STATE OF SOUTH CAROLINA

ORIGINAL

IN THE SUPREME COURT

Certiorari to Lexington County

Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAKE LAKE,

PETITIONER

APPELLATE CASE NO. 2016-000976

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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ISSUE PRESENTED

Did the Court of Appeals err in dismissing Petitioner's appeal where (1) counsel abandoned Petitioner following his guilty plea rendering his post-sentencing motion properly filed, (2) the state is judicially estopped from arguing the post-sentencing motion was not properly filed in light of the state's factual presentations in the PCR proceedings that the motions were properly filed, and (3) the doctrine of laches prohibited the state's argument that Petitioner's post-sentencing motion was not properly filed?

STATEMENT

Petitioner's case has a long and tortured history, which must be studied in detail in order to determine whether Petitioner's notice of appeal following his guilty plea was timely filed. The primary issue is whether the state is judicially estopped from positing one fact during the direct appeal process and a different fact during the post-conviction relief process. A secondary issue is whether laches prevents the state from making the argument it has presented for the first time on direct appeal.

Indictment & guilty plea

A Lexington County grand jury indicted Petitioner for attempted murder (2011-GS-32-3107) on October 3, 2011. On October 4, 2012, Petitioner appeared before the Honorable Roger M. Young, Sr., to enter a guilty plea to the charge. Suzanne Mayes represented the state, and Frank McMaster represented Petitioner. Judge Young sentenced Petitioner to twenty-eight years' imprisonment.

Post-sentencing motions

On October 9, 2012, Petitioner filed a *pro se* motion for reconsideration. App. 8-9. On December 4, 2012, Petitioner submitted a *pro se* motion to withdraw his guilty plea. App. 10. In the motion, Petitioner stated he "was under the belief that a plea negotiation had been reached between the state and [his] attorney for a sentence of five (5) years." App. 10. On April 12, 2013, plea counsel sent a letter to the Clerk of Court noting his representation of Petitioner at the guilty plea, his awareness of Petitioner's filing of the motion to reconsider, and his request to be notified of the hearing on the motion so that he could assist Petitioner. App. 11.

In 2013, while the post-sentencing motions remained pending, McMaster was arrested and charged with driving under the influence, failure to give or giving improper signal, and hit

and run involving property damage.[1] In the Matter of Frank Barnwell McMaster, 419 S.C. 37, 38-39, 795 S.E.2d 853, 854 (2017). McMaster pleaded guilty to DUI and improper turn, and the remaining charge was dismissed. Id. at 39, 795 S.E.2d at 854. McMaster paid a fine for his criminal offenses. Id.

In 2014, McMaster was arrested for use of a firearm while under the influence of alcohol or drugs, disorderly conduct, and damaging/tampering with a vehicle.[2] Id. On March 4, 2014, shortly after his arrest for the second set of criminal charges, McMaster was placed on interim suspension. Id.; In the Matter of Frank Barnwell McMaster, Appellate Case No. 2014-000334 (S.C. Sup. Ct. filed Mar. 4, 2014). Ultimately, McMaster pleaded guilty to unlawful carrying of a pistol and paid a fine. McMaster, 419 S.C. at 39, 795 S.E.2d at 854.[3]

At some point subsequent to McMaster's suspension, Sarah Mauldin of the Lexington County Public Defender's Office, was appointed to represent Petitioner.

Post-conviction relief proceedings

On March 5, 2015, Petitioner filed an application for post-conviction relief (PCR). App. 45-54. His filing included a copy of his motion for reconsideration of sentence, which showed it had been filed with the Clerk of Court on October 9, 2012. App. 51. He informed the PCR court

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[1] According to the Richland County Clerk of Court, Frank McMaster was arrested on these charges on April 29, 2013, a mere seventeen days after McMaster's letter to the court in Petitioner's case, and he entered his guilty plea on December 5, 2013.

[2] According to the Lexington County Clerk of Court, McMaster was arrested for these offenses on February 21, 2014, and entered a guilty plea on November 4, 2014.

