

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM PICKENS COUNTY S.C. SUPREME COURT

The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

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Court of Appeals Appellate Case No. 2015-000211

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THE STATE,.....PETITIONER,

v.

FREDERICK SCOTT PFEIFFER,.....RESPONDENT.

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PETITION FOR WRIT OF CERTIORARI

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## **CERTIFICATE OF COUNSEL**

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 23, 2018.

## **QUESTION PRESENTED**

WHETHER PER RULE 29(a), SCR CRIMP. THE CIRCUIT COURT WAS WITHOUT AUTHORITY TO RULE ON RESPONDENT'S 2ND POST-TRIAL MOTION BECAUSE RESPONDENT'S 2ND MOTION WAS NOT MADE WITHIN TEN (10) DAYS AFTER THE IMPOSITION OF HIS SENTENCE.

## STATEMENT OF THE CASE

On June 19, 2012, the State Grand Jury of South Carolina (the “State Grand Jury”) returned a true-billed indictment charging Respondent and Arthur M. Field (“codefendant”) with securities fraud and conspiracy. (App. pp. 107 - 113 [Indictment 2013GS4709]). Respondent was a lawyer licensed in South Carolina until his indictment.<sup>1</sup> The Indictment alleged that Respondent and codefendant conspired to perpetrate a fraud upon South Carolina investors by concealing and misstating material information in connection with the offer and sale of notes by the now defunct Capital Investment Funding, LLC (“CIF”). CIF raised money through the sale of “senior notes” to South Carolina investors. These notes constituted securities under South Carolina law, and as such were registered with the South Carolina Securities Division (the “Securities Division”). The proceeds of these note sales were then lent to various entities; primarily the New Jersey based Lancaster Resources, Inc. (“LRI”), which was CIF’s primary debtor for the entirety of its existence. Respondent served as counsel to CIF as well as the co-owner and co-manager of CIF’s principal re-lender Cosimo, LLC (“Cosimo”). Throughout the course of CIF’s existence, Respondent supplied legal opinions on CIF’s compliance with state and federal securities laws and the lack thereof. Respondent was also separately indicted by the South Carolina State Grand Jury; these multi-county indictments include commission of securities fraud and conspiracy with regard to

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<sup>1</sup> <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2012-06-15-01>

the operations of Cosimo, LLC, which served as the major relender of investor funds provided to Capital Investment Funding, LLC. (App. pp. 115 - 118 [Indictment 2013GS4710]). They also alleged forgery by use of a fictitious name to endorse a check from the South Carolina Department of Transportation for compensation in condemnation of property, and perjury and false swearing regarding this fictitious name in two depositions where Capital Investment Funding loans were involved.

Ultimately, Respondent pled guilty on September 18, 2013 to three (3) of the counts, i.e. 2013GS4709 Count I (Criminal Conspiracy, CDR 0049); Count III (Securities Fraud, CDR 2615); and Count VI (Securities Fraud, CDR 2615). (App. pp. 16 - 64 [September 18, 2013 plea transcript]). Respondent's restitution hearing was deferred following his plea and sentencing.

Respondent filed a timely (1<sup>st</sup>) motion for reconsideration on September 30, 2013. (App. p. 14 [Respondent's 1<sup>st</sup> Motion for Reconsideration, dated September 30, 2013]). On October 8, 2013, the circuit court held a hearing on Respondent's (1<sup>st</sup>) Motion for Reconsideration of sentence at the same time as the restitution hearing – the circuit court issued amended sentencing sheets the same day at Respondent's request for a mere clarification regarding SCDC's calculation(s) methods. (App. pp. 5 - 7 [Amended Sentencing Sheets dated October 8, 2013], App. pp. 65 - 78 [October 8, 2013 restitution and re-sentencing transcript]).

Twenty-nine (29) days after his plea and sentencing, Respondent filed a 2<sup>nd</sup> motion for reconsideration – dated October 17, 2013. (App. p. 15). Respondent was ordered to pay restitution in the net amount of \$169,186.30. (App. pp. 102 - 105

[July 9, 2014 restitution and 2<sup>nd</sup> reconsideration transcript], App. p. 8 [Restitution Order]). Ultimately, the circuit court granted Respondent's 2<sup>nd</sup> request to reconsider his sentence. (App. p. 9)

Petitioner filed a timely Notice of Appeal and the Final Briefs were filed on November 7, 2016. (App. p. 124, 136). The Court of Appeals issued a decision affirming the circuit court on March 28, 2018. (App. p. 152). Petitioner's Petition for Rehearing was filed on April 12, 2018. (App. p. 154). Respondent filed a Return to Petition for Rehearing on April 23, 2018. (App. p. 158). The Court of Appeals issued its decision denying the Petition for Rehearing on May 23, 2018. (App. p. 160).

## STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). “On appeal, the trial court’s ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law.” State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs where the trial court’s conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 860 (Ct. App. 2010).

## ARGUMENT

PER RULE 29(a), SCRCrimP. THE CIRCUIT COURT WAS WITHOUT AUTHORITY TO RULE ON RESPONDENT'S 2ND POST-TRIAL MOTION BECAUSE RESPONDENT'S 2ND MOTION WAS NOT MADE WITHIN TEN (10) DAYS AFTER THE IMPOSITION OF HIS SENTENCE

This Court recently reiterated, in no uncertain terms, that [absent an exception] the ten-day limit for serving a post-trial motion is an absolute deadline and a trial court does not have the power to alter or amend, nor does it have any power to grant an extension of time in which to file a post-trial motion. Overland, Inc. v. Nance, Op. No. 27800 (S.C. Sup. Ct. filed May 23, 2018). Nance is a civil case applying Rule 59, SCRCP; but the logic applies to criminal cases applying Rule 29(a), SCRCrimP. because the language of the rules is practically identical.<sup>2</sup>

There were two (2) motions for reconsideration filed by Respondent, the first was timely filed and the circuit court of course retained authority to decide the very narrow issue presented in Respondent's 1<sup>st</sup> motion for reconsideration – but that authority does not extend to supplemental arguments presented outside the ten (10) day window.<sup>3</sup> See, State v. Warren, 392 S.C. 235, 708 S.E.2d 234 (Ct. App. 2011).

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<sup>2</sup> Rule 59(f), SCRCP, provides:

“[A]nd the trial judge shall retain jurisdiction of the action for the purpose of hearing and disposing of such motion if not heard and disposed during the term.”

Rule 29(a), SCRCrimP., provides:

“[A]nd the circuit judge shall retain jurisdiction of the action for the purpose of hearing and disposing of the motion if not heard and disposed of during the term.”

<sup>3</sup> Respondent's plea/sentencing was on September 18, 2013. Ten (10) days later was September 28, 2013, which was a Saturday. Accordingly, Respondent's 1<sup>st</sup> Motion for Reconsideration was timely filed on September 30, 2013.

The relevant dates are as follows:

Sept. 18, 2013	Respondent's plea and sentencing. (App. p. 16).
Sept. 30, 2013	Respondent's 1st "Motion to Reconsider." (App. p. 14).
Oct. 8, 2013	Order granting Respondent's 1st "Motion to Reconsider." (App. p. 5-7).
Oct. 17, 2013	Respondent's 2 <sup>nd</sup> "Motion to Reconsider." (App. p. 15).

After September 30, 2013, the only narrow issue the circuit court had authority to address was to clarify the sentences for SCDC as requested in the 1<sup>st</sup> motion for reconsideration. Respondent got exactly what he was seeking in the 1<sup>st</sup> motion; there was nothing to warrant a 2<sup>nd</sup> motion.<sup>4</sup> The narrow issue in Respondent's 1<sup>st</sup> motion was how SCDC was doing their arithmetic, i.e. how they were interpreting which count was consecutive/concurrent. (App. p. 66, line 12 – p. 67, line 18). Respondent's 2<sup>nd</sup> "Motion to Reconsider" was twenty-nine (29) days after Respondent's sentencing – far beyond the ten (10) days required for the circuit judge to "retain jurisdiction" "of the motion" per Rule 29(a), SCRCrimP.

Respondent's 2<sup>nd</sup> "Motion to Reconsider" raised for the first-time a completely new and wholly unrelated issue and is therefore untimely and invalid. Respondent's 2<sup>nd</sup> motion was essentially a *new information has come to light* type claim regarding the sentence of the co-defendant, who Respondent argued was the "ring-leader kingpin of the conspiracy", and thought the comparative sentences were unfair. (App. p. 15). Respondent did not and could not have raised the co-defendant sentence disparity issue within ten (10) days of Respondent's sentencing [September 18] because "the codefendant's sentence was not known to Defendant until October

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<sup>4</sup> There was only one (1) single issue in the 1<sup>st</sup> motion for reconsideration - an alleged inconsistency with the circuit court's sentencing as interpreted by SCDC, i.e. "that there are inconsistencies between the sentences handed down by the Court with what is reflected within the Sentencing Sheets..." (App. p. 14 [Respondent's 1<sup>st</sup> Motion for Reconsideration, dated September 30, 2013]).

