STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Calhoun County
Honorable R. Scott Sprouse, Circuit Court Judge
Appellate Case No. 2018-000565

THE STATE,

Respondent,

vs.

MICHAEL ALEXANDER SEALS,

Appellant.

REPLY TO RETURN TO MOTION TO REMAND FOR RECONSTRUCTION OF THE RECORD

Respondent ("the State"), through its undersigned counsel, would respectfully show unto the Court as follows:

I.

Through his Return to the State's Motion to Remand for Reconstruction of the Record, Appellant contends any attempt to reconstruct the missing portions of the trial record that he readily acknowledges are currently unavailable would be a "waste of time" because he believes those portions are "wholly irrelevant" to the matter currently before this Court. In support of that contention, Appellant *concedes* the issue he is raising on appeal was not raised to the trial judge, which means that issue simply was not preserved for appellate review under South Carolina law. See State v. Galloway, 305 S.C. 258, 264, 407 S.E.2d 662, 666 (Ct. App. 1991) ("This Court may not decide an issue not raised by proper exception."); see also Brown v. State, 317 S.C. 270,

272, n. 1, 453 S.E.2d 251, 252 (1994) ("The absence of an on the record waiver of a constitutional or statutory right where there is no contemporaneous objection in death penalty cases is reviewable only on post conviction relief for cases tried after [State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)]."); cf. State v. Mitchell, 261 S.C. 452, 460-461, 200 S.E.2d 448, 452 (1973) ("This objection was not raised during the trial in the lower court nor by any exception in this appeal. It was first mentioned in the written brief of appellant. Since the objection was not raised in the lower court, it is not available to appellant on appeal."). Despite that concession, Appellant appears to maintain this Court will nonetheless have the following two options available to it on appeal without any reconstruction efforts being attempted: (1) the Court can resolve the appellate issue he has raised in his favor due to the fact he characterizes it as an "obvious structural error" regardless of any issue preservation concerns; or (2) the Court can "avoid" the issue he has raised by applying South Carolina's binding issue preservation rules. See State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) ("[T]he plain error rule does not apply in South Carolina state courts."); see also Weaver v. Massachusetts, __ U.S. __, 137 S. Ct. 1899, 1910 (2017) ("Despite its name, the term 'structural error' carries with it no talismanic significance as a doctrinal matter. It means only that the government is not entitled to deprive the defendant of a new trial by showing that the error was 'harmless beyond a reasonable doubt.' Thus, in the case of a structural error *where there is an objection at trial* and the issue is raised on direct appeal, the defendant generally is entitled to 'automatic reversal' regardless of the error's actual 'effect on the outcome.' " (emphasis added and citations omitted)).

II.

To the extent Appellant contends reconstruction of the trial record is irrelevant, the State respectfully disagrees and submits the matter of *why* Appellant's trial was conducted as a bench

trial is, in fact, directly relevant to—and may prove to be essential to—the resolution of Appellant's case on direct appeal. Specifically, despite Appellant's concession no objections to the bench trial were raised during trial, it is presently unclear if Appellant's trial was conducted as a bench trial *at defense counsel's request* and, if so, what information was communicated to the trial judge in support of that request. That fact is particularly important because defense counsel's request for a bench trial would constitute a waiver of Appellant's ability to raise any issues regarding the bench trial for purposes of his direct appeal, which would mean a separate and distinct procedural bar could exist apart from the one Appellant appears to be suggesting this Court can and should ignore. See State v. Worthy, 239 S.C. 449, 465, 123 S.E.2d 835, 843 (1962) ("[T]he appellant is not in position to assert error when he was the author of such and his own conduct induced the situation of which he now complains."), overruled by on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); see also Clark v. Clark, 271 S.C. 21, 23, 244 S.E.2d 743, 744 (1978) ("The acts and omissions of an attorney are directly attributable to the client."); Arnold v. Yarborough, 281 S.C. 570, 572, 316 S.E.2d 416, 417 (Ct. App. 1984) ("Acts of an attorney are directly attributable to and binding upon the client."); cf. State v. Washington, 315 S.C. 108, 110, 432 S.E2d 448, 449 (1993) ("Appellant may not now be heard to complain of the admission of evidence elicited by his own counsel."). Furthermore, if the *decision* to be tried through a bench trial was personally made by Appellant and that decision was communicated to the trial judge at Appellant's request through defense counsel, such a circumstance could potentially be directly relevant to the merits of the issue raised by Appellant on appeal. See Moore v. State, 399 S.C. 641, __, 732 S.E.2d 871, 873 (2012) (recognizing a defendant's knowing and voluntary waiver of a basic trial right, such as the right to a jury trial, "may be accomplished by a colloquy between the court and defendant, *between the court and*

