

R. MILLS ARIAIL, JR.
ATTORNEY AT LAW

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March 15, 2019

RECEIVED

MAR 19 2019

S.C. SUPREME COURT

Via US Mail

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

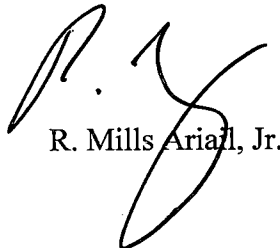
Re: *Notice of Intent to Appeal from Justin Ryan Cone vs. State of South Carolina*
C.A. No.: 2012-GS-39-0660

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 Alex Kinlaw Jr.'s Order Granting Belated Appellate Review Pursuant to *White v. State* and Appellant's General Sessions Sentencing Sheet 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 Pickens 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

APPEAL FROM PICKENS COUNTY
Court of General Sessions

William P. Keesley, Circuit Court Judge
Case No. 2012-GS-39-0660

RECEIVED

MAR 19 2019

S.C. SUPREME COURT

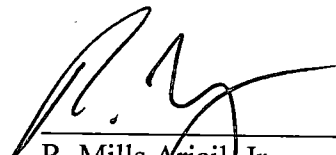
Justin Ryan Cone,..... Appellant,

v.

State of South Carolina Respondent.

NOTICE OF APPEAL

Pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), Appellant appeals his jury trial conviction and sentence which occurred on November 19, 2014. Appellant filed an application for post-conviction relief and on March 6, 2019, the Honorable Alex Kinlaw Jr. signed an order granting belated appellate review pursuant to *White v. State*. Appellant, through his PCR counsel, received written notice of entry of this order on March 14, 2019. A copy of the Honorable Alex Kinlaw Jr.'s Order Granting Belated Appellate Review Pursuant to *White v. State* and Appellant's General Sessions Sentencing Sheet are attached.



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Facsimile (864) 232-9392
Attorney for Brian Edward Norris

Greenville, South Carolina
March 15, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM PICKENS COUNTY
Court of General Sessions

MAR 19 2019

S.C. SUPREME COURT

William P. Keesley, Circuit Court Judge

Case No.2012-GS-39-0660

Justin Ryan Cone,..... 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 March 15, 2019, 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:

Kelly Oppenheimer, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211

Pickens County Clerk's Office
Pickens County Courthouse
214 East Main Street
Pickens, SC 29671

Justin Ryan Cone #362238
Broad River Correctional
4460 Broad River Road,
Columbia SC 29210

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

Denise Tanner LaBeck
Denise Tanner LaBeck

March 15, 2019

STATE OF SOUTH CAROLINA)
COUNTY OF PICKENS)

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

Justin Ryan Cone, #362238,)

2019 MAR 12 A 11:24

Case No. 2017-CP-39-928

Applicant,)

v.)

State of South Carolina,)

Respondent.)

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

**ORDER GRANTING BELATED
APPELLATE REVIEW PURSUANT
TO *WHITE V. STATE* AND
WITHDRAWING ALL OTHER
ALLEGATIONS WITH PREJUDICE**

This matter comes before this Court by way of an application for post-conviction relief filed August 1, 2017, by Justin Ryan Cone (Applicant). The State (Respondent) made its return on January 16, 2018, requesting an evidentiary hearing be held. Thereafter, Respondent made its amended return and motion to dismiss on February 14, 2019, requesting a hearing be held solely on the claim of ineffective assistance of trial counsel for failing to file an appeal. An evidentiary hearing into the matter was convened on February 21, 2019, at the Greenville County Courthouse before the Honorable Alex Kinlaw, Jr. Applicant was present at the hearing and represented by R. Mills Ariail, Jr., Esquire. Assistant Attorney General Kelly Oppenheimer of the South Carolina Attorney General's Office represented Respondent.

Following a thorough review of the record in its entirety, and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has met his burden, such that this Court shall grant him a belated appeal pursuant to *White v. State*.¹ This Court further finds Applicant withdrew, with prejudice, all of his remaining allegations knowingly and voluntarily.

PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Pickens County

¹ 263 S.C. 110, 208 S.E.2d 35 (1974).

