

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

William H. Seals, Jr., Circuit Court Judge

ORIGINAL

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S.C. Supreme Court

HAZEL STOUDEMIRE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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STATE OF SOUTH CAROLINA ) COURT OF GENERAL SESSIONS  
: )  
COUNTY OF SPARTANBURG ) SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA, )  
: )  
PLAINTIFF, )  
: )  
VERSUS ) TRANSCRIPT OF RECORD  
: 95-GS-42-1837-1838  
HAZEL STOUDEMIRE, )  
: )  
DEFENDANT. ) JUNE 17, 2005  
SPARTANBURG, SOUTH CAROLINA

**B E F O R E:**

**THE HONORABLE GORDON G. COOPER, JUDGE**

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

**FOR THE STATE:  
SOUTH CAROLINA DEPARTMENT OF PARDON AND PAROLE**

**FOR THE DEFENSE:  
JASON CHEBOSKI, ESQ., ASSISTANT PUBLIC DEFENDER**

**PHYLLIS S. BARRETT  
CIRCUIT COURT REPORTER**

1 THE COURT: AGENT FAUST.

2 AGENT FAUST: THANK YOU, YOUR HONOR. MAY IT PLEASE THE  
3 COURT. THIS IS THE MATTER OF HAZEL STOUDEMIRE, CITATION 3-  
4 42-070571. AND I WANT TO START OFF BY ASKING YOU TO WITHDRAW  
5 W-42-01649. THIS WARRANT WAS SERVED ON HIM THIS MORNING,  
6 WHICH I NOW REALIZE DID NOT NEED TO BE SERVED ON HIM.

7 THE COURT: YOU WANT TO WITHDRAW THE WARRANT?

8 AGENT FAUST: YES SIR. USUALLY WHAT HAPPENS IS WHEN A  
9 WARRANT IS SERVED ON SOMEONE WHEN IT DOESN'T HAVE TO BE SERVED  
10 OR IT SHOULD NOT HAVE BEEN SERVED, WE GET A GENERAL SESSIONS  
11 JUDGE TO WITHDRAW IT.

12 HE IS ON PROBATION FOR A BURGLARY SECOND, NINE COUNTS,  
13 NON-VIOLENT; ANOTHER BURGLARY SECOND. WHAT'S GOING ON IS MR.  
14 STOUDEMIRE IS IN PRISON FOR MURDER. HE RECEIVED A LIFE  
15 SENTENCE. WE ISSUED A PROBABLE CAUSE CITATION AND BASICALLY,  
16 THE CITATION IS SAYING THAT HE COULD NOT, HIS VIOLATION IS  
17 THAT HE COULD NOT COMPLETE THE PROBATION, BEING THAT HE IS IN  
18 PRISON FOR THE REST OF HIS LIFE.

19 SO, WE'RE ASKING FOR A REVOCATION BASED ON THAT  
20 VIOLATION, NOT THE FACT THE HE COMMITTED MURDER. THAT IN  
21 ITSELF IS NOT A VIOLATION OF THE PROBATION. THE VIOLATION IS  
22 HE CANNOT COMPLETE THE PROBATION BECAUSE HE IS SERVING A  
23 SENTENCE FOR LIFE. AND WE FEEL THAT IF WE DID NOT ASK FOR A  
24 REVOCATION HE WOULD NOT BE PUNISHED FOR THIS CRIME. AND AS

1 YOU SEE, HE OWES TWELVE THOUSAND DOLLARS IN RESTITUTION. THE  
2 VICTIM IS PRESENT IN THE COURTROOM.

3 THE COURT: COUNSEL, HAVE YOU REVIEWED THE CITATION WITH  
4 YOUR CLIENT?

5 MR. CHEHOSKI: YES SIR. YOUR HONOR, I'M TEMPTED TO SAY  
6 OUR RESPONSE IS LEGALLY "SO WHAT". THERE IS NO VIOLATION.  
7 THEY'RE SAYING THAT THE FACT THAT HE CANNOT COMPLETE PROBATION  
8 BECAUSE HE IS INCARCERATED IS A VIOLATION. BUT IN ORDER FOR  
9 IT TO BE A VIOLATION IT HAS TO BE WILLFUL, UNINCARCERATED.  
10 THERE'S A LOT OF THINGS THAT HE'S DOING THAT HE'S JUST NOT  
11 ALLOWED TO DO ANYTHING THAT WOULD BE-- HE CAN'T REPORT  
12 BECAUSE HE'S INCARCERATED.

13 YOUR HONOR, I THINK THAT THE ONLY REASONABLE REMEDY HERE  
14 IS TO TERMINATE AND CONVERT TO A CIVIL JUDGMENT. HE'S SERVING  
15 A LIFE SENTENCE FOR MURDER. THAT'S A DAY FOR DAY SENTENCE, SO  
16 HE WILL NOT BE LEAVING THE DEPARTMENT OF CORRECTIONS. I'M  
17 SORRY TO SAY THIS TO THE VICTIMS BECAUSE THEY'RE OUT ALL THIS  
18 MONEY, BUT THERE'S NOTHING THAT CAN BE DONE.

19 MR. FAUST: YOUR HONOR, FIRST OF ALL, HE TERRORIZED THIS  
20 VICTIM. HE BROKE INTO HER HOUSE. SHE WAS NINETY YEARS OLD.  
21 AND SECONDLY, IT IS A VIOLATION BECAUSE HE KNEW WHEN HE  
22 COMMITTED THIS MURDER THAT HE HAD A PROBATION DATE THAT WAS  
23 GOING TO START AND IT WOULD MAKE IT WHERE HE COULD NOT COMPLY  
24 WITH PROBATION AND THAT'S A VIOLATION.

25 THE COURT: WHAT'S THE END DATE ON THE OTHER?

1 MR. FAUST: 4/21/95. THAT IS CORRECT, THE BEGIN DATE  
2 OF AUGUST 8, 2000. AS YOU CAN SEE, THE CONVICTION DATE ON  
3 THE BACK OF THE REPORT WAS IN APRIL OF THE SAME YEAR, FOUR  
4 MONTHS PRIOR TO THE END DATE OF HIS PROBATION.

5 MR. CHEHOSKI: AGAIN, I DON'T MEAN TO MINIMIZE THE HARM  
6 TO THE VICTIMS IN ANY WAY, BUT THERE IS NO VIOLATION THAT IS  
7 ALLEGED IN THE REPORT.

8 MR. FAUST: THE END DATE WAS 4/21/95 AND THE SENTENCE WAS  
9 NOT TO BEGIN, IT WAS NOT DUE TO BEGIN UNTIL HE COMPLETED YOA.  
10 SO, THAT'S THE REASON FOR THAT.

11 MR. CHEHOSKI: YOUR HONOR, AGAIN, THERE ARE NO VIOLATIONS  
12 THAT ARE ALLEGED TO HAVE OCCURRED WHILE THIS MAN WAS ON  
13 PROBATION.

14 MR. FAUST: YOUR HONOR, IF I MAY. THE DEFENDANT WAS  
15 PLACED ON A YOA SENTENCE AND THAT WAS REVOKED, AND THEN THE  
16 MURDER CONVICTION OCCURRED. THE DEPARTMENT ATTEMPTED TO GO  
17 THROUGH THE SPECIAL REVOCATION PROCESS. THE DEFENDANT FAILED  
18 TO PARTICIPATE IN THE SPECIAL REVOCATION PROCESS. THAT'S WHY  
19 WE'RE HERE TODAY. THE CITATION MEANS THAT THERE'S PROBABLE  
20 CAUSE TO BELIEVE THAT THE DEFENDANT IS UNABLE TO COMPLY WITH  
21 THE CONDITIONS OF HIS PROBATIONARY SENTENCE RECEIVED ON APRIL  
22 21, 1995, DUE TO THE FACT THE DEFENDANT RECEIVED A LIFE  
23 SENTENCE FOR MURDER ON APRIL 13, 1995 IN THE SPARTANBURG  
24 COUNTY COURT OF GENERAL SESSIONS.

1           SO, BASICALLY, THE DEPARTMENT IS SAYING THE DEFENDANT WAS  
2           ORIGINALLY PLACED ON PROBATION, AGAIN, NOT TO SATISFY THAT  
3           PROBATIONARY SENTENCE THAT WAS ORIGINALLY ORDERED. AT THIS  
4           POINT WE'RE GOING TO HAVE TO DO SOMETHING AND CANNOT, HE IS  
5           NOT GOING TO BE RELEASED FROM THE DEPARTMENT OF CORRECTIONS ON  
6           A PROBATIONARY SENTENCE THAT HE WAS ORIGINALLY ORDERED, WAS  
7           ORIGINALLY PLACED ON. AT THIS POINT THAT'S JUST NOT AN OPTION  
8           THAT THE DEPARTMENT HAS.

9           MS. CHEHOSKI: YOUR HONOR, I RESPECTFULLY DISAGREE WITH  
10          THE AGENT. THE OTHER OPTION IS TO TERMINATE THIS CASE AND  
11          CONVERT THE MONEY TO A CIVIL JUDGMENT. WITHOUT ANY SPECIFIC  
12          VIOLATIONS THAT OCCURRED WHILE HE WAS ON PROBATION, THERE ARE  
13          NO GROUNDS FOR REVOKING.

14          AGENT FAUST: WE DISAGREE WITH THAT. WE FEEL THAT THE  
15          VIOLATION IS HE HAS NOT COMPLETED HIS PROBATION AND WE HAVE A  
16          VICTIM WHO HAS NO OTHER RECOURSE.

17          THE COURT: COUNSEL APPROACH.

18          (WHEREUPON A BENCH CONFERENCE TOOK PLACE)

19          THE COURT: MR. STOUDEMIRE, I'M GOING TO FIND THAT YOU  
20          VIOLATED THE TERMS OF YOUR PROBATION AND THAT YOU HAVE PLACED  
21          YOURSELF VOLUNTARILY IN A POSITION THAT IS IMPOSSIBLE FOR YOU  
22          TO COMPLY WITH THE TERMS OF YOUR PROBATION. AND  
23          SPECIFICALLY, AS TO PARAGRAPH ONE, THE DETAILS OF YOUR  
24          VIOLATION, I'M GOING TO FULLY REVOKE YOUR PROBATION AND THAT

1 WILL RUN CONCURRENT WITH THE SENTENCE THAT YOU ARE CURRENTLY  
2 SERVING.

3 THE AMOUNT THAT IS DUE TO THE VICTIMS WILL BE CONVERTED  
4 TO A CIVIL JUDGMENT.

5 AGENT, IS THERE ANYTHING ELSE TO TAKE UP?

6 AGENT FAUST: NOTHING ELSE, YOUR HONOR.

7 THE COURT: THAT'S THE ORDER OF THE COURT.

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CERTIFICATE

I, THE UNDERSIGNED PHYLLIS S. BARRETT, OFFICIAL COURT REPORTER FOR THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE PROBATION VIOLATION HEARING HELD IN THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF GENERAL SESSIONS FOR THE SEVENTH JUDICIAL CIRCUIT, SPARTANBURG COUNTY, SOUTH CAROLINA ON THE 17<sup>TH</sup> DAY OF JUNE, 2005.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

  
PHYLLIS S. BARRETT

# PROBATION CITATION

No. C-42-02- 0571

JTH CAROLINA  V.  ZEL JUNIOR STOUDEMIRE	COUNTY: SPARTANBURG	
	SCDC # 220501	SID # 955159

HAZEL JUNIOR STOUDEMIRE

YOU ARE HEREBY NOTIFIED to appear in the above named case at the time, date and place specified below.

Place	Room
	Date and Time

YOU ARE HEREBY NOTIFIED that you are charged with violating the conditions of your supervision as stated below.

Violations Charged

BY BEING UNABLE TO COMPLY WITH THE CONDITIONS OF PROBATION ORDERED UNDER CAUSE NUMBER 95-GS-12-1837, 1838, 1842, 1862, 1841, 1844, 1851, 1853, 1855

YOU ARE HEREBY NOTIFIED that you have the rights listed below.

List of Rights:

You have the right at the hearing to question any person who appears as a witness against you and to have witnesses appear in your behalf. You may present evidence on your behalf. You may have an attorney represent you. If you cannot afford an attorney, an attorney will be appointed for you. You must advise the agent or the court in writing of your desire for an attorney. It is your responsibility to make arrangements for your witnesses and your attorney to appear at the hearing.

IF YOU FAIL TO APPEAR AT THE TIME, DATE AND PLACE SHOWN ABOVE, THE HEARING WILL BE HELD IN YOUR ABSENCE AND YOU MAY BE INCARCERATED.

SPARTANBURG , South Carolina	Probation and Parole Agent <i>Terry D. Knight</i> TERRY D. KNIGHT	Agent # 897
Date 08.23.02		

A copy of the citation was served by the undersigned and given to the individual named therein at the time, date, and place indicated below.

Place	Date and Time
	Serving Officer's Signature

Sworn to and subscribed before me this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_

Signature of Notary Public \_\_\_\_\_ My Commission Expires \_\_\_\_\_

STATE OF SOUTH CAROLINA

AFFIDAVIT

County of SPARTANBURG

Personally appeared before me, TERRY D. KNIGHT, who first being duly sworn, deposes and says that HAZEL JUNIOR did within this County and State on the 23 day of AUGUST, 2002, violate certain conditions of release in the following particulars:

DESCRIPTION OF VIOLATION

BY BEING UNABLE TO COMPLY WITH THE CONDITIONS OF PROBATION ORDERED UNDER CAUSE NUMBER 95-GS-42-1837, 1838, 1842, 1862, 1841, 1844, 1851, 1853, 1855

The Affiant states that there is probable cause to believe the defendant named committed the violations set forth and that such probable cause is based on the following facts:

THERE IS PROBABLE CAUSE TO BELIEVE THAT THE OFFENDER IS UNABLE TO COMPLY WITH THE CONDITIONS OF HIS PROBATIONARY SENTENCE RECEIVED ON APRIL 21, 1995 DUE TO THE FACT THAT THE OFFENDER RECEIVED A SENTENCE OF HIS NATURAL LIFE FOR MURDER ON APRIL 13, 2000 BY THE SPARTANBURG COUNTY COURT OF GENERAL SESSIONS

Sworn to and subscribed

before me this 30 day of AUGUST, 2002

Terry D. Knight  
Affiant

[Signature]  
Signature of Notary Public

My Commission Expires: 2-13-2008

# PROBATION CITATION

No. C-42-02-0572

SOUTH CAROLINA  V.  HAZEL JUNIOR STOUDEMIRE	COUNTY: SPARTANBURG	
	SCDC # 220501	SID # 955159

NO: HAZEL JUNIOR STOUDEMIRE

YOU ARE HEREBY NOTIFIED to appear in the above named case at the time, date and place specified below.

Place	Room
	Date and Time

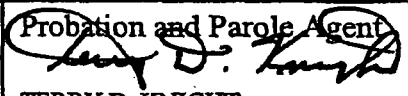
YOU ARE HEREBY NOTIFIED that you are charged with violating the conditions of your supervision as stated below.

