

PCR

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas  
HONORABLE EDWARD W. MILLER

**RECEIVED**

FEB 27 2014

**S.C. SUPREME COURT**

Case No.: 2012CP2303344

JAMES FREDDIE MILLER, )  
)  
PETITIONER, )  
)  
vs. )  
)  
STATE OF SOUTH CAROLINA )  
)  
RESPONDENT. )

**NOTICE OF APPEAL**

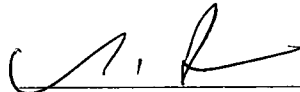
The Petitioner, James Freddie Miller, hereby appeals the Honorable Edward W. Miller's January 23, 2014, order denying post-conviction relief to the Petitioner. A copy of the order on appeal is attached to this notice.

**RECEIVED**

FEB 27 2014

**S.C. SUPREME COURT**

Respectfully submitted,



Brian P. Johnson, Esq.  
522 North Church Street  
Greenville, SC 29601  
Attorney for Petitioner

Date: February 24, 2014  
Other counsel of record: Karen Ratigan  
P.O. Box 11549/Columbia, SC 29211

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas  
HONORABLE EDWARD W. MILLER

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Case No.: 2012CP2303344

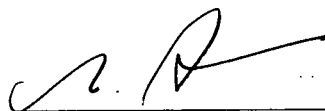
JAMES FREDDIE MILLER, )  
 )  
 PETITIONER, )  
 )  
 vs. )  
 )  
 STATE OF SOUTH CAROLINA )  
 )  
 RESPONDENT. )  
 )

**PROOF OF SERVICE**

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I, Brian P. Johnson, Esq., certify that I have today served the within notice of appeal upon the Respondent by depositing a copy in the United States Mail, postage prepaid, addressed to the attorney of record, Karen Ratigan, at P.O. Box 11549 Columbia, SC 29211.

Respectfully submitted,



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Brian P. Johnson, Esq.  
522 North Church Street  
Greenville, SC 29601  
Attorney for Petitioner

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

JUDGMENT IN A CIVIL CASE  
CASE NO: 2012CP2303344

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMER  
JAN 27 AM 11:42

James Freddie Miller vs. South Carolina State Of

CHECK ONE:

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):  
SCRC (Vol. Nonsuit);  Rule 43(k), SCRC (Settled);  Other: \_\_\_\_\_  
 Rule 12(b), SCRC;  Rule 41(a);
- ACTION STRICKEN (CHECK REASON):  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Other: \_\_\_\_\_  
 Rule 40(j) SCRC;  Bankruptcy:
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):  
 Affirmed;  Reversed;  Remanded;  
 Other: \_\_\_\_\_

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

IT IS ORDERED AND ADJUDGED:  See attached order;  Statement of Judgment by the Court;

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE - Edward W Miller

This judgment was entered on the <sup>1-27-14</sup> , and a copy mailed first class this <sup>1-27-14</sup> to attorneys of record or to parties (when appearing pro se) as follows:

Brian P. Johnson 522 North Church Street  
Greenville, SC 29601

Karen Christine Ratigan PO Box 11549 Columbia,  
SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

*Paul B. Wickensimer*

Paul B. Wickensimer Greenville County Clerk Of Court  
- Clerk of Court

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 James Fred Miller, )  
 S.C.D.C. No. 259635, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2012-CP-23-3344

**ORDER OF DISMISSAL**

FILED-CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL B. WICKENSIMMER  
 2014 JAN 27 AM 11 47

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed May 17, 2012. The Respondent filed a return and motion to dismiss dated July 17, 2012 and an amended return dated October 17, 2012. An evidentiary hearing into the matter was convened on October 22, 2013 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's probation revocation counsel, Tara Waters, Esquire. The Court had before it the transcript of the probation revocation hearing, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the amended return, and the Applicant's Exhibits 1-3.<sup>1</sup>

**PROCEDURAL HISTORY**

The Applicant waived presentment to the Greenville County Grand Jury on the charge of

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<sup>1</sup> At the conclusion of the hearing, this Court left the record open in order to allow the Respondent to obtain a statement from Carlton Andrews. Andrews' letter is attached to this Order as Court's Exhibit 1.

shoplifting, third offense or greater (2009-GS-23-9275). Susannah C. Ross, Esquire represented the Applicant.

On May 11, 2010, the Applicant pled guilty. The Honorable R. Lawton McIntosh sentenced the Applicant to ten (10) years suspended on service of three (3) years and five (5) years probation. Judge McIntosh ordered this sentence to be concurrent with the sentence the Applicant was already serving. The Applicant did not appeal.

On April 3, 2012, the Applicant appeared in court in Laurens County pursuant to a probation citation. He was represented by Tara Waters, Esquire. The Honorable Frank Addy revoked the Applicant's probation and levied a sentence of six (6) years imprisonment. The Applicant did not appeal.

### ALLEGATIONS

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

1. "I was instructed to report on 3-6-2012."
2. "I did everything Judge Jefferson told me to do."
3. "I was not instructed to report on release of drug program."

The Applicant subsequently added the following allegations as to why he believes he is entitled to relief:<sup>2</sup>

1. Ineffective assistance of probation revocation counsel:
  - a. Failed to subpoena a counselor from Morris Village as a witness.
  - b. Failed to subpoena "legal documents from the State of South Carolina" to confirm the State's argument that the in-house drug program was not completed.
  - c. Failed to subpoena mental health records from Morris Village.
  - d. Failed to file an appeal.