Clerk of Court. During its May 2012 term, the Pickens County Grand Jury indicted Applicant for first-degree criminal sexual conduct with a minor (2012-GS-39-0660). The indictment was later amended during the August 2014 term of the Grand Jury. Steve W. Sumner, Esquire, represented Applicant on this charge. On November 17-19, 2014, Applicant proceeded to a jury trial before the Honorable William P. Keesley. Following deliberations, the jury convicted Applicant as indicted, and Judge Keesley sentenced Applicant to a term of imprisonment of thirty years. Applicant did not appeal.

STATEMENT OF FACTS

Applicant was a friend of Victim's family and spent almost every weekend at Victim's family's home. Tr. 54, 148-49, 167, 192. Applicant and Victim's mother and father were also engaged in a sexual relationship. Tr. 150-51, 163, 167, 192. Around Christmas of 2011, Victim's mom noticed that Victim was playing with her dolls in a sexually inappropriate manner. Tr. 154, 168. Victim's mom confronted Victim about this on January 1, 2012, and Victim disclosed she had been sexually abused in her room during the night. Tr. 156. Victim later disclosed the abuse to her father and to Detective Rita Burgess, of the Pickens County Sheriff's Office, on the same day. Tr. 175, 178, 195. During her disclosure, Victim indicated the abuse happened frequently, in her bedroom or her parents' bedroom, for a period of several years, until she was nine years old. Tr. 178, 181-82, 185. Victim also indicated she swallowed semen during the abuse. Tr. 182.

At trial, Victim testified Applicant made her perform oral sex on him. Tr. 55. Victim would not be wearing any clothes when the abuse occurred, and Applicant's pants and underwear would be pulled halfway down. Tr. 57-58. Victim was about four or five years old when the abuse started happening, and it ended when she was nine years old. Tr. 56. The abuse



would occur in either Victim's room or her parents' room when her parents were gone. Tr. 57.

When the abuse would happen, Applicant told Victim not to tell anyone. Tr. 58.

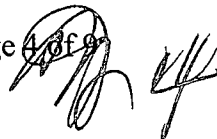
CURRENT APPLICATION

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following allegations:

1. Ineffective assistance of trial counsel;
 - a. I am writing you today to request the right to proceed with a late appeal because of July 5th, 2017 I became aware that my original appeal was dismissed due to my deficient trial attorney;
 - b. Trial counsel ailed to motion for a new trial when the trial court declared that the jurys [sic] verdict was a compromise verdict and that the trial court's sentence would not serve justice;
 - c. Trial counsel failed to motion for an acquittal when the trial court declared that the jurys [sic] verdict was a compromise verdict and that the trial court's sentence would not serve justice;
 - d. Trial counsel failed to file for a sentence reconsideration after sentencing, when the trial court declared that the jurys [sic] verdict was a compromise verdict and the trials court [sic] sentence would not serve justice;
 - e. Trial counsel failed to motion for a new trial on the grounds that evidence was insufficient to support conviction;
 - f. Trial counsel ineffective for making improper comments during closing arguments;
 - g. Trial counsel failed to object to prosecutor's unconstitutional, burden shifting, and prejudicial closing argument and motion for a mistrial;
 - h. Trial counsel failed to object to prosecutor, victim and witness perjured testimony;
 - i. Trial counsel failed to pretrial interview victims and witnesses that testified;
 - j. Trial counsel failed to contact, interview and subpoena potential witnesses;
 - k. Trial counsel failed to present character witnesses;
 - l. Trial counsel failed to present evidence of [Applicant's] good character;
 - m. Trial counsel failed to impeach witnesses and victims;
 - n. Trial counsel failed to present favorable evidence in support of defenses;



