

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Sumter County  
William Jeffrey Young, Circuit Court Judge  
George M. McFaddin, Jr., Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT **RECEIVED**

v.

DEC 11 2018

MICHAEL SPANN,

SC Court of Appeals

APPELLANT.

APPELLATE CASE NO. 2015-002317

MOTION TO VACATE APPELLANT'S  
CONVICTION AND SENTENCE  
AND REMAND FOR A NEW TRIAL

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, undersigned counsel requests an order vacating Appellant's conviction and sentence and remanding the case for a new trial. In support of this motion, Appellant provides this Court with an Order signed by the Honorable George M. McFaddin, Jr., indicating the parties agreed the record could not be reconstructed in a manner to permit meaningful appellate review. Judge McFaddin agreed with the parties and signed an Order to this effect on November 28, 2018, recommending this Court remand the case for a new trial. See Exhibit #1.

A Sumter County grand jury indicted Appellant on December 30, 2009 for armed robbery. The state, represented by Jason Corbett, Esquire, and John Meadors, Esquire, called the

case to trial on November 14, 2012, before the Honorable William J. Young and a jury. John Britton represented Appellant.<sup>1</sup> The jury returned a guilty verdict on the following day, November 15, 2012. Judge Young sentenced Appellant to thirty years' imprisonment, which was placed under seal due to Appellant's absence from his trial. The sentence was opened and read on November 3, 2015, by the Honorable R. Knox McMahon. Ernest A. "Chip" Finney, III, represented the state, and Appellant appeared *pro se*. During the imposition of the sentence, Appellant expressed his confusion and dismay regarding the proceedings. In response, the judge appointed the public defender to represent Appellant. The public defender filed the notice of appeal.

Upon receipt of appointment to represent Appellant, the Office of Appellate Defense requested trial transcripts. Undersigned counsel received a partial transcript. The available partial trial transcript includes jury *voir dire*; however, it is incomplete as it contains numerous indications that colloquies between the judge and jurors were not audible. After jury selection, the state moved to try Appellant in his absence. Upon hearing the motion, the judge requested a bench conference with counsel. That bench conference was not transcribed. The available transcript does contain the testimony of a witness concerning the state's motion to proceed to trial in Appellant's absence and the judge's ruling on that motion. During a hearing on pre-trial motions, trial counsel relayed information to the judge concerning a witness's statement, but the court reporter was unable to transcribe it because the recording was inaudible. There was another bench conference that was not transcribed prior to a lunch break on the first day. Immediately after the lunch break, a bench conference occurred that was also not transcribed. According to the court reporter's note, the opening statements were not audible and could not be

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<sup>1</sup> John Britton passed away on August 3, 2016.

transcribed. The transcript showed the state called Arthur McDaniel, Jr., as a witness. The solicitor and the witness exchange pleasantries and no further testimony is transcribed. Thereafter, the court reporter's note indicates as follows: "The balance of the record in the within matter cannot be produced as there is a defect in the hard drive."

After receiving a partial transcript, Appellant moved for a new trial or, in the alternative, remand for reconstruction. On October 11, 2016, this Court denied Appellant's request for a new trial, but granted his request to remand for reconstruction. While this case was remanded for reconstruction, the parties contacted a second court reporter who indicated she could produce a portion of the transcript. Ultimately, this court reporter provided the testimony of two witnesses, closing arguments, jury instructions, and verdict. Nevertheless, in addition to the missing portions described above, other portions of the transcript remain missing and unable to be produced.

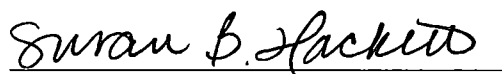
Pursuant to this Court's Order, undersigned counsel and the assistant solicitors began discussions regarding the case. During those discussions, the assistant solicitors extended a plea offer to Appellant. Appellant accepted the state's plea offer. Based upon the ability of the parties to resolve the matter with a guilty plea and the difficulty with reconstruction as expressed in the accompanying order, the parties agreed the trial could not be reconstructed to permit meaningful appellate review. Judge McFaddin agreed as well.

When a trial transcript has been lost or destroyed, the Court may vacate the conviction and sentence and remand for a new trial if meaningful appellate review is not possible. See Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004); Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002); Deaton v. Leath, 279 S.C. 82, 84, 302 S.E.2d 335, 336 (1983); China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968); Dolive v. J.E.E. Developers, Inc., 308 S.C. 380,

383, 418 S.E.2d 319, 321 (Ct. App. 1992); State v. Ladson, 373 S.C. 320, 325, 644 S.E.2d 271, 273-274 (Ct. App. 2007). In light of the court reporters' inability to produce a full transcript of Appellant's trial, the acceptance of a guilty plea offer by Appellant as extended by the state, and the parties' agreement, along with the trial judge's agreement, that the record cannot be reconstructed in a way to permit meaningful appellate review, Appellant requests this Court order a new trial in his case.

