In the Court of Appeals
for the State of Mississippi

COPY

John Paul Wallace — Appellant

vs.

Case no: 2007-CP-00766-COA

State of Mississippi — Respondent

Brief for the Appellant

Comes now, the Appellant, pro-se, to file with this court his brief in support of the Appellant. The Appellant files this brief pursuit to the Mississippi Rules of Appellant Procedure and prays this court will find merit in arguements presented.

Respectfully Submitted

John Paul Wallace

John Paul Wallace [redacted]

S.C.R.C.F.

1420 Industrial Park Road

Wiggins, MS 39577

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for the State of Mississippi

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Case no: 2007-CP-00766-COA

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Certificate of Intrested Persons

The Appellant certifies that the following listed persons have an interest in the outcome of this case for the puspose of disqualifications.

a) Appellant's immeadiate family, to include Paul and Juanita Wallace, Charles and Doris Blackwell, Henrrietta Overstreet, Pamela Thomas, and Chesler Frank Whisanet

b.) Appellant's former boss and owner of Steak-out in Gulfort and Biloxi, Matt Harkins

C) The attourney of record for Appellant's family, Paul and Juanita Wallace, Edward Miller, attourney at law

John Paul Wallace

Appellant's signature

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Statement of the Issues

Appellant seeks review of Circut Courts denial of post-conviction motion where appellant felt he was denied effective assistance of counsel under the sixth Ammendment of the U.S. Constitution at the June 28, 2002 revocation hearing.

Statement of the Case

On Feb. 25, 2002, the appellant plead guilty to two (2) counts of exploitation of child. The appellant was sentenced to five (5) years probation with ten (10) years suspended. At this hearing the appellant was asked by the court if he had used any illegal drugs and the appellant said "no". However the appellant lied at the hearing. (Records pg 23-27). The appellant reported to the probation office to give a urine sample on March 8, 2002. This sample was found to be positive for THC (marijuana) on March 18, 2002 (Transcripts pg 20 lines 18-20). The probation officer filed a petition to revocate probation on March 19, 2002. The appellant was detained on March 19, 2002 and detainment lasted until the April 8, 2002 revocation hearing. At this hearing the appellant truthfully testified that he lied about the use of illegal drugs and stated that he stopped using illeagal drugs on Feb. 25, 2002 (Transcipts pg 2-3), the day of the pleading of guilty. The court allowed the appellant to remain on

probation but fined the appellant (500) five hundred dollars for lying to the court. (Records pg. 30). On May 1, 2002 the appellant reported to the probation office and gave another urine [redacted] sample. (Records pg. 30.D) This sample was removed from cold storage on May 3, 2002 by someone. (Records 30D). The probation officer typed and signed a petition to revocate probation on May 5, 2002 alleging that on May 1, 2002 the appellant tested positive for THC. (Records pg 30B-B). A sample with the accession number 7170, which matches the chain of custody form, was tested and found to be positive for THC on May 6, 2002 (Records pg. 30C). A violation report was typed and signed by the probation officer on May 7, 2002. This report states the appellant [redacted] tested positive for THC on May 6, 2002. (Records pg 30E). The appellant was detained on June 3, 2002 untill a June 28, 2002 revocation hearing. On June 20, 2002, the appellant gave another sample to be tested and this sample tested negative for the presense of all illegal drugs. (Transcripts pg 22 lines 24-25) The May 1, 2002 was also retested by an independent labratory and a "trace" of THC was detected using a "gold standard test". At the June 28, 2002 revocation hearing, Counsel did not call an expert witness to explain the results of the "gold standard test" and the states witness was not trained in this test. (Transcripts pg 12 lines 1-4) The appellant was believed to have violated the terms and condition of probation and sentence to 10 years with the MDOC. On July 22, 2002, Counsel filed a motion to reconsider. This motion was not filed within the time limits and the court had lost jurisdiction to hear this motion. (Records pg. 1 #21) On Feb. 21, 2006 Appellant filed a motion for post-conviction on the grounds of ineffective

assistance of counsel. The appellant alleged that counsel was deficiant in failing to object to the states evidence, the test results from the May 1, 2002 sample, failing to call to the stand an expert witness, eliciting damaging evidence on cross-examination, and failing to file motion for releif in a timely fashion. (Records pg 4-20) The trial judge denied the motion for post-conviction on March 29, 2007, (Records pg 2) and appellant appeals this decision to the Mississippi Court of Appeals.

Summary of the Arguements

The appellant argues that he was denied effective assistance of counsel at the June 28, 2002 revocation hearing. Counsel's many errors prejudiced the Appellant under the sixth (6th) Amendment to the U.S. Constitution.

At the revocation hearing, Counsel failed to investigate the MDOC pobcy concerning drug testing. Had counsel investigated these relevant facts, counsel would have had enough evidence to question the authenticity of the May, 1, 2002 sample. The petition to revocate probation raised even more questions about the accuracy of the chain of custody, where it appears that the probation officer knew in advance that the sample would test positive for THC. Had counsel properly investigated the facts surrounding the case and learned the dates that everything happened, counsel would have noticed the test on the sample was done after the probation officer typedand signed

the petition to revocate and the dates differ from the chain of custody. The most crucial break in the chain of custody, had counsel investigated it, was who picked up the sample and how did it get to the lab to be tested and was the security of the sample still intact when it was tested by the Lab technician, Harold Stanley. Counsel should have investigated these errors and objected to the use of the sample as evidence against his client. Due to the errors, an uncertainty of the security of the sample that was known by the probation officer to test positive a full day before the sample was tested would have been enough to exclude the test results into evidence under MDOC policy and state and federal law. Thus creating a different outcome at the revocation hearing.

Appellant also argues that counsel failed to call an expert witness to the stand to corraborate the defense position instead of opting to relly on state witness to give counsel the answers he wanted, which did not happen, thus eliciting damaging evidence that THC will only stay in a persons system for 21 days. This information could have been found out well in advance of the hearing. Had counsel investigated the MDOC policy, counsel would have found evidence that contradicted the testimony of the state's witness. where policy states 45 days to allow system to clear of drugs.

Counsel also failed to object to the use of the post sentence report as evidence due to the post-sentence report was not disclosed to the defense prior to the hearing.

After the hearing counsel understood his mistakes and filed

a "Motion to Reconsider" on the grounds of failing to call an expert witness. However this motion was filed after the deadline was expired and the Court lost jurisdiction to hear the case. The appellant was prejudiced by this because trial court could not hear the facts of the case to make a fair and reasonable decision. This caused the appellant to seek post-conviction collateral reveiw.

