

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Robert E. Hood, Circuit Court Judge

App. Case No.: 2017-002311

Miguel Alejandro Urena, 354385,

Petitioner,

vs.

State of South Carolina,

Respondent.

Petition for Writ
of Certiorari

Tricia A. Blanchette
Post Office Box 2147
Leesville, SC 29070
(803) 908-3266
Attorney for Petitioner

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S.C. SUPREME COURT

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STATEMENT OF ISSUE ON APPEAL

- I. Whether the Lower Court Erred in Finding that Petitioner was not Entitled to a Belated Appeal Pursuant to *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974).

STANDARD OF REVIEW

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact but deference is not given to conclusions of law. *Smalls v. State*, 810 S.E.2d 836 (2018). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling on findings of fact. *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984). Questions of law are reviewed *de novo*, and the appellate court "will reverse the decision of the PCR court when it is controlled by an error of law." *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

STATEMENT OF THE CASE

The records before this Court indicate that on November 8, 2004, Petitioner and Ernie Muriel (hereinafter “Muriel”) were arrested following a traffic stop in Dorchester County.¹ App. p. 1. On December 13, 2004 the Honorable James Williams issued an Order for Bond. App. p. 331. During the March 14, 2005 term of the Dorchester County Grand Jury, Petitioner was indicted for Trafficking in Heroin, more than 28 grams (Indictment No.: 2005-GS-18-0198). App. p. 4. Petitioner retained James A. Bell, Esquire. On March 16, 2006, Petitioner was tried in his absence and his sentence was sealed by the Honorable Lee S. Alford.² App. p. 3.

In November 2010, Petitioner was arrested and detained in New York. Subsequently, he was convicted and received a four years sentence in New York on December 21, 2012. After the completion of his New York sentence, Petitioner was extradited and arrived in South Carolina on January 26, 2013. On February 21, 2013, Petitioner appeared in front of the Honorable Edgar W. Dickson, and Petitioner was represented by James A. Bell, Esquire. Judge Dickson unsealed Petitioner’s twenty-five year sentence. App. p. 6.

Within ten days, Petitioner met with and retained the legal representation of the Honorable Bentley Price, and Adam Young, Esquire.³ App. p. 6. Following the timely filing of a post trial motion, Judge Dickson issued a Consent Order to Modify Sentence on May 13, 2013. App. p. 6. As is reflected in the Order, the Dorchester County

¹ As was explained at the evidentiary hearing, Petitioner asserts his day of arrest was November 5, 2004. App. p. 186.

² As was addressed at the evidentiary hearing, the online records available from the Clerk of Court, at the time of the evidentiary hearing, do not give the disposition date or any reference to the trial in absence, but the records reflect a guilty plea disposition of February 21, 2013. App. p. 332.

³ The Honorable Bentley Price was elected to the circuit court bench in February 2019.

Solicitor's Office conceded knowledge of Petitioner's whereabouts in New York in 2010 and agreed to Petitioner being given credit for time served in New York. App. p. 6.

Per Petitioner, he attempted to file his PCR Application by mailing it to the Dorchester County Clerk of Court on December 17, 2013. App. pp. 219, 335-38. On March 31, 2014, he filed a letter, written by a "law clerk" and "Notice of Belated Appeal" with the South Carolina Court of Appeals. App. pp. 8, 314. On May 21, 2014, the South Carolina Court of Appeals issued an Order dismissing the appeal, which was copied on Adam Young, Esquire and Robert M. Dudek, Esquire. App. p. 16, 323. The Remittitur was issued on June 6, 2014. App. pp. 18, 325.

On May 22, 2015, the instant Application for Post Conviction Relief was filed. App. p. 19. On February 10, 2016, Petitioner, through counsel, filed an Amendment to Application for Post Conviction Relief, which contained the following allegation:

1. Ineffective assistance of James A. Bell, Esquire, Bentley Price, Esquire, and Adam Young, Esquire, for failure to timely file a Notice of Intent to Appeal and properly perfect a direct appeal, which resulted in dismissal of Applicant's pro-se Notice as untimely. As a result, Applicant is requesting a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

App. p. 31.

