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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable Michael G. Nettles, Circuit Court Judge

MICHAEL BRENTON WILSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000192

APPENDIX

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ATTORNEYS FOR RESPONDENT

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1	STATE OF SOUTH CAROLINA	)	COURT OF GENERAL SESSIONS
2	COUNTY OF HORRY	)	(98-GS-26-02612)
3		)	
4	STATE	)	
5	VERSUS	)	TRANSCRIPT OF RECORD
6	MICHAEL WILSON	)	
7		)	October 3, 2010
		)	Conway, South Carolina

8 B E F O R E:

9 HONORABLE STEVEN H. JOHN, Judge.

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

11 CANDACE A. LIVELY, ESQ.

12 ASSISTANT SOLICITOR FOR HORRY COUNTY

13 ATTORNEY FOR STATE

14 RUSSELL B. LONG, ESQ.

15 ATTORNEY FOR DEFENDANT

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DIXIE COX EUBANK
CIRCUIT COURT REPORTER
FIFTEENTH JUDICIAL CIRCUIT

1 (THE FOLLOWING TAKES PLACE ON OCTOBER 4, 2010.)

2 THE COURT: Yes, Solicitor.

3 MS. LIVELY: Thank you, Your Honor. This is State of
4 South Carolina versus Michael Brenton Wilson. Indictment
5 number (1998-GS-26-02612).

6 Your Honor, this matter is before you this morning for
7 the purposes of a sealed sentence from a trial that was held
8 before the Honorable Edward Cottingham back in 1999 regarding
9 the charges of Criminal Sexual Conduct and Kidnapping against
10 this Defendant. It was my understanding -- I was not the
11 prosecutor at the time that the Defendant did abscond in the
12 middle of the trial. He was convicted and a sentence was
13 actually rendered by Judge Cottingham, sealed until this
14 Defendant was later located by the State. He is now in the
15 custody of the State of South Carolina. He has been at J.
16 Reuben Long Detention Center awaiting a hearing for his sealed
17 sentence to be read.

18 THE COURT: All right. And the case is (1998-GS-26-
19 02612).

20 MS. LIVELY: Yes sir.

21 THE COURT: Apparently Judge Cottingham issued this
22 sentence -- and I'll open the sentence in just a second, on
23 December 5, 2001.

24 MS. LIVELY: Oh, I'm sorry, Your Honor. I didn't have
25 that ---

1 THE COURT: There was -- it's -- I'm just looking at
2 the Notice of Appeal that was filed, and thereafter there was
3 an order of Remittitur back to the Circuit Court, after the
4 Notice of Appeal, an Order of the Court of Appeals saying the
5 appeal was premature, that -- indicating that a criminal
6 defendant may not appeal his sentence until the sentence is
7 imposed. Though the sentence had been rendered it had not
8 been imposed because the Defendant was not present, so the
9 Court of Appeals obviously properly returned the matter to the
10 Circuit Court for the imposition of a sentence.

11 Let me look at the sealed sentence of Judge Cottingham
12 in this particular matter.

13 First, in the two matters, the (1998-GS-26-02612), in
14 the charges that the Defendant was facing, Kidnapping and
15 Criminal Sexual Conduct in the First Degree, by a jury of his
16 peers, as reflected by the Foreman's Verdict Form in this
17 matter, the jury unanimously found the Defendant guilty of the
18 crime of Kidnapping, and guilty of the crime of Criminal
19 Sexual Conduct in the First Degree.

20 Thereafter, in (1998-GS-26-02612), count one, Criminal
21 Sexual Conduct in the First Degree, the sentence of Judge
22 Cottingham was, the Defendant is committed to the State
23 Department of Corrections for a determinate term of thirty
24 years.

25 (1998-GS-26-02612), count two, the sentence of Judge

1 Cottingham to the crime of Kidnapping was, the Defendant was
2 committed to the State Department of Corrections for a
3 determinant term of thirty years, concurrent with the sentence
4 imposed in count one to Criminal Sexual Conduct in the First
5 Degree.

6 All right, Mr. Long, this Court has the authority to
7 hear from you as to the sentence, as to whether it should be
8 changed or modified. It having now been imposed I'll be glad
9 to hear from you.

10 MR. LONG: Your Honor, we -- I will -- if you will have
11 -- beg Your Honor's ---

12 THE COURT: Yes sir.

13 MR. LONG: Your Honor, the lady standing behind the bar
14 there is Mr. Wilson's mother. She's an attorney from another
15 State. Her question to me just now was that they didn't
16 realize they could put on new evidence, could they have some
17 more time.

18 THE COURT: It's not -- no, it's not -- there's no new
19 evidence.

20 MR. LONG: That's right. That's what I indicated ---

21 THE COURT: There is no new evidence that can be --
22 that can be heard by the Court at this point in time. I'll be
23 glad to hear you as to the sentence that was imposed, only as
24 to the sentence. There is nothing in the way of evidentiary
25 matter that may be presented at this point in time. I'll be

1 glad to hear you as to sentencing only.

2 MR. LONG: Absolutely, and that -- and I wanted to make
3 sure that that was clear, both to my client and also to his
4 family present, that ---

5 THE COURT: Very good.

6 MR. LONG: ---That we are here just to receive the
7 sentence.

8 THE COURT: Receive the sentence, and I'll be glad to
9 hear from you as to the sentence imposed. The Court ---

10 MR. LONG: I have nothing as to the sentence imposed,
11 Your Honor. I know that Mr. Wilson would like to address the
12 Court if the Court would have him do so.

13 THE COURT: I'll be glad to do so. I assume you have
14 communicated with him and informed him that obviously anything
15 he says now can and will be used against him should the matter
16 be returned at a later date.

17 MR. LONG: Yes sir.

18 THE COURT: All right. Sir, you understand that
19 anything you say to the Court now can and will be used against
20 you should the matter be returned to the Circuit Court at a
21 later date. Do you understand that?

22 DEFENDANT: Yes sir, I do.

23 THE COURT: Very good. I'll be glad to hear from you.

24 DEFENDANT: May I have one second to confer with
25 counsel, please.

1 THE COURT: Yes sir.

2 DEFENDANT: Okay. I'm sorry, Your Honor.

3 THE COURT: All right, sir. If you are going to
4 address the Court then the Clerk will place you under oath.
5 Madame Clerk, place him under oath.

6 (AT THIS TIME THE DEFENDANT WAS SWORN.)

7 THE COURT: Very good. Be glad to hear from you, sir.

8 DEFENDANT: I'll try to keep it as brief as possible,
9 Your Honor, but if you would allow me a few minutes I would
10 appreciate it.

11 THE COURT: Yes sir.

12 DEFENDANT: This happened some twelve years ago, about
13 this same time of year, 1998. I lived a totally different
14 lifestyle back at that time. I was involved with people I
15 shouldn't have been involved in, doing things I shouldn't have
16 been doing, was dating a girl that was a dancer at the time.
17 We did a lot of partying, lot of drinking, pot-smoking, some
18 drug use. I had been diagnosed with tret syndrome when I was
19 fourteen, and been on a couple of different medications, and I
20 had been -- as I have later learned the term now to be called
21 self-medication. I was an accident waiting to happen twelve
22 years ago.

23 I am -- I can only hope that the pain this incident has
24 caused to S.B. has been the smallest fraction of the
25 pain that I have put myself through as a result of this past twelve

1 years.

2 When I was arrested I was initially represented by Bud
3 Long. He had to -- my attorney here's father. He ultimately,
4 due to failing health and other issues, had to come off of my
5 case. I retained Morgan Martin to represent me. For reasons
6 unknown to me the case was handed over to Scott Bellamy.
7 Shortly down the road Scott Bellamy said he had to come off of
8 my case due to a conflict of interest, couldn't advise me what
9 the conflict was, met in chambers, closed session with the
10 Honorable Judge Breeden. He was removed from my case, then I
11 was given Mr. Long here.

12 We were under the impression that the day I came to
13 court that due to an error in the indictment, and not being
14 re-indicted, that there would be no trial that day. We were
15 not the least bit prepared to go to trial that day, not
16 believing there would, in fact, be a trial that day, and when
17 I was advised that morning that your bond is to be revoked, we
18 are to proceed with the trial, and not one single witness of
19 mine had been interviewed, and we were not the least bit
20 prepared I panicked and I left. I don't deny it.

21 In the past nine years that I've been gone I have stayed
22 out of trouble. I no longer use any drugs. I don't drink. I
23 gave up cigarettes in February of 2008. I have changed my
24 life around dramatically. I'm forty years old practically
25 now. I'm not that same kid that I was in my twenties, back

1 when this happened.

2 I would just ask that the Court take that into
3 consideration in the imposition of the sentence. I don't want
4 to take up too much of your time.

5 THE COURT: No. I'm ---

6 DEFENDANT: I could probably go on, but ---

7 THE COURT: ---Glad to listen to you if you've got
8 anything else you want to tell me.

9 DEFENDANT: You know, I -- this was not a thing of
10 premeditation in any way. That night when I went up to the
11 club I went up there on my motorcycle. When I left the club
12 with the lady -- before I left the club with the lady I was so
13 inebriated I had to go home and get my car because there's no
14 way I could have driven myself and her home on my motorcycle.

15 This was a train wreck ready to happen, and it was not a
16 pre-meditated thing. It was not with malice or aforethought,
17 and I -- you know, I don't know really what else to say. I
18 mean, you know, it's been a long time and I'm sure we are all
19 very different people now than we were then, you know. That's
20 really -- that's really, I guess, about all I have to say.
21 That's the gist of it.

22 THE COURT: All right. Y'all come and talk to me for a
23 second.

24 MS. LIVELY: Yes sir.

25 (BENCH CONFERENCE TAKES PLACE OFF THE RECORD.)

1 THE COURT: All right. Mr. Long, based upon the bench
2 conference we had, and I asked you about any motions, since
3 obviously this matter was heard a significant time ago, and
4 you, honestly, are the only one present at these proceedings
5 now that was present when the original proceedings took place,
6 and the sentence was imposed, so I'm telling you, if there are
7 any motions that were not made before Judge Cottingham, if you
8 -- if there are any issues that should have been made to Judge
9 Cottingham at that point in time, and were not made, you have
10 an opportunity to do that now.

11 MR. LONG: Yes sir.

12 THE COURT: But if all the motions were made before
13 Judge Cottingham at that point in time, and were ruled upon by
14 Judge Cottingham, then I can't change those. Those are --
15 then those have been ruled upon by the Circuit Court, and that
16 is the law of the case until it is heard, if it is heard, by
17 an appellate court, but if there is some outstanding issue
18 that has not already been ruled upon by the Circuit Court,
19 then I'll be glad to hear you about that at this time.

20 MR. LONG: Thank you, Your Honor. And for the record -
21 - and he's raising his hand, but I'll -- if you don't mind,
22 I'll speak to the Court first.

23 THE COURT: Yes sir, absolutely.

24 MR. LONG: We had a full trial in the case, and I made
25 all of my post-trial motions. Judge Cottingham, as I recall,

1 did deal with all of my post-trial motions.

2 Again -- and I understand Your Honor's concern, if there
3 are post-trial motions that haven't been made, and they still
4 could be made now, of course ---

5 THE COURT: Because I'm impose -- because the sentence
6 is now being imposed on the Defendant, and they could be
7 raised. If they -- if ---

8 MR. LONG: And I can't imagine how I could raise a
9 motion that Your Honor could even rule on because you don't
10 even have a transcript of the trial.

11 But all that being said, Judge, I know that I made all
12 my post-trial motions. I know that Judge Cottingham ruled on
13 all of those, and then we went to sentencing.

14 THE COURT: All right. Well if he ---

15 MR. LONG: Then I presented everything that I could in
16 mitigation before he sentenced Mr. Wilson, then he sentenced
17 Mr. Wilson and placed it in the file.

18 THE COURT: All right. Well, if Judge Cottingham has
19 ruled on the motions then I can't change those rulings. That
20 is not something that I could do, but I just wanted to give
21 you the opportunity. If something had not been raised I would
22 be glad to hear from you.

23 Why don't you speak to your client for a minute.

24 (MR. LONG CONFERS WITH HIS CLIENT.)

25 MR. LONG: Your Honor, Mr. Wilson has some things that

1 he thinks -- he -- I believe he would have raised at the time
2 of the ending of his trial had he been here, and I think he
3 would like to raise them now.

4 Is that correct, Michael?

5 DEFENDANT: A couple of things that I would like to have
6 made sure that were raised at the beginning of the trial, and
7 a couple of things that I would have raised myself at the ---

8 THE COURT: Are you talking about testimony that you
9 would have given at the trial?

10 DEFENDANT: No. No, Your Honor. No. The first two
11 things are simply -- and I just want to make sure that -- I'm
12 not an attorney, Your Honor. I'm not that familiar ---

13 THE COURT: I appreciate -- just tell me what it is.
14 Let's just get to the point.

15 DEFENDANT: The first thing, like I said, I was
16 concerned about, was the indictment. The State did reindict
17 me on another charge that they had on me. This one the
18 statute changed. They did not reindict me. They tried me on
19 the original indictment from '98.

20 THE COURT: All right. And I appreciate it, Mr. Long,
21 that ---

22 DEFENDANT: Okay. That was one ---

23 THE COURT: Just wait one second. Just wait one
24 second.

25 MR. LONG: Forgive me, Your Honor. I apologize.

1 THE COURT: That's all right. All right.

2 Ma'am -- Ma'am -- Ma'am, I'm speaking to you. Sit down
3 and be quiet. You are not representing the Defendant.

4 MOTHER OF DEFENDANT: Your Honor, I'm trying to talk ---

5 THE COURT: Please be quiet.

6 Now Mr. Long, please listen to your client, because I
7 want you to tell me whether or not these issues were addressed
8 in any way by Judge Cottingham. Okay. Tell me that -- tell
9 me that again, so Mr. Long can hear you.

10 DEFENDANT: This was my first motion that I had wanted
11 to make at trial. When I was charged in 1998, in between the
12 time I was charged and indicted in 1998, and tried in 2001 the
13 C.S.C. statutes were changed, and it was my understanding, as
14 explained to me by Morgan Martin and Scott Bellamy that the
15 State would have to reindict me prior to bringing me to trial,
16 as they had done in another case.

17 They explained this to Mr. Long. That -- according to
18 my attorney, he related to me that he made that motion the
19 morning of the trial and the Judge denied it.

20 THE COURT: Was that issue raised before Judge
21 Cottingham, Mr. Long?

22 MR. LONG: May we approach, Your Honor?

23 THE COURT: Yes sir.

24 (BENCH CONFERENCE TAKES PLACE OFF THE RECORD.)

25 THE COURT: All right, Mr. Long, let me ask you a

1 question. You met with your client prior to the trial being
2 commenced in this matter.

3 MR. LONG: I did.

4 THE COURT: Based upon your conversations with your
5 client did you raise all of the issues you felt were proper
6 before Judge Cottingham as to the matters that were facing the
7 Defendant?

8 MR. LONG: Yes sir, Judge. I raised -- any pretrial
9 motion that we had was raised and ruled on. Again, we had a
10 full trial, evidentiary trial, where I cross-examined
11 witnesses. There were motions made throughout the trial, and
12 then, of course, I made all my post-trial motions. There is
13 no motion sitting out there -- mysterious motion sitting out
14 there that was not made on Mr. Wilson's behalf pre, or during,
15 or post-trial on anybody's behalf.

16 THE COURT: That Judge Cottingham did not address.

17 MR. LONG: Absolutely not.

18 THE COURT: All right. Very good. All right, the
19 Court finds that the previous matters were all addressed and
20 ruled upon by Judge Cottingham. Obviously if there is some
21 kind of jurisdictional issue that is something that can be
22 raised at any time, even on appeal.

23 Thank you very much.

24 Sentence has been imposed in this matter.

25 MS. LIVELY: Thank you, Your Honor.

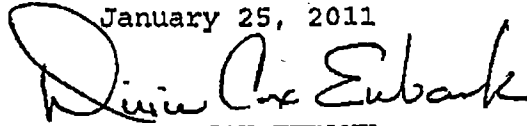
-----END OF REQUESTED TRANSCRIPT OF RECORD-----

C E R T I F I C A T E

I, the undersigned, DIXIE COX EUBANK, Official Court Reporter for the Fifteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the OPENING OF SEALED SENTENCE of the captioned case, relative to appeal, in the COURT OF GENERAL SESSIONS for HORRY COUNTY, SOUTH CAROLINA, on the 5th day of October, 2010.

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

January 25, 2011


DIXIE COX EUBANK

CIRCUIT COURT REPORTER

FIFTEENTH JUDICIAL CIRCUIT

OFFICE OF THE ATTORNEY GENERAL
Brenda Babb
Circuit Court Reporter
South Carolina Court Administration
Post Office Box 11549
Columbia, South Carolina 29211-1549
November 5, 2010

15 SE
RECEIVED
NOV 8 2010
ATTORNEY GENERAL'S
OFFICE

ALAN WILSON
ATTORNEY GENERAL

Salley W. Elliott, Esquire
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Dear Ms. Elliott:

I am in receipt of your letter October 25, 2010 letter requesting a transcript in the matter of State of South Carolina v. Michael Brenton Wilson heard December 5, 2001.

I no longer have the tapes or my court notes from the year 2001. Those records were destroyed pursuant to Rule 607(i), SCACR, which provides for the retention of records for a period of five years.

Thank you for your request and I hope this letter has been of assistance.

With regards,


Brenda Babb
Circuit Court Reporter

STATE OF SOUTH CAROLINA

County of HORRYMichael Brenton Wilson # 343053
Full name and prison number (if any) of Applicant

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

13 469
APPLICATION FOR

POST-CONVICTION RELIEF

FILED
HORRY COUNTY
2013 JAN 23 AM 9:49
MELODIE HUGGINS-WARD
CLERK OF COURT**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 clear to which question any such continued answer refers.

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

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention McCormick C.I.
2. Name and location of Court which imposed sentence Horry County General Sessions
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 1998-GS-26-2612
 - (b) _____

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 30 years imposed on 10/6/10
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty X
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. SC Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Appeal Dismissed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. 11/16/11
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Counsel
- (b) Denial of Due Process
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Attorney failure to preserve trial transcript.
- (b) Trial Counsel had a conflict of interest.
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? no
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? no
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no
- (d) any other petitions, motions or applications in this or any other Court? no
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

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

(d) the date of each such disposition:

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

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

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

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

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

(a) which grounds have been presented:

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

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

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

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) _____
 (b) _____
 (c) _____

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

(a) your arraignment and plea? _____
 (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 applications with respect to this conviction, which you filed?
yes _____

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

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

i. Russell Long 5907 N Kings Hwy. Myrtle Beach, SC 29577

ii. Tristan Shaffer P.O. Box 176 Chapin, SC 29036

iii. _____

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

i. Trial and first Appeal

ii. Second appeal and this application

iii. _____

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

New Trial

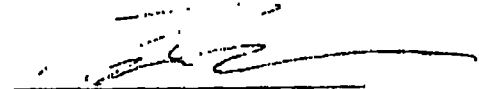
20. Are you now under sentence from any other court that you have not challenged?

No

APPLICATION TO PROCEED WITHOUT PAYMENT

Based to information obtained from the Applicant I believe the applicant is indigent and unable pay for filing fees or costs associated with this application.

Respectfully Submitted,



Tristan Shaffer
Attorney for Applicant
P.O. Box 176
Chapin, SC 29036
(803) 575-0384
SC Bar # 77565

January 6, 2013

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Michael Brenton Wilson # 343053)

vs.)

State of South Carolina,
Defendant.)IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH CIRCUIT

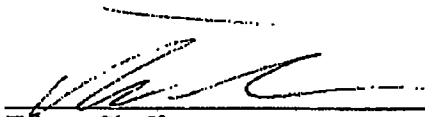
13

469

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on 1/17/2012 the Application for Post Conviction relief was served in the above referenced case upon the Attorney for the State, Andrew Johnson, via mail, at P.O. Box 11549 Columbia, South Carolina 29201

Respectfully Submitted,


Tristan Shaffer
Attorney for Applicant

FILED
HORRY COUNTY
2013 JAN 23 AM 9:49
MELANIE HUGGINS-WARD
CLERK OF COURT

TATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	
	)	
	)	2013-CP-26-469
	)	
Michael Brenton Wilson, 343053	)	
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Respondent, making its Return to the Application for post conviction relief (PCR) filed January 23, 2013, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the December 1998 term of the Horry County Grand Jury for CSC and kidnapping (1998-GS-26-2612). J. Andrew Rittner, Esquire, represented Applicant.

On December 5, 2001, the Applicant was tried, on information and belief, in his absence. He was convicted and sentenced by the Honorable Edward Cottingham to thirty years imprisonment on each charge, with both running concurrently. The sentence was imposed on October 5, 2010. Applicant filed a timely notice of appeal. The South Carolina Court of Appeals dismissed Applicant's appeal due to Applicants decision to remain a fugitive from justice for eleven years pursuant to the *fugitive disentitlement rule*. The remittitur was sent March 29, 2012.

Attached herewith and incorporated herein are the records of the Horry County Clerk of Court regarding the subject conviction, and Applicant's SCDC records, and on information and believe, the transcript is no longer available. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of counsel."
2. "Denial of due process."

III.

In a post-conviction relief action, 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 the application alleges ineffective assistance of counsel 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).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient.

Under this prong, the court measures an attorney's performance 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.

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

In addition, the doctrine of laches bars Applicant's claims as the transcript is no longer available and the state is thereby prejudiced.

IV.

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

V.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the State requests that the Application be denied and the matter dismissed with prejudice.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

TYSON ANDREW JOHNSON, SR.
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

5/14, 2013.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT

Michael B. Wilson, #343053,

) Case No. 2013-CP-26-469

) Applicant,

) v.

) State of South Carolina,

) Respondent.

NOTICE OF MOTION
AND
MOTION TO DISMISS

FILED
HORRY COUNTY
2014 AUG -4 AM 10:48
KELANIE HUGGINS-WARD
CLERK OF COURT

COMES NOW RESPONDENT, by and through undersigned counsel, who will move before the Presiding Judge of the Court of Common Pleas for the Fifteenth Judicial Circuit, on **Wednesday, August 27, 2014, at 10:00 AM**, for an order dismissing this post-conviction relief action with prejudice. In support of said motion, Respondent would show unto the Court as follows:

I.