[3] On January 11, 2017, this Court suspended Frank McMaster from the practice of law for thirty (30) months. In the Matter of Frank Barnwell McMaster, 419 S.C. 37, 795 S.E.2d 853 (2017). According to the agreement for discipline by consent to which McMaster entered, "the common thread in both incidents was alcohol abuse induced by depression associated with the dissolution of his marriage." Id. at 39, 795 S.E.2d at 854.

that his attorney "was supposed to arrange a hearing with the judge" on the post-trial motions. App. 50. Petitioner's PCR filing also included two letters from the Honorable Roger M. Young, Sr., which were written in response to requests from Petitioner concerning his outstanding motions. App. 53-54. In the letters, Judge Young indicated the Lexington County Clerk of Court had no record of Petitioner's motion for reconsideration. App. 53-54.[4]

In July 2015, Petitioner wrote to the Clerk of Court requesting the appointment of counsel in his PCR case. App. 56-57. On September 4, 2015, Jeffrey P. Bloom wrote to the Clerk of Court requesting the appointment of counsel and noting that Petitioner had filed post-sentencing motions. App. 59. Mr. Bloom's letter stated that Petitioner filed his post-sentencing motions *pro se*. App. 59. Importantly, Mr. Bloom copied "Walt Whitmire, Asst. Attorney General" on this correspondence. App. 59. On September 22, 2015, the Clerk of Court appointed David Allen to represent Petitioner in his PCR action. App. 61.

On March 7, 2016, the Honorable William P. Keesley entered a scheduling order, finding there was a pending motion to reconsider the underlying guilty plea and continuing the PCR proceeding beyond the April 2016 term. App. 63

Return to post-sentencing motions

On April 1, 2016, Petitioner, through counsel, filed a brief in support of motion to reconsider sentence. App. 12-22. The state filed a response. App. 23-24. The state's response made no mention of hybrid representation. App. 23-24. The state never moved to dismiss the motion based on hybrid representation. App. 23-24. Instead, the state responded to the

[4] In fact, the Clerk of Court lost the original motion for reconsideration. App. 8-9. The motion shows the Clerk scanned the original motion, but lost it subsequently. App. 8-9. A copy of the motion was placed in the file on August 11, 2015, and as of that date the motion had not been ruled upon. App. 8-9. Additionally, the Clerk noted "Patrick Schmeckpeper/AG Office to follow up w/ Judge Young b/c outcome affects disp of PCR." App. 9.

substance of the motion. App. 23-24. By an order filed on April 28, 2016, Judge Young denied Petitioner's motion to reconsider. App. 25. In the same order, he denied Petitioner's motion to withdraw his guilty plea as untimely filed. App. 25. The order never indicated any concern regarding hybrid representation. App. 25.

On May 6, 2016, Petitioner filed and served a notice of appeal concerning his guilty plea and post-sentencing motions. Pursuant to Rule 203(d)(1)(B)(iv), Petitioner filed a written explanation to show there was an issue to be reviewed on appeal. In the explanation, Petitioner asserted the guilty plea was not made knowingly and voluntarily because attempted murder requires a specific intent to kill and the record demonstrated Petitioner did not understand the charge against him. Further, Petitioner asserted it was structural error for the court to find the plea was freely, voluntarily and intelligently made prior to hearing the state's recitation of the facts. The state did not respond to the notice of appeal or move to dismiss at that time.

Return to post-conviction relief proceedings

On June 23, 2016, the state, represented by the Attorney General's Office, filed its return and motion to dismiss without prejudice. App. 67-69. In the return, the state represented to the court that "Applicant, through counsel, moved to reconsider his sentence on October 9, 2012." App. 67. Additionally, the state informed the court that "Applicant filed a Notice of Appeal with the South Carolina Court of Appeals on May 9, 2016" and that the matter was "presently pending before the South Carolina Court of Appeals." App. 67. Thereafter, the state argued the matter was "currently on appeal before the South Carolina Court of Appeals," and that under the cited rule and statutory provision, "post-conviction relief [was] not available to the Applicant

because the direct appeal [was] pending in the appellate courts." App. 68.[5] The state requested the application for PCR "be summarily dismissed without prejudice until such time as the direct appeal is resolved." App. 68. The state mentioned no concerns regarding hybrid representation. App. 67-68.

