R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

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January 27, 2017

RECEIVED
JAN 31 2017
S.C. SUPREME COURT

Via US Mail
Daniel Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

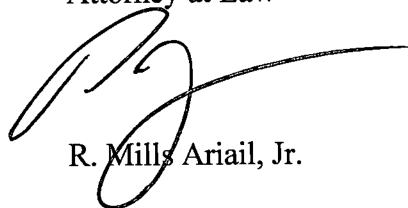
Re: ***Notice of Intent to Appeal from Millanyo A. Woody vs. State of South Carolina***
C.A. No.: 2015-CP-23-5718

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable John C. Hayes, III's Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Greenville County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,
LAW OFFICE OF R. MILLS ARIAIL, JR.
Attorney at Law



R. Mills Ariail, Jr.

RMAjr/dl
Enclosures (as stated)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JAN 31 2017
S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2015-CP-23-05718

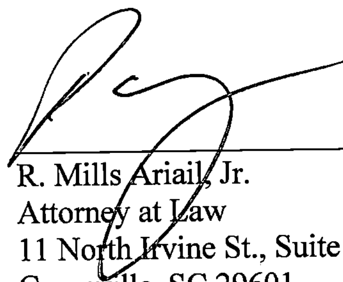
Millanyo A. Woody,.. Appellant,

v.

State of South Carolina .... Respondent.

NOTICE OF APPEAL

Appellant appeals the Honorable John C. Hayes III's Order of Dismissal dismissing Appellant's application for post-conviction relief. On January 13, 2017, the Honorable John C. Hayes, III signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on January 23, 2017. A copy of the Honorable John C. Hayes, III's Order of Dismissal is attached.



R. Mills Ariail, Jr.
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Attorney for Millanyo A. Woody

Greenville, South Carolina
January 27, 2017

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2015CP2305718

2017 JAN 20 AM 11 59
PAUL B. WICKENSIMER
CLERK OF COURT
CO. S.C.

Millango A Woody *vs.* South Carolina State Of

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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: ____________________

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: ____________________

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: ____________________

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

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

Dated at Greenville, South Carolina, this .

Court Reporter:

____

PRESIDING JUDGE - John C Hayes, III

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

R. Mills Ariail Jr. 11 North Irvine Street, Suite 11
Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

Patrick Lowell Schmeckpeper PO Box 11549
Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

____

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

CPFORM4M
SCCA SCRCP Form 4 Revised 06/2008

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	C.A. No.: 2015-CP-23-05718
Millanyo A. Woody, SCDC No. 227810, Applicant,	)	
vs.	)	ORDER
State of South Carolina, Respondent.	)	ENTERED COMPUTER

2017 JAN 20 AM 11 55
PAUL B. WICKENSIMER
CLERK OF COURT
GREENVILLE CO. S.C.

Applicant filed this Application for Post-Conviction Relief September 17, 2015. This matter was heard December 9, 2016. Applicant was represented by R. Mills Ariail, Jr., Esquire. The State was represented by Patrick Schmeckpeper, Esquire.

Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. Applicant was indicted by the September 2012 term of the Greenville County Grand Jury for one count of Lewd Act Upon a Child (2012-GS-23-07385) and one count of Criminal Sexual Conduct with a Minor, Second Degree (2012-GS-23-07386A). Dorothy Manigault, Esquire, represented Applicant.

On October 14, 2013, Applicant proceeded to trial where he was found guilty as indicted on all charges. The Honorable G. Edward Welmaker sentenced Applicant to confinement for 177 months (fourteen years, nine months).

A notice of appeal was filed on Applicant's behalf and an appeal perfected pursuant to *Anders v. California*, 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals

dismissed Applicant's appeal. *State v. Woody*, Op. No. 2015-UP-056 (filed on January 28, 2015). The Remittitur was issued on February 13, 2015.

In his Application for Post-Conviction Relief, Applicant alleges he is being held in custody unlawfully and that his trial counsel was ineffective. In support of this claim Applicant alleges four grounds with seven subparts. Applicant subsequently amended his application to include an additional ground with two subparts and three additional grounds pertaining to ineffective assistance of counsel. The Court will address the grounds presented at the hearing. All grounds not presented by Applicant at his hearing are deemed waived as abandoned.

Where Applicant and trial counsel testified differently as to matters of fact, I find in all such instances credibility lies with trial counsel.

