

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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**Oct 29 2020**

**SC Court of Appeals**

APPEAL FROM RICHLAND COUNTY  
Honorable L. Casey Manning, Circuit Court Judge

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The State .....Respondent

v.

Kenneth Ray Gleaton .....Appellant.

Appellate Case No. 2019-002072

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**RESPONSE TO MOTION TO PRESERVE AUDIO RECORDING OF THE TRIAL AND  
ALLOW APPELLATE COUNSEL TO OBTAIN A COPY OF THE AUDIO**

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The captioned matter is a murder direct appeal pending before the Court. On October 28, 2020, Appellant filed a motion to preserve the audio recording of the trial and to obtain a copy of the recording. Appellant submits that the one-year retention period is due to expire from the trial that concluded on November 1, 2019. Due to the timing of the request and the possible destruction of the recording before the parties may litigate the issue, Respondent does not object to an Order directing the court reporter to retain and not destroy the audio recording of the trial until this motion may be ruled upon. However, Respondent submits the motion should be denied.

Court reporter tapes are retained and used under the authority of Court Administration. The only provision under the rules that attaches after transcription appears to be that which directs the recordings are to be retained for one year after transcription “to allow any party to challenge the accuracy of the transcription.” Rule 607 (j), SCACR. To that extent, Appellant

may review the tapes through the process established by Court Administration. However, there is no provision in the rule that allows for use of the recording as evidence of a collateral issue bearing on the quality or other specifics of representation. Direct appeal is particularly not suited for such an exercise as direct appeal does not allow for development of the claim. *See State v. Felder*, 290 S.C. 521, 522, 351 S.E.2d 852, 852 (1986) (appellate courts in direct appeal review “usually will not consider an ineffective assistance of counsel issue on appeal from a conviction” but will refer the matter to post-conviction relief) (*citing, e.g., State v. Carpenter*, 277 S.C. 309, 286 S.E.2d 384 (1982)). Other portions of the court rules indicate use of recordings from media coverage specifically may not be used as evidence. Rule 605 (f)(8), SCACR. *See also* S.C.Sup.Ct. Order No. 2020-09-28-01, RE: Recording of In-Person or Virtual Court Proceedings (prohibiting “recording (visual or audio)” and noting “The *written transcript* remains the official record of any court proceeding.”) (emphasis added)). Logically, the limitation on retention in time and purpose militates against finding the recording may be used as evidence.

Additionally, it does not appear that any portion of the recording was played for review in challenge to anything. Thus, the recording is not a part of the record presented to the lower court. *See generally* 210(c), SCACR (content allowed in record on appeal restricted to “matter... *presented* to the lower court”) (emphasis added).

Lastly, the standard of review argues against allowing new evidence for this Court to consider and weigh. “In criminal cases, the appellate court sits to review errors of law only.” *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). To the extent Appellant complains only of the denial of a motion for mistrial, that determination, if properly preserved, turns on a matter of law. *See, e.g., State v. Culbreath*, 377 S.C. 326, 331, 659 S.E.2d 268, 271 (Ct. App. 2008) (“Whether to grant or deny a mistrial motion is a matter within the trial court’s sound

discretion, and the court's decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law."); *see also State v. Herring*, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009) ("The grant of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way."). The official written transcript may be reviewed for the record of the decision and the reasons supporting that decision.

WHEREFORE, based on the foregoing, Respondent is not opposed to a limited stay to preserve the recording until disposition of this motion. However, Appellant has not shown any entitlement to a copy of the recording, or any authority by which he may receive a copy of the recording for use as evidence in the direct appeal. The motion should be denied.

Respectfully submitted,

ALAN WILSON  
Attorney General

DONALD J. ZELENKA  
Deputy Attorney General

MELODY J. BROWN  
Senior Assistant Deputy Attorney General

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BY: *s/Melody J. Brown*  
S.C. Bar No. 14244

October 29, 2020

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Richland County  
The Honorable L. Casey Manning, Circuit Court Judge  
Appellate Case No. 2019-002072

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THE STATE,

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APPELLANT.

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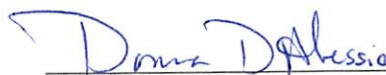
**CERTIFICATE OF SERVICE**

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I, Donna D'Alessio, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Response to Motion to Preserve Audio Recording of the Trial and Allow Appellate Counsel to Obtain a Copy of the Audio has been forwarded to Appellant's counsel, Kathrine H. Hudgins, Esq., via email today, October 29, 2020 to [khudgins@sccid.sc.gov](mailto:khudgins@sccid.sc.gov), and to her assistant Chris Stock at [cstock@sccid.sc.gov](mailto:cstock@sccid.sc.gov).

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

This 29<sup>th</sup> day of October, 2020.



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Donna D'Alessio,  
Legal Assistant to Melody J. Brown,  
Senior Assistant Deputy Attorney General

**Donna D'Alessio**

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**From:** Donna D'Alessio  
**Sent:** Thursday, October 29, 2020 4:52 PM  
**To:** 'khudgins@sccid.sc.gov'; Stock, Chris (cstock@sccid.sc.gov)  
**Subject:** Gleaton, Kenneth Ray - Appellate Case No. 2019-002072 - Response to Motion to Preserve Audio Recording, etc.  
**Attachments:** Return to Motion to Preserve the Audio Recording of the Trial and Allow Copy. Kenneth Gleaton, Appellate Case No. 2019-002072 (02415963xD2C78).pdf

Dear Ms. Hudgins:

Attached is a scanned copy of the Response to Motion to Preserve Audio Recording of the Trial and Allow Appellate Counsel to Obtain a Copy of the Audio, and Certificate of Service regarding the above matter. The Response to Motion and supporting documents are being submitted to the South Carolina Court of Appeals through e-filing, along with a copy of this email.

Hope you are well, and thank you.

Donna D'Alessio, Legal Assistant  
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