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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Aiken County

Honorable Courtney Clyburn-Pope, Circuit Court Judge

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ARTRELL HICKSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2021-001262

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# MOTION TO VACATE THE ORDER OF DISMISSAL AND REMAND FOR A NEW POST-CONVICTION RELIEF HEARING

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Pursuant to Rule 240 of the South Carolina Appellate Court Rules (SCACR), Petitioner respectfully requests this Court vacate the Order of Dismissal denying Petitioner's first application for post-conviction relief, which was signed by the Honorable Edgar W. Dickson and filed on January 9, 2017, and remand for a new post-conviction relief hearing. By way of a written Order dated June 29, 2022, Judge Dickson found the record of the September 11, 2015 evidentiary hearing held during Petitioner's first action for post-conviction relief cannot be reconstructed.

In accordance with Rule 240(c), SCACR, Petitioner submits the following documents to support this motion: Judge Dickson's Order dated June 29, 2022 (Exhibit No. 1); Transcript of

the April 28, 2022 Reconstruction Hearing (Exhibit No. 2); Respondent's Exhibit No. 1 (Daniel Gourley Hearing Notes) from the Reconstruction Hearing (Exhibit No. 3); Respondent's Exhibit No. 2 (Email Chain) from the Reconstruction Hearing (Exhibit No. 4); Court's Exhibit No. 1 (Judge Dickson's Hearing Notes) from the Reconstruction Hearing (Exhibit No. 5); Indictment 2009-GS-02-02294 (armed robbery) and Indictment 2010-GS-02-00670 (possession of a firearm during the commission of a violent crime) (Exhibit No. 6); Petitioner's first PCR application filed May 21, 2013 (Exhibit No. 7); State's Return to Petitioner's first PCR application dated July 1, 2013 (Exhibit No. 8); Order of Dismissal filed January 9, 2017 (Exhibit No. 9); Petitioner's Motion to Reconsider filed January 17, 2017 (Exhibit No. 10); State's Return to Petitioner's Motion to Reconsider dated February 3, 2017 (Exhibit No. 11); Order Denying Petitioner's Motion to Reconsider dated March 14, 2017 (Exhibit No. 12); Applicant's Exhibits from the September 11, 2015 Hearing (Exhibit No. 13); Order Granting Motion to Merge PCR Actions and Granting Belated Appellate Review of Initial PCR Action Pursuant to Austin v. State filed September 10, 2021 (Exhibit No. 14); Email chain confirming September 11, 2015 transcript cannot be transcribed (Exhibit No. 15).

## RELEVANT FACTS

An Aiken County grand jury indicted Petitioner in December 2009 for armed robbery and in April 2010 for possession of a firearm during the commission of a violent crime. Petitioner's case was called to trial on September 20, 2010 before the Honorable Doyet A. Early, III, and a jury. Petitioner was tried jointly with his brother and codefendant, Javier Hickson. Then Solicitor J. Strom Thurmond, Jr. and Assistant Solicitor Susanna Ringler represented the state. Kelley Brown represented Petitioner and Michael Routzong represented Javier Hickson. On

September 22, 2010, the jury found Petitioner guilty as indicted. He was sentenced to twenty-eight years for armed robbery and five years concurrent for the weapons offense.

Petitioner filed a timely notice of appeal. The appeal was perfected by Jerry M. Screen. The Court of Appeals affirmed Petitioner's convictions and sentence in an unpublished opinion. State v. Hickson, 2012-UP-667 (S.C. Ct. App. filed December 19, 2012).

On May 21, 2013, Petitioner filed an application for post-conviction relief (PCR). The state filed a return to this application on July 3, 2013. An evidentiary hearing was held on September 11, 2015 before the Honorable Edgar W. Dickson. Assistant Attorney General Daniel Gourley represented the state, and Aimee Zmroczek represented Petitioner. Petitioner and his trial counsel, Kelley Brown, testified at the hearing. Two exhibits were entered in evidence: Applicant's Exhibit No. 1 (Statement of Tommy Parker) and Applicant's Exhibit No. 2 (Statement of Charles Smalls).

By order filed January 9, 2017, Judge Dickson denied Petitioner relief. In the order, Judge Dickson ruled upon seven separate claims of ineffective assistance of trial counsel, including (1) failure to move to quash the arrest warrants and any evidence stemming from the warrants because they were not supported by probable cause; (2) failure to call alibi witnesses at trial; (3) failure to advise Petitioner to testify at trial; (4) failure to request a pretrial hearing pursuant to Neil v. Biggers, 409 U.S. 188 (1972); (5) failure to object to two state witnesses publishing their prior written statements to the jury; (6) failure to object to comments by the trial judge about a "true and just verdict" pursuant to State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012); and (7) failure to cross-examine a codefendant about his plea deal with the state. Notably, the order did not reference any of the testimony elicited from the witnesses during the evidentiary hearing to support the findings of fact and conclusions of law.

