

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Aiken County

Honorable William P. Keesley, Circuit Court Judge  
\_\_\_\_\_

RECEIVED

JAN 28 2019

S.C. SUPREME COURT

STEPHEN B. WILHITE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001166

\_\_\_\_\_  
APPENDIX  
\_\_\_\_\_

ROBERT M. DUDEK  
Chief Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON  
Attorney General

JANELL GREGORY  
Assistant Attorney General  
Rembert Dennis Building  
1000 Assembly Street, Room 519  
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

INDEX

INDEX ..... i

GUILTY PLEA TRANSCRIPT (DATED APRIL 23, 2015) .....1

APPLICATION FOR POST-CONVICTION RELIEF (SEPTEMBER 21, 2015) .....12

RETURN (DECEMBER 29, 2017) .....23

POST-CONVICTION RELIEF HEARING TRANSCRIPT (JANUARY 25, 2018) .....29

ORDER OF DISMISSAL (MAY 22, 2018) .....54

INDICTMENT .....62

MOTION TO RECONSIDER SENTENCING (NOVEMBER 5, 2015) .....64

|    |                          |   |   |
|----|--------------------------|---|---|
| 1  | State of South Carolina  | ) | In the Court                                |
| 2  | County of Aiken          | ) | Of General Sessions                         |
| 3  |                          |   |   |
| 4  |                          |   | Indictment No.: 2015-GS-02-591              |
| 5  |                          |   |   |
| 6  | State of South Carolina, | ) |   |
| 7  | Plaintiff.               | ) |   |
| 8  | vs.                      | ) | Transcript of Record                        |
| 9  |                          | ) |   |
| 10 | Stephen Wilhite,         | ) |   |
|    | Defendant.               | ) |   |
| 11 |                          |   |   |
| 12 |                          |   |   |
| 13 |                          |   | April 23, 2015                              |
| 14 |                          |   | Aiken, South Carolina                       |
| 15 |                          |   |   |
| 16 |                          |   | <u>B E F O R E:</u>                         |
| 17 |                          |   | The Honorable Doyet A. Early, Judge.        |
| 18 |                          |   |   |
| 19 |                          |   | <u>A P P E A R A N C E S:</u>               |
| 20 |                          |   | David Miller, Deputy Solicitor              |
| 21 |                          |   | Attorney for the State                      |
| 22 |                          |   | David Hayes, Esquire                        |
| 23 |                          |   | Attorney for the Defendant                  |
| 24 |                          |   |   |
| 25 |                          |   | Brenda J. Sigwald, Circuit Court Reporter   |
|    |                          |   | P.O. Box 206, Jackson, South Carolina 29831 |

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I N D E X

Page

Guilty Plea

Certificate of Reporter

Keyword Index

E X H I B I T S

Number

Description

Page

(REPORTER'S NOTE: There were no exhibits entered during this hearing.)

1           **PLAINTIFF'S/STATE'S ATTORNEY:** Stephen Wilhite.

2                               STEPHEN WILHITE,

3           having been duly sworn, testified as follows:

4           THE CLERK: Defendant is sworn, Your Honor.

5           MR. MILLER: Your Honor, before the court is

6 Stephen Brett Wilhite. He is here today to plead guilty to  
7 the charge contained in Indictment 2015-GS-02-591. That is  
8 a true-billed indictment for temporary use of the vehicle  
9 without permission.

10           THE COURT: I'm sorry. Mr. Miller, we were just  
11 getting stuff from the Supreme Court up here.

12           MR. MILLER: Yes, sir.

13           THE COURT: Go ahead.

14           MR. MILLER: He's here to plea, Your Honor,  
15 straight up plea with no recommendation.

16           THE COURT: Does he have a record? Mr. Wilhite  
17 have a record?

18           MR. MILLER: He does, Your Honor. His record goes  
19 back to 2008. He had a possession of less than a gram of  
20 meth or cocaine base. That was a first offense. He was  
21 placed on probation for that offense. He had a public  
22 disorderly conduct in 2009, Driving under Suspension and  
23 attempt to possess a controlled substance in 2009; petit  
24 larceny and what they list as a miscellaneous criminal  
25 offense. It stemmed from a drug paraphernalia charge,

1 February of 2010; traffic offenses, including DUS and  
2 possession of marijuana in 2010; and petit larceny in 2010;  
3 financial transaction card fraud, 2010; at that time, this  
4 Court revoked 3 years and terminated his probation. That  
5 was from August of 2010; shoplifting in 2011; breaking into  
6 automobiles and possession of meth or coke second offense  
7 on August 31st of 2011, he was sentenced to 5 years,  
8 suspended -- and \$1,000, suspended upon 3 years and \$500  
9 plus probation for 5 years. And I believe that's the  
10 charge he's on probation for at the current time, Your  
11 Honor.

12 THE COURT: Is that correct, ma'am?

13 PROBATION AGENT: Yes, sir, he's on for four  
14 different indictments: Grand larceny, burglary third,  
15 another grand larceny.

16 THE COURT: What was the sentences on each one of  
17 them and when was it.

18 PROBATION AGENT: They're all for the same, 5 years  
19 suspended to 2 years and 3 years probation.

20 THE COURT: 5, 3 and 5?

21 PROBATION AGENT: 5, 2 and 3. 5 years suspended on  
22 the service of 2 years, and 3 years probation.

23 THE COURT: 5 suspended to 2, 3 years of probation.

24 PROBATION AGENT: Yes, sir.

25 THE COURT: And when was that, please?

1 PROBATION AGENT: July 24th, 2013.

2 THE COURT: And this occurred a little over a year

3 later; is that correct? Is that correct, anybody?

4 PROBATION AGENT: Yes, sir, actually, Your Honor,

5 the original probation, that was on was back in 2011 where

6 he had a failure to stop for a blue light, financial

7 transaction card and breaking into automobiles. And then

8 in 2013 he got charged again and got put on probation for

9 burglary third, grand larceny, another grand larceny, which

10 was an enhancement, a shoplifting and another breaking into

11 automobiles charge. So that probation started up in 2013,

12 August of 2013. He was incarcerated for a 2 year time --

13 sentence at that time. And so shortly after he got out of

14 prison on that charge is whenever he picked up this charge

15 which was September of 2014.

16 THE COURT: Mr. Hayes, you represent Mr. Wilhite in

17 connection with a charges in Indictment 15-GS-02-591, an

18 indictment for use of a vehicle without permission on a

19 temporary basis.

20 MR. HAYES: Yes, sir.

21 THE COURT: Have you advised him it carries up to a

22 year and/or a \$500 fine?

23 MR. HAYES: Yes, sir.

24 THE COURT: You advised him of his right to a trial

25 by jury?

1 MR. HAYES: Yes, sir.

2 THE COURT: You advised him that a plea will  
3 violate the terms of his probation where he's looking at 3  
4 years?

5 MR. HAYES: Yes, sir.

6 THE COURT: How does he indicate to you he wishes  
7 to plea?

8 MR. HAYES: Guilty, sir.

9 THE COURT: You agree with that?

10 MR. HAYES: Yes, sir.

11 THE COURT: Mr. Wilhite, you stand before me  
12 charged with use of a vehicle without permission on a  
13 temporary basis. That carries up to a year and/or a \$500  
14 fine. You understand that?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: You understand those charges and the  
17 potential sentence, how do you wish the plea? Not guilty  
18 or guilty?

