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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHN PAUL WALLACE — APPELLANT

VS.

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SUPREME COURT
COURT OF APPEALS

NO. 2007-CP-0766-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHN PAUL WALLACE **APPELLANT**

VERSUS **NO. 2007-CP-00766-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

In this direct appeal from a denial of his "Motion for Post Conviction Relief to Vacate and Set Aside Conviction and Sentence," **JOHN PAUL WALLACE** seeks appellate review of an order signed by Jerry O. Terry, Circuit Judge, finding as a fact and concluding as a matter of law that " . . . Wallace's probation revocation was due to his continued use of an illegal substance and cannot be attributed to his counsel's alleged inactions." (C.P. at 38-40; appellee's exhibit A, attached)

Wallace does not assail the integrity of his guilty plea to child exploitation; rather, the target of his appellate complaint appears to be the revocation of his probation and the order of the trial court requiring him to serve, day for day, his ten (10) year sentence.

STATEMENT OF FACTS

John Paul Wallace, having violated the terms and conditions of his probation after receiving two ten year concurrent sentences following his plea of guilty to two counts of exploitation of a

child, has had his probation and suspended sentences revoked.

Wallace, twenty-three (23) years of age (R. 4, 38) and a high school graduate (C.P. at 24), is now serving, day for day, a ten (10) year sentence based upon laboratory tests of his urine which were positive for the presence of THC, i.e., marijuana.

This did not sit well with Wallace who filed for post-conviction relief four (4) years after his plea of guilty and three (3) years seven (7) months following his revocation hearing.

On February 25, 2002, John Paul Wallace entered a voluntary plea of guilty in the Circuit Court of Harrison County to two counts of exploitation of a child. He was sentenced to serve ten (10) years on each count to run concurrently.

A revocation hearing was held on April 8, 2002, after Wallace tested positive for marijuana. Although the court found Wallace guilty of violating the conditions of his probation, the court did not revoke Wallace's probation; rather, Judge Terry ordered Wallace to remain on his original probation under the same terms and conditions. (R. 1-6; C.P. at 28-30)

The record reflects the following colloquy between Wallace and Judge Terry:

> THE COURT: Mr. Wallace, you now have an assessment of a $500 fine for lying to the Court at the time that you pled guilty. You can just add that onto the court costs, and you have - - you will be paying that at $100 a month in the same fashion.
>
> Now, I emphasize to you at this time: Don't let it happen again.
>
> DEFENDANT WALLACE: It will not happen again, sir. (R. 6)

Regrettably, it happened again. (R. 10; C.P. at 30 C)

Two and a half months later, on June 28, 2002, a second revocation hearing was conducted before Judge Terry. At the conclusion of the second hearing, Judge Terry revoked Wallace's

probation with the following rhetoric:

> THE COURT: Mr. McKoin [defense counsel], I don't need any more argument.
>
> All right. Historically Mr. Wallace was before the Court on February the 25th [and] entered a plea of guilty. That's the 25th of February, 2002. He entered a plea of guilty, denied any use of controlled substance at that time.
>
> March the 8th, two weeks later, he tested positive for the use of marijuana.
>
> The petition was filed for review of the matter at that time.
>
> Mr. Wallace appeared before the Court at that time and confessed to the use of marijuana. I don't have a report at this time as to all of the statements that Mr. Wallace made at that hearing, but he did admit to the use of it. And I will accept his statement that he had used it on the 25th, and that's the likelihood as to the reason that I did not revoke him at that hearing. I fined him $500 and allowed him to remain on probation.
>
> According to what I've heard here today almost two months later, he was tested. That was in May. That is two months after the March the 8th test, and he tested positive then. I have nothing before me to make a determination as to how long that marijuana will stay in one's system, but I do have an individual here who has on more than one occasion testified falsely, and I think it's time that Mr. Wallace atone for his indiscretion of continuing to use marijuana, and also for the crime that he committed which he was placed on probation for.
>
> John Paul Wallace, stand up.
>
> THE COURT: I hereby find that you have now violated the terms and conditions of your probation for a second time, the first time being at the hearing that was held on April the 8th. Now I find that you violated the terms and conditions once again, and I hereby revoke your probation and sentence you to the original sentence that [you] were sentenced to, and that is ten years on Count I and ten years on Count II.
>
> Those are to run concurrently. And I believe those are sex offenses, and they will be day-for-day. That's the sentence. (R. 555-