Legal Arguement

Mississippi Code Annotated 47-7-37 sets forth the proceedure for probation revocation in this state. This statue meets the minimal requirements of due process as long as it is construed as inhearing to the due process requirements set forth in Morrissey v. Brewer 408 US 471, 33 L.Ed.2d 484, 92 S.ct. 2593 (1972); Gagnon v. Scarpelli 411 US 778, 36 L.Ed.2d 656, 93 S.ct. 1756 (1973); and Berdin v. State 648 So.2d. 73 ¶. 76 HN2 " The following procedural requirements are necessary for the final revocation hearing: 1) written notice of the violation 2) disclosure of the evidence against the probationer, 3) opprotunity for defendent to testify and to present witnesses and other evidence, 4) right to confront and cross-examine witnesses, 5) nutral and detached hearing body, and 6) a written statement of reasons for revocation and evidence rellied on." citing Gagnon supra at [redacted] 1761-62. " Theese requirements in themselfs serve as substantial protection against ill-considered revocation. what these requirements overlook is the effectiveness

of the rights garenteed by Morrissey may in some circumstances depend on the use of skills which the probationer is unlikely to posess. The introduction of counsel into a revocation hearing, will significantly alter the nature of the proceeding. Counsel is bound by proffessional duty to present all availible evidence and arguements in support of their clients' positions and to contest with vigor all adverse evidence and veiws". Gagnon supra 411 us [redacted] @ 787

Strickland v. Washington 466 us 668, 104 S. ct. 2052, 80 L. Ed.2d 674 (1984) set forth the "standard" for all claims of ineffective assistance of counsel. Strickland set forth a two prong test to establish a claim for a violation of this right. " 1). to determine wheather counsels conduct was deficiant Strickland supra @ 690, 104 s. ct. @ 2052, 2) to show that there is a reasonable probability that, but for counsel's unproffessional errors, the results of the proceeding would have been different." Strickland supra @ 694, 104 S. ct @ 2052

Counsel's Errors

To establish the first prong of the Strickland test, the appellant will breakdown all errors the appellant feels were deficiant in counsels representation of him at the June 28, 2002 revocation hearing.

Failure to investigate the chain of custody and object to the states admission of the test results

The Mississippi Department of Corrections has in place a standard operating procedure, DOC 26-02 (Attached exhibit A) that governs the collection and testing procedures of urine samples used by the MDOC to test for usage of illegal drugs among all offenders, incarrcerated and on some type of supervision. This information would have been relevant to counsel's investigation because it outlines all steps in detail of the collection, to chain of custody, to testing, and emphasises "... testing will only be performed on those specimens handled according to established proceedures" (Ex. A pg. 6, lines 273-75). There are guidelines established within the policy to ensure that every sample is authentic and sealed properly to prevent tampering and/or contamination. The "chain of custody" is defined as "A legal term that refers to the ability to trace and safegaurd the specimen from the time it is donated through all the steps in process from collection to reporting the results" (Ex. A. pg 1 ln. 13-15). "The chain of custody is initiated once the offender submits the sample. The offender will place the tamper evident seal across the cap once the specimen is poured into vial and cap is placed on firmly. The offender will inital the tamper proof seal to verify that it, the sample, is that of the offender. At no time will the witnessing staff touch or handle the specimen untill ~~until~~ the offender has secured the seal". (Ex. A pg 6 ln. 232-36). "Each person who handles the specimen at the unit or during transport must enter their name on the Urinanalysis Chain of Custody form indicating they have checked the security of the Seals and assumed responsibillity of the sample." (Ex. A. pg. 6 ln. 253-255).

The sample in question was collected on May 1, 2002 by the probation officer at 1335 hrs and placed into cold storage at the same time and date (Records pg. 30D). During the collection of the sample, the appellant poured the sample into a correctly labeled vial. The appellant then placed the cap on the vial untill it snapped into place. There was no tamper evident seal placed over the cap, nor did the appellant see anyone place anything over the cap. The vial was then given to the probation officer and he placed the sample into the cold storage. This is substantiated by the chain of custody form because the probation officer failed to indicate if the sample was sealed. The chain of custody asked if the sample was sealed prior to being placed in cold storage but this is a preprinted circle around the "Y". (Records pg. 30D) There is no indication of the probation officer 'checking the security of the seals". The wording of the policy requires at least that. It should be noted that the appellant was under the impression that "sealing the sample" was placing the cap on untill it snapped into place, since this sample was only the second sample given at the probation office and nothing was done different either time. On the next line of the chain of custody, "LAB" removed the sample from cold storage on May 3, 2002. "LAB" indicated that the sample was sealed. This would indicate that someone sealed the sample after it was placed into cold storage. "Every person who handles the specimen must enter their name on the Urinanalysis Chain of Custody form" according to policy. "LAB" failed to follow the MDOC policy, ~~this~~ even though it could be assumed that H. Stanley collected the sample. It could also be assumed that someone with the initals LAB collected the sample. There was no testimony as to who collected the sample

from cold storage or [redacted], when, or how the sample got from the cold storage to the test site or what Condition the sample was in when it was tested on May 6, 2002 (Records pg. 30C) However the chain of custody states the test was conducted by H.Stanly on May 3, 2002 (Records pg 30D). The violation report states the test was done on 5-6-02 and the accuall test results say May 6, 2002. (Records pg. 30 C, E). This leaves a suggestion of either a typo or there was two different samples. "A defect in the chain of custody arises if there is any suggestion of tampering or substitution of evidence" Wilburn v. State No. 2002-KA-01117-COA @ 689 ¶.9 (miss 2003). quoting Wells v. State 604 So.2d. 271, 277 (miss 1992) "A showing that there was no break in the chain of custody is required to establishe a sufficient predicate for admission into evidence. The identifacation of the evidence and continuity of possession must be sufficiently established in order to assure the authenticity of the item" Morgan v. State 570 So.2d. 859 @ 860 (Ala. Cr. App. 1990). The ability to trace and safeguard the sample from the time of collection to reporting the results were severly deficient in this case. "Testing will only be conducted on those specimens handled according to established procedures and specimens may be rejected if all established procedures have not been followed correctly in documentation and obtaining the specimen" (Ex. A pg 7 lines 273-75). "A chemical analysis of a persons . . . urine is deemed valid only when performed according to appoved methods..." Miss Code Anno. 63-11-19; Johnson v. State 567 So.2d. 237 @ 238 n. 2,3 (miss 1990)

"The test for improper chain of custody is weather there is any

reasonable interence of likely tampering with or substitution of evidence" Wilburn v. State supra @ ¶. 9, quoting Williams v. State 794 So.2d. 181, 185 (miss 2001). The petition to revocate probation, (Records pg 30 A-B) which counsel should have easily gotton before the hearing, was typed and signed by probation officer Jimmy Shows on May 5, 2002. The circut court acknowlages this May 5, 2002 date in its answer to the post-conviction (Records pg. 38, 3rd paragraph), "on may 5, 2002 the state filed a second petition to revocate probation."

The dates in this case are especially crutial and a quick review are as follows: 1) May 1, 2002, the appellant submitted a urine sample to the probation officer that was not sealed or initialed properly according to the MDOC policy. The probation officer failed to indicate if the sample was properly sealed in order to start the chain of custody. 2.) On May 3, 2002 "LAB" removed a properly secled sample from cold storage. According to the chain of custody this sample was tested on this date, May 3, 2002. There is no test results for this sample tested on May 3, 2002 in the record. 3) On May 5, 2002 the probation officer prepared and signed a petition to revocate probation stating that the appellant tested positive on 5-1-02 for THC. Please note the date was changed to [redacted] 5-1-02 but originally stated 5-6-02, the date the test results stated (Records 30 A-E) The state contends that a sample was tested on 5-6-02 and the results of that test were positive for THC. (Transcripts pg 20 lines 18-20)

These are serious deficianeys in the chain of custody that question the accuracy of the sample. Appellant does not argue that this could have been, and should have, been brought up at the hearing.