19 THE DEFENDANT: I'm guilty, sir.

20 THE COURT: By pleading guilty you will give up our  
21 right to remain silent, your right to trial by jury and you  
22 will violate the terms of your probation where you're  
23 looking at 3 years. Do you understand that?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Understanding that, do you still wish

1 to plead guilty?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Has anyone promised you anything to  
4 make you plead guilty?

5 THE DEFENDANT: No, sir.

6 THE COURT: Are you satisfied with your lawyer?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Are you today under the influence of  
9 alcohol or drugs?

10 THE DEFENDANT: No, sir.

11 THE COURT: Are you pleading guilty of your own  
12 free will?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Did you, sir, here in Aiken County on  
15 or about September 9 of last year use a vehicle, a 2000  
16 Honda motorcycle, belonging to one Candice Hite, with the  
17 attempt to deprive her of that vehicle on a temporary  
18 basis.

19 THE DEFENDANT: Yes, sir.

20 THE COURT: All right. Set the plea, Mr. Miller.

21 MR. MILLER: Your Honor, on September 9, officers  
22 with the Aiken County Sheriff's Office were dispatched to  
23 meet with the victim, a Ms. Candice Hite at 13 -- 345  
24 Connector Road in Aiken County in reference to a breach of  
25 trust. Ms. Hite said she'd loaned her 2000 Honda CBR

1 motorcycle that was red and white in color to the  
2 defendant, Mr. Wilhite that he would return the vehicle to  
3 her on September 8th, at 4:30 in the afternoon.

4 Ms. Hite said she had several text messages from  
5 the defendant stated he would return to vehicle but she  
6 wasn't able to make contact with him by telephone and he  
7 had refused and failed to return the vehicle.

8 Officers at that time attempted to contact the  
9 defendant by phone and they couldn't get in touch with him  
10 either and ultimately they located the motorcycle at ■  
11 McKinney Street in Aiken County in Beech Island. At that  
12 time the vehicle was returned to Ms. Hite.

13 MR. HAYES: May it please the Court, Judge. He is  
14 29 years of age. A little context, the motorcycle was his  
15 and they had purchased it together and she had put it in  
16 his name. They were boyfriend and girlfriend. They were  
17 having a -- an argument over their relationship and when he  
18 left, he decided he was going to go see his father. I've  
19 known Mr. Wilhite for a long time and in August, I was at  
20 the soccer fields with my son watching him play soccer and  
21 his brother was actually a coach. His dad and brother both  
22 approached me and was telling me about how Mr. Wilhite was  
23 doing. I know I'd seen him several times out there at the  
24 practice field and he appeared to be doing very well.

25 About this time we were talking and when he had an

1 argument with her, he called his dad and his dad was at the  
2 lake. He new his dad wasn't home, so instead of going home  
3 to stay with his dad, he decided to go see some friends,  
4 which put him on the spiral of going back to drug use.

5 Unfortunately, this is what his issues have been  
6 for a very long time, an addiction. While he was in the  
7 Aiken County jail and we were waiting to come the Court,  
8 the probation did a paperwork review and put him on a leg  
9 monitor and he was scheduled to try to go into an inpatient  
10 rehab, which is what he very much wishes to be able to do.  
11 He thinks that would help him greatly in his issues.  
12 However, he ended up violating the curfew because of the  
13 drug use and was put back in the Aiken County jail.

14 Judge, he attends Milbrook Baptist Church and there  
15 are friends in court that has been working with Mr. Wilhite  
16 for quite a while as well. Judge, he's got a great  
17 support.

18 THE COURT: I understand, but he's done probation  
19 two times before and he keeps violating and violating.  
20 He's got another break, as soon as he gets out, he's right  
21 back into --

22 MR. HAYES: Yes, sir.

23 THE COURT: -- into criminal activity. I don't  
24 know what else to do with him other than to recommend ATU,  
25 which is the Addictions Treatment Unit.

1 MR. HAYES: Yes, sir. Judge, we -- he wants me to  
2 ask the Court to consider a possibility of some sentence  
3 that would allow him to get into rehab.

4 THE COURT: I understand. You're doing your job  
5 though. I'm pretty easy to get along with, but once they  
6 violate and violate, you know, you give them a chance and  
7 give them a chance and he just seems to not want to comply  
8 with anything. I'm going to sentence him to one year on  
9 this charge. It will run concurrent to his probation. I'm  
10 going to revoke him in full, terminate and convert to civil  
11 judgment.

12 What's that Indictment Number, ma'am?

13 PROBATION AGENT: There's four different ones, Your  
14 Honor, the same sentence. You want to just revoke --

15 THE COURT: Just give me one.

16 PROBATION AGENT: Yes, sir. 2013-GS-02-1259.

17 THE COURT: I'll give him credit for the time  
18 served.

19 MR. HAYES: Yes, sir, he did 129 days.

20 THE COURT: Thanks.

21 PROBATION AGENT: Your Honor, shall I terminate all  
22 three cases?

23 THE COURT: Yes, ma'am.

24 \* \* \* \* \* END OF TRANSCRIPT \* \* \* \* \*

25

1 State of South Carolina )  
2 County of Aiken ) **Certificate of Reporter**  
3  
4  
5  
6 I, THE UNDERSIGNED, Brenda J. Sigwald, Official  
7 Court Reporter for the Eleventh Judicial Circuit of the  
8 State of South Carolina, do hereby certify that I reported  
9 the proceedings in the captioned case in the Court of  
10 General Sessions in and for the State of South Carolina on  
11 23rd day of April 2015.  
12 I FURTHER CERTIFY that the foregoing pages  
13 constitute a true, accurate and complete transcript of said  
14 hearing.  
15 I FURTHER CERTIFY that I am neither kin, counsel,  
16 nor of interest to any party hereto.  
17 IN WITNESS WHEREOF, I have hereunto set my hand and  
18 seal at Aiken County, this 25th day of August, 2017.  
19  
20  
21  
22 *Brenda J. Sigwald*  
23 \_\_\_\_\_  
24 Brenda J. Sigwald,  
25 Court Reporter and Notary Public  
For the State of South Carolina  
My commission expires  
January 4, 2020

STATE OF SOUTH CAROLINA )

County of Aiken )

Stephen B. Wilhite 339350 )  
Full name and prison number (if any) of Applicant )

v. )

State of South Carolina )

2015-CP-02-02223  
IN THE COURT OF COMMON PLEAS  
2013A0210900157  
2014A0210900172

APPLICATION FOR  
POST-CONVICTION RELIEF

FILED September 21, 2015  
[Signature]  
Clerk of Court  
[Signature]  
Deputy Clerk 8:30am

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 \_\_\_\_\_
2. Name and location of Court which imposed sentence \_\_\_\_\_
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) \_\_\_\_\_
  - (b) \_\_\_\_\_

