

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Maite Murphy, Circuit Court Judge

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MAY 01 2017

SC Court of Appeals

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

THOMAS ROBERT SHEWTZUK,

APPELLANT.

APPELLATE CASE NO. 2016-001957

RETURN TO MOTION FOR AN ORDER TO RECONSTRUCT THE RECORD
OF THE BENCH CONFERENCES AT THE TRIAL

The Respondent State of South Carolina, hereby makes a Return, at the request of the Court, to the motion of the Appellant, Thomas Shewtzuk, for a limited remand to the Court of General Sessions and the Honorable Maite Murphy, Presiding Judge, to reconstruct the record of a series of bench conferences that the Court Reporter, the Honorable Heather R. Landry, indicated that the backup recordings were unintelligible to her due to backup noise. The Appellant, through appellate counsel Susan Hackett, reasonably contends that remand was appropriate to reconstruct the various conferences to clarify the nature of any objections, responses and ruling. The Appellant includes various pages of the trial transcript which indicate the omissions in the record.

Respondent's below-signed counsel concurs that a remand is appropriate to reconstruct the record in an attempt by the Appellant's counsel to preserve the appellate record. State v. Porter, 389 S.C. 27, 37, 698 S.E.2d 237, 242 (Ct. App. 2010); York v. Conway Ford, Inc., 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997). 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); China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968); Ladson, 373 S.C. at 325, 644 S.E.2d at 273-274; Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 383, 418 S.E.2d 319, 321 (Ct. App. 1992).

Further, the Court has discretion in remanding the case to the trial court for a reconstruction of the content of the recordings. See State v. Ladson, 373 S.C. 320, 324, 644 S.E.2d 271, 273 (Ct. App. 2007) ("The authority of the trial court in South Carolina to reconstruct the record for appellate purposes aligns our state with the majority of jurisdictions that hold 'the inability to prepare a complete verbatim transcript, in and of itself, does not necessarily present a sufficient ground for reversal.'" (quoting Smith v. State, 433 A.2d 1143, 1148 (Md. 1981))); *id.* at 325, 644 S.E.2d at 273-74 (concluding a reconstructed record on appeal must allow for "meaningful appellate review," and a new trial is only appropriate if the appellant establishes "the incomplete nature of the transcript prevents the appellate court from conducting a 'meaningful appellate review.'" (quoting In re D.W., 615 S.E.2d 90, 94 (2005))).

Respondent submits an attempt to reconstruct the record of the bench conferences is appropriate. At the reconstruction hearing, it may be appropriate, in the discretion of the trial judge, to review the back-up tapes, the notes of all counsel, if any, any written motions or responses related to the various bench conferences and the collective memories of the parties.

WHEREFORE, Respondent has no objection to the Appellant's reasonable request for a remand for a reconstruction hearing limited to the bench conferences referenced in the motion.

Respectfully submitted,

ALAN WILSON
Attorney General

J. ROBERT BOLCHOZ
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General
S.C. Bar # 5758



Donald J. Zelenka

ATTORNEYS FOR RESPONDENTS

May 1, 2017

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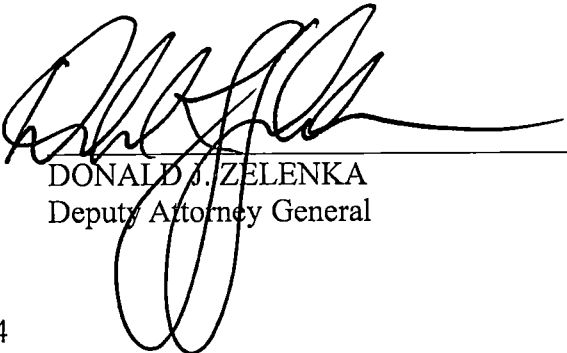
APPELLATE CASE NO. 2016-001957

CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, hereby certify that a true copy of the Final Brief of Respondent in the above-referenced case has been served upon counsel for Appellant by depositing two copies of same in the InterAgency Mail to:

Susan B. Hackett, Esq.
Appellate Defender
SCCID/Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

This 1st day of May, 2017.



DONALD J. ZELENKA
Deputy Attorney General



ALAN WILSON
ATTORNEY GENERAL

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SC Court of Appeals

May 1, 2017

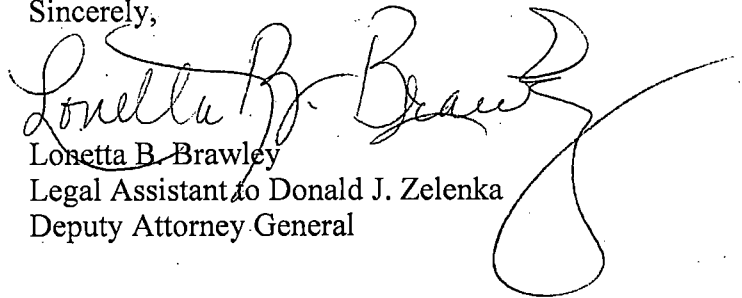
Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Thomas Robert Shewtzuk
Appellate Case No. 2016-001957

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of a **Return to Motion for an Order to Reconstruct the Record of the Bench Conferences at the Trial** in the above-referenced case for filing. By copy of this letter I am serving opposing counsel with same.

Sincerely,



Lonetta B. Brawley
Legal Assistant to Donald J. Zelenka
Deputy Attorney General

/lbb

cc: Susan B. Hackett, Esquire