

RECEIVED

AUG 19 2016

S.C. SUPREME COURT

Re: Salas V. State

Appellate Case No.2016-001479

Dear: Clerk Mr. Shearouse:

Please find enclosed a Motion to Vacate Form 4 and to remand to lower Court to issue a Properly file final order I am filing with the Court. The opposing counsel has been served.

Respectfully Submitted,

Wilfredo Salas
Wilfredo Salas, #347611.

August 18th, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

AUG 19 2016

S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
STILWELL ROBIN, PRESIDING JUDGE

APPELLATE CASE No. 2016-001479.

Wilfredo Salas,

Petitioner,

Vs.

State of South Carolina,

Respondent.

Motion to Vacate Form 4 and Remand to Lower
Court to issue a Properly Filed Final Order

Comes Now, Wilfredo Salas, the petitioner in the above caption matter respectfully moving in this Honorable Court on a Motion to Remand to Lower Court to Issue a Proper Final Order. Petitioner will show unto this Honorable Court the following:

I.

The petitioner filed a Rule 60(b)(4)(5), SCRC Motion to Vacate his PCR Judgment in Wilfredo Salas Vs. State, (2012-CP-23-03341). See Attachment (A) (Rule 60(b) Motion). Petitioner filed a Motion For Summary Judgment Pursuant to Rule 56 (c), SCRC. See Attachment (b).

However, on July 1, 2016 petitioner received a "Form 4" indicating his Rule 60(b) and Motion For Summary Judgment was denied because he failed to comply with the South Carolina Rules of Civil Procedure and for lack of Merits.

This "Form 4" does not show the "Respondent neither the petitioner" being served with the Suppose to be Order. The Honorable Judge who denied petitioner's Motions names are not legible and does not make Specific finding of Fact and Conclusion of Law. See Attachment (c) It is argued by petitioner this Form 4 is not A Properly Filed Final Order. Therefore, this Court should Vacate the Form 4 Order and issue a order directing the lower Court to issue a properly file final appealable order. Finally, is asked that all briefing be held in abeyance until this motion is adjudicated.

Respectfully Submitted,

Wilfredo Salas
Wilfredo Salas, #347611.

RECEIVED

AUG 19 2016

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
STILWELL ROBIN, PRESIDING JUDGE

Appellate Case No. 2016-001479

Wilfredo Salas,

Petitioner,

Vs.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I, Wilfredo Salas, hereby certify that I did serve Petitioner's Motion to
~~Vacate~~ Form 4 and to remand to lower Court to issue a Properly file Final
Order on:

Attorney General Office
John B. Aplin, Esquire
P.O. BOX 11549
Columbia, S.C 29211

by depositing a copy in the mail with sufficient funds on this 18th day of
August, 2016.

Respectfully Submitted,

Wilfredo Salas

Wilfredo Salas, #347611.
Kershaw Correctional Inst.
4848 Goldmine Hwy.
Kershaw, S.C 29067.

Attachment (A)

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL T. HICKS, CLERK
2015 JUN 20 AM 11:50

Handwritten initials

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
Wilfredo Salas, #347611,
Applicant,
v.
State of South Carolina,
respondent

IN THE COURT OF COMMON

Case No.: 2012-cp-23-3341

MOTION TO VACATE JUDGMENT
PURSUANT TO SCRPC Rule 60(b)
(4), (5)

ENTERED COMPUTER

Comes Now Wilfredo Salas, the Applicant in the aboved captioned matter respectfully moving this Honorable Court on a motion to vacate judgment pursuant to SCRPC Rule 60(b), (4), (5). Applicant would show this Court the following:

PROCEDURAL BACKGROUND

The Applicant plead guilty in Greenville County August 8, 2011, to Lewd Act on a minor. See Enl The Applicant received a maximum sentence of fifteen (15) years. (2011-GS-23-6255). Scott D. Robinson, Esquire represented the applicant. On August 17, 2011 Counsel filed a timely "post-trial" motion to "Reconsider the sentence" See Attachment (A) (Motion for Reconsideration of sentence). As to this date an Order has not been issued concerning this motion. See Attachment (B) (Letter from Clerk of Court dated January 5, 2015)

On May 17, 2012 Applicant filed a post-conviction relief application and on August 31, 2012 the State made its return.

Enl The Applicant was originally charged with criminal sexual conduct with a minor less than ten years of age. The State agreed to reduce the charge in exchange for Lewd Act on a minor.

cc - AG office

An evidentiary hearing into the matter was convened on October 23, 2013 at the Greenville County Courthouse. The Honorable Edward W. Miller issued an Order dated January 7, 2014 filed January 8, 2014. Before the time expired to perfect an appeal PCR Counsel filed a Notice with intent to Appeal. Wifredo Salas v. State, Appellate Case No.: 2014-000240. The South Carolina Supreme Court dismissed the appealed by way of an Order filed December 10, 2014.

