

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

Eugene C. Griffith, Jr., Circuit Court Judge

RECEIVED

JUN 17 2013

S.C. Supreme Court

ASHLEY RAY HARDIN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212395

APPENDIX

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INDEX

INDEX	i
GUILTY PLEA TRANSCRIPT DATED NOVEMBER 16, 2005	1
PROBATION REVOCATION TRANSCRIPT DATED AUGUST 28, 2008	33
APPLICATION FOR POST-CONVICTION RELIEF	45
RETURN AND MOTION TO DISMISS	52
AMENDED RETURN	56
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED JANUARY 31, 2012	64
ORDER OF DISMISSAL	139
NOTICE OF APPEAL	158
PETITION FOR REINSTATEMENT OF APPEAL	159
AMENDED PETITION FOR REINSTATEMENT OF APPEAL	161
INDICTMENTS	164

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA	)	
-vs-	)	TRANSCRIPT OF RECORD
ASHLEY R. HARDIN, ET AL,	)	05-GS-32-4210, et al
	)	
Defendants.	)	

November 16, 2005
Lexington, South Carolina

B E F O R E:
HONORABLE EDWARD W. MILLER, Judge.

A P P E A R A N C E S:

C. DAYTON RIDDLE, III, Deputy Solicitor
ANGELA G. AVINGER, Senior Asst. Solicitor
Attorneys for the State

ROBERT T. WILLIAMS, SR., Esquire
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Circuit Court Reporter

INDEX

Guilty Plea 11/16/05	3
Statement of Facts	21
Sentence of the Court	24
Certificate	32

INDEX OF WITNESSES

(Court Reporter's Note: There was no direct or cross examination of any witnesses).

INDEX OF EXHIBITS

(Court Reporter's Note: No exhibits were marked or received into evidence).

1 (The following proceedings are reported on
2 November 16, 2005).

3 CLERK: On Indictment 2004-GS-32-1238, the
4 State versus Charles Long, indicted for driving under
5 the influence third offense, he is pleading to driving
6 under the influence first offense. It has been true
7 billed and he is represented by Mr. Calhoun.

8 On Indictment 2005-GS-32-4210, the State
9 versus Ashley Hardin, indicted for receiving stolen
10 goods, 1,000 to \$5,000, he is pleading as charged.

11 On Indictment 2005-GS-32-4209, the State
12 versus Ashley Hardin, indicted for criminal sexual
13 conduct with a minor second degree, he is pleading as
14 charged. He has waived presentment to the grand jury
15 and is represented by Mr. Williams.

16 On Indictment 2005-GS-32-4211, the State
17 versus Fernando Limas, indicted for assault and battery
18 of a high and aggravated nature, he is pleading as
19 charged. He is waiving presentment to the grand jury
20 and is represented by Mr. Buchanan.

21 On Indictment 2004-GS-32-2847, the State
22 versus Billy Dea Clark, indicted for possession with
23 intent to distribute cocaine third offense, he is
24 pleading to possession with intent to distribute cocaine
25 first offense.

1 And on Indictment 2004-GS-32-2850, the State
2 versus Billy Dea Clark, indicted for possession with
3 intent to distribute cocaine within proximity of a
4 school, he is pleading as charged. It has been true
5 billed and he is represented by Mr. William.

6 Raise your right hands, please.

7 CHARLES LONG, ASHLEY HARDIN,
8 FERNANDO LIMAS, and BILLY DEA CLARK are first duly
9 sworn.

10 THE COURT: Mr. Long, how old are you?

11 THE DEFENDANT: Thirty-five.

12 THE COURT: What is the highest grade you
13 finished?

14 THE DEFENDANT: Graduated, 12th.

15 THE COURT: What kind of work do you do?

16 THE DEFENDANT: Construction with Gregory
17 Electric.

18 THE COURT: What is your marital situation?

19 THE DEFENDANT: Two children, seven year
20 old -- I'm single. I got a girlfriend. I stay with my
21 girlfriend.

22 THE COURT: You have got one that is seven and
23 one that is what?

24 THE DEFENDANT: Fourteen.

25 MR. CALHOUN: He lives with his wife and

1 children.

2 THE COURT: He says he's single. She claims
3 him; he doesn't. What it is?

4 THE DEFENDANT: It's been -- we haven't
5 married.

6 THE COURT: You ain't made an honest woman out
7 of her yet.

8 THE DEFENDANT: We just been together 13
9 years.

10 THE COURT: How many days did you spend in
11 jail on this?

12 THE DEFENDANT: Two days.

13 THE COURT: Two?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Hardin, how old are you?

16 THE DEFENDANT: Twenty.

17 THE COURT: What is the highest grade you
18 finished?

19 THE DEFENDANT: Tenth, sir.

20 THE COURT: What kind of work do you do?

21 THE DEFENDANT: I'm a subcontractor for Best
22 Builders, mainly construction, sir.

23 THE COURT: What is your marital situation?

24 THE DEFENDANT: I'm single, sir.

25 THE COURT: Kids?

1 THE DEFENDANT: Stepchildren.

2 THE COURT: You are single and you have
3 stepchildren?

4 THE DEFENDANT: That's right. I claim them.

5 THE COURT: You need to talk to your lawyer
6 about that. You never say anything like that. They are
7 not yours unless you adopt them.

8 THE DEFENDANT: They are not mine.

9 THE COURT: How many days did you spend in
10 jail?

11 THE DEFENDANT: I'm not too sure. I can't
12 really remember, about five, six.

13 MR. WILLIAMS: That's right, Judge.

14 THE COURT: Limas, how old are you?

15 THE DEFENDANT: Thirty-four.

16 THE COURT: What is the highest grade you
17 finished?

18 THE DEFENDANT: About third grade.

19 THE COURT: Third?

20 THE DEFENDANT: Yeah, in Mexico.

21 THE COURT: Where in Mexico?

22 THE DEFENDANT: Quarantaquattro.

23 THE COURT: Where is that?

24 THE DEFENDANT: Far from here.

25 THE COURT: Far from here. How did you get

1 over here?

2 THE DEFENDANT: I walked.

3 THE COURT: You walked?

4 THE DEFENDANT: Yeah, walked all the way here.

5 THE COURT: How long have you been here?

6 THE DEFENDANT: Probably about 19 years.

7 THE COURT: Nineteen. You picked up the
8 language pretty well.

9 THE DEFENDANT: Right.

10 THE COURT: You know what is going on today?

11 THE DEFENDANT: Yeah.

12 THE COURT: Can you read and write?

13 THE DEFENDANT: A little bit, not too much.

14 THE COURT: You take care of your own money?

15 THE DEFENDANT: Yeah.

16 THE COURT: Have you got a bank account or
17 anything?

18 THE DEFENDANT: Not now.

19 THE COURT: But you pay your own bills?

20 THE DEFENDANT: Yeah. I got my wife. I got
21 my wife and two kids.

22 THE COURT: You got a wife and two kids. She
23 pays the bills?

24 THE DEFENDANT: I pay the bills. I take care
25 of everything.

1 THE COURT: You bring your check home and give
2 it to your wife?

3 THE DEFENDANT: Well, I gave it to him because
4 he has to go over there and pay, you know.

5 THE COURT: You think he is competent? Who is
6 your lawyer?

7 MR. BUCHANAN: I am, Your Honor.

8 THE COURT: Do you think he is competent?

9 MR. BUCHANAN: Yes. I work with Richard
10 Breibart. He has explained everything, the ins and outs
11 of the agreement.

12 THE COURT: What kind of work do you do?

13 THE DEFENDANT: I work with Walter Perrone --

14 COURT REPORTER: Judge, I'm having trouble
15 understanding.

16 THE COURT: A little clearer. I didn't
17 understand it either. What kind of work do you do?

18 THE DEFENDANT: Load some trucks.

19 THE COURT: Load trucks?

20 THE DEFENDANT: Yeah, and take care, you know,
21 the trailers and all that.

22 THE COURT: Take care of the trailers?

23 THE DEFENDANT: (Nods head). (Indicating
24 affirmative response).

25 THE COURT: You told me you are married. And

1 how old are your children?

2 THE DEFENDANT: Six and eight.

3 THE COURT: How many days did you spend in
4 jail?

5 THE DEFENDANT: I think about a month and two
6 weeks, like that.

7 THE COURT: Six weeks?

8 MS. AVINGER: Sounds good, Your Honor.

9 THE COURT: Check on that.

10 MS. AVINGER: From May 8 to June 22.

11 THE COURT: That's pretty good.

12 Mr. Clark, how old are you?

13 THE DEFENDANT: Twenty-four.

14 THE COURT: Twenty-four. What's the highest
15 grades you finished?

16 THE DEFENDANT: Twelfth grade.

17 THE COURT: What kind of work do you do?

18 THE DEFENDANT: Gilliam Construction,
19 apprentice.

20 THE COURT: Construction?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: What is your marital situation?

23 THE DEFENDANT: Single.

24 THE COURT: Kids?

25 THE DEFENDANT: One.

1 THE COURT: How old?

2 THE DEFENDANT: Six.

3 THE COURT: And days in jail?

4 THE DEFENDANT: Two months.

5 THE COURT: Sixty days?

6 MR. WILLIAMS: Two months, yes, sir.

7 THE COURT: How many days did you figure on
8 Mr. Limas?

9 MS. AVINGER: Forty-five.

10 THE COURT: In the last 24 hours, have you had
11 any drugs, alcohol or medication, Mr. Long?

12 THE DEFENDANT: Sir?

13 THE COURT: In the last 24 hours, have you had
14 any drugs, alcohol or medication?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: What did you have?

17 THE DEFENDANT: I drunk a couple of beers last
18 night.

19 THE COURT: A couple of beers?

20 THE DEFENDANT: Yes, sir, when I got off of
21 work.

22 THE COURT: Are you all right today?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: You are not hung over?

25 THE DEFENDANT: No, sir.

1 THE COURT: And you are not still intoxicated?

2 THE DEFENDANT: No, sir.

3 THE COURT: How about you, Mr. Hardin?

4 THE DEFENDANT: No, sir.

5 THE COURT: Mr. Limas?

6 THE DEFENDANT: No, sir.

7 THE COURT: No tequila?

8 THE DEFENDANT: No.

9 THE COURT: Mr. Clark?

10 THE DEFENDANT: No, sir.

11 THE COURT: Have you ever been treated for the
12 abuse of alcohol, drugs, mental illness or emotional
13 problems, Mr. Long?

14 THE DEFENDANT: Yes, sir, I have attended A.A.
15 meetings.

16 THE COURT: For alcohol?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: You are okay today, right?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: How about you, Mr. Hardin?

21 THE DEFENDANT: No, sir.

22 THE COURT: Mr. Limas?

23 THE DEFENDANT: No, sir.

24 THE COURT: Mr. Clark?

25 THE DEFENDANT: No, sir.

1 THE COURT: Mr. Long, you are up here on
2 Indictment 04-1238, which alleges you did in Lexington
3 County, November 22, '03, drive a motor vehicle under
4 the influence of alcohol, drugs or a combination thereof
5 which materially and appreciably impaired your ability
6 to drive. D.U.I. first is what you are pleading to. It
7 carries 30 days or a \$400 fine, plus costs and
8 assessments. Do you understand?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Mr. Hardin, you are up here on
11 05-4210. It alleges that you did in Lexington County,
12 January 21, '04, possess stolen property, miscellaneous
13 household items valued between one and \$5,000, and you
14 knew or should have known they were stolen. That
15 carries five years. Do you understand that?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: You are also here on 05-4209,
18 which alleges you did in Lexington County, between
19 June 11, '03, and June 14, '03, commit a sexual battery
20 upon and with the body of ^{Minor}, being a child
21 between 14 and 16 years of age. You were in a position
22 of familial, custodial or official authority to coerce
23 the victim to submit. You had intercourse with her.
24 It's up to 20 years. Do you understand that?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: This is a violent and most serious
2 offense. If you get convictions for two most serious
3 offenses or a combination of three serious and most
4 serious offenses, you can get life in prison without
5 parole. Do you understand that?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Any time that you would serve for
8 this would be day for day, no parole. Do you
9 understand?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Mr. Limas, you are here on...

12 MS. AVINGER: Your Honor, we did a waiver.

13 THE COURT: It's 05-4211. That alleges that
14 you did in Lexington County, February 8, '01, commit an
15 unlawful act of violent injury to Mary Jane Smith,
16 accompanied by circumstances of aggravation, a
17 difference in the sexes or inflicted serious bodily
18 injury or with indecent liberties with a female. It
19 carries ten years. Do you understand?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Mr. Clark, you are here on
22 04-2847. It alleges you did in Lexington County,
23 February 21, '04, possess with intent to distribute a
24 quantity of cocaine. That carries 15 years and a
25 \$25,000 fine. Do you understand that?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: You are also here on 04-2850,
3 which alleges you did in Lexington County, February 21,
4 '04, possess with intent to distribute a quantity of
5 cocaine within close proximity to a school. That
6 carries ten and it's a serious offense, which means if
7 you get three or more of those, you can get life without
8 parole. Do you understand that?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Understanding the nature of the
11 charges against you and the maximum possible punishment,
12 how do you want to plead, Mr. Long?

13 THE DEFENDANT: Guilty.

14 THE COURT: Mr. Hardin?

15 THE DEFENDANT: Guilty.

16 THE COURT: Mr. Limas?

17 THE DEFENDANT: Guilty.

18 THE COURT: Mr. Clark?

19 THE DEFENDANT: Guilty.

20 THE COURT: Mr. Hardin and Mr. Limas, neither
21 of your cases have been presented to the Lexington
22 County Grand Jury. You have an absolute right to
23 require the State to present the cases to the grand
24 jury, where they would have to prove more probably than
25 not that a crime was committed, and you committed that

1 crime. Do you want to give up your right to require the
2 State to present the case to the grand jury and go
3 forward today, Mr. Hardin?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Mr. Limas?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Mr. Limas, you have a negotiated
8 sentence. That just means if I don't like it, I won't
9 take it.

10 Other than that, has anybody forced you,
11 coerced you, threatened you or promised you anything to
12 get you to plead guilty, Mr. Long?

13 THE DEFENDANT: No, sir.

14 THE COURT: Mr. Hardin?

15 THE DEFENDANT: No, sir.

16 THE COURT: Mr. Limas?

17 THE DEFENDANT: No, sir.

18 THE COURT: Mr. Clark?

19 THE DEFENDANT: No, sir.

20 THE COURT: You each understand you have an
21 absolute right to a trial by jury where you would be
22 presumed innocent unless and until the State could prove
23 you guilty beyond any reasonable doubt of each and every
24 element of each offense you are charged with, and you
25 would have a right to confront and cross examine the

1 witnesses and the evidence put up against you by the
2 State.

3 You have a right to compel in court all
4 relevant and competent evidence in your defense or you
5 could remain silent. Your silence could not be held
6 against you, and you could never be compelled to
7 incriminate yourself. Do you understand all those
8 rights, Mr. Long?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Mr. Hardin?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Mr. Limas?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Mr. Clark?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Do you want to give up those
17 rights and plead guilty, Mr. Long?

18 THE DEFENDANT: Plead guilty, Your Honor.

19 THE COURT: Mr. Hardin?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Mr. Limas?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Mr. Clark?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Are you guilty, Mr. Long?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Mr. Hardin?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Mr. Limas?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Mr. Clark?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Are you totally satisfied with
9 your attorney, Mr. Long?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Mr. Hardin?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Mr. Limas?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Mr. Clark?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Do you have any complaints you
18 want to make with respect to your charges, Mr. Long?

19 THE DEFENDANT: No, sir.

20 THE COURT: Mr. Hardin?

21 THE DEFENDANT: No, sir.

22 THE COURT: Mr. Limas?

23 THE DEFENDANT: No, sir.

24 THE COURT: Mr. Clark?

25 THE DEFENDANT: No, sir.

1 THE COURT: Have you had ample opportunity to
2 review the evidence the State has against you, Mr. Long?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Mr. Hardin?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Mr. Limas?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Mr. Clark?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Listen while the State recites the
11 evidence in your case.

12 MS. YERACES: Thank you, Your Honor. As to
13 Mr. Long, on November 22nd of 2003, the responding
14 officers with Batesburg Leesville Police Department
15 responded to an accident which was at Saluda Avenue in
16 Lexington County in Batesburg Leesville.

17 The subject was the cause of the accident. He
18 was driving a white pick-up truck, and he had a wreck.
19 He had a very strong odor of alcohol on his breath. He
20 could hardly walk. He failed several field sobriety
21 test.

22 They took him to Lexington County and did a
23 Datamaster test where he blew a .3, Your Honor. His
24 prior record consists of a simple assault and battery
25 from 1991, a criminal domestic violence from 1993, open

1 container from 1993, and two D.U.I.s from 1995.

2 THE COURT: Is all that true?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: What do you want to tell me?

5 MR. CALHOUN: He does live with a common law
6 wife. He has two children. He has been a supervisor
7 for Gregory Electric for the last two years. He is
8 pleading guilty to a first, but his prior two D.U.I.s
9 did happen back to back, back in 1995.

10 We ask that you impose a fine for him. He
11 would also like to request that the Court set him up on
12 a payment plan of 150 a Monday or so, something along
13 those lines.

14 THE COURT: Would you rather just go to jail?
15 A point three, how much had you had to drink?

16 THE DEFENDANT: During that time, Your Honor?

17 THE COURT: Yeah, when you got caught with .3.
18 That's way up there.

19 THE DEFENDANT: I remember that that day, me
20 and a friend had drunk about half a pint.

21 THE COURT: Half a pint?

22 THE DEFENDANT: Yes, sir.

23 MR. CALHOUN: Your Honor, if I could add, I
24 felt there was an issue on the admissibility of the
25 Datamaster score. I discussed that with Mr. Long, and

1 he has chosen to take responsibility.

2 I would like to remind the Court this is a
3 Batesburg Leesville charge, and I did not feel that the
4 score justified was commensurate with what Mr. Long
5 drank, not just on the arrest report but what he
6 informed me of. It's something that didn't make sense,
7 along those lines.

8 THE COURT: Yeah.

9 MS. YERACES: Your Honor, he did admit on the
10 videotape that he consumed a pint of liquor and two
11 beers.

12 THE COURT: That was it?

13 MS. YERACES: That's what he admitted on the
14 videotape.

15 THE COURT: That's all? You didn't have more
16 than that?

17 THE DEFENDANT: Not to my memory, Your Honor.

18 THE COURT: See, that might be the problem.
19 That's way up there, a three. I mean, people are dead
20 with .3. You better get it under control, don't you
21 think?

22 THE DEFENDANT: I can do that, yes, sir.

23 THE COURT: Thirty days or \$400. What does
24 that work out to? Does anybody know?

25 MR. CALHOUN: I think it's around 992. It's

1 magistrate's court.

2 CLERK: One thousand sixty-seven dollars, Your
3 Honor.

4 THE COURT: It's \$1,067. How long will it
5 take you to pay it?

6 THE DEFENDANT: I can probably pay it weekly.

7 THE COURT: How long? Three months to pay?
8 That's 12 weeks. It's about a hundred a week.

9 THE DEFENDANT: Yes, sir.

10 THE COURT: You can handle that?

11 THE DEFENDANT: Yes, sir, I got no other
12 choice but to handle it.

13 THE COURT: All right. It's 30 days or \$400,
14 four months to pay.

15 MS. YERACES: Thank you, Your Honor.

16 THE COURT: Good luck.

17 MR. RIDDLE: Your Honor, if it please the
18 Court, the receiving stolen goods, that's an incident
19 that took place -- gosh, I can't even read the date --
20 on the date that is listed in the indictment because my
21 copy of this is so bad.

22 Essentially what happened is the individual
23 who is listed as the victim, his home was broken into,
24 Your Honor. Various items were stolen. Mr. Hardin
25 actually got in touch with the police and told them

1 about the break-in itself and told them that he had the
2 goods and returned all the goods.

3 He was actually charged initially with
4 burglary. Upon further investigation it looked like he
5 was actually more guilty of receiving stolen goods.
6 That is what he is pleading guilty to off of that.
7 There is no restitution involved.

8 On the C.S.C., Your Honor, Mr. Hardin is
9 pleading to one count. He was initially charged with
10 four. It is a consensual 17 year old and 14 year old
11 having sexual intercourse.

12 Mr. Hardin had reported to the victim's
13 mother, because he was living in that house at the time,
14 that they had, in fact, had sexual intercourse. At that
15 point the mom kicked him out of that house.

16 Your Honor, the victim initially indicated
17 that she wanted to be here. We have made all efforts to
18 contact her, called all the numbers that we had for her,
19 even sent a letter to the last known address. We have
20 not heard back from her.

