

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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**Mar 22 2021**

**SC Court of Appeals**

APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas  
Post Conviction Relief

Honorable Robert E. Hood, Circuit Court Judge

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App. Case No.: 2017-002311

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Miguel Alejandro Urena, 354385, Petitioner,

vs.

State of South Carolina, Respondent.

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MOTION TO HOLD APPEAL IN ABEYANCE  
AND  
MOTION TO REMAND FOR RECONSTRUCTION  
OF TRIAL AND SENTENCING OR THE GRANTING OF A NEW TRIAL

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Pursuant to Rule 240 of the South Carolina Appellate Court Rules, undersigned counsel requests an Order requiring the parties to reconstruct Petitioner's trial held before the Honorable Lee S. Alford on March 16, 2006 and sentencing held in front of the Honorable Edgar W. Dickson on February 21, 2013 if such cannot be done the granting of a new trial. While this motion is pending, Petitioner asks this Court to hold the timeliness for filing the brief ordered on February 23, 2021 in abeyance.

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

1. The undersigned represents Petitioner in his appeal before this Court.
2. The transcript of Petitioner's trial and sentencing hearing cannot be produced as was addressed in the Petition for Writ of Certiorari, transcript of the

evidentiary hearing and Order of Dismissal issued by the Honorable Robert E. Hood on August 22, 2017.

3. In order for meaningful appellate review the record must be reconstructed or a new trial granted due to the inability to reconstruct the record, as addressed in the Petition for Writ of Certiorari and herein.

### PROCEDURAL HISTORY

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.<sup>1</sup> App. p. 1. Petitioner retained James A. Bell, Esquire. 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. On March 16, 2006, Petitioner was tried in his absence and his sentence was sealed by the Honorable Lee S. Alford.<sup>2</sup> App. p. 3.

In November 2010, Petitioner was arrested and detained in New York. On December 21, 2012, Petitioner was convicted and received a four-year sentence in New York. 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. Petitioner was represented by

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<sup>1</sup> As was explained at the evidentiary hearing on the application for post conviction relief, Petitioner asserts his day of arrest was November 5, 2004. App. p. 186.

<sup>2</sup> As was addressed at the evidentiary hearing, the online records available from the Clerk of Court did 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. Additionally, 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.

James A. Bell, Esquire. Judge Dickson unsealed and pronounced 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.<sup>3</sup> 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 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 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, Petitioner filed an Application for Post Conviction Relief. App. p. 19. On February 10, 2016, Petitioner, through counsel, filed an Amendment to Application for Post Conviction Relief. 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

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

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 South Carolina 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 file 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 yielded few 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 originally 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 Conditional Order of Dismissal due to pending discovery. On September 6, 2016, Petitioner, through counsel, filed an Amendment to Application for Post Conviction Relief. 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. 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 to his Application for Post Conviction Relief. App. p. 168.

On February 27, 2017, 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. 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), SCRCPP,

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 following the transcription of the evidentiary hearing transcript in accordance with the Order of the Honorable Robert E. Hood.

On August 12, 2019, the Petition for Writ of Certiorari and Appendix were filed. On December 15, 2019, the Return was filed by Respondent. On February 23, 2021, this Court issued an Order granting the petition for writ of certiorari and directing Petitioner to file his appellant's brief within thirty days, from which this motion follows.

#### ARGUMENT

It is well established that the Court may remand to have the record reconstructed to allow for a meaningful appellate review when the transcript has been lost or destroyed. *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002), *China v. Parrot*, 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). As a result of this established precedent, Petitioner respectfully requests an order for remand of this matter and subsequent reconstruction of the entirety of Petitioner's trial and sentencing to perfect the brief ordered by this Court. A reconstruction and/or granting of a new trial is proper because the absence of transcripts prevents this Court from conducting a meaningful appellate process of the granted belated direct appeal. *Ladson* at

325, 644 S.E.2d at 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, 382-383 (2002) (Finding criminal defendant is entitled to meaningful appellate review of his lower court proceedings, and if this not possible form a reconstructed record, a new trial is appropriate.).

In the instant case, the trial transcript cannot be produced and the sentencing hearing tapes are defective. App. p. 305. A transcript of both proceedings are necessary for counsel to represent Petitioner effectively and address on appeal whether the trial court made proper findings prior to the trial in absentia and to address the motions trial counsel asserted were made while testifying at the evidentiary hearing. App. pp. 260-261, 266.

Furthermore, Petitioner is prejudiced by the absence of a transcript on which to rely in pursuing this Court's grant of a belated direct appeal. As was argued at the motion and evidentiary hearings, the absence of a transcript should not be attributed to Petitioner's absence since the State of South Carolina acknowledged knowing he was detained in New York when the transcript would have been available and agreed against precedent to give him credit for time served in New York. App. pp. 303-304. Additionally, retained trial, sentencing and post-trial motion counsel each failed to obtain a transcript. As is addressed in the exhibit entered by the State at the evidentiary hearing, Petitioner asked post trial counsel to obtain his transcript. App. pp. 343-344. Finally, this Court has found that Petitioner is entitled to a belated direct appeal, which should have been filed by counsel following the issuance of the Order by Judge Dickson on May 13, 2013 and the transcripts ordered.

