

**ORIGINAL**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

Appeal from Richland County  
Hon. Alison R. Lee, Circuit Court Judge

---

Appellate Case No. 2012-213669

---

The State,

Appellant,

v.

Alexander G. Nutt,

Respondent,

---

**RECORD ON APPEAL**

---

DANIEL E. JOHNSON  
Solicitor, Fifth Judicial Circuit

JOSEPH Y. SHENKAR  
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ATTORNEY FOR RESPONDENT

**RECEIVED**

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SC Court of Appeals

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2011-CP-40-07689

State of South Carolina

Alexander G. Nutt

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Attorney for  Plaintiff  Defendant  
 Self-Represented Litigant

Disposition Type (Check One)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 13(b), SCRCP;  Rule 41(j), SCRCP (Vol. Nonsuit);  Rule 43(k), SCRCP (Settled);  Other \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRCP;  Bankruptcy arbitration award;  subject in right to restore to confirm, vacate or modify arbitral award;  Other \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICATION):**  Affirmed;  Reversed;  Remanded;  Other \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TOLUNA, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

This matter came before me on an appeal from an Order issued by the Honorable Mel W. Maurer, Dutch Fork Magistrate. On December 29, 2008, Alexander Nutt was charged with simple possession of marijuana. On or about April 2, 2009, Mr. Nutt filed a Motion to Comply with Rule 6, SCR CrimP. The Motion objected to the introduction of any chemist or analyst's report that the State sought to introduce at trial, and moved to require any chemist or analyst to personally testify. A trial was held on May 13, 2011 in Mr. Nutt's absence, and it was discovered that due to administrative error, Mr. Nutt was not sent notice of the May 13, 2011 hearing. The case was reopened and Mr. Nutt pled to a Conditional Discharge on July 21, 2011. Under the terms of the Conditional Discharge, Mr. Nutt was to undergo drug testing in the months of September, October, and November 2011. Upon successful completion of those tests, the case was to be dismissed. Mr. Nutt chose the facility to conduct the drug test and provided a sample for testing on September 28, 2011. Mr. Nutt tested positive, violating the Conditional Discharge. The Court issued a Rule to Show Cause on October 14, 2011, ordering Mr. Nutt to appear. A hearing on the Rule to Show Cause was held on November 3, 2011, and the Magistrate found that Mr. Nutt violated the Conditional Discharge and ordered him to pay a fine of \$570.00. Mr. Nutt filed an appeal on November 10, 2011.

"In criminal appeals from the magistrate's court, the circuit court does not review the matter *de novo*; rather, the court reviews the case for preserved error raised by appropriate exception." *State v. Hoyle*, 397 S.C. 622, 625, 725 S.E.2d 720, 721-722 (Ct. App. 2012). The circuit court "may either confirm the sentence appealed from, reverse or modify it, or grant a new trial." S.C. Code Ann. § 18-3-70 (1976). Mr. Nutt argues that the Magistrate erred in considering an unsigned report that Mr. Nutt failed his September 2011 drug test. No one was summoned to testify at the November 2011 hearing regarding the results of the test. Mr. Nutt claims that the Rule 6, SCR CrimP Motion filed in April 2009 was still in effect at the time of the hearing. Rule 6(n), SCR CrimP provides that "a report signed by the chemist or analyst who performed the test or tests required concerning its nature shall be evidence . . . that the material is or contains the substance or substances stated . . . without the necessity of the chemist or analyst personally being present or appearing in court." The State argues that Mr. Nutt's Motion would have expired upon his guilty plea and release upon the Conditional Discharge.

The purpose of the hearing on the Rule to Show Cause was to determine if Mr. Nutt was in contempt for violating the terms of his Conditional Discharge. Rule 6, SCR CrimP is inapplicable during such a hearing. Rule 6, SCR CrimP applies to pre-trial matters, and a Rule to Show Cause hearing is "fundamentally different from a criminal trial and other pre-sentencing proceedings." *State v. Hill*, 368 S.C.

