STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Berkeley County
R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DERRICK JOSEPH MILES,

PETITIONER

Opinion No. 2022-UP-338 (S.C. Ct. App. Filed August 10, 2022)

APPELLATE CASE NO. 2019-000958

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that pursuant to the South Carolina Court of Appeals' Opinion issued in this case on August 10, 2022, a petition for rehearing was filed on August 25, 2022, which was denied by the South Carolina Court of Appeals on November 2, 2022.

QUESTION PRESENTED

The Court of Appeals erred in holding that the question of whether petitioner received house arrest credit, which was an unresolved matter, qualified as a moot issue in the case.

STATEMENT OF THE CASE

Petitioner Derrick J. Miles pled guilty to second degree burglary during the July 2013 term of the Berkeley County General Sessions Court before Judge Stephanie P. McDonald and was sentenced to a negotiated fifteen-year prison term. Petitioner was represented by William Runyon at the plea proceeding, and Assistant Solicitor Colleen Dixon appeared on behalf of the state. Petitioner did not enjoy the benefit of a direct appeal in the case.

On December 23, 2013, petitioner filed a PCR application with the Berkeley County Office of the Clerk of Court. An amended PCR application was filed on June 19, 2015. Tr. 26. The respondent filed a return dated March 31, 2015, requesting that a hearing be held in the case.

A PCR hearing was convened on July 21, 2015, at the Charleston County Courthouse before Judge Roger E. Henderson. Petitioner was present at the hearing and represented by Lance S. Boozer, and Assistant Attorney General J. Rutledge Johnson appeared on behalf of the state. On August 28, 2015, Judge Henderson issued an Order of Dismissal denying petitioner's claims of ineffective assistance of counsel in the case.

Petitioner appealed Judge Henderson's Order of Dismissal. Per the PCR appeal, the South Carolina Supreme Court issued an Order dated June 21, 2017, remanding the case on the question of whether "petitioner should be given credit for time served on house arrest." See Derrick J. Miles v. State, Memorandum Opinion No. 2017-MO-012 (filed June 21, 2017). A Remand Sentencing Hearing was held on May 28, 2019, at the Berkeley County Courthouse before Judge R. Markley Dennis. Petitioner was present at the hearing and represented by the undersigned counsel and Assistant Bryan Alfaro appeared on behalf of the state. Per Order dated May 29, 2019, Judge Dennis denied sentencing relief on the request for house arrest credit. Petitioner appealed and filed a brief with the South Carolina Court of Appeals on November 22,

2019. The Respondent filed a brief on March 5, 2020. On August 10, 2022, the South Carolina Court of Appeals issued an Opinion holding that the issue raised on appeal as moot. Tr. A petition for rehearing was filed on August 25, 2022, which was denied on November 2, 2022, by the South Carolina Court of Appeals. Tr. This Petition for Writ of Certiorari to the Court of Appeals follows.

STANDARD OF REVIEW

A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support. In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010). In criminal cases, the appellate court sits to review errors of law only. State v. Vick, 384 S.C. 189, 197, 682 S.E.2d 275, 279 (Ct. App. 2009) (quoting State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). The appellate court is "'bound by the trial court's factual findings unless they are clearly erroneous.'" Id. (quoting Wilson, 345 S.C. at 5-6, 545 S.E.2d at 829). The reviewing court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." State v. Slocumb, 412 S.C. 88, 91, 770 S.E.2d 436, 438 (Ct. App. 2015).

ARGUMENT

The Court of Appeals erred in holding that the question of whether petitioner received house arrest credit, which was an unresolved matter, qualified as a moot issue in the case.

Petitioner was arrested and jailed for first degree burglary on October 25, 2011, but granted release on bail per an Order Setting Bond filed on June 29, 2012. Tr. 80; Tr. 82. On July 25, 2013, petitioner pled guilty to second degree burglary at the Berkeley County General Sessions Court before Judge Stephanie P. McDonald. During the plea proceeding, Judge McDonald gave petitioner time served credit for the months that he spent in jail only from October 25, 2011, to his release on bond on June 29, 2012.

However, at no point during the plea proceeding did trial counsel request time served for the **second** 365 days that followed jail time when petitioner was on house arrest (while out on bond) from June 2012 through July 2013. Petitioner pled guilty on July 25, 2013. Subsequently, petitioner filed a PCR action. A PCR hearing was held on July 21, 2015, before Judge Roger E. Henderson.