Applicant has filed a second post-conviction relief application dated January 16, 2015. Wilfredo Salas v. State of South Carolina, Case No.: 2015-cp-23-00985

ARGUMENT

Applicant hereby asserts that the judgment issued in this case is void ab initio as a matter of law and no longer equitable that the judgment should have prospective application because this court was without subject matter jurisdiction and the authority to issue an order in the instant case where applicant's guilty plea counsel filed a motion for "Reconsideration of Sentence" on his behalf under Rule 29(a) SCr.Crimp which is still pending at this current time. See Attachment (B) (Letter from Clerk of Court) Therefore, the court of common pleas was without the authority and subject matter jurisdiction to issue an order pursuant to S.C.R.Civ.Proc. Rule 71.1 (b) "Time and form of application" (An application for post-conviction relief "[c]annot" be made while an appeal from conviction or sentence is pending or "during the time in which an appeal may be perfected". Al-Shabazz, 527 S.E.2d

747 (S.C.2000)(Holding Applicant may not bring a PCR action while a direct appeal is pending.Rule 71.1(b),the focus usually is upon alleged errors made by trial or plea counsel.)

Its Clear Applicants application was filed and Ruled upon during which time an appeal may be perfected. The PCR Court order could impact upon applicant's rights to adjudicate his ineffective assistance of plea counsel claims on PCR after the ruling on the motion to Reconsider his sentence and impact his jurisdictional claims in the Appellate court once the motion to Reconsider the sentence is finalize in the General Sessions court..See Fn2 Therefore, the judgment should ^{be} vacated as it is no longer equitable that the judgment should have prospective application where the court was without subject matter jurisdiction pursuant to Rule 71.1(b)-Al-Shabazz, supra.
Linda McCompany Inc. V. Shore, (S.C. App.2007) 375 S.C. 432,653 S.E.2d 279 (The definition of "void under voidness provision of relief from judgment rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction);Saro Investments v. Ocean Holiday Partnership, (S.C. APP.1994) 314 S.C. 116,441 S.E.2d 835 (Generally, standard to be applied in determining whether an order or judgment has prospective application, within meaning of rule providing for relief from judgment on ground that it is no longer equitable that judgment have prospective application, is whether it is excutory or involves supervision of changing conduct or condition by court.)

Fn2 A timely motion to Reconsider sentence toll time to file an appeal.Rule 203(b),(2) Wilcer State,696 S.E.2d 587 (2010)

CONCLUSION

It is respectfully asked that this Honorable Court vacate its judgment as a matter of law due to applicant's motion to Reconsider sentence is still pending in the General Sessions court and could impact upon his rights to seek and appeal and post-conviction relief application.

This 10th Day of July, 2015

Wilfredo Salas

Wilfredo Salas, #347611

5. The criminal record of the defendant is minor; and

6. The defendant is the father of two minor children with the mother of the child

that made the allegation against him.

Respectfully submitted,



Scott D. Robinson (SC Bar ID # 65351)

9 East Avenue

Greenville, SC 29601

ATTORNEY FOR DEFENDANT

Dated: 8/17/11

(Attachment "B")

Office of the Clerk of Court

Greenville, South Carolina

Paul B. Wickensimer
Clerk of Court



**Greenville
County**

Circuit Court Division
Greenville County Courthouse
305 East North Street
Greenville, South Carolina 29601
(864) 467-8551 FAX (864) 467-8540

January 5, 2015

Wilfredo Salas #347611
Kershaw C.I.
4848 Goldmine Hwy
Kershaw, SC 29067

Re: I479542

Dear Mr. Salas:

Your letter postmarked 12-31-2014 was received 1/2/2015. As of today's date, no order in relation to the Motion for Reconsideration of Sentence filed 8/17/2011 has been filed with the Clerk of Court for the above referenced charge.

Sincerely,
Clerk of Court
Greenville County General Sessions

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON

Wilfredo Salas, #347611,)
Applicant,)
v.)
State of South Carolina)
Respondent)

Case No.: 2012-cp-23-3341

Certificate of service

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL A. WICKENSIMMER
2015 JUL 20 AM 11 58

I, Wilfredo Salas the applicant in the aboved captioned matter hereby certify that I did serve his motion to vacate judgment on:

Attorney General Office

Allen Wilson

P.O. Box 11549

Columbia, South Carolina 29211

by depositing a copy in the U.S. mail with sufficient funds this 10th day of July, 2015.

Wilfredo Salas

Wilfredo Salas, #347611

Attachment (b)

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Wilfredo Salas, #347611

Petitioner,

v.