<b>Violations Charged</b>  BY BEING UNABLE TO COMPLY WITH THE CONDITIONS OF PROBATION ORDERED UNDER CAUSE NUMBER 95-GS-11-554 BY THE CHEROKEE COUNTY COURT OF GENERAL SESSIONS
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

YOU ARE HEREBY NOTIFIED that you have the rights listed below.

<b>List of Rights:</b> You have the right at the hearing to question any person who appears as a witness against you and to have witnesses appear in your behalf. You may present evidence on your behalf. You may have an attorney represent you. If you cannot afford an attorney, an attorney will be appointed for you. You must advise the agent or the court in writing of your desire for an attorney. It is your responsibility to make arrangements for your witnesses and your attorney to appear at the hearing.
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

IF YOU FAIL TO APPEAR AT THE TIME, DATE AND PLACE SHOWN ABOVE, THE HEARING WILL BE HELD IN YOUR ABSENCE AND YOU MAY BE INCARCERATED.

SPARTANBURG , South Carolina	Probation and Parole Agent  TERRY D. KNIGHT	Agent # 897
Date 08.23.02		

A copy of the citation was served by the undersigned and given to the individual named therein at the time, date, and place indicated below.

Place	Date and Time
	Serving Officer's Signature

Sworn to and subscribed before me this \_\_\_\_\_ day of \_\_\_\_\_

Signature of Notary Public	My Commission Expires _____
----------------------------	-----------------------------

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

Appeal from Spartanburg County

Gordon G. Cooper, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

HAZEL STOUDEMIRE,

APPELLANT

---

FINAL BRIEF OF APPELLANT

---

ELEANOR DUFFY CLEARY  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err by revoking appellant's suspended sentence where there was no evidentiary basis for the revocation and where the revocation was based on an error of law?

STATEMENT OF THE CASE

Appellant Hazel Stoudemire was sentenced to ten concurrent terms of fifteen years in prison on April 21, 1995 under the Youthful Offenders Act. He was scheduled to begin YOA probation on August 8, 2000. However, he was convicted of murder in Spartanburg County General Sessions Court in April 2000. ROA. p. 4. The Honorable Wyatt Thomas Saunders, Jr. sentenced him to life imprisonment on April 13, 2000.<sup>1</sup>

The Department of Probation, Parole and Pardon Services issued a citation on August 23, 2002 charging Stoudemire with violating his probation by "being unable to comply with the conditions of probation ...." ROA p. 8. The affidavit stated "there is probable cause to believe that the offender is unable to comply with the conditions of his probationary sentence received on April 21, 1995 due to the fact that the offender received a sentence of his natural life for murder on April 13, 2000 by the Spartanburg County Court of General Sessions." ROA p. 9.

The Honorable Gordon G. Cooper convened a probation hearing on June 17, 2005. He revoked appellant's probation and ordered that the restitution be reduced to a civil judgment. He ordered that the fifteen year sentences be served concurrently with his life sentence. ROA. p. 5, lines 19 – p. 6, line 4.

This appeal follows.

---

<sup>1</sup> Appellant has a PCR appeal pending before the Supreme Court for the murder conviction.

## ARGUMENT

The trial court erred in revoking appellant's suspended sentence because there was no evidentiary basis for the revocation and because the revocation was based on an error of law.

The Department of Probation, Parole and Pardon Services alleged in its affidavit stated "there is probable cause to believe that the offender is unable to comply with the conditions of his probationary sentence received on April 21, 1995 due to the fact that the offender received a sentence of his natural life for murder on April 13, 2000 by the Spartanburg County Court of General Sessions." ROA p. 9. The probation agent explained at the hearing that the state wanted the revocation because appellant cannot complete probation since he is in prison. The agent explained that the department was not alleging his probation was being revoked for committing murder. ROA p. 2, lines 12-23. (The murder conviction occurred four months prior to the start of his probation. ROA. p. 4, lines 1-10.) The agent further explained that the state believed that appellant would not be punished for the burglaries if the trial court did not revoke his probation. ROA. p. 2, lines 2 – p. 3, line 2.

Appellant's counsel argued that there was no violation and that his failure to report or otherwise comply with probation was not willful since he is incarcerated. ROA. p. 3, lines 5-12. He further requested the trial court terminate probation and convert the restitution to a civil judgment. ROA. p. 3, lines 13-18.

In response, the agent argued that "it is a violation because he knew when he committed this murder that he had a probation date that was going to start and it would make it where he could not comply with probation and that's a violation." ROA. p. 3, lines 21-24. Counsel argued that there were no grounds for revoking and the judge found

that appellant had willfully violated the terms of his probation and revoked his suspended sentence. ROA. p. 5, lines 9-24. The judge found on the revocation order that he had violated terms one and six, which are:

1. I shall report in person to the South Carolina Department of Probation, Parole and Pardon Services' office on the day of my sentencing or release, and as instructed by the Department; and I shall make complete and truthful reports to the Agent

6. I shall not violate any Federal, State, or Local Law, and I shall immediately contact my Agent if I am ever arrested or questioned by a law enforcement official for any reason whatsoever.

This was error.

The decision to revoke probation is in the discretion of the circuit court judge. State v. Hamilton, 333 S.C. 642, 647, 511 S.E.2d 94, 96 (Ct.App.1999). The appellate court's authority to review such a decision is confined to correcting errors of law unless the lack of legal or evidentiary basis indicates the circuit judge's decision was arbitrary and capricious. State v. Williamson, 356 S.C. 507, 589 S.E.2d 787 (Ct. App. 2003).

As an initial matter, the judge committed an error of law by finding that appellant violated condition number six, forbidding the violation of any law while on probation. As the agent recognized, appellant did not violate his probation by committing murder. ROAp. 2, lines 12-23. Appellant had not yet begun his probation when the murder was committed and thus revocation on this basis would be improper. State v. Proctor, 345 S.C. 299, 546 S.E.2d 673 (Ct. App. 2001). In Proctor, the defendant was granted a conditional release from incarceration while serving a five-year YOA sentence. He pled guilty to two counts of assault and battery of a high and aggravated nature. *Id.* at 300, 546 S.E.2d at 674. This Court held that the judge committed an error of law by finding Proctor in

violation of his probation since he committed a crime while conditionally released from a YOA sentence. That is, the Court held that probation does not begin until a person is unconditionally released. *Id.* Therefore, since appellant's probation had not begun when the murder was committed or when he was sentenced to life in prison, it was an error of law for the trial judge to revoke his suspended sentence on this basis.

Secondly, the trial judge's decision to revoke based on probation condition number one, which required that he report to his agent, was not based on an evidentiary showing that he violated his probation. The "authority of the revoking court should always be predicated upon an evidentiary showing of fact tending to establish a violation of the conditions." State v. Hamilton, 333 S.C. 642, 648, 511 S.E.2d 94, 97 (Ct.App.1999). Accordingly, "before revoking probation, the circuit judge must determine if there is sufficient evidence to establish that the probationer has violated his probation conditions." *Id.* at 648-649, 511 S.E.2d at 97. Even though the circuit judge may not be required to find evidence of willfulness where the case does not involve the failure to pay fines or restitution, he must find sufficient factual evidence of the violation. *Id.*

In appellant's case, there was no evidence that he failed to report to his agent on the "day of [his] sentencing or release, and as instructed by the Department" or that he failed to "make complete and truthful reports to the Agent." The state did not allege that he had been instructed to report and had failed to. ROA p. \* (citation and affidavit). Instead, it appeared his revocation was predicated on the judge's finding that it will be, *in the future*, "impossible for [appellant] to comply because of [his] incarceration." ROA p.

5, lines 21-22. Therefore, the revocation of appellant's suspended sentence was arbitrary and capricious because there was no evidentiary basis. Hamilton, *supra*.

CONCLUSION

Based on the foregoing, appellant's suspended sentence should be reinstated.

Respectfully submitted,



Eleanor Duffy Cleary  
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of December, 2006.

## CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

December 4, 2006



Eleanor Duffy Cleary  
Appellate Defender

S.C. Commission on Indigent Defense  
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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Gordon G. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

HAZEL STOUDEMIRE,

APPELLANT

CERTIFICATE OF SERVICE

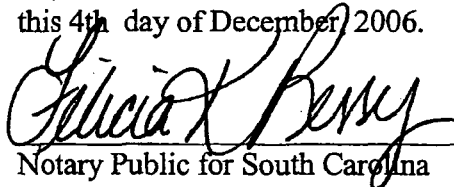
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Teresa A. Knox, Esquire, at Deputy Director for Legal Services, South Carolina Department of Probation, Parole and Pardon Services, Post Office Box 50666, Columbia, South Carolina 29250, this 4th day of December, 2006.



Eleanor Duffy Cleary  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 4th day of December 2006.



(L.S.)  
Notary Public for South Carolina

My Commission Expires: August 15, 2010

STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY  
Gordon G. Cooper, Special Circuit Court Judge

THE STATE, ..... RESPONDENT.

v.

HAZEL STOUDEMIRE, ..... APPELLANT

**FINAL BRIEF OF RESPONDENT**

**J. Benjamin Aplin**  
Assistant Chief Legal Counsel

**South Carolina Department of Probation,  
Parole and Pardon Services  
P. O. Box 50666  
Columbia, South Carolina 29250  
(803) 734-9220**

**ATTORNEY FOR RESPONDENT**

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**RESPONDENT'S STATEMENT OF ISSUE ON APPEAL**

Did the circuit court properly revoke Appellant's probation where a sufficient factual basis supported the decision that Appellant breached the conditions of his probation?

## RESPONDENT'S STATEMENT OF THE CASE

Appellant was charged in Cherokee and Spartanburg Counties with ten (10) counts of burglary - second degree (non-violent) (95-GS-11-554, 95-GS-42-1837, -1838, -1841, -1842, -1844, -1851, -1853, -1855, & -1862 ). On April 21, 1995, he waived presentment to the grand jury and entered an Alford plea to the charges. Appellant was sentenced by the Honorable L. Casey Manning to ten (10) concurrent terms of fifteen (15) years imprisonment suspended upon the service of five (5) years probation, with probation to begin "after service of the YOA Sentence this date."<sup>1</sup> (R.p. 22- p.41). He was ordered to comply with the Department of Probation, Parole and Pardon Services' (the Department's) standard conditions of probation including condition number one (1) which requires that he:

[R]eport in person to the South Carolina Department of Probation, Parole, and Pardon Services' office within 48 hours of sentencing or release, and as instructed by the Department and [he] shall make complete and truthful reports to the agent.

Appellant did not appeal his conviction or sentence.

Appellant was subsequently charged with violating the conditions of his probation in the following respects:

There is probable cause to believe the offender is unable to comply with conditions of his probationary sentence received on April 21, 1995 due to the fact that the offender received a sentence of his natural life for Murder on April 13, 2000 by the Spartanburg County Court of General Sessions.

(R. p.8 - p.11). On June 17, 2005, Appellant appeared at a probation violation hearing before the Honorable Gordon G. Cooper. At the conclusion of the hearing, Judge Cooper found Appellant

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<sup>1</sup> At the same proceeding Appellant was sentenced under the Youthful Offender Act to an indeterminate term of imprisonment not to exceed six (6) for grand larceny (95-GS-42-1852). He subsequently satisfied that YOA sentence and on August 7, 2000, began serving the five (5) year term of probation described above.

had violated the terms of his probation by placing himself voluntarily in a position by which it is impossible for him to comply with those terms, specifically the terms of paragraph one (1). The court revoked probation in full, reinstated the fifteen (15) year suspended sentence, and converted restitution owed to civil judgments. (R.p.5, line 19-p.6, line 7). In written orders issued the same day, the probation court found Appellant had violated several conditions of his probation and revoked his probation. (R. p.12 - p.21). Appellant timely filed a notice of intent to appeal his probation revocation. This Final Brief of Respondent follows.

## ARGUMENT

**The circuit court properly revoked Appellant's probation where a sufficient factual basis supported the decision that Appellant breached the conditions of his probation.**

Appellant contends the circuit court erred in revoking his probation because there was no evidentiary basis for the revocation and because the revocation was based on an error of law.

The State submits this argument should be dismissed on several grounds.

Initially, the State submits the argument now raised by Appellant is not preserved for appellate review because it was neither raised to nor ruled upon by the revocation judge. See State v. Hamilton, 333 S.C. 642, 648, 511 S.E.2d 94, 96 (Ct. App. 1999) (challenge to validity of probation revocation must be raised to and ruled upon by the revocation judge to be preserved for appellate review). At the probation revocation hearing, Appellant agreed he could not comply with his conditions of probation because he was currently incarcerated. He did not contest that he had failed to comply with basic probation condition such as failure to report; rather, he argued any deficiencies in this regard could not be violations because they were not willful. (R.p.3, lines 5-12). The State submits that after failing to challenge the existence of the charged probation violations and simply choosing to argue that they could not be violations because they were not willful, Appellant should not be permitted to now alter his argument to challenge the very existence of facts and allegations previously acknowledged. Thus, this argument is not preserved for review. In any event, the State submits the argument is without merit.

The decision to revoke probation is addressed to the discretion of the circuit judge. Hamilton, supra; State v. White, 218 S.C. 130, 61 S.E.2d 754 (1950). The appellate court's authority to review such a decision is confined to correcting errors of law unless the lack of a

legal or evidentiary basis indicates the circuit judge's decision was arbitrary and capricious.

Hamilton, supra. Probation is a matter of grace; revocation is the means to enforce the conditions of probation. Id. However, the authority of the revoking court should always be predicated upon an evidentiary showing of fact tending to establish a violation of the conditions.

Id. Thus, before revoking probation, the circuit judge must determine if there is sufficient evidence to establish that the probationer has violated his probationary conditions. Id. It is only when probation is revoked solely for failure to pay fines or restitution that a finding of willfulness is mandatory. Hamilton, supra.

Appellant was charged with an overall failure to comply with his conditions of probation as a result of a life sentence he was, and still is, serving for murder. (R.p.8 - p.11, p.42 - p.43). At the revocation hearing, Appellant admitted that his life sentence had resulted in his failure to do "a lot of things" he should be doing on probation, specifically noting that "he can't report." (R.p.3, lines 5-12). The State submits that since Appellant didn't contest the substance of his violations, instead arguing they were simply not willful, there was a sufficient factual basis to support the revocation. Hamilton, supra. Furthermore, since the revocation was not based solely on Appellant's failure to pay his fines and fees, no finding of willfulness was required. Id.

In addition, regarding Appellant's claim that the lower court committed an error of law by basing the revocation in part on a finding that Appellant violated a state law, the State submits the claim is without merit. Although the murder itself did not occur during the term of probation, the resulting sentence and incarceration which directly resulted from that conviction did; therefore, Appellant's revocation for a violation of a state law should stand. In any event, even if the probation court's order on this ground was an error of law, it is immaterial because the

revocation was also based on other grounds. State v. Allen, (S.C. Sup. Ct. August 21; 2006)

(Shearouse Adv. Sh. No. 33 at 45); State v. Williamson, 356 S.C. 507, 589 S.E.2d 787 (Ct. App.