On September 4, 2015, Petitioner, through counsel, filed a Motion for Discovery. App. p. 26. On February 23, 2016, a motion hearing was conducted in front of the Honorable Maité Murphy at the Dorchester County Courthouse. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Clay Mitchell, Assistant Attorney General.

At the motion hearing, Petitioner's counsel explained that she had contacted Petitioner's prior South Carolina attorneys, and only Attorney Bell had provided very

limited paperwork pertaining to Petitioner's case. To ensure that Petitioner had the case materials needed to properly prepare for an evidentiary hearing, Petitioner's counsel requested the opportunity to issue subpoenas to the appropriate people, offices or agencies for the production of the following case files/materials pursuant to S.C. Code Ann. §17-27-150(a) (2008) limited to those files/materials that were subject to discovery during the underlying criminal proceeding, as follows:

1. A complete copy of Petitioner's file from the Office of Appellate Defense.
2. A complete copy of Petitioner's file from Bentley Price, Esquire, Adam Young, Esquire and James A. Bell, Esquire.
3. A copy of the State Law Enforcement Agency (SLED) file.
4. A copy of Petitioner's file maintained by the Dorchester County Solicitor's Office.
5. A copy of the Dorchester County Sheriff's Department file.
6. A complete copy of the trial and/or sentencing hearing exhibits maintained by the Dorchester County Clerk of Court.
7. The opportunity for Petitioner's counsel, private investigator and potential experts to review the evidence maintained at the Dorchester County Sheriff's Department and SLED (if needed).

In response, Clay Mitchell, Assistant Attorney General, did not object explaining that his file was very limited, but he requested that initially discovery be limited to the attorneys' files and Solicitor's file. After discussion with the Court, Petitioner's counsel was agreeable to Respondent's request that initial discovery be limited in nature and the matter be revisited if needed. On March 21, 2016, Judge Murphy issued an Order Authorizing Discovery, which was filed on March 31, 2016. App. p. 34.

On May 19, 2016, a motion hearing was conducted in front of the Honorable Benjamin H. Culbertson at the Dorchester County Courthouse. Petitioner was present and

represented by Tricia A. Blanchette, Esquire. Respondent was represented by Clay Mitchell, Assistant Attorney General.

Following the call of the case, Petitioner's counsel provided the procedural history detailed above and informed Judge Culbertson that she had issued subpoenas to Bentley Price, Esquire, Adam Young, Esquire, James Bell, Esquire, the S.C. Office of Appellate Defense and the First Circuit Solicitor's Office. Petitioner's counsel marked and admitted a letter from the Solicitor's Office in response to her subpoena stating that a filed could not be located. App. p. 306. Counsel further explained that Mr. Bell sent a letter indicating that he no longer had a file, and the remaining subpoenas produced very little case documents. App. p. 307. As a result, Petitioner's counsel requested the opportunity to subpoena the Dorchester County Sheriff's Department and SLED, as was requested in the Discovery Motion. Respondent did not object to the request. At the conclusion of the hearing, Judge Culbertson granted Petitioner's request, and an Order Authorizing Discovery was issued on May 25, 2016. App. p. 39.

On July 5, 2016, Respondent submitted a Return and Motion to Dismiss, along with a Conditional Order of Dismissal. App. p. 45. Upon receipt, Petitioner's counsel responded, and Respondent rescinded the submissions due to pending discovery. On September 6, 2016, Petitioner, through counsel, filed an Amendment to Application for Post Conviction Relief, which contained the following allegations:

1. Ineffective assistance of James A. Bell, Esquire (trial counsel), [for failure] to preserve issues on the record and preserve the record/transcript of the trial for a direct appeal.
2. Ineffective assistance of post trial counsel, Bentley Price, Esquire, and Adam Young, Esquire, for failure to obtain transcripts of the court proceedings as requested by Applicant, have all motions ruled upon, timely file an appeal (as previously addressed) and/or a PCR Application.