During the PCR hearing, petitioner testified that he did not receive his full time served credit, i.e., "one year in the county jail [**plus**] three hundred seventy-eight days under house arrest with GPS monitoring" per S.C. Code Ann. 24-13-40. Tr. 32, lines 15-22. In other words, petitioner received credit for time served while jailed, but failed to receive time served credit while out on bond during house arrest.

Trial counsel testified at the PCR hearing and admitted that he failed to request time served credit for petitioner from 2012-2013 during which time petitioner was on house arrest under the ankle monitor while out on bond, and agreed that "[he] probably should have called that to the court's attention." Tr. p.57, l. 18 – p. 58, l. 7.

The PCR judge ruled that petitioner failed to meet his burden of proof that counsel promised him credit for time served on house arrest. Tr. 77. On PCR appeal, petitioner raised the following:

Did trial counsel err in failing to request time served credit (for house arrest)?

On June 21, 2017, the South Carolina Supreme Court held as follows:

> Petitioner seeks a writ of certiorari from the denial of his application for [PCR]. The petition for a writ of certiorari is granted. We...direct the court of general sessions to determine if, in its discretion, petitioner should be given credit for time served on house arrest. *See* S.C. Code Ann. § 24-13-40 (Supp. 2016) (stating sentence credit "may be given for any time spent under monitored house arrest"). **REMANDED**.See Miles v. State, Memorandum Opinion No. 2017-MO-012 (June 21, 2017).

During the Remand Sentencing hearing held in the case, counsel for petitioner argued that the plea judge was never presented with the request for house arrest time served credit due to ineffective assistance of trial counsel in that counsel failed to raise the issue at the plea proceeding; and therefore, the purpose of the remand sentencing hearing was to explore the question of whether the issue of house arrest credit had been considered by the plea judge and withheld from petitioner. Remand Sentencing Hearing Transcript p. 5, l. 22 – p. 6, l. 20; p. 10, l. 6 – p. 11, l. 18. The record indicated that the issue of house arrest credit was overlooked, and that trial counsel failed to raise the matter at the plea proceeding. Hence, the inescapable conclusion reached is that because the matter was not addressed by trial counsel at the plea proceeding, and the record is devoid of any proof that the plea judge considered house arrest credit, then it appeared that petitioner did not receive his due house arrest credit by the plea judge. The prejudice was obvious in that if house arrest time served credit had been granted to petitioner by the plea judge, then a shortened sentence would have been the result.

The Remand Sentencing hearing judge ruled that since the plea judge sentenced petitioner per a negotiated sentence, then this automatically meant that the plea judge had already considered

house arrest credit as a part of the negotiated sentence; and went on to summarily and erroneously dismiss the issue of whether the plea judge considered house arrest credit for petitioner. Remand Sentencing Hearing Transcript p. 7, l. 5- p. 8, l. 22, p. 11, l. 19 – p. 15, l. 25. This assumption made by the Remand Sentencing hearing judge lacked evidentiary support. To the contrary, the Remand Sentencing hearing judge's assumption that the plea judge contemplated house arrest credit and factored the same into the negotiated sentence was untenable as trial counsel admitted that he did not make the request for house arrest credit to the plea judge. Counsel's failure to request house arrest credit begged the question of whether the plea judge considered and included house arrest credit in finalizing the negotiated sentence. There is no proof that the plea judge did so.

The case began as a PCR action. The PCR judge ruled that trial counsel did not err in failing to request that house arrest time credit be calculated into petitioner's sentence at his plea proceeding. On appeal, the argument was that trial counsel erred indeed in failing to request house arrest credit for petitioner during his time spent on house arrest before he pled guilty.

The South Carolina Supreme Court Remanded for a determination as to whether "if in its discretion, [petitioner] should be given credit for time served on house arrest."

The Remand Sentencing judge ruled that since the plea judge sentenced petitioner per a negotiated sentence, then this automatically meant that it could be assumed that the plea judge had already considered house arrest credit as part of the negotiated sentence.

