

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

ORIGINAL

\_\_\_\_\_

Certiorari to Lexington County

Honorable Edgar W. Dickson, Circuit Court Judge

RECEIVED

SEP 21 2016

QUINCY MCCANTS,

PETITIONER S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2015-002142

\_\_\_\_\_

MOTION TO HOLD APPEAL IN ABEYANCE  
AND  
MOTION TO REMAND FOR RECONSTRUCTION OF POST-CONVICTION RELIEF  
HEARING OR THE GRANTING OF A NEW TRIAL

\_\_\_\_\_

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, undersigned counsel requests an order requiring the parties to reconstruct Petitioner's post-conviction relief hearing originally before the Honorable Edgar W. Dickson held on August 13, 2013. While this motion is pending, Petitioner asks this Court to hold the timelines for filing his appendix and petition for certiorari in abeyance.

In support of his motion, Petitioner would present the following:

1. The undersigned represents Petitioner in his appeal before this Court.

2. The transcript from Petitioner's Post-Conviction Relief hearing cannot be produced or ascertained by the Court Reporter. (See letter from Harriet Bennett dated July 19, 2016, attached as Exhibit A).

3. In order to allow for meaningful appellate review, the record must be reconstructed.

### PROCEDURAL HISTORY

4. During the December 2005 term of court, a Lexington County grand jury indicted Petitioner for armed robbery (2005-GS-32-4674). This case proceeded to trial before the Honorable R. Knox McMahon on October 16, 2006. Petitioner was represented by Jonathan Harvey and Stanley Myers. Petitioner's trial lasted two days.

5. Petitioner was tried, and the jury found him guilty as indicted. Judge McMahon sentenced Petitioner to twenty-two years of imprisonment.

6. Petitioner filed a timely notice of appeal. The South Carolina Court of Appeals affirmed his sentence in an unpublished opinion. State v. McCants, 2009-UP-194 (S.C. Ct. App. filed May 6, 2009).

7. Petitioner filed an application for Post-Conviction Relief in August 2009. The State's Return was filed in February 2010.

8. Petitioner filed an amended application for PCR on or about November 5, 2012.

9. An evidentiary hearing was held before the Honorable Edgar W. Dickson on August 13, 2013. Petitioner was represented by Tricia Blanchette. Respondent was represented by Walt Whitmire of the Office of the Attorney General.

10. Following the evidentiary hearing, an Order of Dismissal (attached hereto as Exhibit B) was issued on November 24, 2014 and filed on or about February 5, 2015.

11. Petitioner filed a Motion for Rehearing or to Alter/Amend the Order of Dismissal on or about February 27, 2015. An order denying the motion was signed on September 7, 2015 and filed on or about September 23, 2015.

12. A notice of appeal was filed on or about October 16, 2015.

13. The undersigned's office first requested the transcript from the August 13, 2013 hearing on January 3, 2015. After repeated follow-up communications, it was determined that Gantt Thomas, the court reporter present at the hearing, had retired. South Carolina Court Administration worked diligently, albeit without success, in order to produce a copy of the transcript.

14. The lost transcript represented the **entire record** of the hearing. Testimony and exhibits alike are unable to be obtained. Crucially, all of Petitioner's testimony was missing.

15. Having spoken with PCR counsel, Tricia Blanchette, the undersigned believes a remand and reconstruction is undoubtedly necessary in order to provide Petitioner with a just and fair appeal.

16. A remand and subsequent reconstruction attempt would ensure that this Court can be provided the most complete and accurate record can be obtained prior to undertaking appellate review of the issues raised in this case.

## ARGUMENT

When a transcript has been lost or destroyed, the Court may remand to have the record reconstructed so as to allow for meaningful appellate review. Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002); China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968); Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004); Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 383, 418 S.E.2d 319, 321 (Ct. App. 1992); State v. Ladson, 373 S.C. 320, 325, 644 S.E.2d 271, 273-274 (Ct. App. 2007).