State of South Carolina

Respondent.

IN THE COURT OF COMMON PLEAS

C/A 2012-cp-23-3341

NOTION FOR SUMMARY JUDGMENT PURSUANT
TO RULE 56(c) ,SCRPC

FILED-CLERK OF COURT
GREENVILLE COUNTY
PAUL H. MILLER
2015 JUN 28 9PM 9 41

Comes Now Wilfredo Salas, the Petitioner in the above caption matter respectfully moving this Honorable Court on a motion for summary judgment pursuant to Rule 56(c), SCRPC. Petitioner will show unto this Court the following:

FACTUAL/PROCEDURAL BACKGROUND

Petitioner plead guilty in Greenville County on August 8, 2011, to lewd act on a minor. See Fn1 The Petitioner received fifteen years of imprisonment without negotiations or recommendation. (2011-GS-23-6255A). On August 17, 2011, Counsel Scott D. Robinson, Esquire filed a timely post-trial motion to reconsider sentence. See Attachment (a) (Motion for reconsideration of sentence).

On May 17, 2012, Petitioner filed a post-conviction relief application raising several grounds of ineffective assistance of counsel. The Respondent made it return on August 31, 2012. An evidentiary hearing into the matter was convened October 23, 2013 at the Greenville County Courthouse. The Honorable Edward W. Miller issued an Order dated January 7, 2014, filed January 8, 2014. PCR Counsel filed a Notice with intent to appeal. Wilfredo v. State, Appellate Case No.: 2014-000240. The South Carolina Supreme Court dismissed the appealed by way of an order filed December 10, 2014. See Fn2

Fn1 Petitioner was originally indicted for criminal sexual conduct with a minor less than ten years of age.

Fn2 Petitioner filed a Motion to Vacate PCR judgment dated July 10, 2015. The Respondent has not responded to the motion to vacate judgment.

Petitioner has a second PCR application pending. Wilfredo Salas v. State, Case No.:2015-cp-23-00985.

ARGUMENT

In the instant case Petitioner plea counsel filed a timely post-trial motion to reconsider Petitioner's sentence. See Attachment (a), supra. However, at the time the PCR Court issue its Order in Petitioner's first PCR application the Court of General Sessions had not issued an order adjudicating the motion for reconsideration of sentence. See Attachment (b), (c) (Letters from the Clerk of Court). Pursuant to Rule 203(b), (2)/SCRAC and Rule 71.1(b) the PCR Court was without the authority and jurisdiction over the subject matter and Petitioner because jurisdiction still belonged to general sessions. Rule 71.1(b) provide in relevant part:

AN APPLICATION FOR POST-CONVICTION RELIEF CANNOT BE MADE WHILE AN APPEAL FROM THE CONVICTION OR SENTENCE IS PENDING OR ~~DURING THE TIME AN APPEAL NAT BE~~ ^{is by} PERFECTED.

It is clear Petitioner's application was ruled upon during the time an appeal could have been perfected. In Wilder v. State, 696 S.E.2d 587 (2010) the Court held "a motion to reconsider sentence toll time to file an appeal. Rule 203(b), (2)". Therefore, the judgment in Petitioner's **first PCR** is void ab initio and should be vacated. Linda McCompany Inc. v. Shore, 375 S.C. 432, 653 S.E.2d 279 (S.C.App.2007) (The definition of void under voidness provision of relief from judgment rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction).

Summary Judgment Standard

Rule 56 of the South Carolina Rules of Civil Procedure states, as to a party who has moved for summary judgment:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions of file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 56(c). A fact is "material" if proof of its existence would affect disposition of the case under applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242/248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the nonmovant. *Id.* at 257. When determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. United States v. Diebold, Inc., 369 U.S. 654/655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the court that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317/323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings. *Id.* at 324. Rather, the non-moving party must demonstrate specific, material facts exist that give rise to a genuine issue. *Id.* Under this standard, the existence of a mere scintilla of evidence in support of the non-movant's position is insufficient to withstand the summary judgment motion. Anderson, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude granting the summary judgment motion. Ross v. Commc'ns Corp., 759 F.2d 355,365 (4th Cir.1985). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted". Anderson, 477 U.S. at 248.

Petitioner has shown via the record that summary judgment is proper in the instant case because no genuine issue as to any material fact existed and he

Attachment (A)

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

State of South Carolina,)

vs.)

Wilfredo Salas,)

Defendant.)