Applicant alleges ineffective assistance of counsel as a ground for relief. In a post-conviction relief proceeding, Applicant bears the burden of proving the allegations in their application. *See Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this

presumption in order to receive relief. *See Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland*, 466 U.S. at 688, 104 S. Ct. 2052 (1984)).

Applicant's second claim is an allegation that he was denied due process of law in violation of certain amendments to the Constitution of the United States of America. However, Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that Applicant must "...specifically set for the grounds upon which the application is based." S.C. Code Ann. § 17-27-50. In an application for post-conviction relief, it is incumbent upon Applicant to make a *prima facie* showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. *Welch v. MacDougall*, 246 S.C. 258, 143 S.E.2d 455 (1965); *Blandshaw v. State*, 245 S.C. 385, 140 S.E.2d 784 (1965). In this case, to the extent covered by Applicant in his hearing, the Court will address what claims appear to fall within the parameters of the constitutional violations claim.

Applicant alleges prosecutorial misconduct as a result of the State calling a witness that offered false testimony. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is Applicant's burden to prove actual prosecutorial misconduct. *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201 (1989). Based on Applicant's testimony, the Court finds no evidence which supports Applicant's claim of prosecutorial misconduct.

In addition to the issues raised by Applicant in his application and amendments, the Court, *sua sponte*, raised concern as to whether or not Applicant had been arraigned on the direct indictment under which he was tried. Applicant testified he was never arrested for the charge for which he was tried. This is true as he was tried by virtue of a direct indictment. The issue is addressed herein below.

Applicant testified he never discussed his case with trial counsel and in almost the same breath testified he "went over statements with trial counsel." Trial counsel testified that she did meet with Applicant and went over the elements of the charges.

Applicant testified trial counsel never went over a plea offer with him. Applicant testified that he just knew of the offer at trial and that he did not have time to consider the offer. Trial counsel testified that she relayed to Applicant the State's offer, and that Applicant claimed he was not guilty and refused the offer "on the spot." Trial counsel testified that Applicant claimed he was

not guilty and wanted to go to trial. Additionally, the record belies Applicant's claim regarding his position relative to his plea. (*See* TR p. 256, l. 14 through p. 257, l. 3).

Applicant testified a Dr. Henderson, M.D., not a forensic interviewer, bolstered the child victim's testimony. Applicant directed the court to page 174, lines 6-14 of the trial record. The exchange at the referenced page is as follows:

> Q: Okay. So based on – let me ask you this first. Do you have an opinion about how Minor got that injury?
>
> A: Well, I think based on the history that she had shared with me and the findings on her exam, including the lab work that we did, that this was due to a penetrating injury, and I felt it was consistent with the disclosure that she had made.
>
> Q: Of penile vaginal penetration?
>
> A: Yes, ma'am.

(TR p. 174, ll. 7-15 (questions by solicitor, answers by Dr. Henderson)).

Earlier Dr. Henderson had testified that the victim had told her about a person "touching her all over her body;" then the victim shared "about penile/vaginal penetration" and shared "about bleeding related to that incident." (TR p. 167, l. 25 through p. 126, l. 3).

Dr. Henderson was qualified as an expert in "the field of child abuse pediatrics." (TR p. 163, ll. 10-11). Dr. Henderson was employed by Greenville Health Systems and was head of the division of forensic pediatrics. (TR p. 158, ll. 18-23). She testified her duties included doing consults when there's a "concern of child abuse." (TR p. 158, ll. 24-25).

While the answer here and the question by the State in *State v. Berry* (Sup. Ct. Appellate Case No. 2015-002580, December 2, 2016) appear at first blush to be identical, the Court finds they are not as set forth herein below.

While not technically qualified as a forensic examiner, there can be no question as to this case that Dr. Henderson's examination was for forensic purposes. To the extent our case law addresses forensic interviewers, it provides guidance on the issue of witness bolstering. In this regard, the Court need look further than the case of *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013).[1] The *Kromah* court listed several kinds of statements that a forensic interviewer should avoid at trial. These include:

1. Any statement that indirectly vouches for the child's believability
2. Any statement to indicate to a jury that the interviewer believes the child's allegations

Dr. Henderson's testimony that her findings on examination were consistent with the description the child had made as to penile vaginal penetration is a statement that the child victim was truthful as to that issue. While this testimony indicates that the interviewer believed the child's allegations of penile penetration, the testimony does not vouch for the child's believability in general. While this appears to be the exact type of testimony *Kromah* warns against, as set forth below, the Court finds that Dr. Henderson's testimony did not bolster the child victim's testimony.

