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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Dorchester County
Robert E. Hood, Post-Conviction Relief Judge
Appellate Case No. 2017-002311

MIGUEL URENA,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN IN OPPOSITION TO PETITIONER’S MOTION TO HOLD APPEAL IN
ABEYANCE AND MOTION TO REMAND FOR RECONSTRUCTION OF TRIAL AND
SENTENCING OR THE GRANTING OF A NEW TRIAL AND RESPONDENT’S
MOTION TO DISMISS APPEAL**

Respondent the State of South Carolina, through its undersigned counsel, makes the following return in opposition to Petitioner Miguel Urena’s “motion to hold appeal in abeyance and remand for reconstruction of trial and sentencing or the granting of a new trial” and makes a cross-motion to dismiss the appeal, and respectfully shows unto the Court as follows:

I. PROCEDURAL HISTORY

Petitioner is presently confined in the South Carolina Department of Corrections. On November 8, 2004, Petitioner and co-defendant were arrested following a traffic stop on I-95 in Dorchester County as they were driving south from New York. The following day, the Dorchester County Sheriff’s Department sought and obtained an arrest warrant against Petitioner

for trafficking in heroin, based on his possession of approximately 225 grams of a brown powder which field-tested presumptive for heroin.

Petitioner retained James A. Bell, Esquire (Bell). On December 13, 2004, upon Petitioner's motion, the Honorable James C. Williams issued an Order for Bond reducing bond from \$150,000.00 to \$75,000.00 surety and \$75,000.00 personal recognizance. Petitioner achieved release through a bondsman on December 15, 2004, on the condition that he not leave South Carolina, amongst other terms. However, at some an unknown time thereafter, Petitioner violated the express provisions of his bond and absconded from the state.

During its March 2005 term, the Dorchester County Grand Jury indicted Petitioner for trafficking in heroin – more than 28 grams (2005-GS-18-198). On March 15, 2006, the State called Petitioner's case to trial before the Honorable Lee S. Alford and a jury. Petitioner failed to appear, and accordingly, Judge Alford issued a bench warrant for Petitioner's arrest and the case proceeded in Petitioner's absence. On March 16, 2006, the jury convicted Petitioner as indicted, and Judge Alford sentenced and then sealed Petitioner's sentence.¹

In November 2010, Petitioner was arrested in New York on a separate, unrelated charge. Petitioner was convicted of that New York charge in December 2012 and received a four-year sentence, which he completed in mid-January 2013. However, Petitioner was held on the March 16, 2006, bench warrant and extradited to South Carolina on January 26, 2013. On February 21, 2013, Petitioner appeared before the Honorable Edgar W. Dickson and was again represented by Bell. Judge Dickson unsealed Petitioner's sentence and imposed a term of imprisonment of twenty-five years. Petitioner did not appeal his conviction or sentence.

¹ Petitioner and a co-defendant were tried jointly. The co-defendant was present at the trial and was acquitted of all charges.

On February 21 or 22, 2013, Petitioner contacted counsels Bentley Price, Esquire² (Price), and Adam Young, Esquire (Young), to assist in attempting to receive credit for the period of time he was incarcerated in New York.. Young met with Petitioner in the Dorchester County Detention Center on February 23, 2013, and agreed to represent Petitioner, along with Price, on a post-trial motion to modify Petitioner’s sentence. On May 13, 2013, Judge Dickson issued a Consent Order to Modify Sentence, giving Petitioner credit for the “786 days of incarceration that he served in New York and South Carolina prior to his sentencing...”

Petitioner subsequently spoke with Price and Young in June 2013, and they discussed the possibility of pursuing post-conviction relief. Price sent Petitioner a letter dated December 4, 2013, which contained a copy of the Consent Order to Modify Sentence. The letter explained Petitioner owed a balance of \$5,000.00 on the original representation agreement for the motion to modify sentence and stated Petitioner could retain Price to represent him in a PCR action for a fee of \$20,000.00. However, Price indicated he was not filing a PCR action and would only do so if Petitioner retained him. Thereafter, Petitioner made no further contact with either Price or Young.