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

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

(a) \_\_\_\_\_

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

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

6. Check whether a finding of guilty was made:

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

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

(c) after a plea of nolo contendere \_\_\_\_\_

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

\_\_\_\_\_

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

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

i. \_\_\_\_\_

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

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

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

i. \_\_\_\_\_

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

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

(c) the date of each such result:

i. \_\_\_\_\_

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) \_\_\_\_\_

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

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

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) \_\_\_\_\_

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

(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? \_\_\_\_\_

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? \_\_\_\_\_

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? \_\_\_\_\_

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

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? \_\_\_\_\_
- (c) your sentencing? \_\_\_\_\_
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? \_\_\_\_\_
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?  
\_\_\_\_\_

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. \_\_\_\_\_
    - \_\_\_\_\_
  - ii. \_\_\_\_\_
  - \_\_\_\_\_
  - iii. \_\_\_\_\_
  - \_\_\_\_\_
- (b) the proceedings at which each such attorney represented you:
    - i. \_\_\_\_\_
    - \_\_\_\_\_
  - ii. \_\_\_\_\_
  - \_\_\_\_\_
  - iii. \_\_\_\_\_
  - \_\_\_\_\_

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

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

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

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

STATE OF SOUTH CAROLINA )  
County of Aiken )

VERIFICATION

I, Stephen B. Wilhite, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Butt Wilhite

SWORN to and subscribed before me this 16 day of September, 2015.

Manuel Wilson (L.S.)  
Notary Public

My Commission Expires: 3-8-2020

**APPLICATION TO PROCEED WITHOUT PAYMENT  
OF COSTS AND AFFIDAVIT  
IN SUPPORT THEREOF**

I, Stephen B. Wilhite, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Stephen B. Wilhite  
Applicant

SWORN or affirmed to and subscribed before me this  
16 day of September, 2015.

Donna Marie Wilhite  
Notary Public

My Commission Expires: 3-8-2020

## Answer sheet

Beth White

1. Place of detention: SCDC
2. Name and location of court which imposed sentence  
Aiken County Court House  
109 Park Ave.  
Aiken, SC 29802
3. Name of co-defendant: N/A
4. The indictment number or numbers upon which and the offenses for which sentence was imposed: 2013-GS-02-01259,  
2015-GS-02-00591.
5. The date upon which sentence was imposed and the terms of the sentence: April 23, 2015, use of vehicle without permission for temp. purpose only, unconnected to other crime, Probation violation, 1 year run concurrent with 3 year probation violation.
6. Check whether a finding of guilty was made: after a plea of guilty.
7. Did you appeal from the judgement of conviction or the imposition of sentence?: No

Bill Miller

9. If you answered no to (7), state your reasons for not so appealing: I didn't know that I could appeal a guilty plea. I plead guilty to temp. vehicle use and sentenced to 1yr, then Probation stepped up and Judge Early fully revoked my Probation. To my understanding I was already sentenced on my Probation violation. Mr. Sumter sentenced me to inpatient drug rehab for it.
10. State concisely the grounds on which you base your allegation that you are being held in custody's ineffective assistance of counsel. If I would have known my Probation was gonna be revoked again, I would never plead guilty to that charge. I was told I would receive time served for the charge but I was sentenced to 1yr.
11. State concisely and in the same order the facts which support each of the grounds set out Mr. Hayes come seen me in the jail and showed me a text message from Mr. Miller stating that if I plead guilty to temp. use of vehicle then he would dismiss the kidnapping and Mr. Hayes told me I would get sentenced to time served. Instead I was sentenced to 1yr. then Probation stepped up and revoked my Probation and I was sentenced to 3yrs. on it. Dec 6, 2014 I was sentenced by Mr. Sumter to inpatient rehab for my violation. So to my knowledge I was going to court to receive time served →

Butt Little

and go back to the county jail to wait on  
bed space for rehab.

12. Prior to this application have you filed with respect  
to this conviction: No

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?  
No

16. I am just now finding out what I can do  
to try and get this sentence over turned. If I  
would have had better assistance at the time  
I would not have plead guilty to any things.

17. A) yes  
C.) Yes

18. David Hayes, 410 Barnwell Ave. N.W.  
P.O. Box Drawer 2247  
Aiken, SC 29802

19. I'm seeking to have my sentence over turned and  
with drawl my guilty Plea.



20. No

*Butt-hitter*



STATE OF SOUTH CAROLINA  
COUNTY OF AIKEN

Stephen B. Wilhite,  
Applicant,

v.

State of South Carolina,  
Respondent.

IN THE COURT OF COMMON PLEAS  
FOR THE SECOND JUDICIAL CIRCUIT

2015-CP-02-02223

**RETURN**

In response to the Application for post-conviction relief (PCR) filed by Stephen B. Wilhite (Applicant) on September 21, 2015<sup>1</sup>, Respondent would respectfully show this Court:

**I.**

Applicant was indicted at the August 2013 term of the Aiken County Grand Jury for grand larceny, more than \$10,000 (2013-GS-02-01259). Applicant was represented by C. David Hayes, Esquire. David W. Miller, Esquire, prosecuted the case. On July 24, 2013, Applicant pled guilty before the Honorable R. Keith Kelly. Judge Kelly sentenced Applicant to imprisonment for five years, provided that upon the service of two years, the balance of the sentence was suspended with probation for three years. Applicant did not appeal his guilty plea or his sentence.

Applicant was subsequently indicted at the April 2015 term of the Aiken County Grand Jury for temporary use of a vehicle without permission (2015-GS-02-000591). Applicant was represented on this charge again by C. David Hayes, Esquire. David Miller, Esquire, prosecuted the case. On April 23, 2015, Applicant pled guilty before the Honorable Doyet A. Early, III. Judge Early sentence Applicant to imprisonment for one year, revoked his probation in full, and ran his one year sentence concurrently with the probationary sentence. Applicant was given

<sup>1</sup> Respondent did not receive the application until February 15, 2017.

credit for 129 days served on this charge. Applicant did not appeal his guilty plea, his sentence, or his probation revocation.

Attached to this Return and incorporated by reference are the records of the Aiken County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the guilty plea transcript, and the application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

## II.

In his application for post-conviction relief, Applicant alleges that he is being held unconstitutionally for the following reasons:

### 1. Ineffective Assistance of Counsel

- a. "If I would have known my probation was gonna be revoked again, I would never plead guilty to that charge. I was told I would receive time served for the charge but I was sentenced to 1 yr."

## III.

Respondent submits Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his 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, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its

“reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

In this case, the record shows Applicant's plea was knowing and voluntary. Applicant testified at his guilty plea hearing that he understood the charges against his and potential sentence. Tr. pp. 6. He stated he was satisfied with his representation and he was pleading guilty of his own free will. Tr. pp. 7. Applicant also testified that he was not promised anything in exchange for his plea and was pleading guilty because he was indeed guilty. Tr. pp. 7.

Respondent submits Applicant can satisfy neither 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).

## IV.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRPC. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRPC.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

## V.

Respondent therefore requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to § 17-27-70 of the South Carolina Code of Laws 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.

VI.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

VIII.

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claims of ineffective assistance of plea counsel.