Trial counsel testified she did not object to the testimony noted above simply because she did not think it was objectionable. In this case Dr. Henderson testified as a medical doctor who

[1] In what the undersigned believes can only be described as dicta, the Supreme Court stated "...although an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors have a tendency to attach more significance to the testimony of experts."

conducted a medical examination of the alleged victim. While she testified basically as a forensic expert, she was not testifying as a forensic interviewer. Dr. Henderson's focus was not on any assertion by the minor victim as to the sexual battery, beyond her medical findings. Dr. Henderson's testimony bolsters the victim's testimony only as to whether or not the victim's vaginal area showed signs of penile intrusion. Dr. Henderson objectively found evidence of penile/vaginal penetration. She testified that such finding was consistent with the victim's testimony that she had been so penetrated.

Dr. Henderson testified that her physical examination of the victim revealed a "healed tear of her hymen" (TR p. 168, ll 9-10); that the type of tear she found "is due to some type of penetration across the hymenal tissue" (TR p. 169, ll. 4-5); that such tears are unusual absent "sexual abuse" (TR p. 169, ll. 14-15); and that the injury observed in the victim's vaginal area was due to a "penetrating injury." (TR p. 144, ll. 7-15).

Dr. Henderson's testified that the penetrating injury she observed *based on her findings on examination* was "due to a penetrating injury." Dr. Henderson was not vouching for the victim's believability or bolstering the victim's testimony. Dr. Henderson simply testified that her objective finding and the victim's disclosure of vaginal penetration was consistent with her physical findings. The fact that the child victim informed the doctor as to how her vaginal area was injured does not equate with believability. Here what Dr. Henderson testified was to substantiate not the credibility of the victim, but the results of her physical exam.

Trial counsel was not ineffective for not objecting to Dr. Henderson's testimony regarding the victim's disclosure having been confirmed by the doctor's physical exam. Again, the testimony is not that the victim was believable, but rather that the physical exam confirmed the child's oral statements to the doctor as part of her medical history.

Gr. #7

Next the Court addresses the issue of whether or not Applicant was arraigned on the direct indictment on which he was tried. At the Court's request, counsel for both parties were asked to explore the issue. Counsel for the State, having checked with the Greenville County Solicitor's office, advises the Court that there is nothing definitive on the arraignment of Applicant. That is, there has been no record found of an arraignment of Applicant on the direct indictment here at issue.

Since Applicant was prosecuted on a direct indictment the Court *sua sponte* raised the question as to whether or not Applicant had been arraigned on the direct indictment. At the time of the hearing neither counsel, nor trial counsel, could answer this question. The Court gave counsel time to, post-hearing, find whether or not Applicant had been arraigned. Counsel for the State, per an email from same, states that the trial solicitor, Ms. Munson, was unable to confirm Applicant's arraignment. Counsel for the State stated that Ms. Munson was "unable to find any records...to confirm it." The Court has received nothing from Applicant addressing this arraignment issue.

Since arraignment is neither a statutory nor constitutional right, but is rather a "mere formality," the absence of arraignment does not violate a defendant's due process rights as long as the accused has sufficient notice and an adequate opportunity to defend himself. *State v. Ariail*, 311 S.C. 35, 426 S.E.2d 751 (1993). Arraignment is not a jurisdictional requisite. *Id.*

Here, Applicant testified he was arrested on a warrant for Criminal Sexual Conduct, First Degree under S.C. Code Ann. § 16-3-652 (1976 as amended). The direct indictment on which he was tried was, as noted above, for Criminal Sexual Conduct With a Minor, Second Degree under S.C. Code Ann. § 16-3-652 (1976 as amended). Both Criminal Sexual Conduct, First Degree and

Criminal Sexual Conduct, Second Degree have as their pivotal element the commission by defendant of a "sexual battery."[2] Each requires that same be committed on a "victim."[3]

The arrest warrant for First Degree Criminal Sexual Conduct is not part of the record before the Court. Trial counsel testified that the difference between the charge for which Applicant was arrested and the charge set forth in the direct indictment was the allegation of the victim's age in the direct indictment. Applicant testified he was aware of the direct indictment (referred to by him as a document) but claims trial counsel never explained to him the difference between the two charges. Trial counsel testified she in fact did explain the differences to Applicant.