By an order filed September 29, 2016, the Honorable William P. Keesley signed a consent order of dismissal without prejudice. App. 71-72. In the order, Judge Keesley found that "Applicant, through counsel, moved to reconsider his sentence on October 9, 2012, and to withdraw his guilty plea on December 4, 2012." App. 71. The order also recounted Judge Young's order denying the motions and Petitioner's filing of a notice of appeal. App. 71. According to the court, "[t]he matter [was] presently pending before the South Carolina Court of Appeals." App. 71. The judge found "post-conviction relief [was] not available to the Applicant because the direct appeal [was] pending in the South Carolina Court of Appeals" "at the present time." App. 71. Ultimately, the judge dismissed the PCR application without prejudice "until such time as the direct appeal is resolved." App. 72. The order provided that Petitioner must file his PCR application within one year of the resolution of his direct appeal. App. 72. Importantly, the order was signed by the PCR judge, Petitioner's PCR counsel, Petitioner, and the state, showing all agreed to the matters discussed in the order, including that plea counsel filed the motion for re-consideration. App. 72. The order voiced no concerns from any of the parties, including the state, regarding hybrid representation. App. 72.

Direct appeal

On February 27, 2017, undersigned counsel filed the initial brief of Petitioner and designation of matter on Petitioner's behalf. On June 30, 2017, Respondent filed a motion to

[5] The return cites "Rule 227, SCACR." App. 68. However, this rule no longer exists. Previously, Rule 227, SCACR, related to the review of orders in post-conviction relief matters.

dismiss and requested the timelines for filing his initial brief of respondent and designation of matter be held in abeyance pending the resolution of the motion. App. 1-26. Petitioner responded on July 20, 2017. App. 27-74. The state filed a reply on July 25, 2017. App. 75-82. On August 9, 2017, the Honorable Paul E. Short, Jr., dismissed Petitioner's appeal. App. 83-84. Petitioner filed a petition for rehearing on August 29, 2017. App. 85-101. In the petition, Petitioner requested the Court of Appeals rehearing the matter to address arguments made by Petitioner concerning judicial estoppel, laches, and abandonment of counsel. App. 85-101. At the Court's request, the state responded on September 28, 2017. App. 102-109. A three-judge panel of the Court of Appeals denied the petition on October 18, 2017. App. 110. This petition for writ of certiorari follows.

ARGUMENT

The Court of Appeals erred in dismissing Petitioner's appeal where (1) counsel abandoned Petitioner following his guilty plea rendering his post-sentencing motion properly filed, (2) the state is judicially estopped from arguing the post-sentencing motion was not properly filed in light of the state's factual presentations in the PCR proceedings that the motions were properly filed, and (3) the doctrine of laches prohibited the state's argument that Petitioner's post-sentencing motion was not properly filed.

The Court of Appeals dismissed Petitioner's appeal. App. 83-84. The Court concluded Petitioner's notice of appeal was not served timely because his motion for reconsideration did not toll the time for filing and serving the notice of appeal. App. 83. The Court arrived at this conclusion after finding Petitioner filed a *pro se* motion for reconsideration while he was represented by counsel. App. 83. The Court failed to address Petitioner's arguments (1) that counsel had abandoned him rendering his filing timely, (2) that the state was judicially estopped from arguing the motions were not filed by counsel in light of the state's factual presentations in PCR proceedings and (3) that laches prohibited the state's argument as it had sat on this argument for years. App. 83-84.

To support its argument to dismiss petitioner's appeal, the state relied on "plea counsel's letter" dated April 12, 2013, filed on April 15, 2013. App. 11. The letter reads as follows:

> I represented Jake Lake at his guilty plea, which occurred on October 4, 2012. Mr. Lake has filed a Pro Se motion to reconsider and I respectfully request that I receive a notice as to the date of the hearing in order that I may assist him if possible. Also, Mr. Lake's father Magistrate Judge Robert H. Lake would like to receive notice of the hearing.