21 As far as the prior record, Your Honor, he has
22 one malicious injury from about '03 from the Columbia
23 Police Department. I don't have a sentence on that. It
24 doesn't reflect it on the rap sheet. That's the extent
25 of his record.

1 THE COURT: Is all that true?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Mr. Williams.

4 MR. WILLIAMS: Judge, on the facts on the
5 receiving, he actually went with another individual to
6 the house. The two of them removed the items from the
7 house.

8 Of course, the story was the other guy had the
9 right to get it out of the house, finds out it's not --
10 he did not have the right, but he should have smelled
11 something wrong with the whole deal. He calls the
12 police. Am I right on that?

13 THE DEFENDANT: Correct.

14 MR. WILLIAMS: I want to make sure I explain
15 that one away. Of course, you heard the 17, 14 year old
16 deal. He's now 20 years of age. In his defense he is a
17 throwaway child. His mother and father have basically
18 done absolutely nothing for him. He has been on his own
19 for many, many years.

20 His grandfather, who I hate is not here today,
21 who hired me and who I have seen a million times and
22 calls about him a million times is the best grandfather
23 any son or grandson could ever have.

24 He went and stayed with his grandfather and
25 grandmother for a period of time. The grandmother died.

1 He has a family member who is very supportive of him. I
2 just wish he was here today so that you could see him
3 because he is a very wonderful old man.

4 I would ask that you give him probation,
5 Judge. He does have some support, but I totally blame
6 the fact that he has had absolutely no father and mother
7 to take care of him for the problems that he has been
8 in.

9 THE COURT: You have got an uphill struggle
10 then. Take care of your grandfather. I will give him
11 ten, provided upon the time he has served, probation for
12 three years. I will make him do ten days public
13 service. On the other one five, suspended during
14 probation.

15 MR. WILLIAMS: Thank you, Judge.

16 MS. AVINGER: Your Honor, on Mr. Limas, Your
17 Honor, the incident date was sometime in 2001, any time
18 between February and May of 2001, here in Lexington
19 County.

20 At that time Mr. Limas was approximately 29
21 years old. The victim was a 13-year-old female, Your
22 Honor. It's my understanding there was some type of
23 sexual relationship between the two.

24 Your Honor, due to the age of the case and the
25 fact that we have not had any recent contact with the

1 victim, we have negotiated a plea to A.B.H.A.N. for
2 probation.

3 THE COURT: Is that true?

4 THE DEFENDANT: Yes, sir.

5 MR. BUCHANAN: May it please the Court, Your
6 Honor. Mr. Limas is satisfied that the State has met
7 the Boykin v. Alabama cases. Right now he has been with
8 his current employer for about eight years.

9 He enjoys a position of responsibility and
10 trust with his employer. This has been pretty much a
11 bad family situation. He is looking forward to putting
12 all this behind him.

13 THE COURT: Have you ever been in trouble
14 before?

15 THE DEFENDANT: No.

16 THE COURT: Never? Not in Mexico?

17 THE DEFENDANT: (Shakes head). (Indicating
18 negative response).

19 THE COURT: Where in Mexico is where you are
20 from?

21 THE DEFENDANT: It's between -- it's pretty
22 close to Tijuana. It's probably about an hour and a
23 half from there.

24 THE COURT: Why did you come to South
25 Carolina? Why didn't you go to California?

1 THE DEFENDANT: I no like California. It's
2 too expensive.

3 THE COURT: It's too expensive. Is there
4 anything you want to tell me?

5 THE DEFENDANT: No, sir.

6 THE COURT: I will give him five years,
7 provided upon the time he has served, the balance is
8 suspended, probation for 30 months, five days public
9 service.

10 MS. AVINGER: Thank you, Your Honor.

11 MR. MOSES: Your Honor, as to Mr. Clark, his
12 charges began when he was charged with drugs and a
13 failure to stop in September of '03, which the State is
14 nol-prossing in exchange for his plea today.

15 He was out on bond that day when he committed
16 the crime on February 21, 2004, that we are here for
17 today.

18 THE COURT: He was out on bond on what?

19 MR. MOSES: He was out on bond for drug
20 charges.

21 THE COURT: Drug charges, okay.

22 MR. MOSES: He is charged again in February of
23 2004 for more drug charges. It occurred on February 21,
24 2004. He had pulled over for speeding. A strong odor
25 of marijuana was in the car. He was the only occupant

1 in the car.

2 He was subsequently arrested for possession --
3 or P.W.I.D. marijuana. A search incident to arrest
4 revealed more baggies inside his waistband. I think he
5 had four separate baggies with crack in it and about
6 four separate baggies with powder cocaine. The crack
7 had a weight of 1.7 grams. The cocaine had a weight of
8 2.1 grams, all packaged for individual sale.

9 Subsequent to all of this, there is an
10 outstanding warrant in Batesburg Leesville for his
11 arrest for more drugs right this second. I spoke with
12 the Batesburg officers on Monday when he was here, and
13 they were on the way down here to serve the warrants on
14 him and take him back to jail.

15 I got to talking to him, saying that we had
16 kind of worked out a plea, that he wanted to plead
17 guilty. They said if he does plead guilty and goes to
18 jail, we won't come down and serve these warrants. So I
19 said, Well, there is no recommendation as to time, but
20 he is looking at some time. He wants to go ahead and
21 plead. I will let him plead.

22 So they are willing to dismiss these new
23 warrants in exchange for his plea today. However, they
24 indicated that they strongly feel he needs to go to
25 jail. His record indicates that he was arrested and

1 convicted in 1999 for manufacturing/distribution of
2 crack. He got convicted and got four years.

3 He had a parole revocation in 2002 and went
4 back to jail for violating his parole. He gets out in
5 2003, gets a simple assault and battery and subsequently
6 gets arrested again in 2003 for drugs.

7 He was arrested again in 2004 for drugs and
8 arrested again in 2005 for drugs. In exchange for his
9 plea -- he is only pleading today to the P.W.I.D. powder
10 cocaine and the proximity to a school.

11 THE COURT: First offense?

12 MR. MOSES: He is going to plead to first
13 offense. However, there is a second offense. We are
14 allowing him to plead down to first. All of this did
15 occur within a half mile of Lexington Middle School, the
16 charges that we are here about today from February 21,
17 2004. There is no recommendation as to time.

18 THE COURT: Is all that true?

19 THE DEFENDANT: Yes, sir.

20 MR. WILLIAMS: Judge, he is 22 years of age, I
21 believe.

22 THE COURT: Twenty-four.

23 MR. WILLIAMS: Twenty-four. At the time that
24 this occurred, he was 22. It was two years ago, so he
25 would have been 22 years old. He contests this

1 allegation about this other drug charge, but it's not
2 important. If they are going to dismiss it, that's
3 fine.

4 From what I have learned about him, he has one
5 prior drug offense, which is 1999, so it would be a
6 second offense. The solicitor is correct on that. That
7 was his first offense that he ever got. That happened
8 in Saluda County, Your Honor, when he was 18 years of
9 age.

10 He went to jail on his first drug offense when
11 he was 18 years of age in Saluda County for like four
12 years or something like that. The only thing that that
13 accomplished, Judge, by sending a young 18-year-old
14 fellow to jail was he was around a bunch of other older
15 drug users.

16 I say that in all candor because he is a nice
17 kid. He has no family support that I'm aware of because
18 they haven't called me and asked about him, but he is a
19 good kid.

20 This young man has never gotten in any kind of
21 drug counseling. That's what's wrong with him. We can
22 say what we want to, but he didn't get it in jail. He
23 has never been on probation.

24 I realize he has got a prior drug offense, but
25 I would ask the Court to consider putting him on

1 probation and maybe house arrest and making him go to
2 all kinds of drug counseling.

3 When you take a case -- and this is not being
4 derogatory to anybody -- but when you take a young man
5 who is 18, 19 or 20, they get a drug arrest. They float
6 out there for two or three years, but they have a drug
7 problem. Sometimes they get in trouble again.

8 I guess the argument is they should be old
9 enough to fix themselves, but sometimes they are not. I
10 guess it's up to us to help try to fix them and make
11 them better members of society. He is a young kid and
12 he hasn't been fixed.

13 THE COURT: Some of them never get fixed.
14 What do you want to tell me?

15 THE DEFENDANT: Yes, sir, you know, what Theo
16 is saying and the solicitor is saying, they right about
17 me. But me, you know, I am not out there selling the
18 drugs or nothing. I see how it look. It don't really
19 matter, but I've just been trying to not go back to
20 jail.

21 MR. WILLIAMS: It's always hard to explain,
22 isn't it, Judge?

23 THE COURT: Yes.

24 MR. WILLIAMS: But he is sure, he remembers
25 now, about why he didn't want to be there. If he could

1 have that drug counseling, he wouldn't back in trouble
2 again, Judge.

3 THE DEFENDANT: Yes, sir. Like them baggies,
4 that was for myself anyway.

5 MR. WILLIAMS: I think he's indicating that he
6 is not a seller but a severe user. Based on the volume,
7 it would be a P.W.I.D. That's what you are saying,
8 right?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Well, I will give him ten,
11 provided upon the service of two, probation for three
12 years, substance abuse counseling, random alcohol and
13 drug testing. On the other ten, suspended during
14 probation.

15 MR. WILLIAMS: Thank you, Judge. Obviously he
16 would get the credit for the two month he has done.

17 THE COURT: Yes, credit for any time he is
18 entitled to.

19 *** END OF REQUESTED TRANSCRIPT OF RECORD ***
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C E R T I F I C A T E

I, the undersigned L. Coconut Pantsari, Official Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of all the proceedings had and the evidence introduced in the hearing of the captioned cause, relative to appeal, in the Criminal Court for Lexington County, South Carolina on the 16th day of no, 2005.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

May 9, 2009

L Coconut Pantsari

Court Reporter

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STATE OF SOUTH CAROLINA)
COUNTY OF CHESTER) COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA,)
PLAINTIFF,)
vs.)
ASHLEY RAY HARDIN,)
DEFENDANT.)

TRANSCRIPT
OF
RECORD

August 28th, 2008
Chester, South Carolina

B E F O R E :

THE HONORABLE ROGER L. COUCH, Judge.

A P P E A R A N C E S :

TYREE LEE
ESQ.
Attorney for the Defendant

PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

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I N D E X O F W I T N E S S E S

(There were no exhibits marked during this hearing.)

P R O C E E D I N G S

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2

3 (WHEREUPON, Mr. Hardin was placed under oath at this
4 time.)

5 THE COURT: All right, sir. Your name is Ashley Ray
6 Hardin, is that right?

7 MR. HARDIN: Yes, sir.

8 THE COURT: Mr. Hardin, you're here with an attorney in
9 this matter. This is a probation violation.

10 Do you understand that, sir?

11 MR. HARDIN: Yes, sir.

12 THE COURT: So, you know what this hearing's about?

13 MR. HARDIN: Yes, sir.

14 THE COURT: You're here with your attorney.

15 Have you had an opportunity to talk to him about your
16 case?

17 MR. HARDIN: Yes, sir.

18 THE COURT: Satisfied with what he's done so far?

19 MR. HARDIN: Yes, sir.

20 THE COURT: Is there anything else you want to discuss
21 with the lawyer before we take up your case today?

22 MR. HARDIN: No, sir.

23 THE COURT: All right, sir. According to the
24 information before me, you were sentenced to, for criminal
25 sexual conduct with a minor, victim under the age of 16,

1 second degree, receiving stolen goods valued over a thousand
2 but less than 5,000, Judge Miller sentenced you to ten years
3 suspended upon time served with three years of probation. I
4 see there's been several times that you have appeared in
5 front of a judge on this matter. There were some fines and
6 other things you needed to pay.

7 Is that a correct statement of your, your sentence you
8 received?

9 MR. HARDIN: Yes, sir.

10 THE COURT: Now, sir, counselor, have you had an
11 opportunity to -- well, let me ask one question, Mr. Hardin.

12 Have you been served with a copy of the warrant or the
13 citation from the probation office letting you know what
14 they're alleging you've done?

15 MR. HARDIN: Yes, sir.

16 THE COURT: So, you're aware of those allegations?

17 MR. HARDIN: Yes, sir.

18 THE COURT: All right. Now, counselor, I assume you've
19 discussed those allegations with your client, is that
20 correct?

21 MR. LEE: That is correct, Your Honor.

22 THE COURT: Are you satisfied that he understood what
23 you went over with him?

24 MR. LEE: I believe that he did, Your Honor.

25 THE COURT: He has indicated to me that you are his

1 attorney and he is satisfied with your services.

2 As far as these allegations, does he admit to some
3 violations and wish to speak in mitigation or does he deny
4 the violations all together and wish to have a hearing?

5 MR. LEE: Your Honor, he would admit some of the
6 violations and has some matters to bring before the Court in
7 mitigation.

8 THE COURT: All right. Then I'll be happy to hear from
9 you at this time.

10 MR. LEE: Thank you, Your Honor.

11 May it please the Court.

12 Your Honor, Mr. Hardin is 22 years of age. He is
13 single. He has approximately a ninth grade education. He
14 lives here in Chester I think with his grandfather if I'm
15 not mistaken or his girlfriend. Has lived previously with
16 grandfather. He had worked, Your Honor, when he was working
17 here right before he was arrested for American Roofing
18 Company as a roofer.

19 Your Honor, I talked with him about these, these
20 matters. He tells me that, and I think the allegations are
21 that he was scheduled to be in a previous term of court and
22 he did not show up. He was -- he did have some other jobs.
23 He quit the jobs because he -- he didn't work full-time jobs
24 cause he was just getting a couple hours, four hours a day,
25 or something like that. He could receive -- he couldn't get

1 a job full-time.

2 He tells me that he went to see his brother in the
3 eastern part or western part of the state, and while he was
4 there he and his girlfriend got into some type of argument.
5 She just left him. He had to try to get back as best he
6 could, and he -- I think that he, he would not -- he came to
7 court and would like to get this disposed of in court.
8 Basically he just panicked, got scared, and didn't, didn't
9 show back-up.

10 Your Honor, we'd ask the Court to be as lenient as
11 possible with him. He tells me that if the Court allows him
12 to, to be out, he does not mind having to wear a monitoring
13 device, but I'm sure he'll be where he's suppose to be and,
14 and so the probation can keep up with him. He's willing to
15 do this if the Court would give him a chance to remain out,
16 and I think he'd like to address the Court also.

17 THE COURT: Anything you wish to say, Mr. Hardin?

18 MR. HARDIN: Yes, sir, I want to serve my, what my
19 lawyer was saying. I know -- I went to Wagner and I guess
20 me and my girlfriend we just got into it. She had left me
21 and, in Wagner. I really didn't have a way back, and I was
22 afraid to call probation and tell them.

23 I reported Monday, and I went and they came to talk to
24 me, and said I needed to go talk to Mr. Whiteside in that
25 office, and I went and reported, signed in, and I called

1 saying what's going on, man, and we did get in a fight. And
2 she told me, she told me how -- I like nothing -- I got
3 scared and I didn't report. So, I took off, and I didn't, I
4 didn't, and, you know, I basically -- if I can see about
5 GPS, and get a GPS monitoring or something. I mean I don't
6 get to feel -- I mean I don't feel like I can do no long
7 run.

8 THE COURT: Can't do what?

9 MR. HARDIN: I don't feel -- I really don't need a lot
10 of time. Well, I served that.

11 THE COURT: All right. Agent, I'll be happy to hear
12 from you.

13 PROBATION AGENT: Okay. May it please the Court, Your
14 Honor?

15 THE COURT: Yes, ma'am.

16 AGENT: Sandy is the girlfriend. I'll just put that on
17 the record.

18 With Mr. Hardin, it was my understanding that he went
19 to Wagner, which is fine for him. He may go. Under sex
20 offender conditions of probation, you are not to spend the
21 night anywhere other than your approved residence. He spent
22 the night a couple of nights. There were children under the
23 age of 18 that resided in that residence. That's what
24 brought this whole thing about.

25 He did report to the courtroom. He did come to the

1 probation office, signed in, and left. Did not speak with
2 me, did not talk to anyone, and left the courtroom. I mean
3 left the probation office.

4 THE COURT: That was for a hearing on these
5 allegations?

6 PROBATION OFFICER: Yes, sir, I done a separate
7 citation for this for failing the drug test. At that point
8 he went on the run. We were unable to locate him --
9 couldn't find, find him. Fortunately, through a tip we were
10 able to locate him and he denied his identity when he was
11 approached by the probation officers from the other county,
12 and eventually we got a picture of him. But, in probation,
13 I do believe that he has had many chances and failed to
14 comply with it.

15 THE COURT: How many different violations have you got
16 on him?

17 PROBATION OFFICER: As far as --?

18 THE COURT: Previous violations.

19 PROBATION OFFICER: Six, Your Honor.

20 THE COURT: So, this is number six or there were seven
21 before this?

22 This is number seven?

23 PROBATION OFFICER: Yes, sir.

24 THE COURT: All right. Anything else from the
25 probation officer?

1 PROBATION OFFICER: Not at this time.

2 THE COURT: Mr. Hardin, anything you'd like to say in
3 response to what I was just told?

4 MR. HARDIN: Yes, sir, no children was in the home. It
5 was my brother. Okay.

6 THE COURT: Yes, sir, but you, you were aware of the
7 requirement you're not suppose to spend the night---

8 MR. HARDIN: Well, I didn't really have no choice.

9 THE COURT: ---whether children are there or not. Let
10 me finish.

11 MR. HARDIN: I'm sorry, Your Honor.

12 THE COURT: Whether the children were there or not away
13 from where you're suppose to be.

14 Aren't you aware of that requirement?

15 MR. HARDIN: Yes, sir.

16 THE COURT: Okay. Go ahead.

17 MR. HARDIN: I was not planning to spend the night.
18 You know, I had somewhere else to actually go, and long -- I
19 mean I couldn't -- I been at work for at least a half a day,
20 and now I really didn't know nobody besides down in that
21 area. I got back down here as quick as I could. I mean I
22 called -- I tried to bum a ride. I gave all the money, gave
23 to him to get me down there. It's all I had.

24 well, the other, the other things, I'm saying I deserve
25 some -- I mean I admit, I admit to my faults, but I just

1 can't, I just really can't say anything else. I mean I---

2 THE COURT: well, I'm looking at---

3 MR. HARDIN: I believe I was actually doing a better
4 job fair out there. I mean I worked recently. I quit my
5 job cause it was not giving me money. I mean working eight
6 and nine hours a week, and when I got roofing, and I got, I
7 got arrested cause -- I know I worked then. I have, I have
8 job offers when I get out of here, and Bojangles said they
9 would hire me back the night shift. I mean all the hours I
10 want if I get out. I told them I---

11 THE COURT: well, I want, I want you to speak though in
12 mitigation concerning the alleged violations.

13 Is there anything else you want to say about---

14 MR. HARDIN: The violation---

15 THE COURT: ---about those alleged violations, what
16 they---

17 MR. HARDIN: No, sir.

18 THE COURT: ---say you did as far as violating it?

19 MR. HARDIN: I just -- I know, I know I messed up.

20 THE COURT: well, yes, sir, and it's been a long
21 series. This is not the first time.

22 MR. HARDIN: I know.

23 THE COURT: This is not the first time. I'm talking
24 now.

25 MR. HARDIN: Yes, sir.

1 THE COURT: Total revocation. Thank you, sir. Good
2 luck to you.

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4 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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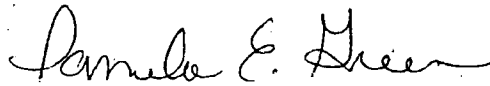
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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Chester County, South Carolina, on the 28th day of August, 2008.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

October 12th, 2011



PAMELA E. GREEN, Court Reporter

NOV 13 2008

NC45

FORM 5

STATE OF SOUTH CAROLINA)

County of Lexington)Ashley Ray Hardin #330300)

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

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

RECEIVED

NOV 10 2008

S.C. SUPREME COURT

APPLICATION FOR

POST-CONVICTION RELIEF

2008CP3204799

FILED

2008 NOV 17 A 11:27

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SCINSTRUCTIONS - 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 clear to which question any such continued answer refers.

Since every application must be sworn 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 in forma 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 the applicant was convicted.

1. Place of detention Macdougal C.I.
2. Name and location of Court which imposed sentence. Lexington County
Court House, Lexington SC
3. Name(s) of co-defendant(s) (if any) Chris Jones
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2005-GS-32-4210 -
 - (b) 2005-GS-32-4210 -

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mkt
SCL 11/18/08

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 11/16/05 - 10 yrs SSP on time served + 3 yrs
- (b) 11/16/05 - 5 yrs Run concurrent
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty YES
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
NO
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. NA
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. NA
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. NA
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. NA
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) A direct appeal from this guilty plea would not have been productive. An Application for Conviction Relief provides the Applicant with an appropriate venue to raise the issues addressed herein.
- (b) _____

(c) _____

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

- (a) the Applicant received ineffective assistance of counsel prior to and during his guilt plea proceeding in violation of his rights pursuant to the sixth and fourteenth Amendments to the United States Constitution as well as article 2, Section 14 of the South Carolina Constitution.
- (b) The Applicant's pleas were entered in violation of his right to due process of law as protected by the constitutions of the United States and the state of South Carolina inasmuch as his pleas were not knowingly and voluntarily entered.

