

# The Supreme Court of South Carolina

Michael D. Day,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable William P. Keesley  
Lexington County  
Trial Court Case No. 2010-CP-32-02119

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## ORDER

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The request for an extension until May 16, 2012 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

April 17, 2012

cc: Appellate Defender LaNelle C. DuRant  
Assistant Attorney General Kaelon E. May



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

April 16, 2012

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

Re: Michael Day v. The State

RECEIVED

APR 16 2012

S.C. Supreme Court

Dear Mr. Shearouse:

The petition for writ of certiorari and appendix in this case are due to be served and filed with the Court today. However, because of my heavy workload at this time, I am requesting an extension for 30 days, in which to serve and file the petition.

By copy of this letter, I am informing Kaelon E. May, of the Attorney General's Office, of my request.

Sincerely,

LaNelle C. Durant  
Appellate Defender

LCD/pds

cc: Kaelon E. May, Esquire



# SCCID

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Division of Appellate Defense  
1330 Lady Street, Suite 401  
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Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

RECEIVED

FEB 15 2012

S.C. Supreme Court

February 15, 2012

The Honorable Daniel E. Shearouse  
Clerk, S.C. Supreme Court  
Post Office Box 11330  
Columbia, SC 29211

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

Michael D. Day v. State of South Carolina

2/15/2012

I would appreciate you beginning our time limits from the above date, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Loriene French  
Legal Services Coordinator



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332  
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Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

December 1, 2011

RECEIVED

DEC - 1 2011

S.C. Supreme Court

Ms. Rema Gantt Thomas  
Circuit Court Reporter  
806 Yacht Club Pointe  
Chapin, SC 29036-9998

Dear Ms. Thomas:

Please provide us with the following transcript:

Michael D. Day v. State of South Carolina      Case #:      10-CP-32-02119

County: Lexington      Date of Trial: May 18, 2011

Presiding Judge: William P. Keesley

To ensure prompt payment, please sign and complete the enclosed CID FORM 3500 and include the original criminal case number (Indictment number) where the space is provided.

Please number the lines on the paper from 1-25, and include any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments.

If you are aware of any co-defendants or if the Attorney General's Office has already requested a transcript, please let us know.

Sincerely,

  
Lorene French  
Legal Services Coordinator

cc: S.C. Supreme Court  
Attorney General's Office

**CAPITOL COUNSEL, LLC**  
AARON J. KOZLOSKI, ESQ.



*November 4, 2011*

Hon. Tanya Gee  
Clerk of the Court of Appeals  
1015 Sumter Street  
Columbia, South Carolina 29201

Re: Notice of Appeal  
Michael Dwight Day, SCDC # 318913  
No. 2010-CP-32-2119

318713

Madame Clerk:

Enclosed please find a Notice of Appeal for filing in the above-referenced case along with a copy of the circuit court's order. I was appointed to represent Mr. Day in his PCR proceedings. I have provided a copy to the Office of Indigent Defense, which will assume representation of Mr. Day from this point.

Sincerely,

A handwritten signature in black ink, appearing to read 'AJK', written over the printed name of Aaron J. Kozloski.

Aaron J. Kozloski

C: Kaelon E. May, Esq.  
S.C. Office of Indigent Defense  
Michael Day

**RECEIVED**

NOV - 8 2011

**S.C. Supreme Court**

**RECEIVED**

NOV 08 2011

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
*In The Court of Appeals*

APPEAL FROM LEXINGTON COUNTY  
COURT OF COMMON PLEAS

William P. Keesley, Circuit Judge

Case No. 2010-CP-32-02119

**RECEIVED**

NOV 08 2011

**SC Court of Appeals**

Michael Dwight Day, #31893 ..... *Appellant,*

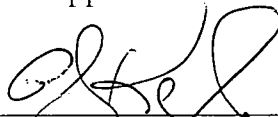
~ \* ~

State of South Carolina ..... *Respondent.*

**NOTICE OF APPEAL**

Michael Dwight Day takes appeal from the attached Order of the Court of Common Pleas, served Oct. 27, 2011. Appellant has this date served this Notice upon Respondent's counsel below and upon the Court of Common Pleas by first class mail in accordance with the applicable rules of court.

For the Appellant:



Aaron J. Kozloski, Esq.  
P.O. Box 1996, Lexington, SC 29071  
Phone 803-748-1320, Fax 888-513-6021  
e-mail: aaron@capitolcounsel.us

November 4, 2011  
Lexington, South Carolina

Other Counsel of Record:

Kaelon E. May, Esquire  
Assistant Attorney General  
South Carolina Office of the Attorney General  
Post Office Box 11549, Columbia, SC 29211  
(803) 734-3970, Fax 803-253-6283  
*Attorney for Respondent*

**CAPITOL COUNSEL, LLC**  
AARON J. KOZLOSKI, ESQ.



*November 4, 2011*

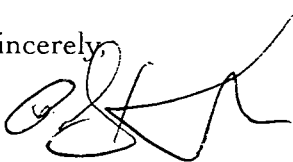
South Carolina Office of Indigent Defense  
Division of Appellate Defense  
PO Box 11433  
Columbia, SC 29211-1433

Re: Notice of Appeal  
Michael Dwight Day, SCDC # 318913  
No. 2010-CP-32-2119

Greetings:

Enclosed please find a copy of the Notice of Appeal I have filed in the above-referenced case along with a copy of the circuit court's order. I was appointed to represent Mr. Day in his PCR proceedings. Please contact me if you have any questions.