App. 11.

One reading of the letter is that plea counsel *abandoned* Petitioner. In the letter, plea counsel used the past tense, "represented," to indicate that his attorney-client relationship no longer existed. Further, he sought notice of the date of the hearing so that he *may* assist Petitioner. This was not an affirmative indication that plea counsel would appear at the hearing or would assist Petitioner. This language indicates plea counsel had abandoned Petitioner. In fact, plea counsel put himself into the same category as Petitioner's father in his request for notice of the date of the hearing. If plea counsel had abandoned Petitioner, as the letter indicated, then Petitioner's filing of his *pro se* motion was **not** a product of "hybrid representation." The filing was entirely proper, adjudicated by the lower court, and tolled the time for filing the notice of appeal, rendering the notice of appeal timely filed.

Another reading of the letter is the one posited by the state – plea counsel continued with his representation of Petitioner. The letter evidences plea counsel's intent to adopt Petitioner's *pro se* motion as his own. This reading of the letter is exactly the one espoused by the state in the related PCR proceedings in the matter, but now disclaimed. Plea counsel did not disavow the motion or indicate he thought the motion was meritless. To the contrary, plea counsel indicated his desire to assist Petitioner with the adjudication of the motion.

Abandonment

Plea counsel abandoned Petitioner following the guilty plea; therefore, his filing of the motion was not the product of hybrid representation. In the letter to the Clerk of Court, plea counsel used the past tense, "represented," to indicate that his attorney-client relationship no longer existed. Further, he sought notice of the date of the hearing so that he *may* assist Petitioner. This was not an affirmative indication that plea counsel would appear at the hearing or would assist Petitioner. This language indicated plea counsel had abandoned Petitioner. In

fact, plea counsel put himself into the same category as Petitioner's father in his request for notice of the date of the hearing. In light of plea counsel's abandonment of Petitioner, Petitioner's filing of his *pro se* motion was **not** a product of "hybrid representation." The filing was entirely proper and adjudicated by the lower court.

Plea counsel's letter to the Clerk of Court, plea counsel's conduct following the guilty plea, including his personal illegal and unprofessional conduct, and plea counsel's failure to diligently pursue adjudication of Petitioner's post-sentencing motion evidence plea counsel's abandonment of Petitioner. Due to plea counsel's abandonment of Petitioner following the guilty plea hearing, Petitioner's motion for reconsideration of his sentence was not the product of hybrid representation and tolled the time for filing a notice of appeal.

Pursuant to the Appellate Court Rules, "[t]rial counsel, whether retained, appointed, or Public Defender, shall continue representation of an accused until final judgment, including any proceeding on direct appeal," unless an exception applies. Rule 602(e)(1), SCACR. Thus, retained counsel, such as McMaster, must represent a criminal defendant through appeal unless permitted to withdraw by a court. Rule 602(e)(4), SCACR. This is of no surprise in light of the Rules of Professional Conduct. Pursuant to the Rules, a lawyer may withdraw from representation only in certain circumstances, such as a client using a lawyer's services to perpetrate a fraud. Rule 1.16, RPC, Rule 402, SCACR. None of those circumstances were present, yet plea counsel failed to represent Petitioner competently and diligently following the guilty plea as required. Quite simply, counsel abandoned Petitioner.

"An attorney who undertakes the conduct of an action impliedly stipulates to carry it to its termination and is not at liberty to abandon it without reasonable cause and reasonable notice." Graham v. Town of Loris, 272 S.C. 442, 452, 248 S.E.2d 594, 599 (1978). "Conscience

requires" the court "to charge the attorney alone with his gross dereliction of duty and not to visit its consequences upon an innocent client." Id. at 452-453, 248 S.E.2d at 599.