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

- (a) Trial counsel failed to adequately investigate the case prior to advising the Applicant to plead guilty.
- (b) Trial counsel failed to adequately investigate and advise the Applicant concerning possible evidence and witnesses who might be presented in his defense had he elected to exercise his right to a trial.

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NA
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NA
- (d) any other petitions, motions or applications in this or any other Court? NA

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:

- i. NA
- ii. _____
- iii. _____
- iv. _____

- (b) the name and location of the Court in which each was filed:

- i. NA
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. NA
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. NA
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. NA
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

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

(a) which grounds have been presented:

- i. NA
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. NA
- ii. _____
- iii. _____

16. If any ground set forth in (10) 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) An Application for Post-Conviction Relief provides the Applicant with an appropriate venue to raise the issues of addressed herein dealing with the Applicant's receipt of ineffective assistance of counsel in the trial court and the involuntary and unintelligent nature of his plea...

(b) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? yes
- (b) your trial, if any? _____
- (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? _____

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:

i. Theodore Williams, Lexington County 803) 359-1559

ii. _____

iii. _____

- (b) the proceedings at which each such attorney represented you:

i. Plea and sentencing

ii. _____

iii. _____

19. State clearly the relief you seek in filing this application:

State clearly the relief you seek in filing this application:
Vacation of Judgment and sentence and remand to the Court of
General Sessions for a new trial.

20. Are you now under sentence from any other court that you have not challenged?

NO

2008CP3204799

STATE OF SOUTH CAROLINA)
County of Lexington)

VERIFICATION

I, Ashley Ray Hardin, 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.

[Signature]

SWORN to and subscribed before me this 06th day of Nov., 2008.
[Signature] (L.S.)
Notary Public

My Commission Expires: My Commission Expires 4/24/2016

BETH A. GARRIG
CLERK OF COURT
LEXINGTON SC

NOV 17 A 11:21

FILED

2008CP3204799

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

FILED

2008 NOV 17 A 11: 27

I, Ashley Ray Hardin, 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 thereof.

A R Hardin
Applicant

SWORN or affirmed to and subscribed before me this

06 day of Nov, 2008.

B. Stevens
Notary Public

My Commission Expires: My Commission Expires 4/24/2016

ORIGINAL

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 11TH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	Case No.: 2008-CP-32-4799
Ashley Ray Hardin, #330300,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN AND MOTION TO DISMISS
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Respondent, making its Return to the application for Post-Conviction Relief filed November 17, 2008, 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 indicted at the November 2005 term of the Lexington County Grand Jury for Receiving Stolen Goods > \$1000 but < \$5000 (2005-GS-32-4210). The Applicant also appeared before the court on charges of Criminal Sexual Conduct with a Minor—Second Degree (2005-GS-32-4209), for which he waived presentment. The Applicant was represented by Theodore Williams, Esquire. On November 16, 2005, Applicant pled guilty as indicted. He was concurrently sentenced to confinement for a period of ten (10) years for Receiving Stolen Goods, suspended to time served plus three years probation, and five (5) years for Criminal Sexual Conduct, suspended during probation. The Applicant did not appeal his convictions or sentences.

The Applicant's probation was subsequently revoked on August 28, 2008. At that time he was sentenced to confinement for a period of five (5) years for Receiving Stolen Goods, and ten (10) years for Criminal Sexual Conduct with a Minor—Second Degree. Both sentences were

ordered to run concurrent with one another.

Attached herewith and incorporated herein are the records of the Lexington County Clerk of Court regarding the subject convictions and probation revocations, the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcripts. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
 - a. "Trial counsel failed to adequately investigate the case prior to advising the Applicant to plead guilty."
 - b. "Trial counsel failed to adequately investigate and advise the Applicant concerning possible evidence and witnesses who might be presented in his defense had he elected to exercise his right to trial."
2. Involuntary Guilty Plea.

III.

The Applicant's allegations in his application for Post-Conviction Relief are directed at his Plea Counsel, who represented him at his Plea Hearing on November 16, 2005, not counsel for the subsequent Probation Revocation Hearing. As such, the Respondent submits that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160 (2003).

S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offense(s) he challenges in this Application on March 2, 1992 and April 1, 1997. The Applicant was therefore required to file his application before July 1, 1996, and April 1, 1998. This Application was filed on May 9, 2006, which was over 10 and 8 years beyond the time that the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (2003) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, the Respondent requests that this Court summarily dismiss the application for post conviction relief for failure to file within the time mandated by the Post Conviction Procedure Act.

IV.

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

V.

WHEREFORE, Respondent moves to summarily dismiss the application because it was filed after the statute of limitations had expired.

Respectfully submitted,

HENRY D. MCMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Assistant Deputy Attorney General

A. WEST LEE
Assistant Attorney General

By: 
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(803) 734-3737

July 7, 2009

ORIGINAL

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 11TH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	Case No.: 2008-CP-32-4799
	)	
Ashley Ray Hardin, #330300,	)	
	)	
Applicant,	)	
	)	AMENDED RETURN AND
v.	)	PARTIAL MOTION TO DISMISS
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Respondent, making its Return to the application for Post-Conviction Relief filed November 17, 2008, 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 indicted at the November 2005 term of the Lexington County Grand Jury for Receiving Stolen Goods > \$1000 but < \$5000 (2005-GS-32-4210). The Applicant also appeared before the court on charges of Criminal Sexual Conduct with a Minor—Second Degree (2005-GS-32-4209), for which he waived presentment. The Applicant was represented by Theodore Williams, Esquire. On November 16, 2005, Applicant pled guilty as indicted. He was concurrently sentenced to confinement for a period of ten (10) years for Receiving Stolen Goods, suspended to time served plus three years probation, and five (5) years for Criminal Sexual Conduct, suspended during probation. The Applicant did not appeal his convictions or sentences.

The Applicant's probation was subsequently revoked on August 28, 2008. He was represented by Tire Lee, Esquire. The Honorable Roger L. Couch revoked the Applicant's probation and sentenced the Applicant to confinement for a period of five (5) years for Receiving

Stolen Goods, and ten (10) years for Criminal Sexual Conduct with a Minor—Second Degree.

Both sentences were ordered to run concurrent with one another.

Incorporated herein are the records of the Lexington County Clerk of Court regarding the subject convictions and probation revocations, and the Applicant's records from the South Carolina Department of Corrections. The Respondent reserves the right to amend this Return upon receipt of any relevant materials, including but not limited to the probation revocation transcript, which will be forwarded upon receipt.

II.

In his current application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:

(a) "Trial counsel failed to adequately investigate the case prior to advising the Applicant to plead guilty and not take it to trial cause there's too much evidence when theres none;"

(b) "Trial counsel failed to adequately investigate and advise the Applicant concerning possible evidence and witnesses who might be presented in his defense had he elected to exercise his right to trial."

(c) "I did not receive Rule V from prosecutor or trial counsel on these two charges;"

2. Involuntary Guilty Plea

3. Ineffective Assistance of Probation Revocation Counsel:

(a) Failure to interview witness Sandra Baker, who alleged to the probation department that the Applicant was using drugs, had relocated to another address without informing his agent, and was unemployed;

(b) Failure to investigate the Applicant's prior probation record, and report to the court the Applicant's prior lack of probation infractions;

(c) Failure to investigate the Applicant's work history, speak to Applicant's employer, or speak with Applicant's family in order to formulate mitigating evidence on the Applicant's behalf;

(d) Failure to adequately interview the Applicant prior to the Applicant's revocation hearing, in that counsel visited the Applicant once at the detention center, which interview lasted approximately ten (10) minutes;

(e) Failure to investigate and submit to the trial court alternative sentencing options, rather than the revocation of Applicant's probation, which consisted of mere technical violations;

4. 5th and 14th Amendment Due Process Violations:

(a) In order to secure the Applicant's affirmative plea to the revocation allegations, counsel promised the Applicant that the trial court would revoke no more than eighteen (18) months of Applicant's revocation;

(b) Counsel assured Applicant that the probation department's allegations would be discounted upon Sandra Baker's recantation of her allegations regarding the Applicant's behaviour. Counsel did not request Sandra Baker to address the court, nor did counsel interview Sandra Baker prior to Applicant's revocation hearing;

(c) Counsel failed to require the trial court to specifically state the basis of the revocation of the Applicant's probation;

(d) Counsel failed to inform the Applicant that he could appeal the trial court's full revocation of Applicant's ten (10) year sentence;

(e) Counsel failed to file a notice of intent to appeal on behalf of the Applicant, in spite of Applicant's repeated requests that he do so.

III.

Except for the Applicant's allegations in his amended application for Post-Conviction Relief directed at his Probation Revocation proceeding, the Respondent submits that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160 (2003). S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offense(s) he challenges in this Application on November 16, 2005. The Applicant was therefore required to file his application before November 16, 2006. This Application was filed on November 17, 2008, which was 2 years beyond the time that the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (2003) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, the Respondent requests that this Court summarily dismiss the application for post conviction relief for failure to file within the time mandated by the Post Conviction Procedure Act, except for the allegations concerning Applicant's probation revocation proceeding.

IV.

A revocation hearing addresses two issues: whether the probationer violated a condition of probation, and whether the violation warrants revocation. Black v. Romano, 471 U.S. 606, 105 S.Ct. 2254, 85 L.Ed. 2d 636 (1985); Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484 (1972). If the evidence tends to show a violation of the conditions, then revocation is an appropriate means of enforcing the probationary sentence. State v. Clough, 220 S.C. 390, 68 S.E.2d 329 (1951); State v. McCray, 222 S.C. 391, 73 S.E.2d 1 (1952).

Due the nature of the revocation hearing, the Sixth and Fourteenth Amendments does not *per se* right to counsel. Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). Nevertheless, in South Carolina, Rule 602(a), SCACR requires the appointment of counsel for indigent defendants in probation revocation proceedings. Where statute or rule of practice creates such a right, the courts have used the Strickland test to evaluate claims of ineffective assistance of probation revocation counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); See, e.g., United States v. Wren, 682 F.Supp. 1237 (S.D.Ga. 1988). However, since a probation hearing is not a formal adversarial proceeding, "the Court must review counsel's performance in light of the particular type of proceeding involved." Id., 682 F.Supp. at 1242.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984). The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Id. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing solely to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

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

VI.

The State therefore requests that this Court convene an evidentiary hearing solely on the on the issues regarding Applicant's probation revocation. As to all other allegations, the State moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

WHEREFORE, having made its Return, the State requests that a hearing be held solely on the issues regarding Applicant's probation revocation proceeding.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Assistant Deputy Attorney General

KAELOE E. MAY
Assistant Attorney General

By: Kaelon E. May
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September 13, 2011

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
	)	
	)	2008-CP-32-4799
	)	
ASHLEY RAY HARDIN, #330300	)	
	)	
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 **Amended Return and Partial Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Hollie-Marie S. Patterson, Esquire
335 North Main St.
Gaston, SC 29053

DATED this 13th day of September, 2011



 Lena Pelishenko, Legal Assistant
 For Respondent

1 State of South Carolina) In the Court
2 County of Lexington) Of Common Pleas
3
4 Docket No. 2008-CP-32-4799
5
6 Ashley Ray Hardin,)
7 Applicant,)
8 vs.) Transcript of Record
9)
10 State of South Carolina,)
Respondent.)
11
12 January 31, 2012
13 Lexington, South Carolina
14
15 B E F O R E:
16 The Honorable Eugene C. Griffith, Judge.
17
18 A P P E A R A N C E S:
19 Tristan M. Shaffer, Esquire
20 Attorney for the Applicant
21
22 Kaelon E. May, Assistant Attorney General
Attorney for the Respondent
23
24
25 Brenda J. Sigwald, Circuit Court
P.O. Box 206, Jackson, South Carolina 29831

I N D E X

	<u>Page</u>
Tyre Lee	
Direct Examination by Mr. Shaffer.....	8
Cross-Examination by Ms May.....	43
Redirect Examination by Mr. Shaffer.....	45
Ashley Hardin	
Direct Examination by Mr. Shaffer.....	47
Cross-Examination by Ms. May.....	64
Certificate of Reporter.....	75

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>PAGE</u>
A-1	Revocation Sentencing Form.....	18
A-2	Revocation Sentencing Form.....	18

POST CONVICTION RELIEF HEARING

THE COURT: All right. Ms. May, you ready?

MS. MAY: Yes, sir. May it please the Court. The next case we have is Ashley Hardin vs. State, Case No. 2008-CP-32-4799.

If we could get Mr. Hardin over here.

MR. SHAFFER: Yes, if that's possible.

MS. MAY: This case comes from a PCR application filed November 17, 2008 by Mr. Hardin. Mr. Hardin was originally indicted for receiving stolen goods, as well as criminal sexual conduct with a minor in the second degree. He was sentenced to confinement for a period of ten years for CSC second and five years for receiving stolen goods, which was suspended during probation.

Upon -- while on probation, Mr. Hardin -- it was revoked on August 28, 2008 by Judge Couch and he revoked the applicant's probation in full. Sentences were ordered to run concurrent with each other; and sometime before we get into it, the State has a motion to dismiss certain claims, but I'll let Mr. Shaffer --

THE COURT: All right.

MR. SHAFFER: Good morning, Your Honor.

Actually, would you like to go ahead and bring that up? I was going to give a brief synopsis of just what we plan on doing after that, but --

1 MS. MAY: Your Honor, the State would like to make
2 a motion to dismiss the ineffective assistance of counsel
3 claim, as well as the involuntary guilty plea claims based
4 on the statute of limitations. His original guilty plea
5 was in November of 2005. Statute of limitations ran on
6 that, November of 2007 he had a year -- I'm sorry, 2006.
7 He had a year to file a PCR application on the guilty plea
8 and he did not. So we would move to dismiss the claims. I
9 believe it's 1 a, b, c, and No. 2.

10 THE COURT: All right. Tell me what happened.

11 MR. SHAFFER: Your Honor, just briefly so that I
12 can address that argument. Our only argument against the
13 statute of limitations is that essentially, he didn't
14 realize the full implications of his sentence that was
15 hanging over his head until the point that he got revoked
16 in full. Your Honor, I don't have any case law why that
17 would go past the statute of limitations, but he's in a
18 situation where he has a plea with probation -- it's a very
19 different seat than revoked in full and ten years. His
20 situation changed substantially in -- in that one year
21 period and he filed it within that one year period of that
22 change.

23 Essentially, I would be arguing the best way I can
24 put it in legal terms is to go with more or less newly
25 discovered evidence. I understand I don't have the case

1 law to support that, Your Honor.

2 THE COURT: All right. Let me ask you this. He's
3 on probation for three years, and toward the end of the
4 third year is when he got revoked?

5 MR. SHAFFER: Yes, sir. As I said, I don't have
6 any legal -- I don't have any case law to support my
7 position in that.

8 THE COURT: My understanding of the statute, it is
9 a statute and it runs one year. One year from -- the
10 sentence would be November of '05, so sometime before the
11 end of 2006. He was revoked in 2008, so that's a year and
12 a half late right there, just running the broad math. I
13 don't think his application was timely made. I think he
14 just drew a short straw and went before the judge looking
15 at his probation violation. That has nothing to do with
16 ineffective assistance of counsel for a plea,
17 unfortunately. It just doesn't.

18 Anything else?

19 MR. SHAFFER: Your Honor, I believe these are only
20 to one and two, the ineffective assistance of counsel and
21 the involuntary guilty plea. I believe the other ones that
22 the State is not moving to dismiss those --

23 MS. MAY: That's correct. We're not moving -- the
24 ineffective assistance of probation revocation counsel,
25 that was filed timely.

1 THE COURT: Okay. Well let's hear those. The
2 trial counsel, that shouldn't apply.

3 MR. SHAFFER: Thank you, Your Honor. I understand.

4 Your Honor, briefly to describe -- I guess to give
5 you a little bit of background just for -- so you
6 understand the case, in 2003, he was living -- Mr. Hardin
7 was living with his girlfriend and her mother. He was 17
8 at the time. His girlfriend was 14. He got into an
9 argument with the girlfriend's mother. The girlfriend's
10 mother then came to the solicitor's office or Lexington
11 County and said they've had sex in my house, you know,
12 please arrest him. He got arrested. He waited -- I think
13 he pled in 2005. Theo Williams represented him.

14 He pled and got probation on this charge and a
15 receiving stolen goods, the CSC second and receiving stolen
16 goods under the statute that was in effect in 2003. The
17 statute's gone through a lot of different revisions, I
18 think probably four or five revisions since then.

19 In most of our arguments that you're going to hear
20 are probably directed more toward the CSC revocation than
21 it is for the receiving stolen goods revocation, but we
22 would like to reserve them also for the other.

23 In 2008 -- he went through several years of
24 probation. He had a couple of different violations where
25 he came into court. I think there were three. The

1 transcript seems to say more, but I think there's only
2 three and the charges include -- the violations were not --
3 even if you believe the allegations, they weren't really
4 anything criminal. They were more of conditions of
5 probation. And the violations include, I think a -- the
6 one that could be criminal would be the drug test. He
7 failed one drug test in three years. He also -- or almost
8 three years, two and a half years.

9 He also was caught with some pornography on his
10 computer and under the sex offender conditions of
11 probation, which are probably designed toward people who
12 are at risk, but he was under those conditions, so he was
13 violated for that. He also had a failure to appear in his
14 counseling as well at one point.

15 And finally in 2008, they brought him in on a
16 probation violation based on the fact that he had left
17 town, stayed over night or allegedly stayed over night at
18 someone else's residence and then whenever he came back for
19 the hearing he got scared and left; and of course, they
20 caught him. And in 2008, I think it was August of 2008,
21 this hearing actually occurred, which is what the basis of
22 our ineffective assistance of counsel for this one.

23 I think the timeline will become important to you
24 later whenever you hear some of our arguments. Before we
25 begin I would like -- and I probably should have pulled

Tyre Lee - Direct Examination by Mr. Shaffer

1 this out prior to -- I'd like to submit a few amendments.
2 Kaelon's already seen these; Ms. May has already seen
3 these.

4 THE COURT: All right.

5 MR. SHAFFER: If I may?

6 (WHEREUPON Mr. Shaffer handed the papers to the
7 Court.)

8 MR. SHAFFER: There are a few additional
9 ineffective assistance of counsel claims that we'll address
10 during the hearing. I apologize, I took over this case a
11 month ago and I sent these to her -- well, I sent a version
12 of them to her Saturday night, but I don't think she --
13 she's that --

14 MS. MAY: No objection to the amendments.

15 THE COURT: All right.

16 MR. SHAFFER: Thank you, Your Honor. Provided the
17 State doesn't have anything further, I'd like to call Tyre
18 Lee to the stand.

19 THE COURT: Very well.

20 TYRE LEE,
21 having been duly sworn, testified as follows:

22 THE CLERK: Have a seat and state your name for the
23 record, please.

24 THE WITNESS: My name is Tyre Lee.

25 ///

Tyre Lee - Direct Examination by Mr. Shaffer

DIRECT EXAMINATION

BY MR. SHAFFER:

Q Mr. Lee, you're a public defender; is that correct?

A That's correct.

Q What's your experience? What's your background?

A I've been a public defender probably twenty-five or more years. I also basically created and ran the office of indigent defense in Columbia for about eleven years and I've been in various offices in the public defender's office.

Q Okay. And when did you -- when did you become a member of the bar?

A I think in 1976.

Q Okay. If you can give me a rough estimate, about -- which County are you assigned to currently?

A Currently I'm the chief of the juvenile division in the 6th Circuit, which is sort of like saying I'm a chief of a one-man police department. I handle all the juvenile cases in the 6th Circuit. Prior to that, I did cases -- I was the public defender for Chester County and prior to that I was the chief public defender for Chester and fair field Counties under the old system.

Q Okay.

MR. SHAFFER: Your Honor, Ms. May just pointed out something that I forgot to do. This probation hearing

Tyre Lee - Direct Examination by Mr. Shaffer

1 was -- it actually took place in Chester County. We're
2 waiving venue to appear before you today here in Lexington
3 County.

