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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

Honorable Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIMOTHY RAY JONES, JR.

APPELLANT

APPELLATE CASE NO. 2019-001008

RETURN TO MOTION TO SUBSTITUTE AND AMEND FINAL BRIEF OF RESPONDENT

On October 23, 2020, appellant filed his initial brief. The state filed its initial brief on May 21, 2021. Appellant filed his initial reply brief on June 30, 2021. Thereafter, the state and appellant filed their respective final briefs on August 19, 2021.

After this Court scheduled oral argument for November 9, 2021, the state filed a motion requesting permission to amend its final brief. Appellant vehemently opposes the state's motion to the extent the state seeks to exceed what is permissible under Rule 211(b)(2), SCACR. Appellant would not oppose the state getting a "do over" of its final brief to correct typographical errors and misspellings only within the final brief of respondent as provided for in Rule 211(b)(2),

SCACR. Appellant in the strongest of terms opposes the state's motion otherwise for a variety of reasons as listed below.

No authority for the motion

First and notably, the state cited no rule or other authority that would permit the filing of an amended final brief to alter the substance of the argument, especially at this late date. Presumably, this is because no such authority exists.

Hopelessly vague explanation of proposed changes

Appellant opposes the state's request to amend the final brief of respondent as the state has failed to provide a comprehensive list of all changes the state intends to make. Rather, the state merely provided *examples* of the proposed corrections. Even those examples are not helpful as page numbers are not provided for all of them. See Motion to Amend p. 2 n.1 (requesting "[t]o correct Dorney's diagnosis to 'schizo-affective disorder'" and "[t]o correct 'state's witness' to 'court's witness'" but not providing a single page number for these alterations). After providing the non-exhaustive list of examples, the state moved to make "[c]orrection of other similarly clear typographical, drafting, spelling and grammatical errors not changing the substance of the argument." See Motion to Amend p. 2 n.1.

What the state has provided in terms of proposed changes is hopelessly vague and fails to enable appellant to determine what he is being asked to not oppose. Further, the state is requesting permission to change substantive matters. For example, "[t]o correct Dorney's diagnosis to 'schizo-affective disorder'" is a substantive change that appellant must oppose.

Further, should this Court allow the state a "do over" to correct typographical errors, appellant would request that the state be required to provide a complete list of *all* changes the state proposes to make. Should this Court grant the state's request to amend its final brief in any broader

form, appellant respectfully requests this Court require the state provide a comprehensive list of all changes. The brief of respondent is 145 pages long. Appellant should not be tasked with going through each sentence of a one hundred and forty-five page amended brief of respondent to ensure the limits of any future order this Court issues have not been exceeded when oral argument is six weeks away on November 9, 2021. Quite simply, this burden should be placed on the state, not appellant or this Court.

In sum, appellant strenuously opposes the state's motion with the exception of the state's request to correct typographical errors and misspellings in accordance with Rule 211(b)(2), SCACR. This limited exception is absolutely contingent upon the state providing a complete list of those changes to appellant and this Court granting appellant an opportunity to reply to the amended brief if appellant were to determine a reply was necessary. Again, appellant vehemently opposes the state making substantive changes to its brief since this is a fundamentally unfair request by the state at this late stage prior to oral argument in this death penalty case.

Rules-based prohibition on substantive changes to final briefs

Although the state claims its proposed changes would not alter the substance of the arguments presented, the state's opening paragraph requests permission to address "incorrect assertions regarding the record." See Motion to Amend p. 1. The very language used shows an intent to alter the substance. Changing the substance of the brief from the initial brief to the final brief is simply not permitted under the applicable rules. See Rule 211(b)(2), SCACR. "The party may correct obvious typographical errors and misspellings which were contained in the initial brief. **No other changes may be made.**" Rule 211(b)(2), SCACR (emphasis added). Therefore, the state seeks to make changes to its final brief that it would *not* have been able to make even during the final briefing process. Appellant simply cannot consent to, and he strongly opposes,

any alterations to any amended final brief that would not have been permitted under Rule 211(b)(2), SCACR, when preparing the final brief.