In December 1998, the Horry County Grand Jury indicted Applicant criminal sexual conduct and kidnapping (1998-GS-26-2612). On December 3, 2001, the matters were called for trial before the Honorable Edward B. Cottingham and a jury. Applicant initially appeared for trial, but absconded during trial. The jury found Applicant guilty as indicted. Judge Cottingham issued a sealed sentence at that time and issued a bench warrant for Applicant's arrest. On October 4, 2010, Applicant appeared before the Honorable Steven H. John, who unsealed and pronounced Judge Cottingham's sentences of thirty (30) years for each offense. Judge John denied Applicant's motion to vacate sentence, motion for a new trial, and motion to reduce sentence.

Applicant filed and served notice of appeal on October 14, 2010. The South Carolina Court of Appeals dismissed Applicant's appeal on November 16, 2011. The remittitur was returned to the circuit court on March 28, 2012.

II.

Respondent submits Applicant's post-conviction relief application should be dismissed based on the fugitive disentitlement doctrine. See Molinaro v. New Jersey, 396 U.S. 365, 366 (1970) (escape from custody "disentitles the defendant to call upon the resources of the Court for determination of his claims"); Jordan v. State, 276 S.C. 168, 169, 276 S.E.2d 781, 782 (1981) (refusing to entertain a challenge to a conviction from "a party who by his escape evades the process of the Court and refuses to submit himself to its jurisdiction." (citing State v. Murrell, 33 S.C. 83, 11 S.E. 682 (1890); State v. Johnson, 44 S.C. 556, 21 S.E. 806 (1895))).

The Bench Warrant Order indicates Applicant failed to appear after being subpoenaed at the address listed on his bond paperwork. (See Attachment A). The Clerk of Court's Bench Warrant indicates Applicant failed to appear at his trial. (See Attachment B). The Fifteenth Circuit Solicitor's Office also sought to estreat Applicant's bond after his failure to appear. (See Attachment C). Upon information and belief, Applicant also admitted to willfully fleeing the jurisdiction because he "got scared." Furthermore, the court reporter's records and tapes of Applicant's trial were destroyed pursuant to the guidelines provided by Rule 607(i), SCACR. (See Attachment D).

Respondent submits that the trial court in this case determined Applicant willfully failed to appear for trial as signified by the issuance of a bench warrant for Applicant's failure to appear. Because of his own conduct, Applicant's sentence could not be published, nor could a timely appeal be taken from the conviction. The notes of the court reporter were destroyed in accordance with authorized procedures during the time Applicant was a fugitive. Respondent submits Applicant's actions in becoming and remaining a fugitive for more than nine (9) years caused a significant delay in the onset of a proper appeal and the loss of the transcript. Applicant forfeited his appeal by his own conduct in causing a delay of more than nine (9) years in sentencing, the loss of the transcript, and the inadequacy of a record for appellate review. Respondent submits these actions also mandate the

dismissal of his post-conviction relief action. By failing to appear for trial and remaining a fugitive for more than nine (9) years, Applicant was not diligent in prosecuting any challenge to his conviction. See, e.g., State v. Serrette, 375 S.C. 650, 654 S.E.2d 554 (Ct. App. 2007) (the right to appeal may be lost when a defendant absconds and the transcript of the trial proceeding is unavailable pursuant to Rule 607). Accordingly, Respondent submits Applicant likewise forfeited his right to collateral review of his conviction.

III.

Respondent further submits this application should be dismissed based on the doctrine of laches. To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. See McElrath v. State, 276 S.C. 282, 284, 277 S.E.2d 890, 891 (1981). 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." Id. (citing Honeycutt v. Ward, 612 F.2d 36 (2nd Cir. 1979)). Thus, the doctrine of laches bars any an action where the applicant has failed to exercise his rights for an unreasonable period. Whitehead v. State, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002) (quoting Hallums v. Hallums, 296 S.C. 195, 371 S.E. 525 (1988)); see also RWE NUKEM Corp. v. ENSR Corp., 373 S.C. 190, 199, 644 S.E.2d 730, 734-35 (2007) ("Laches connotes not only an undue lapse of time, but also negligence and opportunity to have acted sooner." (citing Chambers of South Carolina, Inc. v. County Council for Lee County, 315 S.C. 418, 434 S.E.2d 279 (1993))). Recognizing the importance of finality in litigation, 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.

The South Carolina General Assembly has likewise recognized this problem and instituted a one year statute of limitations. See S.C. Code Ann. §17-27-45(a).

Applicant absconded from the jurisdiction of the State of South Carolina for nine (9) years after his conviction. The Applicant's intentional delay has greatly prejudiced the Respondent (as well as Applicant). Records and exhibits from the trial may no longer be available. See, e.g. Rule 607(i), SCACR (court reporter only required to retain records for five years). Respondent should not be called upon to defend the constitutionality of convictions after such a long delay. See Aice, 305 S.C. at 451, 409 S.E.2d at 394. Therefore, Respondent submits the Court should dismiss the application for post-conviction relief based on Applicant's lack of diligence in pursuing his claim for relief.

IV.

Wherefore, for the above reasons, Respondent respectfully asks the Court to dismiss Applicant's application with prejudice based on the doctrines of fugitive disentitlement and laches.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

JOSHUA L. THOMAS
Assistant Attorney General
Bar No. 100777

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

By:


Attorneys for Respondent

Aug. 4, 2014

Attachment A

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

THE STATE)

VS.)

MICHAEL BRENTON WILSON)

IN THE COURT OF GENERAL SESSIONS
FIFTEENTH JUDICIAL CIRCUIT

BENCH WARRANT ORDER

1998-GS-26-2612

The Solicitor appears before the Court upon a motion that a bench warrant be forthwith issued and executed on the defendant, Michael Brenton Wilson for Failure to Appear in Court. A subpoena was issued and mailed to the listed bond mailing address for each defendant.

After hearing from the State, I find that good cause has been shown to issue a bench warrant on each defendant listed below:

AND IT IS SO ORDERED.

Elva B. Estess
FIFTEENTH JUDICIAL CIRCUIT JUDGE

DECEMBER 3, 2001
CONWAY, SOUTH CAROLINA

01 DEC -3 PM 3:53

Attachment B

STATE OF SOUTH CAROLINA

THE STATE



VS.

MICHAEL BRENTON WILSONWarrant/Case No. 1998-GS-26-02612

COUNTY OF HORRY

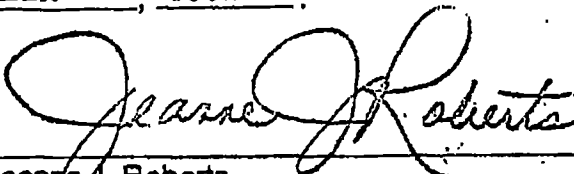
To all the Sheriffs, Deputy Sheriffs, Constables, and Other Peace Officers of the State:

WHEREAS, at the term of the aforesated Court beginning DECEMBER 03, 2001,
it was among other things ordered by Judge COTTINGHAM, EDWARD
that a General Sessions Bench Warrant should be issued for the arrest of
MICHAEL BRENTON WILSON
FOR FAILURE TO APPEAR

It is, therefore, ordered that you make diligent search for the above named and take
him to the county jail where he will be safely held until he may be brought before
this Court, or otherwise discharged by due course of law.

It is further ordered that the county jailer notify the Office OF THE SOLICITOR
immediately, during the normal operating hours of the Office OF THE SOLICITOR
that the above named is in custody.

ISSUED on the 03 day of DECEMBER, 2001.



Jeanne J. Roberts
Clerk of Court

Attachment C

State of South Carolina
Office of the Solicitor
Fifteenth Judicial Circuit



REPLY TO 2
P.O. BOX 1276
CONWAY, SC 29528
843-248-1309

REPLY TO 1
P.O. BOX 1888
GEORGETOWN, SC 29442
843-548-3751

J. GREGORY HEMBREE
Solicitor

December 4, 2001

Michael Brenton Wilson
310 North 27th St.
Wilmington, NC 28401

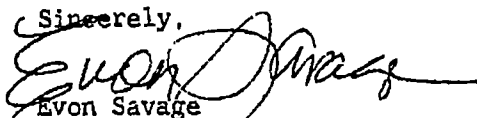
Re: Michael Brenton Wilson 1998-2612

Dear Bondsman:

Please be on notice that a bench warrant was issued for the above referenced defendant as a result of the defendant's failure to appear in court when under subpoena. As the Bondsman for this defendant, you should note further that section 17-15-20 of the South Carolina Code of Laws (1976) as amended), requires the defendant's appearance in court as a condition of the bond set on the above charge.

Due to the defendant's failure to comply with the statutory terms on the bond in this case, the State will move before the Circuit Court to have this bond declared forfeited and to have a judgement in the amount of the particular bond entered against you, as required by 17-25-170 of the South Carolina Code of Laws (1976 as amended). Bond estreatment pleadings will be prepared and filed and a hearing scheduled if the defendant is not deposited in the detention center within thirty (30) days after the date of the issuance of the bench warrant.

Please do not hesitate to call me at (843) 248-1466 if you have any questions about this notice.

Sincerely,

Evon Savage
Court Coordinator

Attachment D

RECEIVED
NOV 8 2010
ATTORNEY GENERAL'S
OFFICE

Brenda Babb
Circuit Court Reporter
South Carolina Court Administration
Post Office Box 4800
Calabash, North Carolina 28467

November 5, 2010

Salley W. Elliott, Esquire
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Dear Ms. Elliott:

I am in receipt of your letter October 25, 2010 letter requesting a transcript in the matter of State of South Carolina v. Michael Brenton Wilson heard December 5, 2001.

I no longer have the tapes or my court notes from the year 2001. Those records were destroyed pursuant to Rule 607(i), SCACR, which provides for the retention of records for a period of five years.

Thank you for your request and I hope this letter has been of assistance.

With regards,


Brenda Babb
Circuit Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT

Michael B. Wilson, #343053,

) Case No. 2013-CP-26-469
)

Applicant,

v.

) CERTIFICATE OF SERVICE
)

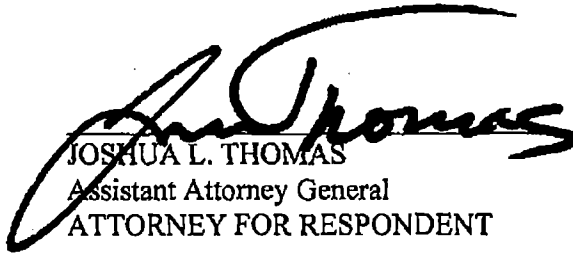
State of South Carolina,

Respondent.

FILED
HORRY COUNTY
2014 AUG -4 AM 10:48
JAILIE HUGGINS-WARD
CLERK OF COURT

The undersigned hereby certifies he has served a copy of Respondent's Notice of Motion and Motion to Dismiss on Tristan M. Shaffer, Esquire, counsel for the above named Applicant by hand delivery in Conway, SC, this same day.

Aug. 4, 2014


JOSHUA L. THOMAS
Assistant Attorney General
ATTORNEY FOR RESPONDENT

1 STATE OF SOUTH CAROLINA)
 2 COUNTY OF HORRY) COURT OF COMMON PLEAS
) No. 2013 CP 26 0469

3

4 MICHAEL BRENTON WILSON)

5 Applicant)

6 versus)

TRANSCRIPT OF RECORD

7)

8 STATE OF SOUTH CAROLINA)

9

Conway, South Carolina

10

August 27, 2014

11

12

13 B E F O R E:

14 HONORABLE KRISTI L. HARRINGTON, Judge Presiding

15

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

17 For the Applicant

SHAFFER, Esq.
 JAMES K. FALK, Esq.

18

19 For the State:

VALERIE G. GIOVANOLI, Esq.
 Assistant Attorney
 General

20

21 Reporter:

MIA PERRON

22

23

HARRIET P. BENNETT
 Reporter, S. C. Court Administration
 46 Regency Oaks Drive
 Summerville, S. C. 29485

24

25

I N D E X

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NO WITNESSES WERE SWORN

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EXHIBITS

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NO EXHIBITS WERE MARKED OR PROFFERED

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1 (The within matter came before the Court for hearing
2 on August 27, 2014)

3 MS. GIOVANOLI: Michael Wilson.

4 THE COURT: Are you Michael Wilson?

5 APPLICANT: Yes, maam.

6 THE COURT: Mr. Shaffer, do you represent Mr. Wilson?

7 MR. SHAFFER: Yes, Your Honor.

8 THE COURT: What are we doing here today?

9 MR. SHAFFER: Your Honor, this is a Motion for the
10 State.

11 THE COURT: Are you prepared to go forward on that Mo-
12 tion?

13 MR. SHAFFER: Yes, Your Honor, I am, and my client has
14 indicated to me that he would like to speak with me for a
15 moment.

16 THE COURT: To speak with you for a moment?

17 MR. SHAFFER: Yes, Your Honor. This is -- he wants to
18 speak to me, and I guess basically -- the last time I spoke
19 to him I told him I would see him or be out to see him this
20 morning.

21 I have seen Mr. Wilson several times, Your Honor, and

22 .

23 THE COURT: Do you need to speak to your attorney this
24 morning?

25 APPLICANT: It would be nice if I could have a few

1 minutes.

2 THE COURT: All right. We'll let that happen.

3 (Brief pause in the proceeding)

4 (Other matters taken up by the Court until the matter
5 resumed)

6 MR. SHAFFER: May we approach, Your Honor?

7 THE COURT: You may.

8 (Discussion between counsel and the Court off the re-
9 cord)

10 (Brief pause)

11 (Another matter taken up by the Court, after which the
12 matter resumed)

13 MS. GIOVANOLI: Mr. Wilson.

14 THE COURT: You are Michael Brenton Wilson?

15 APPLICANT: Yes, ma'am, I am.

16 THE COURT: And you have had an opportunity to speak
17 with Mr. Shaffer?

18 APPLICANT: Yes, ma'am. That's correct.

19 THE COURT: All right, and, Mr. Shaffer, this is the
20 State's Motion?

21 MR. SHAFFER: Yes, Your Honor, and before we begin do
22 you mind if I put something briefly on the record?

23 THE COURT: Yes, sir. Take all the time you need.

24 MR. SHAFFER: Thank you. I represented Mr. Wilson for
25 some time. I first represented him when I left Appellate

1 Defense three years ago. After I left Appellate Defense
2 he retained me to represent him.

3 So I have known him for quite some time now and he --
4 we have had several discussions over time and I have had
5 notes from him and written him. I have represented him for
6 quite some time.

7 Some of my notes I don't have with me right now due to
8 a computer problem this morning. I just had the internet
9 for a few minutes. I think everybody had stuff that went
10 down who was with Time Warner.

11 So I wanted to say that I don't have all of my notes
12 with me right now. I mean, I can still go forward on this
13 Motion but I wanted to put that on the record.

14 THE COURT: All right.

15 MR. SHAFFER: May I hand up a couple of cases?

16 THE COURT: Sure.

17 (Brief pause)

18 MR. SHAFFER: Your Honor, there are actually two cases
19 but one that I would rely on although I did pull up two for
20 this Motion which I would cite.

21 The first one is Roddick v State and that is 344 SC
22 578.

23 The next case is Brazel v State, 278 SC 253.

24 I'm sure the State is ready on the Motion.

25 MS. GIOVANOLI: Yes, Your Honor. The caption on the

1 Motion would be really a Motion for summary judgment under
2 the civil rules.

3 But basically what are alleging here is -- I'll give
4 you some procedural background.

5 In December of 1998 Mr. Wilson was indicted for CSC and
6 kidnapping. It was called for trial in December of 2001.
7 He appeared at the beginning of trial but absconded at some
8 point after the jury was selected.

9 The Judge issued a sealed sentence after he was con-
10 victed. He was eventually apprehended in 2010, at which
11 point he appeared before Judge John who unsealed and he pro-
12 nounced Judge Cottingham's thirty year sentence.

13 He then filed an appeal from that and once that appeal
14 was filed Mr. Wilson through counsel filed a Motion to re-
15 construct the record because at that point the transcript
16 had been destroyed pursuant to Rule 607. Court Reporters
17 destroy their records after five years.

18 So he filed a Motion to reconstruct the record and the
19 State filed a Motion, a Cross Motion, to dismiss based on
20 the Fugitive Entitlement Doctrine which is sufficiently out-
21 lined in the authority Mr. Shaffer has passed up but also
22 in our Motion.

23 The Court of Appeals dismissed the appeal in November
24 of 2011.

25 Basically the State's Motion today is to also dismiss

1 collateral action based upon the same doctrine. At this
2 point it has been more than nine years since the time he
3 was taken to trial to the time he left.

4 At this point we have no record of the proceedings.
5 We have difficulty in recollection of the witnesses' state-
6 ments and basically all the justifications that have been
7 outlined.

8 The cases citing the Entitlement Doctrine -- if I could
9 approach, Your Honor, . . .

10 THE COURT: You may.

11 Did you say -- so he was present at least for one day
12 of the hearing?

13 MR. SHAFFER: Your Honor, he actually disputes that he
14 was present.

15 THE COURT: So you believe that he was not there?

16 MR. SHAFFER: Your Honor, my client has informed me he
17 was not there for jury selection.

18 THE COURT: Was he there at any stage of the trial?

19 MR. SHAFFER: No, Your Honor. My understanding is he
20 was there the morning but not in the afternoon.

21 To be honest with you, I am not in a position where I
22 -- I would probably have to put him up. He has said that
23 he was present that morning.

24 THE COURT: All right.

25 MS. GIOVANOLI: Your Honor, if I could ask the Court's

1 indulgence for a second?

2 THE COURT: All right.

3 MS. GIOVANOLI: I can respond to that.

4 (Brief pause)

5 MS. GIOVANOLI: Your Honor, I cannot base my knowledge
6 on his presence at the trial. I base it all on his Motion
7 to reconstruct the record that was filed with the Court of
8 Appeals where he said he was at the trial but then left.

9 I don't know exactly when he was there but he was there
10 at some point based on his own admissions in that Motion.

11 At this time, Your Honor, I pass up to you, and I've
12 handed counsel a copy, of United States -- I'm sorry -- of
13 Bagwell versus Tretke, a Circuit Court of Appeals' Opinion.
14 It is located at 376 F Third 408, and basically that outlines
15 -- basically there is no authority -- there is no authority
16 in the Fourth Circuit or in this State for applying the Fu-
17 gitive Entitlement Doctrine to a collateral review, but
18 there is authority for other jurisdictions.

19 I think this is just the case I found that sums it up
20 the best. Basically in that case it says that a prisoner's
21 escape is no (inaudible) the dignity of the Court sitting in
22 in habeas review but it is the Court sitting in direct ap-
23 peal.

24 So we would just motion at this time to dismiss this
25 entire case based on the Fugitive Disentitlement Doctrine.

1 and sort of part and parcel of that is the Doctrine of
2 Laches. It's an unnecessary delay for a length of time.
3 There is no record available, and it is just prejudicial to
4 the State trying to go forward at this point.

5 Thank you, Your Honor.

6 THE COURT: I'm going to give you, Mr. Shaffer, an op-
7 portunity to go into whether or not he was present at the
8 trial.

9 MR. SHAFFER: Your Honor, it is not in your records.
10 I didn't know that was going to be an issue, but . .

11 (Brief pause)

12 MR. SHAFFER: May we approach?

13 THE COURT: You may.

14 (Conference at the bench between counsel and the Court
15 off the record)

16 MS. GIOVANOLI: Your Honor, it is captioned a Motion to
17 remand for reconstruction hearing.

18 THE COURT: Okay, thank you.

19 Do you believe, Mr. Shaffer, that it is not an issue?
20 If so, we will not use it.

21 MR. SHAFFER: Yes, Your Honor.

22 THE COURT: All right, and so on Paragraph Five the
23 Trial Court denied Appellant's Motion to quash the Indict-
24 ment and ordered the case to proceed to trial.

25 Appellant, in quotation, panicked and, in quotations,

1 left.

2 The trial then proceeded without him, and that would
3 indicate to me by the plain reading that he was there.

4 MR. SHAFFER: He was there for a portion of the trial,
5 yes, Your Honor, and I don't know when.

6 THE COURT: I need an answer without qualification.
7 Was he there? Yes or no?

8 MR. SHAFFER: He was there during a part of the trial.

9 THE COURT: The question is, Mr. Shaffer, whether or
10 not he had notice.

11 MR. SHAFER: If he had notice that there was a trial
12 remaining?

13 Based on my reading of the -- I'm not trying to divert
14 the question, but based on my initial reading of the sentenc-
15 ing transcript, which was the only thing I had when I wrote
16 that Motion, that was my understanding, is that he did
17 have notice of a trial.

18 That is based upon my reading of the sentencing tran-
19 script and, Your Honor, that creates a little -- I guess it
20 creates a little bit of a problem because essentially when-
21 ever I am doing this, and all defense attorneys do, is to
22 rely upon what is in the transcript.

23 Whether or not it is in the transcript doesn't neces-
24 sarily mean that it is true or not true.

25 THE COURT: What do you want to do, Mr. Shaffer?

1 MR. SHAFFER: I don't think it should be summarily
2 dismissed. I don't think they have sufficient grounds to
3 summarily dismiss it, and I think there is testimony that
4 could be heard in the matter.

5 THE COURT: Are you prepared to go forward on that, on
6 his application for post conviction relief?

7 MR. SHAFFER: Your Honor, no, because we did not bring
8 witnesses here today and we have witnesses to call. Trial
9 counsel is not here as well.

10 We had agreed -- I mean, the State and I had agreed
11 this would be a Motion hearing only.

12 MS. GIOVANOLI: Your Honor, I did notice it as a Mo-
13 tion hearing and not a merits hearing.

14 THE COURT: All right. Let me hear from you.

15 MR. SHAFFER: Your Honor, first of all, in regard to
16 the Fugitive Entitlement Doctrine there is a per se rule
17 that they should be dismissed. The Supreme Court spoke to
18 that. That is the Ortega Rodriguez case I handed up. It
19 is 507 US 324 -- sorry, 234. That's a 1993 U.S. Supreme
20 Court case.

21 It says that they cannot summarily bar all cases un-
22 der the Fugitive Entitlement Act.

23 Your Honor, the State has made a statement during its
24 argument that the Fugitive Entitlement Act is a ~~re~~stitur
25 in the South Carolina Courts. I disagree with that to some

1 extent.

2 It is not cited but I think it is named in the case I
3 mentioned earlier. It does apply to the rules about Fugitive
4 Entitlement.

