

STATE OF SOUTH CAROLINA  
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

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Appellate Case No. 2014-000373

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James F. Miller,.....Petitioner,

v.

State of South Carolina,.....Respondent.

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**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Did the PCR court err in finding probation counsel was not ineffective for failing to subpoena Carlton Andrews, an addictions specialist at Morris Village, to testify at Petitioner's probation revocation hearing to prove Petitioner successfully completed the inpatient program at Morris Village, which was a condition of his probation, where Petitioner had requested counsel subpoena Andrews before his hearing and counsel instead relied on a letter containing inadmissible hearsay?
2. Did the PCR court err in finding probation counsel was not ineffective for failing to advise Petitioner of the right to a direct appeal from his probation revocation where extraordinary circumstances existed, namely Petitioner had a non-frivolous ground for an appeal, and where Petitioner suffered prejudice since if he would have been advised of his right to appeal, he would have appealed, and likely would have been granted relief on appeal since the trial court abused its discretion in finding Petitioner willfully violated the conditions of his probation?

## STATEMENT OF THE CASE

Petitioner waived presentment to the Greenville County Grand Jury on the charge of shoplifting, third offense or greater (2009-GS-23-9275). (App.pp.88-89). Susannah C. Ross, Esquire represented Petitioner.

On May 11, 2010, Petitioner pled guilty. The Honorable R. Lawton McIntosh sentenced Petitioner to ten years suspended on service of three years and five years probation. Judge McIntosh ordered this sentence to be concurrent with the sentence Petitioner was already serving. (App.p.90). Petitioner did not appeal.

On April 3, 2012, Petitioner appeared in court in Laurens County pursuant to a probation citation. He was represented by Tara Waters, Esquire. The Honorable Frank Addy revoked Petitioner's probation and levied a sentence of six years imprisonment. (App.p.13; p.16). Petitioner did not appeal.

Petitioner filed an application for post-conviction relief (PCR) on May 17, 2012 (2012-CP-23-3344). (App.pp.17-24). A hearing was convened at the Greenville County Courthouse on October 22, 2013. (App.pp.42-70). Petitioner was present and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Edward W. Miller denied relief in an order filed January 27, 2014. (App.pp.79-87).

## STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). 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, 442, 334 S.E.2d 813, 814 (1985).

## ARGUMENT

**I. The PCR judge did not err in finding Petitioner failed to meet his burden of proving counsel was ineffective because she did not subpoena Carlton Andrews.**

Petitioner argues probation revocation counsel was ineffective because she relied upon a letter from Carlton Andrews (a counselor at Morris Village) instead of subpoenaing him to testify at his probation revocation hearing. This issue is without merit.

**A.**

A probation arrest warrant was issued for Petitioner on March 7, 2012. (App.p.15). The warrant stated probable cause for such was based upon the following: failure to report upon release from Morris Village on February 27, 2012, failure to report as instructed by agent on March 6, 2012, failure to follow advice from agent by not reporting as instructed on March 6, 2012, failure to complete Morris Village in-patient program as ordered by Judge Jefferson on November 7, 2011, and failure to report to Gateway on March 5 for follow-up appointment. (App.p.15).

At the probation revocation hearing, the probation agent listed Petitioner’s prior

probation violations. (App.pp.2-3). Petitioner's prior violations included the following: lied to agent, failed drug tests, was arrested, failed to report at least one arrest to agent, was in arrears on fees, child support bench warrant, and absconded from supervision. (App.pp.2-3). The probation agent noted Petitioner's case had been continued and then listed his current probation violations (which were the same as those listed in his arrest warrant). (App.pp.3-4). The probation agent told the judge he called Morris Village and was told

prior to 27th of February or the week of 27th of February, subject asked to be released early and they denied that request and on 27th of February, he told the counselor that his sister had surgery and his father needed help taking care of his sister. That's why they released him and also they gave him a follow-up appointment at Gateway the 5th of March.