4 THE COURT: Fair enough.

5 MR. SHAFFER: Thank you, Your Honor.

6 BY MR. SHAFFER:

7 Q Mr. Lee, when you were in Chester County -- how
8 many years were you in Chester County?

9 A I'm sorry, I didn't --

10 Q I apologize. How many years did you practice in
11 Chester County?

12 A Well, I practiced in Chester County for fifteen
13 years before I became executive director for the Commission
14 on Indigent Defense and then when I came back, I started up
15 a private practice again and I also became the chief public
16 defender for basically the -- Fairfield County at that
17 time. So, I've been in Chester County, I guess -- well, I
18 live there, so ever since I got out of law school.

19 Q When did your -- when did the position change --
20 excuse me. When the position changed to the circuit system
21 that we're under now?

22 A We were the last circuit to go into the system and
23 I believe it changed maybe April of 2009 or sometime prior
24 to that.

25 Q Okay. And how long did you work in Chester County

Tyre Lee - Direct Examination by Mr. Shaffer

1 after that?

2 A Since that time.

3 Q Okay. And --

4 A I mean except -- like I said, part of my duties
5 encompass Chester County now, so that's the correct answer.

6 Q Okay. How many public defenders were working with
7 you when you were in Chester County GS?

8 A We had -- at that time there was only one public
9 defender. Maybe I -- I might explain it a little easier.
10 I received the appointment on Mr. Hardin's case as a
11 private attorney. I accepted private appointments in
12 Chester County and at that time I was the chief public
13 defender in Fairfield County, so those were all appointed
14 down there, but they were as public defenders and I was
15 appointed as a private attorney in Chester County.

16 Q Okay. I'm assuming that was a conflict case in
17 Chester?

18 A No. We had -- basically an agreement, the public
19 defender who was there, Yale Seymore, took the position
20 that he couldn't do probation cases that -- not as a
21 conflict, but just he didn't want to do them and so I got
22 appointed to almost all of them.

23 Q Okay. About how many probation cases did you do up
24 there then? Per year?

25 A I don't know. I would say maybe fifty,

Tyre Lee - Direct Examination by Mr. Shaffer

1 seventy-five, something like that. There were a fair
2 number because I got most of them that were up --

3 Q Okay. How many -- can you even estimate how many
4 probation cases you've done in your entire career?

5 A I would say at least a thousand or more.

6 Q Okay. But you had other duties in Fairfield County
7 and Chester County other than just probation?

8 A That's correct.

9 Q Okay. And Mr. Lee, do you remember Mr. Hardin's
10 case?

11 A I do.

12 Q You do? Okay. Tell me this: In your opinion
13 what's the purpose of a probation revocation hearing?

14 A Well, it's do -- in my opinion, it's something like
15 a rule to show cause. In other words, you have to show why
16 the allegations are not correct or to contest the
17 allegations. And that the allegations are made that you
18 violated your probation by doing a, b, or c, and you have
19 to show either you didn't do a, b, or c. Or if there were
20 reasons why you did them and if they have some mitigating
21 factors, you're entitled to have a hearing and entitled to
22 present evidence and call witnesses if it comes to that.

23 Q And in your opinion, you mentioned mitigation, what
24 is the -- describe what you would consider a mitigating
25 factor or mitigation. Give us some examples of what you

Tyre Lee - Direct Examination by Mr. Shaffer

1 consider --

2 A Well, they're complicated these days where the
3 violations allege that the person isn't paying the money
4 that they're supposed to pay. Chester County has one of
5 the highest unemployment rates in the state and so that's
6 generally -- that would be a mitigating factor, Judge, he's
7 tried, he's gone out, he can't find a job. There are no
8 jobs here to find and that's why he hasn't paid the money
9 and my experience has been that most judges take that into
10 consideration that if it's monetary they're going to be
11 much more lenient than they would be with something else.
12 That's a common mitigating factor.

13 It could be that -- I don't know, it just varies
14 with the facts of each case.

15 Q Okay. Now, correct me if I'm wrong, but you would
16 say that there's -- or is it a correct statement to say
17 there are two parts to a probation hearing?

18 A There could be. I'm not sure what you're --

19 Q I mean, is it correct to say that there's -- first
20 the judge needs to make a finding of whether or not a
21 violation has occurred and then secondly, you deal with
22 sentencing, similar to a trial?

23 A That's correct.

24 Q Okay.

25 A He decides that that's occurred and then he decides

Tyre Lee - Direct Examination by Mr. Shaffer

1 what he should do about it.

2 Q All right. Now, you mentioned in a previous
3 answer, you said that you had a chance to find out which --
4 which violations occurred and the judge gets to make a
5 decision on that; is that correct?

6 A That's correct.

7 Q Okay. And what violations are alleged to have
8 occurred in Mr. Hardin's case?

9 A I'll have to look at his --

10 Q And if you'd like you can refresh with the Form 9?

11 A I think I have a copy. Mr. Hardin's case is a
12 little unusual and one of the reasons I know him is that I
13 had represented him in 2006 for a probation violation also.
14 And actually, he had another one in 2007 in Fairfield
15 County, and I'm assuming Mr. Fitzsimmons represented him.
16 I didn't, but I recognized him when he was down there.

17 My understanding is from -- and normally, when I
18 first talk with someone, the only thing I have is the
19 probation arrest warrant. At a later time, the probation
20 office gives me the 1106, their Form 1106, which should, in
21 most cases -- one of the things I check to see, it should
22 basically say the same thing that's on the warrant. And
23 this one -- the first thing is failed to follow the advice
24 and instructions of the agent. And in my mind, that's
25 always a -- sort of a catch all. If he didn't do anything

Tyre Lee - Direct Examination by Mr. Shaffer

1 or if he did anything wrong, you fail to follow their
2 advice and instructions. And it's not generally spelled
3 out and it covers the other factors. But the first, and I
4 think the most serious, was he failed to report to Agent
5 Whitesides of the Chester County Probation Office as
6 instructed by Agent in Charge Moore on June 16, 2008. He
7 did not appear. He was told to be in court. He had been
8 issued a citation to be in court on that day and he did
9 not -- he was in court initially, but he left and when they
10 started to look for him, they couldn't find him. And I
11 think basically it just sort of spells out what happened on
12 that occasion. He failed to work diligently on a lawful
13 occupation. He failed to notify agent if he became
14 unemployed in that he hadn't told his agent that he was
15 fired on June 13th.

16 He failed to pay his intensive supervision fee as
17 instructed by being \$20 in arrears at the issuance of the
18 warrant. And he failed to stay at his approved residence.
19 Mr. Hardin was on the sexual register and he was not
20 supposed to be away from his home and they had evidence
21 that he had been away from his home -- I forgot what the
22 date was, but at some period of time had not told them that
23 he was not at his home and Agent Whitesides put into it
24 that she had overheard him saying he'd stayed at Tim's
25 house the night before. And I think that these are the

Tyre Lee - Direct Examination by Mr. Shaffer

1 allegations that he had in there.

2 Q All right. Real briefly, what are the mens re
3 requirements of this?

4 A I'm sorry?

5 Q What are the mens re requirements for those
6 allegations?

7 A Well, it would be to know that you aren't supposed
8 to do a certain thing in that you realized you were not
9 supposed to do it and that you were -- and that you did it.

10 Q And is that for all of the violations?

11 A I would think that that would be on all of them
12 except -- you know, there may be factors why you didn't do
13 them. There may be mitigating factors that were involved
14 in the particular situation. I think in Mr. Hardin's case
15 there were some factors -- he had an excuse for all of the
16 things he hadn't done.

17 Q Okay. But can you tell me if there's any one that
18 required -- any element in that -- or any of those
19 violations that require a different mens re requirement?

20 A I'm not sure if there is. I think it's all, you
21 know, that you know that you're supposed to do something
22 and you failed to do it.

23 Q All right. Could you please tell me which of those
24 violations that Judge Couch actually found him in violation
25 of? Those alleged violations?

Tyre Lee - Direct Examination by Mr. Shaffer

1 A Well, I'd have to look at the transcript. I know
2 he had some of them that -- I don't think, and I looked at
3 your amended. I don't think he specifically said item one
4 you violated, I find that you violated; item two, I find
5 that you violated. I don't think he actually came out and
6 said that. I think he just sort of lumped them together.
7 I don't see anything in here where he specifically said
8 that, I find you violated item one or item two or item
9 three.

10 Q Do you have a copy of the Form 9, the probation
11 revocation sentencing sheet?

12 A I don't know that I have that or not.

13 Q Or probation revocation order?

14 A I'm looking to see if maybe I had one.

15 (WHEREUPON there was a pause in the proceedings.)

16 THE WITNESS: Quite often we don't get those. I
17 have the sentencing sheet on that. Wait a minute.

18 (WHEREUPON there was a pause in the proceedings.)

19 BY MR.. SHAFFER:

20 Q Well, I can actually hand you a copy of it, but
21 what I'm wondering is do you know if you ever received that
22 order?

23 A I don't think I ever received a copy of this until
24 I got the packet from the attorney general's office.

25 Q Okay. And when did you get the packet from the

Tyre Lee - Direct Examination by Mr. Shaffer

1 attorney general?

2 A Probably about two weeks ago or something about
3 that -- maybe three weeks ago.

4 Q Okay.

5 MR. SHAFFER: Your Honor, if I may approach the
6 witness?

7 THE COURT: You may.

8 (WHEREUPON Petitioner's Exhibits 1 and 2 were
9 marked for evidence.)

10 THE COURT REPORTER: Petitioner's 1 and 2, Your
11 Honor.

12 THE COURT: One and two. Without objection?

13 MS. MAY: Without objection, Your Honor.

14 THE COURT: All right. In without objection.

15 BY MR. SHAFFER:

16 Q Mr. Lee, I'm showing you Petitioner's 1 and 2. Can
17 you identify what that appears to be?

18 A That would appear to be the sentencing sheet. I
19 believe this may have been a copy of what I received. I
20 think it is.

21 Q Okay.

22 A Those would be the sentencing sheets.

23 Q And if you could, could you tell us from that
24 sentencing sheet what are part of the -- well, first of
25 all, should that sentencing sheet tell you which violations

Tyre Lee - Direct Examination by Mr. Shaffer

1 the judge found he was --

2 A I would think that it would say, but it's not on
3 there. I don't see it.

4 Q Okay. So it's not on there. But generally they
5 are on there; is that correct?

6 A Again, like I said, most of the times we don't see
7 these because they're done after the fact and --

8 Q Okay.

9 A I don't --

10 Q Now, is there anywhere in the transcript that you
11 have found in your review that would indicate some
12 violations the judge found him -- or which alleged
13 violations the judge found that he had actually committed?

14 A I don't see anything in there specifically. Like I
15 said, I don't see anything that says, I find that you
16 violated a, b, c, d.

17 Q Could you flip to page 5 of the transcript?

18 A Okay.

19 Q Could you read lines 5 through 7?

20 A Says, Your Honor, he'd admit to some of the
21 violations and has some matters to bring before the Court
22 in mitigation. That's 7.

23 Q Okay. And you said some of the violations,
24 correct?

25 A That's correct.

Tyre Lee - Direct Examination by Mr. Shaffer

1 Q And which violations were you not admitting to? Do
2 you recall?

3 A Actually, when I look back on it, I think we were
4 basically admitting all of them. He had not -- the
5 mitigation was the main factor in that he had -- he had
6 admitted to me that he had stayed away from home. He had a
7 reason for staying away from his residence. He had not
8 been paying, but he had been working and I forgot what else
9 was it that the warrant said. I think the main thing was
10 that he had not been home and that he had actually left the
11 courtroom. So there's really nothing there that he didn't
12 say he didn't admit to.

13 Q Okay. If you will, could you tell us the -- at
14 least, I found whenever I was doing probation cases and
15 things like that they're somewhat routine. I know that I
16 had a general spiel that I would tell the person whenever I
17 first talked to them. Do you have anything like that?

18 A I normally go through -- the first thing I do is
19 get some basic information from the person, name, address,
20 things of that nature. Most of the people that I talk
21 to -- in fact, I was real surprised on his -- the way this
22 one started out in that he was issued a citation because
23 most of the people get warrants and they're locked up and
24 the magistrates deny the bond and I see them in jail. In
25 fact, if I know them or if I don't know them, I still

Tyre Lee - Direct Examination by Mr. Shaffer

1 introduce myself again as to who I am. I tell them let me
2 get some basic information from them, get that information
3 from them. Then I say now, this is a probation hearing and
4 what this is, is they're alleging that you either did
5 certain things or you didn't do certain things. We want to
6 talk about these things. And then I will give them a
7 little bit of information about, it's different from a
8 trial in that there's no jury. We -- you know, we appeared
9 in front of the judge, the judge makes the decisions in the
10 case as to whether you violated your probation or not and I
11 say -- they're making the allegations, we need to give
12 information to the judge as to if you didn't violate it, we
13 need to be able to tell him what aspects you didn't violate
14 it in. If we have to call witnesses, we could do that, but
15 I need to know that. I need to know the things that you
16 did do. If you did do them, then I need to know why you
17 did them and what we can give the judge to explain why you
18 did those particular things. And I think something along
19 those lines.

20 We talk about them. I take the -- normally, I only
21 have the warrant at that time. And I take it and I sit
22 down and I go, Now, this is the first thing they say. And
23 the first one is always failed to follow advice and
24 instructions and I do say, look that's encompassed -- I
25 don't use that term, but I say, that includes everything

Tyre Lee - Direct Examination by Mr. Shaffer

1 else. And I say if you didn't do something, then you
2 failed to follow their instructions. And they don't spell
3 that out, but here's what they spell out, this is what they
4 say and then we talk about each one. And for whatever
5 reasons, you know, the person has -- if he says he didn't
6 do it, I want to get some information to say he didn't.
7 Quite often it comes up, I paid that money. Okay. We need
8 to get those receipts and if you've got them or somebody in
9 your family got them, or, you know, something of that
10 nature.

11 If they have anything else to say they didn't do
12 the particular things, then I want to know what they've
13 got. If they didn't do them, I want to say -- I ask them,
14 Well, what -- you know, why did this happen? Why did you
15 do this? What can we tell the judge to make this less of a
16 bad thing that you did. And that's generally the way I
17 handle those.

18 Q Okay. And now, in the case of Mr. Hardin, did you
19 meet with him beforehand?

20 A This is what happened in his case. Like I said, I
21 had represented him in 2006, so I sort of knew who he was.
22 He went to the clerk of court -- he received a citation, I
23 think, in May that said be in court on June 16th. On June
24 16th, he went to the clerk of court and he paid -- I think
25 he paid his \$40 and she appointed me to him. I remember

Tyre Lee - Direct Examination by Mr. Shaffer

1 him coming up to me in court and saying when we have a
2 break, I need to talk to you. I want to talk to you, I
3 want to talk to you. And I said, Look, I can't -- you
4 know, I've got all these other people, you just got
5 appointed to me. And I -- you know, I've got to talk with
6 them. Their cases are coming up right away. I'll talk to
7 you. Hang around.

8 And at some point in time, my recollection is the
9 probation officer came and said, Do you know where Ashley
10 Hardin is; and I said no, he was here a few minutes ago and
11 he said, We can't find him. And so they did whatever they
12 do to try to find him and weren't able to find him and a
13 couple of days later, I think they asked the judge for a
14 bench warrant for him.

15 Q Okay.

16 A That was the first contact I had with him. It was
17 very minimal, we didn't discuss the case or anything at
18 all. At a later date, I found out that he'd been arrested
19 and he somehow or another got appointed to me again, which
20 really wouldn't have been necessary. But I found out he'd
21 been arrested. I went out to the jail and talked to him.
22 That's when we went through the spiel of what happened,
23 why -- you know, that sort of thing.

24 My records show I met with him briefly the day
25 before he was in court and then I met with him again

Tyre Lee - Direct Examination by Mr. Shaffer

1 briefly right before we actually went into court. You
2 know, so it would not have been for very long periods of
3 time. But at the jail, I was there to talk with him I know
4 at least a half an hour or maybe more.

5 Q Okay. Now, did you -- did you at any time
6 explain -- did you go through each of the allegations with
7 him? Do you recall? Or is that just --

8 A That's normally what I do with each one of them and
9 ask him --

10 Q Okay.

11 A -- did you do this, if they did, what -- we need to
12 explain why you did this.

13 Q Okay. Do you ever give, whenever you're talking to
14 probationers an idea of what they might be looking at?

15 A I'm sorry?

16 Q Do you ever give probationers an idea of what they
17 might be looking at? What the outcome of the hearing will
18 be?

19 A Well, the first thing I say, this is what you're
20 facing. And that's what's left of the sentence. Normally
21 I will say, you know, you're facing this sentence that you
22 got, minus any time that you've been in jail. And I have
23 represented more than just Mr. Hardin on previous
24 occasions, where they have served some time in jail
25 awaiting the probation case, perhaps got continued, had a

Tyre Lee - Direct Examination by Mr. Shaffer

1 short revocation or something of that nature. My
2 understanding that sentence subtracted off of the time.
3 But basically, I'll say, you know, what you're facing is
4 the maximum sentence that you got in your original
5 sentence. And as a consequence, you know, basically that's
6 what can happen to you. And I don't tell anybody and have
7 never told anybody, you're going to get such and such. The
8 only time I've ever done that is in a negotiated plea
9 situation where we knew what the sentence was going to be
10 unless the judge rejected the negotiation. But on
11 probation cases -- and really any case, I tell my clients,
12 you need to go out there with the idea that you can catch
13 the whole sentence if you get less than that, then we've
14 done good, but you need to be aware you could get the whole
15 sentence.

16 Q Okay. And did you -- did you -- what did you
17 advise Mr. Hardin as an idea of what might happen? Did
18 you --

19 A I think probably what I told him was, you know you
20 were supposed to be in court when Judge Goode was here.
21 While Judge Goode revokes sentences, he doesn't revoke --
22 normally he doesn't revoke the sentence totally and he
23 terminates probation, but you weren't here then and as a
24 consequence, we've got Judge Couch and Judge Couch had been
25 through Chester, I think in May, and I knew that basically

Tyre Lee - Direct Examination by Mr. Shaffer

1 what he did was total revocations.

2 Q Okay.

3 A And I said, Well, you know, we'll try to put up as
4 much as we can, maybe he won't do that.

5 Q So generally, he just passed out total revocations
6 in your opinion?

7 A My recollection was that was the way he handled
8 probation cases, that that's what was going to happen. I
9 can't, without looking back on whoever I represented during
10 this period of time to say, well they did; but that was my
11 reaction to what I thought was probably going to happen.

12 Q Okay. Back to one of those general questions I
13 asked you earlier. Actually, I might wait on that for a
14 second.

15 Now, you mentioned -- you mentioned you spoke with
16 him maybe thirty minutes in the jail. How long do you
17 think you spoke to him the morning of?

18 A It wouldn't have been very long. It would have
19 been maybe five minutes or something like that. And my
20 records reflect that I did talk to him the day before.
21 Now -- you know, but that wouldn't have been for a long
22 time. Probably -- at that point in time, I think I
23 probably had the 1106 and basically said, Look, I've got
24 the 1106, this is what they've got, this is what they're
25 going to show the judge. You know, it looked like they've

Tyre Lee - Direct Examination by Mr. Shaffer

1 covered everything we've talked to -- talked about
2 previously.

3 Q Okay.

4 A It wouldn't -- neither that one or the one before
5 going into the courtroom were very long periods of time.

6 Q All right. And during that time period, you
7 mentioned one of your goals is to establish mitigation
8 evidence, right?

9 A That's correct.

10 Q And did you ever -- do you generally call witnesses
11 to mitigate probation hearings?

12 A Unless they want somebody to come up, you know,
13 specifically -- now, I have -- I have called ministers,
14 people that -- that maybe don't know anything about the
15 facts of the case, but want to say this is not somebody who
16 should go to jail, things of that nature. But I have to
17 rely on the defendant to tell me the people and to give me
18 the names and addresses and so forth so that I could get in
19 touch with them.

20 Q Now, do you generally seek out -- outside of just
21 relying on them to come forward with something, do you
22 generally ask them who can testify for you?

23 A Normally that would be -- you know, I would ask
24 them who it is because they're going to know who they have
25 contact with and things of that nature and I would -- you

Tyre Lee - Direct Examination by Mr. Shaffer

1 know, I would -- sometimes it's just family members. And
2 you know, well, they can come up while you're standing up
3 there and stand with you and they could talk to you and
4 generally if they're there, I say, first of all it means
5 something to have family support. But if you want to say
6 something, you can say something about them, about their
7 character or something or whatever you want to say. You
8 know, but you don't necessarily have to do that because in
9 a lot of cases, the families are just -- they don't want to
10 talk, but I like to have people in front of the judge with
11 the client.