57)

Over three years later, on February 21, 2006, Wallace, by and through an attorney in the State of Texas (C.P. at 14), filed a pleading styled "Motion for Post-Conviction Relief to Vacate and Set Aside Conviction and Sentence." (C.P. at 4-27) Wallace claimed his retained lawyer, Mr. Kelly McKoin (C.P. at 6), was ineffective in his representation of Wallace during the revocation hearing. (C.P. at 4-21) Attached to Wallace's post-conviction papers were the affidavits of Wallace's father and mother (C.P. at 16-17, respectively) and Robert F. Conley, a person affiliated with an organization known as "Impaired Driving Consultant Group." (C.P. at 19-20) Conley, it appears, was an "impaired driving consultant."

Specifically, Wallace, who is not assailing the voluntariness or integrity of his guilty plea, claimed

> "Mr. McKoin failed to present expert evidence at the [probation revocation] hearing to explain the test results from urine tests conducted by the defense, failed to object to introduction into evidence of the State's urine test results which did not comport with rules of evidence, and failed to file a Motion to Reconsider within the time limits required by the procedural law [and] [t]hese failures prejudiced Mr. Wallace." (C.P. at 6)

Judge Terry did not deny relief immediately; rather, he issued an order directing the State to file an Answer. (C.P. at 32)

The State answered on March 23, 2007. (C.P. at 33-37)

On March 29, 2007, Judge Terry entered a three (3) page order summarily denying post-conviction relief. Judge Terry found as a fact that " . . . Wallace's probation revocation was due to his continued use of an illegal substance and cannot be attributed to counsel's alleged inactions." (C.P. at 40; appellee's exhibit A, attached)

The sole issue presented on appeal to this Court is articulated as follows: Was Wallace

denied the effective assistance of counsel at his probation revocation hearing?

It is our position the answer to this inquiry is an unequivocal "no."

A transcript of Wallace's probation revocation hearings is a matter of record at R. 1-58.

A copy of Wallace's petition to enter plea of guilty is a matter of record at C.P. 23-27.

SUMMARY OF ARGUMENT

Fact-finding made by the circuit judge in denying post-conviction relief was neither "clearly erroneous" nor "manifestly wrong." **Hersick v. State,** 904 So.2d 116, 125 (Miss. 2004); **McGaughy v. State,** 954 So.2d 452, 453 (Ct.App.Miss. 2006); **Ruff v. State,** 910 So.2d 1160, 1161 (Ct.App.Miss. 2005); **Hunt v. State,** 874 So.2d 448, 452 (Ct.App. Miss. 2004).

Judge Terry applied the correct legal standard in finding as a fact and concluding as a matter of law that " . . .Wallace's probation revocation was due to his continued use of an illegal substance and cannot be attributed to his counsel's alleged inactions." (C.P. at 38-40; appellee's exhibit A, attached.)

Stated differently, Judge Terry found as a fact and concluded as a matter of law that counsel's performance was neither deficient nor did any deficiency prejudice Wallace.

Judge Terry found as a fact that Wallace admitted he lied to the Court about his drug use and confessed to the court his use of marijuana. (C.P. at 38)

Judge Terry also found as a fact that ". . . Wallace's attorney filed a motion to have Wallace's urine sample from May 1, 2002(,) reexamined by an independent laboratory of Wallace's choice and to have a new urine sample taken and tested." (C.P. at 39; R. 12)

Judge Terry found as a fact that "[t]he tests performed by Dynacare came back positive for marijuana for the May 1, 2002[,] sample . . ." (C.P. at 39) and that " . . . Wallace had violated the conditions of his probation . . ."

The court thereafter sentenced Wallace ". . . to serve ten years day for day in the custody of the MDOC." (C.P. at 17-18)

These findings were neither clearly erroneous nor manifestly wrong; rather, they were supported by both substantial and credible evidence. Indeed, Wallace's admissions to the violation is both loud and clear. (R. 2-4) The record reflects Judge Terry, in revoking probation, relied upon Wallace's admissions made under oath as well as the results of an independent test requested by defense counsel. (C.P. at 55-56)

In short, Judge Terry was eminently correct and did not err in rejecting Wallace's post-conviction claims because they were plainly without merit.