In its motion, the state divides its proposed changes into two categories. The state calls the first set "typographical errors in filing, i.e., minor punctuation, spelling, grammar, capitalization errors, and/or stray words." The state provides a list of examples that allegedly fall within this category. Examining the list belies the state's claim that the proposed alterations would not change the substance. For example, the state proposes "to correct by deletion of the sentence opining 'Jones did not have a worse childhood than most' as a weight or comparative assessment not necessary to the argument . . ." and "to correct 'state's witness' to 'court's expert.'" Motion to Amend at p. 2 n.2. These are not mere typographical errors. Thus, appellant cannot consent to, and he strenuously opposes, the state being granted permission to make the proposed changes contained within its non-exhaustive list of changes contained in footnote 1 because those changes affect the substance of the arguments presented.

In its second category of changes, the state appears to concede these are substantive alterations prohibited by the Rules. In fact, the state repeatedly admits it wants to make these changes so that its brief "accurately reflect[s] the record." Motion to Amend p. 2-3. Similarly, in many instances mentioned in the motion to amend, the state seeks to "conform text to citations to the record." These changes are strictly forbidden by the Appellate Court Rules, which could not be clearer in this regard.

Effect on reply brief

In addition to his objection to the state making any substantive changes as prohibited by the Rules, appellant objects to the state making any substantive changes to its brief because of the effect these changes would have on the comprehensibility of the reply brief. Appellant carefully

crafted his reply brief in response to the initial brief filed by the state. Should this Court permit the state to change the substance of its final brief, a serious risk exists that appellant's reply brief would no longer be clear in its specific response to the state' arguments. The care with which appellant prepared the reply brief would be for naught.

Untimely request

Argument is scheduled before this Court in approximately six weeks, on November 9, 2021. Appellant strenuously objects to the state being granted permission to make changes to the substance of its brief at this late date. See Southerland v. State, 337 S.C. 610, 613 n.4, 524 S.E.2d 833, 834 n.4 (1999) (explaining this Court denied a request to amend where appellate counsel "waited until one week before oral arguments to move to supplement his appellate brief to raise" an issue).

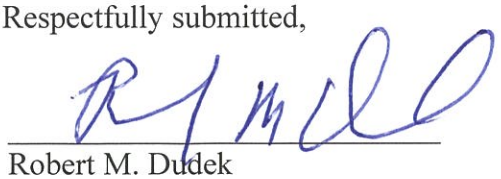
The state had 210 days – from October 23, 2020 until May 21, 2021 – to prepare its initial brief of respondent. Appellant readily agreed to all extensions requested by the state due to the voluminous records involved and the importance of the matters at issue. This is a capital case. It therefore requires the utmost care and attention since there is a heightened need for reliability in its outcome. See Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Further, after the filing of its initial brief, the state had another 90 days -- until August 19, 2021 -- to review its initial brief for typographical errors that could be changed for the final brief pursuant to Rule 211(b)(2), SCACR. Thus, it is hard to be sympathetic for the typographical errors in the final brief. Nevertheless, appellant will not oppose the state receiving a "do over" for typographical errors and misspellings in an amended final brief. However, allowing the state to alter the substance of the brief, especially when the state had 300 days to prepare the brief, is a bridge too far which appellant vehemently opposes.

Conclusion

In conclusion, appellant strenuously opposes the state's motion to amend its final brief of respondent. Appellant does not oppose, as a convenience to this Court, the state correcting distracting typographical errors and misspellings that could have been corrected in the final briefing process pursuant to Rule 211(b)(2), SCACR, as long as the state provides a separate list identifying each error corrected and appellant is provided with an opportunity to file a reply if one is necessary. Appellant opposes any other alterations to the state's final brief, and appellant objects to the state making any substantive changes (regardless of how the state chooses to label them) to the final brief of respondent.

In the event this Court grants the state's request to file an amended brief, appellant respectfully requests the opportunity to file a reply to the amended brief. In all likelihood, appellant would require an additional thirty todays to file the reply because undersigned counsel and Susan B. Hackett are working on a reply to the state's return to the petition for writ of certiorari in a capital post-conviction relief appeal, Andres Antonio Torres v. The State, Appellate Case No. 2020-000842. Furthermore, undersigned counsel is scheduled to argue before this Court in the capital case of The State v. Jerome Jenkins, Jr., Appellate Case No. 2019-001280 on October 12, 2021, and the murder case of The State v. Justin Jamal Warner, Appellate Case No. 2020-000930 on October 14, 2021. Thus, appellant would need thirty days in order to prepare a reply in light of these other obligations.

Respectfully submitted,



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This 21st day of September, 2021.