IN THE GENERAL SESSIONS

C.A. NO.: I-479542

FILED-CLERK OF COURT
PAUL E. HENDERSON
COURTHOUSE
GREENVILLE, SC

2011 AUG 17 PM 4: 22

MOTION FOR RECONSIDERATION OF SENTENCE

The defendant, by and through undersigned attorney, moves the Court to reconsider his sentence in the above-mentioned matter. On August 8, 2011, the defendant pled guilty to the crime of Lewd Act on a Minor and received the maximum sentence of fifteen (15) years. The defendant believes that the sentence is harsh and unfair considering the following:

1. Contrary to what the State seemed to allege at the hearing, there was no record of any penetration either penile or digital;
2. Contrary to what the State seemed to allege at the hearing, there was no record of "vaginitis; "
3. Contrary to what the State seemed to allege at the hearing, there was no record of the child being affected negatively by any action allegedly taken by the defendant. In fact, the documents filled out by the maternal grandmother indicated no depression, acting out or talk of sex by the minor child;
4. The interests of justice and fairness would be served if the court were to reconsider her sentence and convene a hearing on the matter;

5. The criminal record of the defendant is minor; and
6. The defendant is the father of two minor children with the mother of the child that made the allegation against him.

Respectfully submitted,



Scott D. Robinson (SC Bar ID # 65351)
9 East Avenue
Greenville, SC 29601
ATTORNEY FOR DEFENDANT

Dated: 8/17/11



Office of the Clerk of Court
Greenville, South Carolina
Paul B. Wickensimer
Clerk of Court

Circuit Court Division
Greenville County Courthouse
305 East North Street
Greenville, South Carolina 29601
(864) 467-8551 FAX (864) 467-8540

Attachment (b)

January 5, 2015

Wilfredo Salas #347611
Kershaw C.I.
4848 Goldmine Hwy
Kershaw, SC 29067

Re: I479542

Dear Mr. Salas:

Your letter postmarked 12-31-2014 was received 1/2/2015. As of today's date, no order in relation to the Motion for Reconsideration of Sentence filed 8/17/2011 has been filed with the Clerk of Court for the above referenced charge.

Sincerely,
Clerk of Court
Greenville County General Sessions



**Greenville
County**

**Office of the Clerk of Court
Greenville, South Carolina**

**Paul B. Wickensimer
Clerk of Court**

Circuit Court Division
Greenville County Courthouse
305 East North Street
Greenville, South Carolina 29601
(864) 467-8551 FAX (864) 467-8540

Attachment (C)

April 21, 2016

Wilfredo Salas #347611
Kershaw Correctional Inst.
4848 Goldmine Highway
Kershaw, SC 29067

Dear Mr. Salas:

Your letter postmarked 3/18/2016 was received 3/29/2016. We are unable to fulfill your request for copies. No order ruling on the "Motion of Reconsideration of Sentence" filed 8/17/2011 was filed with the Clerk of Court for the warrant/indictment numbers you provided.

Sincerely,
Clerk of Court
Greenville County General Sessions

is entitled to judgment as a matter of law. Rules 56 Civ.Proc. Sloan v. Friends of Hunley, Inc, 369 S.C. 20,630 S.E.2d 474 (S.C.2006).

CONCLUSION

Wherefore, based upon the foregoing, the Petitioner's motion for summary judgment be granted and the Motion to Vacate Judgment be granted.

Respectfully Submitted

Wilfredo Salas, 347611
4848 Goldmine Hwy
Kershaw, South Carolina 29067

This 23, June 2016

Wilfredo Salas

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Wilfredo Salas, #347611,

Petitioner,

C/A No.: 2012-cp-23-3341

2016 JUN 28 AM 9 42

FILED-CLERK OF COURT
GREENVILLE, S.C.
PAUL S. HOKI

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I, Wilfredo Salas, the Petitioner in the above caption matter hereby certify that I did serve motion for summary judgment on:

South Carolina Attorney General Office

Alan Wilson

P.O. Box 11549

Columbia, South Carolina 29211

by depositing a copy in the mail with sufficient funds on this 23 day of June 2016.

Wilfredo Salas

Wilfredo Salas, #347611

4848 Goldmine Hwy

Kershaw, South Carolina 29067

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP2303341

Wilfredo Salas, #347611

State of South Carolina

ENTERED COMPUTER

JUL 1 PM
WIKEN
COURT

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

The Petitioner's Motion to Vacate Judgment Pursuant to Rule 60(b), (4), and (6) and Motion for Summary Judgment Pursuant to Rule 56(c) are respectfully denied for failure to comply with the South Carolina Rules of Civil Procedure and for lack of merit.

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled (List amount(s) below) |
|--|--|--|
| | | |
| | | |
| | | |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Handwritten signature/initials


Circuit Court Judge

2158

7/1/2016

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on ⁷⁻¹⁻¹⁶ , and a copy mailed first class or placed in the appropriate attorney's box on ⁷⁻¹⁻¹⁶ , to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer

Court Reporter

Paul B. Wickensimer Greenville County Clerk Of
Court - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