2012 DEC 13 AM 10:08  
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JEANETTE W. HERSHDE  
CLERK OF COURT

SCANNED

649, 658, 650 S.E.2d 274, 279 (2006). The violation of a conditional discharge, like a probation revocation, occurs after the imposition of a criminal sentence. In a probation revocation, "the intervening criminal sentence is the crucial point at which the due process guarantees dramatically change." *State v. Hill*, 368 S.C. 649, 658, 650 S.E.2d 274, 279 (2006). "[W]hile the underlying probation violations 'may themselves be criminal offenses, the probation revocation proceeding is not a criminal trial of those charges, but a more informal proceeding with respect to notice and proof of the alleged violations.'" *Id.* (quoting *State v. Franks*, 276 S.C. 636, 638, 281 S.E.2d 227, 228 (1981)). South Carolina courts have held that Rule 5, SCRCrimP "does not apply to probation revocation proceedings because they are not criminal trials." *Id.* Similarly, Rule 6, SCRCrimP does not apply in a Rule to Show Cause proceeding for violation of a Conditional Discharge.

While Rule 6, SCRCrimP is inapplicable in this case, I find that the Magistrate erred in not requiring the State to support ~~the~~ contention that Mr. Nutt violated the terms of his Conditional Discharge with reliable evidence. The report that Mr. Nutt tested positive for drugs was unsigned and the State presented no other sworn document to support their claim. On this basis, the Magistrate's decision is REVERSED.

Order Information  
 This order  costs  does not end the case.  
 Additional Information for the Clerk:

Complete if judgment requires payment of a sum of money or affects title to real or personal property.			
JUDGMENT AGAINST PLAINTIFF:		JUDGMENT AGAINST DEFENDANT:	
Judgment Amount	\$ _____	Judgment Amount	\$ _____
Taxable Costs	\$ _____	Taxable Costs	\$ _____
Attorney's Fees	\$ _____	Attorney's Fees	\$ _____
Interest	\$ _____	Interest	\$ _____
Other:	\$ _____	Other:	\$ _____
Total Amount to be Enrolled:	\$ _____	Total Amount to be Enrolled:	\$ _____
If applicable, describe the property, including tax map information and address, referenced in the order.			

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: This document and research should refer to the official court order for judgment details.

Circuit Court Judge \_\_\_\_\_ Judge Code \_\_\_\_\_ Date 12/11/2012

For Clerk of Court Office Use Only

This judgment was entered on the 13 day of DEC, 2012 and a copy mailed first class this 14 day of DEC, 2012 to attorneys of record or to parties (when appearing pro se) as follows:

\_\_\_\_\_  
 ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
 ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT  
*Jeanette W. McBride*

STATE OF SOUTH CAROLINA,  
Plaintiff,

vs.

CASE NO. 59978DE

ALEXANDER G. NUTT,  
Defendant.

AUDIO  
TRANSCRIPTION

2012 JAN -6 PM 2:13  
CUTLER FORK MAGISTRATE

TRANSCRIBED BY: LORA L. McDANIEL,  
Registered Professional Reporter

A. WILLIAM ROBERTS, JR. & ASSOCIATES

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Greenville, SC  
(864) 234-7030

Charlotte, NC  
(704) 573-3919

1 (Begins audio recording.)

2 MR. O'LEARY: Morning, Judge.

3 THE COURT: Morning, Mr. O'Leary.

4 MR. O'LEARY: Judge, this shows prior --

5 THE COURT: Yeah.

6 MR. O'LEARY: I don't know how this  
7 replies directly. It just shows that he failed the  
8 drug test, second drug test. I would argue that  
9 (inaudible). I don't agree. It's not even signed,  
10 the test sheet, signed off.

11 THE COURT: Where did you have it taken?  
12 I mean, I didn't send him any particular place to  
13 have it taken.

14 MR. O'LEARY: (Inaudible).

15 THE COURT: He chose the provider.

16 MR. O'LEARY: I know. I don't know who  
17 did the test, whether it's accurate. No confirmation  
18 test on this. I would argue --

19 THE COURT: I would also say you have to  
20 give us ten days notice for us to bring the provider  
21 in here who took the test.