However counsel failed to investigate these relevant facts. "Physical evidence should be a focal point of defense counsels pre-trial investigation and analysis of the Matter." Pavel v. Hollins 261 F.3d. 210 @ 224 (2nd Cir. 2001). "Counsel's investigation is not reasonable within the meaning of Strickland supra, when facts of a case supply him with notice that a particular line of ~~defense~~ pre-trial investigation that may substantially benifit his client and counsel does not pursue it", Pavell supra @ 225 citing Holladay v. Haley 209 F.3d. 1243, 1251-52 (11th Cir. 2000)

But it does not stop there, had counsel investigated a "matter of law", counsel would have found the relevant MS Code Ann. 63-11-19 (1972) "A chemical analysis of a person's... urine is deemed valid only when ... performed on a machine certified to be accurate. The machine must be certified at least quarterly." Quarterly means at least every 90 days, quoting Johnston v. State 567 So. 2d. 237 @ 238 (miss 1990) According to the testimony of H. Stanley, the states witness, "We have an engineer come from the manufacture every 180 days ... he was in here earlier this month, and the machine is in peak operating condition." (Transcripts pg 24 ln. 14-18). Please note the revocation hearing was on June 28, 2002 and the engineer from the manufacture certified the machine earlier that month. The sample was tested on May 6, 2002, on the outside bubble of the manufactures certification but well after the 90 day requirement of the law of the state. This argument would be moot ~~to~~ due to the statue is under the ~~implied~~ DUI laws but the plain language of the statue specifically states "A chemical analysis

of a persons breath, blood or urine", which is exactly what the MDOC does to test for drugs.

In light of all the errors in the chain of custody, errors in the dating of the tests, the extreme foresight of the probation officer and the violations of mississippi law, it is easy to see that counsel was constitutionally deficiant in his investigation of the relevant facts surrounding the case. Because of counsels lack of "due dilligence" in the investigation, counsel was unable to make any strategic decission. "A decision based on ~~the~~ ignorance of relevant facts ... was not based on strategic considerations" Kimmelman v. Morrison 477 U.S. 365 382, 106 S.Ct. 2574, 91 L.Ed.2d. 305 @ 368 (1986). "Strategic choices made after a thorough investigation of law and facts relevant to plausable options are virtually unchallengable" Strickland 466 US. 104 S.Ct. 2052 @ 690.

If all relevant facts had been investigated properly, any competant counsel would have challenged the chain of custody and in light of all the evidence availible to counsel at the time of the hearing, had it been brought to the light at the revocation hearing would have adversely changed the outcome of the hearing. In Blendon v. State No. 96-KA-01339 consolidated with 97-KA-00073-SCT, 748 So.2d. 77 @ P.10 "the trial court granted the defense motion... to exclude the results of the blood tests. The trial court found that the crime lab failed to follow its policy". "This Court has recognized that an agency's interpretation of its own standards and ~~p~~ regulations is controlling, unless such interpretation is clearly erronous." Blendon supra @ 85 P.28.

Failing to call an expert witness to explain test results

It is easy to see the defense counsel's position, (Transcripts pg 48-54) after reveiwing the transcripts, that due to the appellants obesity that the THC was still in his system and the appellant never used marijuana after the April, 8, 2002 revocation hearing. Counsel could not have had the neccessary education or the experience to corroborate the defense's position. (transcripts pg. 11 line 28-29; pg 12 line 1-4, pg 31 lines 10-14; pg. 26 lines 28-29 thru pg 27 lines 1-11). The trial judge also stated that there is "no evidence before the court" to support the defenses position (transcripts pg 53 lines 3-7) and then again afterwords (transcripts pg 56 lns. 10-12) In order to prove this counsel needed an expert witness to testify to exactly that. Counsel accually argued that one was not needed (transcripts pg 48 lines 27-28). "There are many ways to properly assist a client, but making important decisions with no regaurd for a clients intrests is not one of them" Pavell v. Hollins 261 F.3d. 210 @ 219. "Having chosen to pursue a particular line of defense counsel did not intro-duce readily available evidence that would have corroborated that line of defense and there was no plausible strategic reason for counsel not introducing the evidence" Pavell supra @ 223 quoting Harte v. Gomez 174 F. 3d. 1067 (9th Cir 1999). This Honorable Court found in Stringer v. State 627 So. 2d. 326 (miss 1993) that counsel was ineffective for failing to subpoena witnesses for his defense.

Appellant found from prison an expert witness to corroborate the defense position. (Records pg. 18-20) This witness would have testified that he could prove that THC could stay in a persons' system 90 days. This witness, Robert F. Conley, could have authinicated the results from Dyna-Care and explained the "borderline" level of THC in the appellants system. (Records pg. 20) Had counsel contacted and called upon Robert F. Conley, a drug recognition expert he would have provided ample testimony that would have been crutial to the defense. Instead counsel, after learning that Dyna-care labroteries has a policy that restricts employee's from testifing, rushed to the hearing with the results from Dyna-Care and relied on the state's witness to "give the answers" counsel wanted. It is also apparent from the record that counsel and the state's witness met at least twice before the hearing (transcripts pg. 11 line 14 ; pg 24 line 22-26) but failed to see if the state's witness could explain the test results or to see, in his opinion, how long THC could stay in a persons system (Transcripts pg 14 line 22-24, pg 16 line 6-21) "Counsel's anticipation of what a potential witness would say does not excuse the failure to find out" Pavell v. Hollins 261 F. 3d 210 @ 221 quoting United States v. Moore 554 F. 2d. 1086, 1093 (D.C. Cir. 1976)

Had counsel used due dilligence and found, easily, Robert F. Conley there would have no need for counsel to even ask these questions to an adverse witness. It would have "evened the playing feild" in the "whom to beleive" eyes of the fact-finder. "When a case hinges on all-but-entirely on whom to beleive"... as in most revocation

hearings..." an experts ~~test~~ interpretation of relevant physical evidence ... is the sort of nutreal, disintrested testimony that may well tip the scales and sway the fact finder" Williams v. Taylor 529 US 362 120 S.ct. @ 632 (2000). Since this was counsels only line of defense, counsel should have at least tried to call somebody that would corroborate appellants position. One ~~the~~ readily available witness that counsel knew about but failed to contact was the drug testing personel at the Grand Casino where the appellant applied for a job. She would have testified that it took 40 days for THC to leave the system. (Transcripts pg. 41 line 6-23) "If there is only one line of defense ... it must include an independent examination of the facts, circumstances, pleadings and laws involved" Strickland supra @ 680, @ 2061. "It is important " of having an independent witness coroborate a defendent's story" Crisp v. Duckworth 743 F. 2d. 580 587 @ 585 (7th Cir. 1984). " Though there may be instances when the defense counsels decision not to contact a potential witness is justified, an attourney who fails even to intervew a readily availible witness whose non cumulative testimony may potentially aid the defense should not be allowed automatically to defend his omission simply by raising the sheild of stategy and tactics" Crisp supra @ 584.