Petitioner asserts that he attempted to file a PCR application by mailing it to the Dorchester County Clerk of Court on December 17, 2013. However, the clerk of court has no record of receiving this application, and no application was ever filed.

On May 5, 2014, the Court of Appeals received Petitioner’s *pro se* “Notice of Belated Appeal,” “Memorandum of Law in Support of Appellants’ Motion for the Appointment of Counsel and Belated Notice of Appeal for Good Cause Shown,” and an accompanying letter written by a “law clerk.” The Court issued an order dismissing the appeal (Appellate Case No.

² The Honorable Bentley Price was elected to the circuit court bench in February 2019.

2014-001000) for untimeliness on May 21, 2014, and copied Young and Chief Appellate Defender Robert M. Dudek of the South Carolina Commission on Indigent Defense-Office of Appellate Defense. The remittitur returned to the circuit court on June 6, 2014.³

Petitioner then retained his current counsel, Tricia A. Blanchette, Esquire, to pursue post-conviction relief, and on May 22, 2015, nearly *six* years before the filing of this motion, Petitioner, through counsel Blanchette, filed this underlying action for post-conviction relief, in which he alleged the following grounds for relief:

1. “Ineffective assistance of trial counsel.”
 - a. “Failure to properly prepare Applicant prior to trial.”
 - b. “Failure to call witnesses and utilize evidence.”
2. “Ineffective assistance of appellate counsel.”
 - a. “Failure to raise all meritorious issues on appeal.”

On September 4, 2015, Petitioner, through counsel, filed a motion for discovery seeking permission to subpoena records from Petitioner’s previous attorneys and the Dorchester County Solicitor’s Office. By amendment filed February 10, 2016, Petitioner added the following allegation:

1. “Ineffective assistance of James A. Bell, Esquire, Bentley Prices, 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 the 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).”

A hearing on this discovery motion commenced on February 23, 2016, before the Honorable Maite Murphy. Petitioner was present and represented Blanchette. Petitioner’s motion for discovery was granted by order dated March 21, 2016. However, because ten years had

³ To Respondent’s knowledge, at no time during the pendency of this appeal did Petitioner order or attempt to order the trial and sentencing hearing transcripts.

passed since Petitioner's trial, Petitioner was unable to acquire complete files from either Bell or the Dorchester County Solicitor's Office.⁴

Thereafter, Petitioner filed a second motion for discovery, seeking law enforcement files. On May 19, 2016, a second discovery motion hearing convened before the Honorable Benjamin H. Culbertson. By order dated May 25, 2016, Judge Culbertson granted Petitioner's request for further discovery and extended the discovery order to include the files of the Dorchester County Sheriff's Office and SLED. These subpoenas produced few, if any, documents regarding Petitioner's underlying case, as the requests were sent over a decade after the trial, and the majority of records from this time had been either lost or destroyed.

Respondent thereafter made its Return and Motion to Dismiss on July 5, 2016, requesting the application be dismissed as untimely, barred by the equitable doctrine of laches, and barred by the doctrine of fugitive disentitlement. Respondent also submitted a proposed Conditional Order of Dismissal along with its return. Thus, Petitioner was on notice at least as of July 2016 that Respondent intended to seek summary dismissal in this case.

On September 6, 2016, Petitioner, through counsel, filed a second amendment to allege the following claims:

1. Ineffective assistance of James A. Bell, Esquire (trial counsel) 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.

Respondent filed an Amended Return and Motion to Dismiss and submitted a Conditional Order of Dismissal to the court on September 7, 2016. During a phone conference with both parties,

⁴ James Bell testified at the PCR evidentiary hearing that he retired from the practice of law and closed his practice on December 31, 2015, at which time, any files that were more than four years old, including Petitioner's, were shredded.

then-chief administrative judge for the First Judicial Circuit, the Honorable Diane S. Goodstein, instructed Respondent to schedule the case for a hearing on Respondent's motion to dismiss.

