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November 17, 2016

Via Hand Delivery

Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

**RE: Wilfredo Salas v. State of South Carolina
Circuit Court Case No: 2012-CP-23-3341
Appellate Case No.: 2016-001479**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to the Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter I am serving opposing counsel with this return today.

Sincerely,

Patrick L. Schmeckpeper
Assistant Attorney General

PLS/aam
Enclosures

cc: Wilfredo Salas, SCDC No. 347611, Esquire (w/enclosure)

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
Court of Common Pleas
Robin B. Stilwell, Circuit Court Judge

2012-CP-23-3341
Appellate Case No. 2016-001479

WILFREDO SALAS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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QUESTIONS PRESENTED

- I. Is certiorari warranted to review the lower court's denial of Petitioner's post-trial motions where Petitioner's argument that the denial of his PCR application is void for lacked jurisdiction is without merit?

STATEMENT OF THE CASE

The Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Petitioner was originally charged with criminal sexual conduct, 1st degree (warrant number I-479542). Pursuant to plea negotiations, that charge was dismissed. Thereafter, the Petitioner waived presentment to the Greenville County Grand Jury for the charge of lewd act on a minor (2011-GS-23-6255A). Scott D. Robinson, Esquire represented the Petitioner.

On August 8, 2011, the Petitioner pled guilty. The Honorable Letitia H. Verdin sentenced the Petitioner to fifteen years imprisonment. The Petitioner did not appeal.

The Petitioner filed a PCR application on May 17, 2012 (2012-CP-23-3341). The Petitioner raised the following issues:

1. Ineffective assistance of counsel:
 - a. Failure to obtain discovery.
 - b. “[M]islead applicant about the conditions of the plea.”
 - c. “[F]ailed to investigate the discrepancies and evidence of which concerns these allegations in this case.”
 - d. “[F]ailed to investigate discrepancies of which concerns the date of offense in this case.”
2. Involuntary guilty plea.

An evidentiary hearing was convened on October 23, 2013 at the Greenville County Courthouse. John G. Reckenbeil, Esquire represented the Petitioner. At the PCR hearing, Mr. Reckenbeil stated they would proceed solely upon issues of ineffective assistance of counsel, subject matter jurisdiction, and after-discovered evidence. The Honorable Edward W. Miller denied and dismissed the PCR application by order filed January 8, 2014.

The Petitioner filed a notice of appeal. Robert M. Pachak, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of a Johnson¹ petition. The South Carolina Supreme Court denied the petition for writ of certiorari on December 10, 2014. The remittitur was sent on December 30, 2014.

Petitioner then filed post-trial motions arguing because there was an outstanding motion to reconsider his original sentence in general sessions court, the PCR Court was without jurisdiction to hear his case. App. p. 116-132. Those motions were denied by Judge Stilwell in an order filed July 1, 2016. This appeal follows.

¹ Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).

STANDARD OF REVIEW

Whether to grant or deny a motion under SCRCP 60(b) is within the sound discretion of the judge. Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 16 (1992). Reviewing courts are limited to determining whether the lower court abused its discretion. Saro Investments v. Ocean Holiday Partnership, 314 S.C. 116, 124, 441 S.E.2d 835, 840 (Ct. App. 1994).

ARGUMENT

I. Certiorari is not warranted to review the lower court's denial of Petitioner's post-trial motions where Petitioner's argument that the denial of his PCR application is void for lack of jurisdiction is without merit.

The PCR Court correctly concluded Petitioner was not entitled to relief pursuant to Rule 60(b), SCRPC. Rule 60(b) provides, in part, that

[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

Petitioner argues the judgment is void due to what he argues is a lack of jurisdiction in the lower court. This argument appears to stem from the fact that his plea counsel filed a post-trial motion to reconsider under his arrest warrant number I-479542, which was never ruled upon. This warrant number refers to the charge of criminal sexual conduct (CSC) with a minor, where the victim is under the age of 11 years old, first degree. Supp. App. p. 1.

The problem with Petitioner's argument is that the CSC 1st degree charge was ultimately dismissed.² Petitioner then pled guilty and was sentenced on a different charge, lewd act on a minor, which was directly presented with no warrant number.³ App. p. 6-20. Petitioner's plea

² A General Sessions Tracking Sheet, filed with the Greenville County Clerk of Court on August 12, 2011, indicates that the charge was dismissed because Petitioner "pled to other." Supp. App., p. 5.

³ Petitioner waived presentment to the Grand Jury on the Lewd Act Charge. App. p. 8.

counsel then filed a motion to reconsider sentence under the warrant number *on the dismissed charge*. App. p. 121.⁴

The lewd act, which Petitioner pled guilty to, and the CSC 1st, which was dismissed, were distinct charges, requiring separate indictments. Committing a lewd act on a minor is not a lesser included offense of first degree criminal sexual conduct with a minor. See State v. Norton, 286 S.C. 95, 96-97, 332 S.E.2d 531, 532 (1985).⁵ A motion to reconsider sentence was never filed on the charge Petitioner actually pled guilty to.

Because there was no pending motion to reconsider on the charge or sentence Petitioner was actually contesting in his PCR application and at the evidentiary hearing, there were no jurisdictional defects in his prior post-conviction relief proceedings. Accordingly, the PCR Judge appropriately dismissed Petitioner's Rule 60(b) motion to alter or amend the judgment. Further, Petitioner's motion for Summary Judgment was properly denied as he was not entitled to relief as a matter of law.

⁴ Respondent notes that the issue on appeal is not whether counsel was ineffective in improperly filing a motion to reconsider sentence. Rather, Petitioner argues he is entitled to relief due to the PCR Court's lack of jurisdiction to hear his case.

⁵ This appears to be the basis for one of Petitioner's claims on his initial application for post-conviction relief. App. p. 109. Petitioner argued the circuit court lacked subject matter jurisdiction to enter his guilty plea. Id. The PCR Court concluded that it was clear Petitioner "pled guilty to lewd act upon a child as a new charge – not as a lesser included offense of the original charge." Id.

CONCLUSION

For the foregoing reasons, the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
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PATRICK SCHMECKPEPER
Assistant Attorney General
Bar No. 102100

By: 
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November 17, 2016

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stillwell, Circuit Court Judge

Circuit Case No.: 2012-CP-23-3341
Appellate Case No.: 2016-000240

WILFREDO SALAS,

Petitioner,

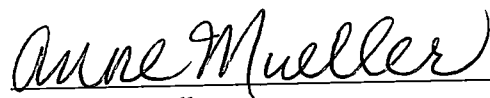
v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copies of the Return to the Petition for Writ of Certiorari was served upon Respondent by depositing the same in the United States mail, postage prepaid, addressed to Wilfredo Salas, SCDC 347611, Kershaw Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, on this the 17th day of November, 2016.



Anne A. Mueller
Legal Assistant for Respondent