

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Lexington County
Roger M. Young, Circuit Court Judge

Order (S.C. Ct. App. filed Aug. 9, 2017)
2011-GS-32-3107

THE STATE,

RESPONDENT,

V.

JAKE LAKE,

PETITIONER

APPELLATE CASE NO. 2016-000976

APPENDIX

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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Roger M. Young, Circuit Court Judge

Appellate Case No. 2016-000976

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAKE LAKE,

APPELLANT.

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

The State is hereby moving this Court to dismiss Appellant's direct appeal based upon a lack of jurisdiction, and is further requesting that this Court hold the time period for the filing of the Initial Brief of Respondent and Designation of Matter in abeyance pending the resolution of this motion. The basis for this motion is explained below.

Background Facts

Appellant was indicted in Lexington County in October 2011 for attempted murder. On October 4, 2012, Appellant appeared before the Honorable Roger M. Young, Sr. for his plea hearing. Frank McMaster, Esquire, represented Appellant; assistant solicitor Suzanne Mayes, Esquire, represented the State. Appellant pled guilty to the charge and the plea judge sentenced Appellant to twenty-eight years' incarceration.

On October 9, 2012, Appellant filed a pro se motion for reconsideration of his sentence.

(Attachment #1 Motion for Reconsideration of Sentence). On December 4, 2012, Appellant submitted a pro se motion to withdraw his guilty plea claiming he believed his counsel and the State had agreed upon a recommended sentence of five years' imprisonment. (Attachment #2, Motion to Withdraw Guilty Plea). On April 12, 2013, plea counsel sent a letter to the Lexington County Clerk of Court requesting notice for Appellant's future hearing on his motion to reconsider, explaining he planned to assist Appellant. (Attachment #3, Plea Counsel's Letter). On March 4, 2014, plea counsel was placed on interim suspension by the South Carolina Supreme Court and Sarah Mauldin of the Lexington County Public Defender's Office assumed representation of Appellant.

On April 1, 2016, Appellant, through counsel, filed a brief in support of his motion to reconsider his sentence, to which the State filed a response. (Attachment #4, Defendant's Brief in Support of Motion to Reconsider Sentence; Attachment #5, State's Response to Defendant's Motion for Reconsideration of Sentence). By order filed April 28, 2016, the plea judge denied Appellant's motion to reconsider and dismissed the motion to withdraw the guilty plea as untimely. (Attachment #6 Order Denying Defendant's Motion to Reconsider Sentencing & Motion to Withdraw Guilty Plea). On May 6, 2016, Appellant filed and served a notice of appeal. Pursuant to Rule 203(d)(1)(B)(iv), SCACR, Appellant also filed a written explanation claiming his plea was not knowing and voluntary because he disputed the charges against him at the plea hearing.

Discussion

Rule 203 of South Carolina's Appellate Court Rules states, in pertinent part:

After a plea or trial resulting in conviction or a proceeding resulting in revocation of probation, a notice of appeal shall be served on all respondents **within ten (10) days after the sentence is imposed**. In all other cases, a notice of appeal shall be served on all respondents within ten (10) days after receipt of written notice of

entry of the order or judgment. When a **timely** post-trial motion is made under Rule 29(a), SCRCrimP, the time to appeal shall be stayed and shall begin to run from receipt of written notice of entry of an order granting or denying such motion (emphasis added).

Rule 29(a), SCRCrimP, provides, in pertinent part, that post-trial motions shall be made **within ten days** after the imposition of the sentence and that the time for appeal shall be stayed by a **timely** post-trial motion and shall run from the receipt of written notice of entry of the order granting or denying such motion.

In Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010), the South Carolina Supreme Court stated as follows:

Since there is no right to “hybrid representation” that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel. State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998); Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989). Because petitioner was represented by counsel, the *pro se* motion was not proper, should not have been accepted, and should not have been ruled upon. **The motion was essentially a nullity.** We therefore vacate the order ruling on the motion and dismiss petitioner's notice of appeal as moot. We also take this opportunity to remind judges and clerks of court of our directive in Foster not to accept substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a party who is represented by counsel (emphasis added).

In State v. Devore, 416 S.C. 115, 784 S.E.2d 690 (Ct.App. 2016), this Court, relying on Miller, dismissed Devore’s appeal after determining it lacked appellate jurisdiction to consider defendant’s appeal because his *pro se* letter, sent seven days after his conviction, was not a proper notice of appeal pursuant to Rule 203, SCACR or a post-trial motion as described in Rule 29, SCRCrimP. Noting Devore was represented by counsel at the time he sent the letter, the Court found the document could not qualify as a proper motion or notice of appeal because it was “essentially, a nullity.”

In Appellant’s case, there was no proper, timely motion for reconsideration or notice of

appeal within the ten days after the conviction. Appellant was represented by counsel at the time he submitted the October 9, 2012 letter to the trial judge, a fact supported by plea counsel's letter claiming he was aiding Appellant with his motions. (See Attachment #3, Plea Counsel's Letter). Under Devore and Miller, this document was an improper pro se filing that should not have been - and could not properly have been - accepted or ruled upon by the trial judge; it was a nullity. Miller at 347, 697 S.E.2d at 527; Devore at 122-24, 784 S.E.2d at 694-695; see also Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002) ("There is no constitutional right to hybrid representation either at trial or on appeal."); Foster v. State, 298 S.C. 306, 307, 379 S.E.2d 907, 907 (1989) (ordering the Clerk of Court to return a substantive *pro se* document filed while the petitioner was represented by counsel). Therefore, the October 9, 2012 letter could not operate as a notice of appeal or a motion for reconsideration that would stay the time period for the filing of the appeal.

Because no proper motion for reconsideration or notice of appeal was filed within ten days of Appellant's conviction, this Court has no jurisdiction over Appellant's case and must dismiss his appeal. See Devore at 122-24, 784 S.E.2d at 694-695; also Hill v. South Carolina Dept. of Health and Environmental Control, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) ("The service of a notice of appeal is a **jurisdictional requirement**, and the time for service may not be extended by this Court."); Canal Ins. Co. v. Caldwell, 338 S.C. 1, 5, 24 S.E.2d 416, 418 (Ct. App. 1999) (in a civil case, pointing out that Rule 203(b), SCACR, requires a party to serve his notice of appeal within thirty days after receiving written notice of the entry of a final order or judgment, and failure to do so divests this court of jurisdiction "and results in dismissal of the appeal"); see also Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992) ("[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this

Court with an orderly mechanism through which to guide appeals in this State.”).

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court dismiss Appellant's appeal for lack of jurisdiction. The State further requests that this Court hold the time period for the filing of the Initial Brief of Respondent and Designation of Matter in abeyance pending the resolution of this motion.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

BY: 
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ATTORNEYS FOR RESPONDENT

June 30, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Roger M. Young, Circuit Court Judge

Appellate Case No. 2016-000976

THE STATE,

Respondent,

vs.

JAKE DALE LAKE,

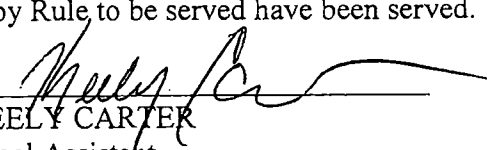
Appellant.

PROOF OF SERVICE

I, Keely Carter, certify that I have served the within Motion to Dismiss Appeal for Lack of Jurisdiction on Appellant by sending two copies of the same to:

Susan B. Hackett, Esq.
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 30th day of June, 2017.


KEELY CARTER
Legal Assistant
Office of the Attorney General
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Columbia, SC 29211
(803) 734-3727

FILED

2012 OCT -9 A 9 56

STATE OF SOUTH CAROLINA) IN THE GENERAL SESSIONS COURT
BETH A. CARRIGS)
CLERK OF COURT)
COUNTY OF LEXINGTON)
LEXINGTON, SC)
Indictment # 11-GS-32-03107

STATE OF SOUTH CAROLINA,)
)
 VS.) NOTICE OF MOTION AND MOTION
) FOR RECONSIDERATION OF
) SENTENCE
 JAKE DALE LAKE)
)
 DEFENDANT.)

TO THE STATE, ABOVE-NAMED, Defendant would show that:

The Defendant Jake Dale Lake pleaded guilty in Lexington County in front of the Hon. Roger Young on October 4, 2012. He was sentenced to 28 years for attempted murder. Additional factors should be considered.

YOU WILL PLEASE TAKE NOTICE that the undersigned Defendant will move before the Presiding Judge of General Sessions Court in _____, South Carolina, on the ____ day of _____, 2012 at _____ o'clock in the ____ m. or as soon thereafter as counsel may be heard for an Order granting a reconsideration of the sentence imposed on the Defendant.

Lake Dale Lake
Defendant

10-93-2012

Lexington, SC

C:\Users\DeB\Documents\DeB\Shared Docs\Public Defender\PD Lake Rec.mot.wpd

Copy of Motion filed - Original MIA - Port was scanned in

Motion for Reconsideration filed 10/9/12
Original missing from file - copy placed in
file - As of 8-11-12 motion not ruled on.
Patrick Schmuckpeper / AG office to follow
up w/ Judge Young b/c outcome affects
disp of PCR

"Attachment 3"

2011-3101

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JOHN GREGG McMASTER

GEORGE HUNTER McMASTER **

FRANK DARNWELL McMASTER

**ALSO ADMITTED IN TEXAS

FRANK G. TOMPKINS

1874-1880

FRANK G. TOMPKINS, JR.

1908-1978

ELIZABETH McMASTER

1804-1878

April 12, 2013

The Honorable Beth Carrigg
 Lexington County Clerk of Court – General Sessions
 Marc Westbrook Judicial Center
 205 E. Main Street
 Lexington, SC 29072

2013 APR 15 PM 3:58
 BETH A. CARRIGG
 CLERK OF COURT
 LEXINGTON SC

FILED

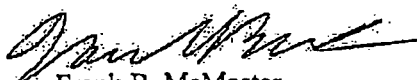
Re: State v. Jake D. Lake
 Warrant #: M302504 - 506

Dear Honorable Carrigg:

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.

Thank you.

Yours very truly,



Frank B. McMaster

FBM/bap

cc: Jake Lake
 Judge Robert H. Lake

ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
2016 APR -1 PM 12:46)
THE STATE)
vs.)
P. A. CARRIGG)
CLERK OF COURT)
LEXINGTON, SC)
IN THE COURT OF GENERAL SESSIONS)
ELEVENTH JUDICIAL CIRCUIT)
WARRANT NUMBER:)
M-302505)
DEFENDANT'S BRIEF IN SUPPORT OF)
MOTION TO RECONSIDER SENTENCE)
Jake Dale Lake,)
Defendant.)

Procedural History

On October 4, 2012, the Defendant entered a guilty plea to the charge of attempted murder for events that occurred on April 7, 2011. The Honorable Roger M. Young, Sr., sentenced the Defendant to twenty-eight years in the South Carolina Department of Corrections.

The Defendant filed a timely motion to reconsider the sentence pursuant to Rule 29 (a), SCRCrimP, but counsel for the Defendant was suspended from the practice of law before the motion to reconsider was heard. The Court subsequently appointed the Lexington County Public Defender's Office to represent the Defendant on the motion to reconsider.

Although this brief addresses facts raised by prior counsel for the Defendant at the plea, present counsel hopes to provide additional context to explain and mitigate the Defendant's actions. This brief includes information provided by the Defendant, his family and friends, the State through discovery, and the South Carolina Department of Corrections.

Defendant's Childhood

The Defendant, Jake Lake, was born in Chesterfield County in 1970. At thirteen years old, Jake and his older brother were adopted by the Honorable Robert H. Lake and his wife Janice Lake. Judge Lake was a magistrate judge in Calhoun County, a position that he holds today and has held for thirty-two years. Janice Lake worked as an administrative assistant for many years.

The Lakes adopted Jake and his brother Lavern from the Connie Maxwell Children's Home in

COPY

Greenwood, South Carolina. Their mother suffered from Hodgkin's disease and sent them there shortly before her death, when Jake was nine years old. Judge Lake remembers that staff members from the children's home said that Jake's biological father declined to assume responsibility for his sons, and that a bench warrant was pending against him when placement with him was attempted. Jake remembers his last interaction with his biological father to be visiting him in prison.

Jake says that the Lakes "saved his life" when they adopted him. According to Judge Lake, a counselor for the children's home told him that Jake's biological father had physically abused him, and that scars on Jake's head were caused by injuries inflicted by his biological father. Since his arrest and incarceration on the present charge, Jake revealed to Judge Lake and to staff at the South Carolina Department of Corrections mental health clinic that his biological father also committed sexual abuse against him.