2003). In conclusion, the State submits that Appellant's probation revocation should be

affirmed.

**CONCLUSION**

For all of the foregoing reasons, the State respectfully requests that the probation revocation be affirmed and that the Appellant's appeal be dismissed.

Respectfully submitted,

J. Benjamin Aplin  
Assistant Chief Legal Counsel

South Carolina Department of  
Probation, Parole, and Pardon Services  
P.O. Box 50666  
Columbia, SC 29250  
(803) 734-9220

BY:   
\_\_\_\_\_  
J. Benjamin Aplin  
Assistant Chief Legal Counsel

Columbia, South Carolina  
October 27, 2006

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

The State,

Respondent,

v.

Hazel Stoudemire,

Appellant.

---

Appeal From Spartanburg County  
Gordon G. Cooper, Special Circuit Court Judge

---

Unpublished Opinion No. 2007-UP-150  
Submitted April 2, 2007 – Filed April 4, 2007.

---

**AFFIRMED**

---

Appellate Defender Eleanor Duffy Cleary, of  
Columbia, for Appellant.

Ben Aplin, of Columbia, for Respondent.

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**PER CURIAM:** In 1995, appellant was sentenced under the Youthful Offender Act (YOA) to an indeterminate term of imprisonment not to exceed six years for grand larceny. At the same time, appellant was also sentenced to concurrent terms of fifteen years imprisonment, suspended upon the service of five years probation, for ten counts of second degree burglary. The probationary period was to commence after appellant served his YOA sentence. Before the probationary period commenced, however, appellant was sentenced to life imprisonment for murder. Because appellant's commission of the offense of murder prevented him from complying with the conditions of his probation for second degree burglary, the State sought and received a revocation of his probation.

Although appellant does not argue on appeal the precise issue he presented in the trial court, the essence of his position is that he did not "willfully" violate the conditions of his probation because he was incarcerated for murder. Appellant argues, for example, he did not "willfully" fail to report in person to the Department of Probation, Parole and Pardon Services, which was a condition of his probation, because his incarceration for murder prevented him from doing so. Appellant's position, even if preserved, is transparently specious. We affirm<sup>1</sup> pursuant to Rule 220(b)(2), SCACR, and the following authorities: State v. McCray, 332 S.C. 536, 542, 506 S.E.2d 301, 303 (1998) (noting a party cannot argue one ground at trial and another on appeal); State v. Lee, 350 S.C. 125, 130, 564 S.E.2d 372, 375 (Ct. App. 2002) ("In the absence of capricious or arbitrary exercise, the discretion of the court in revoking probation will not be disturbed on appeal."); and State v. Hamilton, 333 S.C. 642, 649, 511 S.E.2d 94, 97 (Ct. App. 1999) ("It is only when probation is revoked *solely* for failure to pay fines or restitution that a finding of willfulness is mandatory.") (emphasis in original).

**AFFIRMED.**

**ANDERSON, KITTREDGE, and SHORT, JJ., concur.**

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<sup>1</sup> We decide this case without oral argument pursuant to Rule 215, SCACR.



## The South Carolina Court of Appeals

KENNETH A. RICHSTAD  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

POST OFFICE BOX 11629  
COLUMBIA, SOUTH CAROLINA 29211  
1015 SUMTER STREET  
COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE: (803) 734-1890  
FAX: (803) 734-1839  
www.sccourts.org

April 20, 2007

### REMITTITUR

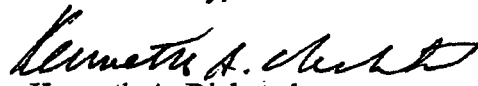
The Honorable Marcus W. Kitchens  
180 Magnolia Street  
PO Box 3483  
Spartanburg, SC 29304-3483

Re: The State v. Stoudemire, Hazel  
1995-GS-11-00554 1995-GS-42-01842 1995-GS-42-01855  
1995-GS-42-01837 1995-GS-42-01844 1995-GS-42-01862  
1995-GS-42-01838 1995-GS-42-01851  
1995-GS-42-01841 1995-GS-42-01853

Dear Mr. Kitchens:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Sincerely,

  
Kenneth A. Richstad  
Clerk of Court

KAR/tf

cc: Appellate Defender Eleanor Duffy Cleary  
Ben Aplin, Esquire

STATE OF SOUTH CAROLINA )

In the Court of Common Pleas

County of Spartanburg )

**2008-CP-42-**

1054

Stoudermire, HAZEL ZORR )

Full name and prison number, if any, of applicant. )

v. )

APPLICATION FOR

POST-CONVICTION RELIEF

State of South Carolina )

Name of Respondent )

Spartanburg County )

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
2008 FEB 27 PM 2:07  
MARC KITCHENS

INSTRUCTIONS - READ CAREFULLY

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

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

If the applicant 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 applicant was convicted.

1. Place of detention Inmate Correctional Institution

2. Name and location of Court which imposed sentence Spartanburg County  
Courthouse GENERAL SESSIONS

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

(a) 95-65-11-554

(b) \_\_\_\_\_

(c) \_\_\_\_\_

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

(a) April 21, 1995

(b) \_\_\_\_\_

(c) \_\_\_\_\_

5. Check whether a finding of guilty was made

(a) after a plea of guilty \_\_\_\_\_

(b) after a plea of not guilty \_\_\_\_\_

(c) after a plea of nolo contendere ✓

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

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

i. The Court of Appeals

ii. \_\_\_\_\_

iii. \_\_\_\_\_

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

i. Affirmed

ii. \_\_\_\_\_

iii. \_\_\_\_\_

(c) the date of each such result:

i. Submitted April 2, 2007 - Filed April 4, 2007

ii. \_\_\_\_\_

iii. \_\_\_\_\_

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

i. N/A

ii. N/A

iii. N/A

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

(a) N/A

(b) N/A

(c) N/A

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

(a) INEFFECTIVENESS OF APPELLATE COUNSEL

(b) EX POST FACTO CLAUSE VIOLATION

(c) \_\_\_\_\_

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SPARTANBURG COUNTY  
2008 FEB 27 PM 2:07  
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10. State concisely and in the same order the facts which support each of the grounds set out in (9)

- (a) \_\_\_\_\_
- \_\_\_\_\_
- (b) \_\_\_\_\_
- \_\_\_\_\_
- (c) \_\_\_\_\_
- \_\_\_\_\_

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

(a) any petition in a State Court under South Carolina Law ?

Appeals Court

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

NO

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) NO

(d) any other petitions, motions or applications in this or any other Court?

NO

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12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. THE STATE OF SOUTH CAROLINA / IN THE COURT OF APPEALS
- ii. REVOCAATION OF PROBATION
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

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

- i. IN THE COURT OF APPEALS
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

(c) the disposition thereof:

- i. AFFIRMED
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

(d) the date of each such disposition:

- i. Submitted April 2, 2007 - Filed April 4, 2007
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

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

- i. APPEALS COURT Rule 215, SCACR
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? NO

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

(a) which grounds have been presented:

- i. N/A
- ii. N/A
- iii. N/A

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

- i. N/A
- ii. N/A
- iii. N/A

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

- (a) \_\_\_\_\_
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

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

- (a) your arraignment and plea? YES
- (b) your trial, if any? YES
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence?  
YES

(e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? YES

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17. If you answered "yes" to one or more parts of (16), list:

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

- i. Jason Chetowski Public Defender
- ii. Eleanor Duffey Cleary Appellate Defender
- iii. \_\_\_\_\_

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

- i. Trial
- ii. Appeal
- iii. \_\_\_\_\_

18. State clearly the relief you seek in filing this application.

To terminate this case and convert to a civil judgment

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

No.

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 MARC KITCHENS

Applicant would also request the court to subpoena Jason Chetowski public defender and Eleanor Duffey Cleary, material witnesses.

SEE ATTACH EXHIBIT #1

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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF Spartanburg )

VERIFICATION

I, Stoudemire, Hazel, 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.

Hazel Stoudemire

Sworn to and subscribed before me  
This \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_

PURSUANT TO 28 USC 1746  
I AFFIRM UNDER OATH  
SI / Hazel Stoudemire PRO SE

L.S.

Notary Public for South Carolina  
My Commission Expires \_\_\_\_\_

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
2008 FEB 27 PM 2:07  
MARC KITCHENS

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

I, Hazel Stoudemire, 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 proceeding or give security therefor.

Hazel Stoudemire  
Applicant

Sworn to and subscribed before me  
This \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_

PURSUANT TO 28 USC 1746  
I AFFIRM UNDER OATH  
SI / Hazel Stoudemire PRO SE

L.S.

Notary Public for South Carolina  
My Commission Expires \_\_\_\_\_

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF SPARTANBURG )  
 )  
 Hazel Stoudemire, #220501, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FOR THE 7TH JUDICIAL CIRCUIT  
 Case No.: 2008-CP-42-1056

**AMENDED**  
**RETURN AND MOTION TO DISMISS**

In response to the post-conviction relief application filed February 27, 2008, the Respondent would show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. In April 1995, the Applicant was charged in Cherokee and Spartanburg counties for ten (10) counts of burglary – 2<sup>nd</sup> degree (non-violent) (1995-GS-11-554, 1995-GS-42-1837, -1838, -1841, -1842, -1844, -1851, -1853, -1855, & -1862). On April 21 1995, the Applicant, after waiving presentment to the grand jury, entered a plea pursuant to Alford v. N.C. Upon information and belief Applicant was represented by counsel from the law firm of Bryant and Devine at the plea. Applicant was sentenced by the Honorable L. Casey Manning to fifteen (15) years suspended upon the service of five (5) years probation and restitution. Subsequently, Applicant was charged with violating probation as a result of failure to comply with conditions of probation due to the life sentence he received for murder on April 13, 2000. He was represented by Jason Chehoski, Esquire, at the probation revocation hearing. On June 17, 2005, the Honorable Gordon G. Cooper revoked Applicant’s probation in full.

The Applicant appealed and the matter was affirmed by the South Carolina Court of Appeals on April 4, 2007. State v. Stoudemire, Up. Op. No. 2007-UP-150 (filed April 4, 2007).

The Applicant was represented on appeal by Eleanor Duffy Cleary.

## 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 Appellate Counsel; and
2. "Ex Post Facto Clause Violationing."

For the purpose of this Return, the Respondent incorporates the Clerk of Court records, the South Carolina Department of Corrections' records, and the Applicant's direct appeal records. The Respondent reserves the right to amend this Return and Motion to Dismiss upon receipt of any relevant materials.

## III.

To the extent Applicant attempts to challenge his 1995 plea, 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, *et. seq.*

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 April 21, 1995. This Application was filed on February 27, 2008, which was more than twelve (12) years after the one-year 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) (1985) 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.

To the extent Applicant attempts to challenge his 1995 plea, the Respondent submits that the doctrine of laches also bars the Applicant from raising these allegations in a post-conviction relief application. The Applicant has filed this application nearly thirteen (13) years after he was convicted. Absent some explanation or justification for the delay in seeking post-conviction relief, laches will prevent an Applicant from seeking collateral review of his conviction, especially where the delay affects the availability of evidence to refute the applicant's claims. McElrath v. State, 276 S.C. 282, 277 S.E.2d 890 (1981); Honeycutt v. Ward, 612 F.2d 36 (2nd Cir. 1979). Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002).

To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. This requirement "guards the state's legitimate expectation that it will not be called upon without due cause, to defend the integrity of convictions that occurred many years

ago, where records and witnesses are no longer available." McElrath, 276 S.C. at 283. Rule 9(a) of the Federal Habeas Corpus Act recognizes the doctrine of laches. The Rule states in pertinent part:

A petition may be dismissed if it appears that the state of which the Respondent is an officer has been prejudiced in its ability to respond to the Petition by delay in its filing unless the Petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

Furthermore the South Carolina legislature has recognized this problem and instituted a one-year statute of limitations. See S.C. Code Ann. §17-27-45(a).

The Applicant's delay has greatly prejudiced the Respondent. A transcript of the Applicant's plea is most likely now unavailable. If the Applicant had sought post-conviction relief within a reasonable time after his plea, neither of these problems would exist. Therefore, the Court should summarily dismiss the Application based on the Applicant's lack of diligence in processing his claim for relief.

V.

The allegation that appellate counsel was ineffective is without merit. Respondent contends that the Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys.

A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id. Appellate counsel must

provide effective assistance but need not raise every non-frivolous issue presented by the record. *Id.* Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. *Id.*

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

## VI.

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel, including probation revocation counsel, is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result."

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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, 80 L.Ed.2d 674. 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." Cherry, 300 S.C. 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.

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 do not provide *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 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 to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

## VII.

The respondent submits that the applicant's "ex post facto clause violationing" allegation is without merit because the applicant has failed to specifically set forth the grounds upon which his application is based in accordance with S.C. Code Ann. §17-27-50.

The purpose of an ex post facto clause is to prevent lawmakers from passing "arbitrary or vindictive legislation." Miller v. Florida, 482 U.S. 423, 429 (1987) (citations omitted). An ex post facto clause also ensures that legislative enactments "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." Weaver v. Graham, 450 U.S. 24, 28-29 (1981). For a law to present an ex post facto violation, the law must (1) be retrospective and apply to events taking place prior to its enactment and (2) work to disadvantage the offender. State v. Huiett, 302 S.C. 169, 171, 394 S.E.2d 486, 487 (1990).

State v. Bryant, 382 S.C. 505, 675 S.E.2d 816 (S.C. Ct. App. 2009).

Applicant offers no additional facts or details as to the alleged violations of the *ex post facto* clause and how those violations disadvantaged him. Therefore, the respondent moves for summary dismissal pursuant to South Carolina 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 this allegation should be dismissed as a matter of law.

## VIII.

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

## IX.

WHEREFORE, Respondent moves for an evidentiary hearing solely on the issue of ineffective appellate counsel and moves to summarily dismiss all other allegations.

Respectfully submitted,

HENRY DARGAN McMASTER  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Assistant Deputy Attorney General

By:   
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October 16, 2009.

STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS  
SEVENTH JUDICIAL CIRCUIT

Hazel Stoudemire,

2008-CP-42-1056

Applicant,

vs.

CERTIFICATE 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 Respondent's Amended Return and Motion to Dismiss in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Alexandria M. Wolf, Esquire  
Callie A. Charles, LLC  
1247 Boiling Springs Road  
Spartanburg, South Carolina 29303

  
\_\_\_\_\_  
Anne A. Mueller  
Legal Assistant for the Respondent

DATED this 16<sup>th</sup> day of October, 2009.

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

2008-CP-42-1056

HAZEL STOUDEMIRE,

Applicant,

-vs-

THE STATE OF SOUTH CAROLINA,

Respondent.

TRANSCRIPT OF RECORD

**COPY**

November 4, 2009  
Spartanburg, South Carolina

Ordered: April 5, 2010  
Delivered: June 22, 2010

**B E F O R E:**

THE HONORABLE WILLIAM H. SEALS, JR., Presiding Judge.