Finally, it would appear that Wallace's post-conviction complaint is procedurally barred because his motion for post-conviction relief was filed more than three (3) years after the entry of the order revoking his probation and ordering Wallace to serve, day for day, his ten (10) year concurrent sentences. (C.P. at 31)

ARGUMENT

WALLACE'S MOTION FOR POST- CONVICTION COLLATERAL RELIEF WAS PROPERLY DENIED WITHOUT AN EVIDENTIARY HEARING BECAUSE IT, *INTER ALIA*, WAS TIME-BARRED.

JUDGE TERRY'S FINDING OF FACT THAT WALLACE'S PROBATION REVOCATION WAS DUE TO HIS CONTINUED USE OF AN ILLEGAL SUBSTANCE WAS NOT CLEARLY ERRONEOUS.

JUDGE TERRY'S CONCLUSION OF LAW THAT WALLACE WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WAS BOTH JUDICIOUS AND CORRECT.

Wallace, whose motion for post-conviction relief was denied after the State filed its Answer, claims the lawyer who represented him at his probation revocation hearing was ineffective in the

constitutional sense because he, *inter alia*, **(1)** failed to investigate the test results, **(2)** failed to call an expert witness to challenge the test results, **(3)** elicited damaging testimony during his cross-examination of the state's witnesses, **(4)** failed to attack the credibility of the State's witnesses, **(5)** failed to object to certain discovery violations concerning a post-sentence report, and **(6)** failed to file a timely motion to reconsider.

Wallace invites this Court to "reverse and remand the decission [sic] of the Harrison County Circuit Court for further proceedings." (Brief for the Appellant at 34)

First, some preliminary considerations.

Unlike many other proceedings involving those caught up in the criminal justice system, there is no automatic right to counsel at hearings for the revocation of probation. *See* **Riely v. State,** 562 So.2d 1206, 1209 (Miss. 1990). A probationer has the right to be appointed counsel at a revocation hearing when the issues are complex or otherwise difficult to develop. *Id.*

The issues involved here were neither overly complex nor excruciatingly difficult to develop, and Wallace was probably not entitled to appointed counsel. *See* **Riely v. State,** 562 So.2d 1206, 1209 (Miss. 1990), where we find the following language:

> All this notwithstanding, probationers (and parolees) do not "have, *per se*, a right to counsel at revocation hearings." *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 26, 101 S.Ct. 2153, 2159, 68 L.Ed.2d 640, 649 (1981) (citing *Gagnon v. Scarpelli,* 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973)); *see Ex parte Laird,* 305 So.2d 357, 358 (1974) (discussing *Gagnon*). **Whether probationers have a right to counsel must be answered "on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system."** *Gagnon*, 411 U.S. at 790, 93 S.Ct. at 1763, 36 L.Ed.2d at 666; *see Lassiter,* 452 U.S. at 26, 101 S.Ct. at 2159, 68 L.Ed.2d at 649; see also *Mempa v. Rhay,* 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967) (holding that a probationer is entitled to be represented by appointed counsel at a combined revocation and

> sentencing hearing - unless probationer was sentenced at the time of trial). Because the "facts and circumstances in [revocation] hearings are susceptible of almost infinite variation," the United States Supreme Court opined that "[i]t is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines" for determining when counsel must be provided in order to meet due process requirements. *Gagnon,* 411 U.S. at 790, 93 S.Ct. at 1764, 93 L.Ed.2d at 666. "Presumptively, it may be said that counsel should be provided in cases [which, for example, are] . . . complex or otherwise difficult to develop." *Id.* at 790-91, 93 S.Ct. at 1764, 36 L.Ed.2d 656, 666-67 (1973) (also noting that counsel should be provided in cases where, "after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim"); *see Ex parte Laird,* 305 So.2d at 358 ("[T]he [parole] hearing officer violated the rules of the Probation and Parole Board when he did not permit the attorney who appeared for petitioner to participate in the proceedings.") Finally, "[i]n every case in which a request for counsel at a . . . hearing is refused, the grounds for refusal should be stated succinctly in the record." *Gagnon,* 411 U.S. at 791, 93 S.Ct. at 1764, 36 L.Ed.2d at 666-67.
>
> In sum, provision of representation at the first three hearings was neither requested nor necessitated in view of the facts and applicable law. **Indeed, the case was not "complex or otherwise difficult to develop."** And as noted, counsel was provided upon request by Riely prior to the fourth hearing and prior to his appeal to this Court. Therefore, this Court holds that Riely's allegation of error is devoid of merit. [emphasis ours]