"The rule that an attorney's negligence may be imputed to his client and prevent the latter from relying on that ground for opening or vacating a judgment does not necessarily prevail in the event of the attorney's abandonment or withdrawal from the case." Id. at 452, 248 S.E.2d at 599. "Our law thus instructs that an exception to the general rule applies when the attorney's inaction was the consequence of willful abandonment or withdrawal from the case." Stearns Bank Nat. Ass'n v. Glenwood Falls, LP, 373 S.C. 331, 342, 644 S.E.2d 793, 799 (Ct. App. 2007). Nevertheless, the general rule attributing the neglect of counsel to the client is not absolute. "Rather it is one that is to be applied rationally, with a fair recognition that justice to the litigants is always the polestar." Brown v. Butler, 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct. App. 2001)(internal quotation omitted).

Thus, if the state's current argument that McMaster was representing Petitioner at the time of the filing of the motion for reconsideration prevails, then the record demonstrated McMaster's ultimate abandonment of Petitioner. According to McMaster's letter, he would assist Petitioner during the post-sentencing motion hearing "if possible." Either the letter indicated McMaster was adopting the motion as his own or that McMaster had abandoned Petitioner. Quite frankly, the state's argument on appeal is that McMaster willfully abandoned Petitioner by not filing the motion and not ensuring the motion was adjudicated. This was not mere neglect on the part of plea counsel, as the state even recognized in its reply when it suggested plea counsel's failure was a basis for ineffective assistance of counsel, which requires a higher showing that negligence. In these circumstances, McMaster willfully abandoned Petitioner following the guilty plea hearing and his conduct – not filing the post-sentencing

motion – should not be attributed to Petitioner. In conclusion, counsel abandoned Petitioner during a critical stage of the proceedings by failing to (1) file the motion for reconsideration, (2) ensure the expedient disposition of the motion, and (3) subsequently file a notice of appeal.

Judicial Estoppel

During the PCR proceedings, it was the state's position that the motion was filed "through counsel." App. 67. The state was aware of the nature of the filing as the pleading was in the Clerk's file and publicly available. App. 8-9. The Clerk's handwritten note on the motion indicated the Attorney General's office was well aware of the motion and was following up on it. App. 8-9. Additionally, Petitioner attached the pleadings to his PCR application. App. 51-52. After concluding that plea counsel adopted the motion filed by Petitioner, the state represented to the PCR court that the pending post-sentencing motion was filed "through counsel" in its return. App. 67. The state convinced the PCR court of this position as evidenced by the PCR court's order using this same language in reference to the motion. App. 71-72. All parties signed the order evidencing their understanding and assent to the entirety of the order, including the language indicating the motion was filed "through counsel." App. 72. The state is estopped from arguing a contrary position now.

In Cothran v. Brown, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004), this Court explained that "[j]udicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." "The purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary." Id. This Court went on to "delineate[] the requirements for the application of judicial estoppel." Id. at

215-216, 592 S.E.2d at 632. According to this Court, the following elements are necessary for the doctrine to apply:

> (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

Id. "The doctrine of judicial estoppel is an equitable concept and should be applied sparingly, with clear regard for the facts of the particular case." Id. at 216, 592 S.E.2d at 632. "The application of judicial estoppel must be determined on a case-by-case basis, and must not be applied to impede the truth-seeking function of the court." Id.

It is the same party in the direct appeal action and the post-conviction relief proceedings – the State of South Carolina. The Attorney General's Office, a part of the Executive Branch of the State of South Carolina, represented the state in the PCR proceedings **and** in the direct appeal. Quite clearly, the first element is satisfied. See State v. Blakney, 410 S.C. 244, 256, 763 S.E.2d 622, 629 (Ct. App. 2014)(Few, C.J. dissenting)(holding the parties were the same at sentencing and on appeal where the state was represented at the sentencing by a solicitor and was represented on appeal by the general counsel for the Department of Probation, Parole and Pardon Services).

The second element is satisfied as well because the positions were taken in related proceedings – direct appeal and post-conviction relief – involving the same parties, the same conviction, and the same sentence.

The state was successful in maintaining its position that the motion for reconsideration was filed through counsel as that was the position ultimately adopted by the PCR court. The

state benefitted from the position it took in the PCR proceedings as its motion to dismiss was granted.