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

MS. ALEXANDRIA WOLF, Esquire  
Attorney for the Applicant

MS. SALLEY W. ELLIOTT, Esquire  
Assistant Attorney General for the Respondent

Pamela Faucette  
Circuit Court Reporter

PAMELA FAUCETTE, CVR - (864) 574-9534 or (336) 260-2864

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**Applicant's Exhibits:** Marked: Received:

(None)

**Respondent's Exhibits** Marked: Received:

(None)

**Court's Exhibits** Marked: Received:

(None)

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1 November 4, 2009

10:51 A.M.

2 THE COURT: All right. Ms. Elliott, are you ready  
3 for the next case?

4 MS. ELLIOTT: Yes, your Honor. We're calling Hazel  
5 Stoudemire next. And I noticed Counsel was here. She  
6 may be speaking to him. And I believe they are bringing  
7 him in now.

8 (Applicant brought into the courtroom.)

9 (Off-the-Record Discussion)

10 THE COURT: All right. Go ahead.

11 MS. WOLF: If we could have just one moment, your  
12 Honor.

13 THE COURT: All right. What case is this that we're  
14 going to hear?

15 MS. ELLIOTT: Your Honor, this is Hazel Stoudemire.  
16 It is the first case on the roster.

17 THE COURT: Thank you.

18 (Off-the-Record Discussion)

19 MS. WOLF: If we could have another moment.

20 THE COURT: Sure.

21 MS. WOLF: I apologize.

22 THE COURT: Sure, that's fine.

23 MS. ELLIOTT: Your Honor, this is *Cory Hazel*  
24 *Stoudemire vs. The State* (phonetic). It is a post-  
25 conviction relief application challenging a two thousand

1 and five (2005) probation revocation for charges for --  
2 or convictions and sentences initially entered in April  
3 of 1995.

4 He violated conditions of -- or was found to have  
5 violated the conditions of probation by subsequently  
6 being convicted of a murder offense. Probation was  
7 revoked in full and ordered to run concurrently with the  
8 murder sentence.

9 And Mr. Stoudemire thereafter appealed that -- that  
10 to the Supreme -- the Court of Appeals. The Court of  
11 Appeals affirmed the lower court's revocation of  
12 probation.

13 They are before Your Honor today to challenge to the  
14 probation revocation. And Mister -- Mr. Stoudemire has  
15 also thrown in some of the -- some references to his  
16 murder conviction and sentence.

17 And we would submit that he has already been though  
18 a PCR on his murder conviction and sentence. And post-  
19 conviction relief is concluded on that although I believe  
20 he may have filed a new application successively that is  
21 pending now.

22 But this application appeared to pertain only to the  
23 probation revocation. Any challenges to the murder  
24 conviction, if that's what he's trying to do, should be  
25 dismissed under the statute of limitations and because

1           it's successive.

2           And the only allegation he has raised in -- the  
3           allegations he has raised in this application have to do  
4           with ineffective assistance of appellate counsel and an  
5           ex post facto (phonetic) violation.

6           And the State submits that the ex post facto  
7           violation is a direct appeal issue. He should have  
8           raised it at the probation revocation.

9           I am not sure exactly what it is. He doesn't  
10          specify what the violation is. But we would submit that  
11          that's a matter for direct appeal and not post-conviction  
12          relief.

13          So, we are present with opposing counsel ready to  
14          litigate that issue. However, Your Honor, I did want to  
15          put on the record that it's my understanding that post-  
16          conviction relief counsel, Ms. Wolf, is a part-time  
17          public defender.

18          Well, actually, that is not going to be an issue in  
19          this case because she is a part-time public defender.

20          Mr. Stoudemire was represented by a member of the  
21          public defender's office at the time of the probation  
22          violation. But the only claim in this matter is  
23          appellate counsel, and appellate counsel is not  
24          associated with the public defender's office.

25          So, that shouldn't have any effect because he hasn't

1 raised claims against the probation revocation counsel.

2 THE COURT: All right. So, you made a motion ---

3 MS. ELLIOTT: To dismiss all claims except for the  
4 ineffective assistance of appellate counsel issue as to  
5 the probation revocation proceeding.

6 THE COURT: All right. Any reply to that, Ms. Wolf?

7 MS. WOLF: Thank you, Your Honor.

8 THE DEFENDANT: Excuse me, Your Honor. I -- I beg  
9 your pardon, sir. I would like to -- I would like to  
10 order you to relieve Ms. Wolf as my counsel.  
11 Your Honor, I've -- I've ---

12 THE COURT: Well, why don't you just sit down for  
13 one minute and let me hear from your lawyer?

14 (Off-the-Record Comments)

15 THE COURT: All right. Ms. Wolf, let me hear from  
16 you if you would.

17 MS. WOLF: Thank you, Your Honor. In this PCR  
18 application, Mr. Stoudemire alleges, as was stated,  
19 ineffective assistance of appellate counsel and an ex  
20 post facto law violations.

21 But he does identify Jason Chehowsky (phonetic) in  
22 his PCR application because Jason did represent him at  
23 that revocation. So, technically he believes, as  
24 presented, that he is challenging Jason's work at the  
25 revocation.

1 I have reviewed everything with -- with -- within  
2 the file, spoken to the State's attorney and spoken to  
3 Mr. Stoudemire.

4 From what I can gather, he is alleging today that  
5 Jason did not properly present the case at the  
6 revocation, so, as to make the record clear on appeal.

7 And, then, when his appellate lawyer handled the  
8 appeal, she raised different issues than that which Jason  
9 placed in the record. He is going to have to clarify  
10 that for the Court if I'm getting that wrong.

11 **THE COURT:** So, am I correct he is not challenging  
12 Jason per se today; he is challenging his appellate  
13 attorney?

14 **MS. WOLF:** Well, he tells me Jason did an acceptable  
15 job, but the appellate lawyer did not bring the issues to  
16 the appellate court that -- that Jason raised on the  
17 record at the original bond revocation hearing.

18 **THE COURT:** So, the appellate lawyer was ineffective  
19 is what he is saying?

20 **MS. WOLF:** Yes.

21 **THE COURT:** Okay.

22 **MS. WOLF:** That is what he has communicated to me  
23 today.

24 **THE COURT:** All right.

25 **MS. WOLF:** As to the conflict presented, Counsel is

1 correct; we are only here on the appellate lawyer's  
2 performance and there would be no conflict.

3 I do handle the prelim hearings for the public  
4 defender's office; didn't at the time that these charges  
5 came upon my client today.

6 Do not have a -- a desk or -- or -- I come to that  
7 office to pick up files. I'm a private attorney and do  
8 work out of my own office.

9 So, I don't believe that there is a work conflict  
10 there. But I just wanted to put forth all my  
11 interactions before the Court today.

12 **THE COURT:** Okay. I understand. And, Mr.  
13 Stoudemire, what was that you wanted to tell me earlier?

14 **THE DEFENDANT:** Thank you, your Honor. Your Honor,  
15 they tried -- the State tried to put me in a box as far  
16 as trying to say that I can't -- that I have not raised  
17 the issue that I ---

18 **THE COURT:** All right. We are going to deal with  
19 the hearing in just a minute.

20 **THE DEFENDANT:** okay.

21 **THE COURT:** Was there anything you wanted to put on  
22 the record about any type of conflict?

23 **THE DEFENDANT:** She -- the conflict that she -- that  
24 she mentioned that it would be a conflict of interest  
25 because the issue that I want to raise during the hearing

1 is -- is -- is against my -- my trial counsel.

2 (Off-the-Record Discussion)

3 THE COURT: But you don't have a conflict with Ms.  
4 Wolf?

5 THE DEFENDANT: Your Honor, that would be -- see,  
6 her conflict -- the conflict will actually a raise --  
7 arise because she's a -- she's a part-time, you know,  
8 public defender and ---

9 THE COURT: But you aren't challenging her work, are  
10 you? Or anything she did?

11 THE DEFENDANT: Well, right now at this moment I  
12 want -- I want to relieve Ms. Wolf as my PCR counsel.

13 THE COURT: Give me a reason.

14 THE DEFENDANT: She's -- she's not litigating like  
15 she's supposed to litigate, your honor.

16 THE COURT: All right. It's denied. Are you ready  
17 to proceed?

18 MS. WOLF: Yes, sir.

19 THE COURT: All right. Let's go, Ms. Wolf. Call  
20 your first witness.

21 MS. WOLF: Your Honor, I would call Mr. Stoudemire.

22 (Off-the-Record Discussion)

23 (The witness stepped forward to be sworn.)

24 (Whereupon,

25 HAZEL STOUDEMIRE

1 first being duly sworn, testified as follows:)

2 THE COURT: You may proceed.

3 MS. WOLF: Thank you, Your Honor. As it pleases the  
4 Court.

5 DIRECT EXAMINATION by MS. WOLF:

10:56 AM

6 Q. Mr. Stoudemire, give us your full name, please?

7 A. Hazel Stoudemire.

8 Q. Okay. I'm sorry, but I'm -- I'm from New York, so,  
9 I put an accent on different things. But it is Stottlemire  
10 (phonetic), not Stoudemire?

11 A. Stottlemire (phonetic).

12 Q. Stoudemire? And where are you currently  
13 incarcerated?

14 A. Leath Correctional Institution.

15 Q. And tell the judge what sentence you're serving?

16 A. I am serving a life sentence for murder.

17 Q. And when was that sentence handed down?

18 A. It was handed down April the -- April 2000.

19 Q. All right. And do you know when your earliest  
20 possible release date will be on that?

21 A. Not on a natural life sentence.

22 Q. So, there is no possible release date?

23 A. No.

24 Q. Okay. Now, we are before the Court today on a PCR  
25 application that you filed concerning a full revocation of

1 probation. And I need you to help us to make sure the judge  
2 understands the timing and really the sequencing before we get  
3 into the performance of your attorney, okay?

4 You were found -- well, not found guilty, but you  
5 were adjudicated guilty after you pled to a series of burglary  
6 charges non-violent; is that right?

7 A. Yeah.

8 Q. What year were those charges handed down?

9 A. Nineteen, ninety-five (1995).

10 Q. Okay. And the plea was in the year 1995?

11 A. Yes.

12 Q. Okay. April 24<sup>th</sup> of 1995 is ---

13 A. Yeah.

14 Q. Does that sound right? And it was multiple  
15 indictments. You received, under an *Alford* plea, fifteen  
16 (15) years, non-violent, suspended upon five (5) years'  
17 probation and restitution in the amount of twelve thousand  
18 dollars (\$12,000)?

19 A. Yeah.

20 Q. All right. And again, correct me if I'm wrong, you  
21 had a six-year YOA, so when the six-year YOA was up, you would  
22 have begun your probation?

23 You would have begun serving that five (5) years and  
24 working on your restitution; is that right?

25 A. Yeah.

1 Q. So, 1995, '96, '97, '99 -- two thousand (2000) would  
2 have been about the time you would have begun starting the  
3 probationary portion of that adjudication, correct?

4 A. Yeah.

5 Q. But, before you were to start the probationary  
6 aspect, you were convicted of murder and received the natural  
7 life sentence you just testified to. Is that timing correct?

8 A. Yes, parts were.

9 Q. Sir?

10 A. Parts of -- what were you saying?

11 Q. Okay. Is the timing correct that, prior to the  
12 beginning of revocation -- sorry, prior -- prior to beginning  
13 the probation, you did your six-year YOA.

14 You were set to began the probation, the five (5)  
15 years' probation where you were to make restitution of twelve  
16 thousand dollars (\$12,000) ---

17 A. Uh-huh (affirmative).

18 Q. --- and be a good person for five years? Prior to  
19 beginning that, you received a life sentence on a murder  
20 charge?

21 A. Uh-huh (affirmative).

22 THE COURT: You're going to need to answer "yes" or  
23 "no". The court reporter cannot take that down.

24 A. Okay. Yes.

25 Q. All right. The revocation was served on you in two

1 thousand, two (2002) and you went to a hearing on the  
2 revocation in two thousand, five (2005); is that right?

3 A. Yes, ma'am.

4 Q. At that revocation hearing, Jason Chehosky  
5 represented you?

6 A. Yes, ma'am.

7 Q. And the result was you were revoked, the argument  
8 being you were in prison serving a natural life; you're not  
9 going to be able comply with your probation.

10 And the Court changed the restitution and converted  
11 it to a civil judgment; is that correct?

12 A. Yes, ma'am.

13 Q. All right. In the PCR application you filed today,  
14 you're asking that the revocation be set aside. And you're  
15 asking for the restitution to be converted to a civil  
16 judgment?

17 A. Well, I'm asking for a hearing also with the issue  
18 concerning the murder.

19 Q. All right. Let's get through what's in this PCR  
20 first. And, then, you can -- we'll address that in just a  
21 minute, okay?

22 A. Thank you.

23 Q. Do you understand that, at the end of this hearing,  
24 if the Court grants the relief that you're seeking, it would  
25 be a half and half granting.

1 I mean, you've already got half of what you wanted.  
2 You got that restitution converted into a civil judgement.

3 Are you saying you want that set aside and you don't  
4 want the civil judgement that was previously ordered or you do  
5 want the civil judgement that was previously ordered?

6 A. After the PCR is concluded, we'll -- I will cross  
7 that bridge when I -- when I reach it.

8 Q. All right. You have to cross that bridge now  
9 because you're asking for relief that is in a contrary  
10 position to what is in the pleadings and what is in the  
11 record.

12 It is very unusual for someone to ask for PCR relief  
13 that had already been granted in part. This judge needs to  
14 know what it is you're asking him to do today when he makes --  
15 after he makes his findings of fact and law.

16 What are the conclusions will you want him to do?  
17 Do you want him to undo that conversion to a civil judgement  
18 or do you want him to leave it in place?

19 A. I think I will leave that up to him once he hears my  
20 whole case..

21 Q. Okay.

22 A. Do you understand that?

23 Q. I need to make sure you understand that. But you  
24 are telling the judge today it's up to him, whatever he  
25 decides to do?

1           A.    Yes, sir -- yes, ma'am.

2           Q.    All right.  The other thing you're asking the judge  
3 to do is to set aside that revocation as if it never happened;  
4 to -- to take it off of the plate of things that you have  
5 before you and would basically send you back for a new  
6 revocation hearing at some point in time?

7           A.    Uh-huh (affirmative).

8           Q.    At the leisure of the Department of Probation,  
9 Pardon and Parole; is that correct?

10          A.    Yes, ma'am.

11          Q.    And do you understand, before we go any further, the  
12 risks of that?  If you win the relief you're seeking today,  
13 you are at risk of getting that revocation put back on you at  
14 a subsequent hearing?

15                   And that could happen in any time.  It could happen  
16 four (4) years from now.  It could happen two (2) years from  
17 now.  A lot depends on what happens with that life sentence?

18          A.    Yes.

19          Q.    All right.  And you're asking this Court  
20 nevertheless to go ahead and revoke -- or set aside that  
21 revocation?

22          A.    Not only that -- not only that but I don't want -- I  
23 don't want to get side tracked.  I want the Court to look into  
24 that situation as far as the revocation hearing.