Wallace, we note had retained counsel (C.P. at 6, para. V. 10.) as well as competent counsel representing him at the revocation hearing. Indeed, Judge Terry noted in his order denying relief that "Wallace's attorney filed a motion to have Wallace's urine sample from May 1, 2002[,] reexamined by an independent laboratory of Wallace's choice and to have a new urine sample taken and tested." (C.P. at 39)

Second, an order revoking probation and suspended sentence is not appealable. **Griffin v. State,** 382 So.2d 289 (Miss. 1980); **Pipkin v. State,** 292 So.2d 181 (Miss. 1974); **Ray v. State,** 229 So.2d 579 (Miss. 1969). *Cf.* **Bobkoskie v. State,** 495 So.2d 497, 499 (Miss. 1986) ["(A)n order

revoking parole is not appealable."]

Wallace, in effect, has filed a direct appeal from probation revocation masquerading as a motion for post-conviction relief.

Third, it appears to us that Wallace's post-conviction complaint was time barred by virtue of the post-conviction relief act.

Miss. Code Ann. §99-39-5(1)(g)(i)(2) reads, in its pertinent parts, as follows:

> (1) Any prisoner in custody under sentence of a court of record of the state of Mississippi who claims:
>
> * * * * * *
>
> (g) That his sentence has expired; **his probation**, parole or conditional release **unlawfully revoked**; or he is otherwise unlawfully held in custody;
>
> * * * * * *
>
> (I) * * * may file a motion to vacate, set aside or correct the judgment or sentence, or for an out-of-time appeal.
>
> (2) A motion for relief under this chapter shall be made within three (3) years after the time in which the prisoner's direct appeal is ruled upon by the supreme court of Mississippi or, in case no appeal is taken, **within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired**, or in case of a guilty plea within three (3) years after entry of the judgment of conviction. * * *

Wallace entered his plea of guilty on February 25, 2002. His probation was revoked on June 28, 2002, following a probation revocation hearing conducted on that date.

Wallace's motion for post-conviction relief was not filed until February 21, 2006, more than three (3) years after the time for filing for post-conviction relief had, we respectfully submit, expired. Wallace is not complaining about an illegal sentence following probation revocation but ineffective representation by counsel during the revocation hearing.

We submit this issue must be time-barred. Post-conviction claims based on involuntary guilty pleas and ineffective assistance of counsel are subject to the three (3) year statute of limitations and the time bar. **Luckett v. State,** 582 So.2d 428 (Miss. 1991); **Wallace v. State,** 823 So.2d 580 (Ct.App.Miss. 2002).

These initial observations, in our opinion, simply detract from the vitality of Wallace's post-conviction complaint. If Wallace was not entitled as a matter of right to court-appointed counsel at his revocation hearing, we have difficulty envisioning how he could have been prejudiced by the representation of retained counsel.

In any event, time bar, *et cetera* notwithstanding, we submit the fact-finding made by the circuit judge in denying post-conviction relief was neither "clearly erroneous" nor "manifestly wrong." **Hersick v. State,** 904 So.2d 116, 125 (Miss. 2004); **McGaughy v. State,** 954 So.2d 452, 453 (Ct.App.Miss. 2006); **Ruff v. State,** 910 So.2d 1160, 1161 (Ct.App.Miss. 2005); **Hunt v. State,** 874 So.2d 448, 452 (Ct.App. Miss. 2004).

Did Wallace violate the terms and conditions of his probation?

Indeed, there can be no question about it. Wallace, under the trustworthiness of the official oath, freely and voluntarily confessed to the court that he did. (R. 43-44, 55) Judge Terry, who presided over both probation revocation hearings as well as the guilty plea-qualification hearing, thereafter revoked Wallace's probation and imposed the previously suspended sentence.

"When reviewing a lower court's decision to deny a petition for post conviction relief this Court will not disturb the trial court's factual findings unless they are found to be clearly erroneous." **Willis v. State,** 821 So.2d 888, 889 (Ct.App.Miss. 2002), quoting from **Brown v. State,** 731 So.2d 595, 598 (¶6) (Miss. 1999).