On appeal of the Remand Sentencing judge's ruling, this issue was raised:

> The remand sentencing hearing judge erred in denying appellant's request for time served credit accrued during his house arrest/GPS monitoring time per S.C. Code Ann. 24-13-40 on the assumption that the plea judge considered the matter as the sentence was a negotiated sentence because trial counsel admitted during the PCR hearing that he failed to bring the issue of house arrest/GPS monitoring credit to the attention of the plea judge at the plea proceeding

The Court of Appeals accepted the conclusion of the Remand Sentencing judge's "assum[ption] that the plea [judge] in its discretion chose not to award [petitioner] credit for the time he spent under house arrest, particularly because the plea negotiation reduced the charge from first-degree burglary, which can carry a life sentence." The Court of Appeals held:

> We granted Miles' petition for writ of certiorari to review whether the remand court erred by denying Miles' request for time served credit pursuant to 24-13-40. However, [appellant's] issue is moot as he is no longer in prison and has fully served his sentence. As such, any decision we could make as to the merits of his case would have no practical legal effect. See Hayes v. State, 413 S.C. 553, 558, 777 S.E.2d 6, 9 (Ct. App. 2015) (explaining an individual's completion of a sentence renders an appeal on the propriety of that sentence moot); see also Midland Guardian Co. v. Thacker, 280 S.C. 563, 566, 314 S.E.2d 26, 28 (Ct. App. 1984) ("Before any action
>
> Nor does [appellant's] issue fall under an exception to the mootness doctrine. The issue here is not whether 24-13-40 granted the plea court discretion in awarding credit for time served under house arrest (it did), but whether Miles' counsel was ineffective in not asking for the credit on Miles' behalf. No ruling we could issue would have any practical effect on Miles, who has fully served the sentence imposed and pointed to no remaining collateral effect of the sentence he received that gives rise to a justiciable controversy. Miles' claim is therefore not a statutory interpretation question which evades judicial review. See State v. Simpson, 429 S.C. 83, 88-89, 837 S.E.2d 669, 672 (Ct. App. 2020)

The fact that petitioner has now served the sentence handed down does not render the issues in this case moot when the issues are capable of repetition yet evading review. In McClam v. State, 386 SC 49, 686 S.E.2d 203 (2009), the Court held that moot appeals result when intervening events render a case nonjusticiable and when judgement, if rendered, will have no practical effect on the controversy and no effective relief can be granted. In State v. Cohen,

Unpublished Opinion No. 2019-UP-162 (2019), the Court listed the following three general exceptions to the mootness doctrine where an appellate court may take jurisdiction:

1.) If the issue raised is capable of repetition yet evading review;

2.) If there is an imperative and manifest urgency to establish a rule for future conduct in matters of important public interest; and

3.) If a decision by the trial court may affect future events or have collateral consequences for the parties, even if the appellate court cannot give effective relief in the present case.

Sentencing credits (home detention, good time credits, and earned time credits etc.) are problems that fall in the category of capable of repetition yet evading review, and our Courts have expressly held this to be so. For example, in Hayes v. State, 413 S.C. 553 777 S.E.2d 6 (Ct. App. 2015), the sentencing issue that was capable of repetition arose where the defendant argued that his reinstated sentence upon revocation of probation exceeded the maximum authorized by law because sentencing credit for time served was not applied by SCDC; and although the issue was moot as the defendant had completed his sentence, nonetheless the Court held that the issue was reviewable as capable of repetition yet evading review. The Hayes Court went on to hold that the defendant who received a split sentence upon revocation of probation was entitled to credit for time served against his reinstated sentence. Certiorari was ultimately dismissed in Hayes as improvidently granted. Moreover, in State v. Simpson, 429 SC 83, 837 S.E.2d 669 (2020), the Court held that an otherwise moot question as to whether the defendant should have been subject to a mandatory minimum sentence rather than sentenced to home detention in a sex case definitely qualified for review as one capable of repetition yet evading review even though the defendant had served his sentence. Additionally, in Nelson v. Ozmint, 390 S.C. 432, 702 S.E.2d 369 (2010), the Court held that the question of calculating good time and/or earned work credits qualified as issues that were capable of repetition yet evading review.