- o. Trial counsel failed to file pre-trial motion to suppress prejudicial evidence;
 - p. Trial counsel failed to object to prejudicial evidence;
 - q. Trial counsel failed to submit favorable evidence into evidence;
 - r. Trial counsel failed to investigate backgrounds of victims and witnesses;
 - s. Trial counsel failed to motion for mistrial due to erroneous and prejudicial jury instructions which were burden shifting and denied [Applicant] of a mistrial;
 - t. Trial counsel failed to investigate and test evidence;
 - u. Trial counsel failed to object to hearsay testimony;
 - v. Trial counsel failed to investigate facts and circumstances of case;
 - w. Trial counsel failed to prepare for case; [and]
 - x. Trial counsel failed to argue favorable evidence during closing arguments.
2. Ineffective assistance of appeal counsel; [and]
3. Prosecutor misconduct/Juror misconduct.
- a. Prosecutor expressing personal opinions about [Applicant's] guilt and credibility;
 - b. Prosecutor made unfair and improper remarks about [Applicant];
 - c. Prosecutor vouching for credibility of victims and witnesses;
 - d. Prosecutor vouching for credibility of government witnesses;
 - e. Prosecutor presenting and failing to correct perjured testimony of victims and witnesses;
 - f. Prosecutor appealing [sic] to jurors to act as the conscience for the community;
 - g. Prosecutor made remarks to inflame the passions of the jurors, which lead [sic] to a compromised verdict conviction;
 - h. Prosecutor making misstatements of law;
 - i. Prosecutor making misstatements of facts;
 - j. Prosecutor made unfair, prejudicial, biased, and burden shifting statements during trial;
 - k. Prosecutor made unfair, prejudicial and biased statements during closing arguments;
 - l. Prosecutor violated [Applicant's] due process right to a fair trial and made [Applicant's] conviction a miscarriage of justice; [and]
 - m. The jury's verdict was a compromise verdict based on passion and prejudice, making the jury's verdict unfair and



not impartial to [Applicant]; which makes [Applicant's] conviction a miscarriage of justice.

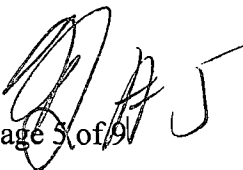
TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant presented the testimony of Steve W. Sumner, Esquire (Counsel). This Court also had before it the transcript from Applicant's jury trial, Applicant's records from the South Carolina Department of Corrections, the records from the Pickens County Clerk of Court regarding the subject conviction, and the records from this current post-conviction relief action.

Counsel testified he represented Applicant. He testified after Applicant was convicted at trial, he and Applicant discussed an appeal. He further testified Applicant requested him to file an appeal as Applicant was leaving the courtroom. Counsel testified Applicant's mother asked about an appeal the following day, and Applicant's mother instructed Counsel not to touch Applicant's file again. He explained he gave Applicant's mother the names of several appellate attorneys who could handle Applicant's appeal and also told Applicant's mother he would be happy to work with the appellate attorney on this case. He further explained he never heard another word from Applicant, or his mother, and assumed Applicant's mother had hired someone else. Counsel testified because of this, he did not perfect the appeal. He also testified Applicant never told Counsel he did not want Counsel to pursue an appeal on his behalf.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their


Page 5 of 9

testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).


Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCPP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review based on the standard discussed above, this Court finds Applicant has establish he did not knowingly and voluntarily waive his right to an appeal. This Court



further finds Applicant knowingly, voluntarily, and intelligently withdrew the remainder of his allegations of ineffective assistance of trial counsel, ineffective assistance of appellate counsel, prosecutorial misconduct, and jury misconduct with prejudice. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

Counsel's failure to appeal

Applicant alleges he was denied the effective assistance of counsel when trial counsel failed to properly initiate his direct appeal. Trial counsel must ensure a criminal defendant is made fully aware of his appeal rights. *White*, 263 at 118, 208 S.E.2d at 39. In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure required by *Anders v. California*, 386 U.S. 738 (1967). *Id.* Where the post-conviction relief judge determines the applicant did not freely and voluntarily waive his appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to *White v. State*. Rule 243(i)(1), SCACR; *see also Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986) ("Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, the applicant must petition this Court for a *White v. State* review.").

Here, Counsel testified Applicant asked him to appeal his conviction at trial, but presuming Applicant's mother had hired someone else to handle the appeal, after being told not to touch Applicant's file any further, Counsel failed to perfect Applicant's appeal within the mandated time limits. Counsel further testified Applicant never told Counsel he did not want Counsel handling his appeal. Based on the foregoing, this Court finds Applicant's allegation he was denied a direct appeal is meritorious. This Court affirmatively finds Applicant did not

knowingly and voluntarily waive his right to a direct appeal. This Court further concludes Applicant is entitled to a belated review of his convictions.

All Other Allegations

After having found Applicant did not knowingly and voluntarily waive his right to appellate review of his trial and, therefore, was entitled to a belated appeal, Applicant, through his counsel, informed this Court of his desire to withdraw his remaining allegations of ineffective assistance of trial counsel, ineffective assistance of appellate counsel, prosecutorial misconduct, and juror misconduct. Respondent consents to the dismissal with prejudice of all remaining allegations. Applicant informed this Court he had discussed this decision with his counsel and understood the risks and advantages of post-conviction relief. Applicant also informed this Court he was aware the voluntary dismissal of the post-conviction relief application would be with prejudice and he would not be able to file another application at any time.