5 Basically it distinguishes cases where they were --
6 where I guess the person asking for a belated appeal was in
7 custody at the time the appeal was perfected.

8 Here we have a similar case. It is really very, very
9 similar in its assertions as this case. Our assertion is
10 this. He had left during the trial or at some point that
11 day.

12 I can't establish that by evidence accurately but he
13 left that day. After the trial he contacted his attorney,
14 and his attorney will corroborate this.

15 He said he spoke to him . .

16 THE COURT: Who was that?

17 MR. SHAFFER: Russell Long, Your Honor.

18 He said he spoke to his attorney which his attorney has
19 corroborated it to me.

20 He said he spoke to his attorney and his attorney said
21 everything was preserved. All of my objections and every-
22 thing was preserved for your appeal.

23 Russell Long said we need to file an appeal and he did.
24 He actually filed a Notice of Appeal. He did not request a
25 transcript and the appeal was dismissed.

1 I believe that the appeal was dismissed or it came
2 down -- it's been a while since I've looked at it but it is
3 my recollection that it said it was dismissed based on the
4 failure to have a transcript or to request a transcript.

5 If I am not accurate in that statement . .

6 THE COURT: Let me just ask you this, counsel. You
7 are asking me to deny . .

8 MR. SHAFFER: Their Motion to dismiss.

9 THE COURT: Then what would you like to do today should
10 I grant your request?

11 MR. SHAFFER: Your Honor, today I would ask that it be
12 scheduled for hearing during the next term of Court.

13 THE COURT: Do I need to hear anything else?

14 MR. SHAFFER: Your Honor, regarding laches, you probably
15 don't need to hear anything else but laches, you know. The
16 Courts have declined to . .

17 THE COURT: I don't need to hear anything else.

18 I am going to take the case under advisement, and I
19 don't know that you need to submit proposed Orders but if
20 you were inclined to submit a proposed Order I would ask it
21 to be submitted within ten days.

22 I know that the State has other matters but I think
23 this would take priority so that if I deny your motion you
24 can put it on the October Docket?

25 MS. GIOVANOLI: Absolutely.

1 THE COURT: Go ahead and just put it on the October
2 Docket, just so it is scheduled rather than something else.
3 Okay?

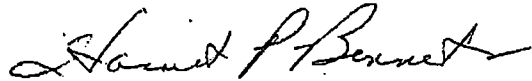
4 Thank you.

5 -----END OF REQUESTED TRANSCRIPT OF RECORD-----
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2 CERTIFICATE

3 I, HARRIET P. BENNETT, Court Reporter for South Carolina
4 Court Administration, hereby certify that the foregoing
5 Transcript was prepared from the records of Mia Perron to
6 the best of my ability, having been heard in the Court of
Common Pleas for Horry County on August 27, 2014.

7 FURTHER, I certify that I am neither of kin nor counsel
8 to any party to this matter, nor do I have any interest in the
9 same.



10 March 19, 2018
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10 March 19, 2018
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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Michael B. Wilson, #343053,

Case No. 2013-CP-26-0469

Applicant,

**ORDER DENYING RESPONDENT'S
MOTION TO DISMISS**

v.

State of South Carolina,

Respondent.

FILED
HORRY COUNTY
14 NOV 19 AM 9:43
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed January 23, 2013. Respondent made a timely Return on or about May 14, 2013. On August 4, 2014, Respondent filed a Motion to Dismiss. The Court convened a hearing into Respondent's motion on August 27, 2014. Applicant was present and represented by Tristan M. Shaffer, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

In December 1998, the Horry County Grand Jury indicted Applicant for Criminal Sexual Conduct and Kidnapping (1998-GS-26-2612 Count 1 and Count 2). On December 3, 2001, the matters were called for jury trial before the Honorable Edward B. Cottingham. Applicant initially appeared for trial, but absconded during trial. The jury found Applicant guilty as indicted and Judge Cottingham issued a sealed sentence along with a bench warrant for Applicant's arrest. On October 4, 2010, Applicant appeared before the Honorable Steven H. John, who unsealed and pronounced Judge Cottingham's sentences of thirty years for each offense to run concurrent.

Applicant filed and served notice of appeal on October 14, 2010. The South Carolina Court of Appeals dismissed the appeal on November 16, 2011, and the remittitur was returned to the circuit court on March 28, 2012.

S.C. Code Ann. § 17-27-70(c) 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." *See also* Rule 56(c), SCRCP. When considering a motion for summary disposition by the State, where no evidentiary hearing has been held, the presiding judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant. *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (citing S.C. Code Ann. § 17-27-80).

The Court has reviewed the pleadings and all relevant supporting documents and must determine if dismissal of Applicant's post-conviction relief action is an appropriate remedy. Applicant alleged he is being held in custody unlawfully based on his attorney's failure to preserve the trial transcript and, on Due Process grounds, that his attorney had a conflict of interest at the time of representation. Applicant's petition for post-conviction relief creates issues of fact that should be resolved by an evidentiary hearing. The Court finds that genuine issues of material fact exist and hereby **denies** Respondent's Motion to Dismiss.

CONCLUSION

The Court finds the record before it creates genuine issue of material fact and Respondent is therefore not entitled to judgment as a matter of law. *See* S.C. Code Ann. § 17-27-70(c); Rule 56(c), SCRCP.

IT IS THEREFORE ORDERED THAT Respondent's Motion to Dismiss shall be **denied**;

IT IS FURTHER ORDERED THAT the Applicant be remanded to the custody of the

South Carolina Department of Corrections until such time as his application can be heard.

AND IT IS SO ORDERED this 10th day of October, 2014.

Charles, South Carolina

[Signature]
THE HONORABLE KRISTIE LEA HARRINGTON
Residing Judge

MAILED

11-21-14 to all
parties not on
default PR

1
2 State of South Carolina)
3 County of Horry) Court of Common Pleas
) 2013-CP-26-00469

4
5 Michael Brenton Wilson)
6) vs.) Transcript of Record
7) State of South Carolina)
8

9
10 February 7, 2017
11 Conway, South Carolina

12 BEFORE:

13 Honorable Michael G. Nettles, Judge.

14 APPEARANCES:

15 James K. Falk, Esq.
16 Attorney for the Applicant

17 Valerie Giovanoli, Esq.
18 Attorney for the State

19

20

21

22 Teresa J. F. Bautz, RPR
23 Official Court Reporter

24

25

1		I N D E X			
2	WITNESS	DIR	CROSS	RED	REC
3	Michael B. Wilson				
4	Mr. Falk	10	--	--	--
5	Ms. Giovanoli	--	37	--	--
6	Russell B. Long				
7	Mr. Falk	43	--	78	--
8	Ms. Giovanoli	--	65	--	--
9	Michael B. Wilson (rebuttal)				
10	Mr. Falk	80	--	--	--
11	Ms. Giovanoli	--	--	--	--

12

13

14 E X H I B I T S

15

16	NO.	DESCRIPTION	ID	EV
17	State's-1	Six Photographs	66	67
18	State's-2	Consent letter	72	73

19

20

21

22

23

24 Exhibits retained by Clerk of Court.

25

1 (The hearing commenced at approximately 4:42 p.m.)

2 THE COURT: Please be seated.

3 MS. GIOVANOLI: For the record, Michael Wilson
4 versus State of South Carolina, 2013-CP-26-469, before
5 the Court on a petition for post conviction relief
6 filed on January 23rd, 2013. In December of 1998, the
7 Horry County Grand Jury indicted Applicant for criminal
8 sexual conduct and kidnapping. That was case
9 1998-GS-26-2612. On December 3rd, 2001, the matters
10 were called for trial before the Honorable Edward B.
11 Cottingham and a jury.

12 Applicant initially appeared for trial but
13 absconded during the trial. The jury found the
14 Applicant guilty as indicted. Judge Cottingham issued
15 a sealed sentence at that time and issued a bench
16 warrant for Applicant's arrest.

17 On October 4th, 2010, Applicant appeared before
18 the Honorable Stephen H. John, who unsealed and
19 pronounced Judge Cottingham's sentences of 30 years for
20 each offense to run concurrently. Judge John denied
21 Applicant's motion to vacate the sentence, motion for a
22 new trial and motion to reduce sentence.

23 And Applicant was represented by Russell Long
24 during both the trial and the sentencing phase.
25 Applicant filed and served a notice of appeal on

1 October 14th, 2010. The South Carolina Court of
2 Appeals denied Applicant's motion to remand for a
3 reconstruction hearing and dismissed Applicant's appeal
4 on November 16, 2011, based on the fugitive
5 disentitlement doctrine.

6 The Applicant submitted an application for PCR
7 January 23rd, 2013. The Respondent moved to dismiss on
8 the basis of the fugitive disentitlement doctrine and
9 the doctrine of laches. The Honorable Christy
10 Harrington denied that motion to dismiss and insisted
11 an evidentiary hearing to resolve the issue of whether
12 the attorney's failure to preserve the trial transcript
13 was ineffective assistance of counsel and if the
14 attorney had a conflict of interest.

15 We're now before the Court. The State is present
16 and ready to proceed. Applicant is also present and
17 represented by Mr. James Falk. And I will hand it over
18 to counsel.

19 MR. FALK: Your Honor, this case we had asked for
20 a -- we had asked for a private investigator because I
21 believe that the only way to show whether or not there
22 is ineffective assistance of counsel in here is whether
23 or not we can develop different witnesses who could
24 have testified similar to an alibi type defense, you
25 know, alibi witnesses.

1 My client has identified, sort of by description
2 and address and all, some people who had seen him
3 bringing the victim -- he and the victim coming back to
4 his apartment, could have seen the victim's demeanor at
5 his apartment. I had gotten money to -- gotten \$500
6 from the State which was a cap of \$500 for an
7 investigator, spoken with John Clayton, Lowcountry
8 Investigative Services.

9 I really had difficult times getting him to get
10 this investigation done. There's been some
11 communication flags. I've had a difficult time with
12 the investigator, but that's the one who was -- that
13 was in the order. So we're coming here today really
14 without being able to develop the testimony that I
15 think that we would need in order to show that there
16 were witnesses that were not called at the trial that
17 could have made a difference.

18 This was a criminal sexual conduct case. This
19 was -- it was a question of whether or not she was
20 giving consent. And to some extent in any type of time
21 in a CSC case where it isn't -- doesn't become an
22 effective date rape case, we do think that there is,
23 you know, testimony as to the victim's demeanor at the
24 time would all have been very relevant and would have
25 been very relevant for the jury.

1 So that is why we are requesting a continuance, so
2 that we have --

3 THE COURT: What is the -- with regard to the
4 issue of continuance, what is the State's position?

5 MS. GIOVANOLI: Your Honor, the State would oppose
6 any continuances in this case. This case has been on
7 the roster three previous times and continued three
8 times. There has been three different attorneys, but
9 Mr. Falk was appointed in May of 2015. So there's been
10 ample opportunity to investigate and prepare this case.

11 Furthermore, this case was filed in January 2013,
12 so it's getting quite old. The State is present, we
13 have our witness ready to proceed, and we feel that
14 there are no further issues that need any further
15 investigation in this case. So we would oppose any
16 continuance.

17 THE COURT: All right. And it's been continued
18 how many times?

19 MS. GIOVANOLI: Three.

20 THE COURT: Okay, all right. And you have
21 retained the services have a private investigator; is
22 that correct?

23 MR. FALK: Yes, I have. But I made a poor choice,
24 I guess. Because either it was an insufficient budget
25 for him to get excited about doing this. He was on the

1 list. I'm limited as far as, you know, in this
2 situation I'm appointed by the indigent defense, and so
3 I'm limited to the investigators that are on their
4 list. I can't go hire my own and pay, you know, in
5 order for indigent defensive I had to use one of their
6 approved investigators. And I'm not sure if it was the
7 fact that it's just not -- bad communication with them.

8 THE COURT: Okay.

9 MR. FALK: You know, telephone calls not returned,
10 e-mails not returned, and I tried to reach him.

11 THE COURT: Very good.

12 MS. GIOVANOLI: I just want to clarify a
13 representation I made to the Court. My witness has
14 informed me that he's actually been subpoenaed four
15 times. So although I don't have in my file a record of
16 four continuances, I truly believe that it has been
17 continued four times.

18 THE COURT: Okay. And your client wishes to say
19 something. Do you want to talk to him, do you want him
20 to say anything?

21 MR. FALK: I'm sure he's going to want to testify.

22 THE APPLICANT: I would like to make a statement,
23 Your Honor.

24 THE COURT: All right. Well, ask your lawyer if
25 he wants you to say it.

1 (Discussion off the record.)

2 THE APPLICANT: We have been here couple times,
3 Your Honor. My first counsel was dismissed due to a
4 conflict of interest because he was also my appellate
5 counsel, so the judge dismissed him and continued it to
6 appoint new counsel.

7 When we were here last year, the judge saw fit
8 that the Court appoint us a private investigator. And
9 unfortunately, the gentleman who was, I guess, the next
10 on their list to be appointed, he doesn't answer his
11 phone, he doesn't return phone calls, he's basically
12 been a ghost. I've managed to get him on the phone one
13 time out of 20, and he was up under his car changing
14 his oil, he said to call him back later.

15 I think, in my opinion, months ago we probably
16 should have come to the Court with a motion to get a
17 new investigator appointed because we desperately need
18 one, and we're in no better position today than we were
19 when the Court appointed this investigator who we've
20 had basically no contact with at our last appearance.
21 We need one that will actually work.

22 THE COURT: All right. Well, I'll tell you what
23 I'm going to do --

24 MR. FALK: Excuse me, Your Honor, if I could just
25 speak to this. One of the times this case was -- I

1 mean, there have been some hand-off issue problems also
2 because, although I was appointed in this case, it took
3 quite a bit of time to get information from his last
4 PCR attorney. I mean, one time we came to court
5 basically because we were trying to get Mr. Schaefer to
6 provide some of the file information that he had had.
7 So there have been some difficulties from the fact that
8 there were three different PCR attorneys in here.

9 But, I mean, as far as from the moment that I got
10 appointed to this case, I was sort of been chained for
11 quite a bit of time because I was waiting to get
12 information from his prior counsel. That's all I want
13 to add.

14 THE COURT: Well, we're going to go ahead and
15 proceed forward with the hearing. And I'm going to
16 consider whether or not to leave the record open for
17 any evidence that an investigator might or might not
18 produce.

19 MS. GIOVANOLI: Okay.

20 THE COURT: And it's your motion, I'll be glad to
21 hear from you.

22 MR. FALK: Well, then, I call my client to the
23 stand.

24 THE COURT: Very good. Yes, sir, if you could
25 please come forward. I'm going to ask you, if you

1 could, to come forward, place your left hand on the
2 Bible and raise your right hand as the clerk
3 administers the oath.

4 MICHAEL B. WILSON, after being duly sworn,
5 testified as follows:

6 THE CLERK: You may be seated.

7 THE COURT: Ask you to have a seat in the witness
8 chair, pull up real close to that microphone, speak
9 loudly, clearly and slowly in order for me to hear
10 everything that you have to say.

11 THE APPLICANT: Yes, sir.

12 THE COURT: Mr. Falk, you're recognized.

13 DIRECT EXAMINATION

14 BY MR. FALK:

15 Q Mr. Wilson, you heard the Attorney General's
16 summary of the facts of that case, a sort of procedural
17 posture. What is your understanding, what is your
18 recollection of when the trial started in this case, or
19 what happened on that time?

20 A Can you give me one second to get my --

21 Q Sure.

22 A -- paperwork spread out and in order. I just want
23 to make sure I'm completely accurate here. Okay, I
24 think I'm ready.

25 Q Do you recall being in court on that day?

1 A Yes. I was in court on December the 3rd, 2001.

2 It was a Monday.

3 Q And what was your recollection of what happened
4 that morning?

5 A I arrived with my girlfriend, who is one person I
6 would like to have here to testify.

7 Q What's her name?

8 A Vita Kairyte, Vitalia Kairyte.

9 Q Can you spell that last name.

10 A K-A-I-R-Y-T-E.

11 Q Thank you.

12 A I had been told to come to general sessions, I
13 think, no less than three times between September and
14 December 3rd.

15 Q Of what year?

16 A 2001.

17 Q Okay.

18 A I was there in October, I was there in November, I
19 was there in December, and I think I was there once at
20 the end of September. It was explained to me by my
21 previous trial counsel, Scott Bellamy, who I asked to
22 explain to Russell Long, and they explained to me that
23 the indictment on which I was to be tried was fatally
24 flawed.

25 Q And what was your understanding of the problem

1 with the indictment?

2 A That the grand jury mistakenly had indicted me
3 under the version of the statute that was no longer
4 extant on my alleged offense date. The statute had
5 been superseded by a new version of the statute that
6 was in effect at the time.

7 Q So the offense, when did the offense allegedly
8 occur?

9 A I believe it was September 30th of 1998.

10 Q Okay.

11 A And that some months prior to that the State had
12 adopted a new CSC statute, but that the grand jury had
13 been presented with the older previous version.

14 MR. FALK: Your Honor, if the Court would consider
15 taking judicial notice of that, I think it's Act 372 of
16 1998 was the Drug-Induced Crime Prevention Act, which
17 added language to the CSC statute, which -- and the
18 Drug Induced Crime Prevention Act became effective
19 May 26, 1998. So the new statute was effective prior
20 to the date of this offense.

21 MS. GIOVANOLI: Your Honor, I'm going to object at
22 this point to relevance. There's been no allegation of
23 a flaw in the indictment, no claim in the application
24 nor any amendments.

25 MR. FALK: But, Your Honor, what I might add is

1 that we did make a claim of ineffective assistance of
2 counsel. And in that I think we're going to find out
3 that my client wasn't there and that all of a sudden
4 trial is starting. And at that time trial counsel
5 could have moved to quash the indictment or ask at that
6 time.

7 Granted, once the trial goes forward, you have,
8 you know, maybe claims have been waived. But that
9 would have been an opportunity on that day when the
10 trial is going forward to have -- move to quash the
11 indictment because it was. So I do think it still
12 falls under the general umbrella of ineffective
13 assistance of counsel, especially when he's facing a
14 trial with no Defendant.

15 THE COURT: All right. Well, I'll allow you some
16 latitude in that regard for that limited purpose.

17 Q So had your -- had any of your lawyers -- so and
18 what year are we in now, 2000?

19 A Well, we're in 2001.

20 Q 2001. Had your lawyer made any representation to
21 you about when they were going to go to trial?

22 A Yes. I quite frequently would call Mr. Long,
23 visit his office on Kings Highway, it was in the First
24 Union bank building, if memory serves. I was very
25 concerned about the case and preparing for the case.

1 And he constantly reassured me that the grand jury
2 would have to reindict me in February of the following
3 year, which is when he told me the grand jury meets. I
4 just took him at his word, and that there would be no
5 trial during the year of 2001, that they would have to
6 fix the indictment. And according to him, there was no
7 great rush to prepare.

8 I subsequently discovered that on the 3rd of
9 December that when I was not there -- and I have a copy
10 of the indictment from the clerk's office here -- that
11 according to what Mr. Long told me, that the judge said
12 that he was unwilling to continue it, that if there had
13 been an indictment objection, that it should have been
14 made before that time. And he requested his law book
15 and an ink pen and handwrote in the new version of the
16 statute on the indictment.

17 Q So that --

18 A And that is this (indicating).

19 Q So that document, it's your understanding that
20 that is the judge's amendment to the indictment?

21 A Correct. The amended part is about administering
22 and distributing, dispensing, etcetera, gamma
23 hydroxybutyrate or other substances. So, I mean, I
24 guess it's part of that drug thing you were mentioning.
25 Those were the changes made.

1 Q Crime induced drug --

2 A One thing I would --

3 Q Drug-Induced Crime Prevention Act.

4 A One thing I would like to point out, and I hope
5 that Mr. Long has his case file with him, because I
6 asked many times to see the alleged SLED report of this
7 cup where they supposedly found this drug.

8 Q Yes.

9 A And I had asked not only to see the report many
10 times, but I had asked to have -- make arrangements
11 where we could have our people test this cup if in fact
12 there was such a report with such a test done. And,
13 again, I was told, relax, it will be sometime next year
14 before you're tried.

15 And I was never able to see that alleged SLED
16 report, and I still haven't to this day, that Mr. Long
17 kept telling me that Prosecutor Modeka had -- that this
18 language and the new language in this indictment is
19 obviously relative to, you know, gamma hydroxybutyrate.

20 Q All right. Sorry. Now, going back, you went to
21 court that morning?

22 A Yes, sir.

23 Q And you left the courtroom?

24 A That's correct.

25 Q All right. What had transpired immediately before

1 you leaving the courtroom?

2 A Immediately before leaving the courtroom?

3 Q Was the judge on the bench?

4 A No. The judge had not come in yet that morning.

5 This was 8:30, 9 o'clock-ish in the morning. The judge
6 did not -- I guess he had not been out yet.

7 Q You said this was a Monday. Had they qualified
8 the jury yet?

9 A No. We had done nothing. Like I said, I'd been
10 basically to every call of court or every time a judge
11 was sitting, they were asking me to come down there. I
12 was -- actually, I was there in October, and the
13 solicitor's office wanted me to stay all week. And
14 Mr. Long actually had to intervene on that one because
15 they had scheduled it in November. And I actually have
16 a letter to that effect.

17 But they were having me come down there every week
18 just for call of court basically. This is the letter I
19 was talking about here (indicating).

20 Q So did you have any conversations with your lawyer
21 prior to leaving the courtroom that day?

22 A Yes, I did. I asked him about the indictment, and
23 you know, what was going on and if he knew anything
24 more than, you know, the day before, the day before
25 that when I had spoken to him last. And he did not.

1 So that was it, I left.

2 Q Did you tell him where you were going, did your
3 lawyer have contact information for you?

4 A He had my cell phone number, I'm sure. I think he
5 knew the hotel I was staying in. Probably almost
6 certainly had my grandfather's number.

7 Q When you say the hotel, were you not living in...

8 A When I was released from jail, I rented a room
9 down near the ocean front on a monthly basis. It was
10 at a hotel.

11 Q Okay.

12 A I was living there. That way I could satisfy the
13 requirements of staying in the State.

14 Q There was at one of the prior hearings, Judge
15 Harrington apparently wanted to have more testimony
16 regarding a conflict of interest?