Respectfully submitted,

ALAN WILSON  
Attorney General

W. JEFFREY YOUNG  
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

JULIE A. COLEMAN  
Assistant Attorney General

By   
ATTORNEYS FOR RESPONDENT

Post Office Box 11549  
Columbia, SC 29211  
Telephone: (803) 734-3737

December 29, 2017

STATE OF SOUTH CAROLINA  
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS

2015-CP-02-02223

STEPHEN B. WILHITE,

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

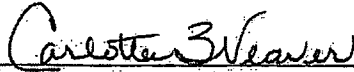
STATE OF SOUTH CAROLINA,

Respondent.

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Arthur K. Aiken, Esquire  
Aiken & Hightower  
2231 Devine Street, Suite 201  
Columbia, SC 29205

DATED this the 29<sup>th</sup> day of December, 2017.

  
\_\_\_\_\_  
Carlotta Weaver, Legal Assistant  
For Respondent

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

State of South Carolina )  
County of Aiken )

In the Court  
Of Common Pleas

Docket No: 2015CP022223

Stephen Brett Wilhite, )  
Applicant, )

vs. )

Transcript of Record

State of South Carolina, )  
Respondent. )

January 25, 2018  
Aiken, South Carolina

B E F O R E:

The Honorable William P. Keesley, Judge.

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

Arthur K. Aiken, Esquire  
Attorney for the Applicant

Christian Saville, Assistant Attorney General  
Attorney for the Respondent

Brenda J. Sigwald, Circuit Court Reporter  
To The Honorable Doyet A. Early III  
P.O. Box 206, Jackson, South Carolina 29831

| <u>I N D E X</u> |  |             |
|------------------|--|-------------|
|                  |  | <u>Page</u> |
| 1                |  |             |
| 2                |  |             |
| 3                | Stephen Wilhite                          |             |
| 4                | Direct Examination.....                  | 5           |
| 5                | Cross-Examination.....                   | 11          |
| 6                | Robert E. Wilhite                        |             |
| 7                | Direct Examination.....                  | 13          |
| 8                | Cross-Examination.....                   | 15          |
| 9                | C. David Hayes                           |             |
| 10               | Direct Examination.....                  | 16          |
| 11               | Cross-Examination.....                   | 18          |
| 12               | Redirect Examination.....                | 21          |
| 13               | Certificate of Reporter.....             | 25          |
| 14               | Keyword Index.....                       | 26          |
| 15               |  |             |
| 16               |  |             |
| 17               | <u>E X H I B I T S</u>                   |             |
| 18               | <u>Number</u>                            | <u>Page</u> |
| 19               | <u>Description</u>                       |             |
| 20               | (REPORTER'S NOTE: There were no exhibits |             |
| 21               | entered during this hearing.)            |             |
| 22               |  |             |
| 23               |  |             |
| 24               |  |             |
| 25               |  |             |

**POST CONVICTION RELIEF HEARING**

1 THE COURT: All right, Mr. Saville.

2 MR. SAVILLE: May it please the Court?

3 THE COURT: Yes.

4 MR. SAVILLE: This is Stephen B. Wilhite versus the  
5 State of South Carolina, Docket Number 2015CP022223.

6 First in August 2013, applicant was indicted by the  
7 August term of the Aiken County Grand Jury for grand  
8 larceny more than \$10,000. Applicant was represented by  
9 Charles David Hayes, Esquire and David Miller, Esquire  
10 prosecuted the case.

11 On July 24, 2013, applicant pled guilty before the  
12 Honorable R Keith Kelly. Judge Kelly sentenced applicant  
13 to imprisonment for five years, provided upon the service  
14 of two years, the balance of the sentence was suspended to  
15 probation for three years; and applicant did not appeal his  
16 guilty plea or sentence.

17 Applicant was subsequently indicted at the April  
18 2015 term of the Aiken County Grand Jury for temporary use  
19 of vehicle without permission. Applicant was represented  
20 on this charge again by Charles David Hayes, Esquire and  
21 David Miller, Esquire prosecuted the case.

22 On April 23rd, 2015, applicant pled guilty before  
23 the Honorable Doyet A. Early, III and Judge Early sentenced  
24 applicant to one year imprisonment and revoked his  
25

1 probation in full; and ran his one year concurrently with  
2 the three years of revoked probation.

3 Applicant was given credit for 129 days served on  
4 this charge and applicant did not appeal his guilty plea,  
5 the sentence, or his revocation.

6 Applicant filed a timely application for post  
7 conviction relief on September 21st, 2015, alleging that he  
8 was being held in custody unlawfully based on the following  
9 allegations:

10 Applicant alleged ineffective assistance of counsel  
11 in that if he would have known his probation was going to  
12 be revoked again he would have never pled guilty to the  
13 charge. Applicant alleges that he was told he would  
14 receive time served for the charge, but was sentenced to  
15 one year.

16 The State filed its return on December 29th, 2017.

17 Applicant's present today and represented in this  
18 matter by Arthur Aiken, Esquire. I will turn it over to  
19 Mr. Aiken.

20 THE COURT: Yes, sir.

21 MR. AIKEN: Thank you, Your Honor, just briefly --  
22 just briefly, Your Honor. This case involves allegations  
23 of misadvice leading up to Mr. Wilhite's plea and the  
24 revocation of his probation and we would like to call  
25 Mr. Wilhite as our first witness.

**Stephen Brett Wilhite - Direct Examination by Mr. Aiken**

1 THE COURT: If you would come around over here.

2 STEPHEN BRETT WILHITE,

3 having been duly sworn, testified as follows:

4 THE CLERK: Please have a seat in the witness box  
5 and state your full name for the Court.

6 THE WITNESS: Stephen Brett Wilhite.

7 **DIRECT EXAMINATION**

8 **BY MR. AIKEN:**

9 Q Mr. Wilhite, you're the applicant in this case?

10 A Yes, sir.

11 Q You're the one alleging that you're being  
12 unlawfully held and that your conviction and sentence  
13 should be overturned?

14 A Yes, sir.

15 Q Now, the conviction and sentence we're dealing with  
16 today, that was a one-year sentence for temporary use  
17 without permission?

18 A Yes, sir.

19 Q And also a three-year sentence on a probation  
20 revocation, right?

21 A Yes, sir.

22 Q And those were run concurrent?

23 A Yes, sir.

24 Q So in effect, you got a three-year sentence?

25 A Yes, sir.

## Stephen Brett Wilhite - Direct Examination by Mr. Aiken

1 Q And now you've completed the sentence?

2 A Yes, sir.

3 Q Okay. You have no probation, no community  
4 supervision, no any other entanglement with the government  
5 having to do with that sentence?

6 A No, sir.

7 Q Okay. Now, you are incarcerated right now, aren't  
8 you?

9 A Yes, sir.

10 Q And you're at the Aiken County Detention Center?

11 A Yes, sir.

12 Q Now, that's -- those charges are totally unrelated  
13 to the ones we're here to discuss today, right?

14 A Yes, sir.

15 Q Now, before you pled guilty, you were charged with  
16 kidnapping?

17 A Yes, sir.

18 Q Okay. And that carries zero to 30 years. You  
19 understand that, right?

20 A Yes, sir.

21 Q You were also charged breach of trust greater than  
22 2,000 and less than 10,000, right?

23 A Yes, sir.

24 Q And you understand that carries zero to 10 years?

25 A Yes, sir.

**Stephen Brett Wilhite - Direct Examination by Mr. Aiken**

1 Q Okay. Now, as part of the guilty plea, when you  
2 entered the plea to your --

3 A Sir, the breach of trust more than two less than  
4 ten carries zero to five, I thought.

5 Q Excuse me, I'm sorry, you're correct. That's zero  
6 to five.

7 A Yes, sir.

8 Q Now, before you entered the guilty plea for which  
9 you received the effective three year sentence, you were  
10 charged with kidnapping, right?