22 MR. O'LEARY: I would argue Rule Six was  
23 filed in this case and would still reply. I don't  
24 know.

25 THE COURT: --No, I wouldn't. -- No, I

1 wouldn't say it replies because it was typically  
2 taken and sent on.

3 MR. O'LEARY: That's fine. I just want to  
4 put that --

5 THE COURT: Okay.

6 MR. O'LEARY: (Inaudible). We did this in  
7 July. And there's another issue. I'm not sure if  
8 the Court knows how they're treating this.

9 (Inaudible). We didn't come in here until July.

10 THE COURT: I'm not taking -- I'm not  
11 going to take the license, but I can't tell you how  
12 DMV, how your buddy will do.

13 MR. O'LEARY: My guess, just a guess,  
14 (inaudible). It does say he failed the test, the  
15 second test. For the record, I do want to put that  
16 (inaudible).

17 THE COURT: Well, actually it was the  
18 first test, I think. It was delivered. It was  
19 taken -- I haven't looked. I don't have it.

20 MR. O'LEARY: I have a date on this. It  
21 was tested in September.

22 THE COURT: Had to be delivered in  
23 October. There was another test to be taken in  
24 October. The way we write these, it's open ended.  
25 Any day that month.

1 MR. O'LEARY: I understand, Judge.

2 UNIDENTIFIED SPEAKER: Albert Martin.

3 MR. O'LEARY: I'm not sure when we were  
4 scheduled to be here. I just got written in my  
5 notebook they said to be here. I can't tell when the  
6 test came in, whether it came to the courthouse or  
7 not. Judge, do you want me to step down?

8 THE COURT: Yeah, let me -- evidently  
9 didn't make the file. It's still in the box back  
10 there. Wait a minute. I got it. Keep going crazy  
11 when it's not in the box. It says Westmoreland.

12 MR. O'LEARY: That's signed. I'm just  
13 saying I don't know. That's just a form. That was  
14 part of my argument. I would ask that you order  
15 official test.

16 THE COURT: Got one.

17 MR. O'LEARY: No, I haven't got one.

18 THE COURT: Yes, sir, in November now.

19 MR. O'LEARY: (Inaudible) Do whatever you  
20 want. (Inaudible). It does bother me when there's  
21 no signature. It's a form letter.

22 THE COURT: It was taken on 9/28.

23 MR. O'LEARY: Yeah, (inaudible).

24 THE COURT: 9/28. Collection site,  
25 Midlands Exam and Drug Screening, Inc. in West

1 Columbia. I would never bring anybody in without --

2 MR. O'LEARY: I understand. I just  
3 assumed Rule Six would've replied to it. It's not a  
4 separate case. I don't know how you file that. In  
5 any event, we're asking the Court for (inaudible).  
6 We did this in front of you in July, Judge  
7 (inaudible).

8 THE COURT: Yeah. I don't ever set these  
9 up until --

10 MR. O'LEARY: I understand.

11 THE COURT: You know, I always give 60  
12 days before whatever residue is in the body to get  
13 out before I ever set them up.

14 Did you get in the military?

15 UNIDENTIFIED SPEAKER: (Inaudible).

16 MR. O'LEARY: (Inaudible). You have to do  
17 first. That would be my guess (inaudible).

18 THE COURT: Yeah, I mean, to get the  
19 provider here, I mean, we have to have a way. With  
20 HIPPA -- I guess I can waive them without HIPPA and  
21 all that sort of stuff.

22 MR. O'LEARY: I never had that problem.

23 THE COURT: You could've gotten any of  
24 this information as well by HIPPA or with your client  
25 before. We didn't set this up and just give you

1 notice last week to show up.

2 MR. O'LEARY: I don't know when I received  
3 notice. I really don't know, Judge. My secretary  
4 said to be here this morning. We would ask to allow  
5 us to (inaudible).