17 A Yes.

18 Q What is your understanding of the conflict of
19 interest?

20 A Okay. Mr. Long had been my attorney actually on
21 two different occasions. I had originally hired his
22 father as trial counsel. He got ill and was unable to
23 proceed as counsel, and I understand he had some other
24 legal issues. And the case went to his son, Russell,
25 Mr. Long.

1 So we had communication over a span of many
2 months, you know, like I said, frequent phone calls,
3 letters, meetings, I would drive to his office. I have
4 a letter here dated November 28th, just a couple days
5 before the trial that was not supposed to happen. And
6 it was faxed to Judge Cottingham to a fax number at the
7 Wave Rider Hotel, which I later discovered was where
8 Judge Cottingham was staying in town.

9 And in the letter, he basically says --

10 MS. GIOVANOLI: I'm going to object to hearsay at
11 this point.

12 THE COURT: Sustained.

13 MR. FALK: May I approach?

14 THE APPLICANT: I'm not sure what's the hearsay.
15 At any rate, the letter that I just gave my attorney, I
16 was given a copy of it. And in the letter it says
17 that, I just now became aware of the fact that I have
18 represented some of the owners --

19 MS. GIOVANOLI: Objection to hearsay.

20 MR. FALK: Mr. Long can testify what the letter --

21 THE APPLICANT: Oh, okay.

22 Q But let's go on. Did he -- so what discussion did
23 Mr. Long have with you about the conflict?

24 A He advised me that he worked for the owner, and
25 some of the principals and employees of the strip club

1 over time and that he just became aware of this a
2 couple days before my trial.

3 Q And the relevance of this?

4 A And that he didn't think he had a conflict. I did
5 not feel that way, but he claimed he did not feel he
6 had a conflict.

7 Q And when we're talking about this, what's the
8 relationship between the victim and the strip club?

9 A Well, every single witness against me was either
10 an owner, principal or employee of that club. And that
11 club being an adult entertainment club that, you know,
12 tends to generate ongoing business, I would assume,
13 for, you know, an attorney. But all the witnesses
14 against me were, you know, in some way employed at that
15 club.

16 Q Did he ask you to agree to the conflict, or did he
17 ask you to waive it?

18 A He said that if I did not -- he said he was going
19 to ask the other people to waive the conflict. He said
20 my only choice was to either waive the conflict, or the
21 judge was going to revoke my bond and lock me up.

22 Q And what was your understanding why the judge
23 would revoke your bond and lock you up?

24 A My feeling at the time was just that they wanted
25 to proceed with the case and be done with it. You

1 know, they didn't want any delays.

2 Q What was your understanding of what would happen
3 if you did not waive the conflict?

4 A That I would probably be sitting back in jail
5 trying to figure out how to, you know, get a different
6 attorney. But from jail instead of from home.

7 Q But it's your testimony that this -- so you had
8 communication with him about November 28th?

9 A That's about right.

10 Q And so you're thinking it is how many days before
11 the trial?

12 A Well, the trial that wasn't supposed to be, the
13 trial was on December 3rd. 28th would have been about
14 what, five days prior to that.

15 Q Okay.

16 A And my main concern at the time was, you know,
17 based upon as many hours as we've had to discuss this
18 case and go over this case ad nauseam, it didn't seem
19 to me to be very believable that you just now realized,
20 you know, you might have this conflict with Fantails.
21 I mean, you know, we've discussed Fantails and that
22 night, you know, hundreds of time.

23 Q And again, for the record, Fantails is the club?

24 A Yes, that's correct. It came as a complete shock
25 to me, that letter.

1 Q Okay. Had you retained Mr. Long, or was he
2 appointed to represent you?

3 A I retained Mr. Long.

4 Q Okay. Did you have a discussion with him what
5 would happen to your retainer money if you were to get
6 a new counsel at this time?

7 A No, I did not. But what I did do, I was -- since
8 I was under the impression that there was not going to
9 be a trial in December or that year, according to
10 Mr. Long, I figured I would be able to hire another
11 attorney. I went to meet him in his office. I had had
12 some insurance checks.

13 Q The him is?

14 A Pardon?

15 Q You said you went to meet him in his office?

16 A Mr. Long.

17 Q Okay.

18 A I went to meet Mr. Long in his office a few days
19 before this. I had some insurance checks that were --

20 Q Just to get this timeline, before this, before the
21 trial?

22 A Before this letter.

23 Q Okay.

24 A Before receiving the letter. You know, end of
25 November but before I received the letter.

1 Q Okay.

2 A I went to his office. I had some insurance checks
3 that amounted to between 40 and \$50,000. And I had
4 attempted to deposit them and open an account
5 downstairs with the branch manager who, A, advised me
6 that they would have to do a federal form because there
7 was over \$10,000 in cash. And he did not want to open
8 an account for me because in his opinion, I would just
9 take the money out of the account once the checks had
10 cleared.

11 Q And now, what bank is this?

12 A First Union.

13 Q Okay.

14 A It was the bank downstairs from where his office,
15 Mr. Long's office, was at that time in 2001.

16 I ended up taking the checks upstairs and
17 explaining the situation to Mr. Long about the federal
18 forms if you move more than 10,000 in cash. And the
19 branch manager's unwillingness to open an account, he
20 offered --

21 MS. GIOVANOLI: I'm going to object at this point
22 to relevance.

23 THE COURT: I'll allow him to answer.

24 THE APPLICANT: I'm getting there. Pardon?

25 THE COURT: Go ahead.

1 THE APPLICANT: I explained it to him, and we
2 struck upon a deal. I would endorse the checks over to
3 him, he could put them in his -- what they call the
4 account, the account that attorneys -- escrow account,
5 put in his escrow account until they cleared. Give me
6 the money, thus avoid having to fill out the form. And
7 I would pay him for the service.

8 And when I agreed to this, one thing that I
9 insisted upon, you know, I said, fine, I'll give you,
10 you know, about six grand out of this money for doing
11 this for me. But I made him understand in no uncertain
12 terms, if anything went sideways, he was to appeal the
13 case and make sure all of our bases were covered.

14 In other words, I insisted, you know, I will give
15 you this money, but I want top notch legal
16 representation. I want you to, you know, do your job.

17 And then I got this, a copy of this letter shortly
18 after that. And then of course we went to trial in
19 December when we weren't supposed to. And he did file
20 a notice of appeal.

21 Q Let me back up here.

22 A Go ahead.

23 Q Because I've asked you about -- I was trying to
24 see what kind of situation you would be in five days
25 before trial, whether or not that you would have any

1 resources to hire another lawyer. That's why I was
2 asking you about any retainer money that you had paid
3 to your counsel. So these -- you testified about these
4 checks. Was that over and above what you had agreed to
5 as a legal fee?

6 A Yes. I mean, to be honest, you know, I had the
7 money, it was available, I had the money. And he asked
8 for it, and I felt that, you know, it would be in my
9 best interest to take that deal, you know.

10 And incidentally, these are some of the things
11 that the investigator, you know, I wanted him to get
12 subpoena duces tecum, or whatever, you know, for the
13 copies of the checks and the transaction history on the
14 account. There's a litany of things that we really
15 need an investigator for on this case, in my opinion.

16 Q All right. Now, you testified a little bit about
17 an appeal?

18 A Yes, sir.

19 Q What kind of conversations did you have with him
20 prior to the trial going on about an appeal?

21 A In the event we lose, I definitely want to appeal
22 the conviction. And I want you to make sure that
23 you've got all of your I's dotted and T's crossed and,
24 you know, preserve it. His phrase he used was,
25 preserve the record for appeal, I believe was the

1 phrase he used in those discussions..

2 Q Okay. So based on that conversation, did you
3 believe that he was going to file an appeal on your
4 case?

5 A I did.

6 Q And what was your understanding of how a trial
7 transcript is made from an appeal?

8 A At that time I had no concept really. I mean, I
9 was aware of the fact that courts of record, you know,
10 have a stenographer, something, and there's a record,
11 but I wasn't familiar with procedure.

12 He did, however, file an appeal. I have a copy of
13 that up here somewhere. It was within just a couple
14 days of the conviction, couple three days. But he did
15 file a notice of appeal. I think this is it. He filed
16 the notice of appeal a couple days after the
17 conviction. However, he didn't get a copy of the
18 transcript of the -- when I was --

19 Q What's your -- when you say he didn't get a copy
20 of the transcript, why don't you think a transcript
21 exists? When did you learn that there was going to be
22 no transcript from the trial?

23 A In 2010, late 2010, early 2011, I realized there
24 would be no transcript forthcoming when I discovered
25 that the court reporters were only required to keep

1 their tapes for five years, and then they were
2 permitted to reuse them. I just assumed that since
3 Mr. Long knew he was supposed to file an appeal, as is
4 evidenced by the fact, you know, he filed an appeal
5 right after trial, that he would either know or should
6 have known by virtue of the fact that he's probably
7 been practicing law for a while, that he would need a
8 transcript.

9 So I mean, I -- it was in his hands. And he
10 didn't get one in time. So now there's no longer one
11 to get.

12 Q So is it your testimony that he had -- all right,
13 so earlier you testified about these checks?

14 A Yes, sir.

15 Q Did he ever refund that money to you?

16 A No. No, I didn't expect him to.

17 Q Did you expect that he would -- never mind.

18 A I mean, the arrangement that I made with him, you
19 know, was I wanted to cash these checks. The bank
20 manager was not being cooperative. I wanted the cash
21 liquid. I was meeting resistance in getting that done.
22 He offered me a solution, you know. He did ask for
23 some money because I think he had only gotten about a
24 \$5,000 retainer from my grandfather for the case in the
25 first place.

1 I was agreeable. And I wanted to keep him happy
2 as long as he was working for me and make sure that he
3 was putting his best foot forward. So you could call
4 it, I guess, a gift, you know, over and above the
5 initial retainer for services rendered for cashing the
6 checks for me in the first place.

7 Q That's the 6,000. But the other -- you said there
8 was about \$50,000?

9 A Yeah, that was -- he gave me the balance of it
10 once it cleared in his account.

11 Q Okay, that wasn't clear.

12 A Yeah, he just got kind of like a service fee,
13 slash, gift out of it. But, yeah, he had already gave
14 me the significant portion of it.

15 Q Okay. So when you left the Court that day, what
16 did you think was going to happen?

17 A That I would probably be back in there next week
18 or the next, next week for another call of court.

19 Q Were you ever advised by the Court that you would
20 be tried in your absence?

21 A No.

22 Q At any time during this proceeding were you ever
23 advised that you would be tried in your absence?

24 A No.

25 Q I mean, if you weren't there, that you would be

1 tried in your absence?

2 A I'm sorry?

3 Q If at any time, were you ever advised that if you
4 didn't appear in court you ran the risk of being tried
5 in your absence?

6 A No.

7 Q If you had an opportunity, what witnesses would
8 you -- what witnesses should your counsel have called
9 to be prepared for trial? Or which witnesses should
10 your counsel have investigated to be ready for trial?

11 A You have to bear with me one second, I have a lot
12 of paperwork up here. Well, one thing, when the lady
13 and I went to my house --

14 Q The lady, the victim?

15 A The victim in this case.

16 Q Okay.

17 A When we went to my house, there were a couple of
18 college kids that lived in the apartment upstairs above
19 me. After I left the -- her name was S.B. [REDACTED]

20 [REDACTED]

21 Q What was this apartment?

22 A Pardon?

23 Q What was the name of the apartment?

24 A Flint Lake Apartments.

25 Q Flint Lake?

1 A Flint Lake. It's off of Burcale Road, I think.

2 It's been a lot of years.

3 Q Okay.

4 A I left Ms. S.B. at my house and subsequently
5 went back to the club to pick up my girlfriend, stop at
6 IHOP, and then come back to the house where Ms.

7 S.B. remained. While we were there over the span
8 of an hour or two, my girlfriend Kelly and Ms. S.B.
9 went upstairs to visit the college guys that lived
10 upstairs and just hung out, you know, this kind of
11 thing. I thought --

12 Q I hate to keep interrupting you.

13 A All right.

14 Q This is a different girlfriend, this is not Vita?

15 A No, sir, this is -- her name is Kelly Hooker, the
16 girl I was dating.

17 Q And she was your girlfriend at that time?

18 A Yes, sir, that's correct.

19 Q Okay. So you and Kelly Hooker?

20 A Kelly and the alleged victim in the case, they
21 went upstairs to hang out with college kids for a
22 little while. And I felt that the college kids should
23 have come to court to, I guess, basically to help show
24 the lady's demeanor and that if she felt, I don't know,
25 kidnapped or something that she probably wouldn't, you

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1 know, go hang out with some college guys and then come
2 right back to where you're being kidnapped at, if you
3 understand my train of thought on that.

4 The nurse that did the, I guess you call it the
5 rape kit or the exam at the hospital had written on one
6 of the forms that the victim seemed to be overly
7 concerned about her husband. And it got my notice when
8 I got my first discovery. And I went out to the
9 emergency room and located this nurse and interviewed
10 her myself and asked her if, you know, she would be
11 willing to testify. And I think she should have come.

12 Basically there was no preparation done because,
13 you know, there was not going to be any trial until
14 2002 is what I kept getting from counsel, you know.

15 Q So there were two witnesses at the apartment,
16 there was the emergency room nurse?

17 A There's also a gentleman and his daughter that
18 lived in the apartment, not my apartment, but next to
19 my apartment, that were, you know, there that night
20 that, you know, saw us and could attest, I guess my
21 demeanor and her demeanor and probably for that matter
22 the college kids' demeanor. They, of course, were not
23 subpoenaed. And, again, I just kept getting there's
24 not going to be a trial this year, don't worry, calm
25 down.

1 Q What conversations did you have with Mr. Long
2 about these witnesses; did you tell him about the
3 witnesses?

4 A Oh, yes.

5 Q Did you tell them where they lived?

6 A Oh, yes. I mean, I think I came just short of
7 harassing him as far as trying to make sure that we
8 were on the same page and prepared, and you know, ready
9 to go if we had to go. There was nothing more
10 important in my life at that time than being prepared
11 for this case.

12 Q So as far as the two girls that were living above
13 you in an apartment.

14 A There were two boys that were living above us.

15 Q Excuse me, the two boys. You gave your lawyer
16 that apartment number?

17 A I'm sure I did, verbally probably many times.

18 Q And you said you talked to the emergency room
19 nurse?

20 A I did. I tracked her down myself.

21 Q And did you give that name to your lawyer?

22 A I did. I don't remember it now, but I had it
23 then.

24 Q Okay.

25 A And actually I still have it, I just don't

1 remember it anymore.

2 Q Did you talk to him about the police officer who
3 made the...

4 A David O'Quinn, yes.

5 Q And what was your conversation with your lawyer
6 about him?

7 A David O'Quinn at the time was a Horry County
8 police officer. He responded to a call for service at
9 Fantails club the next morning around noon. And the
10 call for service was based upon S.B.

11 husband was there, and he was causing a commotion.

12 And Officer O'Quinn had opportunity during that
13 time to, you know, interact with him and, you know, get
14 some back story from her husband and, of course,
15 interact with her as well and form some opinions. And
16 I thought it would be relevant that he never spoke with
17 them either.

18 Q I think I know what you're talking -- why you're
19 talking about -- what's the relevance of the victim's
20 husband?

21 A Well, his position -- okay. Well, when I spoke
22 with the nurse -- I got to back up a little bit here --
23 the nurse, her story was basically that the victim
24 was --

25 MS. GIOVANOLI: I'm going to object, it's hearsay.

1 THE COURT: Sustained.

2 THE APPLICANT: I'm not sure how to answer the
3 question.

4 Q You keep saying that the husband was concerned.

5 A The husband was angry, according to David O'Quinn.

6 Q How in your mind does the husband's anger relate
7 to a defense that you could have asserted at trial?

8 A Speaking to Officer O'Quinn at the time, he told
9 me that --

10 Q Without saying what he said, okay.

11 A Okay.

12 Q I'm just asking you -- I mean, I'm not going to
13 put the words in your mouth. But you're saying that
14 the husband is angry, and you think that that fact may
15 be relevant towards your defense. What about in
16 general an angry husband is going to be relevant to
17 your defense?

18 A Well, just that the woman seemed to be very
19 concerned about her safety from, you know, this angry
20 husband that they, you know, had had previous domestic
21 violence issues. And here she was concerned about his
22 wrath. And then he showed up at the club with some
23 wrath.

24 Q And you're saying it would give her a possible
25 reason to not be forthcoming --

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1 MS. GIOVANOLI: Objection to leading.

2 THE COURT: Sustained.

3 THE APPLICANT: I think I know where you're going
4 with that, but my assumption, and it's not an
5 assumption, but my reasoning would be that a lot of
6 times when people are afraid, they say what they feel
7 they have to say to protect themselves. And I think
8 this was an example of that kind of situation.

9 Q Thank you.

10 A And he was also, according to what David told me,
11 he was very upset with --

12 MS. GIOVANOLI: Objection to hearsay.

13 THE COURT: Sustained.

14 THE APPLICANT: What David told me I can't repeat?

15 Q No, no, no, no.

16 A Okay, all right.

17 Q That's fine. Now, did you have any previous
18 dealings with the victim in this case?

19 A I had met her one time before at the club.

20 Q And what is her -- what was her occupation at the
21 club?

22 A She was a dancer.

23 Q And I assume that you're saying this so that she
24 is topless dancer?

25 A They went nude, but yes.

1 MS. GIOVANOLI: Objection as to relevance.

2 THE COURT: I'll allow him to answer.

3 Q Okay.

4 A I had one prior dealing with her. My girlfriend
5 at the time, Kelly Hooker, was also employed as a
6 dancer at Fantails with S.B. [REDACTED], the alleged
7 victim in this case. They were both dancers together.
8 I went up there to pick up Kelly a few nights before
9 the alleged -- date of the alleged offense here, and I
10 met S.B. [REDACTED]. Seemed like a nice girl, she
11 was from North Carolina, I grew up in North Carolina.
12 We talked, you know, hit it off nicely. I'm

13 anticipating some objections, but I'm going to --

14 Q No, that's fine. Let me ask you, did you have a
15 romantic relationship with her prior to that night?

16 A No, I did not.

17 Q Were you aware of other people who had a romantic
18 relationship with her?

19 MS. GIOVANOLI: Objection as to relevance.

20 MR. FALK: I think that is.

21 THE APPLICANT: No, no, well, I wasn't -- it
22 wasn't my concern, no. I was just going to tell you my
23 interaction with her the only one time I met her. We
24 met, we hung out, like I said, bought her a couple
25 drinks. That night after performing a table side dance

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1 for someone, she -- and this occurred right in front of
2 me -- she was trying to get the guy to give her more
3 money. And he felt he had paid for his dance, and she
4 felt he had not paid her what he was supposed to pay
5 her.

6 Q Were you witnessing this?

7 A I was witnessing this. This was as close to me as
8 the lady to my left.

9 Q So you witnessed an altercation?

10 A Correct. Anyhow, she had been drinking and
11 smelled of --

12 Q Did you witness her drinking?

13 A Yes. She was drinking with us, you know, that
14 night.

15 Q At the table?

16 A At the tables, yes. Basically long, short, she
17 was -- she was buzzing, and she felt that the guy owed
18 her more money than he did. And they were disagreeing,
19 and it was getting louder and louder and louder until
20 finally the club manager came over there and told her
21 to drop it, go to the changing room and just change and
22 call it a night.

23 She wouldn't let it go, she insisted the guy owed
24 her more money. Finally, he told her she was fired at
25 which point she burst into tears. And at that point me

1 and Kelly just left, we didn't need to be part of the
2 drama.

3 So when I came in there almost a week later, the
4 night that this happened, September 30th, I was
5 actually surprised to see her there, you know. Because
6 I was under the impression she had been fired about
7 four nights prior to this. So I was actually
8 pleasantly surprised to see her in there. Like I said,
9 she was a nice lady. That was my only previous
10 encounter with her, though.

11 Q Did you -- Kelly Hooker, did she testify at your
12 trial, do you know?

13 A I was not there during the trial.

14 Q Have you had any contact with Kelly Hooker?

15 A Since the trial?

16 Q Yes.

17 A Not since the trial, no.

18 Q Does your lawyer have her information?

19 A Of course.

20 MR. FALK: I have no further questions.

21 THE COURT: Cross-examination.

22 MS. GIOVANOLI: Yes, Your Honor, just briefly.

23 CROSS-EXAMINATION

24 BY MS. GIOVANOLI:

25 Q Going back to the conflict of interest, did you

1 ever sign off on that conflict of interest?

2 A I did.

3 Q And you were free -- after you signed off on that
4 conflict of interest, weren't you free to retain other
5 counsel?

6 A That was the plan.

7 Q Okay. And why didn't you?

8 A Well, I didn't think I was going to be tried in
9 seven days. It's not that I wasn't actively looking to
10 replace him. It's just the trial happened like that,
11 when I was under the impression it was going to be next
12 calendar year.

13 Q Your testimony was that this was the most
14 important thing going in your life?

15 A Correct.

16 Q But you didn't find any time that week to find new
17 counsel?

18 A Yeah, that's a fair statement. I mean, I had not
19 found new counsel in that week.

20 Q Were you working that week?

21 A Pardon?

22 Q Were working that week?

23 A No, I wasn't working.

24 Q So what did you do during the day?

25 A Geez, I...

1 Q So you had ample opportunity to reach out and find
2 new counsel if you believe that --

3 A I put some feelers out. But unfortunately the
4 firm of Hearn, Brittain and Martin which was my first
5 choice, they had a conflict and could not take the
6 case. I had not found anyone yet that, you know, I
7 wanted to entrust my life with that week.

8 Q Okay. So after your trial, did you ever reach
9 out -- after you absconded, did you ever reach back out
10 to Mr. Long?

11 A I did.

12 Q Okay. And how did you reach out to him?

13 A I called him.

14 Q And what were the contents of that phone
15 conversation?

16 A He told me that, I have to go ahead and tell you
17 that the judge changed the indictment, and you were
18 tried in your absence. He said, they convicted you, he
19 said, the jury came out one time and asked for some
20 second look at something. And when they came back out
21 the next time they convicted you, and that I have to
22 advise you that you should turn yourself in.

23 Q And what did you do, did you turn yourself in?

24 A No.

25 Q Okay. Did you -- what day did that phone call

1 take place, the day of your trial?

2 A No, ma'am. This would have been, I believe,
3 either Wednesday, the 5th, or Thursday, the 6th. I
4 would have to look back at the cell phone records to be
5 a hundred percent sure. It was two or three days after
6 the trial.

