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 20, 2022)

APPELLATE CASE NO. 2019-000958

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Derrick Joseph Miles, Appellant.

Appellate Case No. 2019-000958

Appeal From Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge

Unpublished Opinion No. 2022-UP-338
Submitted June 1, 2022 – Filed August 10, 2022

DISMISSED

Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General William M. Blitch, Jr., and Assistant Attorney General Jonathan Scott Matthews, all of Columbia, and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

PER CURIAM: In this post-conviction relief (PCR) action, Derrick J. Miles challenges the circuit court's order denying him credit for time for 387 days he spent under global positioning system (GPS) monitored house arrest before he pled guilty. Miles argues the circuit court abused its discretion by assuming the plea court considered but declined to give him credit for time spent under house arrest when it sentenced him pursuant to a negotiated sentence. We dismiss the petition as moot.

I.

In 2012, a Berkeley County grand jury indicted Miles for first-degree burglary. On July 25, 2013, Miles pled guilty to second-degree burglary pursuant to a negotiated plea of fifteen years' imprisonment. The plea court accepted Miles' negotiated plea, and sentenced Miles to fifteen years with credit for time served in county jail. About a month before the sentencing, S.C. Code Ann. § 24–13–40 (Supp. 2021) was amended to allow a sentencing court, in its discretion, to award a defendant credit for time served while under GPS monitored house arrest. Miles' plea counsel never requested credit for or mentioned the 387 days Miles spent under house arrest.

In December 2013, Miles filed an application for PCR, asserting his plea counsel was ineffective for not requesting credit for the time he served while under house arrest. The PCR court denied Miles' application, finding Miles failed to show plea counsel promised him credit for the time served under house arrest or that he was prejudiced by plea counsel's performance.

Miles then filed a petition for a writ of certiorari. Our supreme court granted the petition and remanded to the circuit court to determine if Miles should be given credit for time served under house arrest. *Miles v. State*, No. 2015-001997, 2017 WL 4873347, at *1 (2017). On remand, the circuit court concluded the record reflected a negotiated sentence, and therefore, it assumed the plea court in its discretion chose not to award Miles 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.

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, Petitioner'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

can be maintained, of course, there must exist a 'justiciable controversy.'" (quoting *Dantsler v. Callison*, 227 S.C. 317, 321, 88 S.E.2d 64, 66 (1955))); *Guimarin & Doan, Inc. v. Georgetown Textile & Mfg. Co*., 249 S.C. 561, 566, 155 S.E.2d 618, 621 (1967) ("A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character."); *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973) ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.").

Nor does Petitioner'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) (finding "that the sentencing question raised … [was] capable of repetition yet generally evades review in that the suspension of mandatory minimum sentences continues to occur in circuit court, but due to the duration of the home detention or probationary portions of such sentences, the question presented here generally evades review"); *Hayes v. State*, 413 S.C. 553, 558, 777 S.E.2d 6, 9 (Ct. App. 2015) (taking jurisdiction, despite mootness, because the issue of whether the Department of Probation, Parole and Pardon Services (DPPPS) misapplied the plain language of the statute explaining how prison time should be calculated was capable of repetition but evading review); *Nelson v. Ozmint*, 390 S.C. 432, 433–34, 702 S.E.2d 369, 370 (2010) (addressing moot issue of the DPPPS' calculation of the prisoner's sentence as not including good time credits or earned work credits because it was an issue that was capable of repetition, yet it would usually evade review). Therefore, Petitioner's application for PCR is

DISMISSED.[1]

GEATHERS and HILL, JJ., and LOCKEMY, A.J., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

DERRICK JOSEPH MILES,

APPELLANT

APPELLATE CASE NO. 2019-000958

Appeal from Berkeley County

Honorable R. Markley Dennis, Circuit Court Judge

Opinion No. 2022-UP-338

PETITION FOR REHEARING

Pursuant to Rules 240 and 221, SCACR, counsel for appellant would petition for rehearing on the ground that this Court might have overlooked error in the assumption that a plea judge's issuance of a negotiated sentence automatically included house arrest credit when the record is devoid of such an assumption, and also error in the acceptance that the plea judge's sentence could exclude house arrest credit as a matter of discretion since the negotiated plea bargain reduced the charge from first degree to second degree burglary to avoid a life sentence, because both of these issues were not moot, but rather remain questions capable of repetition yet evading review, and not barred from review because appellant has served his sentence.