6 THE COURT: The officer is standing in the  
7 background. Hasn't said anything. What you got to  
8 say about anything?

9 OFFICER: This has been going on for, I  
10 think, two or three years now. I think we were just  
11 back here a month ago.

12 THE COURT: It was July.

13 MR. O'LEARY: It was July.

14 THE COURT: Whatever date.

15 OFFICER: (Inaudible).

16 THE COURT: Conditional discharge.

17 MR. O'LEARY: I haven't been here since  
18 July.

19 THE COURT: Yeah, July 21st motion.  
20 Motion to reopen.

21 MR. O'LEARY: That was in July.

22 THE COURT: Looks like all on 21st.  
23 Everybody gets tired of appearing on these things.

24 MR. O'LEARY: I understand.

25 THE COURT: 570. That's marijuana.

1 MR. O'LEARY: That's fine. See the clerk?

2 THE COURT: Yeah, make arrangements to get  
3 it paid. (Inaudible).

4 MR. O'LEARY: Thank you, Your Honor.  
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1 CERTIFICATE OF REPORTER  
2

3 I, Lora McDaniel, Registered Professional  
4 Reporter and Notary Public for the State of South  
5 Carolina at Large, do hereby certify that the  
6 foregoing audio transcription was produced to the  
7 best of my ability and may include inaudible  
8 sections.

9 I further certify that I am neither related  
10 to, nor counsel for, any party to the cause pending  
11 or interested in the events thereof.

12 Witness my hand, I have hereunto affixed my  
13 official seal this 19th day of December, 2011 at  
14 Charleston, Charleston County, South Carolina.  
15  
16  
17  
18  
19  
20  
21

22 \_\_\_\_\_  
23 Lora H. McDaniel,  
24 Registered Professional Reporter,  
25 My Commission expires:  
September 18, 2016

ORIGINAL

STATE OF SOUTH CAROLINA }  
COUNTY OF RICHLAND } COURT OF COMMON PLEAS

State of South Carolina, )  
 )  
 PLAINTIFF, ) NOTICE OF CRIMINAL APPEAL  
 ) 2011-CP-40-07639  
 -VS- )  
 )  
 Alexander T. Nutt, )  
 )  
 DEFENDANT. )

BEFORE THE HONORABLE ALISON R. LEE, JUDGE

NOVEMBER 1, 2012

COLUMBIA, SOUTH CAROLINA

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

Joseph Y. Shenkar, Esq.  
For the State

John A. O'Leary, Esq.  
For the Defendant

REMA K. SAINT THOMAS  
CIRCUIT COURT REPORTER

I N D E X

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E X H I B I T S

THERE WERE NO EXHIBITS SUBMITTED AT THIS HEARING.

1 THE COURT: The next matter is the State  
2 of South Carolina versus Alexander Nutt. The State  
3 is represented by Ryan Hensch. Is that correct?

4 MR. SHENKAR: No, Your Honor, Joseph  
5 Shenkar.

6 THE COURT: Oh, okay. And Mr. John  
7 O'Leary is representing Alexander Nutt, is that  
8 correct?

9 MR. O'LEARY: Yes, Your Honor.

10 THE COURT: This is an appeal, Docket  
11 Number 2011-CP-40-07589. It was filed by Mr.  
12 O'Leary on behalf of his client arising out of  
13 criminal charges in Magistrate's Court.

14 MR. O'LEARY: Your Honor, I filed a brief  
15 last week that's stamped. I don't know if y'all  
16 have a copy of it.

17 THE COURT: Yes, I have a copy of one that  
18 was filed on October 24, 2012. It's a three-page  
19 brief.

20 MR. O'LEARY: That's it, Your Honor.

21 THE COURT: Okay.

22 MR. O'LEARY: Your Honor, this is  
23 basically an appeal. It was a conditional  
24 discharge. Supposedly, Mr. Nutt failed the drug  
25 test. It was sent to the Court, rule to show cause.