defendant's counsel, or both" (emphasis added)); Brown, 317 S.C. at 272, 453 S.E.2d at 252 ("An on-the-record waiver of a constitutional or statutory right is but one method of determining whether the defendant knowingly and intelligently waived that right."); see also Gonzales v. United States, 553 U.S. 242, 250 (2008) (recognizing some decisions, such as a decision to waive the right to a jury trial, "are so important that an attorney *must seek the client's consent* in order to waive the right" (emphasis added)); Florida v. Nixon, 543 U.S. 175, 187 (2004) ("[C]ertain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate. A defendant . . . has the ultimate authority to determine whether to plead, *waive a jury*, testify in his or her own behalf, or take an appeal. Concerning those decision, an attorney must both *consult with the defendant and obtain consent* to the recommended course of action." (emphasis added and citations and internal quotations omitted)); Brookhart v. Janis, 384 U.S. 1, 7 (1966) (holding defense counsel cannot ordinarily waive a defendant's constitutional rights *when the waiver would be inconsistent with* the defendant's expressed desire); United States v. Harris, 106 U.S. 629, 635 (1883) ("[T]hough the right of trial by jury is a constitutional one, . . . this court has declared that when it simply appeared by the record that party was present *by counsel* and had gone to trial before the court without objection or exception, a waiver of his right to a jury trial would be presumed, and he would be held in this court to the legal consequences of such waiver." (emphasis added)). Accordingly, notwithstanding the inherent value in the reconstruction of any missing trial record, reconstruction may prove to be important and directly relevant to the resolution of Appellant's appeal both from a procedural standpoint and from a merits standpoint and, as a result, would not be unnecessarily wasteful as Appellant currently claims. See Weaver, 137 S. Ct. at 1912-1913 (2017) (instructing "[w]hen a structural error *is preserved* and raised on direct review, the

balance is in the defendant's favor, and a new trial generally will be granted as a matter of right" while also explaining there is a different standard "for evaluating a structural error depending on whether it is raised on direct review or raised instead in a claim alleging ineffective assistance of counsel" (emphasis added)); cf. United States v. Boynes, 515 F.3d 284, 286 (finding a waiver of Boynes's right to a jury trial to be valid even though it was made solely by defense counsel following an out-of-court request by Boynes for the right to be waived). Moreover, in light of the delay of *over four years* that has already occurred as a direct result of Appellant's decision to remain a fugitive from justice for such a lengthy period of time, a remand of reconstruction at the present stage will best ensure the memories of the individuals who may be able to reconstruct the missing portions of the trial record will not fade any further due to the continuing passage of time. See, e.g., New York v. Hill, 528 U.S. 110, 117 (2000) ("Delay can lead to a less accurate outcome as witnesses become unavailable and memories fade.").

IV.

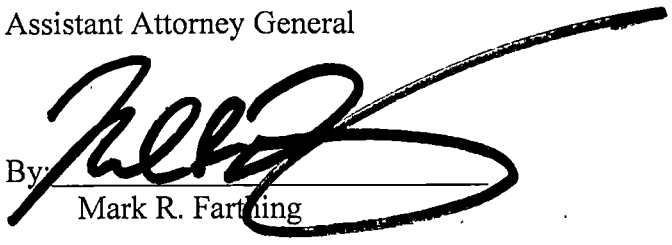
Based on the foregoing coupled with the arguments raised in the State's Motion to Remand for Reconstruction of the Record, the State respectfully asks this Court to grant its motion and remand the matter to the trial court so prompt efforts to reconstruct the missing portions of the trial record can be undertaken by the trial judge. Furthermore, the State requests this Court to hold the appeal in abeyance until this matter has been ruled upon.

WHEREFORE, Respondent prays this Court will grant the Motion to Remand for Reconstruction of the Record; remand the matter to the trial court to allow the Honorable Edgar W. Dickson, circuit court judge, to reconstruct the missing portions of the trial court record; hold this appeal in abeyance pending a ruling on Respondent's motion; and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General



By: _____
Mark R. Farthing

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

January 17, 2019

STATE OF SOUTH CAROLINA
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Honorable R. Scott Sprouse, Circuit Court Judge
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THE STATE,

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vs.

MICHAEL ALEXANDER SEALS,

Appellant.

PROOF OF SERVICE

I, Mark R. Farthing, certify I have served the within Reply to Return to Motion to Remand for Reconstruction of the Record on Appellant by sending two copies of the same to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify all parties required by Rule to be served have been served.
This 17th day of January, 2019.

MARK R. FARTHING
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

January 17, 2019

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

RE: State v. Michael Alexander Seals – Appellate Case No. 2018-000565

Dear Ms. Kitchings:

Enclosed please find the original and six copies of the Reply to Return to Motion to Remand for Reconstruction of the Record, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar No. 76901

MRF/
Enclosures

cc: David Alexander, Esquire
Victim Advocacy Division