Jake lived with the Lakes until he was sixteen years old, at which time he and his brother moved from the Lakes' home to the home of their older sister. The Lakes retained legal custody of Jake and his brother.

Defendant's Adulthood

During his guilty plea, the Court asked Jake whether he worked before he was arrested. He answered that he did not and that he had a worker's compensation case pending. Judge Lake mentioned briefly that Jake had been gainfully employed for most of his life.

At the age of sixteen, after Jake and his brother moved from the Lakes' home to their sister's home, Jake stopped going to school and began working as a painter. Although he had only a ninth grade education, he worked steadily and earned a comfortable income most of his adult life.

Jake's first job was working for a man named Gary Gates. Jake worked for Mr. Gates for ten to twelve years. After initially working as a painter, he also learned remodeling skills. Eventually, while continuing to work for Mr. Gates, Jake began finding his own jobs and worked for himself, painting

and remodeling, on residential and commercial buildings.

In the mid-1990s, Jake began working for the Carolina Eastman company, in addition to the work he did on his own. He was employed there, as jobs were available, for several years. While there, he worked as a millwright. He also earned a forklift license and underwent chemical waste management training.

Jake's last job was working for Guess Farm Equipment, a John Deere dealership, in St. Matthews, South Carolina, where he worked as a mechanic on farm equipment. He was employed there for several years until he sustained an injury.

In 1989, Jake married Kathy McKenzie. The couple had two daughters, Elizabeth and Kathryn Dale. Judge Lake reports that in some ways Kathy was the backbone of the family and that she provided Jake emotional support. Jake and Kathy separated in 2009, at which point they had been married 20 years. After surviving a tumultuous childhood, Jake's dream was to be a part of a family, and he achieved that dream for many years.

In 1993, Jake realized that his use of alcohol negatively affected him and his family. He successfully dealt with his problem by replacing drinking with cycling. He became an avid cyclist, eventually cycling thousands of miles per year. Cycling was more than a hobby for him; it was his method of coping with problems, and it was a way to avoid dealing with his abusive childhood. With the relief cycling brought, Jake was able to remain sober for sixteen years.

Defendant's Criminal Record

Before his arrest in this case, Jake's criminal record, as provided by the State in discovery, consisted of the following convictions and sentences:

1988	Unlawful Weapon, Public Drunk – Paid fine
1993	Open Container – 10 days or \$248
2010	DUI <.10, First Offense; Open Container – Fine or jail time

Jake was forty-two years old at the time of his guilty plea, and until then, had a minimal criminal record, consisting of only misdemeanor convictions. Most importantly, Jake had no prior

record of committing physical violence towards any other person, and he had no prior record of threatening or attempting to commit physical violence towards any other person.

Defendant's Injury

Until he was injured at work, Jake led a productive life. He was part of a family, and he and his wife provided for their daughters. He had been sober for many years. He had a good relationship with his adoptive parents, and he had close friendships. However, his life took a dramatic downward turn.

Around 2007, Jake was employed at Guess Farm Equipment. While working, a piece of equipment struck him in the mouth, injuring his jaw, the area above his gums, and knocking out some of his teeth. The injury required surgery, and Jake's recovery was lengthy and painful. His doctor prescribed pain medication, and Jake soon became dependent on the medication.

Jake was injured badly enough that he was no longer able to participate in cycling. Since cycling had become his way of coping with problems, he struggled to deal with his pain and frustration and began drinking again, despite his years of sobriety.

As a result of the injury and his use of alcohol and pills, Jake's marriage began to fail. His wife Kathy moved out of their home three weeks before Thanksgiving in 2009. Their older daughter Elizabeth lived independently then, and their younger daughter Kathryn Dale moved out of the family home with Kathy.

In addition to feelings of failing his family, Jake experienced a loss of stability that his wife had brought to their lives. He saw his daughter Kathryn Dale periodically, but as an older teenager, she was becoming more independent of him. Jake was lonely and isolated and felt like he was losing the family that had been his childhood dream.

Jake's friends and family watched him become a different person than he had been before. Judge Lake describes that time as a dark period of Jake's life. During this time, Jake withdrew from the Lakes. His friend Steve Herweyer maintained contact with Jake through telephone conversations and

witnessed the changes in Jake's attitude and lifestyle. A pastor and friend of the Lakes', Reverend Charles Tyler, encountered Jake after his injury and immediately noticed the change in his demeanor.

Relationship with Anita Pritchett

Jake was desperate to find love and stability again. He met Anita Pritchett in May of 2010. He believed that she was the solution to his problems and that she would help him find happiness. Shortly after meeting Ms. Pritchett, Jake received a worker's compensation settlement of approximately \$149,000 from the injury to his jaw.

Jake spent much of the money on Ms. Pritchett. He gave her money to buy a Ford Explorer and bought new tires for the vehicle. He bought her gifts of clothing and jewelry. He made improvements to her home, buying appliances and installing siding. He paid for trips for the two of them, including one to the Bahamas and one to Las Vegas, Nevada. He even spent money on her daughter's car payment.

Jake moved into Ms. Pritchett's home in December of 2010. Shortly thereafter, in January 2011, his divorce from Kathy was finalized. Jake loved Ms. Pritchett deeply. He says that aside from his wife, she was the only woman with whom he ever had a serious relationship. Judge Lake says that Jake is someone who is totally dedicated to the people who are important to him, but that he expects the same dedication from them in return. He believes that Jake expected Ms. Pritchett to reciprocate his feelings.

Jake says that although he became attached to her quickly, he suspected Ms. Pritchett of being unfaithful to him, even early in the relationship. He acknowledges that there were signs that that she stayed in the relationship with him because of the money he spent on her, but he says that he thought that if he showed her enough love, she would love him in return.

Eventually, Jake and Anita spent all of the entire worker's compensation settlement money, and Ms. Pritchett began to reject Jake. Jake had no home and alternated between staying with friends and living in his truck.

When Jake finally understood that Ms. Pritchett did not share his feelings, he became terribly

"Attachment 4 (page 6)"

frustrated and depressed. He believed Ms. Pritchett had become involved with other men. He became jealous of her, and he reached his lowest point on April 7, 2011. That day, Jake went to Ms. Pritchett's home, suspicious that she was with another man. He saw a man drive her to her home early that afternoon.

The allegations are that Jake fired a shot at Ms. Pritchett from a rifle, at which time she ran into the house. He fired another shot that entered her bedroom area through her bathroom window. Law enforcement officers were unable to locate a cartridge or casing to determine the location from which he fired.

Ms. Pritchett called 911 to report gunshots about 1:45 pm. Law enforcement officers responded and performed a traffic stop on the truck Jake was driving, approximately two miles away from Ms. Pritchett's house. Jake was taken into police custody by 2:30 pm the same day.

The discovery materials show that Jake's actions that day were influenced by his use of alcohol. Although voluntary intoxication is not a defense, his alcohol use clearly contributed to his behavior. When law enforcement officers stopped his truck, they found a case of beer inside and reported that they smelled alcohol.

Law enforcement officers interviewed a friend of Jake's, James Slice, who said that he talked to Jake that morning. In his written statement, Mr. Slice said that Jake asked to stay with him because he was down on his luck. Mr. Slice agreed but said that after a week, Jake started drinking at all times of the day.

Law enforcement officers also interviewed Patricia Lauria, another friend of Jake's, who told them that he lived with her from February 21 until March 19, 2011. She talked to Jake on the telephone at 9:30 am on the incident date and told police that he had sounded as though he had been drinking at that time.

Mr. Slice and Ms. Lauria, the two people who interacted with Jake immediately before his

arrest, also realized that he was in tremendous despair. Mr. Slice told police during the brief time Jake stayed with him, he drank alcohol most of the time he was there. He said that Jake talked every day about Ms. Pritchett and how unhappy he was. Mr. Slice told police that Jake and Ms. Pritchett regularly fought on the telephone.

In her statement to police, Ms. Lauria wrote that when she talked to Jake on the morning of April 7, he was crying. He talked about causing harm to Ms. Pritchett and to himself. According to her written statement, Ms. Lauria was alarmed and responded: "I proceeded to try and talk to him again to please go to the nearest ER or hospital to get help and [that] he was not in his right mind and that he was not thinking straight. I told him that he needed help he said that no one could help him...."

The time between Jake's injury at work and his arrest in 2011 was the worst time in his life. He was struggling with addiction. He was unable to deal with another failing relationship. He reacted to Ms. Pritchett's rejection with jealousy and anger, instead of by turning to family and friends for support. The people who have written affidavits on his behalf believe that his actions were out of character and unusual for him.

Letters to Anita Pritchett

The transcript of Jake's guilty plea reflects that Assistant Solicitor Mayes told the Court that there was a no-contact order in place after his arrest, and that he sent multiple letters to the victim from jail. Jake was arrested on April 7, 2011, and wrote four letters to Anita Pritchett before April 29, 2011, within a month of his arrest.

Ordinarily, no-contact orders are conditions of bond. However, the magistrate judge presiding over Jake's bond hearing declined to set bond. Bond was not set later, and Jake was never released from custody before his plea. Neither the Lexington County Clerk of Court's Office nor the Lexington County Bond Court has a record of any bond conditions. Therefore, it appears that there was not a no-contact order in effect as a bond condition and that Jake did not violate a no-contact order when he sent

the four letters Ms. Mayes mentioned.

However, a Family Court hearing was held on April 29, 2011, at which the presiding judge issued an order of protection. Unfortunately, Jake violated the Family Court order of protection by sending a single letter to Ms. Pritchett before her birthday in December 2011. Law enforcement issued a ticket and he entered a guilty plea to violating the order of protection. He was sentenced to an additional thirty-day sentence consecutive to the sentence he serves now.

There is no evidence that he subsequently attempted to have contact of any kind with Ms. Pritchett through the remainder of his incarceration in the Lexington County Detention Center or during his incarceration at SCDC.

Jake demonstrated respect for authority in his behavior after Ms. Pritchett called police on the incident date. The police reports reflect that police identified Jake's truck and activated their blue lights and sirens. Once he stopped the vehicle, police took defensive positions and instructed him to show his hands, to get out of the vehicle and how to lie down. He complied, was handcuffed, and was taken into custody.

Additionally, the South Carolina Department of Corrections provides records of all disciplinary actions against each inmate on its website. The website indicates that Jake has had no disciplinary actions since his incarceration at SCDC began.

Defendant's Incarceration.

Jake's arrest was the culmination of a series of rather unlikely events and his bad decisions in dealing with those events. He is unlikely ever again to find himself in the kind of tailspin that began with his injury. He is now better equipped to deal with challenges that do arise, and his mindset has changed during his incarceration.

On April 7 of this year, Jake will have been incarcerated for five years. As his criminal record indicates, his current sentence is the first lengthy period of incarceration he has experienced. Although

he hopes that the Court will reduce his sentence, he has lived for five years with the knowledge that he was sentenced to serve twenty-eight years, and that knowledge has weighed heavily on him.

During his incarceration, he has examined the bad choices he made. He knows that it was a mistake to try to solve problems with alcohol and pills, and that it was a mistake to withdraw from his family and friends. He regrets the pain he has caused them and is grateful that they continue to care for him in spite of his choices.

Jake realizes that he was at fault in his relationship with Ms. Pritchett and that he was trying to buy her love. When present counsel asked him how he felt about Ms. Pritchett now, he said, "It was all right for her to find another man if that's what she wanted to do. I was wrong."

Judge Lake believes Jake is remorseful. He says that Jake's attitude has matured during his incarceration. He says that Jake has expressed to him his willingness to take responsibility for his mistakes. Judge Lake says that Jake expected his absolute devotion to be reciprocated, but that now he has realized that was his expectation and not Ms. Pritchett's. Now he realizes his expectations were unreasonable. Judge Lake also believes that Jake has long known that alcohol had a negative effect on him, but that now he has a renewed resolve not to use it.

Judge Lake says that before his incarceration, Jake distrusted modern medication. Medical records from SCDC reflect that Jake has been diagnosed with Post Traumatic Stress Disorder and Major Depressive Disorder. He has been prescribed medication and says that he has found that the medication is beneficial to his mental health. Judge Lake believes that Jake will retain this insight when he is released from SCDC.

Jake has demonstrated tenacity and the ability to change his life. He was abused as a child but was able to form a positive familial relationship with his adoptive parents the Lakes. He remained married for twenty years to his wife Kathy and was a good father to his daughters Elizabeth and Kathryn Dale. Despite his lack of high school education, he learned a trade and, with his wife,

supported his family financially. After becoming dependent on alcohol, he was able to stop drinking and remained sober for sixteen years. These prior successes are evidence of his determination and his likelihood of resuming a productive, happy life when he is released.