The inconsistencies in the positions on behalf of the state must be part of an intentional effort to mislead the court. The attorney representing the state in the direct appeal action works for the Attorney General, just as the attorney representing the state in the PCR action worked for the Attorney General. The pleadings filed by the Attorney General in the PCR action were available to the attorney who filed the motion to dismiss either on the internal system used by the Attorney General's Office or through the Clerk of Court's Office. There is simply no other explanation for why the Attorney General would make one representation during the direct appeal and a different representation during the PCR action. In its return to the petition for rehearing, the state claimed ti was confused over the authorship of the post-trial motion and such confusion "was not part of any intentional effort to mislead the court." App. 106. The state further blamed Petitioner for its inconsistency, stating those originated from Petitioner's statements in the PCR application. App. 106. The state's finger-pointing in this regard cannot go without response. Petitioner's PCR application was clear as he included the post-trial motions with the application. Additionally, the state inquired about the motions with the Clerk of Court. The state's attempt to shift blame for its conduct onto Petitioner must not stand.

The two positions taken by the state are totally inconsistent. In the PCR action, the state represented to the court that the motion for reconsideration was filed **through counsel**. However, in the motion to dismiss, the state contended the motion for reconsideration was filed by Petitioner and never adopted by plea counsel resulting in "hybrid representation." These two positions are totally inconsistent. See Blakney, 410 S.C. 254, 763 S.E.2d 628 (Few, C.J. dissenting)(explaining that under judicial estoppel "the state may not argue to a sentencing court

that the court has the power to suspend a sentence, and after the court accepts the state's argument and suspends the sentence, turn around and argue, as it has done in this appeal, the sentence may not be suspended" as these two positions are "precisely the opposite" of each other).

"Judicial estoppel generally applies only to inconsistent statements of fact." Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). South Carolina adopted the doctrine "as it relates to matters of *fact* (not law)." Id. (emphasis in original). "In order for the judicial process to function properly, litigants must approach it in a truthful manner." Id. at 251-252, 489 S.E.2d at 477. Certainly, "parties may vigorously assert their version of the facts," but "they may not misrepresent those facts in order to gain advantage in the process." Id. at 252, 489 S.E.2d at 477. Thus, "[w]hen a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him." Id. "[T]he truth-seeking function of the judicial process is undermined if parties are allowed to change positions as to the facts of the case, unless compelled by newly-discovered evidence." Id.

Failing to apply judicial estoppel in this case would impede the truth-seeking function of the courts. Petitioner entered his guilty plea, and post-trial motions were filed. Unable to have his motions despite due diligence and numerous inquiries, heard and in light of plea counsel's suspension from the practice of law, Petitioner sought relief through the avenue of PCR. During the PCR proceedings, Petitioner provided truthful information regarding his guilty plea, his filing of post-sentencing motions, his expectation that plea counsel would assist him with the litigation of his post-sentencing motions, his writings to the plea judge in order to have the post-sentencing motions heard, and the plea judge's responses to his inquiries. App. 45-54. During the PCR

proceedings, the parties discovered that one of Petitioner's motions was properly filed with the Clerk, but misplaced. App. 8-9. This contributed to confusion on the part of the plea judge. App. 53-54. Upon realizing the outstanding motion was not ruled upon, all parties, **including the state**, agreed the proper course of action would be to have the motion considered. Thereafter, all parties agreed the proper course of action would be to dismiss the PCR action and allow the direct appeal to proceed. App. 63; App. 67-68; App. 71-72.

Petitioner requests this Court apply judicial estoppel to a statement of fact – Petitioner's post-sentencing motions were filed "through counsel" – consistent with this Court's authority and case law. By applying judicial estoppel, this Court will prohibit the state from making inconsistent representations of facts in the same or related proceedings to the detriment of a criminal defendant. Treating Petitioner differently in the PCR proceedings and the direct appeal proceedings would place Petitioner "in a classic Catch-22 situation which [he] could find no redress." See Tobias v. Rice, 386 S.C. 306, 311, 688 S.E.2d 552, 554 (2010)(overruling the Court of Appeals' opinion affirming the denial of Rice's post-trial motions to set aside the judgment and explaining that when Rice filed a *pro se* motion to reconsider the judgment, alleging her trial counsel abandoned her, the trial court declined to rule on it, treating her as though she were represented by counsel, but on appeal, the Court of Appeals treated her as a *pro se* litigant with a duty to monitor her own proceedings where it was undisputed Rice's counsel was suspended from the practice of law during the course of the representation).