5

1 Then the document that showed the refusal, which  
2 I've attached, wasn't even signed. We had filed a  
3 Rule 6. I objected to using the document.

4 THE COURT: Okay, wait a minute, Mr.  
5 O'Leary. All I have is a three-page brief, but I  
6 don't have any attachments. You've got attachments?

7 MR. O'LEARY: We do have the attachments.  
8 I wasn't sure --

9 THE COURT: They may be in the file in the  
10 record, but --

11 MR. O'LEARY: I've got an extra copy.

12 THE COURT: Okay, thank you. Okay, now  
13 we're on the same page, yes, sir.

14 MR. O'LEARY: Judge, the attachment -- I  
15 put a copy of the transcript in there, too, which we  
16 had to do an order to compel to get the transcript.  
17 In any event, it's Exhibit E that's the document in  
18 question where the judge admitted it absent a  
19 signature, and also a Rule 6 had been filed in this  
20 matter.

21 And the judge ruled that he didn't think  
22 the Rule 6 applied. I have no idea why, because  
23 it's the same case, the same case number. The Rule  
24 6 was properly filed in '09. I attach that as  
25 Exhibit A.

6

1 I think it was improper for the judge to  
2 find in violation based upon an unsigned letter and  
3 based upon the fact that a Rule 6 -- they were on  
4 notice of a Rule 6. And for those reasons, I would  
5 ask that the case be reversed and dismissed.

6 THE COURT: Now, what was the issue about  
7 Exhibit E? Exhibit E was the actual report?

8 MR. O'LEARY: That's the report, but that  
9 isn't even signed, Judge.

10 THE COURT: Okay. So that's what you're  
11 objecting to, is the report is not signed. So you  
12 don't know who within the Midlands Exams and Drug  
13 Screening, Incorporated, performed the test?

14 MR. O'LEARY: I have no idea, Judge. And  
15 the other problem that I had was the Judge, I think  
16 if you look at the transcript there, he basically  
17 said that we could have brought them in. I can't  
18 bring them in when we don't even know who it is.

19 And I think it's reversible for a judge to  
20 accept an unsigned document and then find a person  
21 guilty of that, not only for the Rule 6 but the fact  
22 that the document on its face would be invalid or  
23 inadmissible.

24 THE COURT: Okay. And I did notice that  
25 on Exhibit E there is a provision that says

1 "Collection and testing performed by N.  
2 Westmoreland, CPCT."

3 MR. O'LEARY: Judge, the only document I  
4 ever saw was B, which I attached. That's the only  
5 thing. It was probably in Court where they couldn't  
6 find the document originally, and I think they found  
7 it in the back room. But in any event, I think with  
8 the Rule 6 that they would be precluded from using a  
9 document such as this absent somebody attesting to  
10 it.

11 THE COURT: Mr. Shenkar?

12 MR. SHENKAR: Thank you, Your Honor, may  
13 it please the Court. Your Honor, the State's  
14 position on this matter is that the Rule 6 that was  
15 filed originally in 2009 is regarded as a pre-trial  
16 issue or a pre-plea issue and therefore is not  
17 admissible in a post-conviction situation like the  
18 matter at hand here.

19 Your Honor, there is a body of law itself  
20 where Rule 6 is classified under the pre-trial  
21 subsection. The State's position is that once the  
22 person had pled guilty to a charge, the rule expires  
23 at the time of the plea, and then another set of  
24 rules begin at that particular time that relates to  
25 a post-conviction situation.

3

1           In this case, Your Honor, as Mr. O'Leary  
2           stated, his client already pled in Magistrate's  
3           Court for the drug charge. He entered a conditional  
4           discharge plea and was ordered to do the drug  
5           testing.

6           At that point, Your Honor, he waived all  
7           his rights, constitutional rights. I do not have  
8           the transcript of the actual plea, but I think that  
9           Mr. O'Leary was present at that plea where he  
10          entered a conditional discharge.

11          I assume he was given his constitutional  
12          rights, and he waived them. But the waiver itself  
13          is for all the issues that come under evidentiary  
14          rules exactly like the one that is at question here.