25                   I also want to get this Court to look into the

1 procedural process in my original application; that I filed a  
2 summary judgement on October the 23<sup>rd</sup> of this -- of this year  
3 with the Clerk of Court and the Attorney General.

4 And I also filed that summary judgement motion,  
5 which the judge already ruled on, to relieve you as my trial  
6 counsel.

7 Q. Okay. Again, let's focus back on -- on the  
8 probation revocation. Let's get that dealt with first, okay?

9 A. Thank you.

10 Q. You filed an appeal from the revocation?

11 A. Right.

12 Q. And you are alleging that your appellate lawyer did  
13 not perform her duties adequately?

14 A. Right, Ms. Cleary.

15 Q. All right. And, if you would, detail for the Court  
16 why you believe that Eleanor Duncan Cleary did not perform the  
17 duties she was supposed to perform to the level of competency  
18 of an average lawyer.

19 A. Well, from the order -- from the order I received  
20 from the South Carolina Appellate Court, they came down with  
21 an order saying that they -- they actually dismissed -- they  
22 actually dismissed my appeal because Ms. Cleary didn't -- she  
23 didn't raise the issue that was preserved for appellate  
24 review.

25 Q. All right. Now, I have to correct you because I do

1 have the order in front of me. And it doesn't say "appeal  
2 dismissed." It says "affirmed."

3 A. Affirmed, yeah.

4 Q. Do you understand the different between "dismissed"  
5 versus "affirmed"?

6 A. Well actually they didn't even hear it.

7 Q. Okay.

8 A. They didn't even go to -- they didn't even go  
9 through oral arguments. So, it was actually -- they didn't  
10 even through oral arguments.

11 Q. Do you understand that the Court does not have to  
12 hear oral arguments? It can make its decision based on  
13 briefs?

14 A. No, I didn't understand that.

15 Q. All right. Were you aware that your attorney did  
16 file with the Court an argument setting out the law and the  
17 facts and why the Court should rule in your favor?

18 A. I didn't -- I didn't -- I didn't -- I didn't receive  
19 no brief from Ms. Cleary.

20 Q. Okay. What is it that Ms. Cleary -- Cleary was  
21 suppose to do for you that she did not do for you?

22 A. She didn't raise the issue that was preserved for  
23 appellate review. That's -- that's -- that's the issue.

24 Q. What was the issue that you felt she should have  
25 raised?

1 A. I don't have it before me to tell you what it was.

2 Q. Well I have the result.

3 THE COURT: You have to speak up now so that the  
4 court reporter can hear everything you say.

5 A. Okay. Can I see the order?

6 Q. Do you know what she -- what she argued? What the  
7 basis for the appeal was?

8 A. I can't -- I mean, I can't -- I can't say it off the  
9 top of my head. If you will let me see the order, I will tell  
10 you what was raised.

11 Q. Okay. But I'm asking you, you said she didn't  
12 appeal what you wanted her to appeal. Tell us what you wanted  
13 her to appeal?

14 A. I would have to read the order Ms. -- Ms. Wolf.

15 Q. But you don't know what you wanted her to appeal?

16 A. Not off the top of my head.

17 Q. Okay. What was it -- let me back track then. What  
18 was it Jason Chehowsky did that you felt was improper or that  
19 he should have done?

20 A. Well Jason -- Jason -- my counsel ---

21 Q. Chehowsky?

22 A. Chehowsky. I think he did -- I think he did a fair  
23 job, as far as -- as far as raising the issue and preserving  
24 it for appellate review. I think he did a pretty good job.

25 Q. Okay. So, you are not asking this Court to find

1 that he did not represent you appropriately?

2 A. Well, I'm not trying to be -- I'm trying Ms.

3 Cleary ---

4 Q. Okay.

5 A. --- in the Appellate Court. And the Appellate Court  
6 says there's -- the Appellate Court said that Ms. Cleary did  
7 not raise -- did not raise the issues that was preserved for  
8 -- for appellate review.

9 She said -- it says that, "Although the appellant  
10 does not argue the precise issue presented to the trial court,  
11 the essence of his position is that he did not "willfully"  
12 violate the condition of the probation because he was  
13 incarcerated for murder.

14 "Appellant argues, for example, he did not willfully  
15 fail to report to the Department of Probation, Parole and  
16 Pardon Service which was a condition of his probation because  
17 his incarceration for murder -- for murder prevented him from  
18 doing so.

19 "Appellant's position, even if preserved, is  
20 transparent -- transparently specious."

21 Q. Okay. Stop there. Do you know what that means,  
22 what that statement says? "Appellant's position, even if  
23 preserved, is transparently specious"?

24 A. Yeah, I know -- I know -- I know it's still -- I  
25 still -- I still have my right to -- to due process.

1 Q. Okay. But let's -- we'll talk about your right in a  
2 second. But I want you to tell this Court what that statement  
3 means; how you understand that statement.

4 A. It means -- actually, it means if the issue that was  
5 preserved, that it would -- it would -- it would be unlikely  
6 that I would be getting my relief.

7 Q. Okay. So, we can agree the Supreme Court is saying,  
8 "You're right, Hazel, even if your appellate lawyer had raised  
9 everything that Jason preserved for you, we're -- we're  
10 looking at that and saying it's not likely we would have ruled  
11 in your favor because it's a specious argument, meaning it  
12 didn't -- well, I can't tell the judge how to define specious,  
13 but in my world -- what does it mean in your world?

14 A. Okay. I understand -- I understand the position,  
15 but it was never brought before them, it wouldn't be -- they  
16 -- they never had an opportunity to rule.

17 Q. But they did consider it. What you just read  
18 indicates they did consider it. They looked at it.

19 I'll tell you what, read for me... And so, that  
20 the State might follow along with me, under the final brief  
21 the appellant filed by Eleanor Duffy Cleary in the matter of  
22 the appeal of your revocation. And it says "Statement of  
23 issue on appeal." Read that for me.

24 A. It says, "The trial Court erred by invoking the  
25 Defendant's suspended sentence -- sentence where there --

1 there was no evidence based on revocation, or where that  
2 revocation was based on an error of law." (Phonetic)

3 Q. Okay. That is the issue she raised with the Court.  
4 And did the Court, in your understanding of that opinion, look  
5 at not only that but also what Jason raised?

6 A. No, they didn't rule it. They didn't rule on the  
7 issue that Jason raised because it was never preserved for  
8 appellate review.

9 Q. Okay. Do you understand, though, that the Court's  
10 language saying, even it was properly preserved, "Even if  
11 preserved, is transparently specious.." "transparently" means  
12 very clear that it ain't going to fly?

13 A. Yeah, I understand that.

14 Q. Okay. So, you have a very difficult calling today.  
15 And that is why we need to be very clear for this record  
16 because you may decide to PCR me.

17 You need to be very clear, so, that this Court  
18 understands what it is that Eleanor did that fell below the  
19 performance of an ordinary lawyer?

20 And you have to also show it would have resulted in  
21 a different result, that your appeal would have been granted  
22 and your revocation set aside for another hearing.

23 A. I don't know, but you could say the Appellate Court  
24 say very specious and I can't really say.

25 Q. And you have to really say that because you do have

1 the burden of proof today. At trial, it was the State's  
2 obligations to prove you.

3 Today is a civil action and you have to be able to  
4 persuade the Court that not only what Eleanor did was  
5 insufficient, but that the result would have been different?

6 A. Was she -- was she insufficient?

7 Q. You say she is, and that's why we need you to be  
8 very clear on the record, so, we can preserve that for you.

9 A. I say that she is because she didn't -- she didn't  
10 raise the issues that was preserved for appellate review.

11 Q. Okay. And, then, you also have the burden of  
12 proving or showing the Court or persuading the Court today  
13 that the result would have been different had she raised the  
14 issues that were preserved by Jason.

15 A. And -- I think I was prejudiced.

16 Q. Okay. Tell us how?

17 A. I think -- I think -- I think it prejudiced me  
18 because it didn't -- it didn't -- it didn't give me the  
19 opportunity to be heard on the issues that was preserved for  
20 appellate review.

21 Q. All right. And do you feel that, if the Court had  
22 heard arguments, based on what Jason preserved, the Court  
23 would have set aside your revocation?

24 A. Yes, ma'am.

25 Q. Okay. Is there anything else? And, again, all that

1 we're doing today is making the record very clear.

2 A. Yes, ma'am.

3 Q. Tell me what else you can possibly think of or have  
4 thought of to demonstrate that Eleanor's performance, hadn't  
5 she not performed the way she did, would have given you a  
6 different result at the appellate level.

7 A. Had she not?

8 Q. Uh-huh (affirmative).

9 A. I mean, I ain't never spoke to the woman, so, I  
10 really can't say.

11 Q. Okay. Is there anything else that you thought she  
12 should done that she didn't do?

13 A. The only thing I wish Eleanor Cleary would have did  
14 was raise the issues that was preserved for appellate review.

15 Q. Okay.

16 A. That would have gave me an opportunity to have an  
17 appeal, a direct appeal, that would have been fair and  
18 impartial.

19 Q. Okay. So, you feel you were prejudiced because you  
20 didn't get a fair and impartial appeal?

21 A. Yes, ma'am.

22 Q. Okay. Good. That's what -- that's what I need from  
23 you today. Anything else?

24 A. Yes.

25 Q. Go for it.

1           A.    Okay.  Your Honor, I -- I raised -- I sent a motion  
2   for summary judgment to -- to the Clerk of Court and -- and to  
3   the Attorney General's office on October the 23rd of this  
4   year.

5                   I don't know whether or not they received this  
6   summary judgment motion, but I did -- I did sent -- send it to  
7   them.

8                   And the stated position, as far as the summary  
9   judgment motion, it's argued to me that -- that I can't raise  
10  issues that -- that considered under my murder indictment.

11                   And if I don't -- if I do not raise the issues  
12  concerning the murder indictment, then, yeah, the statute of  
13  limitations would bar me from raising these issues -- raising  
14  the issues in the near future.

15                   So, I -- and what I'm challenging, Your Honor, is  
16  the procedural -- a procedural violation in my first original  
17  order concerning my -- my murder indictment, Your Honor.

18                   That's what I'm challenging.  I've got -- I got  
19  evidence -- I got evidence to prove that -- that -- that I  
20  received unjust procedural -- procedural errors in my first  
21  PCR application concerning my murder indictment.

22                   And the statute of limitations is not -- it's not in  
23  effect right now because I filed this -- I filed this  
24  application within six months -- within six months of the --  
25  the -- the researchuary (phonetic) that I got from the Supreme

1 Court stating that they would not rule on these issues because  
2 they wasn't -- they wasn't preserved for appellate review.

3 But, at the same time, Your Honor ---

4 MS. ELLIOTT: Your Honor, I'm going to object.

5 THE DEFENDANT: Excuse me. Excuse me. Excuse me.

6 MS. ELLIOTT: --- to any -

7 THE COURT: You got to let her talk.

8 MS. ELLIOTT: --- of the murder conviction. That  
9 is not complained about in this application.

10 THE COURT: The only thing before the Court today is  
11 ineffective assistance of appellate counsel; is that  
12 correct?

13 MS. ELLIOTT: It is. And this is totally ---

14 THE COURT: Sustained.

15 MS. ELLIOTT: --- separate.

16 THE COURT: And, if you would contain him a little  
17 bit, I would appreciate it.

18 MS. WOLF: I will do my best, Your Honor.

19 Q. (By Ms. Wolf) Mr. Stoudemire, do you have a copy of  
20 what it is you're talking about, the motion for summary  
21 something?

22 A. No, ma'am.

23 Q. Did you file it under this case number or another  
24 case?

25 A. Yes, ma'am, it was filed under this case number.

1 Q. Do you have a -- a copy of that?

2 A. I didn't -- I didn't receive a -- a copy of it from  
3 the Clerk of Court. But I did -- I did send it to the Clerk  
4 of Court. And I filed it under this case number -- this case  
5 number.

6 Q. Okay. Do you understand that no one has a copy of  
7 that? Even the Court doesn't have a copy of that in its file.

8 And I'll ask the Court -- although I've never done  
9 this before -- to take a moment and ask the Court again to  
10 review the Court file to make sure that there's nothing in  
11 there that was missed.

12 But I know I don't have a copy of it. And  
13 apparently opposing counsel, they don't have a copy.

14 MS. ELLIOTT: And maybe we just don't have filed --  
15 in the file because I didn't pull the file for it. But,  
16 nevertheless, it doesn't pertain to the indictment ---

17 THE COURT: Anyway, it is not an issue today. So,  
18 there is not even any need to go down that road.

19 MS. WOLF: All right.

20 Q. (By Ms. Wolf) What I'm trying to establish is  
21 perhaps you filed it in another action. But, nevertheless,  
22 the judge has said he is not going to hear anything concerning  
23 that litigation.

24 The only thing he is going to hear today is  
25 evidence on the post-conviction relief seeking setting aside

1 the probation revocation and challenging your appellate  
2 lawyer's performance.

3 That being said, this is your last chance --

4 A I know that.

5 Q. --- to raise one of those issues pertaining to this  
6 PCR application. You're not allowed to talk about -- the  
7 Court will not hear any evidence concerning the murder. You'll  
8 have to pursue that through the other case file? Okay?

9 A See, I'll be -- I'll be barred -- I'll be barred  
10 because the statute of limitation will bar me from raising the  
11 issue that I already have preserved that I have amended.

12 Q. Okay. And that is on the record now. And the judge  
13 has denied that on -- on the State's motion, has denied your  
14 ability to go into that.

15 So, you have it on the record. And that is the  
16 reason you wanted to bring it in was because you feel you'll  
17 be barred if you can't get it in today, correct?

18 A Yeah, I mean that.

19 Q. Okay. Anything else on the petition that we're  
20 here about today?

21 A No.

22 MS. WOLF: All right. Sit tight then. Opposing  
23 counsel will have some questions for you and the judge  
24 may also.

25 MS. ELLIOTT: No questions, Your Honor.

1 THE COURT: All right. You may step down. Thank  
2 you.

3 (The witness stepped down from the witness stand at  
4 11:18 a.m.)

5 THE COURT: All right. Is the State ready to call  
6 their first witness?

7 MS. ELLIOTT: Yes, Your Honor. We would call Ms.  
8 Cleary.

9 (The witness stepped forward to be sworn.)

10 (Whereupon,

11 ELEANOR DUFFY CLEARY, ESQUIRE

12 first being duly sworn, testified as follows:)

13 (Off-the-Record Comments)

14 DIRECT EXAMINATION by MS. ELLIOTT: 11:19 A.M.

15 Q. State your name, please.

16 A. Eleanor Duffy Cleary.

17 Q. And, Ms. Cleary, you're a practicing attorney?

18 A. Yes.

19 Q. And did you represent Hazel Stoudemire on appeal on  
20 a probation revocation?

21 A. Yes, I did.

22 Q. And how were you employed at that time?

23 A. I worked for the Commission of Appellate Defense,  
24 which is part of the South Carolina Commission on Indigent  
25 Defense. And we handled appeals. We -- we handled appeals

1 for people who can't afford to hire their own attorney.

