. 607, 607, 757 S.E.2d 421 (2014). These will all be filed today, April 23, 2024, with the Court of Appeals via electronic filing.

Respectfully,

Kaylynn

**Kaylynn Warren**

Administrative Assistant

South Carolina Commission on Indigent Defense

Division of Appellate Defense

(803) 734-1330