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STATE OF SOUTH CAROLINA

S.C. SUPREME COURT

IN THE SUPREME COURT

Certiorari to Jasper County

Deadra L. Jefferson, Circuit Court Judge; Bentley Price, Circuit Court Judge

BREON ALEXANDRE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2022-001654

MOTION TO RECONSTRUCT
THE RECORD OF PETITIONER'S PCR HEARING
OR MOTION FOR A NEW PCR HEARING

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, undersigned counsel requests an order requiring the parties to reconstruct Petitioner's August 27, 2013, post-conviction relief (PCR) hearing. Alternatively, in the interest of judicial economy, Petitioner requests a new PCR hearing. Petitioner was granted a belated appeal of his August 27, 2013, PCR hearing pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). However, undersigned counsel has confirmed that due to the age of the case, that transcript cannot be

obtained. Opposing counsel for the State, Megan Jameson, Esquire, does not oppose a reconstruction hearing based on these circumstances.

On April 12, 2010, Petitioner pleaded guilty to murder, armed robbery, and first-degree burglary before the Honorable J. Ernest Kinard. He was sentenced to concurrent terms of imprisonment of forty years, thirty years, and forty years, respectively. Petitioner was represented by Stephen Plexico. Duffie Stone prosecuted the case. *See Exhibits #1 – 3.*

No direct appeal was taken, and on March 29, 2012, Petitioner filed his first application for PCR. The State made its return and partial motion to dismiss on December 28, 2012. A PCR hearing was held on August 27, 2013, before the Honorable Deadra L. Jefferson. Gerald Kelly represented Petitioner. Ashleigh Wilson represented the State. Petitioner has been unable to obtain a transcript of this hearing, as will be discussed below. *See Exhibits #4 – 6.*

On October 31, 2013, the PCR court issued an order of dismissal. The order of dismissal noted that Petitioner and his plea counsel, Stephen Plexico, testified at the hearing. The order of dismissal granted the State's motion to dismiss all allegations except for Petitioner's allegation that his counsel was ineffective in failing to file a direct appeal of the guilty plea. The order of dismissal stated that the court found counsel properly advised Petitioner of his right to appeal and Petitioner failed to indicate his desire for an appeal. Therefore, the first PCR court found Petitioner had not met his burden of proof to show he was entitled to a belated direct appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). *See Exhibit #6.* However, PCR counsel did not timely serve notice of intent to appeal the order of dismissal, and Petitioner's *pro se* attempt to do so was found to be deficient; this Court dismissed the appeal. The remittitur was issued on January 22, 2014. *See Exhibits #7 – 11.*

On September 10, 2014, Petitioner filed a second PCR application. The State made its return and motion to dismiss all claims except *Austin* review on August 19, 2015. On October 20, 2015, a hearing was convened on the matter before the Honorable Roger L. Couch. James Falk represented Petitioner. Alicia Olive and J. Rutledge Johnson represented the State. The State agreed Petitioner was entitled to *Austin* review, and the court ruled Petitioner was so entitled. *See Exhibits #12 – 14.*

However, Judge Couch retired before an order was signed. On October 14, 2022, the Honorable Bentley Price issued a consent order granting Petitioner belated appellate review of his 2013 PCR hearing pursuant to *Austin*. *See Exhibit #15.*

In the final analysis, this would be an appeal of the first PCR judge’s order of dismissal denying Petitioner *White v. State* review of his guilty plea. Because the PCR court took testimony during the August 27, 2013, PCR hearing, Petitioner needs a transcript of the hearing to raise appellate issues presented during the hearing. The Office of Appellate Defense has attempted to obtain a transcript of the hearing from the retired court reporter division without success. The Court Reporter Manager, Tammie Holmes, has confirmed the transcript is not obtainable. *See Exhibit #16.*

In accordance with Rule 240(c), SCACR, Counsel submits the following documents to support this motion:

Exhibit Number	Description
#1	Indictments – murder (2009-GS-27-00494); armed robbery (2009-GS-27-00492); first-degree burglary (2009-GS-27-00493)
#2	Sentence sheets
#3	Plea Transcript dated April 12, 2010
#4	PCR Application dated March 29, 2012
#5	Return and Partial Motion to Dismiss dated December 28, 2012

#6	Order of Dismissal dated October 31, 2013
#7	Pro Se Notice of Appeal
#8	Deficient Notice of Appeal dated December 18, 2013
#9	Deficiency Letter dated December 5, 2013
#10	Order Dismissing Appeal dated January 3, 2014
#11	Remittitur Dated January 22, 2014
#12	PCR Application dated September 10, 2014
#13	Return and Motion to Dismiss All Claims Except <i>Austin</i> Review dated August 19, 2015
#14	Transcript of PCR Hearing dated October 20, 2015
#15	Consent Order Granting Right to Seek Belated Appellate Review Pursuant to <i>Austin v. State</i>
#16	Affidavit of appellate counsel, Joanna K. Delany

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 also 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 also China*, 251 S.C. 329, 162 S.E.2d 276; *Adams v. H.R. Allen, Inc.*, 397 S.C. 652, 726 S.E.2d 9 (Ct. App. 2012); *Dolive*, 308 S.C. 380, 418 S.E.2d 319. The Court of Appeals held “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 quotations omitted).

In *Ladson*, after the reconstruction hearing, the Court was “left with a bare bones summary of the evidence (with more remaining unknown than known) from a lengthy multi-day 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, this Court also noted the record “would effectively foreclose any collateral challenge through post-conviction relief or otherwise.” *Id.* at 327, 644 S.E.2d at 275. Thus, this Court concluded, *Ladson* had demonstrated “clear prejudice.” *Id.*

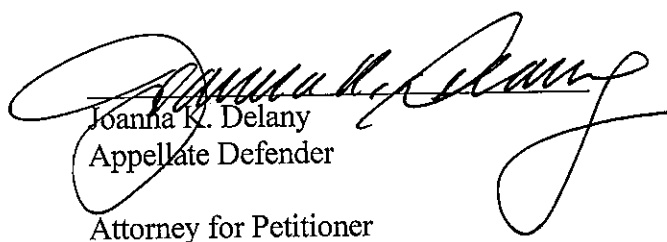
In *Deaton v. Leath*, 279 S.C. 82, 84, 302 S.E.2d 335, 336 (1983), the defendant’s convictions were set aside and a new trial had where the court reporter’s equipment malfunctioned and there was no transcript of the trial court proceedings in the case from which to base an appeal. Citing *Deaton*, the 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 this Court explained was “not a situation where the court reporter’s equipment malfunctioned at trial leading to a loss of the trial transcript.”

Petitioner’s PCR counsel failed to timely serve notice of intent to appeal the PCR hearing. The second PCR court granted Petitioner *Austin* review of his August 27, 2013, PCR

hearing. However, Petitioner is unable to obtain a transcript of the hearing due to the passage of time. Petitioner was not at fault for the loss of his transcript. Meaningful review of the record below is not possible without the transcript. Petitioner therefore seeks reconstruction of the record to permit meaningful appellate review of his PCR hearing, and asks that this Court order a new PCR hearing if the record cannot be reconstructed. Alternatively, in the interest of judicial economy, Petitioner requests a new PCR hearing.

WHEREFORE, Petitioner requests an order for the reconstruction of the August 27, 2013, PCR hearing so as to perfect the belated *Austin v. State* review he was granted. While this motion is pending, Petitioner asks this Court to hold the timelines for filing his petition for writ of certiorari in abeyance.

Respectfully submitted,


Joanna K. Delany
Appellate Defender
Attorney for Petitioner

This 31st day of March, 2023.