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**Apr 09 2021**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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

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MIGUEL URENA,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

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**REPLY TO RETURN TO RESPONDENT'S MOTION TO DISMISS APPEAL**

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Respondent the State of South Carolina, through its undersigned counsel, makes the following reply to Petitioner Miguel Urena's return to Respondent's motion to dismiss appeal, and respectfully shows unto the Court as follows:

**I.**

In his Return to Respondent's Motion to Dismiss Appeal, Petitioner states his belief Respondent is arguing he should have simply filed a Final Brief as directed in this Court's March 18, 2021 letter, and calls this position "disingenuous." Respondent is not arguing Petitioner should have simply filed a Final Brief, nor is Respondent asserting Petitioner's motion was frivolous. Respondent's position has always been that the appropriate time to make a motion to reconstruction is before briefs are filed by either side. However, Petitioner himself admits in his motion that it is highly unlikely the trial and sentencing record can be reconstructed due to the passage of time and the lack of nearly all records pertaining to this case from the State, defense

counsel, and law enforcement. Therefore, there is no meaningful way for this Court and the parties to engage in the belated direct appellate review Petitioner has requested. Petitioner's proposed solution is for this Court to grant a new trial; Respondent disagrees. Instead, this Court should dismiss the appeal.

While the record clearly reflects that Petitioner initially sought to order the relevant transcripts and rebuild both the State's and the defense's files, ordering a transcript and engaging in discovery is not equivalent to moving for reconstruction of the record. Once Petitioner learned the trial and sentencing transcripts were unavailable – which he knew at least by October 2016 – Petitioner should have moved to reconstruct the record of those hearings. Petitioner asserts he did not do so because “reconstruction was not ripe for this Court's consideration until the belated direct appeal was granted and the lower court was reversed.” The authority to reconstruct the record, however, rests with the trial court, and there is no requirement that the directive to reconstruct the record must come from an appellate court. See State v. Ladson, 373 S.C. 320, 324, 644 S.E.2d 271, 273 (Ct. App. 2007) (“South Carolina jurisprudence recognizes the trial court's authority to set the record for appeal.”) (citing Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 383, 418 S.E.2d 319, 321 (Ct. App. 1992) (trial court did not err in granting request to reconstruct the record made via Rule 59(e), SCRPC, motion)). Additionally, the trial and sentencing transcripts would have been of obvious use in determining the post-conviction relief issues raised by Petitioner, not only the direct appeal issues.

Petitioner could have and should have moved to reconstruct the record *at least* prior to the PCR evidentiary hearing, which Judge Goodstein ordered via written order dated December 12, 2016, and Petitioner failed to do so. He now asks this Court to grant him a new trial due to the current inability to reconstruct, which is a situation entirely of his own making, starting with his

willful decision to abscond from this state prior to trial, his remaining a fugitive from justice for seven years, and now his belated request for reconstruction of the record.

## II.

As Respondent has previously acknowledged, 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). In this particular case, then, Serrette, not Whitehead, should control the outcome and the appeal should be 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 any significant 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.”). Respondent therefore asks this Court to dismiss the appeal as there is no record from which the parties and this Court can engage in meaningful review of direct appeal issues.

**III.**

Based on the foregoing coupled with the arguments raised in the State’s Return 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 Respondent’s Motion to Dismiss Appeal, the State respectfully asks this Court to grant its motion and dismiss the appeal. Furthermore, the State requests this Court to hold the appeal in abeyance until this matter has 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 Petitioner’s motion.

Respectfully submitted,

ALAN WILSON  
Attorney General

LINDSEY A. MCCALLISTER  
Assistant Deputy Attorney General

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

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

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Appellate Case No. 2017-002311

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MIGUEL URENA,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**PROOF OF SERVICE**

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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 **Reply to Return to 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 9<sup>th</sup> day of April, 2021.

s/ Lindsey A. McCallister  
LINDSEY A. MCCALLISTER  
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SC Court of Appeals

ALAN WILSON  
ATTORNEY GENERAL

April 9, 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 **Reply to Return to 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