If the Court reduces Jake's sentence, he still faces significant consequences. As the Court advised him during the plea, since his charge was a no parole offense, he will serve 85% of any sentence, even a reduced sentence. Additionally, once he is released, he must successfully complete two years of community supervision. Further, as the Court also advised during the plea, he was sentenced under the two-strike law, which means that a second most serious strike would result in a sentence of life without parole.

Jake has no intention of having any further contact with Ms. Pritchett. He realizes now that his relationship with her has completely ended and that he has nothing to gain from any further contact with her.

In addition, an investigator retained by present counsel to provide services on Jake's behalf has determined that Ms. Pritchett has moved to a location more than 700 miles from Lexington, South Carolina. Jake's current counsel has not revealed, and will not reveal, her location to him. Her relocation makes any accidental encounter with Jake unlikely.

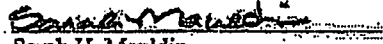
Jake respectfully asks the Court to reduce his sentence to a sentence of fourteen years or less. Jake acknowledges his conduct warranted a significant prison sentence, but he hopes for a reduction. He and his family do not expect that he will be immediately released from SCDC, but his family will be able to provide him a home upon his eventual release. If he is released while still able to work, he believes that he can quickly find employment, and he is willing to comply with any additional conditions of release, including house arrest. Jake is appreciative of the Court's reconsideration of his sentence.

The Honorable Robert H. Lake, Kathryn Dale Lake, Eula Wolfe, Reverend Charles Tyler, and

"Attachment 4 (page 11)"

Steve Herweyer have submitted affidavits in support of Defendant's motion, and these affidavits, along with a printout from the SCDC website, follow.

Respectfully submitted,


Sarah H. Mauldin
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STATE OF SOUTH CAROLINA)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF LEXINGTON)	
STATE OF SOUTH CAROLINA)	#2011-GS-32-03107
)	
)	
vs.)	
)	STATE'S RESPONSE TO
JAKE DALE LAKE,)	DEFENDANT'S MOTION FOR
<u>DEFENDANT.</u>)	RECONSIDERATION OF SENTENCE

Now comes the State in response to the motion by Defendant, Jake Dale Lake, by and through counsel for Defendant, Sarah H. Mauldin, Esquire, for reconsideration of the sentence imposed by the Court on April 4, 2012 following his plea to the charge of attempted murder. Charges of stalking and possession of a weapon during commission of a violent crime were not pursued in consideration of Defendant's plea to the charge of attempted murder.

The State offers the following facts or assertions in response:

(1) Factual circumstances of the case and the nature of the crime:

Jake Dale Lake pled guilty to attempted murder following an incident where he shot at the victim, Anita Pritchett, while she was entering her residence on April 7, 2011 at 587 Neely Wingard Road in Lexington County. Ms. Pritchett had recently ended a relationship with the defendant. The evidence recovered from the scene by law enforcement established that the defendant had been hiding in a wooded area for several hours waiting on his girlfriend to return to her residence. He was armed with a rifle and ammunition. The defendant had made verbal statements to at least two independent witnesses that he intended to kill the victim according to documented statements and the Lexington County Sheriff's Department investigative report:

- a) Telephone call to the victim's daughter, Kristen Pritchett, on the morning of April 7, 2011 wherein the defendant stated: Call and tell your mother goodbye. I'm going to kill her";
- b) Telephone call to his friend, Patricia "Patti" Lauria, on the morning of April 7, 2011 wherein the defendant stated he was going to "kill somebody" and then kill himself. He stated multiple times that he was going to "kill that bitch."

A copy of the arrest warrant and the investigative report is included with this memorandum.

- (2) Crime Scene Investigation confirmed that the defendant had been hiding in the wooded area behind the victim's residence in a premeditated act of planning the shooting. The victim positively identified the Defendant near the wood line of her house at the time of the incident. CSI officers recovered beer cans (Ice House) from the wooded area which were consistent with cases of beer located in the Defendant's car. The victim heard at least two shots fired as she entered her residence. At least one shot entered into the residence through a window and then through a bathroom and a bedroom wall of the home. The victim and her two children

were inside the residence at the time of the shooting. A copy of the CSI report is included with this memorandum.

- (3) Victim Impact Statement: Anita Pritchett prepared an additional victim impact statement dated September 14, 2015 in anticipation of the hearing for reconsideration of sentence. A copy of the original statement to law enforcement (2 pages) and the victim impact statement dated September 14, 2015 is attached with this memorandum.
- (4) Photographs documenting the circumstances of this offense and the ballistics entry through the window and walls of the home are included with this memorandum.

For the foregoing reasons, the State respectfully requests that the sentence remain intact as originally provided by the Court.

Respectfully submitted:



Suzanne Mayes
Senior Assistant Solicitor
Eleventh Circuit Solicitor's Office
Lexington, South Carolina

April 11, 2016

"Attachment 6"

ORIGINAL

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

State of South Carolina

v.

Jake Dale Lake (Inmate # 352637)

Defendant.

IN THE COURT OF GENERAL SESSIONS

Indictment No.:

2011-GS-32-03107

Warrant No.:

M302505

2016 APR 28

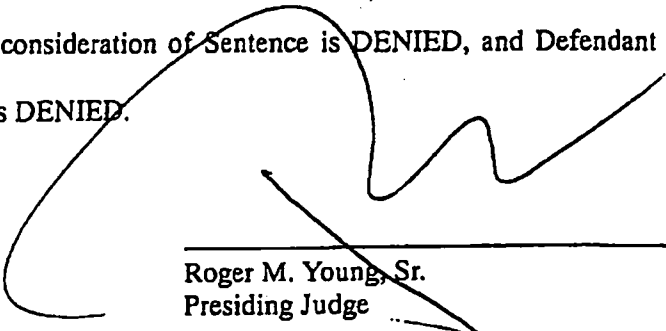
BETH A. CARROLL
CLERK OF COURT
LEXINGTON, SC**ORDER DENYING DEFENDANT'S
MOTION TO RECONSIDER
SENTENCING & MOTION TO
WITHDRAW GUILTY PLEA**

This matter originally came before this Court on October 4, 2012 when the defendant pleaded guilty to the charge of attempted murder and was sentenced to twenty-eight years in South Carolina Department of Corrections. On October 9, 2012, defendant timely filed a Motion for Reconsideration of Sentence. On December 4, 2012, the defendant filed a Motion to Withdraw a Guilty Plea. This Court received briefs on these matters from the defendant's Public Defender Sarah Mauldin, and Senior Assistant Solicitor Suzanne Mayes.

After thoroughly considering the Defendant's motion, brief, and supporting material, and the State's brief in opposition, and based on the same, this Court denies Defendant's Motion to Reconsider Sentencing. Rule 29 requires post-trial motions to be filed within ten days of the imposition of sentence. Rule 29, SCRCrimP. Pursuant to Rule 29, this Court finds the defendant failed to timely file his Motion to Withdraw a Guilty Plea, and the same is denied.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant Lake's Motion for Reconsideration of Sentence is DENIED, and Defendant Lake's Motion to Withdraw Guilty Plea is DENIED.

IT IS SO ORDERED!


 Roger M. Young, Sr.
 Presiding Judge

April 25, 2016
 Charleston, S.C.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Roger M. Young, Circuit Court Judge

Appellate Case No. 2016-000976

THE STATE,

Respondent,

vs.

JAKE DALE LAKE,

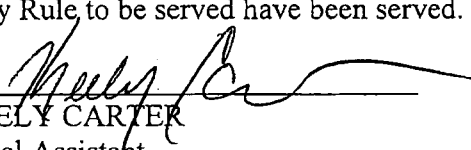
Appellant.

PROOF OF SERVICE

I, Keely Carter, certify that I have served the within Motion to Dismiss Appeal for Lack of Jurisdiction on Appellant by sending two copies of the same to:

Susan B. Hackett, Esq.
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule, to be served have been served.
This 30th day of June, 2017.


KEELY CARTER
Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAKE LAKE,

APPELLANT

APPELLATE CASE NO 2016-000976

RETURN TO MOTION TO DISMISS

On February 27, 2017, Appellant, through undersigned counsel, filed his initial brief of appellant and designation of matter. The brief and designation were served on the state on the same date. On June 30, 2017, the state filed a motion to dismiss the appeal for lack of jurisdiction. Pursuant to Rule 240(e), SCACR, Appellant respectfully files this return and requests this Court not dismiss his appeal.

Procedural History

Appellant's case has a long and tortured history. Some of that history was omitted from the initial brief of appellant as it seemed irrelevant to the matter before this Court at the time. However, the state's motion to dismiss requires a closer examination of each twist and turn in this case.

Indictment & guilty plea

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

Post-sentencing motions

On October 9, 2012, Appellant filed a *pro se* motion for reconsideration. State's Attachment #1. On December 4, 2012, Appellant submitted a *pro se* motion to withdraw his guilty plea. State's Attachment #2. In the motion, Appellant 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." State's Attachment #2. On April 12, 2013, plea counsel sent a letter to the Clerk of Court noting his representation of Appellant at the guilty plea, his awareness of Appellant's filing of the motion to reconsider, and his request to be notified of the hearing on the motion so that he could assist Appellant. State's Attachment #3.

In 2013, while McMaster was representing Appellant, he 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.

¹According 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 Appellant's case, and he entered his guilty plea on December 5, 2013.

In 2014, again while McMaster was representing Appellant, he 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 Appellant.

Post-conviction relief proceedings

On March 5, 2015, Appellant filed an application for post-conviction relief (PCR). Exhibit #1. 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. He informed the PCR court that his attorney "was supposed to arrange a hearing with the judge" on the post-trial motions. Appellant's PCR filing also included two letters from the Honorable Roger M. Young, Sr., which were written in response to requests from Appellant concerning his outstanding

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, the Supreme 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.

motions. In the letters, Judge Young indicated the Lexington County Clerk of Court had no record of Appellant's motion for reconsideration. Exhibit #1.⁴

In July 2015, Appellant wrote to the Clerk of Court requesting the appointment of counsel in his PCR case. Exhibit #2. On September 4, 2015, Jeffrey P. Bloom wrote to the Clerk of Court requesting the appointment of counsel and noting that Appellant had filed post-sentencing motions. Exhibit #3. Mr. Bloom's letter stated that Appellant filed his post-sentencing motions *pro se*. Exhibit #3. Importantly, Mr. Bloom copied "Walt Whitmire, Asst. Attorney General" on this correspondence. Exhibit #3. On September 22, 2015, the Clerk of Court appointed David Allen to represent Appellant in his PCR action. Exhibit #4.

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. Exhibit #5.

Return to post-sentencing motions

On April 1, 2016, Appellant, through counsel, filed a brief in support of motion to reconsider sentence. State's Attachment #4. The state filed a response: State's Attachment #5. The state's response made no mention of hybrid representation. State's Attachment #5. The state never moved to dismiss the motion based on hybrid representation. State's Attachment #5. Instead, the state responded to the substance of the motion. State's Attachment #5. By an order filed on April 28, 2016, Judge Young denied Appellant's motion to reconsider. State's Attachment #6. In the same order, he denied Appellant's motion to withdraw his guilty plea as

⁴ In fact, the Clerk of Court lost the original motion for reconsideration. The motion included as Attachment #1 with the state's motion to dismiss shows the Clerk scanned the original motion, but lost it subsequently. 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. Additionally, the Clerk noted "Patrick Schmeckpeper/AG Office to follow up w/ Judge Young b/c outcome affects disp of PCR." State's Attachment #1.

untimely filed. State's Attachment #6. The order never indicated any concern regarding hybrid representation. State's Attachment #6.

On May 6, 2016, Appellant filed and served a notice of appeal concerning his guilty plea and post-sentencing motions. Pursuant to Rule 203(d)(1)(B)(iv), Appellant filed a written explanation to show there was an issue to be reviewed on appeal. In the explanation, Appellant asserted the guilty plea was not made knowingly and voluntarily because attempted murder requires a specific intent to kill and the record demonstrated Appellant did not understand the charge against him. Further, Appellant 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. Exhibit #6. In the return, the state represented to the court that "Applicant, through counsel, moved to reconsider his sentence on October 9, 2012." Exhibit #6 at 1. 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." Exhibit #6 at 1. 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." Exhibit #6 at 2.⁵ The state requested the application for PCR "be summarily dismissed without

⁵ The return cites "Rule 227, SCACR." Exhibit #6 at 2. However, this rule no longer exists. Previously, Rule 227, SCACR, related to the review of orders in post-conviction relief matters.

prejudice until such time as the direct appeal is resolved.” Exhibit #6 at 2. The state mentioned no concerns regarding hybrid representation.