It was also claimed by counsel in his own "motion to Reconsider" filed July 22, 2002, that he failed to call an expert witness to explain the tests and how long THC could stay in a persons system. This motion is not part of the record, & the appellant feels it should be due to counsels admission of error.

Eliciting Damaging Evidence

on cross-examination

Counsel's defense position was that the appellant had not used marijuana since ~~Feb. 25~~ April 8, ~~2002~~ 2002 and that the positive results was the lingering effects of THC in the appellants system. This leaves a time frame of 64 days. Counsel should have had an expert to say that it is possible, like Robert F. Conley. However, no one other than the appellant was called to the stand.

Continuing to use or attempt to use the test results that Dyna-care performed should be considered damaging to the defense without evidence of how long THC stays in a persons system. When defense counsel asked how long THC could stay in a persons system he answered numerous times as to drill this into the fact-finders head that "it takes 21 days" (Transcripts pg 16 lines 6-14, pg 17 lines 23-29) Counsel just could not leave it to that and, thinking he could get a different answer asked again. This was the most damaging testimony. The witnessed, based on his training, "that in 21 days the level should be down to zero". (Transcripts pg. 20 lines 5-10). This testimony of the state's witness destroyed the defenses position and damaged the credibility of the appellant when he testified that he had not used marijuana since Feb. 25, 2002 (Transcripts pg 42 lines 23-24). The continued use of this line of defense allowed the prosecuter to comment on the matter and use it in her closing arguments, "in fact their own testing has ~~confirm~~ confirmed that he was in fact positive for marijuana in May of 2002" ... "it doesn't make sense that someone would continue to test positive some three months"... 64 days..." after sentencing

unless they were again smoking marijuana." (Transcripts pg 54-55 line 22 29, 1-6). Again the testimony of the states witness would have been contradicted by Robert F. Conley, " In a major study by the United States Navy at the Rocky Mountain Instrumental Laboratories, Robert K. Lantz, Ph.D. and Patricia L. Sulik, Ph.D. found that it could take two (2) months (60-61 days) after the last marijuana use for the urine to become negative for THC." It is even noted that the study used a much higher cut-off than a level 15ng/mL. (Records pg 19 3rd paragraph) This could explain the remaining 4 days of the 2 months it would take for THC to leave the appellant's system. "During the last two (2) weeks or so, it is quite reasonable to expect that the urine will alternate between 'positive' and 'negative'. That is, the level of THC", in the appellants case, "was slightly above, then slightly below, the cut-off value. It is ~~also~~ due to the normal metabolic effects such as the state of hydration and weight loss. It is also due to the 'definition of 'positive' and 'negative'. If a urine sample is found to contain even 1ng/mL less than the cut-off level, it is termed to be 'negative'. If it is 1ng/mL greater than the cutoff level it is termed 'positive'." (Records pg 19)

Had counsel called on this witness, the testimony would have been crutial to the defense and counsel would not have had to rely on state witness to testify that it leaves the ~~at~~ system in 21 days., damaging the defense's position. It was also not strategic under the meaning of strategic " A strategic 'decision'... is a 'decision' that... is expecting to... yeild some benifit, or avoid some harm to the defense." Moore v. Johnson 194 F.3d. 586, 610 @ 615 (5th Cir. 1999)

The appellant has proved from the record that counsel and the state's witness spoke to each other as disussed earlier. Counsel's strategic, if it was strategic, would require counsel under Strickland to "~~thor~~ thoroughly investigate the line of defense used. As the record shows, counsel could not have "thoroughly investigated" this line of defense if he did not investigate what Harold Stanley would say concerning the amount of time THC would stay in a persons system when he had the opprotunity to do so on at least 2 occasions. The first chance was some time before the hearing (Transcripts pg. 22 ln. 26-29, pg 23 lines 1-2) and then again before the hearing when counsel showed the state's witness the Dyna-Care test results. (Transcripts pg. 12 line 13-16) "Strategic decisions made after a 'thorough investigation' of law and 'facts relevant' to plausible options are virtually unchallengable" Strickland 466 US Supra @ 690-691 (emphasis added)

It could not have been considered "strategic" when counsel kept on using the test results from Dyna-Care and kept asking how long THC stays in a persons system. This continued error illicited damaging evidence that utterly destroyed the appellants position, absent evidence to corobor-ate the appellant. "Illiciting damaging evidence that destroys a defense constitutes ineffective assistance of counsel" Moore v. Johnson 194 F.3d 586 supra (5th Cir. 1999)

Failure to attack the credibility of States witnesses

The appellant's credibility was at stake before the appellant took the oath. Presumably counsel in light of his clients intrest should try to level the playing feild in the credibility contest. Appellant agrees that after testifing on Feb 25, 2002 that he lied to the court, it does not look all that well going back to court on the same violation. However it should be duly noted that at the time of the Feb. 25, 2002 plea, the appellant was under the influence of drugs. So the question should be what is the state's witnesses excuss. According to the testimony of H. Stanley, a drug assay technician employed with the MDOC, that after 21 days THC will be completly out of the system. (Transcripts pg. 20 lines 5-10) However the MDOC policy specifically states "(those test positive for marijuana will be tested weekly for 45 days) to allow offenders to clear their system of drugs." (Attached Exhibit A pg. 14 line 606-607). This gives the impression that the MDOC allows 45 days not 21 days. If someone is taught that it takes 21 days then where's the logic in allowing 45 days.

Since the whole idea of the state was that the appellant used drugs after the April 8, 2002 revocation hearing, the "21 days" factor comes into play. Hypothetically, it is 21 days from when the appellant was released from jail on April 8, 2002, after the court allowed him to remain on probation and the May 1, 2002 sample was given. It is also "21 days" from the date of the March 18, 2002 urine test (Transcripts pg 20 line 20) and the April 8, 2002 revocation hearing. The probation officer waited longer than 21 days to arrest the appellant even though the appellant

worked 3 blocks away from the probation office. (May 4, 2002 to June 3, 2002). This delay would be logical for the probation officer since the appellant contested the results of the May, 1, 2002 sample.

The MDOC policy would have shown that MDOC allowed 45 days for offenders under "feild supervision" (probation) to clear their system of drugs. This relevant information would not only contradicted the state's witnesses testimony but also showed that the probation office was in routine practice of not following its own policy and procedures in "~~[redacted]~~, offenders testing positive for THC will be tested weekly for 45 days to allow offenders to clear their system of drugs. This would have added more weight to the policy failures in the chain of custody.

The wording of the policy basically states the day the test sample is found to be positive ~~#~~ the offender will be tested again in 7 days for 45 days when testing positive for THC. So, for 45 days the offender could test positive for THC and no violation reports would be held against him. The states witness testified that on March 18, 2002 the appellant tested positive for THC (Transcripts pg 20 line 20). Apply the "45 day" standard, this would bring the allowed time for THC to be in the appellants system until May 2, 2002. The appellants May 1, 2002 sample was found to be positive for THC, ~~but~~ barely, but still within the MDOC allowed timeframe. The appellant should have never been violated for the May 1, 2002 sample. However the appellant was and was prejudiced with 10 years to serve because THC was found in the Appellents urine on day 44 of a 45 day graceperiod. A sample, whose authenticity is questioned.