In *State v. Mayfield*, 235 S.C. 11, 109 S.E.2d 716 (1959), one of several grounds on direct appeal was Mayfield's assertion that he was never arraigned. This assertion was not supported by the record. The Court found that two basic factors weighed against the Defendant's assertion as set forth in an affidavit presented by him. There was his plea of not guilty of the charge to which he was tried and the presumption of regularity in the trial proceedings.

In the instant case, Applicant was, as noted above, aware he was charged with a Criminal Sexual Conduct with a Minor in the Second Degree. By proceeding to trial with this knowledge, Applicant waived arraignment. Also, there being no evidence to overcome the presumption of regularity in this proceeding, in considering the absence of proof that Applicant was arraigned, the Court must presume he was properly arraigned.[4]

From the above it is clear Applicant was aware that he had been charged with Criminal Sexual Conduct With a Minor, Second Degree and had the charge explained to him. Trial counsel

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[2] Defined at 16-3-650, S.C. Code of Laws 1976, as amended.
[3] Defined at 16-3-651, S.C. Code of Laws 1976, as amended.
[4] As to the presumption of regularity, *see also Weathers v. State*, 319 S.C. 59, 459 S.E.2d 838 (1995); *State v. Jones*, 321 S.C. 75, 472 S.E.2d 38 (1942).

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testified she had the State's discovery and had discussed the State's evidence and the facts of the case with Applicant. A review of the trial transcript exhibits that trial counsel was thoroughly prepared for trial.

Therefore, based on an *Ariail, supra*, analysis, whether or not Applicant was arraigned on the charge of Criminal Sexual Conduct With a Minor, Second Degree is of no moment. Applicant was aware of the accusations against him and was adequately defended.

The Court addresses the arraignment issue even though not raised by Applicant since the Court raised the arraignment question at Applicant's hearing. Applicant neither raised any issue regarding arraignment nor presented any testimony relevant to the issue.

As to trial counsel's failure to object to, or move to quash the indictment, the Court finds trial counsel was not ineffective. At the time of Applicant's trial the current law as to whether time periods in indictments were overbroad was *State v. Baker*, 390 S.C. 56, 700 S.E.2d 440 (Ct. App. 2010). In *Baker*, the Court stated, "time is not a material element of committing a lewd act upon a minor" or "of criminal sexual conduct with a minor." *Id* at 61, 700 S.E.2d at 443. The indictment in *Baker* encompassed a six year and three month span of time in which Baker was alleged to have committed Lewd Acts Upon Minors (five counts) and Criminal Sexual Conduct with a Minor (one count). The Court of Appeals' *Baker* opinion was reversed by the South Carolina Supreme Court in February 2015.

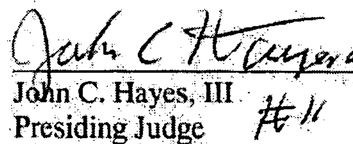
Trial counsel was not ineffective for failure to move to quash the indictments in Applicant's case. Our courts have never required an attorney to anticipate or discover changes in the law which did not exist at the time of trial. *Thomas v. State*, 310 S.C. 306, 426 S.E.2d 764 (1993).

Applying the *Strickland* and *Cherry* standard to trial counsel's representation, the Court finds that trial counsel provided to Applicant representation within the range of competence required in criminal cases. The Court finds trial counsel's performance in her representation of Applicant reasonable under professional norms.

The Court finds Applicant has failed to carry his burden of proof as to any of the claims in his Application for Post-Conviction Relief. Therefore, Applicant's Application for Post-Conviction Relief is denied and dismissed with prejudice.

This Court hereby advises Applicant that he must file and serve a Petition for Writ of Certiorari within thirty (30) days of the service of this Order to secure appellate review. *See* Rules 203 and 243, South Carolina Appellate Court Rules (SCACR). The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the Petition.

IT IS SO ORDERED.



January 13th, 2017
York, South Carolina

John C. Hayes, III
Presiding Judge #11

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No.2015-CP-23-05718

Millanyo A. Woody,.. Appellant,

v.

State of South Carolina .... Respondent.

CERTIFICATE OF SERVICE

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this January 27, 2017, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

Patrick Schmeckpeper, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211
Attorney for the State of South Carolina

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Greenville County Courthouse
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SC Commission of Indigent Defense
Division of Appellate Defense
PO Box 11433
Columbia, SC 29211-1433

Denise Tanner LaBeck
Denise Tanner LaBeck

January 27, 2017