By an order filed September 29, 2016, the Honorable William P. Keesley signed a consent order of dismissal without prejudice. Exhibit #7 at 1. 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.” Exhibit #7 at 1. The order also recounted Judge Young’s order denying the motions and Appellant’s filing of a notice of appeal. Exhibit #7 at 1. According to the court, “[t]he matter [was] presently pending before the South Carolina Court of Appeals.” Exhibit #7 at 1. 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.” Exhibit #7 at 1. Ultimately, the judge dismissed the PCR application without prejudice “until such time as the direct appeal is resolved.” Exhibit #7 at 2. The order provided that Appellant must file his PCR application within one year of the resolution of his direct appeal. Exhibit #7 at 2. Importantly, the order was signed by the PCR judge, Appellant’s PCR counsel, Appellant, and the state, showing all agreed to the matters discussed in the order, including that plea counsel filed the motion for re-consideration. Exhibit #7 at 2. The order voiced no concerns from any of the parties, including the state, regarding hybrid representation.

Direct appeal

On February 27, 2017, undersigned counsel filed the initial brief of appellant and designation of matter on Appellant’s behalf. On June 30, 2017, Respondent filed a motion to 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. Appellant now files this response.

Discussion

Judicial Estoppel

The state contends that Appellant's notice of appeal is untimely because his motion for reconsideration did not stay the timeline for filing the notice of appeal as it was filed *pro se*. The state argues that Appellant was represented by counsel at the time of the filing of the motion. In support of this argument, the state points to "plea counsel's letter" dated April 12, 2013, filed on April 15, 2013. State's Attachment #1. However, a careful reading of the letter indicates plea counsel adopted the motion.⁶ 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.

State's Attachment #3. The state insists the letter shows plea counsel continued with his representation of Appellant. Additionally, the letter evidences plea counsel's intent to adopt Appellant's *pro se* motion as his own. This reading of the letter is exactly the one espoused by the state in related proceedings in the matter.

During the PCR proceedings, it was the state's position that the motion was filed "through counsel." Exhibit #6 at 1. The state was aware of the nature of the filing as the pleading was in the Clerk's file and publicly available. Additionally, the Clerk's handwritten

⁶ Another reading of the letter is that plea counsel abandoned Appellant. 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 Appellant. This was not an affirmative indication that plea counsel would appear at the hearing or would assist Appellant. This language indicates plea counsel had abandoned Appellant. In fact, plea counsel puts himself into the same category as Appellant's father in his request for notice of the date of the hearing. If plea counsel had abandoned Appellant, then Appellant'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.

note on the motion indicated the Attorney General's office was well aware of the motion and was following up on it. State's Attachment #1. After concluding that plea counsel adopted the motion filed by Appellant, the state represented to the PCR court that the pending post-sentencing motion was filed "through counsel" in its return. Exhibit #6 at 1. 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. Exhibit #7 at 1. 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." Exhibit #7 at 2. 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), the South Carolina Supreme 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. The 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 the 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

explanation for why the Attorney General would make one representation during the direct appeal and a different representation during the PCR action.

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 contends the motion for reconsideration was filed by Appellant 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. Appellant entered his guilty plea, and post-trial motions were filed. Unable to have his motions heard and in light of plea counsel's suspension from the practice of law, Appellant sought relief through the avenue of PCR. During the PCR proceedings, Appellant 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. During the PCR proceedings, the parties discovered that one of Appellant's motions was properly filed with the Clerk, but misplaced. This contributed to confusion on the part of the plea judge. 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.

Appellant requests this Court apply judicial estoppel to a statement of fact – Appellant'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 Appellant differently in the PCR proceedings and the direct appeal proceedings would place Appellant "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 Appellant. 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 Appellant, his desire for notice of the hearing date on the motion, and his indication that he would assist Appellant 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.

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, 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." State's Attachment #5. 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 Appellant'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 of appellant and designation of matter had been filed and after the parties had consented to the dismissal without prejudice of Appellant's PCR application, to make such an assertion. At a minimum, the state was negligent in its unreasonable delay in making its claim that Appellant's motion was the result of hybrid representation and not proper for consideration by a court.

Appellant suffered prejudice as a result of the state's negligent delay. During the PCR proceedings, Appellant 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 Appellant to believe that his direct appeal would be permitted to go forward. While Appellant 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 Appellant's post-sentencing motions did not toll the time period for filing a notice of appeal, Appellant would not have agreed to the dismissal of his PCR application.

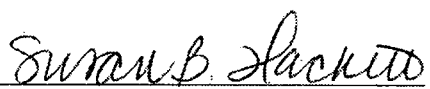
If this Court determines Appellant's post-sentencing motion was the product of hybrid representation and, therefore, the time the motion was pending did not stay the time for appeal, pursuant to Rule 29(a), SCRCrimP, then there is a high likelihood that Appellant's PCR application filed in 2015 or any 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, Appellant's conviction and sentence would never be reviewed by any court. This too is contrary to what Appellant 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 Appellant based on the state's negligent inaction in this case is abundant, material, and clear.

This Court should deny the state's motion to dismiss under the doctrines of judicial estoppel and laches. 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 Appellant was represented by counsel and not adopted by counsel. Further, the doctrine of laches must bar the state's attempt to strip Appellant 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

Appellant respectfully requests this Court deny the state's motion to dismiss and allow the direct appeal to proceed.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of July, 2017.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

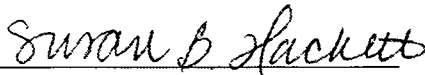
V.

JAKE LAKE,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Motion to Dismiss in the above referenced case has been served upon William F. Schumacher, IV, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Jake Dale Lake, #352637, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 26th day of July, 2017.


Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of July, 2017.

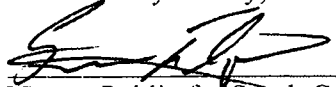
 (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

Exhibit #1

ORIGINAL 45

JM

STATE OF SOUTH CAROLINA

FILED

In the Court of Common Pleas

County of LEXINGTON

JAKE LAKE #352637
 Full name and prison number (if any) of Applicant,
 vs.

2015 CP3200860

APPLICATION FOR
 POST-CONVICTION RELIEF

STATE OF S.C.
 Name of Respondent.

INSTRUCTIONS --- READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore,, exercise care to assure that all answers are true and correct.

If the application is taken *informa pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention

B.R.C.I.

2. Name and location of Court which imposed sentence

LEXINGTON CO. COURT OF GENERAL SESSIONS, LEX., S.C.

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

- (a) 2011-GS-32-03107
 (b)
 (c)

4. The date upon which sentence was imposed and the terms of the sentence:

OCTOBER 4, 2012; AND COURT DENIED POST-TRIAL
 MOTIONS ON JANUARY 12, 2015, AND FEBRUARY 3, 2015.

(a) SEE ABOVE ON P. 1.

(b)

(c)

5. Check whether a finding of guilty was made

(a) after a plea of guilty

(b) after a plea of not guilty

(c) after a plea of nolo contendere

6. Did you appeal from the judgment of conviction or the imposition of sentence?

FILED MOTION TO RECONSIDER ON OCTOBER 9, 2012 (WITHIN 5-DAYS OF SENTENCE) + MOTION TO WITHDRAW GUILTY PLEA ON DECEMBER 12, 2012, WHICH COURT HAD JURISDICTION TO HEAR BECAUSE THE MOTION TO RECONSIDER "STOPPED" THE CLOCK.

(a) the name of each Court to which you appealed: COURT OF GENERAL SESSIONS OF LEXINGTON CO., HON. ROGER YOUNG.

(b) the result in each such Court to which you appealed:

MOTIONS DENIED.

(c) the date of each such result:

JAN. 12, 2015, AND FEB. 3, 2015

(d) if known, citations of any written opinion or orders entered pursuant to such results:

SEE ATTACHED LETTERS FROM JUDGE YOUNG.

8. If you answered "no" to (6), state your reasons for not so appealing:

(a)

(b)

(c)

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) INEFFECTIVE ASSISTANCE OF COUNSEL, 6TH AMEND, U.S. CONST.

(b)

(c)

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) MY ATTORNEY TOLD ME THAT HE HAD A NEGOTIATED SENTENCE OF 5 (FIVE) YEARS, BUT I WAS SENTENCED TO 28 (TWENTY-EIGHT) YEARS.

(c)

11. Prior to this application have you filed with respect to this conviction

FILED
2015 MAR - 5 PM 5:14
JULIA A. GARNER

- (a) any petition in a State Court under South Carolina Law? **YES**
- (b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? **—**
- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? **—**
- (d) any other petitions, motions or applications in this or any other Court? **YES**
12. If you answered "yes" to any part of (II), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- MOTION FOR RECONSIDERATION OF SENTENCE, OCT. 9, 2012**
 - MOTION TO WITHDRAW GUILTY PLEA, DEC. 12, 2012**
 -
 -
- (b) the name and location of the Court in which each was filed:
- LEXINGTON CO. COURT OF GENERAL SESSIONS**
 -
 -
 -
- (c) the disposition thereof:
- DENIED**
 - DENIED**
 -
 -
- (d) the date of each such disposition:
- FEB. 3, 2015**
 - JAN. 12, 2015**
 -
 -
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- SEE ATTACHED LETTER FROM JUDGE YOUNG.**
 - SAME.**
 -
 -
13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

YES

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

i. **MOTION TO WITHDRAW GUILTY PLEA.**

FILED
2015 MAR -3 P 4 50
JESSICA S. [illegible]

2015 CP3200880

- ii.
iii.
- (b) the proceedings in which each ground was raised:
i. WRITTEN MOTIONS FILED WITH G.S. COURT
ii.
iii.
15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:
(a) INEFFECTIVE ASSISTANCE OF COUNSEL, PER 6TH AMEND. OF U.S. CONSTITUTION. THIS IS MY FIRST PCR.
(b)
(c)
16. Were you represented by an attorney at any time during the course of:
(a) your arraignment and plea? YES
GUILTY PLEA
(b) your trial, if any? YES
(c) your sentencing? YES
(d) your appeal, if any, from the judgment of conviction or the imposition of sentence?
(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? MY ATTORNEY WAS SUPPOSED TO ARRANGE A HEARING FOR ME, BUT NEVER DID.
17. If you answered "yes" to one or more parts of (16), list:
(a) the name and address of each attorney who represented you
i. FRANK McMASTER
ii. TOMPKINS + McMASTER, 1530 RICHLAND ST., PO BOX 7337,
iii. COLUMBIA SC 29202
(b) the proceedings at which each such attorney represented you:
i. PLEA + SENTENCE + POST-TRIAL MOTIONS
ii.
iii.
18. State clearly the relief you seek in filing this application.
VACATE PLEA + SENTENCE, AND GRANT NEW TRIAL.
19. Are you now under sentence from any other court that you have not challenged?
NO.

2015 MAR -5 P 4:50

FILED

2015 CP3200880

STATE OF SOUTH CAROLINA }
 COUNTY OF LEXINGTON }

VERIFICATION

I, JAKE D. LAKE, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Jake Lake
 (Signature)

SWORN to and subscribed before me this 4TH
 day of MARCH, 2015.

[Signature] (L.S.)
 Notary Public
 My Commission Expires: 6-21-2015

APPLICATION TO PROCEED WITHOUT PREPAYMENT
 OF COSTS AND AFFIDAVIT
 IN SUPPORT THEREOF

I, JAKE D. LAKE, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant, in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security therefor.

Jake Lake
 (Signature)

SWORN to and subscribed before me this 4TH
 day of MARCH, 2015.

[Signature] (L.S.)
 Notary Public
 My Commission Expires: 6-21-2015

FILED
 2015 MAR -5 PM 4:49
 CLERK OF COURT

2015 CP3200880

STATE OF SOUTH CAROLINA

County of LEXINGTON

In the Court of Common Pleas

JAKE D. LAKE #352637

Full name and prison number (if any) of Applicant,

VS.

STATE OF S.C.

Name of Respondent.

SUPPLEMENTAL
ATTACHMENT FOR
APPLICATION FOR
POST-CONVICTION RELIEF

The Applicant submits that he is within the one (1) year statute of limitations, per S.C.

