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S.C. SUPREME COURT

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

**APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Hon. G.D. Morgan, Jr., Circuit Court Judge**

**Lower Court Case No. 2018-CP-42-03680
Appellate Case No. 2023-001011**

Stepheno Alston Petitioner-Appellant,

v.

The State of South Carolina..... Respondent-Appellee.

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO SUPPLEMENT RECORD ON APPEAL AND/OR
TO TAKE JUDICIAL NOTICE OF ADJUDICATIVE FACTS**

Petitioner-Appellant, Stepheno Alston, proceeding as pro-se, makes this Memorandum of Law in Support of his Motion to Supplement the Record and/ or to take judicial notice of adjudicative facts, pursuant to Rule – 212(b), SCACR and Rule – 201, SCRE. The motion is made seeking Petitioner’s desire to supplement the record with exhibits or other material in the above-entitled cause for setting forth the principal matter contained in his Amended Petition for Writ of Certiorari and Appendix for the reviewing court to which this appeal is being taken, to be part of the record on appeal within the Appendix.

ARGUMENT

I.

THIS COURT SHOULD GRANT PETITIONER'S MOTION TO SUPPLEMENT THE RECORD, TO ALLOW PETITIONER TO SET FORTH THE PRINCIPLE MATTER CONTAINED IN HIS AMENDED PETITION FOR WRIT OF CERTIORARI, PURSUANT TO RULE – 212(b), SCACR,

Petitioner-Appellant states that this Court must take judicial notice or otherwise permit him to supplement the record with the following document pursuant to Rule – 212(b) of the South Carolina Rule of Appellate Practice and Rule – 201 of the South Carolina Rule of Evidence, that has been provided to this Court as Exhibit – 1.

Exhibit-1:

Is an indictment that was amended during Petitioner-Appellant's trial proceedings before the closing of the State's case in *State v. Stepheno Alston*, Docket Case No. 2011-GS-42-3090, that was filed by Asst. Solicitor, J. Edward Hunter in the Spartanburg County General Sessions Court.

The Record on Appeal is the appellate court's source of information as to what occurred in the [lower court]. Its purpose is to inform the court authoritatively of the legal questions contested below and of the facts pertaining to those questions. See 15 S.C. Jur. Appeal and Error § 59 (citation omitted). The Record on Appeal should contain only the information needed to permit the court to decide the issues on appeal; it should contain no irrelevant material. *Id.*

The Record on Appeal should bring clearly and succinctly to the court's attention all necessary elements of the questions on appeal. *Id.* The appellate has the burden of showing that the lower court earned in some respect; to do this, the appellate court must place in the record on appeal evidence sufficient to support his argument. *Id.* The appellate court cannot consider questions relating to points based on facts not in the Record on Appeal. *Id.*

The Appellate Court will not consider any fact not appearing in the record on an appeal, Rule – 210(h), SCACR, unless it appears in a supplement to the record on appeal, Rule – 210(h) and 211, or relate to an undisputed portion of the case history set forth in the parties' statement of

the case, Rule – 210(h), and Rule – 207(b)(1)(c) and (2), SCACR. The record on appeal cannot contain any matter not presented to the lower court or tribunal, Rule – 210(c), SCACR; the same is true for supplements to the record on appeal. See Rule – 211(a), SCACR (appellate court may supplement record on its own motion by requiring copies of all or any part of the transcript of proceedings or “other matter which was before the trial court”); see also *Norris v. Ferre*, 315 S.C. 179, 432 S.E.2d 491 (Ct. App. 1993) (denying party’s motion to supplement record with matters not presented to the trial judge). Accordingly, reversal is not available for an argument based on facts not appearing in the record, *Ravan v. Greenville Cnty.*, 315 S.C. 447, 434 S.E.2d 296 (Ct. App. 1993), or matter not presented to the lower court. See *Henning v. Kaye*, 307 S.C. 436, 415 S.E.2d 794 (1992) (ordering appellate to serve and file amended brief and designation of matter to be included in the record that comply with the appellate court rule and reminding appellate that the record on appeal shall not contain matters not presented to the trial court). The Appellate has the burden of presenting the Supreme Court with an adequate record. *Harkins v. Greenville Cnty.*, 340 S.C. 606, 533 S.E.2d 886 (2000), cert. denied, 721 S.Ct. 880 (2001).

Rule – 212(b) of the Rules of Appellate Practice allows a party to supplement the record at anytime prior to argument with leave of the court. In fairness to the opposing party, that Rule allows the Respondent, in response, to designate any supplemental material which the desires to add if the Court grants Petitioner-Appellant’s motion. Rule – 240(c)(3) of the South Carolina Rules of Appellate Practice provides that where the Record on Appeal does not contain the facts relied upon in support of a motion, the parties may attach other documents in support of their position. The facts which Petitioner-Appellant ask this Court to consider in this Motion relate to a violation of South Carolina Statutory Code Annotated section 17-19-100, that deals with the trial court’s amendment of Petitioner-Appellant’s indictment during his trial right before the State made it’s

closing arguments, a factor that this Court must consider in determining whether to grant the petition for writ of certiorari.