7 Q Okay. And where were you when you got the phone
8 call?

9 A I was, best of my recollection, there's some side
10 street that runs from Kings Highway --

11 Q What county?

12 A The mall. I was in Horry County.

13 Q When did you receive the money that you allege
14 that Mr. Long put in his escrow account?

15 A As soon as the checks cleared. It took, I think,
16 about three days.

17 Q Was that -- you said that that -- you got that
18 check cashed or attempted to get that check cashed a
19 week prior to your trial?

20 A No. It was a little more than a week. Because
21 the letter that I got was dated the 28th where he just
22 discovered, you know, that he worked for Fantails. And
23 this was about a week prior to that.

24 Q Okay. So about a week and a half to a week prior
25 you got a bunch of cash?

1 A I would say mid November would be a fair
2 statement, yeah.

3 Q Okay. Did you use that cash to abscond from the
4 jurisdiction?

5 A That cash in particular, I mean, that was cash
6 that I had amongst other cash that I had. I took all
7 of my cash with me when I left.

8 Q Right. But this particular transaction you
9 received about \$44,000; right?

10 A That's correct.

11 Q Okay. And did you use that to create your new
12 identity in Florida?

13 A No.

14 Q No, you didn't use that cash to create your new
15 identity?

16 A No. I actually created my new identity in North
17 Carolina at the registrar of deeds office.

18 Q Okay.

19 A I think if your point is was that money earmarked
20 for a bug out, no. It was insurance -- life insurance
21 checks. And I wanted them cashed, and I just wanted to
22 do it with as little fanfare as possible. And he
23 offered me a solution, so I took it.

24 Q And why did you return to Horry County to receive
25 your sentence?

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1 A It wasn't really up to me, they brought me.

2 Q Who brought you?

3 A The police department.

4 Q Okay. And how did the police department get their
5 hands on you?

6 A I was arrested in Florida and transported to Horry
7 County.

8 MS. GIOVANOLI: Okay. I have nothing further.

9 THE COURT: Any redirect?

10 MR. FALK: No, Your Honor.

11 THE COURT: All right. You may step down.

12 THE APPLICANT: I have -- I do have some points.
13 Should I do that later or?

14 THE COURT: You can't do that now, it has to be
15 pursuant to a question. And I'll allow you to have a
16 seat over there. Thank you.

17 (Witness excused.)

18 THE COURT: Any further witnesses?

19 MR. FALK: Mr. Long.

20 THE COURT: Please come forward, Mr. Long. I'm
21 going to ask you to place your left hand on the Bible,
22 raise your right hand as the clerk administers the
23 oath.

24 RUSSELL B. LONG, after being duly sworn, testified
25 as follows:

1 THE CLERK: You may be seated.

2 THE COURT: Mr. Long, have a seat and speak
3 loudly, clearly and slowly in order that we hear
4 everything that you have to say. And let's start with
5 your name.

6 THE WITNESS: Russell Blake Long.

7 DIRECT EXAMINATION

8 BY MR. FALK:

9 Q Mr. Long, how did you come to represent Michael
10 Wilson in this case?

11 A Let me preface all of my testimony with the fact
12 that this was a really long time ago. And even when he
13 was caught in Florida and brought back to have the
14 sentence unsealed, it had been a long time then. And
15 now it's been seven more years.

16 And so there's a whole lot fuzzy about my memory
17 about representation of him. But I think, well, I
18 know, my dad was getting very old and very sick. He
19 was dying of emphysema, and his ability to practice was
20 getting pretty depleted.

21 And Michael had -- or Brent he goes by -- had
22 hired my dad to represent him. And I think, you know,
23 it was getting to a point where my dad wasn't going to
24 be able to continue on. And so there was sort of a
25 global offer to all of my dad's clients through the

1 Court, through the Supreme Court, to allow them to
2 choose me to finish out his case load at no additional
3 cost to them, or to get their files from me as the
4 custodian of my dad's files and take their files to
5 someone -- take their files somewhere else.

6 So I'm pretty sure that's how I first got contact
7 with Mr. Wilson was through that.

8 Q Okay. And you had tried CSC cases in the past;
9 had you not?

10 A Certainly, yeah. I've been practicing 25 years,
11 so I had been practicing maybe ten years at that point.

12 Q And I characterize this as a date rape case; is
13 that -- I mean, this wasn't --

14 A No, I don't think so. No, they weren't dating.
15 He was alleged to have gone into a strip club --

16 Q Excuse me. Was there -- my client asserted that
17 it was consensual; isn't that correct?

18 A To me he did, yes. He didn't to the jury because
19 he left in the middle of the trial.

20 Q No, I know that. But, I mean, to you he said that
21 it was consensual?

22 A To me he said that it was consensual.

23 Q Okay. And she worked as a -- and there was no --
24 and was there a rape kit done?

25 A Yes.

1 Q And was there any sign of force as the rape; do
2 you recall?

3 A You know, I don't think there was a whole lot of
4 finding in the rape kit. That's not outrageous or
5 unusual, I mean, they are not very good. It depends,
6 there are so many factors in the event itself.

7 The allegation was that she was deemed unconscious
8 by him, taken from the business to his house, raped,
9 repeatedly while she was unconscious, took photographs
10 of it, his girlfriend later found the photographs of
11 her unconscious and him penetrating her. And that was
12 really what convicted him.

13 But the question of whether or not he could have
14 cleaned her up, cleaned himself up, all of that, while
15 she was still unconscious when they were finished -- or
16 he was finished, you know, was a big part of the
17 prosecution. And, of course, again, without him being
18 there to help me defend this case, it was pretty hard
19 for me to refute any of that.

20 Q But there were no signs of bruising, stab wounds,
21 anything like that, that would go along with a coercive
22 sexual assault?

23 A No, there weren't signs of bruising or cuts. But
24 there was a picture of her, looked liked she was
25 completely unconscious, with him penetrating her. I

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1 mean, I hear you, and a rape kit may be helpful. But a
2 picture of him penetrating her unconscious body was a
3 lot more valuable to the jury, and it would require him
4 to refute that from a witness stand.

5 I don't know how else to handle that other than --
6 because his position was, she was acting like she was
7 unconscious, which again, you know, it was a little
8 hard to believe. But if that's what his position was,
9 then he was going to have to be the person to tell the
10 jury that. And that was the position.

11 Q And the victim was a dancer?

12 A Correct.

13 Q Topless dancer, nude dancer?

14 A Correct.

15 Q Did you develop any evidence that you would have
16 needed to provide the solicitor as far as under the
17 rape shield statute?

18 A To provide the solicitor? Explain.

19 Q You have to provide notice. If you're going to
20 provide evidence in a rape case that the victim had
21 prior conduct that was similar, or I mean, if you were
22 going to impugn her reputation as being is somebody who
23 did this frequently with other people, you would have
24 had to provide the solicitor with that information.

25 A We didn't have any of that information.

1 Q Did you look for any of that information?

2 A No.

3 Q Did you talk to any of the witnesses -- did you
4 talk to the two boys that he described lived in the
5 apartment above?

6 A I have no idea what he's talking about. He never
7 told me about two boys. Again, the allegation -- the
8 victim testified that she woke up naked and left
9 wandering around in the streets looking for help. I
10 have no idea how -- I don't know about two boys, I
11 don't know anything about it.

12 Q How about the emergency room nurse?

13 A Again, the records from the emergency room were
14 all consistent with what the victim said. She made a
15 statement to their emergency room nurse, and she made a
16 statement to the emergency room doctor that she was
17 working, that she was talking to Michael Wilson or a
18 man that described as him. She became getting really
19 ill, and the next thing she knew she woke up in his
20 apartment at 3 o'clock in the morning naked.

21 Q Did you go -- I mean, he had testified that he
22 located the emergency room nurse and talked to her; did
23 you?

24 A I doubt he did. And no, I did not.

25 Q Were you ready to go to trial that morning?

1 A Absolutely. And, again, Michael knew we were
2 going to trial. My letter to him that I had to get,
3 you know, to the conflict issue in the answering this
4 question, I knew that I'd done Fantails, LLC years
5 prior to this. It wasn't news to me that I had done
6 Fantails, LLC. I just didn't realize one of the
7 members of the LLC was going to testify in the case, I
8 find out the week prior.

9 So I decide -- I looked at it hard and I called
10 another law -- every time I have an ethical issue or a
11 conflict issue, I always call somebody with more
12 experience just to kind of get an opinion. And they,
13 of course, from there, I didn't think I -- that it
14 created a conflict that I had done an LLC for these
15 people, and one of them might have ended up being a
16 witness in this case.

17 But out of an abundance of caution, I brought it
18 to the Court's attention, I brought it to the
19 solicitor's attention, I brought it to my client's
20 attention, and I brought to the members of the LLC's
21 attention. I made everybody aware of it.

22 And I had Michael come in, I explained it to him.
23 I explained to him I didn't think it was a conflict at
24 all. And I had him sign the waiver, understanding that
25 he had been explained and waived it.

1 Q You had said that one of the members of the LLC
2 testified?

3 A Yes.

4 Q And who was that? Just what did he testify to?

5 A Well, I can tell you who it was, if I can look at
6 the form that I had everybody sign waiving the
7 conflict. His name is Kenneth Smith.

8 Q And what did he testify to?

9 A He testified, amazingly, he testified that he was
10 working the door that night and that Michael Wilson
11 came up to him and said the victim is drunk, and I'm a
12 good friend of hers. And if it's okay with you, I'm
13 just going to take her home and sleep it off.

14 And this Mr. Kenneth Smith testified he said,
15 okay. And he literally allowed, according to him,
16 Michael Wilson to carry the victim out of the
17 establishment lifeless and put her in a vehicle and
18 drive her away.

19 Q So he testified to her demeanor when she left?

20 A Yes.

21 Q Okay.

22 A Lack of demeanor, because she was asleep.

23 Q All right. So you said that there was -- you
24 didn't anticipate any employees of the LLC testifying?

25 A No. I said I didn't realize there were going to

1 be employees of the LLC testifying until we --

2 Q But the victim worked at Fantails; is that
3 correct?

4 A Yeah. Yes, sir, she did.

5 Q Would you not have anticipated that she would have
6 testified?

7 A Well, again, just because I formed an LLC for four
8 people, that doesn't create a conflict on whether one
9 of those happens to be a witness in a criminal trial.

10 Q Did you do other work for Fantails?

11 A No. No, sir.

12 Q Did you represent other employees of Fantails?

13 A No, sir.

14 Q Other independent contractors of Fantails?

15 A No, sir.

16 Q What conversations did you have with him about the
17 indictment in this case?

18 A I'm really fuzzy on that. I -- and I actually --
19 it's crazy how time, you know, with thousands -- I
20 don't know how many cases I've had since then. But I
21 think in my discussions with you prior to this, I have
22 no recollection of any of that.

23 But then hearing Michael testify almost jogs my
24 memory that maybe they had moved to amend the
25 indictment. I can't tell you, I don't remember. And

1 there's nothing in my file about it. But it's possible
2 that they moved to amend the indictment, and Judge
3 Cottingham granted that motion. I'm not a hundred
4 percent sure.

5 Q Did you ever hear Judge Cottingham advise
6 Mr. Wilson that if he were not present in court he
7 would be tried in his absence?

8 A No, why would he. We came in, they called the
9 case for trial. Michael and I drew a jury together.
10 We empaneled a 12-member, two-alternate jury, put the
11 jury in the jury room. Judge called us back into
12 chambers to ask us if we had any pretrial motions or
13 if -- you know, he wanted to know, as Cottingham always
14 did, if there had been an offer in the case and was
15 there any way we can resolve the case.

16 Was there anything, any -- you know, any middle
17 ground. He always did that, civil cases, criminal
18 cases, that's what he did. He was famous at getting
19 cases moved on the docket.

20 I explained to him that Michael wasn't going to
21 plead to anything, that he was adamant that he was not
22 guilty, this was a consensual case, and we were ready
23 for trial. Walked back out in the courtroom, he was
24 gone. His mother who is seated in the back of the
25 courtroom right now was there, his grandfather was

1 there, and his current girlfriend at the time -- she
2 was not his girlfriend at the time of the incident, but
3 his current girlfriend at the time -- were sitting on
4 the front row.

5 I asked them, where's Michael. I think it was the
6 grand -- maybe the grandfather and the girlfriend only
7 at that point, maybe the mother hadn't shown up yet.
8 But the grandfather and the girlfriend said, I don't
9 know, he went that way.

10 And so I asked the judge for a moment. I went
11 down the hall looking for him. I looked in the men's
12 room. I went downstairs, looked in the men's room. I
13 went across the bottom -- this was at the old
14 courthouse. I went across the bottom looking for him,
15 I didn't find him anywhere.

16 So I went back upstairs. I told the judge we had
17 to -- I asked if we could talk to him in chambers.
18 Went back into chambers, I said, judge, I don't know
19 where he is. So the judge sent bailiffs out all around
20 the courthouse, all around looking for him like we do
21 when this sort of thing happens.

22 Again, I was talking to his grandfather and his
23 girlfriend, and they were just as -- seemed as
24 bewildered as I was about where he went. Judge said,
25 well, we're going to -- when he realized that they

1 couldn't find him, the deputies couldn't find him, the
2 judge said, we're going to go forward. I stood up on
3 the record and asked for a continuance. I said, judge,
4 I don't know, he could have -- he could have walked
5 across the street and fallen dead.

6 He could have gotten kidnapped or something. He
7 could -- there are many possibilities why he's not
8 here. He's not here, and I ask for a continuance. And
9 of course, we know now Judge Cottingham denied that.

10 MR. FALK: May I approach the witness?

11 THE COURT: Yes.

12 Q I know this has been almost 20 years. Do you
13 recognize that document, or does that...

14 A Not really. I mean, I see that it's an
15 indictment, his indictment allegedly.

16 Q You would have gotten his indictment as part of
17 the Rule 5; would you not?

18 A Sometimes we do, sometimes we don't, actually. So
19 if they provide us with discovery before the cases -- a
20 lot of times we get discovery before the grand jury
21 meets. I come to court probably more often without
22 indictments in my file than with. I've got the warrant
23 and I've got the case file, and I've got, you know, all
24 the witness statements and everything else. But it's
25 very rare actually that we have an indictment in the

1 file.

2 But this certainly is his indictment. As far as
3 the handwritten language, I don't know that's -- I
4 can't remember, I told you that, if Judge Cottingham
5 entered that handwritten language and amended the
6 indictment or not. I have no idea.

7 Q How long have you been practicing in Horry County;
8 you said 25 years?

9 A Yes.

10 Q Have you ever seen indictments come back from the
11 grand jury with handwriting on them?

12 A Yes.

13 Q And without the initials?

14 A Again, it depends on who does it. I think if
15 Judge Cottingham did it, he wouldn't initial it. But
16 if somebody -- the grand jury did or a solicitor did,
17 they might. I have no idea.

18 Q Yeah, might as well. Could you just read in what
19 you can understand as the handwriting in there.

20 A Well, it's count one, criminal sexual conduct in
21 the first degree, count two, kidnapping.

22 They certainly didn't amend the kidnapping
23 indictment. And he was charged with kidnapping and
24 found guilty of kidnapping and sentenced to 30 years
25 for kidnapping. And the evidence was a lot clearer on

1 kidnapping than it was -- well, I don't know, evidence
2 was pretty clear on both, judge. But the additional
3 language added by handwriting to the CSC first degree
4 is -- well, it says in type, the last sentence in type
5 that the Defendant had sexual intercourse with the
6 victim without her consent while the victim was
7 unconscious.

8 Then somebody's added, I don't know when, in
9 handwriting: By administering, distributing,
10 dispensing, delivering or causing to be administered,
11 distributed, and dispensed or delivered a controlled
12 substance or gamma hydroxybutyrate.

13 Q I'll take that. Did you -- do you recall telling
14 my client that the judge wrote that in?

15 A No. No. The only conversation I had with Michael
16 after the trial was that telephone call that he said he
17 made to me. I was out in the front yard kicking a
18 soccer ball with my one-year-old son, who's now 16 and
19 a half.

20 And he said, how did it go. And I said, how do
21 you think it went. You know, the jury met you, and
22 they you left. And this is a "he said/she said"
23 consensual or not consensual rape case. The only other
24 witness in his apartment at the time of them having sex
25 was him. How do you think it went. They found you

1 guilty. So that was the conversation there.

2 There would have been no -- I don't even know how
3 he would have known that -- if what he is saying is
4 true, how would he have known to ask me about the
5 indictment. I don't even know how that would have
6 occurred.

7 Q What witnesses did you have subpoenaed for trial?

8 A Michael Wilson.

9 Q Were you planning to call him to testify?

10 A Absolutely. It was a "he said/she said" case.
11 They had pictures of a girl that looked like she was
12 completely unconscious with him inside of her. He had
13 to testify, he didn't have a choice. And he had no
14 criminal record that was going to stop him from doing
15 so.

16 He did have other pending charges. He had a
17 criminal sexual conduct with a minor that occurred
18 within the same 30 days that this occurred that I
19 represented him on and was pending at the time.

20 Q And why did you not have anybody else subpoenaed
21 that day?

22 A There wasn't anybody else. He didn't provide me
23 with any names of any witnesses. There were no other
24 witnesses. He left Fantails, just he and she,
25 according to him, she was unconscious, went to his

1 house, and had either consensual or nonconsensual sex,
2 and then she left, and you know, naked in the street.
3 There were no other witnesses to it that I knew of.
4 And he definitely didn't provide me with any names.

5 Q What witnesses were there who testified as to her
6 condition when she left Fantails?

7 A There were -- I think there was at least one other
8 dancer that testified she was limp and unconscious or
9 drunk looking. He actually gave a full post Miranda
10 statement before he had a lawyer to the police. He
11 testified -- or he told them in this statement that she
12 was really drunk. So they had that. And then Mr.
13 Smith, the guy that was working the door.

14 Q Did Kelly Hooker testify?

15 A Yes.

16 Q What did she testify --

17 A Kelly Hooker was his girlfriend at the time. She
18 testified that she came home, found --

19 THE COURT: She did testify?

20 THE WITNESS: Kelly Hooker, his girlfriend at the
21 time, did testify. He said in his direct examination
22 that his girlfriend at the -- that was seated in the
23 front row when the case was called for trial is a
24 different person. He had gotten a new girlfriend by
25 trial.

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1 But his girlfriend in 1998 when this allegedly
2 occurred was Kelly Jo Hooker. And she was the key to
3 the case because she found that a -- that's how long
4 ago it was, judge, it was a disposable camera.

5 THE COURT: She testified for the State?

6 THE WITNESS: She testified for the State that she
7 found the camera, didn't know what was on it, took it
8 to the little photo shop, got the things printed and
9 saw what it was and was shocked, and called the police.
10 Q Were those photographs provided as part of the
11 discovery?

12 A They were. I actually have some of them here.

13 Q Was the whole roll provided?

14 A Yes. There was pictures of Michael sitting on a
15 couch, there was pictures of his motorcycle that
16 somebody had described earlier. There was pictures of
17 the apartment in general, and then the rest of it was
18 what appeared to be an unconscious victim in many
19 different poses.

20 Q When he signed the conflict letter, were there any
21 discussions with you about that he wanted to get a new
22 lawyer?

23 A Never. Absolutely not. There was no -- he wasn't
24 talking about getting another lawyer. He wasn't --
25 that never even got raised. And, in fact, he's -- all

1 of the conversation that he says he and I had about
2 that leading in, and he coupled it with us having a
3 conversation about, if I lose you file an appeal for
4 me, I've been practicing law 25 years, I've never heard
5 anybody say, if I lose, file an appeal for me. We talk
6 about that after we lose. That's just the way it
7 works. Nobody does that. And he didn't -- we didn't
8 do that.

9 I did it out of an abundance of caution. When he
10 took off and the jury found him guilty, I knew that I
11 probably still had an obligation to file notice of
12 intent to appeal. So I did.

13 But then I found out that an appeal is not going
14 to go until they find him. So there's no reason --
15 nobody requested me to ask for a copy of the
16 transcript. Therefore, there was no -- I mean, I'm
17 sure the transcript would have cost me a bunch of money
18 that I hadn't been given to pay for a transcript
19 anyway. But beside that, I didn't have an obligation
20 to do anything else other than file that notice of
21 intent to appeal, and I did that.

22 Q That conversation about, if I lose I want you to
23 file an appeal, could that not been interpreted that he
24 also wanted you to represent him on an appeal?

25 A It didn't happen, so I have no idea what it could

1 have meant. He didn't say it. I've never heard that
2 from somebody in 25 years. And judge said Ed Chrisco's
3 practice, you know, tried more cases than anybody in
4 this courtroom. I might have been second or third
5 maybe only behind the judge. I've tried a bunch of
6 cases in this courthouse.

7 I've never had anybody tell me, in case I lose,
8 you need to file an appeal. I never heard that. And
9 according to him, and I don't remember that -- this
10 part of it either, but I'm definitely going to go now
11 that I just heard about it for the first time today
12 about this trust account thing, about him asking for me
13 to help him cash these life insurance checks. It's
14 possible that that's close to true, I don't know, I
15 don't remember.

16 But if that had occurred, then we certainly could
17 have talked about that, and I could have quoted him a
18 fee and had the money in my trust account to do it.
19 But I'm a go-getter lawyer, I probably would have
20 thought about that, you know, if he's asking me to be
21 prepared to file an appeal, which would be unusual for
22 somebody to say, he had the ability hire me on the
23 front end to do it anyway.

24 None of that happened. There was no conversation
25 about, if I lose, file an appeal.

1 THE COURT: What did the retainer agreement say
2 with regard to appeal?

3 THE WITNESS: I didn't have a retainer agreement,
4 I took it over for my dad.

5 THE COURT: Okay.

6 THE WITNESS: I didn't get paid. I think his
7 grandfather did send me some money, sort of a -- I
8 think they almost felt bad for me that I was involved
9 in such a huge case. Again, it's not like I wasn't --
10 I mean, I tried many cases just like this before this.
11 I was a really good option. Almost everybody that -- I
12 mean, in fact, everybody that got that option from the
13 Supreme Court took it.

14 I closed out every -- like 45 cases, big bad ones,
15 you know. The easy ones were taken care of. But I had
16 to close out a huge case file load for my dad, and that
17 was one of them.

