

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APR 22 2015

SC Court of Appeals

Appeal from Greenville County  
Letitia H. Verdin, Circuit Court Judge  
Appellate Case No. 2014-001150

THE STATE,

Respondent,

vs.

WALTER JACOB MERKA,

Appellant.

**MOTION TO STRIKE INITIAL REPLY BRIEF  
OF APPELLANT FOR ARGUING  
FACTS OUTSIDE THE RECORD**

Respondent now moves for this Court to strike the Initial Reply Brief of Appellant. Specifically, on pages one and two of the reply brief, Appellant alleges a conversation where Victim allegedly asked for an "ATU" sentence. This alleged conversation was never presented to the trial court. Further, Appellant alleges on page 2 of the brief that, "[n]umerous discussions" occurred between Victim and "the prosecutors and Victim's Advocates" where Victim allegedly asked that Appellant not be incarcerated. The rank hearsay assertions allegedly occurring between victims' advocates and the Victim were not presented to the trial court below and therefore are not proper matters to be referenced in the reply brief. Respondent would note the prosecutor in this case denied these purported discussions took place between him and the victim. Motion transcript, p. 22.

I.

The facts asserted as referenced above are without any support in the record and clearly, Appellant is seeking to go outside the record to support his arguments. Under Rule 210(h), SCACR, facts not appearing in the record on appeal are not proper for this Court's consideration. Under Rule 210(c), SCACR: "The record shall not, however, include matter **which was not presented to the lower court** or tribunal." (Emphasis added). The reply brief is not the opportunity for an appellant's counsel to expound on his personal recollections of previous hearsay assertions apparently presented to him, but never mentioned to the trial court, or to sandbag the opposition with brand new allegations that apparently opposing counsel did not think worthy of mention while the matter was still pending in General Sessions. Respondent requests that these matters be struck.

II.

Respondent also moves to hold all time-lines in abeyance until this Court rules on the State's motion.

III.

WHEREFORE, Respondent prays that this Court strike Appellant's Initial Reply Brief and further requests that all filing deadlines be held in abeyance pending resolution of this motion; and for such other and further relief as the Court may deem just and proper.

[SIGNATURE BLOCK FOLLOWS ON NEXT PAGE]

Respectfully submitted,

ALAN WILSON  
Attorney General

DAVID SPENCER  
Senior Assistant Attorney General

BY:

  
\_\_\_\_\_  
DAVID SPENCER

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727

ATTORNEYS FOR RESPONDENT

April 8, 2015

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SC Court of Appeals

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal From Greenville County  
Honorable Letitia H Verdin, Circuit Court Judge  
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THE STATE,

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WALTER JACOB MERKA,

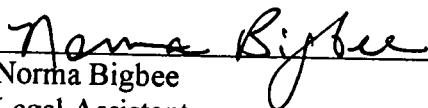
Appellant

\_\_\_\_\_  
**PROOF OF SERVICE**  
\_\_\_\_\_

I, Norma Bigbee, certify that I have served Respondent's Motion to Strike Initial Reply Brief of Appellant For Arguing Facts Outside The Record on Appellant's Attorney by depositing a copy of the same in the United States mail, postage prepaid, addressed to William G Yarborough, III, Esquire, 522 North Church St., Greenville, SC 29601.

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

This 8<sup>th</sup> day of April, 2015

  
Norma Bigbee  
Legal Assistant  
Office of Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3737



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APR 22 2015

SC Court of Appeals

ALAN WILSON  
ATTORNEY GENERAL

April 14, 2015

William G Yarborough, III, Esquire  
522 North Church St  
Greenville, SC 29601

Re **The State v. Walter Jacob Merka**  
**Appellate Case No: 2014-001150**

Dear Mr Yarborough

Please be advised we are forwarding (2) copies of the Respondent's Motion to Strike Initial Reply Brief of Appellant For Arguing Facts Outside The Record, along with a corrected proof of service, in the above-referenced case This was inadvertently sent to the incorrect attorney on April 8, 2015

Sincerely,

David Spencer  
Senior Assistant Attorney General

DS/nb  
Enclosures

cc The Honorable Jenny A Kitchings  
Ms Trisha Allen

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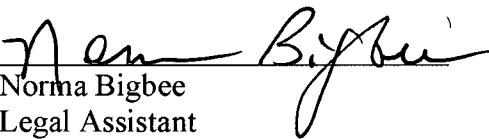
Appellant

**CORRECTED PROOF OF SERVICE**

I, Norma Bigbee, certify that I have served Respondent's Motion to Strike Initial Reply Brief of Appellant For Arguing Facts Outside The Record on Appellant's Attorney by depositing a copy of the same in the United States mail, postage prepaid, addressed to William G Yarborough, III, Esquire, 522 North Church St , Greenville, SC 29601

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

This 14<sup>th</sup> day of April, 2015

  
Norma Bigbee  
Legal Assistant  
Office of Attorney General  
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