11 A That's correct.

12 Q Zero to 30 years, right?

13 A Yes, sir.

14 Q You were charged with breach of trust, zero to five  
15 years, right?

16 A Yes, sir.

17 Q And you were charged with petit larceny?

18 A Yes, sir.

19 Q Okay. Now the petit larceny was tried in  
20 magistrate's court, right?

21 A Yes, sir.

22 Q And you were found not guilty on that?

23 A Yes, sir.

24 Q Okay. Now, do you understand that if you win your  
25 PCR, you could conceivably face that kidnapping charge at

**Stephen Brett Wilhite - Direct Examination by Mr. Aiken**

1 zero to 30 years and that breach of trust two to 10,000 for  
2 five years, you could conceivably face those charges again?

3 A Yes, sir.

4 Q And you understand that your sentence on the plea  
5 where you got an effective three-year sentence is  
6 completed?

7 A Yes, sir.

8 Q And notwithstanding your understanding of all that,  
9 you still want to go forward with this PCR?

10 A Yes, sir.

11 Q Okay. Now, you were represented in the case for  
12 which you received the sentence we're discussing today by  
13 David Hayes; is that right?

14 A Yes, sir.

15 Q Okay. Now, first of all, let me make something  
16 clear. I forgot to do this. The kidnapping was dismissed  
17 as far as the plea?

18 A Yes, sir.

19 Q Okay. Or not prosed as part of the plea.

20 A Yes, sir.

21 Q And the breach of trust was reduced down to where  
22 you were actually separately indicted, instead of breach of  
23 trust, you were separately indicted for use of vehicle  
24 without permission, temporary use of vehicle without  
25 permission, right?

## Stephen Brett Wilhite - Direct Examination by Mr. Aiken

1 A Yes, sir.

2 Q Okay. And all that's part of the plea, right?

3 A Yes, sir.

4 Q Now, the charge of temporary use of a motor  
5 vehicle, was that a motorcycle?

6 A Yes, sir.

7 Q Okay. Now, did you own that motorcycle?

8 A Yes, sir.

9 Q Did you tell Mr. Hayes that you owned the  
10 motorcycle?

11 A Yes, sir.

12 Q Did he ever explain to you that if you owned the  
13 motorcycle you couldn't be guilty of temporary use without  
14 permission?

15 A No, sir.

16 Q Now, reference your probation revocation, okay?  
17 Before you went in court to appear before Judge Early for  
18 your guilty plea and your probation revocation, what did  
19 you understand about your -- the status of your probation?

20 A That I was sentenced to inpatient drug rehab, to be  
21 housed in the Aiken County Detention Center until bed space  
22 at a rehab came available.

23 Q Did you explain to Mr. Hayes that that's what you  
24 understood --

25 A Yes, sir.

## Stephen Brett Wilhite - Direct Examination by Mr. Aiken

1 Q -- was the status of your probation?

2 A Yes, sir.

3 Q Did he explain to you that if you pled guilty you  
4 would have yet another probation violation?

5 A No, sir.

6 Q Did he ever explain to you that with yet another  
7 probation violation you could get a revocation of three  
8 years?

9 A No, sir.

10 Q Well, what was your understanding of what you were  
11 supposed to get on the probation revocation?

12 A My probation revocation was already sentenced on  
13 February 26th. It was signed by Judge Early for me to stay  
14 in the Aiken County Detention Center until bed space at a  
15 rehab come available. From February 26th to April 23rd, I  
16 was still housed in Aiken County Detention Center. On  
17 April 23rd, when I gave the plea to the year, I was  
18 understood that I was going to receive time served for the  
19 year. My probation violation was already done. Worse case  
20 scenario, I thought I may go the R and E for two months to  
21 finish up for whatever -- for me being sentenced over 90  
22 days and come back to the Aiken County Detention Center to  
23 wait on bed space in rehab.

24 Q Now, let me ask you this: If Mr. Hayes had advised  
25 you that you could not be guilty of temporary use of the

**Stephen Brett Wilhite - Cross-Examination by Mr. Saville**

1 vehicle without permission because you owned the  
2 motorcycle, would you have pled guilty?

3 A No, sir.

4 Q Now, if Mr. Hayes had advised you that your  
5 probation was not, in fact, set, that you could be revoked  
6 for your plea, actual plea; if he had advised you of that  
7 would you have pled guilty and suffered that revocation?

8 A No, sir.

9 MR. SAVILLE: That's all I have, Your Honor, thank  
10 you.

11 THE COURT: Cross?

12 **CROSS-EXAMINATION**

13 **BY MR. SAVILLE:**

14 Q Good morning Mr. Wilhite, how you doing?

15 A Good morning.

16 Q How many times did you meet with Mr. Hayes prior to  
17 your plea?

18 A Maybe one time at the detention center.

19 Q Okay. Do you recall telling the plea judge that  
20 you were satisfied with the services?

21 A Yes, sir.

22 Q Okay. Is Mr. Hayes representing you on any current  
23 charges or --

24 A Yes, sir.

25 Q Do you recall telling the judge that no one was

## Stephen Brett Wilhite - Cross-Examination by Mr. Saville

1 promising you anything pursuant to your plea?

2 A Yes, sir.

3 Q Do you recall telling the judge that were indeed  
4 guilty?

5 A Yes, sir.

6 Q And do you recall the plea judge advising you that  
7 your probation would be revoked as a consequence of  
8 pleading guilty?

9 A Say that again?

10 Q Do you recall telling the -- or do you recall the  
11 plea judge advising you that your probation would be  
12 revoked if you pled guilty?

13 A Yes, sir.

14 Q Do you recall telling him that you understood that?

15 A Yes, sir.

16 Q Were any charges dismissed for pleading guilty?

17 A The kidnapping.

18 Q And would you like a charge on the original  
19 charges?

20 A Yes, sir.

21 Q Okay. That's all I have, thank you.

22 THE COURT: Redirect?

23 MR. AIKEN: No redirect, Your Honor.

24 THE COURT: Sir, you may step down.

25 Anything further from the applicant?

**Richard Wilhite, Jr. - Direct Examination by Mr. Aiken**

1 MR. AIKEN: I have one more witness, Your Honor, it  
2 will take about three minutes.

3 THE COURT: Call your witness.

4 MR. AIKEN: I'd call Robert Wilhite, Jr.

5 ROBERT WILHITE, JR.,

6 having been duly sworn, testified as follows:

7 THE CLERK: Please have a seat in the witness box.  
8 State your full name for the Court.

9 THE WITNESS: I'm Robert, Wilhite, Jr.

10 **DIRECT EXAMINATION**

11 **BY MR. AIKEN:**

12 Q Mr. Wilhite, how old are you?

13 A I am 58.

14 Q And where do you live?

15 A I live in Aiken, South Carolina.

16 Q And where do you work?

17 A I work at Gregg Park Super Center in Graniteville.

18 Q All right. And are you Stephen Wilhite's father?

19 A Yes, I am.

20 Q Do you -- you've heard about the motorcycle we've  
21 been discussing, the motorcycle that was wrapped up in this  
22 guilty plea. Do you have any information about who owned  
23 that motorcycle?