Again, failure to properly investigate relevant facts surrounding the case made counsel ignorante to these facts. Counsel could have

attacked the credibility of both states witnesses, when both witnesses work for the MDOC and should be versed on the MDOC policy. This deprived the appellant of a fair and reliable revocation hearing.

Had counsel investigated the MDOC policy it would have raised doubts as to the credibility of both ~~the~~ H. Stanley and J. Shows. "One of counsel's initial steps would presumbly be to find ways to poke holes in the testimony." Pavell v. Hollins supra @ 226. Since the sample was within the allowed time authorized by the MDOC, this policy statement alone would have caused a strong probability that the results of the hearing would have been different, had counsel used the policy ~~to~~ as evidence. "At its roots the right to effective assistance of counsel exists in order to protect the fundamental right to a fair hearing." Strickland 466 U.S. @ 684.

Failure to object to the post-sentence report, non disclosure.

It is normally assumed that the probation officer will testify at a revocation hearing, but the minimum due process requires that if a probationer denies the allegations, the state must disclose all evidence to the probationer. Generally hearsay evidence is not allowed but in a revocation hearing the formal rules of evidence need not be employed. This unfortunatly gives a wide discretion of "he said", "she said" or what ever can be made up. At the hearing the probation officer testified the Appellant told him that " He had told me, that he had used it since the age 14, he

used marijuana one time a week." (Transcripts pg 34 lines 11-13)

If someone is trying to determine if ~~a~~ you need any help and trying to determine if you are a heavy smoker of marijuana, common sense would indicate that someone would ask how much do you smoke. This would be needed to make a determination of a heavy smoker or a light smoker. The appellant still denies saying "one time per week" and ~~con~~ insists that he was a heavy smoker of marijuana but stopped smoking marijuana on Feb. 25, 2002. The appellant after almost 6 years in prison has not tested positive for THC since May 1, 2002 despite being tested randomly. The appellant feels the post-sentence report should have been disclosed to the defense prior to the hearing. Counsel was unaware that the probation officer would testify nor ~~the~~ was the defense aware of any such "post-sentence" report being used as evidence against him. (Transcripts pg. 36 lines 13-15). Counsel should have objected to the probation officer mentioning the "post-sentence report untill after he has had a chance to reveiw it. The appellant feels to this day that it did not state "use only one time a week" This post-sentence report, that was not present at the hearing, destroyed the appellants credibility even though it was introduced as hearsay evidence. "The final hearing ... is the ultimate decision to revoke ... but the minimal due process requirements require ... disclosure to the probationer ... of evidence against him ..." Morrissey v. Brewer ~~@~~ @ 489, 92 S. Ct. at 2604.

Failure to file Motion to Reconsider in a timely fashion

"The standard for considering ineffective assistance of counsel is the same as for appellate counsel as it is for trial counsel" Foster v. State 687 So. 2d 1124 @ 1138 (miss 1997). According to signed affidavit's (Records pg. 16-17) counsel was asked to file a "Motion to Reconsider." Counsel indeed did file the motion, but failed to file the motion on time. It was filed 23 days after the court lost jurisdiction on the case on July 22, 2002. A thorough investigation of law would show that this type of motion should have been filed in the same "term" as the final order. In this motion, counsel admitted the mistake of not having an expert witness and rushing to the hearing without an expert. "Counsel's behavior was not based on tactical considerations but lack of dilligence" United States v. Gray 878 F. 2d. 702 @ 712 (3rd Circuit 1989). "Lack of knowlage of the law that prejudices the client is reversable error" U.S. v. Grammas No. 03-50310 (5th Circuit 2004)

Establishing Prejudice

An ineffective counsel claimant "must show that there is a reasonable probability that, but for counsel's errors, the results of the proceeding would have been different." Strickland supra @ 694

104 S. Ct. @ 2052. "The errors must be considered in the aggregate" Lindstadt v. Keane 239 F.3d. 191, 199 @ 149 (2nd Cir. 2001)

The MDOC policy would have been a crutial part of the pre-trial investigation. However counsel never investigated the policy or the petition to revocate probation, counsel could not even learn the dates properly, all through the hearing counsel used wrong dates. The MDOC policy laid the ground rules for the chain of custody (Ex. A pg 6 lines 232-263) After reading the policy and reveiwing the chain of custody, any competent counsel would have challenged the chain of custody. Questions should have been raised about how the probation officer knew the test would be positive before the sample was tested, and why the probation officer changed the date from May 6, 2002 to May 1, 2002 when the May 6, 2002 date was accurate. And more a question should have been raised about when the testing was done. The two different dates, 5-3-02 and 5-6-02 suggest two samples. If it was one sample, where was the sample after it was removed from cold storage. And most of all who removed the sample. If it was two samples where is the test results from May 3, 2002 as stated by the chain of custody. "Any evidence which is helpfull in getting at the truth of the material issue is relevant even though it is only a link in the chain of facts which must be proved to make the proposition at issue appear more or less probable" Pavell v. Hollins supra @ 227 F.N. 21 quoting People v. Warner 52 A.D. 2d. 684 382 N.Y.S. 2d 377, 378-79 (3rd Dept 1976).

The MDOC policy would have also contradicted the states witness concerning how long THC would stay in a person's system, where policy allows 45 days (Ex A. pg. 14 ln. 605-06) but the witness was trained, 21 days

(transcripts pg. 20 line 5-10). This would have gave the fact-finder reason to beleive THC stays in a persons system longer than the 21 days the States witness beleived. It would also show that the state's witness was not aware of its departmental policies and gave more weight to the argument that the state did not follow it's own procedures.

The evidence of the "45 days' allowance would have given the appellant untill ~~45~~ May 2, 2002 to clear his system. The appellant gave the sample on May 1, 2002, inside of the allowance bubble. This evidence would have destroyed the state's ~~accusation~~ evidence. It could be assumed that the state would, after learning of the "45 day" evidence want to violate the appellant for not reporting after he was released from jail on April, 8, 2002. However the appellant was instructed "Return him back to probation on the same probation as before, and you'll continue to make your reports. All right, Thats it." (transcripts pg 6 line 19-22). Nothing was stated to the appellant to go directly to the probation office, so the appellant went and got a job the next day and tried to contact the probation officer ~~*~~ but was unsuccessfull.

The defense counsel had at his hand ample evidence to discredit the chain of custody for not following procedures. ~~*~~ It left the sample in question to "where was it" and "who did", what with it" after May ~~1~~ 1, 2002 and most important was the sample sealed with the tamper evident seal to ensure that the sample was that of the offenders, or ~~*~~ [redacted] was the sample tainted with by a vindictive probation officer who planned on violating the appellant a full day before the test results were known.

Since the Mississippi Rules of Evidence are not generally employed

in full force at a revocation hearing the cummulative weight credited to the positive test results must be attacked. The deficiancies in the chain of custody, the failure by the ~~and~~ probation officer to follow policy greatly diminishes the weight afforded ~~the~~ to the positive drug test.