App. p. 58.

On September 7, 2016, Respondent filed an Amended Return and Motion to Dismiss and resubmitted a Conditional Order of Dismissal. App. p. 60. During a phone conference with both parties, the Honorable Diane S. Goodstein instructed Respondent to schedule the case for a motion hearing.

On October 13, 2016, Petitioner, through counsel, submitted an Amendment to Application for Post Conviction Relief, which contained the following allegation:

1. Ineffective assistance of James A. Bell, Esquire (trial counsel) for representing Applicant at trial while having an actual conflict of interest by simultaneously representing Applicant's co-defendant. *See Jordan v. State*, 406 S.C. 443, 752 S.E.2d 538 (2013).

App. p. 68.

On October 25, 2016, a motion hearing was conducted at the Dorchester County Courthouse in front of the Honorable Diane S. Goodstein. App. p. 70. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Johnny E. James, Jr., Esquire, of the Attorney General's Office. Judge Goodstein ruled from the bench in Petitioner's favor and issued an Order on December 12, 2016, which was filed on December 13, 2016. App. pp. 108-9, 160.

On February 16, 2017, Petitioner submitted an Amendment, which amended his Application with the following claim:

1. Ineffective assistance of James A. Bell, Esquire (trial counsel) for failing to properly notify Applicant of his trial date, request a continuance to ensure that Applicant had notice and the ability to be present, and/or ensure that objections were made to the trial in Applicant's absence and raised to the appellate court.

App. p. 168.

On February 27, 2107, an evidentiary hearing was convened at the Dorchester County Courthouse in front of the Honorable Robert E. Hood. App. p. 171. Petitioner was present and was represented by Tricia A. Blanchette, Esquire. Respondent was represented by Ruston W. Neely, Esquire. Petitioner testified, along with James A. Bell, Esquire, and Yesenia Reyes. At the conclusion of the hearing, the court engaged in a lengthy discussion with counsel. Thereafter, the court requested and the State submitted a proposed Order.

On August 22, 2017, an Order of Dismissal was issued, which was filed on August 30, 2017. App. p. 346. A timely Motion, pursuant to Rule 59(a) and (e), SCRCPC, was filed on September 21, 2017. App. p. 364. An Order denying the Motion was issued on September 27, 2017, which was filed on October 4, 2017. App. p. 375.

A timely Notice of Appeal was filed, which was followed by a Motion to Hold Appeal in Abeyance and Motion to Remand for Reconstruction of Record on March 15, 2018. An Order was issued granting the Motion on April 17, 2018. On May 13, 2019, this Court issued a letter lifting the abeyance, from which this Petition follows.

ARGUMENT

I. The Lower Court Erred in Finding that Petitioner was not Entitled to a Belated Appeal Pursuant to *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974).

The lower court erred in finding that Petitioner was not entitled to a belated appeal pursuant to *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974). Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. *See White*, 263 S.C. at 118, 208 S.E.2d at 39. In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738 (1967). *Id.*

Petitioner submits that the lower court's analysis of his *White* claim amounts to an error of law as the lower court failed to properly address the absence of an intelligent waiver and counsel's failure to "initiate an appeal or comply with the procedure in *Anders v. California*." The record before this Court is void of the lower court conducting the proper analysis; therefore, no deference should be given to the lower court's analysis of the factual record. Nevertheless, the lower court's factual analysis is also not supported by the record.

By way of the Order of Dismissal, the lower court addressed the testimony of "sentencing counsel" in support of the following finding: "Sentencing Counsel was under no duty to perfect an appeal for Applicant after concluding their negotiation of time served for Applicant." App. p. 360-1. As the procedural history explains, Petitioner was represented by trial counsel (Mr. Bell) at the opening of his sentence and subsequently retained Adam Young, Esquire, and Judge Price. At the evidentiary hearing, Mr. Bell testified and exhibits were introduced that established that he advised Petitioner of his right to a direct appeal. App. pp. 263, 328. As noted in the Rule 59, SCRCPP, Motion,

