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Aug 11 2025

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
The Honorable Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

ANTHONY NICHOLAS ARGOE,

APPELLANT.

Appellate Case No. 2023-000223

**REPLY TO RESPONSE IN OPPOSITION TO MOTION TO SUPPLEMENT THE
RECORD BASED ON CHANGE OF CIRCUMSTANCES**

Previously, due to a change in circumstances, the State respectfully moved this Court to supplement the record pursuant to SCACR, Rule 212(a)&(b) due to the fact appellant's Reply Brief filed December 30, 2024, had asserted facts that are incorrect, including that a hearing on his Motion to Reconsider the denial of his Motion to Represent Himself was not scheduled and was not cancelled or withdrawn by appellant. (Reply Brief of Appellant, pp. 1, 2 & 4). These assertions were even contrary to appellant's previous representation to this Court in his original Return to Respondent's Motion to Supplement the Record in 2024. This change of circumstances required supplementation of the Record on Appeal in order that this Court had the correct record so that it may appropriately decide this case.

Appellant filed a Response to the Motion to Supplement the Record Based on Change of Circumstances asserting among other things that the e-mails were irrelevant and the factual inaccuracies in appellant's Reply Brief were irrelevant. Respondent disagrees. The issue raised on appeal from appellant's conviction was the subject of a Motion to Reconsider which was scheduled for a hearing before Circuit Court Judge Maite Murphy on January 30, 2023, at 4:00 p.m. but that Motion to Reconsider was knowingly, intelligently, and voluntarily withdrawn by appellant as demonstrated by the previously attached documents to Respondent's Motion to Supplement the Record Based on a Change of Circumstances. (Previous Attachment 1). Respondent has asserted in its Brief that appellant waived his right to self-representation by his conduct and vacillating on whether he wanted to represent himself or not. United States v. Gillis, 773 F.2d 549, 559 (4th Cir. 1985); Brown v. Wainwright, 665 F.2d 607, 611 (5th Cir. 1982). (IBOR, pp. 3-11).

In response to Respondent's argument in its Brief, in his Reply Brief, appellant asserted: "No time for a motion to reconsider hearing before Judge Murphy was ever set,..." (**Reply Brief, p. 2, ln. 17**). Again, on page 4 of appellant's Reply Brief, appellant asserts as follows: "As seen, a hearing on a motion to reconsider Judge Murphy's ruling that appellant could not represent himself after an insufficient Faretta colloquy was never set." (**Reply Brief, p. 4, ll. 10-11**). These assertions were simply not correct as shown by the previously attached e-mails between appellant's trial counsel and Judge Murphy and her Office and appellant's previous Return to the first Motion to Supplement the Record filed with this Court in 2024 wherein appellant and appellant's trial counsel admitted he cancelled the scheduled hearing on the Motion to Reconsider.

Appellant also asserted in his Reply Brief, "...the state incorrectly asserts that all parties 'including Argoe and defense counsel,' agreed a motion to reconsider hearing would be held before Judge Murphy and was scheduled, but that petitioner 'with the assistance of counsel failed to follow

through.' " (Reply Brief p. 1, ll. 18-20)(partially quoting Respondent ' s Initial Brief). This assertion is also incorrect as shown by the transcript of the January 19, 2023, hearing before Judge Goodstein and the previously attached e-mails. (Previous Attachment 1).

Because the sole issue raised on appeal is an alleged error of Judge Murphy in denying appellant's motion to represent himself, Respondent asserts waiver of the right to self-representation by vacillation and conduct, and appellant ' s incorrect representations in his Reply Brief, it is critical this Court have the correct record and what occurred regarding the motion to reconsider that prior ruling. *See Gillis*, 773 F.2d at 559 (4th Cir. 1985); *Brown*, 665 F.2d at 611. (IBOR, pp. 3-11).

Appellant also asserts in his Response, that the e-mails between trial counsel and the court are irrelevant because appellant subsequently moved to fire his trial counsel. Appellant is wrong. A motion to fire counsel is different from a motion to represent yourself.