Counsel then needed an expert witness to explain the "borderline" test and how it is possible for THC to be retained in the system longer than the "21 days" offered by the state. Robert F. Conley or the drug testing staff at the Grand Casino, would have supported the appellants testimony, boosting the appellants credibility, ~~and~~ contradicted the state's testimony, and gave the fact-finder evidence to make a dermination as to how long THC could stay in a persons system. This would have ultimatly destroyed the state's allegations. Had Robert F. Conley been called to the stand he would have presented scientific proof and expressed his expert opinion that " the positive test is not necessarily indicative of... the appellant ... engaging in conduct that would vidate his probation..." and " there does remain a definate possibility that the "appellants" testimony was truthfull in regaurd to his marijuana usage." because " Depending on the source the complete absorbation of THC and its metabolites, (THC-COOH) can take 15 to 90 days." (Testimony of Robert F. Conley; Records Pg. 19 par. 3) This evidence would have prevented defense counsel from asking the question "How long does THC remain in the system?" to states witness and after answering "21 days" thus elicited damaging evidence. This evidence, had it been presented, would have boosted the appellants credibility that he had not used marijuana after being released from ~~prison~~ jail. Most importantly it would have given the fact-finder

what he was looking for. (Transcripts pg 54 lines 10-12)

The testimony of probration officer, Jimmy Shows, as to what was said by the appellant concerning prior usage of marijuana was used to destroy the already weak credibility of the appellant. The probation officer used the unique situation of a revocation hearing, where the rules of evidence concerning hearsay are not employed, to say the appellant told him that he only smoked "one time a week since the age of 16" a statement that could be said without the backup of evidence. The appellant denies to this day ever saying this. In fact the only questions concerning the appellant drug use was "when was the last time you used marijuana?" The appellant ans werd ... February 25, it used to be alot but not anymore I smoked the last one on that date". This was the only discussion on the appellants drug history. The appellant feels strongly that the post-sentence report should have been admitted into evidence by the state to prove what the appellant said, and because it wasn't, shows what was testified to did not exist. Counsel should have objected to this post-sentence report on the grounds that none of it was disclosed to the defense. If that failed counsel could have destroyed the credibility of the probation officer simply by pointing out the failure to follow policy and the knowing before the test would be positive on a sample that he did not verify the security on. Why didn't the probation officer test the appellant weekly for 45 days like policy states. And why did the probation officer hold the appellant in violation of probation for testing positive on the May 1, 2002 sample that was inside the allowed time by policy. This would have destroyed the probation officers credibility and destroyed his testimony.

Had the defense counsel investigated the MDOC policy, chain of custody, petition to revocate probation, called an expert witness to explain the defense position properly, counsel would not have elicited damaging evidence on cross examination, had the evidence to contradict everything the state presented and shown the chain of custody to be questionable.

After the hearing counsel was asked to file a Reconsideration by Appellants parents (Records, affidavits pg 16, 17 #10-12) apparently the defense counsel went and talked to the judge and agreed on a Motion to Reconsider because defense counsel stated "the court would reconsider the decision once the motion was filed." (Records affidavits pg 16, 17 #12). At the hearing counsel could have presented all the evidence the appellent cites, thus giving the court the information that was needed to make a fair and reliable decission. However the motion was filed to late and the court lost jurisdiction to hear the motion. This caused the appellant to investigate the facts and circumstances surrounding the case and file a post-conviction 3 years later. Had counsel filed the motion on time while it was still fresh in the mind of the court considering the defense counsel told appellant and his family the court would reconsider the sentence, the results of the hearing would have been different. This case at hand is very similar to a case heard in the same courtroom some 5 years beforehand. The blood test done on the defendant was not done according to the state's Crime Labs policy and procedure and the court granted the defense motion to exclude the test results from in re-trial. Blendon v. State 97-KA-00073-SCT @ P. 10 (Miss 1999). If the urine sample was found

not to be collected according to established methods in collection and documenting, the trial court would have no choice but to exclude the results of the appellants drug test by order of precedent, law, and in the intrest of justice that the constitution is founded on.

In light of the arguments presented in this breif, the appellent feels strongly that had counsel not committed these clear errors of judgement based on lack of investigation of relevant facts, law, and policy the results of the hearing would have been different, a difference that satisfies the reasonable probibility ~~that~~ of a fair and reliable outcome.

Conclusion of the Case

The right to counsel is the most fundamental constitutional right because counsel is needed to protect the clients rights and marshal the evidence necessary for a fair and reliable determination of guilt or innocense and if guilty, a proper sentence. When counsel fails to investigate and present evidence, fails to file timely requests for releif, and fails to make strategic decisions to advocate his clients cause, the rights to effective assistance of counsel is unfortunatly abridged. "The probationers version of a disputed issue can be fairly represented only by a trained advocate, bound by proffesional duty to present all availible evidence and arguements in support of their client's positions, and to contest with vigor all adverse evidence and veiws." Gagnon v. Scarpelli supra @ 787-88.

"Revocation is, if anything, commonly treated as a failure of supervision. While presumably it would be inappropriate for a feild agent never to revoke, the whole thrust of the probation movement is to keep men in the community, working with adjustment problems there, and using revocation only as a last resort when treatment has failed or is about to fail." Criminal Justice Administration, F. Remmington, D. Newman, E. Kimball, M. Melli, and H. Goldstein; Materials and Cases 910-11 (1969).

The appellant was prejudiced with (10) ten years to serve because counsel was ineffective in his representation of the appellant at the June 28, 2002 revocation hearing. Had counsel acted within the "wide discretion" of properly assiting a client and investigated the key elements of the case, the appellent would have been found not to have violated the terms of his probation.

Wherefore the appellant prays this Honorable Court would find merit in these arguments and reverse and remand the decission of the Harrison County Circut Court for further proceedings.

Respectfully Submitted

John Paul Wallace

Appellant, pro-se

MISSISSIPPI DEPARTMENT OF CORRECTIONS		POLICY NUMBER 26-02
		AGENCY WIDE
OFFENDER/INMATE DRUG TESTING, SANCTIONS, & TREATMENT PROGRAMS		INITIAL DATE 06-01-1992
ACA STANDARDS: 4-4437 thru 4-4441, 4-4377, 4-ACRS–5A-08 thru 4-ACRS-5A-09		EFFECTIVE DATE 09-01-2005
STATUTES: 47-5-103, 47-5-603, 47-7-3	NON-RESTRICTED	Page 1 of 17

POLICY:

It is the policy of the Mississippi Department of Corrections (MDOC) to control offenders' unauthorized use and abuse of all substances by drug testing offenders, and providing substance abuse intervention, treatment programs and sanctions.

DEFINITIONS:

A-Custody Offender – Status that affords offenders a more relaxed atmosphere and extension of social privileges. This status requires a responsible attitude and the display of a high degree of integrity along with the ability to work satisfactorily with minimum supervision of security staff.

Chain of Custody – A legal term that refers to the ability to trace and safeguard the specimen from the time it is donated through all the steps in process from collection to reporting the results.