On October 13, 2016, Petitioner filed a third amendment to include 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).

On this same date, counsel for Petitioner notified Respondent that the recording of the sentencing hearing was defective and unable to be transcribed. However, Petitioner took no action to attempt to reconstruct the sentencing record.

A hearing on Respondent's Motion to Dismiss was held before Judge Goodstein at the Dorchester County Courthouse on October 25, 2016. In an order dated December 12, 2016, Judge Goodstein denied Respondent's Motion to Dismiss and ordered the matter be scheduled for an evidentiary hearing. Again, Petitioner took no action to attempt reconstruction of the trial and sentencing record, despite by this time knowing that neither transcript was available and his efforts at discovery had failed to reconstruct either the State's or the defense files.

On February 16, 2017, Petitioner, through counsel, submitted a fourth amendment alleging 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 at trial in Applicant's absence and raised to the appellate court.

The evidentiary hearing convened before the Honorable Robert E. Hood on February 27, 2017. Petitioner was present and was represented by Blanchette. Petitioner testified on his own behalf, along with his sister, Yesenia Reyes, and trial counsel, James Bell. In an order dated August 22, 2017, and filed August 30, 2017, Judge Hood denied Petitioner's Application for

post-conviction relief. On September 27, 2017, Petitioner filed a timely motion pursuant to Rule 59(a) and (e), SCRCF. Judge Hood denied Petitioner's Rule 59 motions in an order filed October 4, 2017.

Petitioner then filed a timely Notice of Appeal. Subsequently, due to severe inaccuracies with the original transcribed evidentiary hearing transcript, Petitioner, through counsel Blanchette, filed a Motion to Hold Appeal in Abeyance and Motion to Remand for Reconstruction of the Record on March 15, 2018.⁵ The South Carolina Supreme Court granted the motion in an order dated April 17, 2018, and remanded the matter to Judge Hood "to hold a hearing to determine if the portions of the recording of the evidentiary hearing deemed inaudible by the transcribing court reporter can be discerned and agreed upon by the parties, and if not, for reconstruction of the record of petitioner's testimony." The hearing commenced before Judge Hood on July 23, 2018. As a result of the hearing, the transcript was ultimately reconstructed to both parties' satisfaction, and Judge Hood issued an order dated April 22, 2019, finding "the purpose of the remand has been met" and sending the matter back to the Supreme Court.

On May 13, 2019, the Supreme Court ordered the abeyance lifted. Petitioner filed a petition for writ of certiorari in the Supreme Court on August 12, 2019. Respondent filed its return on December 15, 2019. By order dated January 7, 2020, the Supreme Court transferred the case to this Court for disposition pursuant to Rule 243(l), SCACR. On February 23, 2021, this Court issued an order granting certiorari as to the PCR court's finding Petitioner was not

⁵ While Petitioner moved to reconstruction the record of the PCR evidentiary hearing, at no time did he move to include the trial and/or sentencing hearing in the reconstruction, even though, by that time, he had been on notice for several years that the records of those proceedings were also unavailable.

entitled to belated appellate review of direct appeal issues, and directing Petitioner to file an initial brief within thirty days.⁶

Thereafter, Petitioner filed a “Motion to Hold Appeal in Abeyance and Motion to Remand for Reconstruction of the Trial and Sentencing or the Granting of a New Trial” on March 22, 2021, over four years from when he first learned the transcripts were unavailable after discovering neither could be transcribed.

II. RETURN TO THE CURRENT MOTION BEFORE THIS COURT

In his “Motion to Hold Appeal in Abeyance and Motion to Remand for Reconstruction of the Trial and Sentencing or the Granting of a New Trial,” Petitioner argues reconstruction of the record of Petitioner’s trial and sentencing is necessary in order to perfect the briefs requested by this Court and obtain meaningful appellate review. Petitioner argues, however, that reconstruction is most likely impossible given the recordings of the trial have been destroyed,⁷ the recordings from the sentencing are damaged and unable to be transcribed, and none of the parties involved in the criminal action – Bell, Young, Price, the Dorchester County Solicitor’s Office, the Dorchester County Sherriff’s Office, or SLED – have been able to produce a complete file, or any significant of documentation regarding the underlying criminal case.