2 Q. So, you specialized in criminal appeals?

3 A. Yes.

4 Q. And how long had you been working -- or how long had  
5 you worked for at the time for the Commission of Appellate  
6 Defense?

7 A. Eight (8) years.

8 Q. And, during -- and in that period of time, about how  
9 appeals did you handle?

10 A. Fifteen hundred (1,500) to two thousand (2,000).

11 Q. And, in that time, approximately how many oral  
12 arguments have you provided to the Supreme Court or the Court  
13 of Appeals?

14 A. I don't know.

15 Q. Hundreds?

16 A. Hundreds.

17 Q. All right. In every case that is -- that is  
18 appealed, does every case have an argument scheduled in the  
19 Appellate Courts?

20 A. Oh, no, no.

21 Q. How did you familiarize yourself with the law or the  
22 trends of the law at -- while you are representing clients on  
23 -- on appeal?

24 A. In general?

25 Q. In general.

1           A.    By reading advance sheets. We have *Wes Law* that we  
2 research. And we are -- we are signed up for the list that  
3 serves the South Carolina Criminal Defense Lawyers and that  
4 keeps us updated on trends.

5           Q.    And did arguing cases give you some indication of  
6 the hot issues or the questions the Court had and where the  
7 Court may have concerns about general areas of criminal law?

8           A.    Yes.

9           Q.    In -- in -- or specifically relating to Mr.  
10 Stoudemire's case, please tell me what you did when you were  
11 assigned this case. And I -- I assume that you were assigned  
12 the case internally; is that correct?

13          A.    Yes.

14          Q.    And, then, what did you do after you -- after you  
15 received that assignment?

16          A.    I read the transcript and I think that this is  
17 probably the only merits brief that I've ever submitted on a  
18 probation revocation case because on probation revocations and  
19 guilty pleas there's almost nothing -- almost never anything  
20 to file an appellate brief on.

21          Q.    And what do you mean by that?

22          A.    Well, there would have been no -- normally no  
23 objections made at the lower court proceedings. In other  
24 words, no -- no error made by the trial judge that could be  
25 raised on appeal.

1           So, I do remember in this case that the trial  
2 attorney had raised an objection, had objected to Mr.  
3 Stoudemire's revocation. And, so, then, I proceeded to do  
4 some detailed research on the revocation issue, you know,  
5 after reading the transcript and whatever else was in the  
6 file.

7           And, also, whenever we do an -- an appeal, at least  
8 when I was there, we never visited personally the defendants  
9 because the only thing that we can raise is whatever is in  
10 that written record in the trial court.

11           So, there is really -- even though we do try to  
12 communicate with our client -- and I certainly should have  
13 sent Mr. Stoudemire a copy of our brief -- there is really  
14 nothing that they can tell us about their case that we can  
15 include in the record.

16           Q.    Because you're bound by what happened at the trial  
17 court?

18           A.    Yes.

19           Q.    Okay. And, upon reading the transcript and  
20 conducting research, what did you decide or what did you  
21 determine was the best course for this appeal?

22           A.    Well, Jason had raised the issue that his violation  
23 wasn't willful. But he had also mentioned that -- or he had  
24 also said on the record that it was also -- he had not  
25 violated it yet.

1 My research, and my understanding of the law under  
2 *State vs. Hamilton*, is that willfulness, that determination  
3 only comes into play if the issue is whether the probationer  
4 failed to pay fines or restitution.

5 So, I still wanted to be able to do a merits brief  
6 because I think I can speak for all public defenders over  
7 there, we -- we delighted in being able to do a merits brief  
8 and being able to do a case where maybe we'll get an argument  
9 and maybe we will be able to set some new law.

10 So, even though it wasn't precisely what Jason had  
11 argued, I had argued that there was no factual basis because  
12 he had not actually violated probation; he had not failed to  
13 report.

14 The -- the citation said that --- I think it said  
15 that in the future he will not be able to report. So, I  
16 argued there was no factual basis and not -- not that it  
17 showed willfulness because, you know, we have credibility --  
18 we have to have credibility with the Court, so, I'm not going  
19 to argue something that I don't think there -- there is case  
20 law to back me up on.

21 Q. And did the Court of Appeals' opinion address  
22 willfulness? Have you had an opportunity to read that?

23 A. Yes.

24 Q. In any way?

25 A. Yes. They basically said it's not -- the -- the

1 issue that I raised wasn't precisely the one that the trial  
2 attorney raised, but even as he had raised it -- you know,  
3 even if I had written a brief on the issue of willfulness, I  
4 wouldn't have won anyway because willfulness only applies  
5 fines and/or restitution.

6 Q. Okay. And is that the reason you argued and briefed  
7 the -- the issue the way you did?

8 A. Yes.

9 Q. Was it a matter of appellate strategy?

10 A. Yes. I -- I really thought maybe we might have a  
11 chance with a factual basis argument.

12 MS. ELLIOTT: I have no further questions, Your  
13 Honor.

14 THE COURT: Okay. Ms. Wolf?

15 MS. WOLF: Thank you, Your Honor.

16 THE COURT: Yes, ma'am.

17 CROSS EXAMINATION by MS. WOLF:

11:24 A.M.

18 Q. Ma'am, in reading the ruling that resulted from your  
19 appeal, did the Court address the issue you raised?

20 A. Yes, sum -- summarily. I can't remember precisely  
21 what they said, but I -- I think it was that there was -- they  
22 basically said that there was a factual basis.

23 Q. Okay. And did they look at what Jason had put on  
24 the record and -- and commented on that or took that into  
25 consideration do you believe?

1           A.    Yes.  Like I said, they basically said if -- if I  
2 had argued that, I wouldn't have won.

3           Q.    All right.  Are you aware of any legal argument you  
4 could have presented which would have resulted in a different  
5 outcome from the Court of Appeals?

6                   (Brief Pause)

7           A.    No, I -- I can't think of any.

8           Q.    All right.

9           MS. WOLF:  Just a minute, your Honor.

10                   (Off-the-Record Discussion)

11           Q.    (By Ms. Wolf)  Mr. Stoudemire has a concern that  
12 perhaps his -- his procedural due process rights were violated  
13 when you chose not to specifically pursue the objection raised  
14 by Mr. Chehowsky.  Can you comment on whether you felt there  
15 was a denial of his Constitutional Rights?

16           A.    Well, usually, when we get a record, and it's  
17 usually from a trial, there will be many, many issues raised  
18 by the trial attorney.

19                   And it's our job, as appellate defenders, to pick  
20 the issues that we think that we can win.  And if there's --  
21 if there is a ruling made by judge that is, you know, just  
22 clearly right, we are going to lose credibility with the Court  
23 if we try to argue that he was wrong.

24                   We have to be able to focus on the ones that we can  
25 win on.  And that's -- that's what you learn as an appellate

1 defender that, even if the client wants you to raise every  
2 single possible preserved issue, you can't do that because the  
3 Court will be distracted from your good issue.

4 And they will also not believe anything you write in  
5 the future.

6 Q. Okay.

7 (Off-the-Record Discussion)

8 MS. WOLF: Thank you, Your Honor. That's all, Your  
9 Honor.

10 THE COURT: Very well. Anything further from the  
11 State?

12 MS. ELLIOTT: That would be the State's case, Your  
13 Honor.

14 THE COURT: Thank you very much. You may step down.

15 (The witness stepped down from the witness stand at  
16 11:26 a.m.)

17 THE COURT: Based upon the record I've heard today,  
18 I hereby find that there has not been ineffective  
19 assistance of appellate counsel; in fact, probably just  
20 the opposite.

21 She appears to be very, very smart and did a good  
22 job. And the Court wants to thank you.

23 And you did too, Ms. Wolf, and I appreciate your  
24 patience and your professionalism today also.

25 MS. WOLF: Thank you, Your Honor.

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MS. ELLIOTT: Thank you, Your Honor.

THE COURT: Thank you.


(Whereupon, the proceeding concluded at 11:26 p.m.)

REPORTER'S CERTIFICATE

I, the undersigned **PAMELA FAUCETTE**, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that I acted as the Court reporter at the foregoing proceeding; that the foregoing pages, numbered 1 through 36, were transcribed by me and represent a complete and accurate transcription of said proceeding to the best of my knowledge and belief.

I do further certify that I am not of counsel for or in the employment of either of the parties to this action, nor am I interested in the results of this action.

June 21, 2010

  
Pamela S. Faucette  
Official Court Reporter  
Seventh Judicial Circuit

V.000  
1-6-10

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF SPARTANBURG )  
 )  
 Hazel Stoudemire, #220501, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 SEVENTH JUDICIAL CIRCUIT

2008-CP-42-1056

ORDER OF DISMISSAL

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This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 27, 2009. The Respondent made its Amended Return and Motion to Dismiss on or about June 19, 2009. An evidentiary hearing into the matter was convened on November 4, 2009, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Alexandria Wolf, Esquire. Salley W. Elliott, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Eleanor Duffy Cleary, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's direct appeal records, the Amended Return and Motion to Dismiss, and the guilty plea transcript.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. In April 1995, the Applicant was charged in Cherokee and Spartanburg counties for ten (10) counts of burglary – 2<sup>nd</sup> degree (non-violent) (1995-GS-11-554, 1995-GS-42-1837, -1838, -1841, -1842, -1844, -

Computer

1851, -1853, -1855, & -1862). On April 21 1995, the Applicant waived presentment to the grand jury and entered a plea pursuant to Alford v. N.C. Upon information and belief Applicant was represented by counsel from the law firm of Bryant and Devine at the plea. Applicant was sentenced by the Honorable L. Casey Manning to fifteen (15) years suspended upon the service of five (5) years probation and restitution. Subsequently, Applicant was charged with violating probation as a result of failure to comply with conditions of probation due to the life sentence he received for murder on April 13, 2000. He was represented by Jason Chehoski, Esquire, at the probation revocation hearing. On June 17, 2005, the Honorable Gordon G. Cooper revoked Applicant's probation in full.

The Applicant appealed and the matter was affirmed by the South Carolina Court of Appeals on April 4, 2007. State v. Stoudemire, Up. Op. No. 2007-UP-150 (filed April 4, 2007). The Applicant was represented on appeal by Eleanor Duffy Cleary, Esquire.

**ALLEGATIONS**

In his application, the Applicant alleges he is being held in custody unlawfully the following reasons:

1. Ineffective Assistance of Appellate Counsel; and
2. "Ex Post Facto Clause Violationing."

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**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon his or her credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80

(2003).

### Ineffective Assistance of Appellate Counsel

The Applicant alleges he received ineffective assistance of appellate counsel when counsel did not raise the issue in his appeal that his probation revocation counsel raised at Applicant's probation revocation hearing. This Court finds the issue is without merit and is denied and dismissed.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Applicant testified that he pled guilty in 1995 pursuant to N.C. v. Alford, to burglar

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and received probation, which was to commence after his service of six-years of a Youthful Offender Act sentence. Applicant testified that in 2000, prior to his beginning his probation, he was arrested for murder and subsequently had his probation revoked. Applicant also testified that since he was in prison for life, the Court converted his restitution to a civil judgment. Applicant testified that he wanted the Court to set aside the probation revocation hearing issues regarding the unrelated murder charge and he wanted the Court to look into the procedural due process issues he raised in his application.

Applicant further testified that he believed the South Carolina Court of Appeals stated that his probation revocation was affirmed because his appellate attorney did not raise issues that had been preserved for review. Applicant stated that the Court of Appeals did not even hear oral arguments on his case. Applicant testified that he never received a brief from Appellate Counsel. Applicant testified that he believed probation revocation counsel did a pretty good job raising and preserving issues, but that appellate counsel did not raise any of the issues on appeal. Applicant also testified that he was prejudiced because he did not have his appeal heard on other issues and believed his probation revocation would have been reversed had counsel raised the issues.

Appellate Counsel testified that while working for the South Carolina Office of Appellate Defense, she specialized in criminal appeals and prepared thousands of appeals during her eight (8) years working there. Counsel testified that she also prepared and argued hundreds of cases before the appellate courts; however, she testified that the courts do not designate every case for oral argument. Counsel testified that in preparation of appeals, she reviews advance sheets, conducts requisite research, and reviews information from a listserv for criminal defense lawyers.

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Appellate Counsel testified that she reviewed the transcript in this case and prepared a brief for Applicant's appeal. Counsel testified that it was her opinion an inadequate factual basis for the revocation existed and chose that issue to present in a brief on the merits. Counsel stated that she is bound by the record in presenting and arguing issues and that Applicant would not have been able to expand on the record had he been provided with a copy of her proposed brief. Appellate counsel testified that her strategy was to spend more time on the factual based argument that she felt offered a greater likelihood of success on appeal. Appellate counsel testified that Applicant's probation revocation counsel argued Applicant's probation violation was not willful and probation had not even been violated at the time of the revocation hearing. Counsel testified that even though she did not raise the issue that probation revocation counsel argued at the hearing, the Court of Appeals addressed the "willfulness" issue and subsequently stated in the opinion that the appeal would not have been granted on that issue either.

On cross-examination, Appellate Counsel testified that the Court of Appeals summarily addressed the issue she raised and also considered what was in the record from the probation revocation hearing. Counsel testified that she was not aware of anything else she could have argued which would have led to a different result. Counsel testified that it is her obligation to choose issues she believes will be successful and not to present issues with little merit that might distract the Court from the stronger issues.

This Court finds that Applicant's interpretation of the Court of Appeals opinion affirming his probation revocation to be incorrect. This Court finds the record is clear that the Court of Appeals considered both the issue raised by appellate counsel and the issue of "willfulness" raised by probation revocation counsel during the revocation hearing. This Court, based on the record and testimony at the hearing, finds that appellate counsel raised the a viable issue on

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appeal.

Accordingly, this Court finds the Applicant has failed to prove that appellate counsel was deficient in her representation of the Applicant. This Court finds that counsel is a competent and experienced attorney who provided knowledgeable representation and who exercised reasonable appellate strategy in this appeal. The Applicant failed to present specific and compelling evidence that Appellate Counsel committed either errors or omissions in her representation of the Applicant or, specifically, that counsel failed to present significant and obvious issues on appeal. This Court also finds the Applicant has failed to prove that he was prejudiced by any alleged deficiencies of Appellate Counsel's performance. This Court concludes the Applicant has not met his burden of proof regarding this claim. Therefore, the allegation of ineffective assistance of appellate counsel is denied.

**Due Process Violation**

Applicant also presents the claim of "ex post facto violationing" in his application. This Court finds the issue is not cognizable as a post-conviction relief claim as this appears to be a matter for the probation revocation hearing on appeal therefrom. Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). Accordingly, the allegation is denied and dismissed.

**Other convictions**

To the extent Applicant attempts to challenge the 1995 burglary convictions and sentences or the 2000 murder conviction and sentence, this Court finds that Applicant may only litigate allegations relating to matters related to his 2005 probation revocation. The 2000 murder conviction was not challenged in this application; it is unrelated to these proceedings and may not be challenged herein.

