

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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APPEAL FROM OCONEE COUNTY
Court of General Sessions

SEP 25 2013

R. Lawton McIntosh, Circuit Court Judge

S.C. SUPREME COURT

Indictment No. 2010-GS-37-364A

The State.....Respondent,

v.

Anthony Clark Odom..... Appellant,

**APPELLANT’S REPLY TO RESPONDENT’S RESPONSE TO MOTION
TO EXCLUDE MATTERS IN THE RECORD ON APPEAL**

In reply now comes, Appellant in this matter, Anthony C. Odom, by and through his counsel of record Brian D. McDaniel, Esquire of the McDaniel Law Firm, Beaufort, South Carolina. The Appellant (Odom) pursuant to Rule 240(f), SCACR does hereby offer in reply to the Response of Respondent (State) as follows:

In their Return to Motion to Exclude, the Respondent's contends that Rule 210 (c), SCACR, which states in applicable part “The Record shall not, however, include matter which was not presented to the lower court or tribunal.” allows the

inclusion of numerous materials presented in pre-trial hearings, not conducted by the trial judge, to be included in the record on appeal. However, it has long been the law of South Carolina to persevere an issue it must be raised and ruled on at trial, not pre-trial, not at another trial or hearing, but at the trial of the matter before the court See Elam v. S.C. Dept. of Tranp., 361 S.C. 23, 602 S.E.2d 772 (2004) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). As to all the matters heard pre-trial and by judges other than the trial judge, the Honorable R. Lawton McIntosh, Circuit Court Judge, those matters must have been specifically raised to the trial judge to rightly be part of the record on appeal. The fact is that the matters sought to be excluded by Appellant's motion were not presented to the trial judge, nor can it affirmatively be claimed that he relied upon them to make any of his rulings at issue in this matter. If these matters would in fact provide context to the case, or explain any actions of the State, then the Respondent should have presented them during the trial to The Honorable R. Lawton McIntosh, Circuit Court Judge, who made the ruling at trial on the issues. Failure to so present those items denied the Appellant any opportunity to contest them.

Furthermore, the Respondent's contention that this Court should take judicial notice of documents and exhibits not presented in the case is unsupported given that the documents and exhibits they seek to include are not limited to matters in the same case which are indisputable. Wise v. Wise, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct.App. 2011). In the Wise case the court, in that appeal

from a worker's compensation action, was willing to take notice of the existence of the filing of a pleading and the existence of a default judgment, because those matters were indisputable. While cautiously allowing the court to take judicial notice of certain limited and indisputable facts, the Wise case also states that "Appellate courts are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable. Notice of "facts" for the first time on appeal may deny the adverse party opportunity to contest the matters noticed; it may also violate the general principle that appellate review should be limited to the record. Finally, appellate courts, limited to the "cold record" cannot be as sensitive to the appropriateness of judicial notice as the trial judge." Id at 600. In this case, the matters in dispute were not presented to the trial judge, are not part of the "cold record", are not simply facts to which notice should be taken, but instead regard the inclusion of materials which are contested, and in some cases, such as the Respondent's designation 13, are so irrelevant that they would likely not have been allowed by the trial judge even if presented in the trial.

The Respondent also contends that their designation #13 of the South Carolina US District Court Order should be included in the record because there was a finding therein relating to bad faith under the Younger abstention doctrine. However, this single issue is entirely irrelevant and has not been raised or ruled upon in any subsequent hearing, because it is purely an issue of whether the court will allow the matter to go forward in federal court and not a ruling on the merits of the claim. Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746(1971). The Younger doctrine in fact is simply an abstention and the merits by definition were never

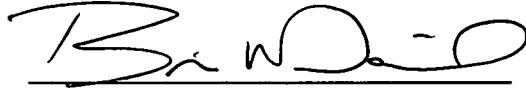
reached. The *bad faith* the Respondent refers to, was an attempt to use an argument under the bad faith *exception* to Younger to keep the case in Federal Court. Bad faith is not the standard for the claim for prosecutorial vindictiveness and is not relevant to the merits of the Vindictive Prosecution claim.

Furthermore, the Order sought to be excluded was also never presented to the Trial Judge in the instant action.

Lastly, the Respondent correctly identifies that the Appellant's objection is to State's Designation of Exhibit 3 not 6. State's Exhibit 3 concerning the May 6, 2006 chat for which Appellant was found not guilty, as is described in the motion, has no relevance to the current appeal. It was a separate charge with its own indictment, not related to any matters on appeal and it would be error to allow it in the Record on Appeal. Exhibit 3 is, from an appellate standpoint, on a separate case which could never be appealed, and the inclusion of those matters is simply misdirection by the Respondent. If, in fact, the State had believed those chats were so interconnected with the matters on appeal, it would not have charged it as a separate and distinct crime. Again, the Respondent seeks to clutter the record with matters not related to the appeal. The only explanation given for the inclusion of this record is to "give a complete picture of the case" (Return to Motion to Exclude p.6), but they provide no basis to indicate any fact or issue on appeal to which such matter would relate. These materials, which relate only to charges for which the Appellate was acquitted, can only be presented to unfairly disparage the Appellate and are a waste of time and resources in this appeal and should be excluded.

Conclusion:

Based upon Appellant's motion and Reply he respectfully asks that the Court grant the relief requested.

A handwritten signature in black ink, appearing to read "Brian McDaniel", written over a horizontal line.

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Date: September 9, 2013

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PROOF OF SERVICE

I, Teresa McDaniel, certify that I have served the **Appellant's Reply to Respondent's Response to Motion to Exclude Matters in the Record on Appeal** on The Office of the South Carolina Attorney General by depositing a copy of it in the United States Mail, postage prepaid, on September 20, 2013, addressed to its attorney of record, William M. Blicht, Jr. Esquire, P.O. Box 11549, Columbia, SC 29211

William M. Blicht, Jr., Esquire,
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September 20, 2013



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