(App.p.4). The probation agent stated he did not know about any of this until March 5th and then spoke to Petitioner's sister, who said she was released from the hospital on February 22nd. The probation agent left a message for the sister to tell Petitioner to report on March 6th. (App.pp.4-5). The probation agent stated Petitioner was arrested when he reported on March 12th and that, while he was being booked, Petitioner said "he was going to get a Uzi" and that "he was going to empty it and he's not going back." (App.p.5). The probation agent also noted Petitioner had an active bench warrant for driving under suspension. (App.p.5).

Petitioner denied he was in violation of his probation. (App.p.6). Revocation counsel gave the judge a document that indicated Petitioner's sister was in the hospital from February 22-28 for surgery but that it could not be performed. (App.pp.6-7). Counsel stated the sister did not recall being asked to tell Petitioner to report to his agent

on March 6th. (App.p.7). Counsel then gave the judge a letter<sup>1</sup> from Morris Village indicating Petitioner successfully completed the program. (App.p.8; p.35). As for failing to go to Gateway, counsel stated Petitioner was unable to get to the March 5th appointment but had rescheduled it for March 23rd. (App.p.8). The probation agent stated, however, that Petitioner was told to report upon his release from Morris Village. (App.p.9).

The probation revocation judge found Petitioner “in willful violation of his probationary terms.” The judge then stated

I am not convinced that he completed the program at Morris Village despite what has been provided to me by counsel . . . 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. I’m glad he’s made progress. He was given one last chance by Judge Jefferson. I can’t give him another. Revoke six years and terminate. [Petitioner], be glad it’s not seven. Good luck to you, sir.

(App.p.13).

## B.

At the PCR hearing, Petitioner stated Carlton Andrews (a counselor at Morris Village) had given him a letter. (App.p.48; pp.50-51). Petitioner stated he asked probation revocation counsel to subpoena Andrews. (App.p.48; p.51). Petitioner stated counsel replied that they did not have to do this. (App.p.51).

Counsel testified she received several documents from probation and reviewed them with Petitioner. (App.pp.58-59). Counsel testified Petitioner said he successfully

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<sup>1</sup> The transcript indicates this letter “was entered into evidence off the record as a Court’s exhibit). (App.p.1).

completed Morris Village and provided her with the letter she gave the judge during the revocation hearing. (App.p.59). Counsel testified she did not recall discussing with Petitioner whether to subpoena Andrews and stated she felt the letter “was solid enough evidence” and that she “didn’t see how the evidence could get much more clear at that point.” (App.pp.59-60). Counsel confirmed Petitioner had several probation violations. (App.p.60).

In denying Petitioner’s PCR application, the judge found counsel was not deficient as she could not anticipate the letter would not be given more credence. The PCR judge also found there was no prejudice because the revocation judge found other violations of probation and it would be speculative to discuss whether Andrews’ testimony would have yielded a different result. (App.pp.82-84).

### C.

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 PCR judge did not err in finding Petitioner failed to meet his burden of proving counsel was deficient. Andrews' letter stated Petitioner completed the program and had excellent participation. Andrews' letter also stated Petitioner's treatment dates were February 2-27, 2012. (App.p.35). Counsel had Andrews' letter prior to the probation revocation hearing and did not believe his appearance at the hearing would be necessary. Based upon the straightforward nature of the letter, this was a reasonable belief. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel). Counsel could not have foreseen the probation revocation judge would discount Andrews' letter.<sup>2</sup> The Strickland court warned an attorney's performance must be judged based on the facts and circumstances known to that attorney at the time:

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. As counsel cannot have been expected to be clairvoyant, Petitioner failed to meet his burden of proving her decision not to subpoena Andrews was deficient.

The PCR judge did not err in finding Petitioner failed to meet his burden of

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<sup>2</sup> Contrary to Petitioner's insinuation, however, there is no evidence in the record the letter was discounted based on hearsay.

proving he suffered any prejudice as a result of counsel's representation. It is completely speculative that Andrews' presence at the probation revocation hearing would have yielded a different result. This is especially true because the letter Andrews submitted for the purpose of the PCR hearing did not expand upon the statements he made in the letter handed up to the probation revocation judge. (App.p.35; p.87). Further, Petitioner had probation violations other than that he did not complete Morris Village. Petitioner failed to report his release from Morris Village to his agent, failed to attend his appointment at Gateway, and failed to report as instructed on March 6th. The decision to revoke probation is within the discretion of the probation revocation judge. 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."). Petitioner has failed to demonstrate the probation judge abused his discretion and that his probation was revoked solely because of the Morris Village issue and not because of the multiple other probation violations.