Sincerely,



Aaron J. Kozloski

C: Clerk of the Court of Appeals  
Kaelon E. May, Esq.  
Michael Day

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
CASE NO: 2010CP3202119

Michael Dwight Day #318913 vs. State of South Carolina

**CHECK ONE:**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b). SCRPC;  Rule 41(a).  
SCRPC (Vol. Nonsuit);  Rule 43(k). SCRPC (Settled);  Other:
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy:  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Other: \_\_\_\_\_

**IT IS ORDERED AND ADJUDGED:**  See attached order;  Statement of Judgment by the Court:

Court Reporter:

\_\_\_\_\_  
**PRESIDING JUDGE -**

This judgment was entered on the 3rd day of October 2011, and a copy mailed first class this 4th day of October 2011, to attorneys of record or to parties (when appearing pro se) as follows:

**Aaron J Kozloski** Capitol Counsel LLC PO Box  
11902 Capitol Station Columbia, SC 29211

\_\_\_\_\_  
**ATTORNEY(S) FOR THE PLAINTIFF(S)**

**David A Spencer** SC Office Atty Gen PO Box  
11549 Columbia, SC 292111549

\_\_\_\_\_  
**ATTORNEY(S) FOR THE DEFENDANT(S)**

**Beth A. Carrigg/wh**

SCRPC APP-24/FORM 4

\_\_\_\_\_  
Beth A. Carrigg - Clerk of Court

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON  
IN THE COURT OF COMMON PLEAS

---

MICHAEL DWIGHT DAY, #318913,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the Order of Dismissal has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

**Aaron J. Kozloski, Esquire**  
**P.O. Box 1996**  
**Lexington, SC 29071**

This 27<sup>th</sup> Day of October, 2011.

*Lena Pelishenko*

---

Lena Pelishenko  
Legal Assistant for Respondent

SWORN to before me this 27<sup>th</sup> Day of October, 2011.

*Larren Meana*  
\_\_\_\_\_  
Notary Public for South Carolina.  
My Commission Expires: 9/25/19

ORIGINAL

STATE OF SOUTH CAROLINA

THE COURT OF COMMON PLEAS  
C.A. NO. 10-CP-32-2119

COUNTY OF LEXINGTON

Michael D. Day,  
S.C.D.C. No. 318413.

318713

Applicant,

ORDER OF DISMISSAL

VS.

State of South Carolina,

Respondent.

This matter is before this Court by way of an application for post-conviction relief (PCR) filed May 19, 2010. The State made its return on September 2, 2010. A hearing on the matter was convened at the Lexington County Courthouse on May 18, 2011. Applicant was present and represented by Aaron J. Kozloski, Esquire. The State was represented by David Spencer of the South Carolina Office of the Attorney General.

*Case #1*

Applicant testified on his own behalf. His <sup>trial</sup> counsel, John Cheatham, Esquire, also testified. Additionally, this Court had before it the trial transcript, the Clerk of Court's <sup>records</sup> ~~Records~~ <sup>(see)</sup> regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the PCR application, and the State's return.

**PROCEDURAL HISTORY**

Applicant is presently incarcerated with the South Carolina Department of Corrections. Applicant was indicted at the October 2006 term of the Lexington County Grand Jury for Criminal Sexual Conduct with a Minor (2006-GS-32-3249). He was represented by John Cheatham, Esquire. Applicant and his counsel elected to waive a jury trial and proceed to trial before the Honorable R.

Knox McMahon on November 6, 7, and 9, 2006. Judge McMahon found Applicant guilty as charged and sentenced Applicant to thirty years imprisonment. Applicant appealed and the conviction and sentence ~~was~~ <sup>WERE</sup> affirmed by decision dated May 18, 2009.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony presented at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (2003).

#### Ineffective Assistance of Counsel and Involuntary Plea

*Case #2*  
Applicant makes various allegations of ineffective assistance of counsel. The burden of proof is on the applicant in a PCR proceeding to prove the allegations in his application. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRCP.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996). In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result at trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id. Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective

assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

This Court will now address each allegation of ineffective assistance of trial counsel below:

#### **Impermissible hearsay**

Applicant claims counsel failed to object to impermissible hearsay. This Court finds the claim unsupported. First, Applicant has a fundamental misunderstanding as to what hearsay is. Applicant testified he believes a witness must have been present during the commission of the alleged crime and if not, all the witness's testimony will be hearsay. Applicant fails to grasp that hearsay is basically testimony by a witness as to what another person said out of court. Applicant was unable to make any specific cites to alleged impermissible hearsay. Applicant alleged Cindy Floyd's testimony was impermissible hearsay, but in reviewing the record, this Court did not find any objectionable hearsay elicited from Floyd, except one instance where counsel did object and his objection was sustained. Applicant has failed to meet his burden of showing counsel's performance was deficient and further, Applicant failed to prove prejudice. This allegation is denied.