8, 2013.” (App. p. 11).

The only way for the circuit court to have jurisdiction over a 2<sup>nd</sup> post-trial motion would be if that 2<sup>nd</sup> motion was timely filed [respectively] and sought “relief on issues coming to light as a result of an order following an initial post-trial motion that alters or amends the judgment.” Collins Music Co. v. IGT, 353 S.C. 559, 564, 579 S.E.2d 524, 526 (Ct. App. 2002) (emphasis added). Meaning, a 2<sup>nd</sup> motion filed outside the original ten (10) day window is only timely if there was a problem with the actual filed order as to the issue(s) raised in the 1<sup>st</sup> motion. Respondent’s 2<sup>nd</sup> motion had nothing to do with the narrow issue raised in his 1<sup>st</sup> motion.

The circuit court specifically rejected this timeliness argument explaining, “*that the codefendant’s sentence was not known until October 8, 2013...With this new codefendant sentencing information, Defendant did timely file this 2<sup>nd</sup> motion for reconsideration, dated October 17, 2013.*”<sup>5</sup> (App. p. 11 [Order Granting Defendant’s 2<sup>nd</sup> Motion to Reconsider, dated January 23, 2015]). The circuit court’s ruling is an error of law. Rule 29(a), SCRCrimP. affords a limited ten (10) day window that begins “after the imposition of the sentence.” The sentencing of a codefendant is irrelevant for the purposes of Rule 29(a), SCRCrimP. The clarification of the sentence that occurred (on October 8, 2013) as a result of Respondent’s 1<sup>st</sup> motion did not “reset” any Rule 29 clock for new claims outside the narrow scope of the 1<sup>st</sup> Rule 29 motion. State v. Warren, 392 S.C. 235, 708 S.E.2d 234 (Ct. App. 2011).

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<sup>5</sup> Applying the sentencing court’s logic would allow any defendant to file a post-trial motion for reconsideration of sentencing whenever a codefendant’s sentence is arguably at issue. To do so would virtually eliminate any finality – for example, in the matter at hand, the codefendant’s sentence calculation is not final; it is the issue in pending Appellate Case number 2018-001042.

If Respondent truly thought the co-defendant's sentence was relevant after-discovered evidence then he could have considered a remedy via the application of Rule 29(b), SCRCrimP. (as opposed to Rule 29(a)). However, Rule 29(b), SCRCrimP. cannot be used to alter a sentence – the only relief afforded under Rule 29(b) is a “new trial”. Respondent never sought a new trial; instead, he sought a sentence reduction by filing an untimely motion raising a new issue that the circuit court no longer had authority to address. The circuit court erred as a matter of law ruling it had authority over the new issue raised in Respondent's untimely 2<sup>nd</sup> “Motion to Reconsider”. Applying this Court's logic from Nance, the *Order Granting Respondent's 2<sup>nd</sup> Motion to Reconsider* filed by the circuit court on January 23, 2015 was a “nullity because the trial judge no longer had jurisdiction over the matter.” Overland, Inc. v. Nance, Op. No. 27800, 2 (S.C. Sup. Ct. filed May 23, 2018) (citing Leviner v. Sonoco Prod. Co., 339 S.C. 492, 530 S.E.2d 127 (2000)).

The Court of Appeals' decision affirms the circuit court's conclusion that it had jurisdiction over the new issue raised in Respondent's untimely 2<sup>nd</sup> “Motion to Reconsider”. Petitioner respectfully petitions for certiorari because Respondent's 2<sup>nd</sup> motion did not seek relief on the order granting his 1<sup>st</sup> motion.

## CONCLUSION

For these reasons, it is respectfully submitted that this Court should reverse the Court of Appeals decision that affirmed the circuit court when the circuit court erred as a matter of law when it granted relief on a new issue raised twenty-nine (29) days after sentencing as the circuit court lacked the jurisdiction to do so per Rule 29(a), SCRCrimP. The circuit court's "*Order Granting Defendant's 2<sup>nd</sup> Motion to Reconsider*" (dated January 13, 2015) should be nullified.


Respectfully submitted,

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PROOF OF SERVICE

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I certify that I have served the *Petition for Writ of Certiorari and the Appendix* by depositing a copy in the United States Mail; postage prepaid, on June 21, 2018, addressed to his attorneys of record:

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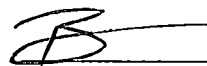
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