Code Ann. §17-27-45, based upon the following:

I PLED GUILTY + WAS SENTENCED ON OCTOBER 4, 2012.
I FILED A POST-TRIAL MOTION ON OCTOBER 9, 2012, FOR
RECONSIDERATION OF SENTENCE. THUS, THIS MOTION
WAS TIMELY FILED AND "STOPPED" THE CLOCK ON THE
ONE-YEAR STATUTE OF LIMITATIONS. I THEN FILED A
MOTION TO WITHDRAW MY GUILTY PLEA ON DECEMBER
12, 2012. MY ATTORNEY FRANK McMASTER WAS SUPPOSED
TO ARRANGE A HEARING WITH THE JUDGE ON JAN,
12, 2015 AND FEB 3, 2015, JUDGE COUCH DENIED MY MOTIONS.
THUS, I HAVE UNTIL FEB. 3, 2016, OR AT LEAST JAN. 12, 2016, TO
FILE A PCR.

(Signature)

Jake Lake

SWORN to and subscribed before me this 4TH
 day of MARCH, 2015.

Notary Public

My Commission Expires: 6-21-2015

(L.S.)

FILED

2015 MAR -5 P. 10:49

FILED

2012 OCT -9 A 9 56

STATE OF SOUTH CAROLINA) IN THE GENERAL SESSIONS COURT
COUNTY OF LEXINGTON) BETH A. CARRIGG
CLERK OF COURT
LEXINGTON 29) Indictment # 11-GS-32-03107

STATE OF SOUTH CAROLINA,)
VS.) NOTICE OF MOTION AND MOTION
JAKE DALE LAKE) FOR RECONSIDERATION OF
DEFENDANT.) SENTENCE

TO THE STATE, ABOVE-NAMED, Defendant would show that:

The Defendant Jake Dale Lake pleaded guilty in Lexington County in front of the Hon. Roger Young on October 4, 2012. He was sentenced to 28 years for attempted murder. Additional factors should be considered.

YOU WILL PLEASE TAKE NOTICE that the undersigned Defendant will move before the Presiding Judge of General Sessions Court in _____, South Carolina, on the ____ day of _____, 2012 at ____ o'clock in the ____ m. or as soon thereafter as counsel may be heard for an Order granting a reconsideration of the sentence imposed on the Defendant.

Jake Dale Lake
Defendant

10-9-1, 2012
Lexington, SC

C:\Users\Barb\Documents\Barb\SharedDocs\Public Defender\PD Lake Rec. mot. wpd

COPIES

FILED

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF LEXINGTON) FOR THE ELEVENTH JUDICIAL CIRCUIT
IND. # 2011-GS-32-03107
STATE OF SOUTH CAROLINA) MOTION TO WITHDRAW
A GUILTY PLEA
VS.)
JAKE D. LAKE)
Defendant.)

The Defendant, Jake D. Lake (hereinafter, "defendant"), hereby moves before the Circuit Court of General Sessions for a hearing to withdraw his guilty plea.

On or about October 4, 2012, the defendant entered a guilty plea before the Hon. Roger Young, to the offense of Attempted Murder. The defendant was represented by attorney Frank McMaster. The defendant was sentenced to 28 years. The defendant immediately filed a Motion for Reconsideration in a timely manner, such that this action has been stayed pursuant to Rule 29 of the S.C. Rules of Criminal Procedure. The defendant now submits this supplemental motion.

The defendant was under the belief that a plea negotiation had been reached between the State and defendant's attorney for a sentence of five (5) years. The defendant did not place these matters on the record at the time of the plea and sentencing because defendant had a good faith belief that his attorney had already done so.

This Motion is made pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution; S.C. Constitution, Art. I §§ 3, 14, 15; *Jordan v. State*, 297 S.C. 52, 374 S.E.2d 683 (1988); and, R. 29, SCRCrim.P.

Respectfully submitted,

Jake D. Lake
Jake D. Lake
Defendant

Dated: 12-4, 2012



State of South Carolina
The Circuit Court of the Ninth Judicial Circuit

ROGER M. YOUNG
JUDGE

100 BROAD STREET, SUITE #368
CHARLESTON, SOUTH CAROLINA 29401
TELEPHONE: (843) 958-2015
FAX: (843) 958-5108
E-MAIL: ryoungj@sccourts.org

January 12, 2015

Mr. Jake Dale Lake
Inmate #352637
B.R.C.I. Murray Unit #153
4460 Broad River Road
Columbia, SC 29210

Dear Mr. Lake,

We received your letter regarding your request concerning a motion you filed in Lexington County, South Carolina. I contacted Lexington County Clerk of Courts Office and they informed me that you filed a motion in December 2012 to withdraw a guilty plea. Furthermore, you stated in that motion that you filed a motion to reconsider. Your motion to withdraw the plea was not based on any after discovered evidence and also was not filed timely. Therefore, the filing of your motion is barred by the statutory statute of limitations.

Additionally, the attorney of record, Mr. McMaster is currently suspended from practicing law at this time. This may be the reasoning behind Mr. McMaster failing to contact you or return any letters you may have sent his way.

At this time you may wish to contact the Assistant Solicitor assigned to your case, Suzanna Mayes, for any further information. Also, please know that Judge Roger M. Young, Sr., is out of the Ninth Circuit, which is located in Charleston County. Therefore, Judge Roger Young does not and will not address any matters that have been addressed in Lexington County.

I hope this helps you address any issues or concerns you may have. Please let me know if I can be of any further assistance.

Sincerely,

Stefan B. Feidler
Law Clerk to Judge Roger M. Young, Sr.



State of South Carolina
The Circuit Court of the Ninth Judicial Circuit

ROGER M. YOUNG
JUDGE

100 BROAD STREET, SUITE #368
CHARLESTON, SOUTH CAROLINA 29401
TELEPHONE: (843) 958-2015
FAX: (843) 958-5108
E-MAIL: ryoung@sccourts.org

February 3, 2015

Mr. Jake Dale Lake
Inmate #352637
B.R.C.I. Murray Unit #153
4460 Broad River Road
Columbia, SC 29210

Dear Mr. Lake,

We received your follow up letter with questions concerning motion(s) you filed in Lexington County, South Carolina. First, both motions are barred. Your motion to withdraw a guilty plea was *not* timely filed and was *not* based on any after discovered evidence. The Lexington County Clerk's Office has no record of your motion to reconsider; thus, that motion is barred as well. Furthermore, you are barred from filing a post-conviction relief, since the application for relief must be filed within one year after the entry of a judgment for conviction. I hope this clears up any and all questions you may have.

Sincerely,

Stefan B. Feidler
Law Clerk to Judge Roger M. Young, Sr.

Exhibit #2

CASE NO. 2015-CP-32-00880

To: Lexington County Clerk of Court

From: Jake D. Lake

SCDC

Inmate # 3526³⁷~~27~~

Q3A 114

Perry Correctional Institution

430 Oak Lawn Rd.

Pelzer, SC 29669

To whom it may concern:

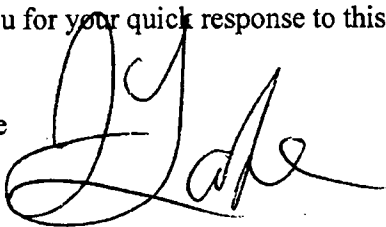
I need a lawyer appointed to me immediately to represent me in my PCR.

I am indigent and I do not have a lawyer currently representing me.

Once you appoint a lawyer to me, I will need their contact information such as phone number, mailing address, and email address.

Thank you for your quick response to this.

Jake Lake



CLERK OF COURT
LEXINGTON, SC

FILED
MAR 30 2015

FILED

Jake Lake # 353631
SCDC Q-3-A114
Perry Correction Inst.
430 Oaklawn Rd
Pelzer, SC 29669

RECEIVED

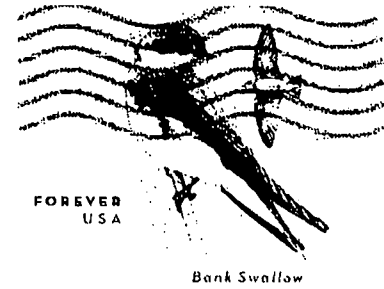
JUL 27 2015

PCI Mailroom

CP

GREENVILLE SC 296

25 JUL 2015 PM 4 L



Clerk of Court
205 East main St.
Lexington, SC 29072

29072359999

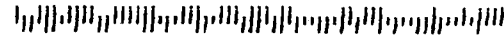


Exhibit #3

**JEFFREY P. BLOOM
ATTORNEY AT LAW**

1911 PICKENS STREET
COLUMBIA, S.C., 29201-2631
OFFICE # (803) 256-7001
FAX # (803) 256-7002
CELL # (803) 261-4576

FILED
LICENSED MEMBER OF THE
S.C., N.C., & N.Y. BARS
E-MAIL: JPBLOOM803@AOL.COM
SEP 18 P 1:43

September 4, 2015

LETHA A. GARRIGG
CLERK OF COURT
LEXINGTON SC

Hon. William P. Keesley
P O Box 10
127 Courthouse Square
Edgefield, SC 29824-0010

Rec 9/8/15

RE: Lake v. State of South Carolina
PCR Case No. 2015-CP-32-0880 (Lexington County)

Dear Judge Keesley,

Please consider appointing PCR counsel to represent the above-named prisoner.

The State will likely submit a routine order of dismissal, arguing that petitioner filed outside the 1-year statute of limitations. I respectfully submit that petitioner has a valid legal claim that he is within the 1-year statute, but requires appointed counsel to make this argument to the court. I have assisted petitioner *pro bono* with some preliminary matters in this regard. For your reference, a summary is included below simply to provide a basis for allowing petitioner to have appointed counsel at this juncture.

On October 12, 2012, he pled guilty before the Hon. Roger Young, and was sentenced. He filed his PCR application on March 5, 2015. However, petitioner filed post-plea motions, *pro se*, on October 9, 2012, within 5-days of his plea, and a supplemental motion, again *pro se*, on December 12, 2012. Subsequently, petitioner's attorney was suspended from the practice of law, such that petitioner wrote Judge Young for the status of petitioner's post-plea motions. On January 12, 2015, and February 3, 2015, Judge Young wrote petitioner, denying the motions. The relevant documents are attached to his PCR petition.

Thus, petitioner has a legal claim that the post-trial motion of October 12, 2012, "stopped the clock," so that the PCR was filed within one-year of the trial judge's January 12, 2015, denial of the post-trial motions. Thank you for your consideration of this request.

Sincerely,


Jeffrey P. Bloom

cc: Walt Whitmire, Asst. Attorney General (PCR cases for the 11th Circuit)
P.O. Box 11549, Columbia, S.C. 29211

Jake Lake, SCDC # 352637; Perry C.I.

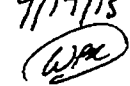
emailed Clerk of Ct. to
App. 9/17/15


Exhibit #4

ORIGINAL

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

JAKE LAKE, #352637)

DOCKET NO. 2015 -CP-32- 00880

Applicant)

STATE OF SOUTH CAROLINA)

ORDERING APPOINTING COUNSEL

Respondent)

POST CONVICTION RELIEF APPLICATION

The Applicant has filed an application for post-conviction relief pursuant to Section 17-27-20, South Carolina Code of Laws, and it appears that the Applicant is indigent.

In accordance with the order and direction of the Court in such case, IT IS ORDERED that David Allen, Esquire, P.O. Box 3241 (Address)

West Columbia, SC 29121 Telephone No. (803) 351-6363 is

appointed to represent the Applicant in this proceeding.

The trial attorney was Frank McMaster

The court reporter at the trial was _____

Attention is directed to a publication of the Post Conviction Relief Subcommittee of the Young Lawyers Division, Post Conviction Relief Proceedings in South Carolina, South Carolina Bar, 1990.


Clerk of Court for LEXINGTON County

Lexington, South Carolina

Sept. 22, 2015

White Copy - Original

Yellow Copy - To Attorney

Pink Copy - To SC Attorney General

Exhibit #5

ORIGINAL

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON) IN THE COURT OF COMMON PLEAS
FILED

Jake Lake, 352637, 2016 MAR -8 A 8:59

Applicant,

BETH A. OVERLGG
 CLERK OF COURT

-vs-

LEXINGTON SCHEDULING ORDER

State of South Carolina,

Case Number 2015-CP-32-000880

Respondent.

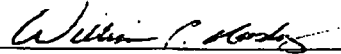
As a result of a status conference conducted today, the following information was obtained and directives given:

1) There is a pending motion to reconsider filed in the underlying guilty plea.

The case is not ready for a final hearing.

2) The case is continued beyond the April 2016 term.