WHEREFORE, the undersigned counsel requests this Court set aside Appellant's conviction and sentence and remand for a new trial.

Respectfully submitted,



Susan B. Hackett  
Appellate Defender

Attorney for Appellant

This 11th day of December, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County  
W. Jeffrey Young, Circuit Court Judge  
George M. McFaddin, Jr., Circuit Court Judge

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SC Court of Appeals

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

MICHAEL ANTWAN SPANN,

APPELLANT.

APPELLATE CASE NO. 2015-002317

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the motion to vacate Appellant's conviction and sentence and remand for a new trial in the above referenced case has been served upon opposing counsel, J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, W. Jason Corbett, Esquire, at 215 N. Harvin Street, Sumter, SC 29150, and Michael Antwan Spann, Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472 on this 11th day of December, 2018.

*Susan B. Hackett*

Susan B. Hackett  
Appellate Defender  
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me  
this 11th day of December, 2018.

*Courtney Powers* (L.S.)

Notary Public for South Carolina  
My Commission Expires: May 2, 2027

# **Exhibit #1**

STATE OF SOUTH CAROLINA  
COUNTY OF SUMTER

RECORDED  
2018 NOV 29 P 3:51  
THE COURT OF GENERAL SESSIONS  
INDICTMENT NO. 2010-GS-43-0034  
APPELLATE CASE NO. 2015-002317

STATE OF SOUTH CAROLINA )

JAMES C. CAMPBELL  
CLERK OF COURT  
SUMTER COUNTY, S.C.

v.

ORDER

MICHAEL ANTWAN SPANN, )  
Defendant )

CERTIFIED TRUE COPY  
OF ORIGINAL FILED  
*Sharon H. ...*  
DEPUTY CLERK OF COURT  
SUMTER COUNTY  
SOUTH CAROLINA

This matter is before this Court pursuant to the Order of the Court of Appeals remanding this case to the Circuit Court to reconstruct the record.<sup>1</sup> W. Jason Corbett, Esquire, and John P. Meadors, Esquire, represent the State in this action. Susan B. Hackett, Esquire, represents Michael Antwan Spann, the defendant.

Counsel for the State and counsel for the defendant have worked diligently in an effort to reconstruct the record in order to permit meaningful appellate review. After extensive efforts, counsel for the State and counsel for the defendant agree that the trial transcript cannot be reconstructed in a manner to permit meaningful appellate review. For the reasons set forth below, this Court agrees.

On December 30, 2009, Mr. Spann was indicted by a Sumter County grand jury for armed robbery in violation of S.C. Code Ann. § 16-11-330. The case was tried over a two-day period—November 14-15, 2012, before the Honorable W. Jeffrey Young and a jury. John P. Britton, Esquire, represented Mr. Spann. Mr. Corbett and Mr. Meadors represented the State during the trial. Mr. Spann's sentence was unsealed on November 3, 2015, by the Honorable R. Knox McMahon. No lawyer was present on Mr. Spann's behalf during the unsealing of the sentence. Mr. Spann was sentenced to the maximum sentence of thirty years imprisonment. On November

<sup>1</sup> Initially, this case was remanded to the Honorable W. Jeffrey Young. Subsequently, Judge Young began employment with the South Carolina Attorney General's Office. Counsel for Michael Spann moved for the appointment a new judge on January 22, 2018. The state posed no objection. On March 2, 2018, the Court of Appeals referred the case to the Chief Judge for Administrative Purposes for the Court of General Sessions of the Third Judicial Circuit.

5, 2015, Timothy Ward Murphy, Esquire, filed and served a notice of appeal on Mr. Spann's behalf.

Upon receipt of the notice of appeal, the Office of Appellate Defense ordered the transcripts in the case. The available partial trial transcript includes jury *voir dire*; however, it is incomplete as it contains numerous indications that colloquies between the judge and jurors were not audible. After jury selection, the state moved to try Appellant in his absence. Upon hearing the motion, the judge requested a bench conference with counsel. That bench conference was not transcribed. The available transcript does contain the testimony of a witness concerning the state's motion to proceed to trial in Appellant's absence and the judge's ruling on that motion.