12 Q So is it fair to say as a matter of course you're
13 going to ask your probation clients who they have --

14 A Generally --

15 Q -- whether they volunteer it or not.

16 A Yeah, that's the thing because I -- you know to be
17 able to find out, yeah.

18 Q Okay. Now, you had mentioned -- back to that
19 general question, the punishment invoked in probation, is
20 it fair to say, is not for the actual violations? Or do
21 you think that it is punishment for the violations
22 themselves?

23 A I think -- well, I've never asked a judge exactly
24 how they do that. My understanding is that that's the
25 punishment for violating is whatever the judge is going to

Tyre Lee - Direct Examination by Mr. Shaffer

1 do on in other words. I don't know if that's answering
2 what you're asking me, but I mean -- it's punishment for
3 violation of -- for the violation.

4 Q Okay. So it's fair to say you generally don't ask
5 for discovery from the original case, right?

6 A No, no, because generally that's done and over
7 with; and my understanding that's not a matter for
8 probation, you know, for a hearing that that's something
9 that would be handled at an appeal or perhaps in a PCR.
10 But in probation it deals with why have you not done what
11 you're required to do.

12 Q So it's fair to say that you do not ever address
13 the facts of the underlying case?

14 A If I know something, I might say something to the
15 judge in the presentation along the lines of trying to say,
16 Judge, he sort of got a raw deal, but, you know --

17 Q Did --

18 A -- that's not going to be something the judge is
19 going to look at, but I try to slip it in if that's the
20 case.

21 Q Do you seek out new information for that case -- I
22 mean, you don't ever seek out information on that, do you?

23 A Not unless the client tells me something.

24 Q Okay.

25 A You know, if the client tells me something, then I

Tyre Lee - Direct Examination by Mr. Shaffer

1 guess I'm in a position of saying, Well, you know, if you
2 can, you need to file a PCR for after discovered evidence
3 or something of that nature, but I normally don't go out
4 and look for it unless the client just really gives me
5 something that I feel like needs to be brought up.

6 Q Okay. Did you ever ask Mr. Hardin for any of that
7 information?

8 A You know, I'm not sure because I did represent him
9 on two occasions and certainly the 2008 is more familiar in
10 my mind than the 2006, but they were for the same offenses
11 and I -- I don't remember anything other than I think he
12 probably told me this was, you know, my girlfriend or
13 something that -- I don't remember anything about age or
14 anything like that being brought up.

15 Q Okay. But, it's fair to say that you don't have an
16 exact recollection of everything he said to you?

17 A No, I -- like I said, I didn't pull the 2006 case
18 because -- the only thing, I do take notes of what somebody
19 told me. And my notes basically reflect what we've talked
20 about, was basically what we presented in court, that he
21 was -- he had gone to see his brother somewhere in South
22 Carolina. I think it later came out as Wagner and that he
23 and his girlfriend got into an argument and she left him
24 there; and that's the reason he wasn't at home at the time
25 and evidently there were younger children in the family and

Tyre Lee - Direct Examination by Mr. Shaffer

1 that I have a few notes about why he would work and he
2 wasn't getting enough hours in the job and he quit.

3 And then also that he was willing to -- if the
4 judge wouldn't revoke him, that he was willing to basically
5 be on house arrest with an ankle bracelet. And I think my
6 recollection is and I think the transcript had it, we
7 brought all those things out to the judge.

8 Q Okay. Did you call any witnesses?

9 A No, and I have -- on this particular sheet that I
10 use that I have those notes on, I put what his original
11 sentence was and I have a space for witnesses names,
12 addresses and it's blank. There's nobody on there.

13 MR. SHAFFER: Your Honor, since he's actually
14 referring to that document, is there any way that I could
15 actually view it?

16 THE COURT: What's on it?

17 THE WITNESS: I don't have -- I will note that it
18 has his name on it, it was in his file, that's the
19 reason --

20 BY MR. SHAFFER:

21 Q But you would say this was from his interview?

22 A That's when we talked at the jail.

23 (WHEREUPON the witness was looking at the paper.)

24 BY MR. SHAFFER:

25 Q First is there any way that you can actually read

Tyre Lee - Direct Examination by Mr. Shaffer

1 that statement aloud?

2 A I'll try to.

3 Q Thank you.

4 A That what I have -- and this is something that I
5 also use in my criminal cases too, so -- I'll pull it out
6 when the client starts talking and what he told me was, he
7 was working -- again, these are just, you know, fragments,
8 but -- he was working, left because he wasn't getting
9 enough money -- enough hours, four or less a day; he quit.
10 Then I said, Went to see his brother; he and gf got into an
11 argument; she left him there; he had to get back the best
12 way he -- way possible; he was not in -- at Chester; took
13 him two days to get back; and then I said client is willing
14 to -- willing to have an ankle bracelet and that's what I
15 put down.

16 Q Now, I'm almost finished asking you questions.
17 Now, when the -- and I apologize I've asked you so many
18 detailed questions about this, but when someone gets their
19 probation revoked, you're standing beside them in court,
20 correct?

21 A That's correct.

22 Q What happens after they get their sentence if
23 they're incarcerated like in the case of Mr. Hardin?

24 A Well, in this case, and in a lot of these cases,
25 because I'm doing all the probation cases, they're

Tyre Lee - Direct Examination by Mr. Shaffer

1 generally bringing up the next person and, you know, they
2 will take them back -- occasionally somebody will say I
3 want to see you or something and you know when I'm out in
4 the hallway -- you'd have to be a little bit aware of the
5 Chester courthouse. The hallway from the courtroom has the
6 lock up and it has a sliding door on it and prisoners quite
7 often will call their attorneys or somebody else from that.
8 And if somebody does, you know, I tell the bailiff and --
9 not the bailiff but the guard, I'd like to see them and
10 take them out and talk to them.

11 Q Okay. Now, is there a way to contact you through
12 mail?

13 A I have a post office box.

14 Q Okay. What -- what post office box is it, just for
15 the record?

16 A My post office box at that time, I think was Post
17 Office Box [REDACTED] in Chester.

18 Q Okay.

19 A And then I -- I have an answering machine on my
20 phone. If they call my phone, then I've got the voice
21 answering. Sometimes I get a lot of, either hang ups or --
22 you can't understand what the person is saying, but there's
23 somebody -- there's -- that's monitored on a daily basis --
24 or was. I don't do that now.

25 Q And your office in Chester, does it have a street

Tyre Lee - Direct Examination by Mr. Shaffer

1 address?

2 A It was [REDACTED] Main Street, directly across from the
3 courthouse. If you walked out of the courthouse door, the
4 front door of the courthouse and kept walking, you'd walk
5 into my office.

6 Q Is there a suite number?

7 A No, it's just --

8 Q It's just the entire building?

9 A Yeah.

10 Q Okay. Do you ever get mail delivered to that
11 street address?

12 A Sometimes I'll see that, but Chester is a small
13 place. Generally if they see my name -- I have gotten mail
14 addressed to that street address in my post office box.

15 Q Okay.

16 A In other words, the -- I don't have a mailbox
17 there, but they generally know, in Chester, Oh, this is
18 Tyre Lee and they put it in there, in my post office box.

19 Q Where I'm from in Chapin, it's sort of similar and
20 in the past, I've gotten little letters saying don't ask
21 people to mail you stuff at your office. Did you ever
22 receive anything like that?

23 A From the post office?

24 Q Yeah.

25 A No.

Tyre Lee - Direct Examination by Mr. Shaffer

1 Q Okay.

2 A They just -- like I said, I've been there for so
3 long, they sort of know -- in fact, I sometimes get home
4 mail stuck in my office box, you know. Just somebody
5 recognized the name and didn't do that. But generally
6 everything ends up in the box.

7 Q Okay. Ever have anyone claim that they mailed you
8 something and you didn't receive it?

9 A I have had people say that they've done that and I
10 haven't received it. I grew up at the time when the post
11 office was almost infallible, but I can't say that now.

12 Q Okay.

13 A If it's something important and I mail somebody and
14 I'm sure you do this too, you send it certified mail so you
15 can trace it down.

16 Q Okay. In your experience with Chester, anyone
17 locked up ever sent you anything certified mail? Who's
18 locked up at the Chester County Detention Center?

19 A No, I wouldn't say if they're in the detention
20 center, they can't do that. I have had certified letters
21 from prisoners, you know, in the Department of Corrections,
22 but I don't think -- you know, most of the times they --
23 the bailiff would -- not the bailiff, the guard from the
24 detention center could say, Here, I've got some things for
25 you that people in the jail had written and asked that it

Tyre Lee - Direct Examination by Mr. Shaffer

1 be sent to me or when I would go out to see somebody, in
2 addition -- in Chester, in addition to getting probation
3 cases, I also got conflict cases from the public defender's
4 office and so I did have a certain number of people who
5 were incarcerated for criminal offenses too. And if there
6 were some things and I went out there and I guess I went
7 out two or three times a week or something -- they would
8 say, Het, we got some things for you. These would not be
9 letters now. Letters would always end up in the postal
10 system. But it would just note, I want to see my lawyer
11 when he's out there, something like that.

12 Q Did you have any more contact with Ashley Hardin
13 after the hearing, the probation hearing?

14 A I don't think so.

15 Q Okay.

16 MR. SHAFFER: Your Honor, Court's indulgence.

17 (WHEREUPON there was a pause in the proceedings.)

18 MR. SHAFFER: Your Honor, I don't think we have
19 anymore questions at this time.

20 THE COURT: Okay. Tell me this again, what is it
21 specifically that Mr. Lee did incorrectly or ineffectively?

22 MR. SHAFFER: Your Honor, you've just taken the
23 wind out of my sail here. I'll try to be brief. Is
24 that -- you'll hear later from an allegation from
25 Mr. Hardin that he had attempted to mail something

Tyre Lee - Direct Examination by Mr. Shaffer

1 requesting an appeal because of it. He didn't contact --
2 he had no contact with him afterwards other than the --
3 some sort of informal way, there's no way for him to
4 request an appeal. He would have asked for an appeal.

5 THE COURT: To appeal the sentence? The
6 revocation?

7 MR. SHAFFER: Your Honor. There's actually no
8 finding anywhere in the record on this case of what Judge
9 Couch found him in violation of.

10 THE COURT: I thought there was.

11 MR. SHAFFER: Your Honor, there's admissions by
12 Mr. Lee who made statements throughout the transcript
13 concerning the violations, but the judge never made a
14 finding himself. The form 9's actually -- the judge did
15 not make any -- I mean did not list them in the Form 9
16 under the section right there with the Court's -- they
17 general list violations.

18 There's also a few ineffective assistance of
19 counsel claims that will come up later. First is, I think,
20 that the underlying charge -- probation of course has been
21 found for years to be a more or less a rescinding of an act
22 of grace, a probation revocation is. It's not punishment
23 for the offenses of probation of -- for example, Mr. Hardin
24 wasn't being punished for the offenses of not showing up to
25 his probation officer.

Tyre Lee - Direct Examination by Mr. Shaffer

1 The judge merely found -- well, he didn't make the
2 finding, but had he made the finding, it would have been
3 that Mr. Hardin -- no one deserves to be on probation
4 because of that. He's being punished for the underlying
5 offense. I can't tell you the code section off the top of
6 my head, but it allows the judges -- it's pretty much
7 common knowledge, it allows judges to treat it as a --
8 treat a probation revocation as a -- as if he was never on
9 probation, as if the previous sentence did not happen.

10 THE COURT: What I'm confused about -- I mean, are
11 you going to present testimony that he hadn't been in front
12 of the Court a time or two on previous violations, that he
13 did owe them a \$20 supervision fee for supervision, he
14 didn't stay in Wagner for whatever reason presented in
15 mitigation. That stay in Wagner seemed to have bothered
16 Judge Couch greatly because there was an exchange of words
17 between Judge Couch and Mr. Hardin on page 9, You're aware
18 of that requirement, you're not supposed to spend the
19 night. I didn't have no choice whether there or not -- let
20 me finish. That's when I notice things going downhill was,
21 Let me finish.

22 It appears to be an interruption of the judge. I
23 don't think that was Mr. Lee's doing, if I'm understanding
24 this conversation. Whether there were children there or
25 not, away from where you were supposed to be, aren't you

Tyre Lee - Direct Examination by Mr. Shaffer

1 aware of that requirement? Yes, sir.

2 Admission right there by him, not Mr. Lee that he
3 didn't stay where he was supposed to stay and that's what
4 Judge Couch was focussing on. Maybe I'm reading it wrong.
5 That's what I'm focussing on. Tell me why not.

6 MR. SHAFFER: Your Honor, I don't believe he ever
7 made the finding that that was the violation.

8 THE COURT: I think he did right there.

9 MR. SHAFFER: Your Honor, I respectfully object to
10 that -- the finding or your interpretation of that. The
11 other thing that I need the address since you just brought
12 it up and it's in my mind right now, Your Honor, you
13 mentioned that things were going down then and it wasn't
14 Mr. Lee's doing. Concerning that, I'm hoping that the
15 Court's not inferring that his interrupting the judge had
16 anything to do with his sentence. I don't believe it
17 would. I think it would be a violation of State law for
18 Judge Couch to more or less use something that could be a
19 contemptible offense in order to enhance the sentence. I
20 know there's a case out of the -- it's somewhere out of the
21 4th Circuit -- 4th Circuit of Court of -- I mean 4th
22 Circuit of South Carolina. It's an appeal case where the
23 Court ruled that -- I think it might have been out of Judge
24 Baxley's court, but saying you can't do that, you can't
25 enhance based off of the contemptible act of interrupting

Tyre Lee - Direct Examination by Mr. Shaffer

1 the judge.

2 So I'm not sure if that's where your going, Your
3 Honor.

4 THE COURT: No, where I'm going at is, if there are
5 violations and there were -- and really and truly, I mean,
6 a lawyer and a reasonable experienced lawyer of Mr. Lee's
7 caliber, all right. You violated, technically the terms of
8 your supervision, what can we tell the judge in mitigation
9 because that was the whole presentation, mitigation,
10 mitigation, mitigation.

11 And the judge on the bench said, you've been in
12 court five or six times before and --

13 MR. SHAFFER: Your Honor, I believe that the
14 mitigation -- first of all, I don't think any true
15 mitigation was brought up. I think he tried to explain
16 away some of the violations. I don't think that that's
17 necessarily mitigation. General mitigation in his case
18 would be the underlying sentence. He more or less -- he
19 faced ten years for something in 2008 at the time of the
20 hearing, Mr. Lee could have said, Well, if he would have
21 committed this today he would have no longer been guilty of
22 a crime because by that point, the statute had changed.
23 The CSC statute had changed. He was immune from that.

24 THE COURT: The judge knows that.

25 MR. SHAFFER: Well, I believe he should have

Tyre Lee - Direct Examination by Mr. Shaffer

1 pointed out --

2 THE COURT: You would have told the judge what he
3 should know?

4 MR. SHAFFER: Your Honor, I --

5 THE COURT: I mean seriously.

6 MR. SHAFFER: Your Honor, I probably would have put
7 it out. I tell judges what they already know plenty of
8 times, Your Honor. I'm probably doing it a lot right now.

9 THE COURT: I'd go with you on that one.

10 MR. SHAFFER: But nothing was brought up regarding
11 the underlying offense. If under statute the Court is
12 supposed to look at the probation revocation as if --
13 basically a sentencing hearing if probation was ever given
14 and that's under the statute. I can pull it up for you if
15 you have one second. I'll be happy to pull up the case,
16 the citation --

17 THE COURT: I don't need that, just keep talking.
18 I know the case.

19 MR. SHAFFER: But essentially, if -- if the -- if
20 it's basically a sentencing hearing for the underlying
21 offense, he could have brought up the fact that, you know,
22 the actual facts of the underlying offense because I'm sure
23 Judge Couch did not realize he was seventeen at the time.
24 I'm sure Judge Couch didn't realize that they were
25 girlfriend and boyfriend. They were living in the same

Tyre Lee - Direct Examination by Mr. Shaffer

1 home. I'm sure he didn't realize that, you know, he would
2 have been -- unless you're referring that Judge Couch
3 actually did some calculation based off his date of birth,
4 I don't think he would have caught on to the fact that he
5 would have been qualified -- he would have been immune
6 under the new statute from that offense. And essentially
7 because of the fact it is continued -- the Court is looking
8 at -- I mean that's strong mitigation evidence at that
9 point. I believe to tell the probation court that a client
10 would -- if he committed this offense today, it would no
11 longer be illegal, he would have not got about anything.

12 This man got ten years for something that in 2008
13 whenever his sentence started was no longer illegal. And I
14 have a case that I'd like to pass up -- well, first I was
15 going to hand up State v. Pierce to the proposition that
16 it's a continuation of -- a continuation of the previous
17 sentence. State vs. Pierce -- excuse me. Pierce v.
18 State -- now, initially this is going to seem like I'm
19 contradicting myself with the holding in Pierce. Pierce
20 says that stands for the proposition that Counsel is not
21 ineffective for pleading someone guilty to the previous
22 version of a statute because the new version of the statute
23 because of the savings clause did not -- did not preempt
24 the other one, did not preempt prosecution on the other
25 one.

Tyre Lee - Cross-Examination by Ms. May

1 I'm not saying that Mr. Hardin could not have been
2 prosecuted based off of that. I'm not raising that here
3 today. The argument essentially I'm raising is one of
4 mitigation. I believe that strong mitigation evidence --
5 especially when the common-law view as stated in Pierce is
6 that the extension of the statute is understood to be a
7 clear indication -- or excuse me an indication from the
8 sovereign that -- sovereign power, no longer desires the
9 former crime to be punished or regarded as criminal. I
10 believe he could have brought up the fact that while Judge
11 Couch might have been within his power to sentence him
12 fully because of the savings clause of the act which
13 amended the CSC statute, it was -- it might have been
14 within his power but it certainly was -- it certainly goes
15 to mitigate the underlying offense, which is what he's
16 being punished for, not for not showing up to probation.

17 And, Your Honor, I might have one or two other
18 arguments whenever he actually comes up.

19 THE COURT: All right. Anyway you've answered my
20 question.

21 Ms. May, do you have any questions of Mr. Lee?

22 MS. MAY: Just briefly.

23 CROSS-EXAMINATION

24 BY MS. MAY:

25 Q Mr. Lee, you met with Mr. Hardin prior to the

Tyre Lee - Cross-Examination by Ms. May

1 probation revocation hearing?

2 A That's correct.

3 Q Okay. And you discussed each of the allegations
4 that were lodged against him?

5 A We went over each one.

6 Q Okay. And he -- y'all discussed whether he was
7 admitting that or whether he was denying it?

8 A That's correct.

9 Q And your recollection was that he did admit to
10 either all or most of the allegations?

11 A That's correct. He had explanations for why it had
12 occurred.

13 Q Okay. And did y'all discuss the mitigation that
14 you were going to offer in explaining why those occurred?

15 A That's correct.

16 Q Okay. And he didn't provide you with the names of
17 any witnesses that he wanted to speak on his behalf?

18 A He didn't tell me of anything. I think this was
19 some of his family members there when we were in court and
20 they were -- you know, I can't -- I do so many of these. I
21 think they came up, but I don't know they may not have. I
22 think he had even a grandfather or uncle and then his
23 girlfriend and I think that was it.

24 Q Okay. Did Mr. Hardin ever ask you to file an
25 appeal in his case?

Tyre Lee - Redirect Examination by Mr. Shaffer

1 A No.

2 Q If he had asked you what would you have done?

3 A I would have filed it. It's not a problem for me
4 to file an appeal because I've got it -- over the years
5 I've got it reduced down and I basically just plug in the
6 names and the variables and print it all out and mail it to
7 Court of Appeals and letters to the clerks of court and --
8 I mean, it takes me maybe an hour to do it and particularly
9 in Chester, it's even shorter because all I've got to do is
10 take the -- I don't have to mail a lot of the documents, I
11 can just walk across the street.

12 Q Okay. So Mr. -- and Mr. Hardin was aware of the
13 violations that he was admitting that he had violated?

14 A That's correct.

15 Q Okay.

16 MS. MAY: I have no further questions, Your Honor.

17 MR. SHAFFER: One brief question.

18 REDIRECT EXAMINATION

19 BY MR. SHAFFER:

20 Q So you went over what the probation officer would
21 have to prove on each of the violations?

22 A That's -- I mean, this is what they're saying and,
23 you know, did you do that, not do that, or tell me about
24 it.

25 Q Okay. And the -- and under the probation violation

Tyre Lee - Redirect Examination by Mr. Shaffer

1 regarding money, his failure to pay the fee, what did you
2 tell him the probation officer would have to prove?

3 A I said they would have to prove that you hadn't
4 paid the -- you did not pay the money when you were
5 supposed to pay it. I said -- and I probably said, you
6 know, the judge is going to understand the economic
7 situation here, you know and the fact that you haven't
8 been -- you've had a spotty work record and you're just
9 not -- you don't have the income. I mean, it's not -- you
10 don't have the income. It's not a matter of necessarily
11 that specific case willfully violating an issue, you just
12 didn't have the money to do it.