AND IT IS SO ORDERED.



William P. Keesley

Chief Judge for Administrative Purposes

Date: March 7, 2016

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP3200880

Jake Lake #352637

State of South Carolina

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

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.

Circuit Court Judge

Judge Code

3/8/2016
Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on **March 8, 2016**, to attorneys of record or to parties (when appearing pro se) as follows:

David Kellum Allen The Allen Law Firm, P.A. PO Box 3241
West Columbia, SC 29171

ATTORNEY(S) FOR THE PLAINTIFF(S)

Patrick Lowell Schmeckpeper PO Box 11549 Columbia, SC
29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/kpk

Court Reporter

Beth A. Carrigg - 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.

Exhibit #6

ORIGINALSTATE OF SOUTH CAROLINA
COUNTY OF LEXINGTONFILED IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Jake Dale Lake, #352637,

2016 JUN 23 A 10:50 2015-CP-32-0880

Applicant,

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

v.

**RETURN AND MOTION TO DISMISS
WITHOUT PREJUDICE**

State of South Carolina,

Respondent.

The Respondent, making its Return to the application for post-conviction relief, filed March 5, 2015, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Applicant was true bill indicted at the October 2011 term of the Lexington County Grand Jury for Attempted Murder. Frank McMaster, Esquire, represented the Applicant. On October 4, 2012, Applicant pleaded guilty as indicted before the Honorable Roger M. Young, Sr. Judge Young sentenced Applicant to twenty-eight years in prison.

Applicant, through counsel, moved to reconsider his sentence on October 9, 2012, and to withdraw his guilty plea on December 4, 2012. On May 9, 2016, Judge Young's Order Denying Defendant's Motion to Reconsider Sentencing and Motion to Withdraw Guilty Plea was filed. The Applicant filed a Notice of Appeal with the South Carolina Court of Appeals on May 9, 2016. The matter is presently pending before the South Carolina Court of Appeals.

II.

Applicant filed an application for Post-Conviction Relief with the Lexington County Clerk of Court on March 5, 2015, citing several allegations from which relief has been requested.

Respondent contends that this matter is currently on appeal before the South Carolina Court of Appeals. Under Rule 227, SCACR, and S.C. Code Ann. 17-27-20(b) (1985), Respondent submits that at the present time, post-conviction relief is not available to the Applicant because the direct appeal is pending in the appellate courts. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). Therefore, Respondent submits that this Application for post-conviction relief must be summarily dismissed without prejudice until such time as the direct appeal is resolved.

III.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

WHEREFORE, Respondent moves to dismiss the application without prejudice because of Applicant's pending appeal, which is directly connected to his conviction and sentence.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:

Johanna C. Valenzuela
Attorneys for the Respondents

21 June, 2016.

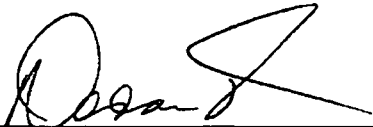
FILED
JUN 23 A 10:56
J. A. CHAFFIN
CLERK OF COURT
COLUMBIA, SC

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
	)	2015-CP-32-0880
JAKE DALE LAKE, #352637	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent,	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion to Dismiss Without Prejudice** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

David Kellum Allen
The Allen Law Firm, P.A.
PO Box 3241
West Columbia, SC 29171

DATED this the 21st day of June, 2016.



Deonna Rogers, Legal Assistant
For Respondent

FILED
2016 JUN 23 A 10:51
BETH A. CLARK
CLERK OF COURT
LEXINGTON, SC

Exhibit

#7

ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON) IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Jake Dale Lake, #352637,

2016 SEP 29 P 3 57

2014-CP-32-3107

2015-CP-32-0880

Applicant, BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

v.

**ORDER OF DISMISSAL
WITHOUT PREJUDICE**

State of South Carolina,

Respondent.

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed March 5, 2015. The Respondent filed a Return, requesting the application be summarily dismissed because of the Applicant's pending direct appeal.

The Applicant was true bill indicted at the October 2011 term of the Lexington County Grand Jury for Attempted Murder. Frank McMaster, Esquire, represented the Applicant. On October 4, 2012, Applicant pleaded guilty as indicted before the Honorable Roger M. Young, Sr. Judge Young sentenced Applicant to twenty-eight years in prison.

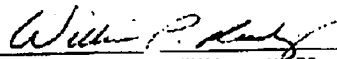
Applicant, through counsel, moved to reconsider his sentence on October 9, 2012, and to withdraw his guilty plea on December 4, 2012. On May 9, 2016, Judge Young's Order Denying Defendant's Motion to Reconsider Sentencing and Motion to Withdraw Guilty Plea was filed. The Applicant filed a Notice of Appeal with the South Carolina Court of Appeals on May 9, 2016. The matter is presently pending before the South Carolina Court of Appeals.

As the matter is presently pending on appeal, jurisdiction is in the South Carolina Court of Appeals. In accordance with Rule 243, SCACR, and S.C. Code Ann. § 17-27-20(b) (1985), this Court finds that at the present time, post-conviction relief is not available to the Applicant because the direct appeal is pending in the South Carolina Court of Appeals. See Al-Shabazz v.

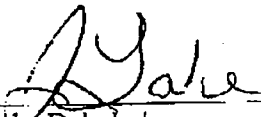
State, 338 S.C. 354, 367, 527 S.E.2d 742, 749 (2000). Therefore, this Court finds this PCR application must be summarily dismissed without prejudice until such time as the direct appeal is resolved. The Applicant may file a PCR application within one (1) year after the resolution of his direct appeal. See S.C. Code Ann. § 17-27-45(a) (Supp. 2003).

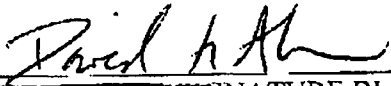
IT IS THEREFORE ORDERED that the application filed on March 5, 2015, be denied and dismissed without prejudice.

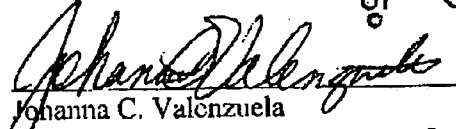
AND IT IS SO ORDERED this 29th day of Sept., 2016.


The Honorable William P. Keesley
Chief Administrative Judge
Eleventh Judicial Circuit

#2 WE CONSENT:


Jake Dale Lake
Applicant


~~INSERT YOUR SIGNATURE BLOCK~~
David K. Allen
Attorney for Applicant


Johanna C. Valenzuela
Senior Assistant Deputy Attorney General
Attorney for Respondent

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

2016 SEP 29 P 3 50

FILED

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER

Jake Lake #352637

State of South Carolina

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

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.

10/18/2016

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the 29th day of September, 2016, and a copy mailed first class or placed in the appropriate attorney's box on the 19th day of October, 2016, to attorneys of record or to parties (when appearing pro se) as follows:

David Kellum Allen
The Allen Law Firm, P.A.
PO Box 3241 West Columbia, SC 29171

Johanna Catalina Valenzuela
PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Beth A. Carrigg - Clerk of Court / kr

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.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Roger M. Young, Circuit Court Judge

Appellate Case No. 2016-000976

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAKE LAKE,

APPELLANT.

REPLY

On June 30, 2017, the State filed a motion to dismiss the appeal for lack of jurisdiction. On July 20, 2017, Appellant filed a return responding to the motion. Pursuant to Rule 240(f), SCACR, the State files its Reply to Appellant's Return.

Appellant's Motion is a Nullity; No Equitable Defenses are Applicable

First and foremost, the State notes Appellant attempts to sidestep the issue of this Court's jurisdiction by claiming the equitable defense of judicial estoppel and laches. However, Appellant's attempt to misdirect the Court's attention ignores the fact that this Court simply does not have the jurisdiction of the case or the ability to consider his equitable claims.

Plea counsel's representation of Appellant was never terminated; thus plea counsel represented Appellant when he filed both of his post-trial motions. "The attorneys . . . of the respective parties in the court below shall be deemed the attorneys . . . of the same parties in the

appellate court until withdrawal is approved and notice is given as provided in this Rule.” Rule 264(a), SCACR. Additionally, Rule 602(e)(1), SCACR stipulates, except as otherwise provided, “[t]rial counsel, whether retained, appointed, or Public Defender, shall continue representation of an accused until final judgment, including any proceeding on direct appeal.” See also Comment 4 to Rule 1.3, RPC, Rule 407, SCACR (“Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client.... [I]f a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer should consult with the client about the possibility of appeal before relinquishing responsibility for the matter.”); Rule 1.16(c), RPC, Rule 407, SCACR (“A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation.”).

In both Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010) and State v. Devore, 416 S.C. 115, 784 S.E.2d 690 (Ct. App. 2016), the Supreme Court of South Carolina and this Court, respectively, found pro se filings from defendants represented by counsel were “essentially . . . nullit[ies].” In Miller, the South Carolina Supreme Court instructed the courts of the state that pro se documents, with the exceptions of motions to relieve counsel, could not even be considered as accepted by the lower court, much less ruled upon.

Appellant fails to understand that his post-trial motions do not exist in the eyes of the law. It was impossible for plea counsel to “adopt Appellant’s pro se motion[s] as his own” if, legally, they never existed. In Devore, this Court specifically stated that such a nullity deprived it of appellate jurisdiction over the entire case because, with the post-trial motions nullified, “there was no proper notice of appeal served or post-trial motion made within ten days of

imposition of the sentence.” Thus, this Court does not have the jurisdiction to even consider Appellant’s equitable defenses.

Finally, even though the State did not reference nullity of Appellant’s post-trial motions in prior filings, such omission does not preclude this Court from ruling on the issue. See Rule 220(c), SCACR (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal).

Appellant’s PCR Case Exemplifies the Dangers of Pro Se Filings

The State argues the confusion among the parties and courts demonstrates why the Miller and Devore courts determined pro se filings from parties represented by counsel cannot be accepted by courts. Appellant’s PCR application twice referenced his post-trial motions, but neither time did he specify his post-trial motions were filed pro se. Appellant’s Exhibit 1. Additionally, Appellant wrote twice in his PCR application that plea counsel “was supposed to arrange a hearing” with the plea judge. Appellant’s Exhibit 1. Thus, a plain reading of the PCR application implies plea counsel filed Appellant’s post-trial motions. Had Appellant filed his post-trial motions through plea counsel, this confusion would never have occurred.

The State also notes that while Jeffery Bloom, Esquire, sent a letter to the PCR judge informing him that Appellant’s post-trial motions were filed pro se, he was not appointed to the case. Appellant’s Exhibit 3. Ultimately, a different attorney, David Allen, represented Appellant. Appellant’s Exhibit 4. At no point did Appellant or the attorneys representing him move to amend the PCR application and remove the ambiguity in the PCR application.

Appellant is not entitled to Equitable Defenses

Even is this Court had the jurisdiction to evaluate Appellant’s equitable defenses, Appellant has fallen woefully short of proving their merit.

A. Unclean Hands

The State contends Appellant is not entitled to equitable defenses because if, as he alleges, the State misrepresented inconsistent positions to the PCR Court regarding the author of Appellant's post-trial motions, Appellant also participated in that misrepresentation and failed to correct the record.

"The doctrine of unclean hands precludes a [party] from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the [other party]." First Union Nat. Bank of South Carolina v. Soden, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998).

"He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief." Emery v. Smith, 361 S.C. 207, 603 S.E.2d 598 (Ct. App. 2004) (internal quotation marks omitted).

Appellant alleges the State's signing of the consent order dismissing the PCR application without prejudice was the State's implicit assent to the representation that the post-trial motions were filed through counsel. Assuming said argument, then Appellant, who, through counsel, also signed the consent order, is equally, if not more, responsible for the misrepresentation to the PCR court because he knew of the inaccuracy in the consent order. Appellant, knowing he, not PCR counsel, filed the post-trial motions, signed off on the mischaracterization of his motions instead of attempting to correct the language of the order. Because of his unclean hands, Appellant is prohibited from seeking equitable relief.

B. Judicial Estoppel

The State would also contend that the doctrine of judicial estoppel does not apply to the instant case. For judicial estoppel to apply, a party must show:

(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; (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.

Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004). Moreover, “[t]he doctrine of judicial estoppel is an equitable concept and should be applied sparingly, with clear regard for the facts of the particular case.” Id. In the instant case, the State’s confusion over the authorship of the post-trial motions was not part of any intentional effort to mislead the court. As referenced above, any “inconsistency” originated from Appellant’s statements in his PCR application.