THE IMPROPER ASSUMPTION OF AUTOMATIC HOUSE ARREST CREDIT INCLUSION IN PETITIONER'S NEGOTIATED SENTENCE

In the case at bar, petitioner's issue on appeal involved a negotiated sentencing issue, specifically with respect to whether it can be assumed that time served credit for house arrest had been automatically included in the negotiated sentence where counsel did not request this, and where the record did not support such an assumption of automatic inclusion, and where petitioner's service of his sentence would not render the issue moot. There is no rule that exempts S.C. Code Ann. Section 24-13-40 from applying in negotiated sentencing cases. Clearly, this negotiated sentencing matter raised by petitioner is capable of repetition yet evading review and should not be deemed moot because petitioner has served his sentence. Petitioner's case falls under the same sentencing vein as Hayes and Simpson, and would constitute an exception to the mootness rule. The unique fact or wrinkle here is that petitioner's sentence was a negotiated sentence, and the question surrounding whether petitioner's negotiated sentence automatically included home detention credit would qualify his case under the capable of repetition exception as there was no proof that petitioner's negotiated sentence automatically included credit for time served. Also, counsel for petitioner was ineffective in failing to question the plea judge as to whether the negotiated sentence included time served credit baked therein. Thus, the question of whether the receipt of house arrest credit for time served for petitioner had been automatically included in his negotiated sentence (without proof of the same) as an assumption of the same would constitute error, and a sentencing matter capable of repetition yet evading review. Such an assumption would risk a ruling that **negotiated** sentences are not bound by 24-13-40 for house credit inclusions therein. Again, petitioner's having served his sentence would not eliminate the issue of whether house arrest credit can be excluded in negotiated sentences.

THE IMPROPER EXCLUSION OF HOUSE ARREST CREDIT IN PETITIONER'S NEGOTIATED SENTENCE AFTER A REDUCTION OF THE CHARGE TO A LESSER ONE

Finally, the issue of excluding house arrest credit in petitioner's negotiated sentence because the negotiated sentence involved a reduced charge is another issue that is capable of repetition yet evading review, and cannot be considered moot because petitioner has served his sentence. Petitioner was indicted for first degree burglary, but sentenced on a reduced charge of second degree burglary; and the question arose as to whether house arrest credit applied in such a scenario or excludable on a discretionary basis. Clearly, the house arrest credit statute cannot be construed to exclude house arrest credit simply because the negotiated sentence is on a reduced charge. The Court of Appeals appeared to accept this rationale as a reasonable discretionary option. Again, petitioner's service of his sentence in this case would not prohibit this scenario from occurring again; and therefore, the issue of whether house arrest credits would apply to a negotiated sentence on a reduced charge is capable of repetition yet evading review.

Hence, petitioner's sentencing issues are sentencing issues that are clearly an exception to the rule of mootness and are capable of repetition yet evading review, regardless of the fact that petitioner has served his sentence. There is no proof that petitioner's **negotiated** sentence included house arrest time served credit.

The PCR judge and the Remand Sentencing judge erred in denying petitioner's request for time served credit rightly accrued to him during his detention while on house arrest. The Court of Appeals erred in holding that the question of whether petitioner received house arrest credit, which was an unresolved matter, qualified as a moot issue in the case.

CONCLUSION

Based on the foregoing arguments, counsel for petitioner requests that this Court grant the petition and allow full briefing on the above raised issue.

Respectfully Submitted,

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ATTORNEY FOR PETITIONER

This 2nd day of December, 2022.

RECEIVED
Dec 02 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
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R. Markley Dennis, Circuit Court Judge

THE STATE,

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DERRICK JOSEPH MILES,

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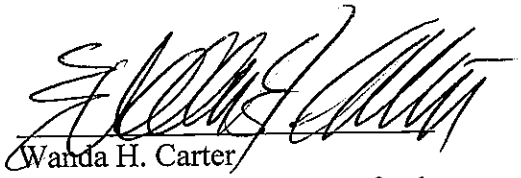
Opinion No. 2022-UP-338 (S.C. Ct. App. Filed August 10, 2022)

APPELLATE CASE NO. 2019-000958

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Writ of Certiorari to the Court of Appeals and Appendix in the above-referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and the South Carolina Court of Appeals; and on Derrick Joseph Miles, #307815, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 2nd day of December, 2022.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

From:	Leverett, Scott
To:	SC - BLITCH WILLIAM
Cc:	SC - COLLINS CAROLINE; Carter, Wanda
Subject:	Derrick J. Miles - Petition for Writ of Certiorari to the Court of Appeals - Appelate Case No. 2019-000958
Date:	Friday, December 2, 2022 3:50:00 PM
Attachments:	Derrick J. Miles - Petition for Writ of Certiorari to the Court of Appeals - Appelate Case No. 2019-000958.pdf AG coverletter COA Cert.pdf Derrick J. Miles - Appendix - Appelate Case No. 2019-000958.pdf

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Dear Mr. Blitch,

Attached please find a copy of the petition for writ of certiorari to the Court of Appeals and accompanying appendix in the above referenced case that is being filed today, December 2, 2022, with the Supreme Court and with the Court of Appeals.

-Scott Leverett
Admin. Asst. for Wanda Carter
Appellate Defense