18 Q Your retainer agreement now provides something
19 about an appeal; does it not?

20 A My retainer agreement now is definitely, after 25
21 years of sitting through PCR's, has changed a lot.

22 Q I know in my retainer agreement I've got something
23 that an appeal is a separate thing, that there's a
24 express language in my agreement. I practice criminal
25 defense law, I know you do too. My agreement has

1 express language in there that an appeal is not
2 covered.

3 A Right.

4 Q Do you have similar language?

5 A Absolutely. But I still filed the notice of
6 intent to appeal for them which was the end of my
7 obligation on that. Even if my retainer agreement said
8 I would take up his appeal, once I filed that notice of
9 intent to appeal and they recognize that he had
10 absconded, there's nothing to do on that appeal. It
11 just sits there until they find him.

12 Q Did you -- were you aware that there would be no
13 transcript after a certain period of time?

14 A Not aware at all.

15 Q Could you have had an opportunity to order the
16 transcript?

17 A Yeah, I probably could have ordered the transcript
18 within minutes of the conviction.

19 MR. FALK: Your Honor, may I have a moment.

20 Q Once you filed the appeal in this case, you were
21 still the counsel of record in the case, were you not?

22 A I was.

23 Q Because you remain there until somebody else picks
24 up the --

25 A Office of Indigent Defense relieved me at some

1 point when he was picked up in 2010.

2 Q Yeah, okay.

3 THE COURT: While they are conferring on that, are
4 you absolutely positive that there was no discussion
5 about college boys having interaction with the alleged
6 victim?

7 THE WITNESS: Absolutely positive.

8 THE COURT: And you had a number of conversations
9 with him about the theory of defense and what all was
10 going to transpire?

11 THE WITNESS: Yes, sir.

12 THE COURT: There was never any discussion about
13 any witnesses to corroborate his story that she was not
14 intoxicated?

15 THE WITNESS: No, sir.

16 THE COURT: All right.

17 THE WITNESS: I don't -- judge, his story wasn't
18 that she was not intoxicated actually. His statement
19 to the police was that she was. His statement to the
20 police was that she was so intoxicated that he offered
21 to take her home. That was what his position was.

22 So it was actually identical to her demeanor, and
23 her state of mind was identical in his statement to
24 what the State believed, that -- but the difference in
25 the theory was, I guess, he felt like she had

1 intoxicated herself, and the State thought that he had
2 aided in her intoxication.

3 THE COURT: He'd indicated in his direct testimony
4 that he wanted somebody to show that she really wasn't
5 that intoxicated and what her demeanor was, that she
6 was able, after they had consensual sex, to engage in
7 frolic with two college boys.

8 THE WITNESS: Not true. I don't have anything --

9 THE COURT: You never heard anything about that?

10 THE WITNESS: No. And I've got his statement to
11 the police, and he didn't tell them anything about
12 that.

13 THE COURT: All right, very good.

14 Q So in 2010, did you file another notice of appeal?

15 A Yes, of his sentence. Because then we came back
16 and his sentence was unsealed. And I, again, out of an
17 abundance of caution, filed another notice of intent to
18 appeal the sentence. Because there was such a gap
19 between the conviction and the sentence, I just wanted
20 to cover him as best I could.

21 Q Because you had sought an extension of time also
22 too?

23 A No. I asked for the transcript. And the response
24 was, we're having difficulty finding it. So I had to
25 ask the Court, the Court of Appeals, for a leave for

1 more time in order to get the transcript because
2 they -- the court reporter couldn't do it.

3 Q Did he correspond with you in letters prior to the
4 trial?

5 A Prior to the trial?

6 Q Yeah.

7 A I don't know. I don't have them, if he did.

8 Q Do you have your file with you?

9 A I have the file that I have, yes. I will admit,
10 my file is not complete. It went through -- I mean,
11 it's been a very long time. We've had to reconstruct
12 some of it just so I could try and remember some of it.
13 But I don't have letters from him in my file.

14 MR. FALK: Your Honor, I have no further
15 questions.

16 THE COURT: Okay. Anything?

17 MS. GIOVANOLI: Yes, Your Honor.

18 CROSS-EXAMINATION

19 BY MS. GIOVANOLI:

20 Q And I apologize, I know it's getting late and
21 everybody wants to go home. But I believe this is
22 extremely important for the record because we don't
23 have a transcript in this case. So can we kind of go
24 through and specifically talk about the evidence that
25 was introduced at trial, because that's relevant to

1 this proceeding as well.

2 I know that you testified about some photographs,
3 we'll start with those. The photographs, what do those
4 photographs depict?

5 A I have them here, I have some of them.

6 Q Okay.

7 A They depict --

8 MS. GIOVANOLI: And if I may inquire, judge, if
9 you are interested in seeing those photos, I'll be more
10 than happy to try to get those admitted into evidence.
11 I don't want to...

12 THE COURT: It's your case, do whatever you feel
13 is necessary.

14 MS. GIOVANOLI: Okay. So if you don't mind, may I
15 approach the witness?

16 THE COURT: Yeah.

17 Q And how many are there?

18 A I have six photocopies of pictures.

19 Q Okay. Is this a fair and accurate representation
20 of the photos that were admitted in the trial of this
21 case?

22 A They are, they are.

23 MS. GIOVANOLI: May I have those marked, please.

24 (WHEREUPON, State's Exhibit No. 1 was marked for
25 identification only.)

1 MS. GIOVANOLI: And Your Honor, we would now move
2 to enter this into evidence as State's Exhibit 1.

3 MR. FALK: May I see them, please.

4 MS. GIOVANOLI: Yes.

5 (WHEREUPON, State's Exhibit No. 1 was admitted in
6 evidence.)

7 Q And is this all of the photographs that were
8 admitted during trial?

9 A No, ma'am. There were more.

10 Q There were more, okay. And are the other ones
11 similar to these?

12 A Very.

13 Q More graphic, less graphic?

14 A Can't be more graphic than that.

15 Q Okay. And besides the photos, do you recall how
16 many witnesses the State had?

17 A I can't tell you how many. I know that obviously
18 the lead investigator, maybe another police officer, a
19 SLED toxicologist.

20 THE WITNESS: They found a plastic shot cup,
21 judge, about like this (indicating), in the spot where
22 she took the police the following day inside the club.
23 They found a cup there. And they sent this cup to SLED
24 to test it for, and the results came back that it was
25 GHB, the date rape drug.

1 Q Okay. And so you had a few law enforcement
2 officers testify?

3 A I'd say at least two, plus the SLED officer. Then
4 we had Kelly Joe Hooker, the girlfriend that found the
5 pictures, of course the victim, and I think the
6 victim's friend about her demeanor the next day and the
7 trip to the hospital. And then the nurse from the
8 emergency room.

9 Q So the nurse did testify?

10 A Yes.

11 Q Okay. Continue. Also a door guy, I believe?

12 A And the doorman from -- or one of the owners from
13 Fantails who was working the door, and at least another
14 dancer that was there was probably about it.

15 Q Okay.

16 A Probably eight or nine witnesses, though. Pretty
17 long -- it was actually, I think, a couple-day-long
18 trial.

19 Q Okay. And how would you characterize this
20 evidence; overwhelming?

21 A Overwhelming. Without Michael there, without
22 Michael there to refute it, it was overwhelming. It
23 was almost not defensible. It was -- I mean, it was
24 pretty bad.

25 THE COURT: What did you say to the jury? What

1 was the theory of your case when you spoke to the jury?

2 THE WITNESS: Well, we had the -- I had some good
3 things. I had the fact that the rape kit didn't show
4 anything. I had what Michael always wanted to make a
5 big point out of the fact that she was a stripper, a
6 hooker, a whore, you know, I'm sure she did this for
7 money, so what's the big deal type thing.

8 I wasn't going to do that and go there. But I
9 tried my best to make sure that the jury was aware that
10 she wasn't the most innocent of victims. It was hard,
11 I mean, it was pretty hard to try it without him here.
12 Obviously it gets hard when we do anything TIA, it's
13 even more difficult when you're prepared to go to trial
14 with a very important witness, and that witness takes
15 off on you.

16 Q Was there any evidence from any witnesses that the
17 victim was conscious?

18 A No..

19 Q Everyone corroborated that she was unconscious
20 during this?

21 A Every everyone.

22 Q Did you call any witnesses?

23 A No, ma'am.

24 Q And your trial strategy was to call the Applicant
25 in this case to the stand?

1 A Absolutely. His position was, she was acting in
2 those pictures. And the only person in the whole world
3 that could say that was him.

4 Q Was that his only version of the facts that he
5 gave you?

6 A Pretty much.

7 Q Okay. And he never provided you with any other
8 witnesses?

9 A No, ma'am.

10 Q With regard to -- did any of the other evidence
11 show that this act was consensual?

12 A No, ma'am.

13 Q Did you ever have a talk with your client at the
14 time about being present in trial?

15 A No, ma'am.

16 Q Was he aware that he could be -- that he had to be
17 present for trial?

18 A Well, he was present. So I don't know if he was
19 aware that it was -- I don't know if he thought it was
20 okay just to take off in the middle of it or not. We
21 didn't talk about that.

22 I assumed he was going to stay there for the whole
23 thing since he showed up -- you know, he was there
24 first thing Monday morning ready to go. I thought we
25 were going to have a trial.

1 Q How far along in the trial did you go before the
2 Applicant absconded?

3 A We drew a jury, the jury was sworn, they were put
4 in the jury room, Cottingham called us back. When I
5 got back in the courtroom, he was gone.

6 Q Okay. I'm going to fast forward or actually
7 rewind a little bit back to the conflict of interest
8 discussion that you had with him. Did you ever tell
9 him that if he didn't waive that conflict of interest
10 that the judge would revoke his bond and he would have
11 to go back to jail?

12 A No way, that's outrageous. That makes no sense.
13 That's like saying because I had a hamburger for lunch,
14 the world's coming to a end. The two don't relate at
15 all. I mean, I have no idea what he's talking about.
16 I can't even imagine how if -- you know, sometimes when
17 somebody like a client or a witness want to say that I
18 said something, I try and figure out, what could I have
19 said that they misinterpreted to believe that that was
20 what I said. You know, well, why -- how could he think
21 that, there's no way I would tell somebody that.

22 Q Did you actually have a physical letter that you
23 had the Applicant sign off on the conflict of interest?

24 A Yes.

25 MS. GIOVANOLI: May I approach, Your Honor, the

1 witness stand.

2 THE COURT: Yes.

3 Q Okay. So do you recognize this document?

4 A Yes.

5 Q And was this written by you?

6 A Yes.

7 Q And signed by you?

8 A Yes.

9 Q And what was the date on it, please?

10 A November the 28th. That was a week prior to
11 trial.

12 Q Okay. And is this in the same condition it was
13 when you wrote it and signed it?

14 A It was.

15 Q Has it changed in any way?

16 A Well, no, that's a copy of it. But, no, it hasn't
17 changed.

18 Q Do you mind if I get this marked?

19 A I don't mind at all. Thank you for asking.

20 MS. GIOVANOLI: Would you please mark this as
21 State's Exhibit 2.

22 (WHEREUPON, State's Exhibit No. 2 was marked for
23 identification only.)

24 MS. GIOVANOLI: And at this time the State would
25 move to introduce State's Exhibit 2 into evidence. No

1 objection?

2 (WHEREUPON, State's Exhibit No. 2 was admitted in
3 evidence.)

4 Q Now, this was a letter that you wrote whom?

5 A Judge Cottingham, Matthew Modeka and to Michael
6 Wilson. Well, you know, I was getting the consent from
7 Michael and the four members of the LLC.

8 Q Okay. And did you receive his consent?

9 A Yes.

10 Q Is that his signature at the bottom of the page?

11 A It is.

12 Q Okay. Is it your practice generally to handle
13 your criminal defendants' appeals?

14 A Never.

15 Q Okay.

16 A And that's not true. I've done two in my 25-year
17 career. I've done two appeals to the Supreme Court.

18 Q Okay. And two out of about how many trials?

19 A I don't know, a bunch.

20 Q A bunch. Hundreds, thousands?

21 A No, not thousands, that would be crazy but, I
22 don't know, a lot. If you're talking about pleas and
23 trials, then maybe a thousand or more. But as far as
24 trials, no, we don't try that many cases. But I did
25 handle two. Actually, both of those were not -- I

1 didn't try their cases, I just handled their appeals.

2 Q Okay. And in all of the cases where you did not
3 handle the appeals, when you filed the notice of
4 appeal, do you generally order a transcript after you
5 filed the notice of appeal?

6 A No.

7 Q No. Does the appellate lawyer generally do that?

8 A Yes. And, again, that's a good point, because the
9 two appeals that I did handle were I was hired to
10 handle appeals.

11 Q Okay.

12 A I have filed many notices of intent to appeal upon
13 a conviction, and then appellate defense or somebody
14 else usually picks up the appeal and orders the
15 transcript.

16 Q And you filed a notice of appeal after the trial
17 in this case; correct?

18 A Yes. The next week.

19 Q And you did that why?

20 A To cover Michael Wilson.

21 Q Did he ever ask you to file a notice of appeal?

22 A No, ma'am.

23 Q Whenever he was brought back to the jurisdiction
24 and appeared before, I believe it was Judge John, to
25 unseal Judge Cottingham's sentence?

1 A Correct.

2 Q Did you have any chance to have a discussion with
3 him prior to that hearing?

4 A Well, as soon as I got him in -- soon as I found
5 out that -- I found out that he had been caught in
6 Florida. And then, so we were sort of looking for --
7 trying to figure out when he was going to be here, so I
8 could go meet with him and tell him the program, tell
9 him what happens. You know, the judge sealed your
10 sentence.

11 Because I hadn't talked to him since. He called
12 me the night after the last day of the trial, and told
13 him he was found guilty, he needed to turn himself in.
14 Hadn't heard from him since.

15 And then, so I needed to talk to him and tell him
16 what occurred and what was going to happen. And then I
17 did. I went out to J. Reuben Long and met with him for
18 a good long time. He was really excited and interested
19 to tell me how he was able to change his identity and
20 avoid everybody and stay hidden in Florida. And he was
21 very excited about that, proud of himself for being
22 able to do that. That was really the majority of that
23 conversation.

24 Q And how many years was he able to elude the
25 authorities?

1 A Nine.

2 Q Okay. I'm going to just ask you couple questions
3 about the indictment. I know you have no specific
4 recollection of addressing the indictment in court.
5 But is it general practice for an indictment to be
6 amended --

7 A Yes.

8 Q -- prior to trial?

9 A I've had it done numerous times.

10 Q Okay. And do they often do it via handwriting on
11 the actual document?

12 A Yes. I've never seen a judge deny the State's
13 motion to amend an indictment.

14 Q Is that something you generally object to?

15 A No.

16 THE COURT: And the original indictment, you
17 understood what the allegations were, was that she was
18 deliberately intoxicated in an effort to facilitate
19 this crime?

20 THE WITNESS: Correct. The --

21 THE COURT: So you were on notice, you knew what
22 the accusation was?

23 THE WITNESS: A hundred percent, yeah. If you --
24 I don't know if she put the indictment -- or they put
25 the indictment in evidence. But the typewritten

1 section of the indictment covered the allegations
2 anyway. They just went in and added the new language.
3 They still could have proven that case without -- you
4 know, under the old law.

5 Under the new law it was the same set of
6 circumstances, the same set of facts, the same set of
7 allegations. They just apparently amended the
8 indictment to reflect how the law had changed. It
9 didn't change the case.

10 MS. GIOVANOLI: I have no further questions, Your
11 Honor.

12 THE COURT: Anything further?

13 MR. FALK: Yeah, a couple things. One, Your
14 Honor, is I've requested a certified copy of the
15 indictment. I'm not going to be able to get it until
16 the end of the week because they're developing records.
17 But if we could at least -- I would offer that, it
18 would be a public record, as an exhibit to this case
19 which would be the indictment.

20 MS. GIOVANOLI: And, Your Honor, the indictment is
21 already a part of the record in the packet that I've
22 provided to the Court, and we've also filed it with the
23 Clerk of the Court. So I don't know why a certified
24 copy would be necessary.

25 MR. FALK: Well, that's fine, then.

1 THE COURT: Okay, very good.

2 REDIRECT EXAMINATION

3 BY MR. FALK:

4 Q You had said that they amend -- this is a
5 significant amendment to the indictment, though, is it
6 not; this is not just changing the date or year?

7 A No. Where is the indictment, do you have a copy
8 of it? May I? The indictment alleges that on the date
9 in question he committed the offense of criminal sexual
10 conduct by use of aggravated force or that the victim
11 submitted to the sexual battery while use of force,
12 confinement or kidnapping while the victim was rendered
13 mentally incapacitated or physically helpless, to wit,
14 that the Defendant had sexual intercourse with the
15 victim without her consent while the victim was
16 unconscious. Stop.

17 If what you're saying is correct, that was the
18 original indictment. Certainly exactly what he was
19 accused of, exactly what I was prepared to try. They
20 must have gone -- somebody must have, and I'm not sure
21 if it was Cottingham before, maybe it was, and added:
22 By administering, distributing, dispensing, delivering
23 or the GHB.

24 But the proof was the same regardless of whether
25 it was amended or not. I mean, he was -- it's the

1 same. No, I don't think it's significant at all. I
2 think it's insignificant. Therefore, that's probably
3 why Cottingham so readily amended it.

4 THE COURT: All right. Go ahead.

5 Q You had seen photographs, the Attorney General
6 showed you copies of the photographs in the case?

7 A Yes, sir.

8 Q And were there other photographs that were
9 admitted into evidence?

10 A I think so.

11 Q Did they supply you as part of the discovery with
12 all of the photographs that came off the camera?

13 A Yes.

14 Q Were there any of those photographs they
15 supplied -- you saw all of them; is that correct?

16 A Yes. I saw all of them that they provided me.

17 Q Okay. Do you know how many?

18 A No.

19 Q Did you ever give -- did you ever see the SLED
20 report about the cup and the...

21 A Yes. I did more than that, I cross-examined the
22 person that tested it.

23 Q Did you ever provide Mr. Wilson with a copy of the
24 SLED report?

25 A Of course. He saw all the discovery two weeks

1 prior to trial, just like I did when we were ready to
2 prepare him for trial. He knew exactly what we were --
3 I mean, he knew exactly what they were alleging and
4 exactly who the witnesses were going to be, and we were
5 ready for trial.

6 MR. FALK: No further questions.

7 THE COURT: You may step down.

8 THE WITNESS: Thank you. And this might be in
9 evidence, I'm not sure. Well, it's not marked.

10 (Witness excused.)

11 THE COURT: Anything further from that?

12 MR. FALK: May I call my client as a rebuttal
13 witness?

14 MS. GIOVANOLI: Your Honor, I would just inquire
15 as to what necessarily needs to be put into evidence
16 any more than what he already has done.

17 MR. FALK: Whether or not he saw the SLED report.
18 And the whole -- his chronology and that chronology was
19 different, and I think he has an opportunity to rebut
20 that.

21 THE COURT: Let's limit it to that. And it would
22 be incumbent upon you to object to any new material.

23 MS. GIOVANOLI: Okay. Thank you, Your Honor.

24 REBUTTAL EXAMINATION

25 BY MR. FALK:

1 Q Did you ever see the SLED report?

2 A No. But I asked to see it many, many times. And
3 as of a few days prior to the trial, I was getting the
4 same answer which is, they have not given it to me yet,
5 they don't actually have to give it to me until trial.
6 And I said, well, please get it from them, I would like
7 to see it, and I would like to -- if what they are
8 saying is true, I would like to have the cup examined
9 by our own people.

10 And then he came back and told me, he said, well,
11 you can't have the cup examined by our own people
12 because they destroyed the cup during the process of
13 testing. And I said, well, that's very convenient,
14 let's see the report. And he kept telling me he had
15 not gotten the report. In fact, if he's got a copy of
16 the case file, I would love to see the report because I
17 still haven't seen the report.

18 And that is why I'm sure they had to change the
19 language in the indictment, because if -- the
20 contention was that it was a gamma hydroxybutyrate
21 issue. That was the difference in the language between
22 the two statutes. That language didn't exist in the
23 previous statute.

24 Q Trial counsel testified that y'all picked a
25 jury --

1 A I don't know when they did it unless they did it
2 at 6 in the morning. Because when I got there at
3 8:30 in the morning, the judge wasn't on the bench. I
4 mean, I don't know where they huddled off to pick
5 juries at, but they certainly didn't do it in the 30
6 minutes that I was there that Monday morning.

7 Q So you were there on Monday morning, you left on
8 Monday morning?

9 A Yes. I got there about 8:30, 8:45. I was there
10 for about a half an hour, then I left.

11 Q Where was your trial counsel when you got there?

12 A Oh, God, I don't know where I first laid eyes on
13 him, somewhere in or about the courtroom, probably.
14 You know, if not in it, somewhere in the hallway. I
15 don't really remember where I first laid eyes on him.

16 But one thing I would like to point out, the
17 girlfriend that I was dating at the time, she left when
18 I left. Because when I left there, I actually walked
19 directly across the street over to Scott Bellamy and
20 Morgan Martin's office to see if I could see
21 Mr. Bellamy. And then when we left there, we went
22 straight from there to a Chevy dealership about a block
23 away, we went over there. And then we went back to the
24 beach.

25 So there's no way she was sitting on the front row

1 at some point in the morning after I left. We left
2 together, and she can testify to that fact.

3 MR. FALK: No further questions.

4 THE COURT: All right. Any cross-examination?

5 MS. GIOVANOLI: Nothing.

6 THE COURT: You may step down.

7 (Witness excused.)

8 THE COURT: What is the State's position with
9 regard to leaving the record open?

10 MS. GIOVANOLI: Your Honor, at this point I think
11 the record is pretty complete. I don't understand what
12 additional information is needed here. So the State
13 would oppose to leaving record open at this point. I
14 feel like the evidentiary hearing was very thorough and
15 complete. So that's the State's position.

16 THE COURT: What do you think about the fact that
17 they want to investigate witnesses who your client has
18 indicated never was brought up to him?

19 MS. GIOVANOLI: Well, the motion to grant
20 investigative funds was heard, I believe, almost a year
21 and a half ago. And at this point if the investigator
22 has been unable to reveal the identities of those
23 witnesses or talk to those witnesses, then there's
24 nothing more that can be done. There's been ample
25 opportunity to pursue these leads and to discuss the

1 case with these witnesses. And as of today, there's no
2 other witnesses except for the Applicant.