15          Now, if we were in a pre-plea situation,  
16          Your Honor, it would be acceptable for the Court to  
17          dismiss the case based on the fact that a drug test  
18          was entered without the signature of the analyst or  
19          the chemist and without an affidavit. However, in a  
20          post-conviction situation, as I stated, these rules  
21          do not apply.

22          Furthermore, Your Honor, if we're looking  
23          at other programs that we have such as probation or  
24          the diversionary program, drug court and veterans  
25          court, all of them are situated for a

9

1 post-conviction -- the person after they pled guilty  
2 to the charge.

3 All of these people continuously or  
4 regularly get tested by officers of that particular  
5 entity, a probationary officer or a drug court  
6 person. On a testing kit, they do not need to  
7 provide an affidavit or anything of that nature in  
8 order for that person to ultimately be violating  
9 their probation or get expelled out of drug court  
10 for failure to comply with the drug testing.

11 Your Honor, in this case the defendant was  
12 given ample time and opportunity to -- the drug  
13 testing was to take place 67 days after the  
14 conditional discharge plea was entered into. And I  
15 believe the transcript also reflects that the place  
16 of the testing was to be picked by the defendant  
17 himself.

18 He was not ordered by the Court of who  
19 would test him. Based on all those reasons, Your  
20 Honor, we ask that you will dismiss this appeal and  
21 affirm the Magistrate Court's decision on this  
22 matter.

23 MR. O'LEARY: Judge, my only response to  
24 that is I don't necessarily think it went down the  
25 way he said. This was -- he was tried in his

10

1 absence because the boy had gone out of state to go  
2 to school to a boarding school. I got that  
3 reopened. The boy  
4 -- my client wasn't there, and the judge said,  
5 "We'll do a conditional discharge."

6 They allowed that. I told him, and that's  
7 how I believe that happened. I don't have that  
8 transcript, but I believe I put that into what was  
9 said after trial in absence.

10 There was no notice to the defendant  
11 because, again, he was out of state. A motion was  
12 filed to reopen. The case was reopened. The  
13 conditional discharge was entered into on behalf of  
14 Mr. Nuzz.

15 I don't believe he was even there to do  
16 that. But in spite of that, I think counsel is  
17 wrong in terms of post-conviction because he's not  
18 convicted in this case until there's a ruling by the  
19 Court that he violated the terms.

20 And violation of the terms would be a  
21 failing of the drug test, and the drug test was  
22 unsigned, and it was clearly on the face a Rule 6  
23 which had been filed. And I think that goes through  
24 the whole process.

25 MR. SHENKAR: Your Honor, if I may reply

11

1       shortly. The violation that occurred here has to do  
2       with the punishment portion. Once a person entered  
3       a guilty plea and received a conditional discharge,  
4       that meant a ruling over the violation occurred for  
5       the portion of the punishment which he had  
6       permission to discharge in this case, which means  
7       the Court ordered him to go out and get drug tested.

8                If he complied with the court order, then  
9       I guess the charge would be expunged later on down  
10      the road. If he failed, then he will have to pay  
11      the consequences of his guilty plea in the form of a  
12      record or a fine, whatever the Court.

13               THE COURT: Well, is it normal practice  
14      for them to be drug tested within two or three days  
15      of entering a conditional discharge?

16               MR. O'LEARY: Judge, I don't know what the  
17      -- I think -- I honestly don't know. But the  
18      difference on the way they do a conditional  
19      discharge -- and it's not uniform today, I don't  
20      think, in the county -- is some of them make you go  
21      up front of the judge actually, and they give you  
22      your rights, and then they give you all these  
23      warnings. That just didn't happen in this case.

24               He was just placed on a conditional  
25      discharge status, conditioned on passing the drug

12

1 test. So it didn't -- as far as I can remember in  
2 this case -- and I did not request a copy of the  
3 transcript on the date that the initial discharge  
4 was entered because I had enough trouble trying to  
5 get the portion where they found that he had  
6 violated the condition.