On January 19, 2017, Petitioner filed a motion to reconsider pursuant to Rule 59(e), SCRCP. The state filed a return to the motion to consider on February 6, 2017. By order filed March 17, 2017, Judge Dickson denied the motion.

Petitioner's counsel failed to file a notice of appeal from the order denying him post-conviction relief. On June 19, 2019, Petitioner filed a second PCR application seeking a belated appeal from the denial of his first application. On March 16, 2020, Petitioner filed a third PCR application again seeking a belated appeal. The state filed a return and a motion merge the two PCR actions on August 13, 2021. An evidentiary hearing was convened on September 7, 2021 before the Honorable Courtney Clyburn-Pope. Senior Assistant Deputy Attorney General Megan Harrigan Jameson represented the state, and Nancy Fennell represented Petitioner.

By order filed September 10, 2021, Judge Clyburn-Pope granted Petitioner a belated appeal from the denial of his first application for post-conviction relief. In the same order, the judge also granted the state's motion to merge the two PCR actions.

Petitioner timely filed a notice of appeal with this Court. The Division of Appellate Defense undertook representation of Petitioner and undersigned counsel was assigned to represent Petitioner on appeal. Upon reviewing the file, undersigned counsel discovered that a transcript of the evidentiary hearing held on September 11, 2015 during Petitioner's first PCR action cannot be transcribed because more than five years had passed from the date of the hearing and the date the transcript was first requested from the court reporter. See Rule 607(i), SCACR (requiring court reporters to retain the tapes of a proceeding for five years).

On February 23, 2022, Petitioner filed a Motion for a New Trial or, In the Alternative, an Order to Reconstruct the Record of Petitioner's Post-Conviction Relief Hearing with this Court. The state filed a return to this motion on March 4, 2022. By order dated April 5, 2022,

this Court remanded the matter to reconstruct the record of the September 11, 2015 evidentiary hearing.

A reconstruction hearing was held on April 28, 2022 before Judge Dickson. Senior Assistant Deputy Attorney General Megan Harrigan Jameson represented Respondent. Undersigned counsel represented Petitioner. Four witnesses testified at the hearing: Aimee Zmroczek, who represented Petitioner during his first PCR action; Kelley Brown, Petitioner's trial counsel; Petitioner Artrell Hickson; and Daniel Gourley, who represented the state during Petitioner's first PCR action. Three exhibits were marked and admitted into evidence: Respondent's Exhibit No. 1 (Daniel Gourley's Hearing Notes); Respondent's Exhibit No. 2 (Email Chain); and Court's Exhibit No. 1 (Judge Dickson's Hearing Notes).

The first witness presented at the reconstruction hearing was Aimee Zmroczek. Zmroczek had no independent recollection of the evidentiary hearing held on September 11, 2015 nor did she recall what claims Petitioner raised. However, she testified that she would have attempted to elicit testimony from the witnesses at the evidentiary hearing on each of the allegations raised in the application. Significantly, Zmroczek did not have any notes from the hearing. Kelley Brown, Petitioner's trial counsel, was the second witness called at the reconstruction hearing. Brown had no independent recollection of her testimony during the September 11, 2015 evidentiary hearing. Petitioner Artrell Hickson was the third witness to testify. Hickson likewise had no independent recollection of his testimony during the evidentiary hearing.

Daniel Gourley, who represented the state during Petitioner's first PCR action, was the last witness to testify. Gourley also had no independent recollection of the September 11, 2015 evidentiary hearing. However, he had notes that he took during the course of the hearing.

Gourley's notes were marked and admitted as Respondent's Exhibit No. 1. During his testimony, Gourley explained the content of his notes to the best of his ability. His notes included some of the questions he asked the witnesses during the evidentiary hearing as well as some of their responses. His notes also touched on some of the testimony elicited from the witnesses by Zmroczek during the hearing. However, his notes were incomplete and at times hard to decipher. Significantly, Gourley's notes made no mention of several of the claims ruled upon in the order of dismissal or the two exhibits that were admitted into evidence during the evidentiary hearing.

Additionally, during his testimony, Gourley identified an email exchange between Judge Dickson's administrative assistant, Peggy Smith, then Assistant Attorney General Julie Coleman, and Gourley. The email exchange, which took place on October 13, 2016, was marked and admitted as Respondent's Exhibit No. 2. In the exchange, Smith forwarded Gourley an email sent by Judge Dickson's law clerk to Gourley and Zmroczek on April 8, 2016, in which the clerk informed the parties Judge Dickson was denying Petitioner's PCR application. The clerk's email requested Gourley prepare the order of dismissal and included findings on the allegations raised in the application. Gourley informed Smith that he no longer worked for the PCR Division at the Attorney General's Office and that Julie Coleman now represented the state. Approximately two hours later, Coleman, who was not present at the September 11, 2015 evidentiary hearing, provided Smith with a proposed order of dismissal.