Applicant indicates his decision is made freely and voluntarily. Applicant indicates he has not been promised anything or threatened, coerced, or induced into withdrawing the application. Applicant further indicates he has had sufficient time to review this decision with counsel, and he is satisfied with counsel. Applicant also indicates he has no complaints of counsel.

It appearing that counsel for both parties and Applicant consent to the dismissal of all remaining allegations, and in light of the fact this Court has not been made aware of any violations of Applicant's constitutional rights, the remaining allegations of ineffective assistance of trial counsel, ineffective assistance of appellate counsel, prosecutorial misconduct, and juror misconduct shall hereby be dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

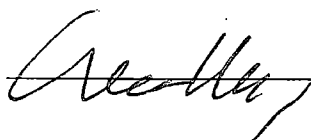
This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

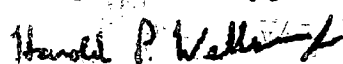
IT IS THEREFORE ORDERED:

1. That Applicant be granted a belated appeal pursuant to *White v. State*;
2. That this application for post-conviction relief must be denied and dismissed with prejudice; and
3. Applicant must be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED this 6th day of March, 2019.

ALEX KINLAW, JR.
Presiding Judge
Thirteenth Judicial Circuit

, South Carolina

Certified Copy

Clerk of Court
Pickens County, SC
Dated March 12, 2019 NB

CLEK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
2019 MAR 12 A 11:24

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Pickens
STATE VS.

INDICTMENT/CASE#: 2012GS3900660

Justin Ryan Cone

A/W#: 1677752

AKA:
Race: WHITE Sex: M Age: 29

Date of Offense: 12/16/2011

DOB: 1985 SS#

S.C. Code §: 16-03-0655(A)(1)

Address:
City, State, Zip: Travelers Rest, SC 29690

CDR Code #: 0385

DL#: SID#

SENTENCE SHEET

25 - LIFE

*CDL Yes No CMV Yes No Hazmat Yes No

CONVICTED OF or PLEADS

In disposition of the said indictment comes now the Defendant who was

TO: Sex / Criminal sexual conduct with minor or Attempt - victim under 11 yrs of age - First degree

In violation of § 16-03-0655(A)(1) of the S.C. Code of Laws, bearing CDR Code # 0385
NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC) §17-25-45 w/minor 1st or Lewd Act

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury (defendant's initials)
The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State

ATTEST: [Signature] SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,

for a determinate term of 30 days/months/years under the Youthful Offender Act not to exceed years

and/or to pay a fine of \$ provided that upon the service of days/months/years and/or payment of \$ plus costs and assessments as applicable, the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:
The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.

The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 (Capital Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered
Total: \$ plus 20% fee: \$

PTUP days/hours Public Service Employment

Payment Terms:
Set by SCDPPPS

Obtain GED
Attend Voc. Rehab. or Job Training
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning \$ paid to Public Defender Fund
Other: Pay COURT COSTS @ \$50/mo. BEGINNING 180 DAYS AFTER RELEASE FROM PRISON INCARCERATION.

Recipient:

Table with 2 columns: Description and Amount. Includes items like § 14-1-206 (Assessments 107.5%), § 14-1-211(A)(1) (Conv. Surcharge) \$100, § 14-1-211(A)(2) (DUI Surcharge) \$100, § 56-5-2995 (DUI Assessment) \$12, § 56-1-286 (DUI Breath Test) \$25, Proviso 47.9 (Public Def/Prob) \$500, § 14-1-212 (Law Enforce. Funding) \$25, § 14-1-213 (Drug Court Surcharge) \$150, § 50-21-114 (BUI Breath Test Fee) \$50, § 56-5-2942(I) (Vehicle Assessment) \$40/ca, Proviso 90.5 (SCQIA Surcharge) \$5, 3% to County (if paid in installments) \$, TOTAL \$ 133.92

Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk: [Signature]
Court Reporter: [Signature]
SCCA/217 (03/2011)

Presiding Judge: [Signature]
Judge Code: 2050
Sentence Date: NOV. 19, 2014



UNITED STATES POSTAGE
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R. MILLS ARIAIL, JR.

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Clerk of Court
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