7 I had to go and get an order, a motion to  
8 compel, and we got the transcript. I think in the  
9 interest of -- I can't say I'll give you a  
10 post-conviction because there's not a guilty plea  
11 entered officially into the records until there's a  
12 finding that he violated the drug issue, and that  
13 clearly you can't do that on an unsigned document.  
14 Unsigned could have been done by anybody.

15 MR. SHENKAR: Your Honor, I feel the issue  
16 -- after the plea, the testing took place -- it  
17 indicated was 67 days after --

18 THE COURT: Sixty-seven or six to seven?

19 MR. SHENKAR: Six seven, Your Honor.

20 THE COURT: Okay.

21 MR. SHENKAR: It's the sixth paragraph in  
22 the return.

23 THE COURT: And so at best this would be  
24 one of those situations in which it would be similar  
25 to a probationary matter in which someone would be

13

1 accused of violating their probation. And in this  
2 case, it would be violating the terms of the  
3 conditional discharge. And they would be entitled  
4 to a hearing on that issue, right?

5 MR. SHENKAR: Yes, Your Honor.

6 THE COURT: Now, does that mean that they  
7 would -- is there not an opportunity to challenge  
8 any drug test results that come about as a result of  
9 submitting a sample? I understand that the samples  
10 are required.

11 They're required to submit the sample. So  
12 it's not a question of whether their rights have  
13 been violated with respect to taking the sample.  
14 The question is, are they entitled to some type of  
15 due process as it relates to the testing of the  
16 sample and who would come and provide testimony as  
17 to its results and how it was tested?

18 MR. SHENKAR: Your Honor, I believe that  
19 that will satisfy their rule to show cause. It was  
20 after the conditional discharge was entered into.  
21 He was given 67 days before he took the drug test.  
22 He failed it.

23 And then, from my understanding, there was  
24 a rule to show cause based on the failure, at which  
25 point Mr. O'Leary challenged the admissibility of

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1 the drug testing based on the fact that it was not  
2 compliant with Rule 6. Obviously, we argue that  
3 Rule 6 doesn't apply to this situation because this  
4 is a post-conviction situation, not a pre-trial  
5 matter.

6 THE COURT: So your argument is that even  
7 absent Rule 6 that it is sufficient -- that Mr.  
8 O'Leary or his client does not have the right to  
9 challenge and inquire of the person who collected  
10 the sample and tested the sample, that that's not a  
11 right that he has?

12 MR. SHENKAR: Well, I believe that Rule 6  
13 doesn't apply here. Therefore, whatever Rule 6  
14 stipulates with regards to a requirement for a drug  
15 test would not apply in this situation. He  
16 obviously has a right to challenge it if they  
17 believe that it's simply some kind of erroneous.

18 I do not know how that would work out.  
19 But I believe Mr. O'Leary's appeal today comes from  
20 the fact that the drug test itself that was taken  
21 and was returned to the Court did not bear the  
22 signature of the analyst or the chemist and was not  
23 accompanied by an affidavit, just like what we would  
24 receive when we request a drug analysis from SLED on  
25 matters that are pending in General Session in a

1 pre-trial situation.

2 MR. O'LEARY: Judge, I don't necessarily  
3 agree with his analogy it's post-conviction. But in  
4 any event, let's assume it was, say it's a probation  
5 kind of comparison. You can't cross-examine a sheet  
6 of paper when there's nobody there to talk to. So I  
7 think I do have a right to confront the chemist in  
8 that case.

9 In spite of my argument of the Rule 6, I  
10 know, I'm absolutely positive, that we would have a  
11 right. But even if you take that away, if they want  
12 to introduce the document, they've got to go through  
13 certain processes. And if we're there to challenge  
14 it, I could not challenge this document.

15 MR. SHENKAR: Your Honor, we remind the  
16 Court the defendant was the one that actually chose  
17 the facility, as well. So it was not that the Court  
18 ordered he go to a particular facility.