24 A Yes, sir. My son owned that bike. He had  
25 purchased that bike when he was -- had to stay home at the

**Richard Wilhite, Jr. - Direct Examination by Mr. Aiken**

1 time. And he purchased that bike and he had called me one  
2 night, he had some problems with the bike. It was broke  
3 down over off of the bypass right off Huntsman Drive. And  
4 me and my dad went over there and loaded it up that night.  
5 It was raining that night and we went and loaded it up and  
6 he had some problems with the bike and I was going to put  
7 the bike in the shop and have it fixed.

8 Well, I'm not for flimflaming, so I told him, when  
9 you're right you're right and I'll stand by you. When  
10 you're wrong you're wrong, but I checked the bike. The  
11 bike was his. I didn't want to put any money out on the  
12 bike that I was going to put it out, you know, on somebody  
13 else's bike. So I checked it out. He was insured by State  
14 Farm with the bike. I checked it out and seen the bike was  
15 in his name, the title was in his name, so I put the bike  
16 over in North Augusta in the shop and had it repaired and  
17 then we picked it up.

18 Q So based on your own investigation of the situation  
19 you're satisfied that you're son actually owned that  
20 motorcycle?

21 A Yes, sir, he actually owned that motorcycle.

22 Q That's all I have. Thank you Mr. Wilhite.

23 THE COURT: Cross-examination.

24 ///

25 ///

## Richard Wilhite, Jr. - Cross-Examination by Mr. Saville

## CROSS-EXAMINATION

1  
2 BY MR. SAVILLE:

3 Q Thank you for being here. Do you have any  
4 documents proving the ownership of the motorcycle?

5 A I do not have any documents, no, not now. Other  
6 than my word, that's the only documents I have, like I  
7 said. But I'm just -- I don't throw money into a deep dark  
8 black hole, you know what I mean.

9 Q Yes, sir, thank you very much.

10 A Thank you.

11 THE COURT: Redirect?

12 MR. AIKEN: No redirect, Your Honor, and that's the  
13 applicant's case.

14 THE COURT: Thank you, sir, you may step down.

15 THE WITNESS: Thank you.

16 THE COURT: State have any evidence to present?

17 MR. SAVILLE: Yes, Your Honor, the State would like  
18 to call Charles David Hayes.

19 THE COURT: Come around, please.

20 CHARLES DAVID HAYES,

21 having been duly sworn, testified as follows:

22 THE CLERK: Have a seat in the witness box. State  
23 your full name for the Court.

24 THE WITNESS: Charles David Hayes, H-a-y-e-s.

25 ///

## Charles David Hayes - Direct Examination by Mr. Saville

## DIRECT EXAMINATION

1  
2 BY MR. SAVILLE:

3 Q Good morning Mr. Hayes, how you doing?

4 A Good morning.

5 Q How long have you been practicing law?

6 A Since 2009.

7 Q And were you appointed or retained in this case?

8 A Appointed.

9 Q Okay. Did you meet with the applicant prior to the  
10 plea?

11 A I did.

12 Q And did you discuss any possible defenses with him?

13 A I have -- I did. The first note that I look at in  
14 my notes was a jail visit on April 21st of 2015 where we  
15 discussed speedy trial. We also discussed where the  
16 solicitor had made the offer to pleading to the temporary  
17 use, dismiss the kidnapping, plea to -- would also violate  
18 probation and he would be looking at jail time; most likely  
19 would be revoked. He wanted me to talk to probation and  
20 talk to the agent to find out for sure.

21 Q So had the applicant proceeded to trial on the  
22 kidnapping charge, he could have served a potential 30  
23 years?

24 A Yes.

25 Q Did you enter into plea negotiations?

## Charles David Hayes - Direct Examination by Mr. Saville

1 A I did.

2 Q What were the terms of those negotiations if you  
3 recall?

4 A They were the ones I just read. Solicitor agreed  
5 that if he would plea to the temporary use, he'd dismiss  
6 the kidnapping.

7 Q And did you ever advise the applicant that he would  
8 receive just time served?

9 A No. I told him we could ask for time served, but  
10 there was no guarantee of that. My specific note here says  
11 that he would most likely be revoked and that he was  
12 looking at jail time.

13 Q Yes, sir.

14 Were there any other promises made regarding the  
15 plea?

16 A No. I don't make any promises ever.

17 Q Did the applicant have a prior record?

18 A He did.

19 Q What did that record contain?

20 A It's -- just a moment, I have to find the NCIC.

21 Q And just from your recollection he had some  
22 relevant prior charges?

23 A Yes; he had -- my recollection he had a federal  
24 transaction card theft and I believe forgery. And then  
25 these charges. And I cannot recall off the top of my head,

**Charles David Hayes - Cross-Examination by Mr. Aiken**

1 but I know there's more. I think there was a conviction  
2 for drugs.

3 Q And Applicant had had probation revoked before,  
4 correct?

5 A He had.

6 Q Okay. That's all we have. Thank you.

7 THE COURT: Cross-examination.

8 **CROSS-EXAMINATION**

9 BY MR. AIKEN:

10 Q How are you, Mr. Hayes?

11 A Doing fine.

12 Q I'm Art Aiken. I represent Mr. Wilhite on the PCR.  
13 Mr. Wilhite owned the motorcycle, didn't he?

14 A No, he did not. What I was told was that he and  
15 his girlfriend had purchased the motorcycle together and  
16 that they put it in her name because of his record and his  
17 insurance issues.

18 Q Okay. The reason why I'm asking you is I'm looking  
19 at the plea transcript.

20 A I understand.

21 Q And it says in the guilty plea transcript, and this  
22 is what you represented to the Court: A little context,  
23 the motorcycle was hers and they purchased -- it was his  
24 and they had purchased it together and she had put it in  
25 his name.

**Charles David Hayes - Cross-Examination by Mr. Aiken**

1 A It's supposed to be her name.

2 Q Okay.

3 A And the issue was that they put it in her name  
4 because he had had issues with the DMV and insurance and  
5 she was -- he was paying for it and that's what I was  
6 representing to the Court. However, it was in her name,  
7 titled to her.

8 Q Nevertheless, you represented to the Court that the  
9 motorcycle was his?

10 A Yes.

11 Q Meaning Mr. Wilhite's?

12 A Right, but titled to her. And also I had discussed  
13 this in full with Mr. Wilhite in the back, through that  
14 door, that he can go forward with a trial on this or he can  
15 go to trial on the kidnapping; but a wiser decision would  
16 be to take a plea on this charge and walk away from the 30  
17 year sentence that's 85 percent. And that's what he agreed  
18 he wanted to do.

19 Q And you would agree that if Mr. Wilhite, in fact,  
20 owned the motorcycle, he could not be guilty of temporary  
21 use without permission?