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<sup>2</sup> These allegations were contained in a document captioned "Response to Conditional Order of Dismissal" filed on September 11, 2012.

## 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 their 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 Counsel

The Applicant alleges he received ineffective assistance of probation revocation counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). Allegations of ineffective assistance of probation revocation counsel are evaluated under the Strickland standard. 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. at 1241-42.

The Applicant stated he and counsel only had one meeting and that they did not discuss the probation violation report. The Applicant stated Judge Jefferson ordered him to complete in-

patient treatment at Morris Village in November 2011 and that he completed treatment and was released. The Applicant stated he asked counsel to subpoena Carlton Andrews (his counselor at Morris Village) and his paperwork. The Applicant stated he had a letter from Morris Village and that counsel said they did not need to subpoena Andrews. The Applicant stated Andrews could have explained that he completed the treatment program. The Applicant stated counsel never discussed an appeal.

Counsel testified she received numerous documents (including the probation violation report, arrest warrant, defense of indigents form, and acknowledgement of hearing date) and that she reviewed these items with the Applicant. Counsel testified she did not recall speaking with the Applicant about subpoenaing Andrews. Counsel testified she believed his letter was solid enough evidence for the revocation hearing. Counsel testified the allegations were that the Applicant did not complete treatment at Morris Village (or report after release) and did not appear for his follow-up at Gateway. Counsel testified the Applicant had also given false information about needing to leave Morris Village early because his sister had surgery on a certain day (and that the sister did not have her surgery on that day). Counsel testified she researched whether to file a motion to reconsider, but that she ultimately felt it would not have been successful.

This Court finds the Applicant failed to meet his burden of proving counsel should have subpoenaed Andrews to testify at the revocation hearing. At the probation revocation hearing, the Applicant's probation agent relayed the previous and current probation violations to the judge. (Transcript, pp.2-5). Regarding the current violations, the agent stated the Applicant

failed to report upon release from Morris Village facility on 27th of February . . .  
failed to report as instructed by agent 6th of March, failed to follow advice of  
agent by not reporting, failed to complete Morris Village inpatient program as

ordered by Judge Jefferson on November 7th and failed to report Gateway 5th of March for his follow-up.

(Transcript, pp.3-4). The agent stated she had contacted Morris Village and they stated they released him in order to care for his sister after her surgery and then confirmed the surgery had not occurred. (Transcript, p.4-5). The agent also stated the Applicant made threatening comments when the warrant was served on him and that he also had an active bench warrant. (Trial transcript, p.5). During the mitigation portion of the hearing, probation revocation counsel made an extensive argument on the Applicant's behalf. Counsel also presented a letter (from Morris Village) to the judge indicating the Applicant had completed the program (Transcript, p.8). The judge confirmed with the probation agent that she had received this letter and then the judge reviewed it. (Transcript, p.9). In revoking the Applicant's probation, the judge found the Applicant was:

in willful violation of his probationary terms and that he failed to report when instructed, he did not follow up with Gateway when he was supposed to have followed up with them and I am not convinced that he completed the program at Morris Village despite what has been provided to me by counsel for the defendant and so I do find that he is in willful violation of his probation and he should not have left when he left. He should have stuck around, he should have gotten a certificate, he should have graduated and he definitely should have followed up with Gateway.

(Transcript, p.13). This Court notes that Court's Exhibit 1 indicates the Applicant did complete treatment at Morris Village. This Court, however, does not find counsel was deficient in failing to have Andrews present at the revocation hearing. First, this Court agrees with counsel that the letter she handed up to the judge (Applicant's Exhibit 1) appeared to be sufficient proof of completion on its face. This Court finds counsel was not deficient in failing to anticipate the judge would not give more credence to that letter. This Court also finds the Applicant failed to demonstrate any prejudice from Andrew's failure to testify at the revocation hearing. While the

issue of whether the Morris Village treatment had been completed was a basis for revocation, the Applicant accrued numerous other probation violations. The judge had the Morris Village letter before him and still chose to terminate the Applicant's probation based upon several different probation violations. See State v. Herndon, 403 S.C. 84, 89, 742 S.E.2d 375, 378 (2013) ("The determination to revoke probation is within the discretion of the circuit court."). This Court cannot speculate that Andrews' testimony at the probation violation hearing would have yielded a different result.

This Court finds the Applicant failed to meet his burden of proving counsel should have filed a notice of appeal. This Court notes probation revocation counsel is not required to discuss the right to appeal. See Turner v. State, 384 S.C. 451, 456-57, 682 S.E.2d 792, 795 (2009). This Court finds the Applicant has failed to demonstrate either that he told counsel that he wanted to appeal or that there were any appealable issues from his revocation hearing. This Court finds the Applicant has failed to meet his burden of proof. See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (finding a PCR applicant bears the burden of proving the allegations in their application).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that counsel committed either errors or omissions in her representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance.

This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

### All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

### CONCLUSION

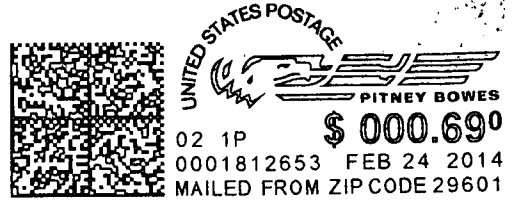
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his probation revocation hearing. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

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Supreme Court of South Carolina  
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