Respondent agrees reconstruction will most likely not be fruitful given the significant delay caused by Petitioner’s willful decision to abscond from the State prior to trial and to remain a fugitive from justice for seven years. However, rather than granting Petitioner a new trial, this Court should dismiss the appeal and uphold the PCR court’s denial of relief.

⁶ Petitioner sent a letter, dated March 8, 2021, requesting clarification of the Court’s order to file an “initial brief,” rather than a final brief, and requesting to hold the timeline for filing in abeyance pending further direction from the Court. The Court responded on March 18, 2021, directing the parties to file their briefs in final brief format.

⁷ See Rule 607(i), SCACR (instructing court reporters to retain tapes and records for a five-year period, after which the tapes may be destroyed).

The usual course of action in instances where a transcript cannot be produced is to remand the matter back to the trial court for reconstruction of the record. See 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). However, in this case it was Petitioner's actions, **and his actions alone**, in fleeing the state prior to trial and remaining a fugitive for seven years, which resulted in an inability to produce a record of his trial, the loss of memory of the facts and circumstances surrounding the matter by necessary witnesses, and the destruction of files. See State v. Serrette, 375 S.C. 650, 652, 654 S.E.2d 554, 555 (Ct. App. 2007) (finding the defendant's willful decision to remain a fugitive from justice for nearly eleven years following his conviction for drug trafficking presented an obstacle to orderly appellate review in that such decision led to destruction of trial transcript, and thus, upon defendant's notice of appeal, he was not entitled to remand for reconstruction hearing; appeal was dismissed). Granting Petitioner a new trial would reward his conduct in absconding prior to trial and prejudices the State by requiring it to re-prosecute a crime for which it no longer has records. See Ortega-Rodriguez v. United States, 507 U.S. 234, 249 (1993) (noting "a long escape, even if ended before sentencing and appeal, may so delay the onset of appellate proceedings that the Government would be prejudiced" and "this problem might, in some instances, make dismissal an appropriate response."). Petitioner's counsel was on notice as of at least July 2016, upon the filing of Respondent's Return and Motion to Dismiss, that the trial recordings had been destroyed and were unable to be transcribed, but Petitioner took no action to reconstruct the record at that time. Now, *fifteen years* have passed since Petitioner's trial.

Additionally, Petitioner's delay also caused the current inability to reconstruct the sentencing hearing. Petitioner was on notice as of October 13, 2016, that the sentencing hearing

tapes were defective and unable to be transcribed. See Attachments 1 and 2. However, Petitioner took no action at that time to reconstruct the record, when the parties were only three years removed from the proceeding, and now a further four and a half years have passed.

Therefore, Petitioner's contention he is entitled to a new trial is without merit. It is Petitioner/Appellant's burden to provide an adequate record for review. State v. Hutto, 279 S.C. 131, 303 S.E.2d 98 (1983). In this case, Petitioner cannot provide such a record because of *his* decision first to flee from justice in South Carolina and then to delay in seeking the remedy of reconstruction. Reconstruction and belated appellate review are both remedies based in equity and the idea of providing every defendant with the proverbial "one full bite at the apple." Here, however, it would be unjust and unfair to the State to grant Petitioner a new trial if the record cannot be reconstructed because it is his actions which necessitate the need for reconstruction in the first place. See Aaron v. Mahl, 381 S.C. 585, 594, 674 S.E.2d 482, 487 (2009) ("The doctrine of unclean hands 'precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.'") (citations omitted). Finally, if Petitioner succeeds in his request for a new trial, it would only encourage other defendants to abscond or to avoid the judicial process and then secure a new trial when the record cannot be reconstructed due to the passage of time.