22 A He could decide to put up a defense.

23 Q But if he -- let's assume he was the owner of the  
24 motorcycle?

25 A Oh, that would be a defense to it, yes.

## Charles David Hayes - Cross-Examination by Mr. Aiken

1 Q Well, you couldn't be guilty of temporary use if  
2 you owned it, could you?

3 A Right.

4 Q So in order, he would be not guilty if he owned it?

5 A Right.

6 Q Now, as far as the probation was concerned, did  
7 Mr. Wilhite discuss with you any prior orders concerning  
8 his probation?

9 A Yes, I was aware that they had violated him to  
10 in-house -- inpatient through a written order. I'd advised  
11 him even on 4/21/15, on the last jail visit, if he entered  
12 this plea, he would violate and most likely be revoked in  
13 full.

14 Q All right. So he -- you deny that he told you he  
15 understood that his probation was already set?

16 A I said everything he said up there was a lie. I  
17 advised him that he would be violated. Any plea, any  
18 conviction, to any client, every time, I advise them you  
19 will violate your probation.

20 MR. AIKEN: May I have just one moment, please,  
21 Your Honor.

22 THE COURT: Certainly.

23 (There was a pause in the proceedings.)

24 MR. AIKEN: Thank you, Mr. Hayes.

25 That's all I have, Your Honor.

**Charles David Hayes - Redirect examination by Mr. Saville**

1 THE COURT: Redirect?

2 MR. SAVILLE: Just briefly, Your Honor.

3 **REDIRECT EXAMINATION**

4 **BY MR. SAVILLE:**

5 Q Mr. Hayes, what led you to believe the bike was  
6 actually in his girlfriend's name?

7 A That's what I was told by him.

8 Q I see.

9 And do you think the statement to the Court that's  
10 in the transcript saying that it was owned by him was  
11 possibly a typo?

12 A What it should have said was that it was owned by  
13 him and his girlfriend and they purchased it and put it in  
14 her name. I believe that part was a typo.

15 Q And you recall the applicant telling the judge at  
16 the guilty plea that he did, in fact, temporarily deprive  
17 the owner, Candace Hite of the motorcycle?

18 A Yes.

19 Q That's all we have. Thank you.

20 THE COURT: Recross-examination?

21 MR. AIKEN: No recross-examination, Your Honor.

22 THE COURT: Thank you, sir, you may step down.

23 Anything else from the State?

24 MR. SAVILLE: Would you like a closing argument,  
25 Your Honor?

1 THE COURT: That's up to the two of you. I  
2 don't --

3 MR. AIKEN: Just very briefly, Your Honor, about  
4 five minutes.

5 THE COURT: Go ahead.

6 MR. AIKEN: What we've got here, Your Honor, as I  
7 said in the brief opening that I gave is misadvice. First  
8 of all, Mr. Wilhite indicates -- testified that he owned  
9 the motorcycle, so did his father. If he owned the  
10 motorcycle, he clearly was not guilty of temporary use of  
11 the motor vehicle without permission. He says he advised  
12 his lawyer that he was the owner. The lawyer represented  
13 to the Court during the plea that the motorcycle belonged  
14 to Mr. Wilhite. He could not possibly have been guilty of  
15 temporary use without permission and his lawyer should have  
16 advised him that he should not plead guilty to that charge.  
17 And Mr. Wilhite testified that had he been properly advised  
18 that he shouldn't plead guilty to the charge that he was  
19 not guilty of that he would not have pled guilty.

20 And then as to the probation revocation,  
21 Mr. Wilhite testified about his understanding of what had  
22 occurred prior to his actual revocation. He understood  
23 that his probation had already been revoked and that his  
24 probation was set. He was not -- and he advised his lawyer  
25 of that. His lawyer didn't explain to him that when he

1 came in and pled guilty in open court that would be another  
2 violation of his probation and he was subject to additional  
3 revocation.

4 Thank you, Your Honor.

5 THE COURT: Yes, sir.

6 Yes, sir?

7 MR. SAVILLE: Just briefly, Your Honor. As to the  
8 ownership of the motorcycle, Applicant has not met his  
9 burden of proof to produce any evidence of his actual  
10 ownership of the bike other than Mr. Wilhite, his father's  
11 testimony. Also, we have the testimony from Counsel that  
12 applicant told Counsel it was in his in girlfriend's name.  
13 Moreover, the applicant admitted to the plea judge that he  
14 temporarily deprived his girlfriend of her motorcycle.

15 It's also the State's position that the guilty plea  
16 transcript refutes that he did not know his probation was  
17 revoked. He was advised by the plea judge that his  
18 probation would be revoked as a consequence of the guilty  
19 plea and he testified at that hearing that he understood  
20 that. Moreover there's no evidence that Applicant was ever  
21 guaranteed that he would just receive time served on this  
22 charge. His allegations are refuted by the transcript and  
23 Counsel's testimony. Thank you very much.

24 THE COURT: Anything else?

25 MR. AIKEN: No, sir.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

THE COURT: I'll notify you of the decision in writing. Thank you.

MR. AIKEN: Thank you, Judge.

\* \* \* \* \* END OF TRANSCRIPT \* \* \* \* \*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

State of South Carolina )  
County of Aiken )      **Certificate of Reporter**

I, Brenda J. Sigwald, Official Court Reporter for the Second Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas in and for the State of South Carolina on the 25th day of January 2018.

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

IN WITNESS WHEREOF, I have hereunto set my hand and seal at Aiken County, this 25th day of August, 2018.

*Brenda J. Sigwald*  
\_\_\_\_\_  
Brenda J. Sigwald,  
Court Reporter and Notary Public  
For the State of South Carolina  
My commission expires  
January 4, 2020



Honorable R. Keith Kelly sentenced Applicant to imprisonment for five years, suspended to two years, with probation for three years. Applicant did not appeal from his guilty plea or sentence.

The Aiken County Grand Jury later indicted Applicant at their April 2015 term for temporary use of a vehicle without permission. (2015-GS-02-000591). Charles David Hayes, Esquire, represented Applicant again. David W. Miller, Esquire, prosecuted the case. On April 23, 2015, Applicant pleaded guilty as indicted before the Honorable Doyet A. Early, III. Judge Early sentenced Applicant to imprisonment for one year, revoked his probation in full, and ran his one year sentence concurrent with the probation revocation. Applicant received credit for one hundred and twenty-nine days served on this charge. Applicant did not appeal from his guilty plea, sentence, or probation revocation.

## II. ALLEGATIONS

In his Application, Applicant alleged that he is being held in custody unlawfully for the following reasons:

### 1. Ineffective Assistance of Counsel

- a. "If I would have known my probation was going to be revoked again, I would have never pleaded guilty to that charge. I was told I would receive time served for the charge, but I was sentenced to one year."
- b. "[Plea Counsel] came to see me in the jail and showed me a text message from [Solicitor] that if I pleaded guilty to temporary use of a vehicle then he would dismiss the kidnapping, and Plea Counsel told me I would get sentenced to time served. Instead I was sentenced to one year, then probation stepped up and [revoked] my probation and I was sentenced to three years."

Applicant also orally amended his application at his PCR hearing to include an allegation that Plea Counsel was ineffective for advising him to plead guilty when he owned the motorcycle he was charged with temporarily using without permission.