Furthermore, the “inconsistent” statements were not made for the State’s benefit. Notably, the statements were present in only two documents: the State’s Return and Motion to Dismiss Without Prejudice and the Order of Dismissal Without Prejudice. Appellant’s Exhibits 6 and 7. The State was not attempting to use this minor “inconsistency” to its advantage in either situation; indeed, it sought only to dismiss Appellant’s motion without prejudice and allow him to refile his PCR application after the completion of his direct appeal, as required by South Carolina law. See § 17-27-20(B) (1985) (requiring the completion of an Appellant’s direct appeal before he may file an application for PCR).

Finally, judicial estoppel “generally applies only to inconsistent statements of fact.” Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 477 (1997). As noted by the Miller and Devore courts, Appellant’s pro se motions are a nullity, meaning this Court does not have jurisdiction over his appeal. The question of this Court’s jurisdiction is ultimately a matter of law, meaning judicial estoppel is not an appropriate means of recourse for Appellant.

Accordingly, this Court should not apply judicial estoppel to the instant matter.

C. Laches

The application of laches to Appellant's case is inappropriate. To claim laches, Appellant must show material prejudice caused by the other party's delay. Mid-State Trust, II, v. Wright, 323 S.C. 303, 474 S.E.2d 421 (1996).

Appellant's claim that the language of the order led him "to believe his direct appeal would be permitted to go forward" is a complete mischaracterization of the language of the order. The language of the order only stated the "PCR application must be summarily dismissed without prejudice until such time as the direct appeal is resolved." Appellant's Exhibit 7. Such action was required under South Carolina law. See § 17-27-20(B) (1985). Neither the PCR court nor the State made any promises about the merits of Appellant's direct appeal.

The State argues Appellant is unable to show any material prejudice to his ability initiate PCR by dismissing this appeal. The PCR order specifically gave Appellant one-year from the ultimate resolution of this appeal to file a new application. Appellant's Exhibit 7. Additionally,

Notably, this Court found in Devore that the proper avenue of relief for the defendant, in light of the Court's lack of jurisdiction to hear his appeal, was PCR. Devore, n.4. In fact, it stated that the failure of Devore's trial counsel to file an appeal was, in itself, a proper ground for relief. Id. Thus, if anything, plea counsel's failure to file the post-trial motions could be an additional ground asserted in a future PCR application by Appellant. The period to file an application on this ground for relief would likely start from the dismissal of this direct appeal. See Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002) (finding the one-year period for filing an application for PCR did not apply where defendant was denied a direct appeal of his conviction due to ineffective assistance of counsel).

Accordingly, Appellant cannot show he was prejudiced in his ability to file future

applications for PCR.

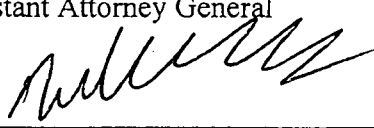
CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court dismiss Appellant's appeal for lack of jurisdiction.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM F. SCHUMACHER, IV
Assistant Attorney General

BY: 

William F. Schumacher, IV
Bar # 100231
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3922

ATTORNEYS FOR RESPONDENT

July 25, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Roger M. Young, Circuit Court Judge

Appellate Case No. 2016-000976

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAKE LAKE,

APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Reply to the Motion to Dismiss in the above-referenced case by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served this 25th day of July, 2017.



Angela Bennett
Administrative Coordinator
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-0368

The South Carolina Court of Appeals

The State, Respondent,

v.

Jake Dale Lake, Appellant.

Appellate Case No. 2016-000976

ORDER

Appellant pled guilty and was sentenced on October 4, 2012. Appellant filed a *pro se* motion to reconsider on October 9, 2012, which was denied April 28, 2016. Appellant served the notice of appeal on May 6, 2016. Because Appellant was represented by counsel at the time he filed the *pro se* motion to reconsider, the "motion was not proper, should not have been accepted, and should not have been ruled upon." *State v. Miller*, 388 S.C. 347, 347, 697 S.E.2d 527, 527 (2010) (holding a *pro se* motion filed while the party was represented by counsel "was essentially a nullity"). Accordingly, the improper motion to reconsider did not toll the time for serving the notice of appeal. Because Appellant's notice of appeal was served more than ten days after his sentence was imposed, Respondent's motion to dismiss is granted. See Rule 203(b)(2), SCACR ("After a plea or trial resulting in conviction or a proceeding resulting in revocation of probation, a notice of appeal shall be served on all respondents within ten (10) days after the sentence is imposed."); Rule 263(b), SCACR ("The time prescribed by these Rules for performing any act except the time for serving the notice of appeal under Rules 203 and 243 may be extended or shortened by the appellate court, or by any judge or justice thereof." (emphasis added)). The remittitur will be sent as required by Rule 221, SCACR.


FOR THE COURT

RECEIVED

AUG 09 2017

APPELLATE DEFENSE

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire

Susan Barber Hackett, Esquire

William Frederick Schumacher, IV, Esquire

FILED

August 9, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JAKE LAKE,

APPELLANT

APPELLATE CASE NO 2016-000976

Appeal from Lexington County

Roger M. Young, Circuit Court Judge

PETITION FOR REHEARING

On February 27, 2017, Appellant filed his initial brief and designation of matter with this Court. Over four months later, Respondent filed a motion to dismiss the appeal for lack of jurisdiction on June 30, 2017. Appellant filed the return to the motion to dismiss the appeal for lack of jurisdiction on July 20, 2017. On July 25, 2017, the state filed its reply. This Court dismissed the appeal by its order of August 9, 2017. On August 24, 2017, undersigned counsel requested an extension of time to file the petition for rehearing due to a family medical emergency. Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter to address the arguments made in Appellant's return concerning judicial estoppel, laches, and abandonment of counsel that were not discussed in this Court's order dismissing

Appellant's appeal. Additionally, Appellant respectfully requests this Court deny the state's request to dismiss his appeal.

Judicial Estoppel

According to this Court's order, Appellant's notice of appeal was untimely because his motion for reconsideration did not stay the timeline for filing the notice of appeal as it was filed *pro se* and that Appellant was represented by counsel at the time of the filing of the motion. This Court's order failed to provide any factual support for this finding. Therefore, it must be assumed this Court relied upon the state's argument that plea counsel's letter dated April 12, 2013, and filed on April 15, 2013, to reach its conclusion. This was error.

Plea counsel's letter stated:

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.

During the current proceedings, the state insisted, and this Court apparently agreed, the letter showed plea counsel continued with his representation of Appellant. What this Court failed to recognize was the letter evidenced plea counsel's intent to adopt Appellant's *pro se* motion as his own. Plea counsel did not disavow the motion or indicate he thought the motion was meritless. On the contrary, plea counsel indicated his desire to assist Appellant with the adjudication of the motion. This reading of the letter is *exactly* the one espoused by the state in related proceedings in the matter. It is only recently that the state changed its position.

During the PCR proceedings, the state maintained the motion was filed "through counsel." When the state told the PCR court the motion was filed through counsel, the state was aware of the nature of the filing as the pleading was in the Clerk's file and publicly available.

Additionally, 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. After reviewing the motion and plea counsel's letter, the state concluded that plea counsel adopted the motion filed by Appellant, and represented to the PCR court that the pending post-sentencing motion was filed "through counsel" in its return. 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. 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." The state is estopped from arguing a contrary position now.

In its reply, the state contended Appellant was "not entitled to equitable defenses because if, as he allege[d], the state misrepresented inconsistent positions to the PCR Court regarding the author of Appellant's post-trial motions, Appellant also participated in that misrepresentation and failed to correct the record." To be clear, it is Appellant's position that the state concluded plea counsel "filed" the post-sentencing motion after a review of the motion and plea counsel's letter by adopting the motion and not disavowing the motion. Appellant's hands are "clean" as he was at all times completely forthcoming in the PCR action and the direct appeal. Appellant provided copies of the motion with his PCR application. It was Appellant's contention then, as it is now, that plea counsel adopted the motion as his own. Therefore, the representations to the PCR court were accurate and consistent with Appellant's representations during the direct appeal. Appellant never argued, as the state contended, that the state "misrepresented inconsistent positions to the PCR Court regarding the author" of the motions. Rather, the argument was and is that the state *consistently* maintained during the PCR proceedings that plea counsel filed the motions, and the state *consistently* maintained an *inconsistent* position during the appellate

proceedings by arguing the motion was filed *pro se*. The state changed its position on a statement of fact in these related proceedings.

In Cothran v. Brown, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004), the South Carolina Supreme 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. The 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 the 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.

The doctrine of judicial estoppel applies in this case because all five elements are satisfied. 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 explanation for why the Attorney General would make one representation during the direct appeal and a different representation during the PCR action. The state, in its reply, offered no reason to explain its decision to tell the PCR court that the motion was filed "through counsel" and to tell this Court that the motion was filed *pro se*. The best the state offered was there was "confusion over the authorship of the post-trial motions." The state went further and blamed its inconsistent positions on "Appellant's statements in his PCR application." Notably, the state made no reference to anything specific in the PCR application that would have contributed to

any alleged confusion. This is not surprising because the state could not point to any matter in the application that would result in any such confusion. The only support offered by the state is that the PCR application twice referenced the post-trial motions, but that Appellant did not “specify his post-trial motions were filed pro se.” Even a cursory examination of the PCR application reveals the fallacy of this argument as Appellant explained “I filed a post-trial motion” and provided a copy of the actual motion showing his signature alone. The state’s argument that it was confused by Appellant’s PCR application and therefore, it made one representation during the PCR proceedings and is now making a completely inconsistent representation during the direct appeal proceedings does not hold water and must be rejected.

The two positions taken by the state are completely 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 Appellant 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. Appellant entered his guilty plea, and post-trial motions were filed. Unable to have his motions heard and in light of plea counsel’s suspension from the practice of law, Appellant sought relief through the avenue of PCR. During the PCR proceedings, Appellant 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. During the PCR proceedings, the parties discovered that one of Appellant’s motions was properly filed with the Clerk, but misplaced. This contributed to confusion on the part of the plea judge. 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.

Appellant requests this Court apply judicial estoppel to a statement of fact – Appellant’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 Appellant differently in the PCR proceedings and the direct appeal proceedings would place Appellant “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 Appellant. 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 Appellant, his desire for notice of the hearing date on the motion, and his indication that he would assist Appellant 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.

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 did not make this claim at the hearing on the post-sentencing motion. The state did not make this claim in its return to the PCR application. The state did not make this claim when the judge continued the PCR hearing to allow the post-sentencing motion to be heard. The state did not make this claim when the PCR judge dismissed the PCR application to allow the direct appeal to proceed. The state did not make this claim in response to the notice of appeal served on May 6, 2016. 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, 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 consideration. 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 on its merits, 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.”

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. After receiving Appellant's notice of appeal, the state failed to argue the notice was untimely. Instead, the state convinced the PCR court to dismiss the PCR action due to the pendency of the appeal. Had the state believed the notice of appeal was untimely, the state should have, and could have, moved to dismiss at that time. Instead, the state did nothing.

Despite the multitude of opportunities over the course of almost five years for the state to claim that Appellant'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 of appellant and designation of matter had been filed and **after** the parties had consented to the dismissal without prejudice of Appellant's PCR application, to make such an assertion. At a minimum, the state was negligent in its unreasonable delay in making its claim that Appellant's motion was the result of hybrid representation and not proper for consideration by a court.

Appellant suffered prejudice as a result of the state's negligent delay. During the PCR proceedings, Appellant 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 Appellant to believe that his direct appeal would be permitted to go forward. While Appellant 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 Appellant's post-sentencing motions did not toll the time period for filing a notice of appeal, Appellant would not have agreed to the dismissal of his PCR application.

This Court's determination that Appellant'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, increases the likelihood that Appellant'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, Appellant's conviction and sentence may never be reviewed by any court. This too is contrary to what Appellant 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 Appellant based on the state's negligent inaction in this case is abundant, material, and clear.

Abandonment

As an alternative basis to permit Appellant's direct appeal to proceed, Appellant posits that plea counsel abandoned him 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 Appellant. This was not an affirmative indication that plea counsel would appear at the hearing or would assist Appellant. This language indicated plea counsel had abandoned Appellant. In fact, plea counsel put himself into the same category as Appellant's father in his request for notice of the date of the hearing.

In light of plea counsel's abandonment of Appellant, Appellant'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 Appellant's post-sentencing motion evidence plea counsel's abandonment of Appellant. Due to plea counsel's abandonment of Appellant following the guilty plea hearing, Appellant's motion for reconsideration of his sentence was not the product of hybrid representation and tolled the time for filing a notice of appeal.