19 The defendant was given an opportunity to  
20 choose a facility of his own. And I understand  
21 there might be some issue with the challenge.  
22 However, I believe that that issue was addressed  
23 with the Magistrate Judge.

24 The Magistrate Judge did not believe that  
25 the challenge that Mr. O'Leary raised to the drug

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1 testing was sufficient and therefore affirmed the  
2 conviction from the guilty plea that he entered  
3 under the conditional discharge.

4 THE COURT: Okay. Anything further? I'll  
5 consider the issue and do a little research and give  
6 you the benefit of my thinking.

7 MR. O'LEARY: I've never run into this  
8 before, Judge, to be honest with you.

9 THE COURT: I'm sure it doesn't come up  
10 very often. Okay, I'll review it and review the  
11 transcript and go from there.

12 MR. O'LEARY: Thank you very much.

13 MR. SHENKAR: Thank you, Your Honor.

14 MR. O'LEARY: Appreciate it. Thank you,  
15 Judge.

16 THE COURT: Thank you very much.

17


STATE OF SOUTH CAROLINA )  
 COUNTY OF LEXINGTON )

COURT REPORTER'S CERTIFICATION

I, REMA K. GANTT, OFFICIAL COURT REPORTER, AND NOTARY PUBLIC IN AND FOR 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 ABOVE-CAPTIONED CASE ON NOVEMBER 1, 2012, IN COLUMBIA, SOUTH CAROLINA.

I FURTHER CERTIFY THAT I AM NEITHER OF COUNSEL NOR KIN TO ANY OF THE PARTIES TO THIS CAUSE OF ACTION, NOR AM I INTERESTED IN ANY MANNER IN ITS OUTCOME.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND SEAL AT LEXINGTON, SOUTH CAROLINA, THIS THE FIFTH DAY OF MARCH, 2013.

  
 REMA K. GANTT THOMAS  
 OFFICIAL COURT REPORTER  
 NOTARY PUBLIC FOR SOUTH CAROLINA  
 MY COMMISSION EXPIRES 11/31/2013

**Midlands Exams and  
Drug Screening, Inc.**

3020 Sunset Boulevard Suite 102  
West Columbia, S.C. 29169  
Phone (803) 939-8422  
Fax (803) 939-8424

**THC/MARIJUANA PANEL DRUG SCREEN**

Name: ALEXANDER NUTT  
Client: PERSONAL

Collection Site: Midlands Exams & Drug Screening, Inc.  
3020 Sunset Boulevard, Suite 102  
West Columbia, SC 29169

Reason for testing:  Pre-employment  Random  Post Accident  Other  
Sample Type: Urine / Drug Screen  
Date Tested: 09-28-11

Collection and Testing Performed by: N. WESTMORELAND, CPCT

ID Verified  Photo I.D.  OTHER

Control.....Valid  Invalid

Temperature Range  90.0 - 100.0 For record actual temp here 52

<u>Drug Screening</u>	<u>Result</u>	<u>Cutoff Value</u>
MARIJUANA	POSITIVE	50 ng / ml

Comments:

Testing Methodology: 1 SCREEN, ONE STEP

CERTIFICATE OF COUNSEL

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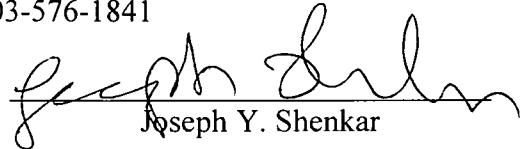
The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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ATTORNEYS FOR APPELLANT

July 12, 2013

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Richland County  
Hon. Alison R. Lee, Circuit Court Judge

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Appellate Case No. 2012-213669

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The State,

Appellant,

v.

Alexander G. Nutt,

Respondent,

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**PROOF OF SERVICE**

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I, Angela Bennett certify that I have served the Final Brief of Appellant and Record on Appeal on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, John A. O'Leary, Esquire, 714 Calhoun Street, Columbia, SC 29201.

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

This 12<sup>th</sup> day of July, 2013.



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