Appellant 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, appellant pled guilty to second degree burglary at the Berkeley County General Sessions Court before Judge McDonald. During the plea proceeding, Judge McDonald gave appellant 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 appellant was on house arrest (while out on bond) from June 2012 through July 2013. Appellant pled guilty on July 25, 2013. Subsequently, appellant filed a PCR action. A PCR hearing was held on July 21, 2015, before Judge Henderson.

During the PCR hearing, appellant 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, appellant 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 appellant from 2012-2013 during which time appellant 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 appellant failed to meet his burden of proof that counsel promised him credit for time served on house arrest. Tr. 77. On PCR appeal, appellant 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 appellant 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 appellant. 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 appellant 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 appellant 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 appellant 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 appellant. 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 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 at appellant's sentence at his plea proceeding. On appeal, the argument was that trial counsel erred indeed in failing to request house arrest credit for appellant 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, [appellant] should be given credit for time served on house arrest."

The Remand Sentencing judge ruled that since the plea judge sentenced appellant 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

This Court accepted the conclusion of the Remand Sentencing judge's "assum[ption] that the plea [judge] in its discretion chose not to award [appellant] 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." Also, this Court held that:

> 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 appellant 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 APPELLANT'S NEGOTIATED SENTENCE

In the case at bar, appellant'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 appellant'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 appellant is capable of repetition yet evading review and not deemed moot because appellant has served his sentence. Appellant'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 appellant's sentence was a negotiated sentence, and the question surrounding whether appellant's negotiated sentence automatically included home detention credit would qualify his case under the capable of repetition exception as there was no proof that appellant's negotiated sentence automatically included credit for time served. Also, counsel for appellant 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 appellant 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, appellant's having served his sentence would not eliminate the issue of whether house arrest credit can be excluded in negotiated sentences.

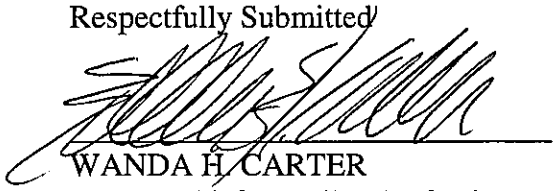
THE IMPROPER EXCLUSION OF HOUSE ARREST CREDIT IN APPELLANT'S NEGOTIATED SENTENCE AFTER A REDUCTION OF THE CHARGE TO A LESSER ONE

Finally, the issue of excluding house arrest credit in appellant'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 appellant has served his sentence. Appellant 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. This Court appeared to accept this rationale as a reasonable discretionary option. Again, appellant'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, appellant'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 appellant has served his sentence. There is no proof that appellant's **negotiated** sentence included house arrest time served credit.

WHEREFORE, based on the forgoing points mentioned above, counsel for appellant would request that this Court grant the petition for rehearing.

Respectfully Submitted,



WANDA H. CARTER
Deputy Chief Appellate Defender

This 25th day of August, 2022

SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

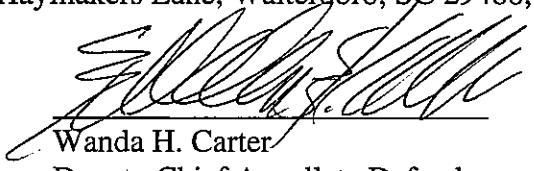
DERRICK JOSEPH MILES,

APPELLANT

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 Rehearing in the above-entitled case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and upon Derrick Joseph Miles, at 220 Haymakers Lane, Walterboro, SC 29488, this 25th day of August, 2022.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

The South Carolina Court of Appeals

The State, Respondent,

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Derrick Joseph Miles, Appellant.

Appellate Case No. 2019-000958

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
William M. Blitch, Jr., Esquire
Wanda H. Carter, Esquire
Jonathan Scott Matthews, Esquire
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The Honorable R. Markley Dennis, Jr.

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