This was not a situation in which plea counsel acted as a mere conduit for *pro se* documents filed by Petitioner. Cf. Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002)(finding hybrid representation where counsel filed a petition for writ of certiorari, then the petitioner filed a motion asking him to file a *pro se* amended petition, followed by counsel filing

the amended petition with a letter stating he did not believe any of the issues in the amended petition were relevant but that he was submitting the petition at petitioner's request because counsel was acting as a "mere conduit for pro se documents in an effort to avoid the prohibition against hybrid representation and the displeasure of his client"). Rather, plea counsel adopted the filing as his own when he wrote to the court explaining his representation of Petitioner, his desire for notice of the hearing date on the motion, and his indication that he would assist Petitioner with litigation of the motion. The state construed the filings in this manner when it represented to the PCR court that the post-trial motions had been filed "through counsel" and won its request to dismiss the PCR action based on this representation. Therefore, the state is estopped from maintaining a contrary position in the direct appeal.[6]

Laches

The state's current contention that the post-sentencing motion was the product of hybrid representation was first presented on June 30, 2017, almost five years after the filing of the motion. Not once during that period of time did the state assert the motion was improperly filed or improper for consideration by a court despite multiple opportunities to do so. The state sat on its right to assert such a defense and is now barred from doing so by the doctrine of laches.

"Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Mid-State Trust, II v. Wright, 323 S.C. 303, 307, 474 S.E.2d 421, 423 (1996); Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988); Muir v. C.R. Bard, Inc., 336 S.C. 266,

[6] Respondent's claim that Petitioner has "unclean hands" because he also participated in the misrepresetntation to the PCR judge that the post-sentencing motion was filed "through counsel" is not supported by the record. Petitioner's hands are "clean" as he was at all times completely forthcoming in the PCR action and the direct appeal. Petitioner provided copies of the motion with his PCR application.

296, 519 S.E.2d 583, 598 (Ct. App. 1999). "Laches is an equitable doctrine, which arises upon the failure to assert a known right." Emery v. Smith, 361 S.C. 207, 215, 603 S.E.2d 598, 602 (Ct. App. 2004)(citing All Saints Parish, Waccamaw v. Protestant Episcopal Church in the Diocese of S.C., 358 S.C. 209, 235, 595 S.E.2d 253, 267 (Ct. App. 2004). "Under the doctrine of laches, if a party, knowing his rights, does not timely assert them, but by unreasonable delay causes his adversary to incur expenses or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce these rights." Muir, 336 S.C. at 296, 519 S.E.2d at 599. "[T]he party asserting laches must show it has been materially prejudiced by the other party's delay." Mid-State Trust, II, 323 S.C. at 307, 474 S.E.2d at 423. In sum, "[t]he party asserting laches must satisfactorily show negligence, the opportunity to have acted sooner, and material prejudice." Muir, 336 S.C. at 297, 519 S.E.2d at 599.

According to the state, the nature of the motion for reconsideration of sentence as the product of hybrid representation was known either as soon as the motion was filed on October 9, 2012, or at least as early as April 12, 2013, when plea counsel sent a letter to the Clerk of Court regarding his involvement. The state was involved in this matter at all stages – the guilty plea, the post-sentencing motions, and the post-conviction relief proceedings. The state simply cannot claim it was unaware of the filing until June 30, 2017.