Respondent did not call Mr. Young or Judge Price to explain why they failed to file a timely appeal for Mr. Urena after obtaining the Consent Order to Modify Sentence. Yet, the lower court's order cites to the testimony regarding the actions taken by "sentencing counsel" to obtain the Consent Order to Modify the Sentence and the failure to file a direct appeal in such a way that it appears the lower court has merged the representation of Mr. Bell, Mr. Young and Judge Price. App. pp. 360-1. As a result of this confusing and inaccurate analysis of "sentencing counsel's" performance, Petitioner submits that the lower court must be reversed.⁴

The record establishes that during the March 14, 2005 term of the Dorchester County Grand Jury, Petitioner was indicted for Trafficking in Heroin, more than 28 grams (Indictment No.: 2005-GS-18-0198). App. p. 4. Petitioner retained James A. Bell, Esquire. On March 16, 2006, Petitioner was tried in his absence and his sentence was sealed by the Honorable Lee S. Alford.⁵ App. p. 3.

In November 2010, Petitioner was arrested and detained in New York. Subsequently, he was convicted and received a four years sentence in New York on December 21, 2012. App. p. 6. After the completion of his New York sentence, Petitioner was extradited and arrived in South Carolina on January 26, 2013. App. p. 6. On February 21, 2013, Petitioner appeared in front of the Honorable Edgar W. Dickson, and

⁴ In a separate section of the Order entitled "Failure of Sentencing Counsel to Perfect Appeal and Obtain Transcript," the actions of "sentencing counsel" are further discussed in a confusing and erroneous manner. Petitioner incorporates this problematic section of the Order as further support of his argument that the lower court must be reversed for failing to conduct the proper analysis and grant relief under *White*. App. pp. 358-360.

⁵ As was addressed at the evidentiary hearing, the online records available from the Clerk of Court, at the time of the evidentiary hearing, do not give the disposition date or any reference to the trial in absence, but the records reflect a guilty plea disposition of February 21, 2013. App. p. 332.

Petitioner was represented by James A. Bell, Esquire. App. p. 6. Judge Dickson unsealed Petitioner's twenty-five year sentence. App. p. 6.

Within ten days, Petitioner met with and retained the legal representation of Judge Price, Esquire, and Adam Young, Esquire. Following the timely filing of a post trial motion, Judge Dickson issued a Consent Order to Modify Sentence on May 13, 2013. App. p. 6. As is reflected in the Order, the Dorchester County Solicitor's Office conceded knowledge of Petitioner's whereabouts in New York in 2010 and agreed to Petitioner being given credit for time served in New York. App. p. 6.

Per Petitioner, he attempted to file his PCR Application by mailing it to the Dorchester County Clerk of Court on December 17, 2013. App. pp. 219, 335-38. On March 31, 2014, he filed a letter, written by a "law clerk" and "Notice of Belated Appeal" with the South Carolina Court of Appeals. App. pp. 8, 314. On May 21, 2014, the South Carolina Court of Appeals issued an Order dismissing the appeal, which was copied on Adam Young, Esquire and Robert M. Dudek, Esquire. App. pp. 16, 323.

At the evidentiary hearing, Petitioner testified that he had no contact with Mr. Bell following the opening of his sentence. App. pp. 212-13. While at the detention center prior to his transfer to the South Carolina Department of Corrections, he contacted "Mr. Price," and Mr. Adam Young (hereinafter when referenced together "post trial counsel") showed up at the detention center to meet with him two days after his sentencing (Saturday). App. pp. 213-4. He recounted being told by Mr. Young that there were multiple avenues to pursue, but he only had ten days to file an appeal, and he recalled: "He told me that he had to do it. Try that way." App. p. 214, lns. 9-18. He

further explained that he reached out to his family to make arrangements for the retainer of post trial counsel. App. p. 214.

He recalled meeting with post trial counsel at Kirkland Correctional Institution and inquiring about what was being filed on his behalf and asking that counsel obtain his transcript. App. pp. 214-15. He remembered being told that he would be provided his case documents once he reached his “destination” since he was temporarily at Kirkland. App. p. 215.