**D.**

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance.

As Petitioner failed to meet his burden of proving ineffective assistance of counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

**II. The PCR judge did not err in finding Petitioner failed to meet his burden of proving counsel should have filed a notice of appeal.**

Petitioner argues probation revocation counsel was ineffective because she did not advise him of his appellate rights. This issue is without merit.

At the PCR hearing, Petitioner stated he did not speak to counsel after the revocation hearing. (App.p.52). Petitioner stated they did not discuss filing either a notice of appeal for a motion to reconsider. (App.pp.52-53).

Counsel testified she did not specifically recall whether she spoke to Petitioner after the hearing. (App.p.63). Counsel testified she researched filing a motion to reconsider but did not believe one would be successful. (App.p.63). Counsel noted the probation revocation judge had great discretion and weighed the evidence and assessed credibility. (App.p.63).

In denying Petitioner's PCR application, the judge found probation revocation counsel is not required to discuss the right to appeal. The PCR judge also found Petitioner failed to demonstrate either that he asked counsel to appeal or that he had any appealable issues. (App.p.84).

The PCR judge did not err in finding Petitioner failed to meet his burden of proving counsel should have discussed his appellate rights. Counsel was not obligated to discuss an appeal after the probation revocation hearing. The South Carolina Supreme Court has held "probation counsel is not required to inform a probationer of his right to an appeal absent extraordinary circumstances. This holding is in accord with counsel's duties at a plea hearing." Turner v. State, 384 S.C. 451, 456-57, 682 S.E.2d 792, 795

(2009). Initially, it should be noted Petitioner did not testify that he asked counsel about an appeal. Regardless, Petitioner failed to demonstrate there were extraordinary circumstances in his case that would have mandated counsel discuss the possibility of an appeal. The decision to revoke probation is addressed to the discretion of the probation revocation judge. See State v. Ellis, 397 S.C. 576, 579, 726 S.E.2d 5, 6 (2012). In this case, the State presented sufficient evidence that Petitioner had numerous probation violations. Even without considering the violation that Petitioner failed to complete Morris Village, Petitioner failed to report upon his release from Morris Village (as instructed) and failed to attend the follow up appointment at Gateway. The probation revocation judge heard the testimony and arguments at the revocation hearing and clearly considered Andrews's letter. The probation revocation weighed the arguments and the credibility of the parties and was within his discretion in revoking Petitioner's probation. See id.; see also Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved."). Petitioner has failed to demonstrate there were either extraordinary circumstances in his probation revocation proceeding or that the revocation judge abused his discretion. See Herndon, 403 S.C. at 89, 742 S.E.2d at 378 (holding the appellate court's authority to review a probation revocation is confined to correction of errors of law unless the judge's action amounted to a manifest abuse of discretion).

As Petitioner failed to meet his burden of proving ineffective assistance of counsel

on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

### CONCLUSION


For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

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By:   
ATTORNEYS FOR RESPONDENT

September 30, 2014

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

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Appellate Case No. 2014-000373

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James F. Miller,..... Petitioner,

v.

State of South Carolina,..... Respondent.

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**CERTIFICATE OF SERVICE**

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I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Lara M. Caudy, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.  
This 30th day of September, 2014.

  
KAREN C. RATIGAN  
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ATTORNEY FOR RESPONDENT



ALAN WILSON  
ATTORNEY GENERAL

September 30, 2014

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SEP 30 2014

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

S.C. Supreme Court

**Re: James F. Miller v. State of South Carolina**  
**Appellate Case No: 2014-000373**  
**Lower Court Case No: 2012-CP-23-3344**

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Karen C. Ratigan  
Senior Assistant Deputy Attorney General  
SC Bar #68331

KCR/jacc  
Enclosures

cc: Lara M Caudy, Esquire  
Trisha Allen, Victim Services Counselor