During a hearing on pre-trial motions, trial counsel relayed information to the judge concerning a witness's statement, but the court reporter was unable to transcribe it because the recording was inaudible. There was another bench conference that was not transcribed prior to a lunch break on the first day. Immediately after the lunch break, a bench conference occurred that was also not transcribed. According to the court reporter's note, the opening statements were not audible and could not be transcribed. The transcript showed the state called Arthur McDaniel, Jr., as a witness. The solicitor and the witness exchange pleasantries and no further testimony is transcribed. Thereafter, the court reporter's note indicates as follows: "The balance of the record in the within matter cannot be produced as there is a defect in the hard drive."

While this case was remanded for reconstruction, the parties contacted a second court reporter who indicated she could produce a portion of the transcript. Ultimately, this court reporter provided the testimony of two witnesses, closing arguments, jury instructions, and verdict. Nevertheless, in addition to the missing portions described above, other portions of the transcript remain missing and unable to be produced.

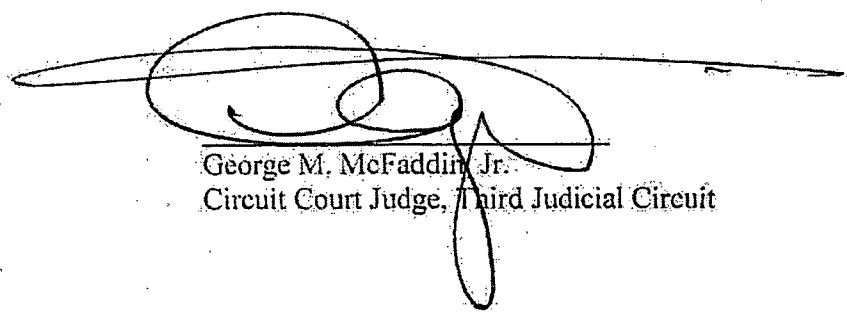
The list of potential witnesses read to the jury included *nine* individuals. The available transcript provides the testimony for *two* of those witnesses. While it is likely that all nine potential witnesses testified, it is clear from the closing arguments that at least three witnesses whose testimony was not transcribed actually testified.



On August 3, 2016, Mr. Britton passed away after a long battle with cancer. The file regarding Mr. Spann's case, which was in Mr. Britton's possession as trial counsel, cannot be found despite efforts by Mr. Spann's current counsel and members of the Sumter County Public Defender Office. Mr. Britton's death makes reconstructing the record extremely difficult.

In light of the inability of the court reporter to produce a transcript in this case, the Court of Appeals remanded this case to this Court in order to conduct a reconstruction hearing. In order for the record to be reconstructed, it must be done in a manner that provides for meaningful appellate review and complies with the constitutional guarantees of procedural due process. See Koon v. State, 358 S.C. 359, 595 S.E.2d 456 (2004); Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002); China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968); Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E.2d 9 (Ct. App. 2012); Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 418 S.E.2d 319 (Ct. App. 1992); State v. Ladson, 373 S.C. 320, 644 S.E.2d 271 (Ct. App. 2007). Based on the amount and type of evidence presented that is unavailable, the seriousness of the charge, the severity of the sentence, and the death of defense counsel, the parties agree, and this Court agrees, the record cannot be reconstructed adequately to permit meaningful appellate review.

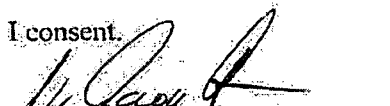
Therefore, this Court concludes the record cannot be reconstructed adequately to permit meaningful appellate review and recommends that the Court of Appeals remand the case for a new trial.



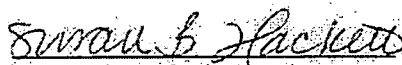
George M. McFaddin Jr.  
Circuit Court Judge, Third Judicial Circuit

NOVEMBER  
September 28, 2018

I consent.

  
W. Jason Corbett, Esquire  
Attorney for the State

I consent.

  
Susan B. Hackett, Esquire  
Attorney for the Defendant



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

Robert M. Dudek, Acting Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender  
Joseph L. Savitz, III, Senior Appellate Defender

December 11, 2018

**RECEIVED**

DEC 11 2018

SC Court of Appeals

The Honorable Jenny A. Kitchings  
Clerk of Court, S.C. Court of Appeals  
P.O. Box 11629  
Columbia, S.C. 29211

Re: State v. Michael Antwan Spann, Appellate Case No. 2015-002317

Dear Ms. Kitchings,

Please find enclosed the original and six copies of Appellant's motion to vacate Appellant's conviction and sentence and remand for a new trial in the above-captioned case.

Thank you for your assistance in this matter.

Sincerely,

Susan B. Hackett  
Appellate Defender

SBH/

Enclosure

cc: J. Benjamin Aplin, Jr., Esquire (w/ enclosure)  
Jason Corbett, Esquire (w/ enclosure)  
Michael Spann (w/ enclosure)