After arriving at Lee Correctional Institution, he remembered meeting with Mr. Young in December and being provided the signed Consent Order to Modify Sentence.⁶ App. pp. 6, 216. He explained how he became upset about the Order and questioned the accuracy of the Order and what had happened with the direct appeal. App. pp. 216-218. As a result of that meeting, he explained that he chose to not further retain post trial counsel’s services and attempted to file a PCR Application via mail on December 17, 2013. App. pp. 218-21, 335-38. After discovering that his Application was not properly filed, he was informed by inmates that a direct appeal had to be filed first. App. pp. 222-23. So, he submitted a pro-se “Notice of Belated Appeal.” App. p. 223, 300-301.

During cross-examination of Petitioner, Respondent introduced a letter from Judge Price dated December 4, 2013 and was asked about the offer made in the letter to be retained for a PCR Application. App. pp. 236-240. Respondent noted that the letter addressed his request for his case documents and his transcript. App. pp. 239-241, 343-44. He explained that he did not want to further retain Judge Price, so he took the advice

⁶ This December meeting would have been more than ten days after the issuance of the Consent Order to Modify Sentence filed May 13, 2013; thus, outside the ten day time limit for filing an appeal following the issuance of the Order.

in the letter and attempted to file his own PCR Application that same month. App. pp. 239-241, 343-44.

At the evidentiary hearing, Respondent did not call either post trial counsel to address their representation of Petitioner or the letter that Petitioner was questioned about. As is inaccurately reflected in the Order of Dismissal, neither attorney testified to refute Petitioner's testimony that it was his understanding that post trial counsel were retained to perfect a direct appeal on his behalf and not to obtain the Consent Order. Furthermore, neither attorney testified that Petitioner was advised of his right to appeal and that Petitioner knowingly waived such a right when he reported meeting with Mr. Young within ten days of his sentence or issuance of the Consent Order (if considered timely and from which the ten days should have been calculated).

By way of the Order of Dismissal, the lower court has failed to make the proper analysis of Petitioner's request for a belated appeal under *White v. State* and has cited to facts that are not in the record to support the denial of Petitioner's request for the appeal he has repeatedly tried to obtain. In contrast to the lack of evidentiary support for the findings in the Order of Dismissal, the record does establish that trial counsel took no steps to ensure that Petitioner's direct appeal was filed or perfected following the opening of his sentence, that post trial counsel failed to ensure that Petitioner's direct appeal was filed or perfected following the opening of his sentence or Consent Order Modifying Sentence, and that Petitioner wanted and attempted to pursue a direct appeal.

Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. *See White*, 263 S.C. at 118, 208 S.E.2d at 39. In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply

with the procedure in *Anders v. California*, 386 U.S. 738 (1967). *Id.* In the instant case, three retained attorneys failed to ensure that Petitioner was made fully aware of his right to appeal, and obtain an intelligent waiver or initiate an appeal on his behalf. Instead of granting relief, the lower court issued an errant order to reach the result of satisfying his concern, as voiced at the evidentiary hearing, that attorneys would have “go out and pay for a transcript on their own.” App. p. 280, ln. 23-25. Petitioner is entitled to a belated direct appeal and the lower court erred in finding otherwise.

As is conceded the Order of Dismissal, a direct appeal would be “frivolous without a proper record.” App. p. 361. At the evidentiary hearing, PCR counsel addressed the inability to obtain a transcript from the 2006 trial and the letter received indicating that the cassette tapes from the 2013 sentencing hearing were defective. App. p. 305. The Order of Dismissal supports the denial of relief, as follows:

Further, there was no reason to believe a trial transcript would be available 8 years after the trial. A court reporter’s tapes are customarily destroyed or reused if a transcript is not requested within 5 years of the time of the hearing, S.C. Court Rule 607(i). At the time of Sentencing Counsel’s representation in May 2014, the tapes of the trial were 8 years old. Presumably, the tapes had been destroyed and were unobtainable. Without a reconstruction of the record, Applicant lacked any meritorious issues to argue on direct appeal. “It is simply unrealistic and unreasonable to think that a trial judge and counsel can – under these circumstances [the passage of fourteen months] – reconstruct a proper record that will permit meaningful appellate review, especially in light of our issue preservation rules. Furthermore, (defendant’s) own actions are the reason a transcript of the proceedings below is not available.” *Serrette*, 375 S.C. at 652, 654 S.E.2d at 555. Applicant was in New York from 2005 to 2012. Thus, any grounds for a potential direct appeal would be moot and frivolous without a proper record.