Appellant also asserts the e-mails between trial counsel and the lower court were not before the lower court. Appellant is wrong. It is clear these matters were before the lower court. Rule 212(a), SCACR. The e-mails constitute communication *with the court*. Rule 210(c), SCACR contemplates presentation as necessary when the matter is not otherwise available or known to the Court. The very next line following the "presentation" requirement allows, among other things, orders and other decisions to be included in the record. These items, the e-mails, are clearly items "presented" to the judge, Judge Murphy, the judge that appellant alleges erred on this issue. Read carefully, the limitation to items "presented" is to ensure that the parties and the circuit court do not fall victim to sandbagging. It is a misuse of the Rule to allow an appellant to avoid his own actions before the circuit court, particularly an action that undermines his position on appeal.

The appellant cannot block from this Court material not just before the lower court *but from this Court* with a hope to establish error and prejudice based on an incomplete record. *See* Rule 210(h), SCACR (without supplementation, "the appellate court will not consider any fact which

does not appear in the Record on Appeal"). Appellant cannot use his previous successful opposition to the Supplementation of the Record on Appeal and argue information that is incorrect in his Reply Brief, in an attempt to defeat Respondent's arguments in its brief. In his Reply Brief, appellant incorrectly argues no hearing was scheduled or set on the motion for reconsideration and appellant did not cancel or not go forward with the hearing and as a result appellant did not waive self-representation by vacillation or conduct. This is incorrect. Gillis; Brown. (IBOR, pp. 3-11).

Therefore, due to this change in circumstance, Respondent previously moved this Court pursuant to Rule 212, SCACR, that it should grant the motion to supplement the record with the e-mails (previous Attachment 1) between appellant's trial counsel and Judge Murphy regarding the scheduling and withdrawal of the scheduled motion to reconsider Judge Murphy's denial of appellant's motion to represent himself. Alternatively, this Court should require "a report of the ... hearing, or any matter relative thereto, to be made by the trial judge..." and "[t]hese matters shall become part of the Record on Appeal" pursuant to Rule 212(a), SCACR.

Appellant states in his Response he received no contact from the State regarding consulting on its Motion; however, Respondent did attempt to contact opposing by counsel by phone however opposing counsel was out of town. Respondent twice attempted e-mails but the e-mails did not go through to opposing counsel. Regardless, Respondent notified this Court in the Motion that appellant opposed Respondent's Motion.

Finally, in his Response, appellant has asserted that Respondent only filed this Motion and only filed this Motion at this time because of a change of counsel due to the untimely death of Robert M. Dudek, previous counsel. This assertion is incorrect. The Motion to Supplement the Record due to a Change of Circumstance was completed before Mr. Dudek's untimely death. Respondent's counsel, pursuant to the SCACR, intended to consult with Mr. Dudek the day of his

death on whether he would oppose this Motion or not.¹ Respondent learned of Mr. Dudek's unexpected death on that very morning and was therefore unable to consult with Mr. Dudek about the Motion. Due to Mr. Dudek's untimely death, Respondent and the Attorney General's Office, out of respect for Mr. Dudek's passing and the staff of the Office of Appellant Defense, waited 1 week to seek to contact the Office of Appellate Defense about the Motion and waited at least 2 weeks to file the Motion itself. Respondent did not file this Motion, or file the Motion when it did, to take advantage of a change in counsel.²

Respectfully Submitted,

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By: s/ J. Anthony Mabry
J. ANTHONY MABRY
ATTORNEYS FOR RESPONDENT

August 11, 2025.

¹ Respondent's counsel was unaware that Mr. Dudek was attending a CLE conference out of town on the date of his death.

² Respondent's counsel can provide this Court with internal e-mails of the Attorney General's Office verifying the information contained in this paragraph.

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PROOF OF SERVICE

I, **J. Anthony Mabry**, of counsel for the Respondent, hereby certify that pursuant to Rule 262(c)(3), SCACR and the Supreme Court Order of April 24, 2024, the Reply to Response in Opposition Motion to Supplement the Record Based on Change of Circumstances, has been forwarded to Appellant's counsel, Jordan Wayburn, Esq., via email today, August 11, 2025 to jwayburn@sccid.sc.gov and to his assistant at cstock@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 11th day of August, 2025.

s/ J. Anthony Mabry
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