Classification Hearing Officer – An individual selected from a list of names that appear on the Executive Order signed by the Commissioner, and is chosen to participate in decisions pertaining to the offender's classification system (MS Code 1972, annotated - §47-5-103).

Disciplinary Hearing Officer – Staff member whose name appears on the Executive Order approved by the Commissioner and is responsible for hearing Rule Violation Reports of nonconformance to the basic rules of conduct or acts that present a threat to the orderly operation of the facility.

Drug Testing Staff/Technicians – Person(s) trained and certified by the manufacturer in the use of SYVA EMIT drug detection system.

Earned Release Supervision (ERS) – A program whereby an offender who meets the good conduct and performance requirements of the earned time allowance program may be released on his conditional earned time release date. Inmates will meet all the applicable state codes applying to ERS in order to be eligible for this program.

Illicit Drug – Any controlled substance or prescription medication used unlawfully.

Intensive Supervision Program (ISP) – A program wherein an accelerated level of community supervision is provided to offenders who would otherwise be incarcerated in an MDOC facility. This may be accomplished with the use of electronic monitoring equipment.

Life Skills Programs – Meetings other than AA/NA designed to provide information to offenders that will assist them in acquiring and keeping a job, building better relationships at home,

Exhibit A

COPY

- Require that all incidents of positive drug tests or other substantial evidence of substance abuse be met with an appropriate sanction and/or treatment intervention
- Provide drug testing for offender population
- Define staff responsibility to ensure offenders remain drug free
- Control contraband through the use of routine searches

TARGET POPULATION

The drug-testing program will include, but not be limited to:

Targeted Testing:

The Commissioner, Deputy Commissioner of Institutions, Deputy Commissioner of Community Corrections, or their designees may authorize Targeted Testing. Such testing will normally be performed under the following circumstances:

- An offender is being considered for placement in a community facility based program
- Required by Court Order
- Requested by the Parole Board
- Prior to placement in the Intensive Supervision Program (House Arrest)
- Pre-Release Community Corrections participants
- Alcohol & Drug Program participants before upgrading to A-Custody
- Offenders serving on Probation & Parole
- Earned Release Supervision inmates
- Prior to being considered for sensitive placement
- Offenders placed in D-Custody for use or possession of alcohol or drugs

Initial RID Drug Testing:

Offenders entering the Reception & Classification Center (R&C) to participate in the RID program are tested immediately upon arrival by the Drug Testing Officer. If the offender receives a positive drug test, he will remain at CMCF for a minimum of an additional 28 days. After the 28 days he is tested for drugs and if negative may apply to re-enter the RID program. The offender may remain longer under medical supervision if the Medical Director or his designee so orders.

Consecutive tests of the same offender may be conducted if his name appears on the appropriate computer-generated random list.

Testing of Offenders Placed in D-Custody for Use or Possession of Alcohol/Drugs or for Trafficking in Alcohol/Drugs

Any offender who is placed in D-Custody for use or possession of alcohol/drugs or for trafficking while incarcerated, attempts or conspires to introduce alcohol/drugs into an MDOC facility, private prison or country regional facility will be tested randomly every 30 days while in D-Custody. Each disciplinary office will provide a list of all alcohol/drug related offenses to the MSP Drug Testing Department.

Testing Of Offenders in an Alcohol & Drug Treatment Program

Offenders in any treatment program may be tested more frequently. Testing of offenders participating in Therapeutic Alcohol and Drug Programs will be done routinely on a random basis, with a minimum of 30% of the offenders in the group tested monthly. Testing of offenders in other alcohol and drug programs will be done monthly. Testing procedures will be the normal MDOC drug-testing program.

Offenders participating in residential substance abuse treatment programs may be tested according to the policies of the treatment center. MDOC may utilize tests from private/public treatment programs when available.

DRUG TESTING

Collecting the Urine Specimen:

Security, Field/Support Staff, or Drug Testing Staff will hand the offender the specimen vial labeled with the offender's name and MDOC number or Social Security number, date, time, housing unit number, or specimen number, if applicable. This information will be typed or legibly written in indelible ink and match the information on the Urinalysis Chain of Custody form.

The offender will be asked to acknowledge the information on the label is correct. The offender will also be asked if he has been taking any medication in the past three weeks, and the response will be noted on the Urinalysis Chain of Custody form. If the offender's response is "yes" and the subsequent test results are positive; an inquiry will be made to Medical Personnel for prescription verification as to what medications the offender has received in the past three weeks.

Security, Field/Support Staff, or Drug Testing Staff of the same sex, in private and outside the presence of other offenders or staff will conduct the collection of the urine specimen. The observer will supervise only one offender at any one time.

If Drug Testing Staff is not immediately available in the Chain of Custody, then the Superintendent or his designee/Community Corrections staff will place the specimen in a secured refrigerator until such staff becomes available.

Testing will be conducted only on those specimens handled according to established procedures. Specimens may be rejected if all established procedures have not been followed correctly in documenting and obtaining the specimen.

The individual performing the urinalysis testing will be appropriately trained and certified in the use of the testing apparatus, and always precisely follow procedures recommended by the manufacturer for the operation of the testing apparatus.

If a positive result is obtained on the first test, a confirmation test will be performed on the same sample using the same methodology.

If a positive result is obtained from the confirmation, the technician performing the urinalysis testing will immediately notify the appropriate person who will ensure that a RVR will be written.

The technician performing urinalysis testing will keep on file positive test results and the Urinalysis Chain of Custody form. Positive specimens will be kept in the lab freezer for a minimum of 45 days from the date tested.

If a negative test result is obtained on the second test, the specimen will be considered negative and no RVR will be written.

Drug testing staff will keep printouts of the loadlists, weekly summary reports, instrument tapes, original Urinalysis Chain of Custody forms and all other lab documentation for three (3) years in a secured area.

The technician performing the urinalysis testing will be responsible for ordering all drug testing supplies and ensuring an adequate stock of supplies. Upon receipt of testing chemicals, the technician performing the urinalysis testing will check the expiration date and rotate perishable chemicals to ensure oldest chemicals are used first.

Only authorized personnel will be allowed access to the drug testing lab. All specimens will be treated as potentially infectious and gloves, lab coat or apron, and protective eye gear will be worn at all times during testing. The lab area will be cleaned daily with 10% Clorox bleach to ensure proper sterilization. Chemicals and urine specimens will be disposed of in accordance with established regulated waste procedures.

All officers involved in the taking of urine samples will be trained in this procedure before any drug testing of an offender is conducted. The vender supplying the testing material or a certified staff member will conduct training.

determined by the MDOC and are listed on the **MDOC APPROVED DRUG TREATMENT/INTERVENTION PROGRAMS list (see attachment).**

The addition or expansion of programs at these facilities, effective July 1, 2005, must meet the certification of the Mississippi Department of Mental Health in addition to the criteria established by the MDOC.

Institutional Alcohol and Drug Unit Program

An alcohol and drug counselor or a volunteer approved according to the policy and procedure *Volunteer Programs* can provide this program in any housing unit.

Institutional Alcohol and Drug Treatment Center Program

This program may be provided in designated housing units and for a specified period of time.