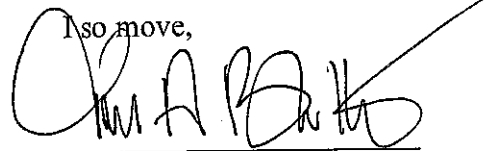
In *Ladson*, this Court noted that ten months transpired after the appeal was filed and before the court reporter notified the parties that the recording equipment had failed to capture the trial. 373 S.C. at 326, 644 S.E.2d at 274. This court reasoned that the delay “clearly dimmed the recall of the participants.” *Id.* Here, the testimony of trial counsel is available to review from the evidentiary hearing, and it is clear from his testimony about the trial that was held “a very long time ago” that his memory is limited and his file has been destroyed. App. pp. 256, In. 13-16, 258-259, 262, 266, 307. Additionally, by invoking the discovery process while the post conviction relief application was pending, Petitioner discovered that files could not be produced by the First Circuit Solicitor’s Office, South Carolina Law Enforcement Division, and South Carolina Commission on Indigent Defense. App. pp. 306, 308, 312. Based upon the record, Petitioner does not have to speculate that memories have faded and files may not be available, it is known. Therefore, undersigned counsel must request that the Order remanding the 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 and a new trial is required.<sup>4</sup> As was addressed in *Ladson*: “It is simply unrealistic and unreasonable to think that a trial judge and counsel can – under the 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.

Finally, Petitioner requests that during the pending of this Motion this Court hold the timeliness for filing the brief ordered on February 23, 2021 in abeyance.

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<sup>4</sup> Upon review of the records and testimony before him, this was the conclusion reached by the Honorable Robert E. Hood. App. p. 361.

Therefore, in order to allow for a meaningful appellate review of Petitioner's direct appeal, Petitioner respectfully requests that this Court hold Petitioner's appeal in abeyance and remand to the Dorchester County Court of General Sessions for reconstruction of the trial and sentencing record or the grant of a new trial.<sup>5</sup> Petitioner also requests that the timeliness of the filing of the brief ordered on February 23, 2021 be held in abeyance during the pendency of this motion.

In so move,  


Tricia A. Blanchette  
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(803) 908-3266

March 22, 2021

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<sup>5</sup>During the pendency of this appeal, Petitioner, through counsel, moved for reconstruction of the evidentiary hearing transcript, as is addressed above. Yet, Petitioner, through counsel, did not file the instant motion until after this Court's order granting the opportunity to go forward with a belated direct appeal since the issue was not ripe for consideration due to the denial of a belated direct appeal by the Order issued by the Honorable Robert E. Hood.

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SC Court of Appeals

APPEAL FROM DORCHESTER COUNTY  
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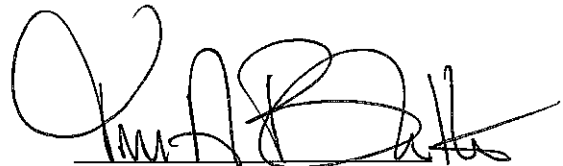
Respondent.

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Motion to Hold Appeal in Abeyance and Motion to Remand for Reconstruction of Trial and Sentencing or the Granting of a New Trial has been served on opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Samantha Jo Weidauer, Esquire  
sammieweidauer@scag.gov

This 22<sup>nd</sup> day of March 2021.



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March 22, 2021



Tricia Blanchette &lt;blanchettelaw@gmail.com&gt;

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**Miguel Urena v. State**

1 message

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**Tricia Blanchette** <blanchettelaw@gmail.com>  
To: Sammie Weidauer <sammieweidauer@scag.gov>  
Cc: Lindsey McCallister <lmccallister@scag.gov>

Mon, Mar 22, 2021 at 10:29 AM

Sammie:

For the above referenced PCR appeal, I have attached a letter, motion and certificate of service that I will be uploading to the Court of Appeals for e-filing today. I have discussed this case with Lindsey, so I am copying her on this email. I am sending and serving on you since you are listed as the attorney of record. I will be printing and attaching this email to the certificate of service.

Please do not hesitate to contact me with any questions.

Thanks,

Tricia


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Tricia Blanchette  
Attorney at Law


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**3 attachments**

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LAW OFFICE OF  
**TRICIA A. BLANCHETTE**

March 22, 2021  
VIA E-FILING

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

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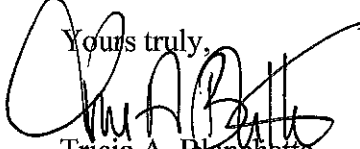
**SC Court of Appeals**

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

Dear Madam Clerk:

For filing with your office, I will be uploading in conjunction with this letter a Motion to Hold Appeal in Abeyance and Motion to Remand for Reconstruction of Trial and Sentencing or the Granting of a New Trial. I will also be uploading a Certificate of Service and email verifying service.

Please let me know if any additional information is needed. I appreciate your assistance with this matter.

Yours truly,  
  
Tricia A. Blanchette  
Attorney at Law

cc: Lindsey McCallister, Esquire  
Samantha Jo Weidauer, Esquire  
Miguel Alejandro Urena