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This Court finds that Applicant's PCR Application, as it relates to allegations regarding Applicant's 1995 plea and convictions, 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, *et. seq.*

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 April 21, 1995. This Application was filed on February 27, 2008, which was more than twelve (12) years after the one-year statutory filing period had expired.

To the extent Applicant attempts to challenge his 1995 plea, this Court finds that the doctrine of laches also bars the Applicant from raising these allegations in a post-conviction relief application. The Applicant has filed this application nearly thirteen (13) years after he was convicted. Absent some explanation or justification for the delay in seeking post-conviction relief, laches will prevent an Applicant from seeking collateral review of his conviction, especially where the delay affects the availability of evidence to refute the applicant's claims. McElrath v. State, 276 S.C. 282, 277 S.E.2d 890 (1981); Honeycutt v. Ward, 612 F.2d 36 (2nd Cir. 1979). Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002).

To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. This requirement "guards the state's legitimate expectation that it will not be called upon without due cause, to defend the integrity of convictions that occurred many years

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
2009 DEC 31 PM 12:40  
MARC KITCHEMS

ago, where records and witnesses are no longer available." McElrath, 276 S.C. at 283. Rule 9(a) of the Federal Habeas Corpus Act recognizes the doctrine of laches. The Rule states in pertinent part:

A petition may be dismissed if it appears that the state of which the Respondent an officer has been prejudiced in its ability to respond to the Petition by delay its filing unless the Petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

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CLERK OF COURT  
SPARTANBURG COUNTY  
2009 DEC 31 PM 12:40  
MARGARET HENS

Furthermore the South Carolina legislature has recognized this problem and instituted a one-year statute of limitations. See S.C. Code Ann. §17-27-45(a).

This Court finds that the Applicant's delay has greatly prejudiced the Respondent, as a transcript of the Applicant's plea is most likely now unavailable and the identity of plea counsel is not known. If the Applicant had sought post-conviction relief within a reasonable time after his plea, this problem would not exist.

### CONCLUSION

Based on all the foregoing, 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. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

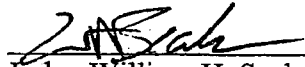
This Court advises the parties that in order to secure the appropriate appellate review, notice of appeal must be served and filed within thirty (30) days after receipt by counsel of notice of entry of this order. See Rules 203 and 243 of the South Carolina Appellate Court Rules. This Court notes that post-conviction relief counsel must advise an applicant of the right to seek appellate review of a post-conviction relief order. State v. Bray, 366 S.C. 137, 620 S.E.2d 743 (2005). Also, pursuant to Austin v. State, 305 S.C. 453, 409 S.E. 2d 395 (1991), an

applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRPC, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on an applicant's behalf.

**IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED** this 29 day of December, 2009.

  
 \_\_\_\_\_  
 Judge William H. Seals, Jr.  
 Presiding Judge  
 Seventh Judicial Circuit

Mauon, South Carolina

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 CLERK OF COURT  
 SPARTANBURG COUNTY  
 2009 DEC 31 PM 12:40  
 MARC KITCHENS

69

WITNESSES

Barry Pridgeon  
Spartanburg County Sheriff's Dept.  
Spartanburg, SC 29304

- 1. SENTENCE MADE
- 2. REPORT ENDED
- 3. CARD FILLED
- 4. INDEXED
- 5. CHECKED WARRANTS
- 6. CHECKED SIGNATURE
- 7. ASSESSMENT AND FINE CARD MADE  New York

ARREST WARRANT COPY 658673

ACTION OF GRAND JURY advised as to  
After being fully advised as to  
my legal rights, I hereby waive  
presentment to the Grand Jury.

Sign Hazel Stodemire

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury

Date:

DOCKET NO. 95-GS-42-1837  
The State of South Carolina,

County of Spartanburg (05A)  
02/10/95

Computer

COURT OF GENERAL SESSIONS

APR 24 1995 TERM

THE STATE

vs.

Hazel Stodemire

Indictment for Burglary  
(Dwelling)

Holman C. Gossett, Jr.

I Hazel Stodemire  
hereby appear in my own proper person and plead  
guilty to Burglary 1st (DW)  
On the within indictment.  
Witness: Raymond Stodemire  
Holman C. Gossett, Jr.  
Clerk of Court 4-21-95

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS  
SIMPSON COUNTY

County of \_\_\_\_\_  
Case No. \_\_\_\_\_  
Date \_\_\_\_\_  
Time \_\_\_\_\_  
Judge \_\_\_\_\_

C/W \_\_\_\_\_  
Name of original offense \_\_\_\_\_  
Conviction # \_\_\_\_\_  
Sanction GAF # \_\_\_\_\_  
Date of original offense \_\_\_\_\_  
Original sentence \_\_\_\_\_  
**ORDER**

The above named defendant has been charged with violating the conditions of probation ordered on \_\_\_\_\_ at the Court of General Sessions of \_\_\_\_\_ County as set forth in the attached written probation order. After reading the evidence and being advised in the presence of \_\_\_\_\_ of the rights of the defendant, the defendant has violated the following conditions of probation: (If you have a written order, list the conditions violated.)

It is hereby ordered that the above named defendant's probation is hereby revoked and the defendant is to be sentenced to \_\_\_\_\_ years in the \_\_\_\_\_ of the \_\_\_\_\_ of \_\_\_\_\_.

The above named defendant's probation is hereby revoked and the defendant is to be sentenced to \_\_\_\_\_ years in the \_\_\_\_\_ of the \_\_\_\_\_ of \_\_\_\_\_.

The above named defendant's conditions of probation as provided to the defendant are hereby terminated and the defendant is to be discharged from supervision of this Court.

Additional conditions imposed by the Court: \_\_\_\_\_

The defendant is given credit for pre-arrest detention time or current probation violation to be calculated and applied by the SC Department of Corrections.

The defendant has previously served \_\_\_\_\_ months/years on this sentence (Specify sentence type and/or prior partial revocation time)

\_\_\_\_\_ day of \_\_\_\_\_, 2015  
\_\_\_\_\_ SC

\_\_\_\_\_  
Presiding Judge  
\_\_\_\_\_ Judicial Circuit

are hereby advised that under the law the Court may at any time revoke or modify any condition of this probation; impose any lawful conditions it deems fit; or extend your period of probation not to exceed five (5) years. At any time within the period of your probation, the Court may require you to serve any of the original sentence imposed.

I, the undersigned, do hereby certify that I have read, or have had read to me, the order and the conditions set out therein; I agree to comply with such conditions and the conditions attached to this probation order during the period of my probation; I have received a copy of this Court's order and all attachments.

Defendant's Signature \_\_\_\_\_

Witnessed by \_\_\_\_\_

Signed this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ at \_\_\_\_\_ SC

FORM 1 (12/87)

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF Spartanburg )

INDICTMENT FOR BURGLARY  
(DWELLING)

At a Court of General Sessions, convened on APR 13 1995,  
the Grand Jurors of Spartanburg County present upon their oath:

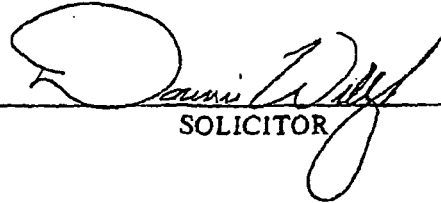
**COUNT ONE — BURGLARY IN THE FIRST DEGREE  
(DWELLING)**

That \_\_\_\_\_  
did in \_\_\_\_\_ County on or about \_\_\_\_\_,  
willfully and unlawfully enter the dwelling of \_\_\_\_\_  
without consent and with the intent to commit a crime therein and the defendant \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**COUNT TWO — BURGLARY IN THE SECOND DEGREE  
(DWELLING)**

That Hazel Stodemire  
did in Spartanburg County on or about January 27, 1995,  
willfully and unlawfully enter the dwelling of Scott Burrell  
without consent and with the intent to commit a crime therein.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

  
SOLICITOR

WITNESSES

Doug Smith  
Spartanburg County Sheriff's Dept.  
Spartanburg, SC 29304

- 1. SENTENCE MADE  *none*
- 2. REPORT ENDED  **Computer**
- 3. CARD FOLDED
- 4. INDEXED
- 5. CHECKED WARRANTS
- 6. CHECKED SIGNATURE
- 7. ASSESSMENT AND FINE CARD MADE
- ARREST WARRANT NO. *E-318566*
- 8. TRAFFIC VIOLATIONS COPY

ACTION OF GRAND JURY as to  
After being fully advised as to  
my legal rights, I hereby waive  
presentment to the Grand Jury.

*Sgt. Hazel Stodemire*  
Foreman of Grand Jury

VERDICT

Foreman of Petit Jury

Date:

POCKET NO. *95-GS-42-1838*  
The State of South Carolina,

County of Spartanburg (05A)

02/13/95

COURT OF GENERAL SESSIONS

APR 24 1995 TERM

THE STATE

vs.

Hazel Stodemire

Indictment for Burglary  
(Dwelling)

Holman C. Gossett, Jr.

I *Hazel Stodemire*  
hereby appear in my own proper person and plead  
guilty to *Burg 2d (M)*  
On the within indictment.  
Witness: *Holman C. Gossett, Jr.*  
Clerk of Court *4-21-95* *BA*

FORM 1 (12/87)

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF Spartanburg )

INDICTMENT FOR BURGLARY  
(DWELLING)

At a Court of General Sessions, convened on APR 13 1995,  
the Grand Jurors of Spartanburg County present upon their oath:

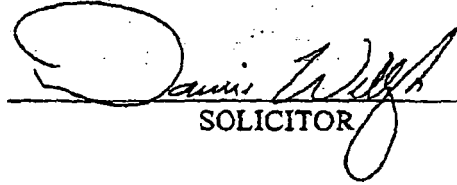
**COUNT ONE — BURGLARY IN THE FIRST DEGREE**  
**(DWELLING)**

That \_\_\_\_\_  
did in \_\_\_\_\_ County on or about \_\_\_\_\_,  
willfully and unlawfully enter the dwelling of \_\_\_\_\_  
without consent and with the intent to commit a crime therein and the defendant \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**COUNT TWO — BURGLARY IN THE SECOND DEGREE**  
**(DWELLING)**

That Hazel Stodemire  
did in Spartanburg County on or about January 27, 1995,  
willfully and unlawfully enter the dwelling of Larry O'Sullivan  
without consent and with the intent to commit a crime therein.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

  
SOLICITOR

DU  
DOCKET NO. GS-42-1842

The State of South Carolina,

County of Spartanburg (05A)

02/09/95

COURT OF GENERAL SESSIONS

APR 24 1995 TERM

THE STATE

vs.

Hazel Stodemire

Indictment for Burglary  
(Dwelling)

Holman C. Gossett, Jr.

WITNESSES

Harry Pridgeon

Spartanburg County Sheriff's Dept.

Spartanburg, SC 29304

- 1. SENTENCE MADE  *None*
- 2. REPORT ENDED  **Computer**
- 3. CARD PULLED
- 4. INDEXED
- 5. CHECKED WARRANTS
- 6. CHECKED SIGNATURE
- 7. ASSESSMENT AND FINE CARD MADE
- ARREST WARRANT NO. E 368677
- 8. TRAFFIC VIOLATIONS COPY

ACTION OF ~~Grand Jury~~ *Grand Jury*  
After being fully advised as to  
my legal rights, I hereby waive  
presentment to the Grand Jury.

Sign Hazel Stodemire

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury

Date:

I Hazel Stodemire  
hereby appear in my own proper person and plead  
ALFOED guilty to Burglary Dwelling  
On the within indictment.  
Witness: Holman C. Gossett, Jr.  
Holman C. Gossett, Jr.  
Clerk of Court 4-21-95 *Bm*

FORM 1 (12/87)

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF Spartanburg )

INDICTMENT FOR BURGLARY  
(DWELLING)

APR 13 1995

At a Court of General Sessions, convened on \_\_\_\_\_,  
the Grand Jurors of Spartanburg County present upon their oath:

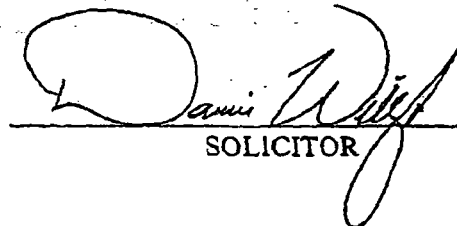
**COUNT ONE — BURGLARY IN THE FIRST DEGREE  
(DWELLING)**

That \_\_\_\_\_  
did in \_\_\_\_\_ County on or about \_\_\_\_\_  
willfully and unlawfully enter the dwelling of \_\_\_\_\_  
without consent and with the intent to commit a crime therein and the defendant \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**COUNT TWO — BURGLARY IN THE SECOND DEGREE  
(DWELLING)**

That Hazel Stodemire  
did in Spartanburg County on or about January 27, 1995,  
willfully and unlawfully enter the dwelling of Anthony Vance Norton  
without consent and with the intent to commit a crime therein.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

  
SOLICITOR

E-421161

95-~~BOOKING~~ GS-42-1862

WITNESSES

Richard Gary  
Spartanburg County Sheriff's Dept.  
Spartanburg, SC 29304

The State of South Carolina,

County of Spartanburg (05A)

02/20/95

COURT OF GENERAL SESSIONS

APR 24 1995 TERM

THE STATE

vs.

Hazel Stoudemire

Indictment for Burglary  
(Dwelling)

Holman C. Goseett, Jr.

- 1. SENTENCE MADE  *None*
- 2. REPORT ENDED  **Computer**
- 3. CARD PULLED
- 4. INDEXED
- 5. CHECKED WARRANTS
- 6. CHECKED SIGNATURE
- ASSESSMENT AND FINE CARD MADE
- ARREST WARRANT NO.
- TRAFFIC VIOLATIONS COPY

ACTION OF GRAND JURY

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

For Sign of Grand Jury *Hazel Stoudemire*

VERDICT

I Hazel Stoudemire  
hereby appear in my own proper person and plead  
ALFRED guilty to Burg. 2d (M)  
On the within indictment.  
Witness: Hazel Stoudemire  
Holman C. Goseett, Jr.  
Clerk of Court 4-21-95 BM 20

96 Foreman of Petit Jury

Date:

STATE OF SOUTH CAROLINA )  
COUNTY OF Spartanburg )

INDICTMENT FOR BURGLARY  
(DWELLING)

APR 13 1995

At a Court of General Sessions, convened on \_\_\_\_\_,  
the Grand Jurors of Spartanburg County present upon their oath:

COUNT ONE — BURGLARY IN THE FIRST DEGREE  
(DWELLING)

That \_\_\_\_\_  
did in \_\_\_\_\_ County on or about \_\_\_\_\_,  
willfully and unlawfully enter the dwelling of \_\_\_\_\_  
without consent and with the intent to commit a crime therein and the defendant \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

COUNT TWO — BURGLARY IN THE SECOND DEGREE  
(DWELLING)

That Hazel Stoudemire  
did in Spartanburg County on or about February 6, 1995,  
willfully and unlawfully enter the dwelling of Steve Turner  
without consent and with the intent to commit a crime therein.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

  
SOLICITOR

WITNESSES

Barry Pridgeon  
Spartanburg County Sheriff's Dept.  
Spartanburg, SC 29304

- 1. SENTENCE MADE  *fine*
- 2. REPORT ENDED  *Computer*
- 3. CARD PULLED
- 4. INDEXED
- 5. CHECKED WARRANTS
- 6. CHECKED SIGNATURE
- 7. ASSESSMENT AND FINE CARD MADE  *due time*
- 8. TRAFFIC VIOLATIONS COPY  *E-318681*

ACTION OF ~~my~~ advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Sign *Hazel Stodemire*

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury

Date:

DOCKET NO. *GS-42-1841*

The State of South Carolina,

County of Spartanburg (05A)

02/10/95

COURT OF GENERAL SESSIONS

APR 24 1995 TERM

THE STATE

vs.