### III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

Applicant testified on his own behalf at the hearing, along with his father. Applicant's Plea Counsel also testified.

#### *Applicant's testimony*

Applicant testified a kidnapping charge was dismissed pursuant to his guilty plea, but he still wished to pursue a new trial understanding he would face the temporary use of a vehicle without permission charge as well as kidnapping. Applicant testified he was supposed to be housed in Aiken County Detention Center until space in a rehabilitation center became available as part of his plea deal. He claimed he would not have pleaded guilty if he knew he would get a one year sentence.

Applicant testified he met with Plea Counsel at the detention center once before his guilty plea. Applicant acknowledged that, at the time of this hearing, Plea Counsel was presently representing him on unrelated charges pursuant to Applicant's wishes. Applicant recalled telling the plea judge he was satisfied with Plea Counsel's services. Furthermore, Applicant conceded he told the plea judge he understood his probation would be revoked as a result of his guilty plea as well as his possible sentencing consequences. Applicant also recalled telling the plea judge that no promises had been made to him in exchange for his plea.

#### *Applicant's father's testimony*

Applicant's father testified Applicant actually owned the motorcycle in question. When questioned whether he had any documents proving Applicant's ownership of the motorcycle, Applicant's father conceded that he did not.

#### *Plea Counsel's testimony*

Plea Counsel testified he advised Applicant the guilty plea would be a violation of his

probation. Plea Counsel further testified Applicant had told him that Applicant's girlfriend, who called the police, was the record owner of the motorcycle as Applicant had "issues" with insurance and the Department of Motor Vehicles. Plea Counsel testified he discussed the issue of ownership of the motorcycle with Applicant at length before the plea. Plea Counsel testified Applicant understood he could plead to the temporary use of a vehicle without permission charge or he could proceed to trial and face the kidnapping charge as well, but he chose the plea. Plea Counsel asserted it was Applicant's decision to plead guilty.

#### IV. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, (1984); Butler, 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 counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use 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, 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. With respect to guilty pleas, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

#### V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

#### INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant alleges Plea Counsel was ineffective in his representation surrounding his guilty plea. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the range of competence demanded of attorneys in criminal

cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). In the present case, this Court finds Applicant has failed to prove that he is entitled to post-conviction relief on any of his allegations.

Applicant alleges Plea Counsel was deficient because Applicant owned the motorcycle in question but nevertheless pleaded guilty to temporary use of a vehicle without permission. This allegation is without merit and the record reveals Applicant was fully aware of the issues related to ownership of the motorcycle. While the term "owner" is not defined in the criminal code section under which Applicant was charged, the term is defined under S.C. Code § 56-3-20(21) as follows:

"Owner" means a person, other than a lienholder, having the property in or title to a vehicle. The term includes a person entitled to the use and possession of a vehicle subject to a security interest in another person but excludes a lessee under a lease not intended as security.

Plea Counsel credibly testified he discussed the issue of ownership with Applicant at length. Plea Counsel also credibly testified Applicant told him that the motorcycle was titled in the name of Applicant's girlfriend because Applicant had difficulty getting title placed in his name. Applicant's testimony at his plea hearing as well as Plea Counsel's credible testimony at the PCR hearing reveal Applicant understood what he was pleading to when he pled to temporary use of a vehicle without permission, understood the consequences of his plea, and chose to plead guilty on his own accord. For these reasons, Applicant has failed to prove Trial Counsel was deficient for allowing him or advising him to plead guilty to temporary ownership of a vehicle without permission.

Applicant also alleges he was promised a different sentence such as time served and would not have pleaded guilty if he knew his probation was going to be revoked. This Court

finds Applicant's claims to be self-serving and not credible. By contrast, this Court finds Plea Counsel credibly testified he discussed the issue of probation revocation with Applicant. Moreover, the record refutes Applicant's allegation as he testified at his plea hearing he understood the guilty plea would result in a probation revocation and he would be facing three years of incarceration. Applicant also told the plea judge under oath that he was not promised anything in exchange for pleading guilty. Therefore, Applicant has failed to Plea Counsel was deficient based on any of his allegations.

Notwithstanding, Applicant's failure to present any evidence of alleged deficiency of Plea Counsel, Applicant has also failed to satisfy his burden of proving he was prejudiced by any of Plea Counsel's alleged deficiencies under the second prong of Strickland v. Washington, 466 U.S. 668 (1984). In this case, a plea bargain was reached whereby very serious charges were dismissed in exchange for Applicant's plea to temporary use of a vehicle without permission. Had Applicant proceeded to trial on his original charges, he would have faced a potential sentence of thirty years for kidnapping. The record clearly reflects the voluntary and informed nature of Applicant's guilty plea. The record reveals Applicant was advised of and understood his sentencing exposure as well as the nature of his charges. Furthermore, Plea Counsel's credible testimony reveals he fully discussed the relevant issues with Applicant, and Applicant chose to plead guilty on his own free will. This Court finds there is no reasonable probability that, but for Plea Counsel's alleged deficiencies, Applicant would not have pleaded guilty and would have proceeded to trial.

## VI. CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant his application.

Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice in regard to all allegations; and
2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 22<sup>ND</sup> day of MAY, 2018.

Edgefield, South Carolina

William P. Keesley  
 WILLIAM P. KEESLEY  
 Chief Administrative Judge  
 Second Judicial Circuit

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF AIKEN )  
 )

INDICTMENT FOR  
TEMPORARY USE OF  
VEHICLE WITHOUT PERMISSION

§ 16-21-0060(B)

At a Court of General Sessions, convened on April 13, 2015, the Grand Jurors of Aiken County present upon their oath:

That **STEPHEN BRETT WILHITE** did, in Aiken County, on or about September 9, 2014, while not being entitled to the possession of and without the consent of the owner, Kandace Hite, take, use or drive a 2000 Honda CBR929 Motorcycle with intent to deprive the owner of the vehicle temporarily, such deprivation of the owner being unconnected with the commission of or intent to commit a crime other than the taking of such vehicle. All in violation of §16-21-60 Code of Laws of South Carolina (1976), as amended.

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

  
\_\_\_\_\_  
J. STROM THURMOND, SOLICITOR

**WITNESSES**

Aiken County Sheriff

S. Masters

Law Enforcement Case #: 14-056351

DWM

**ARREST WARRANT NUMBER**

2014A0210900172

FILED 9 April 2015

*Liz Godard*  
S.C.P.R.G.  
*Shannon W. Rosenkrantz*  
Deputy Clerk

**ACTION OF GRAND JURY**

*True Bill*

*[Signature]*  
Foreperson of Grand Jury *Danny Quattlebaum*  
Date: April 9, 2015

**VERDICT**

Foreperson of Petit Jury  
Date:

**DOCKET NO. 2015GS0200591**

**The State of South Carolina**

**County of Aiken**

**COURT OF GENERAL SESSIONS**

**APRIL TERM 2015**

**THE STATE**

**vs.**

**STEPHEN BRETT WILHITE**

**CDR #: 0222**

**Indictment for**

**TEMPORARY USE OF VEHICLE  
WITHOUT PERMISSION**

**§ 16-21-0060(B)**

**J. STROM THURMOND, SOLICITOR**