Further, the state never argued before any court that the motion for reconsideration was not proper for consideration as the product of hybrid representation despite multiple opportunities to do so. As explained previously, the state's position was the opposite – the motion was filed through counsel and proper for reconsideration. Nevertheless, the state, fully aware of how and when the motion was filed, never asked the trial court to dismiss based on hybrid representation. The state could have asserted in its pleadings before the trial court that the

post-sentencing motion was not proper for consideration due to hybrid representation, but the state made no such argument. In fact, the state's memorandum in support of denial of the motion stated that the "in response to the motion by Defendant, Jake Dale Lake, by and through counsel for Defendant, Sarah H. Mauldin, Esquire for reconsideration of sentence imposed by the Court on April 4, 2012[,] following his plea to the charge of attempted murder." App. 23-24. The state, fully aware of how and when the motion was filed, moved to dismiss without prejudice the post-conviction relief application to permit consideration of the merits of the post-sentencing motion. Certainly, the state could have asserted the post-sentencing motion was improper for consideration due to hybrid representation during the post-conviction relief proceedings, but it did not. Despite the multitude of opportunities over the course of almost five years for the state to claim that Petitioner's motion was not proper for consideration by a court as it was the product of hybrid representation, the state failed to do so. The state waited until June 30, 2017, after the initial brief and designation of matter had been filed and after the parties had consented to the dismissal without prejudice of Petitioner's PCR application, to make such an assertion. At a minimum, the state unreasonably delayed in making its claim that Petitioner's motion was the result of hybrid representation and not proper for consideration by a court.

Petitioner suffered prejudice as a result of the state's negligent delay. During the PCR proceedings, Petitioner agreed to the dismissal without prejudice of his PCR application so that his direct appeal may proceed. Notably, the state agreed to this resolution as well. The language of the order induced Petitioner to believe that his direct appeal would be permitted to go forward. While Petitioner was not led to believe he would obtain relief on appeal, he was led to believe he would have the opportunity to seek relief on direct appeal. Had there been any contention at that

time that Petitioner's post-sentencing motions did not toll the time period for filing a notice of appeal, Petitioner would not have agreed to the dismissal of his PCR application.

If this Court determines Petitioner's post-sentencing motion was the product of hybrid representation and, therefore, the time the motion was pending did not stay the time for appeal, pursuant to Rule 29(a), SCRCrimP, then there is a high likelihood that Petitioner's PCR application filed in 2015 or any other PCR application would be ruled untimely under the statute of limitations in the Uniform Post-Conviction Procedure Act. See S.C. Code Ann. § 17-27-45(A)(providing for a one year limitations period after the entry of a judgment of conviction or one year after the sending of the remittitur to the lower court from an appeal). Thus, Petitioner's conviction and sentence would never be reviewed by any court. This too is contrary to what Petitioner was led to believe when he entered into the consent order to dismiss his PCR application without prejudice as the order specifically provided for him to file a PCR application at the conclusion of his direct appeal. The prejudice to Petitioner based on the state's negligent inaction in this case is abundant, material, and clear.

This Court should grant the petition for writ of certiorari to review the Court of Appeals' order dismissing Petitioner's appeal. This Court should consider Petitioner's arguments related to abandonment, judicial estoppel, and laches. First, plea counsel abandoned Petitioner following the guilty plea. This abandonment by plea counsel placed Petitioner in a position to file *pro se* motions, therefore, Petitioner's filing of a timely post-sentencing motion did not run afoul of South Carolina's bar on hybrid representation. As a timely and properly filed motion, it tolled the time period for filing the notice of appeal. Second, the state must be judicially estopped from taking a position in the PCR proceedings inconsistent with the position it currently asserts during the appeal. The factual assertion by the state during the PCR pleadings

was that the post-sentencing motion was filed "through counsel." The state cannot assert a contrary fact now – that the motion was filed pro se while Petitioner was represented by counsel and not adopted by counsel. Finally, the doctrine of laches must bar the state's attempt to strip Petitioner of his right to a direct appeal, and potentially, of his right to a PCR action in light of the state's almost five-year delay in asserting his claim despite numerous opportunities to do so.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari. If this Court grants the petition and dispenses with further briefing, Petitioner respectfully reuests this Court reverse the Court of Appeals, reinstitute the direct appeal, and remand for disposition of the direct appeal.

Sarah M Cauchy for:
Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of November, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAKE LAKE,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon William F. Schumacher, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Jake Dale Lake, #352637, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 17th day of November, 2017.

Lara M. Caudy for:
Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 17th day of November, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.