Hazel Stodemire

Indictment for Burglary (Dwelling)

Holman C. Gossett, Jr.

I Hazel Stodemire  
 hereby appear in my own proper person and plead  
 ALLEGED guilty to Burglary (DW)  
 On the within indictment.  
 Witness: Thyrl Stodemire  
Holman C. Gossett, Jr.  
 Clerk of Court 4-27-95

FORM 1 (12/87)

STATE OF SOUTH CAROLINA )  
COUNTY OF Spartanburg )

INDICTMENT FOR BURGLARY  
(DWELLING)

APR 13 1995

At a Court of General Sessions, convened on \_\_\_\_\_  
the Grand Jurors of Spartanburg County present upon their oath:

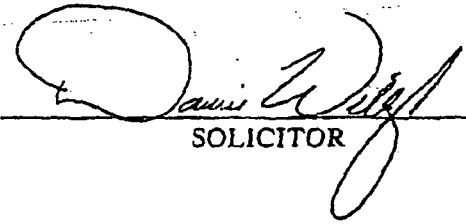
**COUNT ONE — BURGLARY IN THE FIRST DEGREE  
(DWELLING)**

That \_\_\_\_\_  
did in \_\_\_\_\_ County on or about \_\_\_\_\_  
willfully and unlawfully enter the dwelling of \_\_\_\_\_  
without consent and with the intent to commit a crime therein and the defendant \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**COUNT TWO — BURGLARY IN THE SECOND DEGREE  
(DWELLING)**

That Hazel Stodemire  
did in Spartanburg County on or about January 27, 1995  
willfully and unlawfully enter the dwelling of Mary Sue Godfrey  
without consent and with the intent to commit a crime therein.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

  
\_\_\_\_\_  
SOLICITOR

9 95CKET NO. S-42-1844

The State of South Carolina,

County of Spartanburg (05A)

02/10/95

COURT OF GENERAL SESSIONS

APR 24 1995 TERM

THE STATE

vs.

Hazel Stodemire

Indictment for Burglary (Dwelling)

Holman C. Gossett, Jr.

WITNESSES

Doug Smith

Spartanburg County Sheriff's Dept.  
Spartanburg, SC

- 1. SENTENCE MADE
- 2. REPORT ENDED
- 3. CARD PULLED
- 4. INDEXED
- 5. CHECKED WARRANTS
- 6. CHECKED SIGNATURE
- 7. ASSESSMENT AND FINE CARD MADE
- 8. ARREST VIOLATIONS COPY
- ARREST WARRANT NO. 2568685

Computer

ACTION OF GRAND JURY

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Foreman of Grand Jury *Hazel Stodemire*

VERDICT

Foreman of Petit Jury

Date:

I Hazel Stodemire  
 hereby appear in my own proper person and plead  
 guilty to Burg 2d (dw)  
 On the within indictment.  
 Witness: Hazel Stodemire  
Holman C. Gossett, Jr.  
 Clerk of Court 4-24-95

FORM 1 (12/87)

STATE OF SOUTH CAROLINA )  
COUNTY OF Spartanburg )

INDICTMENT FOR BURGLARY  
(DWELLING)

At a Court of General Sessions, convened on APR 13 1995,  
the Grand Jurors of Spartanburg County present upon their oath:


**COUNT ONE — BURGLARY IN THE FIRST DEGREE  
(DWELLING)**

That \_\_\_\_\_  
did in \_\_\_\_\_ County on or about \_\_\_\_\_,  
willfully and unlawfully enter the dwelling of \_\_\_\_\_  
without consent and with the intent to commit a crime therein and the defendant \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**COUNT TWO — BURGLARY IN THE SECOND DEGREE  
(DWELLING)**

That Hazel Stodemire  
did in Spartanburg County on or about December 7, 1994,  
willfully and unlawfully enter the dwelling of Tony Watson  
without consent and with the intent to commit a crime therein.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

  
\_\_\_\_\_  
SOLICITOR

DOCKET NO. 95-GS-42-1851  
The State of South Carolina,

County of Spartanburg (05A)  
02/09/95

WITNESSES

Doug Smith  
Spartanburg County Sheriff's Dept.  
Spartanburg, SC 29304

- 1. SENTENCE MADE  None ~~sent to SCDC~~
- 2. REPORT ENDED  Computer
- 3. CARD FILLED
- 4. INDEXED
- 5. CHECKED WARRANTS
- 6. CHECKED SIGNATURE
- 7. ASSESSMENT AND FINE CARD MADE
- 8. ARREST WARRANT NO. 68039

COURT OF GENERAL SESSIONS  
APR 24 1995

TERM

THE STATE

vs.

Hazel Stodemire

Indictment for Burglary  
(Dwelling)

I Hazel Stodemire  
hereby appear in my own proper person and plead  
guilty to Burg 2d (wv)

On the within indictment.

Witness: Hazel Stodemire

Hester L. Selvin  
Clerk of Court 4-21-95 BM  
20

ACTION OF GRAND JURY  
After being fully advised as to  
my legal rights, I hereby waive  
presentment to the Grand Jury.

Sign Hazel Stodemire  
Foreman of Grand Jury

VERDICT

Holman C. Gossett, Jr.

Foreman of Petit Jury

Date:



3  
DOCKET NO. G S - 42 - 1853

The State of South Carolina,

County of Spartanburg (05A)

02/09/95

WITNESSES

Doug Smith

Spartanburg County Sheriff's Dept.  
Spartanburg, SC 29304

- 1. SENTENCE MADE Note:  Sent to SCDC
- 2. REPORT ENDED  **Computer**
- 3. CARD FILLED
- 4. INDEXED
- 5. CHECKED WARRANTS
- 6. CHECKED SIGNATURE
- 7. ASSESSMENT AND FINE CARD MADE
- ARREST WARRANT NO. 6-368043
- 8. TRAFFIC VIOLATIONS COPY

COURT OF GENERAL SESSIONS

APR 24 1995 TERM

THE STATE

vs.

Hazel Stodemire

ACTION OF GRAND JURY  
After being fully advised as to  
my legal rights, I hereby waive  
presentment to the Grand Jury.

Sign Hazel Stodemire  
Foreman of Grand Jury

Indictment for Burglary  
(Dwelling)

VERDICT

Holman C. Gossett, Jr.

14  
Foreman of Petit Jury

Date:

I Hazel Stodemire  
hereby appear in my own proper person and plead  
ALLEGED  
guilty to Burg Del (all)  
On the within indictment.  
Witness: Hazel Stodemire  
Holman C. Gossett, Jr.  
Clerk of Court 4-21-95

FORM 1 (12/87)

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF Spartanburg )

INDICTMENT FOR BURGLARY  
(DWELLING)

APR 13 1995

At a Court of General Sessions, convened on \_\_\_\_\_,  
the Grand Jurors of Spartanburg County present upon their oath:

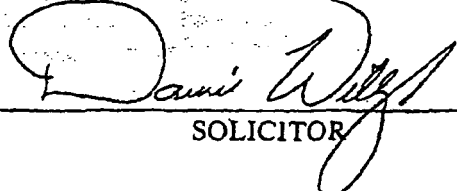
**COUNT ONE — BURGLARY IN THE FIRST DEGREE  
(DWELLING)**

That \_\_\_\_\_  
did in \_\_\_\_\_ County on or about \_\_\_\_\_,  
willfully and unlawfully enter the dwelling of \_\_\_\_\_  
without consent and with the intent to commit a crime therein and the defendant \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**COUNT TWO — BURGLARY IN THE SECOND DEGREE  
(DWELLING)**

That Hazel Stodemire  
did in Spartanburg County on or about February 1, 1995,  
willfully and unlawfully enter the dwelling of Gene E. Henderson  
without consent and with the intent to commit a crime therein.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

  
\_\_\_\_\_  
SOLICITOR

WITNESSES

Doug Smith

Spartanburg County Sheriff's Dept.

Spartanburg, SC ~~Subject to SCDC~~

2. REPORT ENDED

Computer

3. CARD PULLED

4. INDEXED

5. CHECKED WARRANTS

6. CHECKED SIGNATURE

7. ASSESSMENT AND FINE CARD MADE

8. TRAFFIC VIOLATIONS COPY ARREST WARRANT NO.

6368047

ACTION OF GRAND JURY

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Signature: Hazel Stodewire  
Foreman of Grand Jury

VERDICT

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Foreman of Petit Jury

Date:

DOCKET NO. ~~95-GS-42-1855~~  
The State of South Carolina,

County of Spartanburg (05A)

02/09/95

COURT OF GENERAL SESSIONS

APR 24 1995

TERM \_\_\_\_\_

THE STATE

vs.

Hazel Stodewire

Indictment for Burglary (Dwelling)

Holman C. Gossett, Jr.

I Hazel Stodewire hereby appear in my own proper person and plead guilty to Burg Bd (M)

On the within indictment.

Witness: Hazel Stodewire

Holman C. Gossett, Jr.  
Clerk of Court 4-21-95

BR 20



STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF Cherokee )

INDICTMENT FOR BURGLARY  
(DWELLING)

At a Court of General Sessions, convened on April 17, 1995,  
the Grand Jurors of Cherokee County present upon their oath:

**COUNT ONE — BURGLARY IN THE FIRST DEGREE  
(DWELLING)**

That \_\_\_\_\_  
did in \_\_\_\_\_ County on or about \_\_\_\_\_  
willfully and unlawfully enter the dwelling of \_\_\_\_\_  
without consent and with the intent to commit a crime therein and the defendant \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**COUNT TWO — BURGLARY IN THE SECOND DEGREE  
(DWELLING)**

That Hazel Junior Stoudemire  
did in Cherokee County on or about January 18, 1995,  
willfully and unlawfully enter the dwelling of Nicki Stanley  
without consent and with the intent to commit a crime therein.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

  
\_\_\_\_\_  
SOLICITOR

1194

WITNESSES

David Gibson, CCSSO

4-21

ARREST WARRANT NO. E179460

**ACTION OF GRAND JURY**  
After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

*[Signature]*

Foreman of Grand Jury

VERDICT

DOCKET NO.

**The State of South Carolina,**

County of Cherokee

COURT OF GENERAL SESSIONS

April 17 TERM 1995

THE STATE

vs.

Hazel Junior Stoudemire

**Indictment for Burglary  
(Dwelling)**

Holman C. Cossett, Jr.

I, Hazel Stoudemire hereby appear in my own proper person and plead guilty - A Hard to Burg 2nd (dw)

COURT OF THE JUDICIAL

WITNESS:  
*[Signature]*  
G.C.C. PIS. & S.S. BA  
4-21-95

South Carolina Department of Probation, Parole and Pardon Service  
**Violation Report**

State of South Carolina, County of: **Spartanburg**  
 Offender's Name: **Hazel Junior Staudemire**  
 SID#: **00955159**

Warrant#: **W-42-01-0649**  
 Date of Birth: **12/28/74**  
 SCDC#: **220501**

**Indictment Numbers:**  
 95-GS-42-1837, 1838, 1842, 1862, 1841, 1844, 1851, 1853, 1855  
 95-GS-11-554

**Offense and Offense Code:**  
 Burglary 2<sup>nd</sup> (NV)-0080 (9 counts)  
 Burglary 2nd

Supervision Program: **Probation** Begin Date: **08/07/00** End Date: **08/06/05**  
 Supervision Level: **Institutionalized**

Sentencing Judge: **Hon. L. Casey Manning** Sentencing County: **Spartanburg**  
 Sentencing Date: **04/24/95**  
 Location (Bold Response): **SCDC Jail Community**

**Sentence:** 15 years suspended to 6 years probation (each count).

**Special Conditions:** Make restitution with co-defendants jointly and severally.

<u>Indictment#</u>	<u>Amount</u>	<u>Victim</u>
96-GS-42-1837	\$1,085.67	Scott Burrell
95-GS-42-1841	\$3,400.00	Marg Sue Godfrey
95-GS-42-1844	\$1,200.00	Tony Watson
95-GS-42-1851	\$507.74	Flroy Kirkland
95-GS-42-1853	\$325.00	Gene Henderson
95-GS-42-1855	\$150.00	Douglas Splawn
95-GS-11-554	\$4,900.00	Scott Burrell

**Current Address and Summary of Residence:** incarcerated.

**Reporting:** N/A

**Employment Records While Under Supervision:**

Employer	Dates (from -to)	Reason(s) for Leaving	Earnings
N/A			

**Financial Conditions:**

	Total Amount ordered	Pay Period	Total Paid	Date Last Paid	Arrearage	Balance Due
Restitution	\$11,568.41		0	N/A	11,568.41	11,568.41
Fine	\$349.00		0	N/A	\$349.00	\$349.00
Supervision Fee						

South Carolina Department of Probation, Parole and Pardon Services  
Violation Report

Form 1106 (Template) [Revision: D Revision Date: 1/31/1998]  
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Offender's Name: Hazel Junior Soudemire

Prior Violation Dates	Prior Violations	Prior Violation Disposition
	None	

Details of the Present Violation: The offender has willfully violated his conditions of probation by:

- 1) Failed to abide by Local, State, and Federal laws by receiving a sentence of his natural life for Murder on 04-13-00 by the Spartanburg County Court of General Sessions;
- 2) Failed to follow the advice and instructions of agent.

Agent's Recommendation: Full revocation.

Agent's Justification: Offender is serving a life sentence.

David Doss

Date: June 9, 2005

Supervisor's Signature

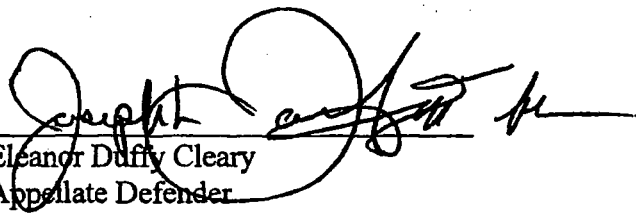
Date:

6-14-05

## CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

October 23rd, 2006



Eleanor Duffy Cleary  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, S. C. 29211-1589  
(803) 734-1343

ATTORNEY FOR APPELLANT.