13 Q Okay. But previously you mentioned a mens re
14 standard for all of the violations?

15 A You know, that --

16 Q What's a mens re --

17 A That would be -- that's probably the one that there
18 would be a lack of mens re. However, he did pay the \$40 to
19 the clerk of court, so...

20 Q Okay. But you believe that his payment of the \$40
21 to the clerk of court in order to get a public defender
22 would somehow be brought up?

23 A It's in the documents. The clerk writes on the
24 front page, paid the \$40. You know, if somebody had
25 questioned it, you know, Well you had the \$40 here, why

Ashley Ray Hardin - Direct Examination by Mr. Shaffer

1 didn't you take half of it and see if you could get the \$40
2 waived.

3 Q And you believe that would be used as evidence
4 against him?

5 A It's a possibility, yeah. Like I say, the clerk
6 writes on the front of it, paid \$40.

7 MR. SHAFFER: Thank you, Your Honor.

8 THE COURT: All right. You can step down.

9 MR. SHAFFER: Your Honor, I'd call Mr. Hardin.

10 THE COURT: Come forward and be sworn.

11 ASHLEY RAY HARDIN,

12 having been duly sworn, testified as follows:

13 THE CLERK: Have a seat and state your name for the
14 record, please.

15 THE WITNESS: Ashley Hardin.

16 DIRECT EXAMINATION

17 BY MR. SHAFFER:

18 Q All right. Mr. Hardin, let's start out, how old
19 are you?

20 A Twenty-six.

21 Q Twenty-six years old?

22 A Yes, sir.

23 Q Where are you from?

24 A From Pelion, South Carolina.

25 Q Okay. How long did you live in Pelion?

Ashley Ray Hardin - Direct Examination by Mr. Shaffer

1 A Almost all of my life, back and forth from my
2 grandparents and my mom and dad between Columbia and
3 Pelion.

4 Q Okay. Who raised you?

5 A My grandparents.

6 Q Okay. And when did you leave home? When did you
7 leave your grandparents home? How old were you?

8 A Actually about eleven.

9 Q You were about eleven years old when you left your
10 grandparent's home?

11 A Yes.

12 Q And where did you go stay?

13 A Back and forth between my mom and dad, but I always
14 ended up, not long, less than a year, back to my
15 grandparents.

16 Q Okay. At some point, you moved in with your
17 girlfriend?

18 A Right, yes, sir.

19 Q When was that?

20 A It was right about three months after I turned
21 sixteen.

22 Q Okay. And then how old was your girlfriend?

23 A She was fourteen, a little over -- almost -- no she
24 was like two months less than being fourteen.

25 Q Okay. Now at some point it's alleged that you had

Ashley Ray Hardin - Direct Examination by Mr. Shaffer

1 sexual relations with her. Now, I'm not going to ask you
2 when you did --

3 **MS. MAY:** Your Honor, I want to object at this
4 point. This is going to the underlying guilty plea which
5 he already pled guilty to having committed the CSC second.
6 I don't understand what this has to do with -- how it's
7 relevant to this probation violation.

8 **MR. SHAFFER:** Your Honor, it goes to prejudice,
9 which I stated was Issue four on the amended -- I have to
10 put forth some evidence of prejudice up to show that the
11 underlying -- that's in the amendment that I gave you
12 today. Essentially, the argument we were discussing with
13 the failure to mitigate with the underlying facts. I need
14 to put those underlying facts on the record to show that.

15 **MS. MAY:** I think those facts are contained in the
16 guilty plea transcript, which is part of the record.

17 **MR. SHAFFER:** Your Honor, I don't believe the facts
18 in the case -- first of all in the guilty plea, the guilty
19 plea, just for personal knowledge in case the Court has not
20 read it, it is one of five guilty pleas and it's broken up.
21 They were all done simultaneously. The -- I don't believe
22 that the underlying facts of the victim and when the
23 alleged conduct occurred are contained within that. I
24 think that her age is contained with it. I don't believe
25 that fact that it's consensual is contained in it. I might

Ashley Ray Hardin - Direct Examination by Mr. Shaffer

1 be wrong in whether or not it's --

2 THE COURT: Consent is not an element of the crime.

3 MR. SHAFFER: Your Honor, I apologize.

4 THE COURT: I mean his age at the time of the crime
5 was less than eighteen. I thought that was on the
6 sentencing sheet. You can establish that. Her age is in
7 the guilty plea as being fourteen, so you've got that. So
8 we can read it, she was fourteen and he was seventeen when
9 the crime for which he pled guilty to in front of Judge
10 Miller -- each party was that age. Can we agree to that?

11 THE WITNESS: Yes, Your Honor.

12 THE COURT: Are there facts within my purview to
13 determine that based on the record before me and the guilty
14 plea sheet and the transcript in of the guilty plea.

15 MR. SHAFFER: Yes, Your Honor, I agree. The one
16 thing that I would like to make on the record is that it
17 was a consensual sexual conduct because otherwise, it could
18 be seen as another crime. I think the consensual nature of
19 it would --

20 MS. MAY: Your Honor, it states in the transcript
21 it was consensual.

22 THE COURT: Okay.

23 MR. SHAFFER: Okay. And if the State will agree
24 not to argue that it was not consensual, we do not know
25 that it was consensual.

Ashley Ray Hardin - Direct Examination by Mr. Shaffer

1 MS. MAY: I mean it's in the transcript.

2 MR. SHAFFER: You're not going to argue that?

3 MS. MAY: It's -- he pled guilty --

4 THE COURT: She's telling you it is. She can't
5 argue it.

6 MR. SHAFFER: Okay. Thank you, Your Honor.

7 BY MR. SHAFFER:

8 Q I will skip ahead to probation. How many times did
9 you go in front of a judge for a probation violation?

10 A Three times.

11 Q Three times. And when were those?

12 A In -- first time in '06 and then '07 and '08.

13 Q Okay. And what were they for each time? The first
14 one?

15 A The first one is I wasn't attending my class, my
16 counseling with Dr. Jack Lazarus in Columbia. I was living
17 in Chester County and I lost means of transportation and
18 they revoked me for it, but I had gotten transportation
19 after that. I had family help me out and I attended.

20 Q Okay. And where -- what happened in that probation
21 revocation hearing?

22 A They just went back on probation and said start
23 going to the classes.

24 Q And those classes were -- because of the fact that
25 you were classified as a sex offender; is that correct?

Ashley Ray Hardin - Direct Examination by Mr. Shaffer

- 1 A Yes, sir.
- 2 Q Okay. Now, going to the next violation, what
- 3 exactly occurred?
- 4 A I got a computer and the internet service on it and
- 5 the dude was looking with me -- my girlfriend's son going
- 6 through some stuff, checked it out XXX, it's kind of a
- 7 pornography website like facing death and different stuff
- 8 like that, but it had pornography on it. And I think it's
- 9 like exotic stuff, like midgets and stuff like that.
- 10 Q How did you get caught in that?
- 11 A I told him.
- 12 Q Did they --
- 13 A They asked me and I told them. Yeah. I mean, I
- 14 got a computer, I told him scan it and he said, Yeah, I
- 15 do -- I didn't lie to him.
- 16 Q And what happened at that hearing?
- 17 A He said -- at that period, they gave me an extra
- 18 two years extra when I get finished with the first three
- 19 years.
- 20 Q And that's of probation, correct?
- 21 A Yes, sir.
- 22 Q Okay. Now, what were the events leading up to the
- 23 third violation, the one we're here on today?
- 24 A Well, explain yourself.
- 25 Q Huh?

Ashley Ray Hardin - Direct Examination by Mr. Shaffer

1 A Explain yourself for me.

2 Q Tell us about how you violated probation. Did you
3 go -- well, first of all, at some point, it's alleged you
4 failed a drug test, right?

5 A Right. I went and told him.

6 Q Okay. So it's alleged that you -- is that what
7 started the chain of events to get you --

8 A Pretty much.

9 Q What happened after that?

10 A They gave me a citation and me and my girlfriend at
11 the time, we'd been arguing for about six months. I went
12 to see my brother and sister, which live at Tim's and their
13 grandmother's house and me and her got into a fight down
14 the road on the way home and she left me. And I was stuck
15 in Wagner until -- until that following day. And when I --
16 I had my grandfather take me to court.

17 Q Okay. And well -- backtracking just slightly, you
18 mentioned that you failed a drug test. What's alleged that
19 you had in your system?

20 A Marijuana.

21 Q Okay. And when you went to court that first time,
22 what happened at court?

23 A I went and sat down and the lady, the supervisor of
24 probation and parole, she came up to me and she looked all
25 spooked, you know, and I was like, okay. In Chester County

Ashley Ray Hardin - Direct Examination by Mr. Shaffer

1 the courthouse and the probation office are side by side.
2 She said you need to go see your agent. I said okay. She
3 said I'm going to court. But I was okay. So I went next
4 door and I signed in and I went to use the pay phone and I
5 called my girlfriend. She told me everything talking about
6 she went and told them -- it pretty much started, how does
7 it feel to be going to jail. That's pretty much how the
8 conversation started and she said she went and told them
9 that I hadn't been living at home and that I haven't been
10 working, which on the job situation, I worked two jobs. I
11 worked Burger King during the day. I worked at Bojangles
12 at night and I didn't make no hours at Bojangles, so pretty
13 much quit and I still worked at Burger King until I got in
14 trouble and left.

15 Q Okay. And that was up until the first court date?

16 A Yes.

17 Q Okay. And after you talked to your girlfriend and
18 she told you how does it feel to go to jail, what did you
19 do then?

20 A Well, I kind of briefly asked her -- she wouldn't
21 tell me much. What happened, I just told the Court and I
22 hung the phone up and I walked out to smoke a cigarette at
23 the time and I just walked off.

24 Q Okay. Why did you walk off?

25 A Scared of going to jail pretty much.

Ashley Ray Hardin - Direct Examination by Mr. Shaffer

1 Q Okay.

2 A Not knowing what to do.

3 Q Now, when you were caught, what happened -- what
4 was the exchange between you and the officer?

5 A What do you mean?

6 Q The next time you saw a probation agent, what
7 happened?

8 A Well, they came to the house -- when they came to
9 get me?

10 Q Yeah.

11 A They came up and I walked out to them asked them
12 who I was. I said you got the paper, right. And they
13 wasn't nothing else said. They looked at my tattoo and
14 they said, This is him.

15 Q Okay. And then they took you to jail?

16 A Yes, sir.

17 Q Where did they take you to jail at?

18 A Columbia, Richland County.

19 Q Okay. And then where did you go after that?

20 A My probation officer and another agent from Chester
21 County came and got me and booked me in Chester County.

22 Q And when was the first time you met with Mr. Lee?

23 A November '06.

24 Q Oh, excuse me, when was the -- relating to this
25 hearing, when was the first time he came to see you?

Ashley Ray Hardin - Direct Examination by Mr. Shaffer

1 A The day before.

2 Q The day before? And it was at jail?

3 A Yes, sir.

4 Q You two were the only people there?

5 A Yes. We was in a side room.

6 Q Where --

7 A Well, a back room, really. If you know what
8 Chester County looks like.

9 Q What did you tell him -- what did he tell you about
10 the case?

11 A I mean, he told me that you're looking at this:
12 They're looking at the drug test; they're looking at me not
13 being home with little kids, me staying the night with
14 little kids and one more thing he said -- the money, not
15 working. And I told him -- I told Mr. Lee, said I was
16 working. I owe like 20 bucks. I did owe that 20 bucks.
17 But I had the money to pay it. I was going to eat out of
18 it if I was going to jail. And then I told him about what
19 happened. About why I was in Wagner and I went from there
20 and he told me this is kind of -- this is everything
21 they're going to pretty much tell you about when you get in
22 front of him.

23 He didn't really tell me what all would happen. He
24 didn't give me anything like that. He didn't say, look,
25 I'm going to do this, I'm going to do that. He said this

Ashley Ray Hardin - Direct Examination by Mr. Shaffer

1 is what it is, this is what they're trying to get you. And
2 I'm like, so I was like, you know, being my first drug
3 test, I really didn't know what to any about what to -- you
4 know what I'm saying, actually what to tell him back and I
5 did tell him about Shana Baker. Although she said all that
6 stuff about me she was coming to the county to see me so I
7 was using her as my references and other pieces of my
8 family, and her family for that matter; and none of them --
9 nobody that I gave him even mentioned; and honestly it went
10 so fast that I looked over and his head was down and it was
11 over.

12 I really didn't know what to say when I went to
13 court with him. And I went to -- I tried to call him in
14 the hallway, but he was so busy he couldn't holler at me.
15 I mailed him letters and they got mailed back to me.
16 Because -- and it took me almost six and a half days to
17 figure out I could appeal. When I found out, I sent him a
18 letter and by the time I was going the SCDC, to Kirkland to
19 R and E. I was getting the letter back and honestly I was
20 so failed at that time, I just struck the floor. Got on my
21 butt.

22 Q Where -- you said this is while you were about to
23 go Kirkland?

24 A Yes. I was still in the county. I was in county
25 when I got the mail.

Ashley Ray Hardin - Direct Examination by Mr. Shaffer

1 Q How many days afterwards was this?

2 A After what?

3 Q After your probation revocation?

4 A This was about a little over a week. I know that
5 much. I can't -- I don't want to give you exact dates, I
6 don't want to lie about it.

7 Q Okay. Now, regarding the first time you met him,
8 did he ever -- did Mr. Lee ever ask you anything regarding
9 the probation hearing? I mean regarding the prior offense
10 that you pled to?

11 MR. SHAFFER: Your Honor, I'd like to ask one
12 particular question in that I don't want to run afoul on
13 your previous ruling. The one question I was going to ask
14 him is whether or not there was -- he ever asked you if the
15 victim wanted to prosecute.

16 THE COURT: You can ask him that.

17 MR. SHAFFER: Okay.

18 BY MR. SHAFFER:

19 Q Did Mr. Lee ever ask you whether or not the victim
20 wanted to prosecute?

21 A No, sir.

22 Q Okay.

23 MR. SHAFFER: May I follow up with, Did the victim
24 want to prosecute.

25 THE COURT: That's fine. I don't think she did.

Ashley Ray Hardin - Direct Examination by Mr. Shaffer

1 I'm not disagreeing with that. I agree with you. I can
2 see that.

3 MR. SHAFFER: Yes, sir.

4 BY MR. SHAFFER:

5 Q But he never asked you that?

6 A No, sir.

7 Q Had he asked you, you would have told him that she
8 did not?

9 A Yes, sir.

10 Q Okay. Did he ask you anything about the previous
11 offense?

12 A No, sir.

13 Q Okay. Did he ask you if you had any witnesses to
14 bring?

15 A He did, but he just started talking -- we got on
16 other subjects and never came back to it.

17 Q Okay. What witnesses would you have liked to have
18 been there?

19 A Honestly, I would like to have -- my girlfriend at
20 the time, Shana Baker and other -- my grandfather and other
21 pieces of the family that I knew I wouldn't -- wouldn't say
22 trouble. I mean everybody makes mistakes. Some of us
23 learn the hard way about mistakes. That's all.

24 Q Now, in the probation hearing, I think there was an
25 exchange, and I apologize, you don't have the transcript in

Ashley Ray Hardin - Direct Examination by Mr. Shaffer

1 front of you, but you're fairly familiar with your hearing,
2 right?

3 A Yes, sir.

4 MR. SHAFFER: Beg the Court's indulgence.

5 (WHEREUPON there was a pause in the proceedings.)

6 BY MR. SHAFFER:

7 Q Okay. Mr. Hardin, do you remember when the judge
8 asked the probation officer how many different violations
9 you have on him?

10 A Yes, sir.

11 Q Okay. Was that previous violations?

12 A Honestly, I don't even know.

13 Q Okay. How many previous violations did they have
14 at this point?

15 A They said like six.

16 Q How many did you actually have?

17 A All I heard was a bunch of numbers, them say a
18 bunch of numbers. That's all I heard. And honestly, I
19 don't know what half of them are.

20 Q How many times had you gone to court?

21 A Three times.

22 Q And this was the third?

23 A That was the third time, yes, sir.

24 Q Okay.

25 MR. SHAFFER: Court's indulgence, just let me make

Ashley Ray Hardin - Direct Examination by Mr. Shaffer

1 sure I've gone over everything.

2 (WHEREUPON there was a pause in the proceedings.)

3 BY MR. SHAFFER:

4 Q Did he ever ask for any proof of the fact that you
5 were employed?

6 A No.

7 Q Okay. Did he ever mention what you might get if
8 you went to court?

9 A I mean, he made an assumption. The probation
10 officer told Sandy Baker, they said being so low in time,
11 this is the probation officers talking first. It being so
12 low in time, that he's looking at mainly eighteen months
13 drug rehab for the -- eighteen months for initial walking
14 and drug rehab for failing the drug test and be done.

15 And I told Mr. Tyre Lee that. And he told me,
16 yeah, that's -- he didn't deny it. He didn't disagree with
17 it.

18 Q He didn't say that's not a possibility?

19 A No, he did not say it's not a possibility. And
20 honestly, I thought that was what he was going to ask for
21 when he asked. Instead he asked for a ninety day ankle
22 monitoring. And right after that, the judge sank the gavel
23 down; and I'm like -- I'm like, well, that's not what we
24 talked about.

25 Q Did he ever -- did he ask you -- or did he ever

Ashley Ray Hardin - Direct Examination by Mr. Shaffer

1 tell you that Judge Couch in his experience was likely to
2 max you out on a probation revocation?

3 A No.

4 Q Did he ever give you the option to proceed with,
5 you know, fighting the charges, making the State prove the
6 charges?

7 A No.

8 Q Did he ever -- did he tell you that the probation
9 officer had to prove all of those charges?

10 A No.

11 Q And why did he tell you that you should admit to
12 all of the charges?

13 A He said I should admit to them because he said that
14 actually -- actually following everything that I had
15 actually done that, but not actually, you know, it wasn't
16 like I actually committed any crimes on charges or using or
17 violating to admit something, I actually violated because I
18 didn't have no choice in the matter.

19 Q Okay. So that's why he said you should admit to
20 them?

21 A Yeah.

22 Q Did he -- what did he say was the -- I mean did he
23 ever tell you that you didn't have to admit to them?

24 A I mean, he didn't -- he pretty much said there
25 wasn't no use to not admit to them.

Ashley Ray Hardin - Direct Examination by Mr. Shaffer

1 Q Okay. So in that letter, just for clarification,
2 just to make sure I cover my basis, in this letter, you
3 requested -- you requested a probation revocation
4 hearing -- I mean appeal from it; is that right?

5 A When I sent him -- I wanted anything he could do to
6 get me back up in front of the judge.

7 Q Okay. And that letter was returned to you.

8 A Yeah, it was returned to me. I really wasn't sure
9 of anything -- how to do anything. Like I said I was an
10 inmate at the County. They said why don't you go back. I
11 said I didn't know I could and that's like six and a half
12 days in and I sent back and that was about -- over four
13 days later I'm getting the letter back.

14 Q Okay. I believe you have -- if he had told you
15 that Judge Couch is likely to max you out no matter what
16 you did, would he have -- would you have gone forward and
17 admitted to all the charges?

18 A No matter what I did?

19 Q Yeah. Would you -- I think that 's an unfair
20 question to ask given the answers to your previous
21 questions that you didn't know you could do that. So I
22 withdraw the question.

23 MR. SHAFFER: No further questions, Your Honor.
24 Well, may I ask one more?

25 THE COURT: Sure.

Ashley Ray Hardin - Cross-Examination by Ms. May

1 BY MR. SHAFFER:

2 Q Is there anything else you would like to add?

3 A Well, right off, man, I just know when it went to
4 court, I sat in there and they was telling me, my family
5 and stuff, you know, just do this and do this. And so I
6 went off what my family actually told me. They said just
7 don't lie and you won't -- that you're looking at about
8 eighteen months and you'll be through. Not knowing that
9 when I went up front of there and I did tell the truth,
10 although it wasn't criminal and it wasn't -- it wasn't like
11 I was offending or anything like that, they still ran me
12 and I know it's kind of the wrong word to use. I got the
13 wrong end of the deal and I don't know technical words to
14 use about that. I really don't. So...