3 THE COURT: So you would glean from the fact that
4 there are no witnesses, that the investigator is not
5 here and has not produced any witnesses, you're
6 indicating that there are no such witnesses?

7 MS. GIOVANOLI: That would be my position. But if
8 counsel is alleging that there are other witnesses, my
9 position is where are they at this point in time.
10 Where is the investigator, why do we not have any of
11 that information.

12 THE COURT: Mr. Falk.

13 MR. FALK: Your Honor, I mean, we had a hard time
14 getting the -- I mean, I'm not -- the fact that we
15 don't have the witnesses doesn't mean that the
16 investigator was out there turning over the bushes
17 looking for them and couldn't find them. We do believe
18 that the -- we do believe that there would be witnesses
19 that could be developed that could talk to about the
20 demeanor of the victim when she came to the house. And
21 again, we just were unable to get the investigator to
22 do the work. And, again, I think it may have been --

23 THE COURT: Did he take the money?

24 MR. FALK: No.

25 THE COURT: He did not take the money?

1 MR. FALK: Well, no, because that's how it works.
2 You know, in indigent defense, he's got to provide the
3 work, provide the invoices, and then I submit those to
4 indigent defense, and they would pay them back. So it
5 was always on that type of basis.

6 THE APPLICANT: We haven't been able to reach him,
7 Your Honor.

8 MR. FALK: And another point to raise is that
9 there has been testimony that he was -- my client was
10 never advised on the record and warned that the trial
11 would proceed in his absence if he failed to appear.
12 And South Carolina law, City of Aiken versus Koontz
13 says that in order to have a trial of TIA, there must
14 be a finding on the record that he was advised of that
15 right. And that's 629 S.E. 2d 686 and 368 South
16 Carolina 542, that there must be -- in order for a TIA
17 to go forward, there must be a finding on the record.

18 THE COURT: Of course, we don't have the record by
19 virtue of the fact that your client absconded for ten
20 years.

21 MR. FALK: But the only -- we do have -- the only
22 testimony we do have is Mr. Long saying that he was not
23 advised. My client said he was not advised of that.
24 And the South Carolina law is that there has to be that
25 finding on the record. My client testified he was

1 never advised, Mr. Long testified he was not advised.

2 THE COURT: Okay, all right.

3 MS. GIOVANOLI: May I respond briefly?

4 THE COURT: Yes, ma'am.

5 MS. GIOVANOLI: I believe that the testimony was,
6 according to Mr. Long, that he didn't specifically tell
7 him that day that he had to be in the trial, but that
8 he knew he had to be in the trial. And no testimony
9 was elicited from Mr. Long that the Court didn't inform
10 him that he had to be there at the trial.

11 Now, the Applicant has testified that the Court
12 did not advise him that he had to be present at the
13 trial. But that's an issue of credibility for Your
14 Honor to decide.

15 MR. FALK: Your Honor, I think I asked him
16 specifically that question, was he -- did the judge
17 advise him that he would be tried in his absence if he
18 failed to appear.

19 MS. GIOVANOLI: And I'll just relay what my
20 witness has just informed me of, is that in that letter
21 he signed the conflict of interest that also said that
22 he was going to proceed to trial the following week.
23 So he was very aware of the trial. He knew that it was
24 going forward the next week. He was there present
25 during the jury empaneling, and it was his decision to

1 then leave.

2 And also, Your Honor, if I can call your attention
3 to the sentencing transcript, I've provided it to Your
4 Honor in the packet, so give me one minute to find the
5 page. On page 7 on line 20, this is during the
6 Applicant's statement to the judge prior to being
7 sentenced. In the last -- the line 20, he says, I
8 panicked and I left, I don't deny it. So he's actually
9 even admitted that he just panicked and left on the
10 record, the record that we do have.

11 (Pause in proceedings.)

12 THE COURT: I'm going to deny the application for
13 post conviction relief. And I think the order, I'm
14 going to ask that you prepare the order, Ms. Valerie.
15 And I think that it needs to state there is indeed no
16 record, which is very unusual. I've practiced law for
17 20 years, been on the bench for 11, and I've never had
18 a post-conviction relief without a record.

19 But this is a very unusual circumstance in that it
20 was the Defendant's actions that created this
21 situation. He was the one that absconded for nine,
22 almost ten years. I specifically find that he knew
23 that he was to be present by virtue of the letter dated
24 September 28, 2001. I will also point that he knew
25 that he was to be here. He admitted that he knew that

1 and that he panicked and ran.

2 The only issue that remains with regard to this
3 case is the existence of these potential witnesses and
4 the Defendant's alternate theory of defense. And the
5 only thing that I have to do is to evaluate the
6 credibility of Mr. Long and the Applicant here today.

7 And Mr. Wilson has indicated that he wanted other
8 witnesses to come, he wanted two college students who
9 were to say that she left this romantic tryst and went
10 up to the second floor which would indicate that she
11 was not kidnapped, nor was she raped, and that she --
12 and the implication was that she went up there to
13 frolic with them in a certain way.

14 I've heard the Applicant's testimony, I
15 specifically do not find that to be credible. And the
16 essence of it was to show that she was really not that
17 intoxicated which would fly in the face of the
18 testimony that has been presented here today.

19 I think the most telling of the evidence is the
20 photographs that were introduced into evidence. And to
21 -- I think the description of these pictures are best
22 described as lifeless. I mean, this girl is clearly
23 comatose, and you would think that she might be dead.
24 Her eyes are slightly open and her mouth is open.
25 Clearly not just intoxicated, but she is completely

1 unconscious. And it's clear that that's what's
2 transpired.

3 There was also testimony with regard to the
4 doorman who said that she was grossly intoxicated to
5 the point of being unconscious. I think that the
6 testimony was also that the Defendant was allowed to
7 take her out of there, I mean, like tote her out of
8 there in a lifeless -- and she was in a lifeless state.
9 And any witness who would -- any witnesses that this
10 investigator would reveal would be in direct
11 contravention to all of the uncontroverted overwhelming
12 evidence that she was intoxicated to the point of being
13 comatose.

14 And I think it's also important for the order to
15 know that the statement that was given by the Defendant
16 pursuant to Miranda indicated that she was extremely
17 intoxicated.

18 The last and perhaps most important point is that
19 if the investigator, if there were such witnesses to be
20 found, I think the investigator could have found them.
21 And I think it's also important to note that in an
22 application for post conviction relief, it's the
23 Applicant's burden of proof, they are the ones who have
24 to prove it.

25 And if there was a problem with the investigator,

1 I think it would have been prudent to have the
2 investigator here to testify that there were problems
3 with his investigation. He's not here. I would
4 indicate -- I would think that by his absence he wasn't
5 able to find anything.

6 And I also think that it's important to note that
7 the order allotting state funds to hire this
8 investigator has been presented to me as a year and a
9 half ago. I would ask that the order state exactly
10 when the order was and the time that transpired.

11 I'm going to ask that you prepare that order.
12 Send a copy of it to Mr. Falk to insure that it
13 accurately reflects my ruling here today. And good
14 luck to you.

15 MR. FALK: Your Honor if I may?

16 THE COURT: Yes.

17 MR. FALK: I don't recall you addressing the issue
18 of the conflict of interest.

19 THE COURT: Okay. And what is the State's
20 position on the conflict of interest?

21 MS. GIOVANOLI: Well, Your Honor --

22 THE COURT: I think he signed a waiver of the
23 conflict.

24 MS. GIOVANOLI: That's right.

25 MR. FALK: Our argument obviously was that it's

1 five days before trial that his lawyer comes in and
2 says that, I've got a conflict, a potential conflict,
3 whether or not that is, you know, a free and voluntary
4 waiver, I mean, that would be our argument is that it's
5 five days before trial, seven days before trial, and
6 all of a sudden he finds out that he has a conflict of
7 interest with possibly --

8 THE COURT: I think the rules require, number one,
9 for there to be a determination as to whether or not
10 there's a conflict. Trial counsel indicated -- first
11 of all, he needs to make the determination as to
12 whether or not it's a conflict, whether or not it poses
13 a problem to him. He made the determination that it
14 was not.

15 But in view of the fact that it could be construed
16 that way or creates the appearance of impropriety, the
17 rules require to do just this, is to get a written
18 waiver of it. He did that. As far as the timing goes,
19 the record is replete on that. And you can, you know,
20 obviously pursue those issues with regard to appeal.

21 But I find specifically that the letter dated
22 November 28th, 2001, adequately addresses the issue of
23 conflict, and Michael B. Wilson by his signature has
24 signed away any potential conflict that might have
25 existed. And there was no testimony that he was --

1 there was anything offered to him, that he was
2 threatened or in any way put under duress to sign this.

3 MR. FALK: Just again to make the record clear,
4 his testimony was that he was advised that if he
5 doesn't sign it, he's going to get his bond pulled.

6 THE COURT: Okay.

7 MR. FALK: That was his testimony.

8 THE COURT: All right, right. I understand that.
9 That certainly wasn't any duress from Mr. Long. But I
10 don't believe that that ever took place. Your client
11 testified to that. And my position is, you know,
12 there's a conflict on that. Mr. Long says that that
13 never would have been the circumstance, that the judge
14 never would have said that if you don't waive the
15 conflict, I'm going to lock you up and revoke your
16 bond.

17 Mr. Long was very adamant about that, that that
18 never happened. I can't imagine a judge ever locking
19 somebody up because a develop -- a conflict may or may
20 not have developed that was not the creation of the
21 Defendant. I believe that that assertion by your
22 Applicant is not credible and without merit, and I
23 believe Mr. Long in that regard.

24 And you're protected on the record with all of
25 those objections.

1 MR. FALK: . Thank you, Your Honor.

2 THE COURT: Very good. All right.

3 THE APPLICANT: Your Honor, I have two points,
4 please.

5 THE COURT: Yes, you may.

6 THE APPLICANT: With regard to this investigator
7 and what witnesses he could or could not have brought
8 or what they would or would not have said, he literally
9 has done zero work on this. We managed to get him on
10 the phone one time when he was under his car. He's
11 done nothing, he's taken no information to pursue,
12 finding anyone or doing anything. He's done no more
13 than this gentleman over here that has no idea what I'm
14 talking about. That's where we are with that
15 investigator.

16 And, quite frankly, I feel like months ago we
17 should have come back on a motion to the Court to get a
18 different investigator assigned because this one had no
19 interest in working for us, number one.

20 Number two, I had the foresight years ago, right,
21 wrong or indifferent, to do a combination of a couple
22 things. One was to wear a digital voice recorder in
23 some of my conversations with Scott Bellamy and Russell
24 Long as well as practically every phone call I ever
25 made with both of them.

1 I have that audio online on a server, and I would
2 like to leave the record open to burn it to CD and
3 bring it in this court and use it to contradict some of
4 the testimony that was offered here today. Even if it
5 means I face a wiretapping charge for doing it.

6 MS. GIOVANOLI: Your Honor, that issue, that
7 allegation has been brought up two attorneys ago, and
8 he still hasn't produced that evidence.

9 THE APPLICANT: I can produce it right now. And I
10 also have the phone number for that detective. If you
11 can get him on the phone, good luck.

12 THE COURT: Well, I think that, you know, the
13 record in this case is closed. And you are protected
14 for appellate purposes with regard to that. And
15 specifically, there are two reasons why I have not
16 allowed the record to remain open.

17 Number one is that I don't believe that the
18 investigator was able to find anything. In the event
19 there was any genuine problem with the investigator,
20 it's incumbent, it would be incumbent upon the
21 Applicant to produce the investigator to testify as to
22 what his efforts were or were not.

23 And in addition to that, even if they were able to
24 produce the witnesses that you say they were able to
25 produce, it's in direct contradiction to all of the

1 other evidence, including your statement. So taking
2 all that into consideration, the overwhelming evidence
3 of your guilt, I'm going to deny the application for
4 post conviction relief.

5 But you're protected on the record. You're able
6 to appeal the case, and I wish you the best of luck.

7 MS. GIOVANOLI: Thank you, Your Honor. And
8 there's nothing further. Thank you.

9 (The hearing concluded at approximately 6:46 p.m.)

10 (End of Transcript of Record.)

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1 CERTIFICATE OF REPORTER

2

3 STATE OF SOUTH CAROLINA)
4 COUNTY OF HORRY)

5

6 I, TERESA J.F. BAUTZ, Official Court
7 Reporter for the Fifteenth Judicial Circuit of the
8 State of South Carolina, do hereby certify that the
9 foregoing is a true, accurate and complete Transcript
10 of Record of the proceedings had and evidence
11 introduced in the trial of the captioned case, relative
12 to appeal, in the Court of Common Pleas for Horry
13 County, South Carolina, on the 5th day of June, 2018.

14

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

17

18

19 *S/Teresa J. F. Bautz*

20 TERESA J.F. BAUTZ, RPR
21 Official Court Reporter

22

23

24

25

Russell B. Long, P.A.
ATTORNEY AT LAW

7400 North Kings Highway
First Citizens Bank Bldg., 2nd Floor
Myrtle Beach, South Carolina 29572
Telephone: (843) 449-1222
Fax: (843) 497-0562

November 28, 2001
(Via facsimile and First Class mail)

Honorable Edward B. Cottingham
Post Office Box 1114
Bennettsville, SC 29512

Re. State vs. Michael Wilson

Dear Judge Cottingham:

I am representing Michael Wilson in his defense of events that allegedly occurred on September 30, 1998, and that are set for trial before you on Monday, December 3rd. During the course of discovery I learned that shareholders of Fantalis Nightclub, former clients of mine, are potential witnesses for the State in this matter. Pursuant to Rule 17, SCACR, I have evaluated whether my representation of Mr. Wilson would be adverse to these shareholders, or if my representation of these shareholders is in any way adverse to my representation of Mr. Wilson.

After careful consideration of the nature of their respective legal matters, I have determined that their interests do not conflict and that my representation of Mr. Wilson will not adversely affect my relationship with Fantalis' shareholders or vice versa. I have further informed all parties of the aforementioned facts and have obtained their consent as evidenced by their signatures on this letter. With kind regards, I am

Sincerely,

RUSSELL B. LONG, P.A.

Russell B. Long

RBL/rb

CC: Matthew J. Modica, Esq.

We Consent:

Michael B. Wilson
Michael B. Wilson

Robert League, III
Robert League, III

Kenneth Smith
Kenneth Smith

Malcolm F. Smith, Jr.
Malcolm F. Smith, Jr.



STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Michael B. Wilson, #343053,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2013-CP-26-0469

**ORDER OF DISMISSAL
WITH PREJUDICE**

FILED
HORRY COUNTY
17 MAY -4 4M 11:27
RENEE H. EVANS
CLERK OF COURT
HORRY COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief filed January 23, 2013. Respondent made a timely Return on or about May 14, 2013. On August 4, 2014, Respondent filed a Motion to Dismiss, requesting summary dismissal based on the fugitive disentitlement doctrine and the doctrine of *laches*. The Court convened a hearing into Respondent's motion on August 27, 2014. The Honorable Kristi Lea Harrington denied Respondent's Motion to Dismiss. Subsequently, an evidentiary hearing was convened into the matter on February 7, 2017 at the Horry County Courthouse. Applicant was present and represented by James K. Falk, Esquire. Valerie Garcia Giovanoli, Esquire, of the South Carolina Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Russell B. Long, Esquire, (Counsel) also testified. This Court had before it a copy of the Horry County Clerk of Court records regarding the subject convictions, Applicant's SCDC records, Applicant's sentencing transcript, Applicant's appellate records, and the records of this PCR action.

PROCEDURAL HISTORY

In December 1998, the Horry County Grand Jury indicted Applicant for criminal sexual conduct and kidnapping (1998-GS-26-2612). Applicant was represented by Russell B. Long, Esquire. On December 3, 2001, the matters were called for trial before the Honorable Edward B. Cottingham and a jury. Applicant initially appeared for trial, but absconded during trial. The jury found Applicant guilty as indicted. Judge Cottingham issued a sealed sentence at that time and issued a bench warrant for Applicant's arrest. After his arrest in Florida, Applicant was returned to this jurisdiction. On October 4, 2010, Applicant appeared before the Honorable Steven H. John, who unsealed and pronounced Judge Cottingham's sentences of thirty (30) years for each offense. Judge John denied Applicant's motion to vacate sentence, motion for a new trial, and motion to reduce sentence.

Applicant filed and served notice of appeal on October 14, 2010. The South Carolina Court of Appeals denied Applicant's motion to remand for reconstruction hearing and dismissed Applicant's appeal on November 16, 2011, based on the fugitive disentitlement doctrine. The remittitur was returned to the circuit court on March 28, 2012.

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

1. Ineffective assistance of counsel
2. Denial of due process

At the evidentiary hearing, Applicant proceeded specifically on the following allegations:

1. Trial counsel failed to preserve trial transcript.
2. Trial counsel failed to warn Applicant that failing to appear for trial would result in a trial in Applicant's absence.
3. Applicant was tried for charges for which he was not indicted and trial counsel failed to move for dismissal.

4. Trial counsel had a conflict of interest at the time he represented Applicant.
5. Trial counsel failed to investigate.

SUMMARY OF TESTIMONY

I. Applicant testified to the following:

Applicant addressed this Court prior to taking the stand complaining that the investigator he hired with the investigative funds issued by this Court in February of 2016, would not do any work and would not respond to inquiries by Applicant. Applicant requested that a new investigator be assigned and more investigative funds be ordered.

Applicant appeared at least three times for his trial, but his case was not called. He showed up to the courthouse early on the date his case was called to trial, however he said the judge had not taken the bench by 8 or 9 o'clock A.M. so he left. His girlfriend at the time was there with him and left with him. No one told the Applicant that he had to be present for his trial. Applicant claims his indictment was flawed because he was indicted under an old statute. Counsel failed to move to dismiss the indictment and force the State to re-indict him under the new statute. Applicant's indictment shows a hand-written amendment of the statute on his indictment. Applicant discussed the indictment flaw before leaving. Applicant claims he did not know his case was called to trial.¹ Applicant attempted to blame his attorney, stating that Counsel had his telephone number and new what hotel he was staying. Applicant claimed the trial court did not advise him he had to be present at his trial or that they would try him in his absence.

Applicant originally hired Counsel's father to represent him. Upon his passing, Counsel took over Applicant's case. After many months of calls, meetings, and letters, Counsel informed

¹ This Court notes the transcript from Applicant's sentencing shows that Applicant admitted that he "was advised that morning that [his] bond [was] to be revoked, [and they were] to proceed with the trial" and that he "panicked and... left" Sent. Tr. 7, ll. 17-20.

Applicant that he had a conflict of interest in his case. Counsel had represented employees and owners of the FanTails club at which the victim worked. The State's witnesses in the case included a club owner and employee. Applicant claimed that Counsel told him he would have to waive the conflict or the judge would revoke his bond and put him back in jail. The letter he received and signed informing him of the conflict of interest came as a complete shock to Applicant. Applicant figured he could hire another attorney, but admitted he made no real effort to do so.

Applicant testified that he had an insurance check for around forty thousand dollars that the bank would not cash for him. Counsel offered to hold it in an escrow account and give him the money for a fee of six thousand dollars. Applicant was complicit in paying the fee in exchange for cashing his check because he expected Counsel to represent him to the utmost standard. Applicant admitted he used some of the money to flee the jurisdiction and that he was able to change his identity before absconding to Florida. Applicant instructed Counsel that if he lost at trial, to make sure to file an appeal and specifically "preserve record for appeal." Essentially, Applicant stated he wanted Counsel to "do his job." Counsel filed a notice of appeal after the trial, but did not order a transcript. After Applicant was extradited from Florida and brought back to Horry County for sentencing about nine years after his conviction, he attempted to file an appeal and found out the transcript was no longer available.

Applicant claimed to have had a list of witnesses that Counsel could have called in his defense at trial. Among those were some college kids that lived in the apartment above him who had seen the victim and Applicant together and could testify to the victim's demeanor the night of the incident. Applicant testified that the victim had even left his apartment to go party with the college guys, proving that she wasn't unconscious from intoxication. Another witness Applicant alleged could have testified in his defense was the nurse who performed a rape kit test on the victim.

Applicant claimed that he tracked down the nurse and she told him the victim was overly concerned about her husband. The nurse was willing to testify for Applicant, but Applicant claims Counsel failed to investigate her or call her as a witness. Applicant claimed he told Counsel about another gentleman who lived next door who also saw the victim and Applicant and could attest to the victim's demeanor that night.

Applicant testified that the victim had prior problems with her husband and that she was concerned for her safety. Applicant described the victim's husband the day following the rape of his wife as "causing a commotion" while the cops were responding to the report made by the victim. Applicant complains that Counsel did not question the victim's husband. Applicant also claimed to have met the victim at the strip club prior to the incident and hit it off with her. Applicant also recalled an altercation the victim had gotten into with another patron because she wanted more money and the patron would not pay her more. The manager fired the victim, but Applicant saw her back at the club a week later and was pleasantly surprised to see her back.

II. Counsel testified to the following:

Counsel testified that the trial was very long ago, approximately 16 years ago. Counsel's father was originally retained to represent Applicant, but after his father passed away, Counsel took over Applicant's case. Counsel has been practicing law for 25 years now, and 10 years at the time of Applicant's trial. Counsel testified that he became concerned with a potential conflict of interest because he created the FanTails Limited Liability Corporation. Counsel sought advice from a more senior attorney regarding the potential conflict of interest. When he learned that a member of the LLC was going to testify against Applicant, out of an abundance of caution, he informed Applicant.

the solicitor, the judge, and the LLC of the potential conflict. Applicant waived the conflict without hesitation and signed a waiver.²

Applicant informed Counsel that the incident between he and the victim was consensual, but the State was alleging that the victim was unconscious, raped repeatedly and photographed. The only evidence supporting Applicant's consensual defense was Applicant's testimony and the results of the rape kit that showed no bruising or cuts. Also, other than the victim being a nude dancer, Counsel had no other information to impugn the victim. Applicant never gave Counsel a list of potential witnesses to interview. The victim's testimony was that she woke up naked, confused, and wandered the streets seeking help and the emergency room records corroborated her testimony. Applicant did not mention the nurse who treated the victim as a potentially helpful witness to Applicant's case. Despite Applicant's allegation that Counsel failed to interview and call the nurse to testify, the nurse, in fact, testified at trial on behalf of the state. The bouncer at the club also testified at trial, that Applicant came up to him, carrying the victim, who was apparently passed out or sleeping, and told him that the victim was a friend, had too much drink, and he would take her home.