Judge Terry's finding that ". . . Wallace's probation revocation was due to his continued use of an illegal substance and cannot be attributed to his counsel's alleged inactions" is a finding of fact that will not be reversed unless clearly erroneous or manifestly wrong.

It wasn't.

Judge Terry's implicit findings, *first*, that counsel's representation did not fall below an objective standard of reasonableness and, *second*, that Wallace failed to demonstrate there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, was both judicious and correct.

Wallace, via post-conviction counsel, filed an impressive motion for post-conviction relief, replete with exhibits, in the trial court. Wallace, via his own hand or the pen of his writ writer has drafted a decent brief on appeal.

Wallace's free and voluntary admissions, together with the results of a subsequent urinalysis detecting the presence of THC, make it is difficult to find error in the decision of the trial judge to revoke Wallace's probation and suspended sentence for failure to abide by some, but not all, of the terms and conditions of his probation.

We reiterate.

"When a trial court has denied a petition for post-conviction relief, this court will examine whether the denial is clearly erroneous." **Bilbo v. State,** 881 So.2d 966, 967 (¶ 3) (Ct.App.Miss. 2004), citing **Kirksey v. State,** 728 So.2d 565, 567 (¶ 3) (Miss 1999).

The burden is upon Wallace to prove by a preponderance of the evidence he is entitled to post-conviction relief. **Bilbo v. State,** *supra*, 881 So.2d at 967 citing Miss.Code Ann. §99-39-23(7) (Rev.2000).

Wallace suggests this Court should grant him a new probation revocation hearing or, if not, to at least remand the case for an evidentiary hearing.

Not every motion for post-conviction relief filed in the trial court must be afforded a full adversarial hearing. **Jones v. State,** 795 So.2d 589 (Miss. 2001). Defendants must show compelling reasons why the trial court should conduct an evidentiary hearing. **Crouch v. State,** 826 So.2d 772 (Ct.App.Miss. 2002).

Wallace has failed to do so here.

"In the review of proceedings for post-conviction relief, this Court shall apply the substantial evidence/clearly erroneous test, thus limiting [this court's] scope of review." **Reed v. State,** 799 So.2d 92, 94 (Ct.App.Miss. 2001) citing **McClendon v. State,** 539 So.2d 1375, 1377 (Miss. 1989).

Judge Terry asserted in his order he had " . . . reviewed the transcript from the June 28, 2002[,] revocation hearing and finds no evidence that Wallace's counsel's representation fell below an objective standard of reasonableness or that, but for counsel's errors, Wallace's probation would not have been revoked." (C.P. at 40; appellee's exhibit A, attached)

The fact-finding and legal conclusion reached by Judge Terry was not "clearly erroneous."

Mr. McKoin, we note, gave a reasonable explanation for the absence of his expert witness. (R. 48-49)

Judge Terry properly dismissed, without the benefit of an evidentiary hearing, Wallace's motion for post-conviction collateral relief because his claims, although sincere, were without legal merit. Miss.Code Ann. §99-39-11(2); §99-39-19; §99-39-5.

Miss.Code Ann. § 99-39-11 reads, in its entirety, as follows:

> (1) The original motion together with all the files, records, transcripts and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned.
>
> (2) If it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, the judge may make an order for its dismissal and cause the prisoner to be notified.
>
> **(3) If the motion is not dismissed under subsection 2 of this section, the judge shall order the state to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.**
>
> (4) This section shall not be applicable where an application for leave to proceed is granted by the supreme court under section 99-39-27. [emphasis added]

After requiring the State to file an Answer, Judge Terry dismissed Wallace's motion for post-conviction relief by virtue of the authority granted in Miss.Code Ann. §99-39-19 which states, in part, that " . . . the judge, after the answer is filed and discovery, if any, is completed, shall, upon a review of the record, determine *whether an evidentiary hearing is required* [and] *[i]f it appears* that an evidentiary hearing is *not* required, the judge *shall make* such disposition of the motion as justice shall require."

It wasn't, it did, and he made.

CONCLUSION

Appellee respectfully submits this case is devoid of any error. Accordingly, dismissal of Wallace's motion for post-conviction relief should be forthwith affirmed.