App. p. 361.

The facts are not as simple as the Order finds. By way of the Consent Order, the State conceded knowing the whereabouts of Petitioner as early as 2010, which is within

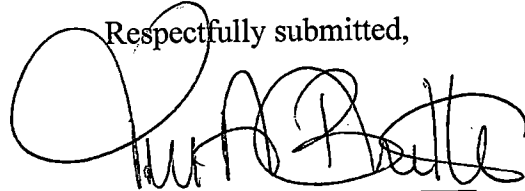
the timeframe when the trial transcript would have been available, but the State admitted to being unable to extradite Petitioner. App. pp. 303-304. As a result, the State agreed, against precedent, to give Petitioner credit on his current unrelated sentence for the time served in New York. App. pp. 303-4. Now, Respondent, who drafted the Order of Dismissal, seems to ignore this admission and simply wants to blame Petitioner for being out of State during the time in which his transcript should have been available.

As was testified to by Petitioner, argued by PCR counsel and argued in the Rule 59, SCRCPP, Motion, Petitioner urged the court to find that the proper relief was a new trial in the absence of a record of his original trial and sentencing. App. pp. 285, 297-97. At this juncture and under this complicated procedural history, it is a matter of fundamental fairness that the record must be reconstructed and/or a new trial granted. Petitioner submits that the remedy for the absence of records and transcripts is not to deny relief and excuse the actions of the State and three attorneys, but it is to acknowledge the prejudice Applicant has suffered by having no meaningful collateral review of a trial that resulted in a mandatory twenty-five year sentence and order a new trial.

CONCLUSION

Based upon the above argument and record before this Court, Petitioner would respectfully ask that this Court grant certiorari, allow briefing of the issue addressed herein, and/or reverse the denial of post conviction relief.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tricia A. Blanchette', written over a horizontal line.

Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
(803) 908-3266
Attorney for Petitioner

August 8, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
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Post Conviction Relief

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S.C. SUPREME COURT

Honorable Robert E. Hood, Circuit Court Judge

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Miguel Alejandro Urena, 354385,

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vs.

State of South Carolina

Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Petitioner, hereby certify that a copy of the Petition for Writ of Certiorari and Appendix were hand delivered to Benjamin H. Limbaugh, Assistant Attorney General, this 12th day of August 2019 at the following address:

Office of the Attorney General
ATT: Benjamin H. Limbaugh, Ast. AG
1000 Assembly Street, 5th Floor
Columbia, SC 29201



Tricia A. Blanchette
S.C. Bar No. 74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266

August 12, 2019

LAW OFFICE OF
TRICIA A. BLANCHETTE

RECEIVED

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S.C. SUPREME COURT

August 12, 2019

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

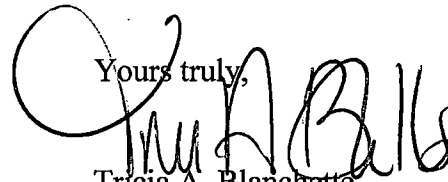
RE: Miguel Alejandro Urena v. State; Appellate Case No.: 2017-002311

Dear Sir:

For filing, attached please find an original and six copies of a Petition for Writ of Certiorari and an unbound and one bound copy of the Appendix for the above referenced case. Also attached please find a Certificate of Service.

Thank you for your assistance with this matter. Please let me know if any further information is needed.

Yours truly,



Tricia A. Blanchette
Attorney at Law

cc: Benjamin H. Limbaugh, Office of the Attorney General
Miguel Urena