The day of trial, Applicant was present that morning. They drew a jury, with Applicant present. Then, during a brief recess, Counsel went to the judge's chambers to discuss something and when he returned, Applicant was nowhere to be found. Counsel tried calling him and looking for him and the judge sent bailiffs out to look for him. Ultimately, Counsel was forced to try the case without Applicant present. Counsel did not recall any problems with the indictment, but found it likely that the solicitor amended the indictment. Had there been a fatal flaw with the indictment,

² This signed waiver was admitted into evidence at the PCR hearing, as State's Exhibit 2.

Counsel would have objected to it. Furthermore, an amended indictment would not have changed the case or the ability to prosecute Applicant.

After the trial, Counsel received a telephone call from Applicant asking what happened at the trial. Counsel told him he was found guilty and advised him to turn himself in. That was the last time Counsel ever heard from Applicant, until he was arrested about nine years later. Applicant never requested that Counsel file an appeal for him nor did he retain Counsel to represent him on appeal. Counsel does not normally handle appeals in his practice. However, in an abundance of caution, Counsel filed a notice of appeal on Applicant's behalf. Counsel did not order Applicant's transcript because that is the duty of appellate counsel. Counsel was relieved after filing the notice of appeal.

Counsel gave a brief summation of the evidence presented during Applicant's trial, which included: multiple photos of a nude and unconscious victim, which included photos of Applicant raping the victim in multiple manners³, the plastic shot cup from which the victim drank was found in the club that had been sent to South Carolina Law Enforcement Division (SLED) for testing and confirmed to contain GHB⁴, Applicant's post-Miranda statement that admitted the victim was extremely intoxicated, testimony from Applicant's then-live-in-girlfriend who found the camera with the nude photos on it, testimony from the victim as to her recollection of events, testimony from the nurse who attended to the victim in the emergency room, testimony from the doorman of the club, and testimony from another dancer at the club who witnessed the victim unconscious. Counsel characterized the case as "undefendable" (sic) and the two day trial was a presentation of "overwhelming" evidence of guilt. Every witness presented at trial corroborated that the victim was

³ Some of the photos used at trial were admitted into evidence during the PCR hearing, as the State's Exhibit 1.

⁴ Gamma-Hydroxybutyric Acid, also known as a "date rape" drug.

unconscious the night of the rape, which was further corroborated by the photos of the victim. Applicant told Counsel that she was “acting” unconscious for the photos, however, Applicant failed to stay for his trial and thus did not testify to such. Regardless, Counsel did his best by making the jury aware that the victim was not the most innocent of victims.

Lastly, Counsel noted that when he represented Applicant nine years later at his sentencing hearing, Applicant was very proud of himself for eluding the authorities for over nine years.

III. Upon rebuttal, Applicant testified to the following:

Applicant never saw the SLED report testing the cup. After his return to this jurisdiction, Applicant learned that the cup was destroyed during testing and could not be re-tested. Applicant reiterated that he arrived to court the day of his trial early and left at about 9:00am. Counsel was there, in or about the courtroom. Applicant’s girlfriend left with him at the same time.

FINDINGS OF FACT AND CONCLUSION OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

As a matter of general impression, this Court finds the testimony of Counsel to be credible. This Court further finds that the testimony by Applicant is not credible.

Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of 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) (citing Rule 71.1(e), SCRCP).

Where ineffective assistance of 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler. Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). 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, 385 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.

Failure to preserve trial transcript

This Court finds Applicant has failed to meet his burden to prove Counsel was ineffective for failing to preserve the trial transcript. This Court finds Applicant's testimony that he told Counsel to file an appeal and specifically to preserve the record for appeal is not credible and is further contradicted by the record in this case. This Court also finds Counsel's testimony that he was never retained to handle Applicant's appeal and there was never any discussion of an appeal between Counsel and Applicant to be credible. There is no duty upon trial counsel to order and preserve a trial transcript from a trial during which the defendant willfully absconds and is tried in absentia. Although there is also no duty upon trial counsel to file a notice of appeal when a defendant does not

so request, Counsel filed a notice of appeal anyway, in an abundance of caution. Not only did Counsel fulfill his duties as Applicant's trial attorney, he went above and beyond those duties by filing Applicant's notice of appeal in the event Applicant returned and wanted to pursue an appeal.⁵ Consistent with the Court of Appeals opinion in Applicant's direct appeal, this Court finds Applicant's willful decision to remain a fugitive from justice for approximately nine years led to the destruction of his trial transcript, not any error or omission by his trial counsel. See State v. Serrette, 375 S.C. 650, 654 S.E.2d 554 (2007). Therefore, this Court finds this allegation is without merit and is denied and dismissed with prejudice.

Failure to warn Applicant could be tried in absentia

This Court finds Applicant has failed to meet his burden of proving Counsel was ineffective for failing to warn Applicant that if he failed to appear for trial, he could be tried in absentia. Applicant's testimony that he was not aware his trial was going forward that day is not credible. Counsel testified that Applicant was notified, appeared the morning of trial, was present during jury selection, and snuck off during a brief recess. This testimony is credible and supported by the prior admission made by Applicant during his sentencing that he panicked and left. This Court finds that Applicant was fully aware that his trial was proceeding that day and willfully fled not only his trial, but the state of South Carolina. Applicant also willfully took on a new identity and eluded authorities for over nine years.

Regardless of whether Counsel advised Applicant he could be tried in his absence or not, there is no duty to advise a defendant of such. Imposing a duty on criminal trial attorneys to inform their clients of the ability to be tried in absentia would in turn impose a duty upon Counsel to foresee

⁵ It is worth noting that Applicant did not return on his own volition seeking to pursue an appeal of his conviction. Rather, Applicant was arrested approximately nine years later in Florida under a new identity and extradited back to Horry County to face sentencing for his outstanding conviction.

a client will abscond. Counsel fulfilled his duty by informing Applicant of his trial date and advising him he must be there. Counsel could not have, and should not be expected to, foresee Applicant's abscondence. Therefore this allegation is without merit and is denied and dismissed with prejudice.

Failure to move for dismissal

This Court finds Applicant has failed to meet his burden to prove Counsel was ineffective for failing to move for dismissal based on Applicant being improperly indicted. Applicant failed to provide sufficient evidence that he was not properly indicted or that his indictment contained any flaws. The indictment is part of the record of this PCR action and shows no flaws or errors. Furthermore, Counsel testified that he had no specific recollection of any problems with the indictment, but that if there had been a problem, Counsel would have objected and brought it to the Court's attention. The Solicitor could have easily amended any alleged error within the indictment with no effect on the ability to prosecute Applicant for the rape and kidnap of his victim. Having found the allegation is without merit, this Court denies and dismisses the claim with prejudice.

Conflict of interest

This Court finds that Applicant has failed to meet his burden to prove that Counsel was ineffective due to a conflict of interest. This Court finds Counsel's testimony that he consulted with a senior attorney for advice and, in the abundance of caution, informed all relevant parties and obtained a written waiver from Applicant is credible. This Court further finds Applicant's testimony that Counsel threatened him to get him to sign the conflict waiver to be not credible. Counsel was astute in obtaining a written and signed waiver. When presented with this issue, Applicant had the opportunity to refuse to waive the conflict and hire new counsel, but he admittedly made no such effort. This Court finds Applicant made an intelligent waiver of any alleged conflict of interest. This allegation is denied and dismissed with prejudice.

Failure to investigate

This Court finds Applicant has failed to meet his burden to prove Counsel was ineffective due to failing to investigate Applicant's case. It was abundantly evident from the PCR hearing that Counsel was more familiar with the actual facts of Applicant's sixteen year old case than Applicant was. Counsel was able to recount in some detail the overwhelming evidence against Applicant. Because of Applicant's willful fleeing during his trial, Counsel was also more familiar with the facts presented at trial. This allegation is denied and dismissed with prejudice.

It is worth noting that the photographs of the victim nude and being sexually assaulted are the most telling – they clearly show the victim's comatose, lifeless, near-dead state. She appears completely unconscious with her eyes only slightly open and her mouth open. The photos, coupled with Applicant's post-Miranda statement, the doorman and other dancer's testimony of the victim's state of intoxication to the point of unconsciousness, makes this case, as Counsel stated, indefensible. Applicant's testimony is in complete contradiction of all other evidence.

Applicant's claim that the investigator in this case failed to do his job is not credible. The investigator could have found witnesses Applicant claims existed if there actually were any. This Court finds the investigator's absence indicates he could not find anything or anyone helpful to Applicant's case. Even if investigation produced witnesses with favorable testimony to Applicant, it would be in direct conflict with all other evidence in this case, including Applicant's own post-Miranda statement. Investigative funding was ordered one year ago from the date of Applicant's PCR evidentiary hearing and Applicant has failed to produce any evidence or information from that investigation to aid in his allegations. This Court denies Applicant's request for more investigative funds to hire a new investigator.

CONCLUSION

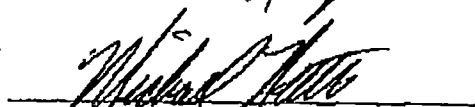
Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice. This Court also finds that Applicant failed to present evidence as to the other allegations, and thus, this Court deems the other allegations abandoned.

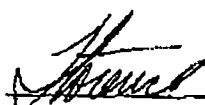
This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 1 day of May, 2017.


MICHAEL G. NETTLES
Presiding Judge
Fifteenth Judicial Circuit

 , South Carolina

MAILED
5-4-17

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

MICHAEL WILSON

Plaintiff,

vs.

STATE OF SOUTH CAROLINA

Defendant.

IN THE COURT OF COMMON PLEAS
15TH JUDICIAL CIRCUIT

CASE NO.: 2013-CP-26-00469

MOTION AND ORDER INFORMATION
FORM AND COVERSHEET

Plaintiff's Attorney: JAMES FALK, Bar No. 80125 Address: PO BOX 1058 Charleston, SC 29402 Phone: 8436066007Fax _____ E-mail: jfalklaw@gmail.comOther: _____		Defendant's Attorney: _____, Bar No. _____ Address: _____ Phone: _____ Fax _____ E-mail: _____ Other: _____	
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and II) ☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: _____		Court Reporter Needed: ☐ YES/ ☐ NO	
Estimated Time Needed: _____			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
Signature of Attorney for ☒ Plaintiff / ☐ Defendant		May 16, 2017 Date submitted	
SECTION III: Motion Fee			
☐ PAID - AMOUNT: \$ _____ ☒ EXEMPT: (check reason)			
☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☒ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		JUDGE CODE _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____			

COURT OF COMMON PLEAS
FOR THE 15th JUDICIAL CIRCUIT
2013-CP-26-0469
MOTION TO RECONSIDER

To: Valerie Giovanoli, Esq., Office of SC Attorney General, PO Box 11549, Columbia,
SC 29211-1549.

2017 MAY 18 PM 3:34

- 1**

helpless by administering, distributing, dispensing, delivering, or causing to be administered, distributed, dispensed, or delivered a controlled substance, a controlled substance analogue, or any intoxicating substance. This language was added with the enactment of 2000 South Carolina Laws Act 355 (S.B. 916). The PCR record shows that language reflecting this amendment to § 16-3-652 appears as a hand written addition to Applicant's indictment. This hand written addition to the indictment must have occurred after the enactment of the law in 2000 amending § 16-3-652. Trial counsel should have objected to the Court's attempt to amend the indictment by adding the hand written language.

An indictment is insufficient if it fails to apprise the defendant of the elements of the offense for which he is charged. State v Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). Trial counsel testified that at trial the State alleged the victim was rendered unconscious, and therefore unable to consent, as the result of having been given a "date rape" drug. At the time of the alleged offense in order to convict a defendant of criminal sexual conduct, first degree, the state had to prove beyond a reasonable doubt that the defendant engaged in sexual battery with either aggravated force or where the victim was also the victim of forcible confinement, kidnapping, trafficking in persons, robbery, extortion, burglary, housebreaking or similar offense. When Applicant was indicted, the State could not convict Applicant of CSC 1st degree by merely proving that he committed sexual battery after administering an intoxicating substance to the victim. Applicant's indictment therefore did not apprise him that the conduct he was alleged to have committed constituted the offense of CSC 1st degree.

The addition of this language to the indictment was prejudicial to Applicant because the State could not have convicted Applicant under the version of § 16-3-652 that existed at the time of the indictment. The testimony reveals that Defendant was indicted under the version of § 16-3-652 that existed on December 3, 1998. However, the State's case against Applicant was based upon the version of § 16-3-652 which existed after the amendment in 2000. The testimony reveals that the State's case against Applicant was not under either § 16-3-652(1) (a) or (1) (b). The State's case against Applicant was based upon their evidence that he committed an act described in § 16-3-652(1) (c). The

Defendant was never indicted under the amended version § 16-3-652. Trial counsel was therefore ineffective for not seeking a dismissal of the criminal sexual conduct indictment.

Respectfully Submitted,



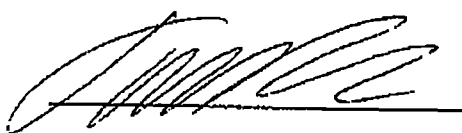
James Falk
Falk Law Group
PO Box 1058
Charleston, SC 29402
(843) 606 6007
jfalklaw@gmail.com

May 17, 2017
Charleston SC

FILED
Horry County
2017 MAY 18 PM 1:34
CLERK OF COURT
Horry County, SC

CERTIFICATE OF SERVICE

Undersigned certifies that a copy of the above was mailed this May 16, 2017 to both Valerie Giovanoli, Esq and Johnny James Esq. at the Office of the South Carolina Attorney General PO Box 11549, Columbia, SC 29211-1549.



James Falk
Applicant's Attorney

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Michael Brenton Wilson, #343053,

Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

2013-CP-26-469

**ORDER DENYING MOTION TO ALTER
OR AMEND JUDGMENT**

This matter comes before the Court by way of Applicant's Motion to Alter or Amend Judgement pursuant to Rule 59(e), SCRPC, filed May 15, 2017. Based upon careful reconsideration of all of the evidence in this case and upon full consideration of Applicant's motion and supporting memorandum, this Court is not persuaded to alter or amend the judgment.

IT IS THEREFORE ORDERED:

1. That Applicant's motion is denied and dismissed.
2. Applicant shall remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 16 day of January, 2018.

Michael G. Nettles
MICHAEL G. NETTLES

Presiding Judge
Fifteenth Judicial Circuit

Horrocks, South Carolina

FILED
... JUVENILE COUNTY
2018 JAN 18 PM 12:45
CLERK OF COURT
HORRY COUNTY, SC

STATE OF SOUTH CAROLINA	)	INDICTMENT FOR:
	)	
COUNTY OF HORRY	)	CT #1: CRIMINAL SEXUAL CONDUCT
	)	FIRST CLASS
	)	CT #2: KIDNAPPING

At a Court of General Sessions convened on December 3, 1998, the Grand Jurors of Horry County present upon their oath:

COUNT ONE: CRIMINAL SEXUAL CONDUCT-FIRST DEGREE

CDR: 0060 16-03-0652

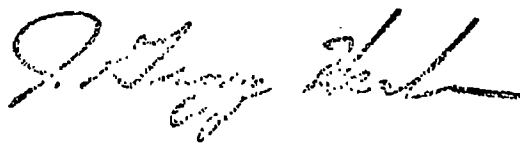
That Michael Brenton Wilson did in Horry County on or about September 30, 1998, commit the offense of Criminal Sexual Conduct First Degree in that he did commit a sexual battery upon the victim, [REDACTED] by use of aggravated force or the victim submitted to the sexual battery while also the victim of a forcible confinement or kidnapping or the victim was rendered mentally incapacitated or physically helpless, to wit: That the defendant had sexual intercourse with the victim without her consent while the victim was unconscious by administering, distributing, dispensing, delivering or causing to be administered, distributed, dispensed or delivered a controlled substance or gamma hydroxy butyrate.

COUNT TWO: KIDNAPPING

CDR: 0095 16-03-0910

That Michael Brenton Wilson did in Horry County on or about September 30, 1998, unlawfully, seize, confine, inveigle, decoy, abduct, or carry away the victim, [REDACTED] without authority of law, to wit: That the Defendant put the victim in his vehicle and brought her to his residence while she was unconscious and without her knowledge or consent.

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



DOCKET NO. 98-GS-26-2612

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY

57061 JEC

COURT OF GENERAL SESSIONS

DECEMBER TERM 1998

THE STATE

vs.

52 MICHAEL BRENTON WILSON W/M

910 [REDACTED]

MYRTLE BEACH SC 29577

SSN: [REDACTED] DOB: [REDACTED]

JURY

BILL

Jury

Atty: J.M. LONG, JR.

INDICTMENT FOR:

CT #1: CRIMINAL SEXUAL CONDUCT
CT#2: KIDNAPPING

ORIGINAL

ity Date:

J. GREGORY HEMBREE, SOLICITOR

C

2/2/99
PW issued
lifted mfs

11/9/99
PW issued
lifted

4/5/2000
PW issued
Wf

Conduct #125
igning

12-05-01

STATE OF SOUTH CAROLINA

☐ County/ ☐ Municipality of
Horry

AFFIDAVIT

Form Approved by
S.C. Attorney General
July 28, 1990
SCCA 518

Personally appeared before me the affiant MICHAEL BRENTON WILSON who being duly sworn deposes and says that defendant MICHAEL BRENTON WILSON did within this county and state on 9/30/98 violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of _____) in the following particulars:

DESCRIPTION OF OFFENSE:

CSA 1ST DEGREE

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

MICHAEL BRENTON WILSON DID KNOWINGLY AND INTENTIONALLY COMMIT SEXUAL BATTERY IN THE FIRST DEGREE AGAINST ONE S.B., A DANCER AT FANTAILS; THAT THE SAID MICHAEL BRENTON WILSON DID TAKE ADVANTAGE OF THE WIE VICTIM WHO HAD BECOME SUDDENLY ILL AFTER CONSUMING A DRINK PURCHASED FROM THE BAR BY THE DEFENDANT AND TAKEN TO AN AREA FOR PRIVATE DANCING; THAT THE VICTIM BECAME MORTUOUS AND INCAPACITATED; THAT DEFENDANT AGREED TO TAKE HER HOME, BUT TOOK HER TO HIS RESIDENCE; AND THAT THE DEFENDANT DID COMMIT SEXUAL BATTERY BY PERFORMING SEVERAL SEXUAL ACTS TO INCLUDE ANAL SEX WHILE BEING FORCIBLY CONFINED AND POSSIBLY KIDNAPPED BECAUSE THE VICTIM WAS UNCONSCIOUS DURING THE COMMISSION OF THIS CRIME.

Sworn to and subscribed before me on 10/01/98
[Signature]
Signature of Issuing Judge (S.)

Signature of Affiant

Affiant's Address 1560 E. MAIN ST SUITE 7
CONWAY, SC 29526

Affiant's Telephone 8507461310

STATE OF SOUTH CAROLINA

☐ County/ ☐ Municipality of
Horry

ARREST WARRANT

TRANSFERRED
TO SOLICITOR
OCT 19 1998

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on 9/30/98 defendant MICHAEL BRENTON WILSON did violate the criminal laws of the State of South Carolina (or ordinance of

☐ County/ ☐ Municipality of _____) as set forth below:

DESCRIPTION OF OFFENSE:

CSA 1ST DEGREE

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

[Signature]
Signature of Issuing Judge (S.)

Judge's Address 4150 E. BEDFORD LANE AVE.

Judge's Telephone 8433149220

Judge Code: 270

Issuing Court: ☐ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

STATE OF SOUTH CAROLINA

COUNTY OF Horsey
STATE VS.

Michael Brandon Wilson

AKA:

Race: W Sex: M Age: 30

DL# _____ SID#: _____

MYRTLE BEACH SC 29577IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:98 -GS- 26 - 262A/W#: 264 7242Date of Offense: 12-9-30-98S.C. Code §: 16-3-652CDR Code #: 0 / 0 / 6 / 0☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: CRIMINAL SEXUAL ASSAULT CONDUCT - FIRST DEGREEin violation of § 16-3-652 of the S.C. Code of Laws, bearing CDR Code # 0 / 0 / 6 / 0☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ The Defendant is to be given credit for _____ days/months jail time.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine: \$ _____

§14-1-206 (Assessments 100%) \$ _____

§14-1-211(A)(1) (Surcharge) \$ 100.00

§14-1-211(A)(2) (Surcharge) \$ _____

§56-5-2995 (DUI Assessment) \$ _____

3% to County (if paid in installments) \$ 3.00TOTAL \$ 103.00

Jeanne J. Roberts
Clerk of Court/ Deputy Clerk

Court Reporter: Brenda Bahl
White - Clerk Green - Corrections

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab. or Job Corps _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund.

Other: _____

PRESIDING JUDGE [Signature]Judge Code: 1 / 1 / 1Sentence Date: 12-5-01

Date Sentence was imposed: 10/5/2010
Canary - Probation Pink - Defendant

STATE OF SOUTH CAROLINA

COUNTY OF Horry
STATE VS.

AKA:

Race: W

Sex: M

Age: 30

DL#

SID#:

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

179

21998-GS-26-2612

A/W#: CAW199811010

Date of Offense: Sept 30, 1998

S.C. Code §: 16-3-910

CDR Code #: 0101915

☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS

TO: Kidnapping

in violation of § 16-3-910 of the S.C. Code of Laws, bearing CDR Code # 0101915

☐ NON-VIOLENT

☒ VIOLENT

☐ SERIOUS

☒ MOST SERIOUS

☐ 17-25-45

The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ The Defendant is to be given credit for _____ days/months jail time.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine:\$

§14-1-206 (Assessments 100%)....\$

§14-1-211(A)(1) (Surcharge).....\$ 100.00

§14-1-211(A)(2) (Surcharge).....\$

§56-5-2995 (DUI Assessment).....\$

3% to County (if paid in installments)...\$ 3.00

TOTAL.....\$ 103.00

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab. or Job Corps. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund.

Other: _____

PRESIDING JUDGE [Signature]

Judge Code: _____

Sentence Date: 12-5-01

Date Sentence was imposed: 10/5/2010

Canary - Probation

Pink - Defendant

[Signature]
Clerk of Court/ Deputy Clerk

Court Reporter: [Signature]

White - Clerk

Green - Corrections