In 2013, while Frank McMaster was purportedly representing Appellant according to the state, he was arrested and charged with driving under the influence, failure to give or giving improper signal, and hit and run involving property damage. 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. According to the Richland County Clerk of Court, McMaster was arrested on these charges on April 29, 2013, a mere seventeen days after McMaster's letter to the court in Appellant's case. Also according to the Clerk's records, McMaster entered his guilty plea on December 5, 2013.

In 2014, again while McMaster was purportedly representing Appellant according to the state, he was arrested for use of a firearm while under the influence of alcohol or drugs, disorderly conduct, and damaging/tampering with a vehicle. 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). 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. 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. On January 11, 2017, the Supreme Court suspended 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.

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 Appellant competently and diligently following the guilty plea as required. Quite simply, counsel abandoned Appellant.

“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 Appellant at the time of the filing of the motion for reconsideration prevails, then the record demonstrated McMaster’s ultimate abandonment of Appellant. According to McMaster’s letter, he would assist Appellant 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 Appellant. Quite frankly, the state’s argument on appeal is that McMaster willfully abandoned Appellant 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

Appellant following the guilty plea hearing and his conduct – not filing the post-sentencing motion – should not be attributed to Appellant.

Conclusion

This Court should deny the state's motion to dismiss under the doctrines of judicial estoppel and laches and due to counsel's abandonment of Appellant. 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 Appellant was represented by counsel and not adopted by counsel. Further, the doctrine of laches must bar the state's attempt to strip Appellant 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. Finally, counsel abandoned Appellant 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.

Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter to address the arguments made in Appellant's return concerning judicial estoppel, laches, and abandonment of counsel. Additionally, Appellant respectfully requests this Court deny the state's request to dismiss his appeal.

Respectfully Submitted,


SUSAN B. HACKETT
Appellate Defender

This 29th day of August, 2017.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

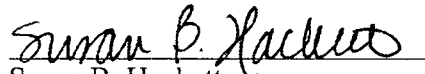
V.

JAKE LAKE,

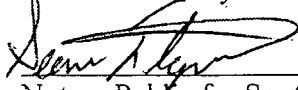
APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon William F. Schumacher, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Jake Dale Lake, #352637, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 29th day of August, 2017.


Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 29th day of August, 2017.

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

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Roger M. Young, Circuit Court Judge

Appellate Case No. 2016-000976

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAKE LAKE,

APPELLANT.

RESPONDENT'S RETURN TO PETITION FOR REHEARING

On August 9, 2017, this Court issued an order dismissing Appellant's appeal because it lacked jurisdiction over the case. Pursuant to Rule 221(a), SCACR, Appellant petitioned this Court for rehearing, and this Court requested that Respondent ("the State") file a return to the petition. For the following reasons, Appellant's petition for rehearing should be denied.

Appellant's Motion is a Nullity; No Equitable Defenses are Applicable

First and foremost, the State notes this Court simply does not have jurisdiction over this matter. While Appellant attempts to sidestep the issue of this Court's jurisdiction by claiming the equitable defense of judicial estoppel and laches, this Court simply does not have the jurisdiction to even consider such arguments because they are "legal nullities" in the eyes of the law.

Plea counsel's representation of Appellant was never terminated; thus plea counsel

represented Appellant when he filed both of his post-trial motions. “The attorneys . . . of the respective parties in the court below shall be deemed the attorneys . . . of the same parties in the appellate court until withdrawal is approved and notice is given as provided in this Rule.” Rule 264(a), SCACR. Additionally, Rule 602(e)(1), SCACR stipulates, except as otherwise provided, “[t]rial counsel, whether retained, appointed, or Public Defender, shall continue representation of an accused until final judgment, including any proceeding on direct appeal.” See also Comment 4 to Rule 1.3, RPC, Rule 407, SCACR (“Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client.... [I]f a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer should consult with the client about the possibility of appeal before relinquishing responsibility for the matter.”); Rule 1.16(c), RPC, Rule 407, SCACR (“A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation.”).

In both Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010) and State v. Devore, 416 S.C. 115, 784 S.E.2d 690 (Ct. App. 2016), the Supreme Court of South Carolina and this Court, respectively, found pro se filings from defendants represented by counsel were “essentially . . . nullit[ies].” In Miller, the South Carolina Supreme Court instructed the courts of the state that pro se documents, with the exceptions of motions to relieve counsel, could not even be considered as accepted by the lower court, much less ruled upon.

Appellant fails to understand that his post-trial motions do not exist in the eyes of the law. It was impossible for plea counsel to “adopt Appellant’s pro se motion[s] as his own” if, legally, they never existed. In Devore, this Court specifically stated that such a nullity deprived

it of appellate jurisdiction over the entire case because, with the post-trial motions nullified, “there was no proper notice of appeal served or post-trial motion made within ten days of imposition of the sentence.” Thus, this Court does not have the jurisdiction to even consider Appellant’s equitable defenses.

Finally, even though the State did not reference nullity of Appellant’s post-trial motions in prior filings, such omission does not preclude this Court from ruling on the issue. See Rule 220(c), SCACR (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal).

Appellant is not entitled to Equitable Defenses

Even if this Court had the jurisdiction to evaluate Appellant’s equitable defenses, Appellant has fallen woefully short of proving their merit.

A. Unclean Hands

The State contends Appellant is not entitled to equitable defenses because if, as he alleges, the State misrepresented inconsistent positions to the PCR Court regarding the author of Appellant’s post-trial motions, Appellant also participated in that misrepresentation and failed to correct the record.

“The doctrine of unclean hands precludes a [party] from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the [other party.” First Union Nat. Bank of South Carolina v. Soden, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998).

“He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief.” Emery v. Smith, 361 S.C. 207, 603 S.E.2d 598 (Ct. App. 2004) (internal quotation marks omitted).

Appellant alleges the State's signing of the consent order dismissing the PCR application without prejudice was the State's implicit assent to the representation that the post-trial motions were filed through counsel. Assuming said argument, then Appellant, who, through counsel, also signed the consent order, is equally, if not more, responsible for the misrepresentation to the PCR court because he knew of the inaccuracy in the consent order. Appellant, knowing he, not PCR counsel, filed the post-trial motions, signed off on the mischaracterization of his motions instead of attempting to correct the language of the order. Because of his unclean hands, Appellant is prohibited from seeking equitable relief.

B. Judicial Estoppel

In his petition for rehearing, Pope contends this Court misapprehended plea counsel's letter to the court filed April 15, 2013. As noted by Appellant, plea counsel's letter stated:

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 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.

Appellant claims this Court erroneously believed this letter was evidence that plea counsel continuously represented Appellant from the time of his plea hearing through the date of the hearing, when the letter was actually plea counsel's attempt to adopt the pro se motion as his motion. Under Appellant's skewed interpretation of the facts, plea counsel's representation of him terminated at the moment the hearing ended and was then restarted months later by the simple act of plea counsel filing a letter with the plea judge. However, such an interpretation is not consistent with South Carolina law. Plea counsel was Appellant's attorney at the time the motions were filed because he had yet to complete or terminate his representation. See Rule 602(e)(1), SCRE (stating "[t]rial counsel, whether retained, appointed, or Public Defender, shall

continue representation of an accused until final judgment, including any proceeding on direct appeal”), Rule 264(a), SCACR (“The attorneys and/or guardians ad litem of the respective parties in the court below shall be deemed the attorneys and guardians of the same parties in the appellate court until withdrawal is approved and notice is given”). Thus, Appellant was required to file any and all post-trial motions through plea counsel.

The State would also contend that the doctrine of judicial estoppel does not apply to the instant case. For judicial estoppel to apply, a party must show:

- (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; (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.

Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004). Moreover, “[t]he doctrine of judicial estoppel is an equitable concept and should be applied sparingly, with clear regard for the facts of the particular case.” Id. In the instant case, the State’s confusion over the authorship of the post-trial motions was not part of any intentional effort to mislead the court. As referenced above, any “inconsistency” originated from Appellant’s statements in his PCR application.

Furthermore, the “inconsistent” statements were not made for the State’s benefit. Notably, the statements were present in only two documents: the State’s Return and Motion to Dismiss Without Prejudice and the Order of Dismissal Without Prejudice. Appellant’s Exhibits 6 and 7. The State was not attempting to use this minor “inconsistency” to its advantage in either situation; indeed, it sought only to dismiss Appellant’s motion without prejudice and allow him to refile his PCR application after the completion of his direct appeal, as required by South Carolina law. See § 17-27-20(B) (1985) (requiring the completion of an Appellant’s direct appeal before he may file an application for PCR).

Finally, judicial estoppel “generally applies only to inconsistent statements of fact.” Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 477 (1997). As noted by the Miller and Devore courts, Appellant’s pro se motions are a nullity, meaning this Court does not have jurisdiction over his appeal. The question of this Court’s jurisdiction is ultimately a matter of law, meaning judicial estoppel is not an appropriate means of recourse for Appellant.

Accordingly, this Court should not apply judicial estoppel to the instant matter.

C. Laches and Abandonment

The application of laches to Appellant’s case is inappropriate. To claim laches, Appellant must show material prejudice caused by the other party’s delay. Mid-State Trust, II, v. Wright, 323 S.C. 303, 474 S.E.2d 421 (1996).

Appellant’s claim that the language of the order led him “to believe his direct appeal would be permitted to go forward” is a complete mischaracterization of the language of the order. The language of the order only stated the “PCR application must be summarily dismissed without prejudice until such time as the direct appeal is resolved.” Appellant’s Exhibit 7. Such action was required under South Carolina law. See § 17-27-20(B) (1985). Neither the PCR court nor the State made any promises about the merits of Appellant’s direct appeal.

The State argues Appellant is unable to show any material prejudice to his ability initiate PCR by dismissing this appeal. The PCR order specifically gave Appellant one-year from the ultimate resolution of this appeal to file a new application.

Notably, this Court found in Devore that the proper avenue of relief for the defendant, in light of the Court’s lack of jurisdiction to hear his appeal, was PCR. Devore, n.4. In fact, it stated that the failure of Devore’s trial counsel to file an appeal was, in itself, a proper ground for relief. Id. Thus, if anything, plea counsel’s failure to file the post-trial motions and alleged

abandonment could be additional grounds asserted in a future PCR application by Appellant.

The period to file an application on this ground for relief would likely start from the dismissal of this direct appeal. See Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002) (finding the one-year period for filing an application for PCR did not apply where defendant was denied a direct appeal of his conviction due to ineffective assistance of counsel).

Accordingly, Appellant cannot show he was prejudiced in his ability to file future applications for PCR.

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court deny rehearing in this case.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

September 28, 2017

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
The Court of General Sessions

The Honorable Roger M. Young, Circuit Court Judge

Appellate Case No. 2016-000976

THE STATE, ...Respondent,

v.

JAKE LAKE, ...Appellant.

PROOF OF SERVICE

I, Destiny Blue, certify that I have served the Return to the Petition for Rehearing on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Susan B. Hackett, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 28th day of September, 2017.



DESTINY BLUE
Legal Assistant

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The South Carolina Court of Appeals

The State, Respondent,

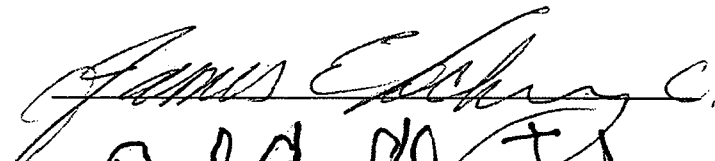
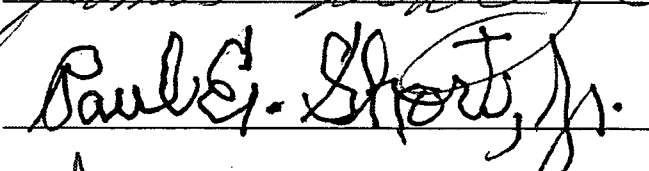
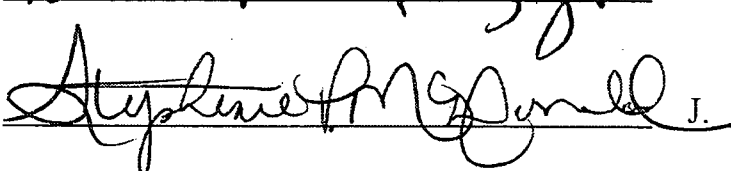
v.

Jake Dale Lake, Appellant.

Appellate Case No. 2016-000976

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

Susan Barber Hackett, Esquire

William Frederick Schumacher, IV, Esquire

Lisa M. Comer

FILED

October 18, 2017