15 MR. SHAFFER: Thank you, Mr. Hardin. Please answer
16 any questions that Ms. May might have.

17 MS. MAY: May it please the Court, Your Honor?

18 THE COURT: Yes, ma'am.

19 CROSS-EXAMINATION

20 BY MS. MAY:

21 Q Mr. Hardin, you stated that Mr. Lee discussed the
22 allegations that were lodged against you?

23 A The ones that he knew about.

24 Q And did y'all discuss the facts of what happened?

25 A Yes.

Ashley Ray Hardin - Cross-Examination by Ms. May

1 Q You told him what happened?

2 A Yes.

3 Q Do you recall the probation agent discussing how
4 you were arrested at your hearing?

5 A No.

6 Q Do you have the transcript up there?

7 A No, ma'am.

8 MS. MAY: Your Honor, may I approach?

9 THE COURT: Yes, ma'am.

10 BY MS. MAY:

11 Q I'll let you borrow mine. If you could look at
12 lines 10 through 12.

13 A All right.

14 Q She stated that when the probation officers
15 approached you that you denied your identity; is that
16 correct?

17 A I didn't really deny my identity. I didn't really
18 tell them who I was. I said, You got the paperwork, you
19 tell me.

20 Q Okay. And you admit you violated the conditions of
21 your probation; is that right?

22 A To an extent. Not ideally, but, yes, I do.

23 Q But you did violate the conditions of your
24 probation?

25 A Not criminally, but, yes, ma'am.

Ashley Ray Hardin - Cross-Examination by Ms. May

1 Q I'm asking if you violated them?

2 A Yeah, I violated.

3 Q And you told -- you stated earlier that Mr. Lee
4 told you to admit that you violated them because you
5 violated them?

6 A Right.

7 Q Okay. Did he tell you to admit to something that
8 wasn't true?

9 A No.

10 Q Okay. And with regard to the letter that you
11 mailed to Mr. Lee, what did it specifically request?

12 A It requested, is there any way that you can -- put
13 it in exact words -- I said is there any way that you can
14 help me get back on the charges since they did give me the
15 whole sentence and nothing lower.

16 Q Okay. And are there attorneys numbers posted at
17 the jail for y'all to call?

18 A Yeah, they are.

19 Q Okay.

20 A But --

21 Q Was Mr. Lee's posted?

22 A Honestly, I can't tell you yes or no.

23 Q Okay.

24 MS. MAY: I have no further questions.

25 THE COURT: Anything else?

1 MR. SHAFFER: No, Your Honor.

2 THE COURT: Thank you. You may step down.

3 MS. MAY: Nothing from the State.

4 THE COURT: Mr. Shaffer are you done?

5 MR. SHAFFER: Yes, Your Honor. I believe I am.

6 There's a couple of things that I'd like to supplement from
7 the previous -- I guess it was the statement that I gave
8 concerning what we were addressing.

9 I think the statute that I was looking at was
10 24-21-460 and essentially it says that the -- in the event
11 of a prosecution -- I can read it directly:

12 THE COURT: 21-24 what?

13 MR. SHAFFER: 24-21-460, I apologize.

14 And basically in the event of an arrest for a
15 violation, the defendant shall be brought or it shall cause
16 the defendant to be brought before and it may revoke --
17 before a court and it may revoke the probation or
18 sentence -- or the suspension of sentence and shall
19 proceed -- this is the important part, The Court shall
20 proceed to deal with the cases as if there had been no
21 probation or suspension of sentence except that they can't
22 go over the maximum that was previously sentenced.

23 The key there is that the Court is supposed to
24 treat it as the original sentence, the -- the original
25 sentencing factors for punishment should be the same, which

1 are, obviously, the elements of the underlying offense are
2 necessary to show whether or not he's justified to have a
3 full ten year sentence. You know, we don't know what would
4 have happened had Judge Couch been aware of that and been
5 able to say, well, you know, honestly what he did is no
6 longer criminal and is not deserving of ten years in
7 prison; therefore, I'm going to revoke in part and
8 terminate or revoke in part and then continue him on
9 probation. We don't know that because it was never brought
10 up.

11 The underlying offense -- if he's being punished
12 for the underlying offense and the punishment was more or
13 less dealt out at that probation sentence, it seems like
14 the Court should have been aware of at least what the
15 underlying offense was versus just CSC second with a minor.
16 That could encompass a broad range of offenses and honestly
17 weren't a broad range of punishments. That goes to the
18 element for the supplemental or the amendment that I gave
19 today. I also would like a more general -- for later
20 purposes to orally amend under Rule 15, for a more general
21 statement that failure to bring up the underlying facts to
22 the probation court is ineffective assistance of counsel as
23 another allegation. Concerning --

24 MS. MAY: Are you asking to do that later or to do
25 that now.

1 **MR. SHAFFER:** Go ahead and amend orally if that's
2 possible. Do you object to amending it orally?

3 **MS. MAY:** I mean you're supposed --

4 **THE COURT:** Are you saying he should have
5 brought -- Mr. Lee should have made comments to Judge Couch
6 that the facts of the prior offense were thus, thus, and
7 thus; and he's now on probation and he's now committed a
8 violation providing the mitigating factors -- something to
9 that effect?

10 **MR. SHAFFER:** Yes, Your Honor. As a second cause
11 or addition to number four. I know they're closely
12 related --

13 **THE COURT:** I'll let you amend your petition to
14 include that.

15 **MR. SHAFFER:** Thank you, Your Honor.

16 The argument concerning his appeal clearly, well,
17 he testified -- if you found that he's credible in
18 testifying, he sent a letter trying to appeal and that that
19 letter was returned to him, then I believe that that should
20 be granted. I think he is credible, which, the Court's --
21 my opinion doesn't really matter to this Court, but there's
22 nothing really -- there's no evidence to contradict that,
23 in which case he should be awarded a belated appeal for the
24 probation revocation and I'd like to have that -- amend
25 that under Rule 15 as well, orally amend that, to include

1 an allegation that --

2 THE COURT: Don't you want to say if he'd been
3 granted the right to appeal, what were the grounds of his
4 appeal would be or is your real motion he tried to contact
5 Mr. Lee to make a motion to reconsider or reduce the
6 sentence, which is it?

7 MR. SHAFFER: Oh, I apologize, it should be
8 ineffective assistance of counsel for failure to contact
9 him afterwards in order to make any contact. Essentially
10 he was left with nothing. I'll go with that argument
11 versus the other one.

12 THE COURT: Okay. So he wants to reconsider the
13 sentence imposed on the revocation.

14 MR. SHAFFER: Yes, Your Honor or an appeal, either
15 one.

16 THE COURT: Okay.

17 MR. SHAFFER: To -- he failed to make any contact
18 so he wouldn't know if he needed to do that or not.

19 And, Your Honor, I would be happy to submit a brief
20 on any or all of the other allegations that I have. I
21 don't think I should go through each one now because there
22 are several -- there's various pro se documents. I'm not
23 sure which ones were filed prior to counsel and which ones
24 were not. And of course -- filed prior to him having
25 counsel, I would request that they be included -- make sure

1 they're included in the Court file.

2 **THE COURT:** All right. Let me make sure I
3 understand. On a probation violation, certainly the
4 probation judge on the probation -- the judge on the
5 probation hearing can assume when the defendant's there
6 that he knows the terms of his original sentence. Can he
7 not presume that or has it got to be re-explained to him?
8 I don't --

9 **MR. SHAFFER:** I believe that it could, but I
10 believe to counter that is 24-21-460 still puts some
11 discretion in the probation court in order to deal out a
12 sentence that's appropriate for the underlying offense.

13 **THE COURT:** I think that's the whole crux of your
14 whole argument is indiscretion of the Court and that's
15 where I'm finding you're not going to make much ground up
16 because the judge has to exercise discretion -- your
17 argument is that your client didn't like the fact that
18 Judge Couch exercised discretion and I don't think that's
19 ineffective assistance of counsel. That's the judge
20 exercising discretion to his detriment.

21 **MR. SHAFFER:** Your Honor, I --

22 **THE COURT:** The client's detriment, not Judge
23 Couch's.

24 **MR. SHAFFER:** I understand. But in PCR's, there's
25 plenty of situations where it's a discretionary ruling.

1 And there's plenty of times where the counsel doesn't raise
2 it or doesn't preserve an issue that is discretionary
3 ruling of the Court nevertheless, but it's still
4 ineffective assistance of counsel. If Judge Couch didn't
5 even have the information to begin with of the mitigation
6 concerning -- and by the way mitigation was his entire game
7 plan -- Mr. Lee's entire plan of action in this case is to
8 mitigate it. If he didn't have the underlying mitigation
9 evidence, which I think is rather strong in this case,
10 that, you know, concerning the facts regarding the
11 violation, if he didn't have that, how could he exercise
12 his discretion? And that's why I'm saying it's ineffective
13 assistance of counsel. That's why we're requesting a new
14 probation hearing because of that.

15 THE COURT: I understand your argument.

16 MR. SHAFFER: Thank you. Your Honor.

17 THE COURT: You got anything else? You want to
18 file an initial brief or not.

19 MR. SHAFFER: Your Honor, if you'd like I'd be
20 happy to file it for you.

21 THE COURT: I don't --

22 MR. SHAFFER: If this Court will consider it, I
23 will file it, Your Honor, or if you're ready to make a
24 ruling, I understand that as well.

25 THE COURT: Well, it seems clear to me Mr. Lee did

1 his job. The violation is there and the judge had wide
2 latitude and wide discretion. Judge Couch exercised that.
3 I don't believe Mr. Lee did anything that would approach
4 being unreasonable as a person representing a probationer.
5 I don't see it. Would a different judge give a different
6 sentence? Perhaps. But that's not the issue.

7 I'd decline to grant your petition for post
8 conviction relief on the probation violation. I don't see
9 it.

10 MR. SHAFFER: Your Honor, if we could just -- for
11 purposes of -- could I just -- I just want to ensure that
12 all of the arguments are addressed.

13 THE COURT: You can protect the record. I have no
14 problem with that.

15 MR. SHAFFER: Thank you. Is Ms. May going to
16 submit a written order?

17 THE COURT: She shall.

18 MR. SHAFFER: Okay. Thank you, Your Honor.

19 THE COURT: And then you may make -- she'll send a
20 copy to you before it's presented to me.

21 MR. SHAFFER: Thank you, Your Honor.

22 THE COURT: All right.

23 MS. MAY: Your Honor, just so I'm clear, you did
24 grant the State's motion to dismiss the claims regarding
25 the guilty plea and ineffective assistance of counsel at

1 the guilty plea?

2 THE COURT: Yes.

3 MS. MAY: Thank you.

4 THE COURT: All right.

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6 * * * * * END OF TRANSCRIPT * * * * *

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1 State of South Carolina)
2 County of Aiken) **Certificate of Reporter**

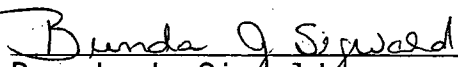
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6 I, THE UNDERSIGNED, Brenda J. Sigwald,
7 Official Court Reporter for the Fifth Judicial Circuit of
8 the State of South Carolina, do hereby certify that I
9 reported the proceedings in the captioned case in the Court
10 of Common Pleas in and for the State of South Carolina on
11 the 31st day of January, 2012.

12 I FURTHER CERTIFY that the foregoing pages,
13 numbered 1 through 74 constitute a true, accurate and
14 complete transcript of said hearing.

15 I FURTHER CERTIFY that I am neither kin, counsel,
16 nor of interest to any party hereto.

17 IN WITNESS WHEREOF, I have hereunto set my hand and
18 seal at Aiken County, this 7th day of January, 2013.

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Brenda J. Sigwald,
Court Reporter and Notary Public
For the State of South Carolina
My commission expires
January 4, 2020.

ORIGINAL

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STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON)

Case No.: 2008-CP-32-4799

Ashley Ray Hardin, #330300,)

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

LMC
FILED

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed November 17, 2008. Respondent made its Amended Return and Partial Motion to Dismiss on September 13, 2011. An evidentiary hearing into the matter was convened on January 31, 2012, at the Lexington County Courthouse. The Applicant was present at the hearing and was represented by Tristan M. Shaffer, Esquire. The Respondent was represented by Kaelon E. May of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. The State offered the testimony of Tyre Lee, Esquire (Mr. Lee) Applicant's probation revocation counsel. This Court also had before it the records of the Lexington County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections.

I. PROCEDURAL HISTORY

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 indicted at the November 2005 term of the Lexington County Grand Jury for Receiving Stolen Goods > \$1000 but < \$5000 (2005-GS-32-4210). The Applicant also appeared before the court

on charges of Criminal Sexual Conduct with a Minor—Second Degree (2005-GS-32-4209), for which he waived presentment. The Applicant was represented by Theodore Williams, Esquire. On November 16, 2005, Applicant pled guilty as indicted. He was concurrently sentenced to confinement for a period of ten (10) years for Criminal Sexual Conduct – 2nd Degree, suspended to time served plus three years probation, and five (5) years for Receiving Stolen Goods, suspended during probation. The Applicant did not appeal his convictions or sentences.

The Applicant's probation was subsequently revoked on August 28, 2008. He was represented by Tyre Lee, Esquire. The Honorable Roger L. Couch revoked the Applicant's probation and sentenced the Applicant to confinement for a period of five (5) years for Receiving Stolen Goods, and ten (10) years for Criminal Sexual Conduct with a Minor—Second Degree. Both sentences were ordered to run concurrent with one another.

In his current application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:

(a) "Trial counsel failed to adequately investigate the case prior to advising the Applicant to plead guilty and not take it to trial cause there's too much evidence when theres none;"

(b) "Trial counsel failed to adequately investigate and advise the Applicant concerning possible evidence and witnesses who might be presented in his defense had he elected to exercise his right to trial."

(c) "I did not receive Rule V from prosecutor or trial counsel on these two charges;"

2. Involuntary Guilty Plea

3. Ineffective Assistance of Probation Revocation Counsel:

(a) Failure to interview witness Sandra Baker, who alleged to the probation department that the Applicant was using drugs, had relocated to another address without informing his agent, and was unemployed;

(b) Failure to investigate the Applicant's prior probation record,

and report to the court the Applicant's prior lack of probation infractions;

(c) Failure to investigate the Applicant's work history, speak to Applicant's employer, or speak with Applicant's family in order to formulate mitigating evidence on the Applicant's behalf;

(d) Failure to adequately interview the Applicant prior to the Applicant's revocation hearing, in that counsel visited the Applicant once at the detention center, which interview lasted approximately ten (10) minutes;

(e) Failure to investigate and submit to the trial court alternative sentencing options, rather than the revocation of Applicant's probation, which consisted of mere technical violations;

4. 5th and 14th Amendment Due Process Violations:

(a) In order to secure the Applicant's affirmative plea to the revocation allegations, counsel promised the Applicant that the trial court would revoke no more than eighteen (18) months of Applicant's revocation;

(b) Counsel assured Applicant that the probation department's allegations would be discounted upon Sandra Baker's recantation of her allegations regarding the Applicant's behaviour. Counsel did not request Sandra Baker to address the court, nor did counsel interview Sandra Baker prior to Applicant's revocation hearing;

(c) Counsel failed to require the trial court to specifically state the basis of the revocation of the Applicant's probation;

(d) Counsel failed to inform the Applicant that he could appeal the trial court's full revocation of Applicant's ten (10) year sentence;

(e) Counsel failed to file a notice of intent to appeal on behalf of the Applicant, in spite of Applicant's repeated requests that he do so.

II. SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT THE

PCR EVIDENTIARY HEARING

Applicant's Testimony

At the PCR hearing Applicant testified that he had probation violations in 2006, 2007, and in 2008. Applicant testified that the events leading to his third probation violation hearing

included failing a drug test for marijuana and staying overnight in an unauthorized residence. Applicant testified that he went to court at one point, signed in, used a pay phone, and that his girlfriend informed Applicant he was going to jail. Applicant testified that he was working but that he had to quit because Applicant was not making enough money, and that Applicant was working at the time of his first court date. Applicant testified that he left the courthouse at his first appearance because he was scared of going to jail and that the next time he saw his probation officer Applicant did not give him a different name.

Applicant testified that he spoke with his attorney, that he and his attorney discussed the failed drug test and Applicant being at a residence with children under eighteen years of age. Applicant testified that counsel discussed the probation violation allegations with Applicant. Applicant testified that he gave his attorney Sandra Baker's name as a potential witness and that counsel never mentioned any names that Applicant provided to him at the probation revocation hearing. Applicant testified that counsel did not ask Applicant if the victim from his underlying offense wanted to prosecute and that the victim never wanted to prosecute. Applicant testified that he and counsel did not discuss any previous offenses, that counsel asked Applicant for witnesses that Applicant wanted, but that they got off track and that Applicant would have wanted his girlfriend and grandfather presented as witnesses.

Applicant testified that he had been to court three times prior to his probation violations hearing and that counsel did not ask Applicant for proof of employment. Applicant testified that his probation officer informed Applicant that Applicant was looking at eighteen months for violating his probation and that counsel never told Applicant that eighteen months was not a possibility. Applicant testified that counsel did not inform Applicant that Judge Couch would max out Applicant's sentence and that counsel told Applicant to admit to the violations.

Applicant testified that at his probation violation hearing his family asked Applicant to tell the truth, that Applicant did what his family asked, and that Applicant did not know that telling the truth would get him fully revoked. Applicant testified that he violated the conditions of his probation. Applicant testified that about one week after the probation violation hearing he tried to write counsel asking what Applicant could do to appeal his sentence.

Mr. Lee's Testimony

At the PCR hearing, Mr Lee testified that he worked as a public defender for over twenty-five years and that at the time he represented Applicant he had a private practice and was the chief public defender for Fairfield County. Counsel testified that appointed to represent Applicant as a private attorney in Chester County. Counsel testified that he has handled about fifty to seventy-five probation revocation cases per year. Counsel testified that in a probation revocation case typically involved contesting the allegations made against the probationer and that if the probationer did not do A or B, counsel's job is to show why the probationer was unable to do A or B. Counsel testified that probationer is entitled to a hearing and entitled to present evidence for a violation. Counsel testified that with regard to mitigation that an example would be that if the probationer was unable to pay the required amount but was actively seeking employment.

Counsel testified that he previously represented Applicant in 2006 for a probation violation and that Applicant had another probation violation in 2007. Counsel testified that when he first speaks with a client who is being held for a probation violation, counsel has the probation arrest warrant and the later receives the 1106 form, which essentially reflects the warrant information. Counsel testified that the 1106 form reflected that Applicant was violated for the following: failure to follow advice and instructions of agent; failure to report to agent as

instructed on June 16, 2008; failure to work diligently at lawful employment; failure to notify agent of unemployment by not disclosing to agent Applicant was fired; failure to pay supervision fees; failure to stay at approved residence every night and not staying overnight anywhere else without prior approval of agent.

Counsel testified that with regard to any mens rea requirement for a violation that the probationer knows what they are supposed to do to comply with probation requirements and that the probationer is supposed to comply with the requirements. Counsel testified that Applicant had an excuse for all of his violations. Counsel testified that Judge Couch did not specifically state during the hearing the condition Applicant violated and that the form 9 did not reflect the specific conditions of probation violated by Applicant.

Counsel testified that his normal practice is to obtain basic information from his client, describe what a probation hearing entails and how it differs from an actual trial, review the warrant/allegations, discuss mitigation, and ask whether the client has any witnesses or whether counsel needs to obtain any documents. Counsel testified that Applicant's case was somewhat different because a citation had been issued in May noticing Applicant to appear for court in June, that Applicant appeared at court in June and was appointed counsel, that counsel tried to speak with Applicant in June but that Applicant did not stay long enough for his June court appearance. Counsel testified that the officers were unable to locate Applicant, that a few days later a bench warrant was issued for Applicant, that counsel learned Applicant had been arrested and counsel was re-appointed to represent Applicant.

Counsel testified that he initially met with Applicant the day before Applicant's hearing at the jail for at least thirty minutes but maybe more, that counsel again met with Applicant right before the probation hearing for about five minutes, and that counsel reviewed each allegation

with Applicant. Counsel testified that he and Applicant discussed what they could present for mitigation. Counsel testified that he informed Applicant the time he was facing minus any time served and that counsel did not promise Applicant an exact sentence. Counsel testified that Applicant was aware he could be fully revoked, that had Applicant appeared when he was supposed to Applicant would have gone in front of Judge Goode, who does not typically revoke in full, but that now Applicant was going to have to go in front of Judge Couch, who usually does total revocations. Counsel testified that he likely discussed the 1106 form with Applicant on the day of the hearing but that the 1006 form covered everything that counsel discussed with Applicant the day before. Counsel testified that he asks his clients for any witnesses they want regardless of whether the client offers any names but that counsel relies on the client to inform of any witnesses.

Counsel testified that he does not ask for discovery from a client's original case/conviction because it is not a matter for probation, that counsel does not address the facts of the underlying case unless counsel made the argument to the probation judge that counsel's client originally got a raw deal. Counsel testified that he did not call any witnesses for Applicant because Applicant did not provide the names of witnesses to counsel and that counsel based this on the fact that there was a blank on his sheet where he would list witnesses provided by a client. Counsel testified that he did not have any contact with Applicant after the probation revocation hearing.