Petitioner respectfully requests an order for the remand of this matter and subsequent reconstruction of the entirety of Petitioner's PCR hearing in order to perfect the certiorari appeal in this case. A new hearing is appropriate because the incomplete nature of the PCR hearing transcript prevents this Honorable Court from conducting a meaningful appellate review. Ladson at 325, 644 S.E.2d 271, 274. See also In re D.W., 171 N.C.App. 496, 615 S.E.2d 90, 94 (2005); State v. Chanze, 211 W.Va. 257, 565 S.E.2d 379, 382-83 (2002) (finding criminal defendant is entitled to meaningful appellate review of his lower court proceedings, and if this is not possible from a reconstructed record, a new trial is appropriate).

In the present case, the **entire** PCR hearing transcript was lost. A reconstructed transcript of his PCR hearing is necessary for appellate counsel to represent him effectively, and for this Court to give meaningful appellate review of his conviction. Mr. McCants is prejudiced by the fact that there is no transcript from which he can appeal the Order of Dismissal. The Order of Dismissal references *sixteen* of Petitioner's exhibits, none of which are available. To hold the record is sufficient would all but guarantee the affirmance of Petitioner's conviction and twenty-two year sentence without a genuine review.

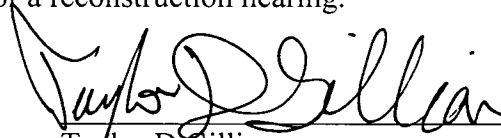
In Ladson, supra, the Court of Appeals noted that ten months transpired after the appeal was filed before the court reporter notified the parties that the recording equipment failed to capture the trial. 373 S.C. at 326, 644 S.E.2d at 274. Such a delay “clearly dimmed the recall of the participants.” Id. In the case *sub judice*, a similar delay exists—the notice of appeal was filed on October 16, 2015 and the undersigned did not become aware of the missing transcript until July 19, 2016. In that nine month span, and certainly in the three year span since the PCR hearing, memories have undoubtedly faded. The resulting lack of information prejudices Petitioner and prevents meaningful appellate review.

Petitioner also respectfully requests that the Order remanding this matter contain language giving the trial court the option to conclude that the record cannot be reconstructed with the specificity to support meaningful appellate review. “It is simply unrealistic and unreasonable to think that a trial judge and counsel can—under these circumstances—reconstruct a proper record that will permit meaningful appellate review, especially in light of our issue preservation rules.” Ladson, 373 S.C. at 326, 644 S.E.2d at 274.

While this motion is pending, Petitioner asks this Court to hold the timelines for filing his petition for certiorari and appendix in abeyance.

WHEREFORE, in order to allow for meaningful appellate review, Petitioner respectfully requests that this Court hold Petitioner’s appeal in abeyance and remand his case to the Lexington County Court of General Sessions for reconstruction of the PCR hearing or the grant of a new trial. Petitioner also requests that this Court hold the timelines for filing the appendix and petition for certiorari in abeyance during the pendency of this motion. The undersigned sought consent from Patrick Schmeckpeper, counsel for the Attorney General, prior to the filing

of this motion. Although Mr. Schmeckpeper was unable to consent, he did state that Walt Whitmire, Esquire, could likely be available for a reconstruction hearing.

A handwritten signature in black ink, appearing to read "Taylor D. Gilliam". The signature is written in a cursive style with a large, stylized initial "T".

Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of September, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

Honorable Edgar W. Dickson, Circuit Court Judge

QUINCY MCCANTS,

PETITIONER

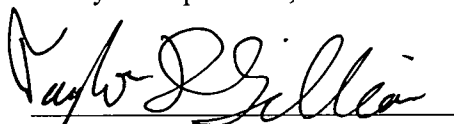
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE


The undersigned hereby certifies that a true copy of the Motion to Hold Appeal in Abeyance and Motion to Remand for Reconstruction of Post-Conviction Relief Hearing or the Granting of a New Trial in the above referenced case has been served upon Patrick Schmeckpeper, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and on Quincy McCants, #318280, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 21st day of September, 2016.



Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 21st day of September, 2016.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: 5/12/2025.