Judge Dickson also had notes he took during the September 11, 2015 evidentiary hearing. His notes were marked and admitted as Court's Exhibit No. 1. Judge Dickson explained the content of his notes on the record for the benefit of the parties. Like Gourley's notes, Judge Dickson's notes summarized some of the testimony elicited from the witnesses, but appeared to

be incomplete and at times were hard to interpret.

By order dated June 29, 2022, Judge Dickson found the record of the September 11, 2015 evidentiary hearing could not be reconstructed.

## DISCUSSION

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 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).

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. Ladson, 373 S.C. at 325, 644 S.E.2d at 273-274; See 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). The Court of Appeals has held that "the party challenging a reconstructed record on appeal [must] demonstrate prejudice flowing from an inadequate record." Ladson, 373 S.C. at 325, 644 S.E.2d at 273. "A new trial is therefore appropriate if the appellant establishes that the incomplete nature of the

transcript prevents the appellate court from conducting meaningful appellate review." Id. at 325, 644 S.E.2d at 274 (internal quotation marks omitted).

In Ladson, the appellant was convicted of first degree burglary at the conclusion of a three day trial. On appeal, he learned the court reporter could not produce a transcript of his trial. Ladson, 373 S.C. at 321, 644 S.E.2d at 271. Ladson moved for a new trial. Id. The state moved to reconstruct the record. The Court of Appeals ultimately remanded the case for reconstruction. Id. The reconstruction hearing took place more than a year after the trial. Id. The Court of Appeals noted "the passage of time clearly dimmed the recall of the participants." Id. at 325, 644 S.E.2d at 274. After reviewing the transcript of the reconstruction hearing, the court emphasized, "It was clear from the outset of this hearing that reconstructing the record from scratch, after such a substantial delay, would be an uphill struggle." Id. at 321-322, 644 S.E.2d at 271-272. The court concluded meaningful appellate review was not possible where the testimony of a majority of the witnesses was in summary fashion, the information provided was conclusory, the parties had forgotten about one witness altogether, and there was a dispute whether the defendant testified. Id. at 322, 644 S.E.2d at 272.

After the reconstruction hearing, the Court of Appeals asserted it was "left with a bare bones summary of the evidence (with more remaining unknown than known) from a lengthy multiday and fact intensive trial that resulted in a non-parolable twenty-five year person term." Id. at 327, 644 S.E.2d at 274. The record before the court contained only "a few gratuitous references to generic motions and objections" without any information concerning "the context of the motions, the specific nature of the motions, and whether the challenged evidence was cumulative to other unchallenged evidence." Id. The court refused to speculate. Id. In concluding the record was insufficient for meaningful appellate review, the court also

emphasized the record "would effectively foreclose any collateral challenge through post-conviction relief or otherwise." Id. at 327, 644 S.E.2d at 275. Thus, the court concluded Ladson had demonstrated "clear prejudice." Id.

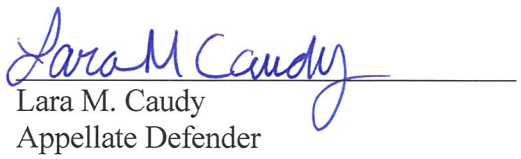
In Deaton v. Leath, 279 S.C. 82, 84, 302 S.E.2d 335, 336 (1983), the defendant's convictions were set aside and a new trial had where the court reporter's equipment malfunctioned and there was no transcript of the trial court proceedings in the case from which to base an appeal. Citing Deaton, the Court of Appeals denied a request for reconstruction in State v. Serrette, 375 S.C. 650, 652-653, 654 S.E.2d 554, 555 (Ct. App. 2007), where the reason for the lack of transcript was due to the defendant's absence for a ten year period, which the Court explained was "not a situation where the court reporter's equipment malfunctioned at trial leading to a loss of the trial transcript."

Unfortunately, despite a diligent effort, the parties were unable to reconstruct the record of the September 11, 2015 evidentiary hearing held during Petitioner's first PCR action. Without a transcript of the evidentiary hearing, the record does not permit meaningful appellate review of the lower court's findings. The standard of review on appeal in a PCR case requires a determination of whether any evidence in the record supports the PCR court's decision. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Significantly, the inability of the court reporter to produce a transcript is through no fault of Petitioner. Consequently, Petitioner respectfully requests this Court vacate the Order of Dismissal filed on January 9, 2017 denying Petitioner's first PCR application and remand for a new evidentiary hearing.

Undersigned counsel has consulted with counsel for Respondent, Senior Assistant Deputy Attorney General Megan Harrigan Jameson, and is authorized to state Respondent does not oppose this motion.

WHEREFORE, Petitioner respectfully requests this Court vacate the Order of Dismissal denying Petitioner's first application for post-conviction relief, which was signed by Judge Dickson and filed on January 9, 2017, and remand for a new evidentiary hearing.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of July, 2022