III. APPLICABLE LAW

A revocation hearing addresses two issues: whether the probationer violated a condition of probation, and whether the violation warrants revocation. Black v. Romano, 471 U.S. 606, 105 S.Ct. 2254, 85 L.Ed. 2d 636 (1985); Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33



L.Ed. 2d 484 (1972). If the evidence tends to show a violation of the conditions, then revocation is an appropriate means of enforcing the probationary sentence. State v. Clough, 220 S.C. 390, 68 S.E.2d 329 (1951); State v. McCray, 222 S.C. 391, 73 S.E.2d 1 (1952).

Due the nature of the revocation hearing, the Sixth and Fourteenth Amendments does not *per se* right to counsel. Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). Nevertheless, in South Carolina, Rule 602(a), SCACR requires the appointment of counsel for indigent defendants in probation revocation proceedings. Where statute or rule of practice creates such a right, the courts have used the Strickland test to evaluate claims of ineffective assistance of probation revocation counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); See, e.g., United States v. Wren, 682 F.Supp. 1237 (S.D.Ga. 1988). However, since a probation hearing is not a formal adversarial proceeding, "the Court must review counsel's performance in light of the particular type of proceeding involved." Id., 682 F.Supp. at 1242.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984). The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Id. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have

prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, the exhibits introduced into evidence at the hearing, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

At the outset of the PCR hearing Respondent made a motion to dismiss Applicant's claims 1(a), 1(b), 1(c), and 2 for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. This Court granted Respondent's motion to dismiss.

Ineffective Assistance of Counsel

Failure to Interview Witnesses

Applicant asserts that counsel was ineffective for failing to interview Sandra Baker, who alleged to the probation department that the Applicant was using drugs, had relocated to another address without informing his agent, and was unemployed; for failing to interview Applicant's employer; and for failing to interview Applicant's family. This Court finds that Applicant failed to meet his burden of proof. At the PCR hearing, the Applicant did not present any witnesses on his behalf. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown

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where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Counsel testified that he did not call any witnesses for Applicant because Applicant did not provide the names of witnesses to counsel and that counsel based this on the fact that there was a blank on his sheet where he would list witnesses provided by a client. This Court finds that Applicant failed to show that counsel's performance was deficient and any resulting prejudice; therefore, this allegation is denied and dismissed.

Failure to Investigate

Applicant asserts that counsel was ineffective for failing to investigate the Applicant's prior probation record and report to the court the Applicant's prior lack of probation infractions; for failing to investigate Applicant's work history; and for failing to investigate and submit to the court alternative sentencing options, rather than the revocation of Application's probation which consisted of mere technical violations. Counsel testified that he received the 1106 form which detailed Applicant's prior probation record and reviewed the form with Applicant prior to Applicant's hearing. Applicant testified that he had been previously violated in 2006 and in 2007. Applicant did not present any evidence of Applicant's lack of prior probation infractions. Counsel testified to six previous probation infractions based in the information contained in the 1106 form. With regard to Applicant's work history the probation hearing transcript reflects that counsel informed the trial court of Applicant's employment and reasons for Applicant's recent unemployment. (Tr. p.5, lines 12-25). Additionally, the record reflects that counsel requested

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leniency from the trial court, the option for Applicant to be placed electronic monitoring, and for Applicant to be continued on probation. (Tr. p.6, lines 10-16). This Court does not agree with Applicant's claim that his violations were 'mere technical violations' as the Applicant admitted to failing a drug test and staying at a residence without informing his agent, among others.

Applicant also asserts that counsel was ineffective for failing to adequately interview Applicant prior to the revocation hearing. Counsel testified that he met with Applicant on the day before the hearing at least thirty minutes and on the day of the hearing for five minutes. Counsel testified that he and Applicant discussed each violation, what to present in mitigation, and the possible sentencing consequences. Counsel further testified that he and Applicant reviewed the 1106 form.

To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must show specific prejudice resulting from counsel's alleged lack of time to prepare. United States v. Cronin, 466 U.S. 648 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990). Here, the Applicant could not point to any specific matters counsel failed to discover which would have resulted in a different outcome. This Court finds the Applicant offered no evidence at the PCR hearing that counsel could have found that would have been likely to have any outcome more favorable to the Applicant. The Applicant did not produce any witnesses or offer any other evidence from which this Court could conclude that the outcome of the case would likely have

been different, had that evidence been developed. Therefore, this Court finds that this allegation is denied and dismissed.

Failure to Adequately Represent During Hearing

Applicant asserts that counsel was ineffective during the probation revocation hearing for failing to require the trial court to specifically state the basis of the revocation; for admitting to all the alleged violations prior to any finding of a violation by the court; for failing to object to the court's questioning of Applicant and probation agent based on separation of powers; for failing to advise the court of the facts of the underlying offense and the change in the law; and for promising Applicant the trial court would revoke no more than eighteen months so as to secure Applicant's affirmative plea to the revocation allegations.

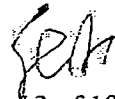
At the probation revocation hearing the judge asked Applicant if he had been served with a copy of the warrant or citation from the probation office informing Applicant of the allegations, and Applicant indicated that had been served with a copy and that he was aware of the allegations against him. (Tr. p.4, lines 12-17). The probation agent informed the court of the Applicant's violations. (Tr. p.7-8). At the probation revocation Applicant admitted that he violated the conditions of his probation. (Tr. p.9-10). The authority of the court revoking probation should always be predicated upon an evidentiary showing of fact tending to establish a violations of those conditions. State v. Lee, 350 D.C. 125, 564 S.E.2d 372 (Ct. App. 2002). Determination to revoke probation is within the trial court's discretion. State v. Hill, 359 S.C. 301, 597 S.E.2d 822 (Ct. App. 2004), reh'g denied, (June 28, 2004). This Court finds and the record reflects that an evidentiary showing of fact was presented to the trial establishing Applicant violated conditions of his probations. Moreover, Applicant admitted to the violations and maintained those admissions at the PCR hearing. Applicant was fully aware of the violations



alleged at his probation revocation hearing. This Court finds that Applicant failed to show that counsel's performance was deficient in failing to require the trial court to specifically state the basis of the revocation as the basis of the revocation was provided the probation agent's testimony and Applicant's own admissions. This Court further finds Applicant cannot show any resulting prejudice; therefore this allegation is denied and dismissed.

This Court finds Applicant's claim that counsel was ineffective for admitting to all the alleged violations prior to any finding of a violation by the court is without merit. At the PCR hearing counsel testified that while Applicant had an excuse for the violations, Applicant did not deny that he committed the violations. The record reflects counsel presented the trial court with mitigating factors as to Applicant's violations. (Tr. p.5-6). The record further reflects that Applicant was given the opportunity to address the trial court, explained his reasons for staying overnight where he was not allowed to do so, and admitted to the violations. The Applicant maintained his admissions to the violations at the PCR hearing. This Court finds that counsel's performance was in no way deficient as Applicant admitted to the violations at probation revocation and again at the PCR hearing. The Applicant did not present any evidence or testimony that he did not commit the violations. This Court finds that Applicant failed to show any resulting prejudice; therefore, this allegation is denied and dismissed.

Applicant asserts that counsel was ineffective for failing to object to the court's questioning of Applicant and probation agent based on separation of powers. Applicant argues that the trial court's actions cast it in a prosecutorial role rather than that of a neutral and detached hearing body mandated by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. This Court finds Applicant's argument unavailing. At any time during the period of probation or suspension of sentence of the court, or the court within the



venue of which the violation occurs, or the probation agent may issue or cause the issuing of a warrant and the defendant to be arrested for violating any of the conditions of probation or suspension of sentence. S.C. Code Ann. §24-21-450. This Court finds and the record reflects that Applicant was served with a copy of his warrant and/or citation. The court has discretionary authority in dealing with guilty persons who are in a probationary status. State v. Lee, 350 D.C. 125, 564 S.E.2d 372 (Ct. App. 2002). Furthermore, while underlying violations may be criminal offenses, the probation-revocation proceeding is not a criminal trial of those charges. State v. Hill, 368 S.C. 649, 630 S.E.2d 274 (2006). Minimal due process requirements afforded to a probationer specifically include the right to have his case heard before and determined by a neutral and detached hearing body. See Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756 (1973). This Court finds that Applicant was afforded minimal due process as required. Applicant has failed to present any evidence showing that the trial court acted as a non-neutral and non-detached hearing body. This Court finds that Applicant has failed to show that counsel's performance was deficient and any resulting prejudice; therefore, this allegation is denied and dismissed.

Applicant asserts that counsel was ineffective for failing to advise the trial court of the facts of the Applicant's underlying offense and the change in the law as a part of Applicant's mitigation. Applicant pled guilty to Criminal Sexual Conduct with a Minor 2nd Degree under the 2005 Statute, which provided: "A person is guilty of criminal sexual conduct in the second degree if the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim." S.C. Code Ann. §16-3-655(C) (2005). Applicant argues that under the 2008 revision the statute was amended such

that a seventeen year old having consensual sex with a fourteen year old would not be a criminal offense and that counsel failed to advise the trial court of this change in the law. The record reflects that the probation officer informed the trial judge that Applicant had six previous violations. Applicant admitted that he violated his probation and the trial judge responded, "Well, yes, sir, and it's been a long series. This is not the first time." (Tr. p.10, lines19-21). At the PCR hearing counsel testified that the facts of the underlying criminal case to which Applicant pled guilty are not a matter for a probation revocation hearing. This Court finds that counsel presented reasonable mitigation under professional norms on the Applicant's behalf. See Cherry, 300 S.C. at 117, 386 S.E.2d at 625. Determination to revoke probation is within the trial court's discretion. State v. Hill, 359 S.C. 301, 597 S.E.2d 822 (Ct. App. 2004), and the judge exercised that authority. This Court finds that Applicant has failed to show that had counsel advised the trial court of the change in the law, that such information would have been likely to have any outcome more favorable to the Applicant. This Court would note that informing the trial court of a change in law may be helpful in front of some judges; however failure to do so does not rise to the level of ineffective assistance of counsel. This Court finds that Applicant failed to show counsel's performance was deficient and any resulting prejudice; therefore this allegation is denied and dismissed.

This Court finds that Applicant's allegation that counsel was ineffective for promising Applicant that the trial court would revoke no more than eighteen months so as to secure Applicant's affirmative plea to the revocation allegations is without merit. This Court finds that Applicant's testimony is not credible. This Court does find counsel to be credible. At the PCR hearing counsel testified that he never promised Applicant a specific sentence. Counsel testified that he did inform Applicant about the judge Applicant would go before and that it was a

possibility Applicant could be fully revoked. Applicant alleges that counsel told him to admit to the violations; however Applicant again admitted at the PCR hearing that he committed the violations. This Court finds that counsel did not promise Applicant any sentence and that Applicant cannot meet his burden of proof in showing that counsel was ineffective; therefore, this allegation is denied and dismissed.

Failure to Inform of Right to Appeal

Applicant asserts that counsel was ineffective for failing to inform Applicant that he could appeal the trial court's full revocation of Applicant's ten (10) year sentence and that counsel was ineffective for failing to file a notice of appeal on Applicant's behalf, in spite of Applicant's repeated request that counsel do so. Applicant testified that he wrote counsel a letter after the probation revocation hearing asking for counsel to file an appeal. Counsel testified that Applicant never requested counsel to file an appeal nor did counsel receive any correspondence from Applicant after the probation revocation hearing. When the question is whether counsel was ineffective in failing to file a direct appeal from the conviction and sentence, the United States Supreme Court has held that counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000). This Court finds that there is nothing in the record that Applicant reasonably demonstrated to counsel that he was interested in appealing and under these circumstances counsel's failure to file an appeal was not unreasonable. This Court finds that the Applicant did not present any evidence or testimony that would entitle Applicant to a belated appeal. Therefore, this Court finds that this allegation is denied and dismissed.

All Other Claims

Except as discussed above, this Court finds that the Applicant affirmatively waived the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

V. CONCLUSION

Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post conviction relief. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.



IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 9th day of May, 2012.

E. C. Griffith, Jr.
Eugene C. Griffith, Jr.
Presiding Judge

Neuberg, South Carolina

LMC
FILED

2012 MAY 11 AM 11:12

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JUN 26 2012

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2008-CP-32-4799

Ashley Ray Hardin, #330300,

Petitioner,

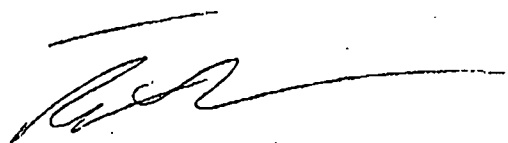
v.

The State of South Carolina,

Respondent.

Certificate of Service

The undersigned attorney hereby certifies that on June 12, 2012 the notice of appeal was served in the above referenced case upon the Attorney for the State, Kaelon E. May, via mail, at P.O. Box 11549 Columbia, South Carolina 29201



Tristan Shaffer
Post Office Box 176
Chapin, South Carolina 29036
(803) 575-0384
Attorney for Petitioner

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

RECEIVED

Eugene C. Griffith, Jr., Circuit Court Judge

JUN 12 2012

Case No. 2008-CP-32-4799

S.C. Supreme Court

Ashley Ray Hardin, #330300,

Petitioner,

v.

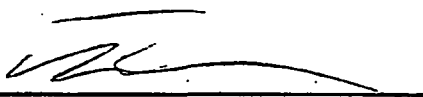
The State of South Carolina,

Respondent.

NOTICE OF APPEAL

Ashley Ray Hardin appeals the order of the Honorable Eugene C. Griffith filed May 11, 2012. Appellant received written notice of entry of this order on May 14, 2012.

June 12, 2012


Tristan Shaffer
Post Office Box 176
Chapin, South Carolina 29036
(803) 575-0384
Attorney for Petitioner

Other Counsel of Record:
Kaelon E. May
Post Office Box 11549
Columbia, South Carolina 29201
Attorney for Respondent

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2012-212395

ASHLEY RAY HARDIN,

PETITIONER,

V.

THE STATE,

RESPONDENT

 PETITION FOR REINSTATEMENT
OF APPEAL

Petitioner through his Counsel, Tristan M. Shaffer, respectfully requests that this Court reinstate his appeal pursuant to Rule 260, SCACR. In support of this motion, counsel would respectfully show the following:

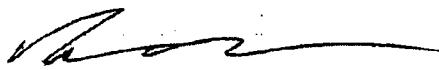
1. Counsel filed a notice of appeal in Petitioners case on June 12, 2012.
2. When the notice of appeal was filed, Counsel had inadvertently omitted sending the Court a copy of the Order of Dismissal.
3. Counsel did not realize or recall that the Order of Dismissal had not been sent until he received a copy of this Court's Order Dismissing Appeal dated October 1, 2012.
4. Counsel regrets this oversight occurred.
5. Counsel has since instituted a new check list procedure to ensure this does not happen again.

6. At the time this petition is submitted, Counsel will also submit a copy of the Order of Dismissal to the Court.

7. Counsel has also copied the office of Appellate Defense on this petition.

THEREFORE, Counsel respectfully requests that this Court reinstate Petitioner's Appeal.

Respectfully submitted,



Tristan M. Shaffer
P.O. Box 176
Chapin, SC 29036
(803) 575-0384
Attorney for Petitioner

October 15, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

The Honorable Eugene C. Griffith Jr., Circuit Court Judge

ASHLEY RAY HARDIN,

PETITIONER,

V.

THE STATE,

RESPONDENT.

APPELLATE CASE NO. 2012-212395

**AMENDED PETITION FOR
REINSTATEMENT OF APPEAL**

Petitioner through his Counsel, Tristan M. Shaffer, respectfully requests that this Court reinstate his appeal pursuant to Rule 260, SCACR. In support of this motion, counsel would respectfully show the following:

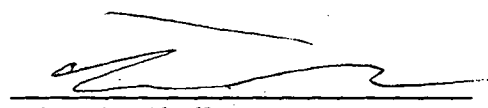
1. Counsel filed a notice of appeal in Petitioners case on June 12, 2012.
2. When the notice of appeal was filed, Counsel had inadvertently omitted sending SCCID's Appellate Division necessary documents so that they would accept the appeal.
3. In July, Counsel was informed that the documents needed to be sent in to Appellate Defense. However, Counsel inadvertently failed to send the documents.
4. As a result, Appellate Defense never ordered the transcripts of the PCR hearing.
5. This Court ordered that the appeal be dismissed on October 1, 2012.

6. Counsel regrets this oversight occurred.

7. At the time this petition is submitted, Counsel will also submit a copy of the following necessary documents: Order Appointing Counsel, Probation Revocation Hearing Transcript, PCR application, and Order of Dismissal to the Court.

THEREFORE, Counsel respectfully requests that this Court reinstate Petitioner's Appeal. Counsel further request and additional time so that Appellate Defense may request a transcript of the PCR hearing

Respectfully submitted,



Tristan M. Shaffer
Attorney for Petitioner

October 15, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

The Honorable Eugene C. Griffith Jr., Circuit Court Judge

ASHLEY RAY HARDIN,

PETITIONER,

V.

THE STATE,

RESPONDENT.

APPELLATE CASE NO. 2012-212395

**CERTIFICATE OF SERVICE
PETITION AND AMENDED PETITION FOR
REINSTATEMENT OF APPEAL**

I, Tristan Shaffer, hereby certify that a copy of the Petition for Reinstatement of Appeal and Amended petition for Reinstatement of Appeal was served upon Counsel for the State Assistant Attorney General Kaelon May on October 16, 2012.

Respectfully submitted,



Tristan M. Shaffer
Attorney for Petitioner

SEP 20 2011

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

INDICTMENT FOR

Criminal Sexual Conduct with Minor 2nd Degree

§16-3-655(C)

At a Court of General Sessions, convened on NOVEMBER, 2005, the Grand Jurors of Lexington County present upon their oath:

That Ashley R Hardin did in Lexington County between June 11, 2003 and June 14, 2003, commit a sexual battery upon and with the body of ^{minor} being a child of at least fourteen (14) years of age but who is less than sixteen (16) years of age, and Ashley R Hardin was in a position of familial, custodial, or official authority to coerce the victim to submit or was older than the victim, to wit: the defendant did place his penis inside the victim's vagina in violation of § 16-3-655 (C) [formerly section 16-3-655(3) of the Code of Laws of South Carolina, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


DEPUTY SOLICITOR

WITNESSES

CITZ
CITZ

A-2003-32-00899

11/16/2005 9:31 AM

ARREST WARRANT NUMBER

H130785

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date:

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2005-GS-32-4209

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

NOVEMBER TERM 2005

THE STATE

vs.

Ashley R Hardin

CDR# 0397

Indictment for

Criminal Sexual Conduct with Minor 2nd
Degree

\$16-3-655(C)

DONALD V. MYERS, SOLICITOR

I DO HEREBY WAIVE MY RIGHT
TO GRAND JURY PRESENTMENT

DEFENDANT ASHLEY R. HARDIN

DATE 11-16-05

WITNESS [Signature]

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

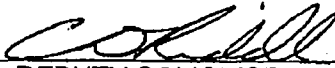
INDICTMENT FOR
Receiving Stolen Good More than \$1000 Less than
\$5000

§16-13-180(2)

At a Court of General Sessions, convened on NOVEMBER, 2005, the Grand Jurors of Lexington County present upon their oath:

That Ashley R Hardin did in Lexington County on or about January 21, 2004, knowingly and willfully buy, receive, or possess stolen goods, chattels, or other property, knowing or having reason to believe the goods, chattels, or property is stolen, to wit: miscellaneous household items, such property having a value of more than one thousand (\$1000) dollars but less than five thousand (\$5000) dollars, in violation of § 16-13-180 (2) of the Code of Laws of South Carolina, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


DEPUTY SOLICITOR

Handwritten signature

WITNESSES

LCSD
Palkowski, Jeff

DOCKET NO. 2005-GS-32-4210

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

NOVEMBER TERM 2005

THE STATE

vs.

Ashley R Hardin
AKA Ashley Ray Hardin

A-2005-32-01904 11/16/2005 8:36 AM

ARREST WARRANT NUMBER

STRAIGHT INDICTMENT - REF: H-430558

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date:

VERDICT

Foreperson of Petit Jury Date:

Handwritten signature

CDR# 0513

Indictment for

Receiving Stolen Good More than \$1000 Less
than \$5000

\$16-13-180(2)

DONALD V. MYERS, SOLICITOR

I DO HEREBY WAIVE MY RIGHT
TO GRAND JURY PRESENTMENT

Handwritten signature
DEFENDANT

DATE 11-16-05

Handwritten signature
WITNESS