Community Based Alcohol and Drug/Pre-Release Center Programs

Offenders with alcohol and drug abuse problems that have been identified through standardized testing will continue to participate in alcohol and drug treatment programs. The offenders will continue to be monitored and receive regular drug testing. This program may be provided in community facilities where the offender participates in alcohol and drug treatment.

CWC/Restitution Center Alcohol and Drug Facility Programs

This program provides for offenders in a community facility to participate in alcohol and drug programs in the community.

CRITERIA FOR ENTRANCE IN THESE PROGRAMS ARE:

- Documentation as a substance abuser
- Willing to sign/abide by the Alcohol & Drug Treatment Contract
- Received no assaultive RVR within the past three months.
- Volunteer for treatment or have treatment recommended by staff,mandated by Court Order or the Parole Board

Those offenders within 2½ years of their tentative release or Earned Released Supervision date will be given priority when considered for participation in the Therapeutic Alcohol and Drug Programs.

- Consultation with outside professionals

- Referral to self-help groups (Alcoholics Anonymous/Narcotics Anonymous)

An evaluation of the offender's progress during treatment will be forwarded to the sentencing judge, if requested.

Conditions for Discharge from Alcohol and Drug Programs are as follows:

- Successful completion of Alcohol and Drug Program requirements

- Non compliance with Alcohol and Drug Program Standards

- Refusal to sign and/or abide by treatment contract

- Refusal to participate in required program activities

- Receiving a RVR of an assaultive nature while attending the treatment program

- Receiving a RVR for any drug/alcohol related offense

- For administrative reasons

MDOC Treatment Program Provided for Offenders in the RID Program

RID requires participation in a four week residential alcohol and drug treatment program consisting of group therapy, personal, and group counseling. At the end of treatment, each offender completes a plan for non-criminal sobriety that is assessed by the treatment staff prior to making recommendations for community release.

MDOC Treatment Program Provided for Probation, Parole Offenders, ERS, ISP (House Arrest), and Medical Releases.

The Alcohol & Drug Program is available to offenders under Field Supervision and is designed to assist Field Officers in the drug treatment aspect of the offender's supervision. It involves the assessment of the offender's drug problems, implementation and verification of treatment services, and coordinating and conducting a life skills curriculum.

For referral to the Alcohol & Drug Program Coordinator for assessment, an offender must meet one of the following criteria:

- One positive urinalysis screen

- Documented history of drug abuse/addiction

- An arrest related to the use of drugs while under field supervision

SANCTIONS FOR POSITIVE DRUG TESTS

MDOC applies serious responses to positive drug tests. Offenders who test positive, whether in a drug program or not, meet with sanctions by the appropriate supervising authorities.

Sanctions for Incarcerated Offenders In General Population (Institutions, Private Prisons & County Regional Facilities):

The Disciplinary Hearing Officer may impose sanctions based on the severity and repetition of the offense. Such sanctions will include, but are not limited to:

- 1st RVR (Drug/Alcohol related)
  Reduction to D-Custody for three months

- 2nd RVR (Drug/Alcohol related)
  Reduction to D-Custody for six months

- 3rdRVR (Drug/Alcohol related)
  Reduction to D-Custody for one year

Sanctions for Offenders in the RID Program:

If an active RID participant tests positive, an incident report will be issued. He may be referred to a Termination Hearing Committee that consists of a case manager, a treatment person, and a security person. They will make a recommendation to the RID Director regarding whether the offender should stay in the program.

If the Termination Committee recommends terminating the offender from the program, a Classification Hearing Officer will meet and reclassify the offender to D-Custody for three months. See Procedure on *Disciplinary Procedures*. The Director of the RID program or his designee will notify the sentencing judge of the positive drug test and reclassification of the offender to D-Custody and removal of the offender from the RID Program.

Sanctions for Incarcerated Offenders in Alcohol and Drug Programs:

Offenders who were in treatment and successfully met the sanctions imposed may be eligible to participate in the Alcohol and Drug Program a second time. Offenders not in treatment who receive sanctions may participate in the Alcohol and Drug Program after successfully completing the imposed sanctions.

Institutions, Private Prison and County Regional Facility Alcohol and Drug Program sanctions:

- 1st RVR (Drug/Alcohol related)
  Reduction to D-Custody for three months

- 2nd RVR (Drug/Alcohol related)
  Reduction to D-Custody for six months

ISP Program (Department of Corrections offenders)

First Offense: If the offender tests positive, he may be placed on notice that further usage of alcohol/drugs may result in arrest. The following sanctions may be imposed:

- Verbal warning
- Access Fee - $10.00
- Refer to the Alcohol & Drug Program Coordinator
- Participation in AA/NA meetings
- Other appropriate sanctions
- Dismissal from the ISP program

Second Offense: If the offender tests positive again, the offender may be dismissed from the ISP program

If an offender is removed from the ERS, Medical, or MDOC ISP program, the Field Officer will issue:

- A Violation Report
- An Arrest Warrant
- A RVR
- Return the offender to an institution and the State Classification Hearing Officer may impose sanctions
- The offender may be placed in an A&D Program and when the offender successfully completes the program, he may be reinstated in the ISP Program

Court Offenders:

First Offense: If the offender tests positive, the offender may be placed on notice that further usage of alcohol/drugs may result in arrest. The following sanctions may be imposed:

- Verbal warning
- Access Fee - $10.00
- Refer to the Alcohol & Drug Program Coordinator
- Participation in AA/NA meetings
- Dismissal from the ISP Program
- Other appropriate sanctions.

Second Offense: If the offender tests positive again, the following may happen:

- Verbal warning
- Access Fee - $10.00
- Increase frequency of drug testing
- Refer to the Alcohol & Drug Program Coordinator
- Participation in AA/NA meetings
- Other appropriate sanctions

Parolees:

It will be mandatory that the Field Officer notify the Parole Board with a request for a preliminary hearing. The decision for the offender to return to an institution or remain on Parole is at the discretion of the Parole Board.

Probationers:

It will be mandatory that the Field Officer notify the Courts and return the offender to the Court for a Revocation Hearing. The return to Probation, imposition of additional sentences, or incarceration will be at the discretion of the Court.

DOCUMENTS REQUIRED:

As required by this policy and through the chain of command.

ENFORCEMENT AUTHORITY		
All standard operating procedures (SOPs) and/or other directive documents related to the implementation and enforcement of this policy will bear the signature of and be issued under the authority of the Deputy Commissioner of Institutions and the Deputy Commissioner of Community Corrections.		
Reviewed and Approved for Issuance	General Counsel	8-24-05 Date
	Commissioner	08/26/05 Date

Certificate of Service

This is to certify that the appellant has mailed via U.S. mail the original and four (4) copies to the Supreme Court of Mississippi and mail (1) one copy to the Mississippi Attorney General, Jim Hood, both at the addresses listed below:

Court of Appeals of Mississippi
Betty W. Sephton
P.O. Box 249
Jackson MS 39205-0249

Mississippi Attorney General
Jim Hood
P.O. Box 220
Jackson MS 39205-0220

This 5th Day of October, 2007

John Wallace [redacted]
Appellant, pro-se