III. PRAYER FOR RELIEF

Based on the foregoing, Respondent respectfully asks this Court to deny Petitioner's "Motion to Hold Appeal in Abeyance and Motion to Remand for Reconstruction of the Trial and Sentencing or the Granting of a New Trial." Rather, given the delay was caused solely by Petitioner's actions in absconding from the state prior to trial and remaining a fugitive for seven

years, the appropriate course of action is to dismiss the appeal. Respondent requests this Court to hold the appeal in abeyance until these matters have been ruled upon.

WHEREFORE, Respondent prays this Court will deny to Petitioner’s “Motion to Hold Appeal in Abeyance and Motion to Remand for Reconstruction of the Trial and Sentencing or the Granting of a New Trial,” and dismiss the appeal with prejudice, holding the matter in abeyance pending a ruling on these motions.

Respectfully submitted,

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Deputy Attorney General

By: s/Lindsey A. McCallister
Lindsey A. McCallister

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

April 1, 2021

Attachment 1

Lindsey McCallister

From: Tricia Blanchette <blanchettelaw@gmail.com>
Sent: Thursday, October 13, 2016 4:04 PM
To: Ruston Neely; Johnny James
Subject: Miguel Urena
Attachments: urena-10132016155452.pdf

Gentlemen:

I have attached the letter I received from the court reporter in the mail today and an Amendment I am mailing out today.

I have emailed the 3 prior attorneys to see if they can be present for the 25th. I subpoenaed them for the 26th, and I don't plan to re-issue subpoenas as I discussed with Ruston.

I had an interpreter for the 26th. I am trying to get one for the 25th. Due to the interpreter, would you all be willing to agree to call the case after lunch?

Thanks,

Tricia

--

Tricia Blanchette
Attorney at Law

Law Office of Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
803-988-0008

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Attachment 2

HARRIET P. BENNETT
Reporter, S. C. Court Administration
46 Regency Oaks Drive
Summerville, S.C. 29485

October 4, 2016

Tricia A. Blanchette, Esq.
P. O. Box 12725
Columbia, S. C. 29211

IN RE: State v. Miguel Alejandro Urena
2005 GS 18 0198

Dear Ms. Blanchette:

Desiree Allen of Court Administration has forwarded to me your letter requesting a transcript of the sentencing in the above case on February 21, 2013, as taken by retired Reporter Harry Walker.

I am sorry to tell you that the cassette tapes sent to me along with the request letter dated on and around the February date are defective, and that a transcript cannot be produced in this case.

Very truly yours,



Copy to Ms. Desiree Allen
Court Admin.

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Dorchester County
Court of Common Pleas
The Honorable Robert E. Hood, Circuit Court Judge

Appellate Case No. 2017-002311

MIGUEL URENA,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PROOF 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 **Return To Motion To Hold Appeal In Abeyance And Motion To Remand For Reconstruction Of Trial And Sentencing Or The Granting Of A New Trial and Respondent's Motion to Dismiss** has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Tricia A. Blanchette, Esquire
blanchettelaw@gmail.com

This 1st day of April, 2021.

s/ Lindsey A. McCallister
LINDSEY A. MCCALLISTER
Assistant Deputy Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
lmccallister@scag.gov



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ALAN WILSON
ATTORNEY GENERAL

April 1, 2021

The Honorable Jenny Abbott Kitchings
Clerk of Court
Court of Appeals of South Carolina
P.O. Box 11629
Columbia, SC 29211

Re: Miguel A. Urena v. State of South Carolina
Appellate Case No. 2017-002311

Dear Ms. Kitchings:

Enclosed please find the original copy of the **Return To Motion To Hold Appeal In Abeyance And Motion To Remand For Reconstruction Of Trial And Sentencing Or The Granting Of A New Trial and Respondent's Motion to Dismiss** in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

s/ Lindsey A. McCallister

Lindsey A. McCallister
Assistant Deputy Attorney General
S.C. Bar # 79054

LAM/kw
Enclosures

cc: Tricia A. Blanchette, Esquire (via email only)
Victim Advocacy Division