W  
#3

#### **Failure to investigate, lack of evidence**

Applicant alleges counsel was deficient for failing to investigate and produce evidence, such as DNA evidence. Applicant seems to also be arguing that evidence was insufficient to convict him. Applicant believes an accused cannot be convicted of a crime based solely on the testimony of the purported victim. As to that belief, he is mistaken. Specifically, S. C. Code Ann. § 16-3-657 declares that a victim's testimony need not be corroborated.

Further, no evidence was presented that DNA evidence could be obtained. As is often the case in prosecutions involving sexual abuse of a child, the incident was not reported by the victim

until several years later. Further, the victim testified Applicant's sexual abuse was interrupted when victim's father entered the dwelling. Victim testified Applicant did not ejaculate. This Court notes Applicant gave a statement to law enforcement admitting to the incident, and other corroborating evidence was provided at trial. Applicant failed to provide any evidence to suggest that counsel failed to properly investigate the case or develop favorable evidence.

Accordingly, this Court finds Applicant failed to prove counsel's performance was deficient or that Applicant was prejudiced by any such deficiency. This Allegation is denied.

#### **Coerced statement**

Applicant alleges he was coerced into giving a statement. The trial transcript refutes that claim and contains testimony from Applicant himself to the contrary. Applicant now says he did not mean that testimony in the way it was <sup>STATED</sup> ~~read~~ and he felt coerced because law enforcement told him he had to give the statement or he would have everything taken away from him. This Court finds that Applicant's testimony at the hearing does not support a claim that his statement was coerced by law enforcement, nor would the testimony have resulted in his statement being suppressed at trial. Further, this Court does not find Applicant's testimony to be credible regarding his claim of coercion. During the trial, he testified he gave the statement of his own will and he was not threatened and could not have been made to provide a statement. This Court finds Applicant failed to meet his burden of proving either prong of Strickland.

#### **Sentencing hearing**

Applicant testified in the PCR hearing about a comment by the Solicitor that the victim stated he wished Applicant had received the death penalty. Since the death penalty was not applicable, as <sup>known</sup> by everyone present, the only reasonable conclusion was that the statement was hyperbolic and

meant to express that the victim wanted Applicant to receive the maximum sentence. Applicant fails to show that this statement was objectionable or that Applicant was prejudiced by the Statement. He has therefore failed to meet his burden of proving counsel ineffective.

#### **Bench trial**

Applicant testified about the decision to have a bench trial instead of a jury trial. No evidence was presented that counsel's performance was deficient in this regard. First, Applicant testified in the PCR hearing that the bench trial was his suggestion. Second, the trial attorney stated a strategic decision was made by the client, after consultation, based on the fact they perceived the jury pool to be unfavorable to their claim. The client and the attorney thought that they would have a better chance with a bench trial. The trial judge properly asked Applicant about his decision to waive a jury trial. His decision to do so was free and voluntary. Basically, it appears to this Court that Applicant is stating in hindsight he would have been better off with a jury trial, but this is pure speculation and not a proper ground for granting post-conviction relief. This Court finds Applicant has failed to prove either prong of Strickland.

#### **Any other allegations**

As to any other issues that may not be specifically addressed in the PCR hearing, they are deemed abandoned by Applicant and not proven. Applicant was given numerous opportunities to fully state his claims. His testimony was extremely non-specific and generalized. Applicant failed to produce any witnesses or offer any other evidence from which the Court could conclude that the outcome of the case would likely have been different, had that evidence been developed.

#### **CONCLUSION**

Based on the foregoing, this Court finds and concludes that the Applicant has not established

any constitutional violations or deprivations that would require this court to grant his application. Therefore, this Application for Post-Conviction Relief must be denied and dismissed with prejudice.

*CAUTIONS*  
This Court ~~advises~~ the parties that in order to secure the appropriate appellate review, notice of appeal must be served and filed within thirty (30) days after receipt by counsel of notice of entry of this order. See Rules 203 and 243 of the South Carolina Appellate Court Rules. This Court notes that post-conviction relief counsel must advise an applicant of the right to seek appellate review of a post-conviction relief order. State v. Bray, 366 S.C. 137, 620 S.E.2d 743 (2005). Also, pursuant to Austin v. State, 305 S.C. 453, 409 S.E. 2d 395 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on an applicant's behalf.

#6

**IT IS THEREFORE ORDERED:**

1. The application for Post-Conviction Relief is denied with prejudice;
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 12<sup>th</sup> day of Sept., 2011.

*William P. Keesley*  
William P. Keesley  
Presiding Judge  
11th Judicial Circuit

Lexington, South Carolina

CAPITOL COUNSEL, LLC  
P.O. BOX 1996, LEXINGTON, SC 29071

*Michael  
Dwight  
Ray*



UNITED STATES  
POSTAL SERVICE

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Hon. Tanya Gee  
Clerk of the Court of Appeals  
1015 Sumter Street  
Columbia, South Carolina 29201