THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM McCORMICK COUNTY

Honorable William P. Keesley, Circuit Judge, 11th Judicial Circuit
Appellate Case No. 2012-210646

State of South Carolina,

Respondent,

vs.

Joe Ross Worley,

Appellant.

APPELLANT'S REPLY TO RETURN TO MOTIONS TO SUPPLEMENT RECORD ON APPEAL AND EXPEDITE BRIEFING

Appellant, Joe Ross Worley, previously filed a Motion to Supplement the Record pursuant to Rule 212(b), SCACR, and a Motion to Expedite Briefing in the above-captioned matter, to which the State has filed a return seeking denial of the requested relief. Appellant hereby respectfully submits this Reply to the State's Return, and renews his request for the relief sought in his motions.

I. SCACR 212 Allows for Supplemental Record to be Created in the Manner Requested by Appellant

Contrary to the arguments made by the State, Rule 212, SCACR, is not limited to mere house cleaning, and instead is a much more robust mechanism for purposes of establishing a

complete and proper Record on Appeal for substantive consideration by this Court of the issues raised on appeal. The State greatly protests Appellants goal, providing information to supplement the available record, apparently because the State does not want this Court to have a complete record. Only a complete record will preserve Appellant's due process rights, and the State's actions to date have prevented the prior presentation of critical information in the form of actual testimony. The State's tortuous reading of the SCACR would limit Rule 212 to a rule allowing for the mere ministerial "completion" of a record. But the rule is not so limited, and specifically anticipates the inclusion of materials of the sort proffered by Appellant, for the purpose of completing a meaningful record for the appellate court's review.

1. Rule 210, SCACR does not limit the power of this Court to supplement the record pursuant to Rule 212, SCACR.

The State first argues that Rule 210, SCACR, limits the breadth of Rule 212, purportedly by restricting its effectiveness to only matters already provided for in Rule 210 that were presented to the trial court below. However, Rule 210(h), the portion restricting the Record this Court is able to review, specifically begins by stating "Except as provided by Rule 212..." and thus clearly cannot be read as superseding or limiting Rule 212, but instead deferring to the authority provided by Rule 212.

Turning to Rule 212, the first paragraph (a) provides for a mechanism by which the Court of Appeals can require materials "to be made" and subsequently included in the Record on Appeal. Any such report would necessarily involve the creation of materials that were not presented by the parties at the proceedings below, which is in specific contrast to the State's proffered legal analysis that with nothing but which the lower court considered prior to ruling should ever be in the Record on Appeal (which itself ignores the obvious fact that the State's

employee failed to preserve the original materials that all parties would rather have included in the Record).

2. Rule 212(b) is clear that it may be applied now, in the manner requested by Appellant.

Rule 212(b) is the particular section under which Appellant has moved to supplement the Record. The State cites language in the rule that states the record may be supplemented "at any time before argument commences" as somehow actually meaning "any any time before argument, but after briefing and submission of a purported complete Record on Appeal" even though no such restriction appears in the text of the rule. Even if that timeframe is applied to instances without consent to supplement, which clearly describes this matter, the Court can supplement even after argument commences in instances without consent and instead motion heard by the Court. In any event, argument has not commenced, and thus the parties are within the contemplated time in which issues of supplementing the record can and should be heard.

3. Appellant's proffered affidavit is a reconstruction of testimony.

Appellant has never disguised the fact that the affidavit proffered in connection with his motion is a reconstruction of testimony (lost to oblivion by an agent of the State). It never purported to be a verbatim transcript, as the State was the only party with that information ever in its possession. But just like any verbatim transcript typically used to reconstruct testimony for purposes of appeal, it can, and Appellant respectfully submits should, be included in the Record on Appeal as the best available record of the testimony lost by the State. "Where portions of stenographic notes are lost prior to transcription, it is appropriate for the judge to accept affidavits of counsel and the court reporter to determine what transpired." Adams v. H.R. Allen,

Inc., 397 S.C. 652, 726 S.E.2d 9, 12 (Ct.App. 2012) (citing China v. Parrott, 251 S.C. 329, 333-34, 162 S.E.2d 276, 278 (1968)).

II. Remand for partial reconstruction of a record would be inappropriate.

The State argues in favor of remand to the trial court for reconstruction of portions missing from the available record on appeal. Appellant objects to any such remand to the extent that it would allow for the trial court, who has necessarily already made credibility determinations regarding the testimony, to be charged with recreating the testimony in its entirety, as the trial court will understandably be predisposed to rejecting testimony favorable to Appellant for inclusion therein. Likewise, any remand allowing for partial recreation of the hearing testimony through renewed live testimony would likewise be patently prejudicial for Appellant, who waived his 5th Amendment privilege and already subjected himself to cross-examination. To allow testimony and re-cross of Appellant defendant only, to the exclusion of Respondent's evidence and testimony it submitted even though it has been preserved, would provide the Respondent prosecution an unfair advantage to an extent that cannot comport with due process protections.

III. Expediting these proceedings advances the interests of justice for both parties.

Contrary to the slippery slope argument advanced by the State in response to Appellant's request for an expedited schedule, Appellant is not asking for the door to be thrown open to expedited schedules in every criminal appeal. Rather, the narrow circumstances in this matter required an expedited process not to speed up anything, but rather to avoid additional subsequent delays in a process that has already taken an extended amount of time even though initial briefs of all the parties have not yet even been filed. In this case, Appellant contends that he is afforded

full immunity from prosecution, not merely a reversal of a conviction, as do most criminal appeals. The State Supreme Court has acknowledged the special nature of such claims by allowing for immediate appeals in such matters, a clear indication the courts in this State favor exceptional treatment of this narrow category of appeal. See State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). The special considerations in such matters form the basis of Appellant's request for the most speedy resolution possible of his claims to statutory immunity that remain in the preliminary stages of a pre-trial appeal almost three years after his arrest.

WHEREFORE, the Appellant respectfully renews his requests that the Court permit it to supplement the Record on Appeal with its previously submitted affidavit and the attached documentation regarding the alleged theft of the court reporter's audio tapes of the proceedings below for the use of the supplemented Record on Appeal by both parties in their respective appellate briefs, and further that this Court establish an expedited briefing and argument schedule upon ruling on the Motion to Supplement.

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September 21, 2012

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CERTIFICATE OF SERVICE

I, Malory L. Hogg, an employee with the Law Offices of Ballard Watson Weissenstein, do hereby certify that on September 21, 2012, I served a copy of the **Appellant's Reply to Return to Motions to Supplement Record on Appeal and Expedite Briefing** in the above-captioned case on the following individuals by United States Mail, with sufficient first-class postage affixed, addressed as follows:

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September 21, 2012

Via Hand Delivery
Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
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Re: Appeal Related to *State of South Carolina v. Joe Ross Worley*
Appellate Case No. 2012-210646

Dear Ms. Kitchings:

Please find enclosed for filing an original and six (6) copies of the Appellant's Reply to Return to Motions to Supplement Record of Appeal and Expedite Briefing.

Please do not hesitate to contact our office if you should have any questions. With warm personal regards, I am,

Sincerely yours,

Malory L. Hogg, Paralegal
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Enclosures

c: Mark R. Farthing, Esquire
Carson Henderson, Esquire (via email only)
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