Respectfully submitted,

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IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

JOHN PAUL WALLACE **PETITIONER**

VERSUS **CAUSE NO. A2401-2006-00042**

STATE OF MISSISSIPPI **RESPONDENT**

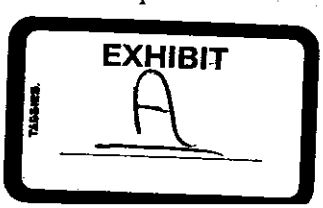
ORDER

This cause is before the Court on John Paul Wallace's motion for post-conviction relief to vacate and set aside conviction and sentence. This Court, having considered the motion, the State's response thereto, the applicable transcripts, and the applicable law, finds the motion is not well taken and should be denied.

FACTS

On February 25, 2002, Wallace pled guilty to two counts of exploitation of a child and was sentenced to ten years in each count to run concurrently for a total of ten years to serve in the custody of the Mississippi Department of Corrections ("MDOC"), with said sentence suspended for five years probation. At the time he was sentenced, Wallace denied any use of drugs. However, Wallace tested positive for marijuana on March 8, 2002 and the State subsequently filed a petition to revoke probation. At the revocation hearing on April 8, 2002, Wallace admitted that he lied to the Court about his drug use and confessed the use of marijuana. The Court found Wallace had violated the conditions of his probation but did not revoke Wallace's probation. Instead, the Court ordered Wallace to remain on his original probation with the same conditions.

Wallace reported to his probation officer on May 1, 2002, and was given a drug test. The drug test came back positive for marijuana. On May 5, 2002, the State filed a second petition to revoke probation due to Wallace testing positive for marijuana on May 1, 2002. On June 10, 2002,



Wallace's attorney filed a motion to have Wallace's urine sample from May 1, 2002 reexamined by an independent laboratory of Wallace's choice and to have a new urine sample taken and tested. Wallace's motion was granted and all proceedings including the revocation hearing were held in abeyance until the results were obtained.

Pursuant to the Court's order, Wallace's urine sample from May 1, 2002 was reexamined by Dynacare Laboratories. Additionally, a new urine sample was taken from Wallace on June 20, 2002 and tested by Dynacare. The tests performed by Dynacare came back positive for marijuana for the May 1, 2002 sample but negative for the June 20, 2002 court ordered sample.

The revocation hearing was held on June 28, 2002. The Court found Wallace had violated the conditions of his probation and sentenced Wallace to serve ten years day for day in the custody of the MDOC. Wallace now files a motion for post-conviction relief and argues he received ineffective assistance of counsel at the June 28, 2002 revocation hearing.

ANALYSIS

Wallace contends he received ineffective assistance of counsel. The United States Supreme Court adopted a two-prong standard for evaluating claims of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the convicted defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. Second, the defendant must show there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694.

Wallace argues his attorney was ineffective since (1) he failed to call an expert witness, (2) he failed to object to the introduction of the State's test results, (3) he elicited damaging evidence on cross-examination and (4) he failed to file a motion to reconsider in a timely fashion. This Court has

reviewed the transcript from the June 28, 2002 revocation hearing and finds no evidence that Wallace's counsel's representation fell below an objective standard of reasonableness or that, but for counsel's errors, Wallace's probation would not have been revoked. To the contrary, the transcript indicates while on probation Wallace tested positive for marijuana on March 8, 2002 and again two months later on May 1, 2002. Thus, Wallace's probation revocation was due to his continued use of an illegal substance and cannot be attributed to his counsel's alleged inactions.

For the reasons stated above, Wallace's motion for post-conviction relief is without merit and should be denied. It is therefore,

ORDERED AND ADJUDGED that John Paul Wallace's motion for post-conviction relief to vacate and set aside conviction and sentence is hereby **DENIED**.

ORDERED AND ADJUDGED, this the 29th day of March, 2007.

JERRY O. TERRY
CIRCUIT COURT JUDGE

FILED
450/318
MAR 29 2007
GAYLE PARKER
CIRCUIT CLERK
BY D.C.

CERTIFICATE OF SERVICE

I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above **BRIEF FOR THE APPELLEE** to the following:

Honorable Jerry O. Terry
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Honorable Cono Caranna
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This the 30TH day of November, 2007.

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