Rule – 201 of the South Carolina Rule of Evidence, governs judicial notice of adjudicative facts. Rule – 201(b), provides that, “a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” A court may take judicial notice, whether requested or not. Rule – 201(c), SCRE. Rule 201(d), provides that, “a court shall take judicial notice if requested by a party *and supplied with the necessary information.*” (emphasis added). A party is entitled to request an opportunity to be heard, “as to the propriety of taking judicial notice and the tenor of the matter noticed.” Such a request may be made after judicial notice has been taken. Rule 201(f), provides that judicial notice may be taken at any stage of the proceeding, including by the Supreme Court.

The Court may take judicial notice of both adjudicative facts and legislative facts, but the rule does not allow a judge to take judicial notice “of a fact merely because it is within his personal knowledge” quoting Rule – 201, SCRE. Providing a party the opportunity to be heard, “appears to be a useful safeguard to protect a party’s rights.” quoting Rule – 201, SCRE (Reporter’s comments, J. Weinstein and M. Berger, Weinstein’s Evidence, ¶ 201[05] (1994).

In *Toole v. Salter, Supra.*, this Court held that, “any evidence that assists in getting at the truth of the issue is relevant and admissible, unless because of some legal rule it is incompetent.” See 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967) (Finding that the trial court erred by failing to take judicial notice of the time of sunset.); see also Reporter’s comments to Rule – 201. *Toole* was reaffirmed by South Carolina Supreme Court in *Anderson v. Buonforte*, 365 S.C. 482, 498, 617 S.E.2d 750, 754 (S.C. 2005) and by the South Carolina Court of Appeals in *Bankers Trust of South*

Carolina v. Bruce, 283 S.C. 408, 417, 323 S.E.2d 523, 529 (S.C. Ct. App. 1984) and in *Butler v. Gamma Nu Chapter of Sigma Chi*, 314 S.C. 477, 480, 445 S.E.2d 468, 470 (Ct. App. 1994).

Here, in this case Petitioner-Appellant desires to supplement the record with exhibits or other material in the above-entitled cause for setting forth the principal matter contained in his amended petition for writ of certiorari and appendix for his issue of challenging the trial court's amendment to his indictment during his trial right before the State made its closing arguments that is attached to this motion as Exhibit-1 and is to be transmitted to this reviewing court to which this appeal is being taken, as part of the record on appeal, whereas, leave to supplement the record will not prejudice the Respondent.

The supplementation of the record is necessary to allow Petitioner-Appellant a fair appeal of his denied Post-Conviction Relief (PCR) application and his denied Rule – 59(e) Motion. Supplementation is also necessary because Petitioner-Appellant wishes to challenge the improper amendment to his indictment by the State during his trial proceedings, which has violated his due process. Whereas, Exhibit-1 is a document filed by Asst. Solicitor, J. Edward Hunter in the Spartanburg County General Sessions Court, insomuch as, the indictment that was amended in that Court during Petitioner-Appellant's trial proceedings is likewise from a source whose accuracy, as having been filed in that Court, cannot be questioned.

In deciding whether it is just and equitable to take judicial notice or to supplement the record with the document that's presented within this motion, the Court should consider that South Carolina Statutory Code Annotated section 17-19-100, governs amendments to indictments that involves "variance between the allegations of the indictment and the evidence offered in proof thereof."

Here in this case, Petitioner desires to supplement the record and/or for this Court to take judicial notice of adjudicative facts with an exhibit or other material in the above-entitled cause for setting forth the principal matter contained in his amended petition for writ of certiorari and appendix, for his issue of challenging the trial court's amendment to his indictment during his trial proceedings right before the State made it's closing arguments, is a document that's attached to this motion as Exhibit-1 and is to be transmitted to this reviewing court to which this appeal is being taken, as part of the record on appeal, whereas, leave to supplement the record and/or to take judicial notice of adjudicative facts, will not prejudice the Respondent.

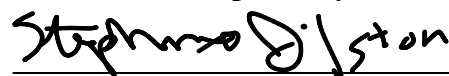
Supplementation of the record is necessary to allow Petitioner-Appellant a fair appeal of his denied Post-Conviction Relief (PCR) application and his denied Rule – 59(e) Motion. Supplementation is also necessary because the Petitioner-Appellant wishes to challenge the improper amendment to his indictment by the State during his trial proceedings, that has violated his due process.

CONCLUSION

For the reasons set out above, Petitioner respectfully request that this Honorable Court grants this Motion to Supplement the Record and/or to take judicial notice of adjudicative facts, pursuant to Rule – 212(b)(c), SCACR, and to Rule – 201, SCRE.

DATED: June 13, 2024

Respectfully Submitted,



**Stepheno Alston, # 355509, Pro-se.
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