LAW OFFICE OF TRICIA A. BLANCHETTE

May 6, 2015
VIA HAND DELIVERY

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

RE: Nicholas Nesmith v. State; Docket No.: 2011-CP-40-0423

Dear Sir:

Enclosed for filing is a Notice of Appeal for the above PCR case. Also enclosed are the following:

(1) Proof of service on the Respondent.

(2) A copy of the Order of Dismissal and Order denying Applicant's Motion.

Mr. Nesmith is indigent. He has been unable to return an Affidavit of Indigency to my office via mail, so I am meeting with him next week to obtain it. I will submit the completed Affidavit to the Office of Indigent Defense next week.

Thank you for your assistance with this matter. Please contact my office with any questions.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Clay Mitchell, Assistant Attorney General
Richland County Clerk of Court
Office of Indigent Defense
Nicholas Nesmith

PO Box 12725 | Columbia SC 29211

p: 803.988.0008 | **e:** blanchettelaw@gmail.com

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post Conviction Relief
Honorable Alison Renee Lee, Circuit Court Judge

Case No.: 2011-CP-40-0423

Nicholas Nesmith,.....Petitioner,

vs.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Nicholas Nesmith, Petitioner, appeals the Order of Dismissal issued by the Honorable Alison Renee Lee on February 27, 2015 and filed on March 2, 2015. Petitioner also appeals the Order signed by the Honorable Alison Renee Lee on March 25, 2015, which was filed on March 25, 2015. Petitioner, through counsel, received written notice of the entry of the Order on April 7, 2015.

Tricia A. Blanchette
S.C. Bar No. 74904
PO Box 12725
Columbia, SC 29211
(803) 988-0008

Other Counsel of Record:
Clay Mitchell
Assistant Attorney General
PO Box 11549
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY
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Nicholas Nesmith,.....Petitioner,

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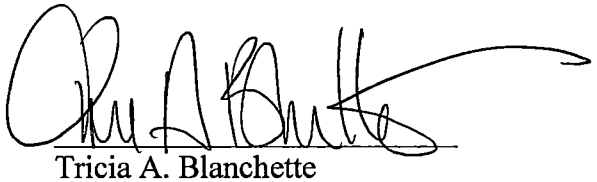
CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney at Law, hereby certify that I placed in the United States Mail on this 6th day of May 2015, a copy of a Notice of Intent to Appeal, with postage prepaid and the return address clearly shown on said envelope to Clay Mitchell with the Office of the Attorney General at:

Office of the Attorney General
ATT: Clay Mitchell, Ast. AG
P.O. Box 11549
Columbia, SC 29211



Tricia A. Blanchette
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May 6, 2015

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2011CP4000423

Nicholas #342520 Nesmith

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (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 (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ **day of** _____, **20** _____ and a copy mailed first class or placed in the appropriate attorney's box on this 2 March 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Nicholas #342520 Nesmith
Tricia A. Blanchette

Eleanor Duffy Cleary

Megan Harrigan Jameson

Nicholas #342520 Nesmith

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Nicholas Nesmith, #342520, Applicant, v. State of South Carolina, Respondent.	Case No. 2011-CP-40-0423 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed January 24, 2011. Respondent filed its Return on February 15, 2011 requesting an evidentiary hearing be held. Thereafter, on April 5, 2013, Applicant, through his counsel, filed an amended application. An evidentiary hearing into the matter was convened on March 19, 2014 at the Richland County Courthouse. Applicant was present at the hearing and was represented by counsel, Tricia A. Blanchette, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted during the March 2009 term of the Richland County Grand Jury for Burglary in the First Degree (2009-GS-40-1713), Assault and Battery of a High and Aggravated Nature (2009-GS-40-1707), Strong Arm Robbery (2009-GS-40-1715), and Kidnapping (2009-GS-40-1714). Jerry L. Finney, Esquire, represented Applicant.[1] On August 11, 2010, Applicant appeared before the Honorable G. Thomas Cooper, Jr., where he pled guilty as indicted. Sentencing was deferred until September 1, 2010, when Judge Cooper sentenced Applicant to twenty-two years imprisonment for Burglary in the First Degree, twenty-two years imprisonment for Kidnapping, fifteen years imprisonment for Strong Arm Robbery, and ten years for Assault and Battery of a High and Aggravated Nature, in accordance with negotiations

[1] Applicant was originally represented by Assistant Public Defender Mitzi Campbell-Williams, Esquire, while his charges were pending in Family Court, as he was fifteen years old at the time of his arrest. Following his waiver to General Sessions, Applicant was represented by Assistant Public Defender Luke A. Shealey. Mr. Shealey's representation ceased in May 2010, when Applicant retained Jerry L. Finney of the private bar.

between Applicant and the State. All sentences were to be served concurrently. Applicant did not pursue a direct appeal of his guilty plea or sentences.

In his *pro se* application for post-conviction relief, Applicant alleged that he was being held in custody unlawfully based on allegations of ineffective assistance of counsel and due process violations. In his amended application for post-conviction relief, Applicant, through counsel, alleged the following claims of ineffective assistance of counsel:

1. Ineffective assistance of counsel Mitzi Campbell-Williams stemming from representation prior to and at Applicant's waiver hearing on February 24, 2009, specifically for: 1) failure to address the legality of applicant's arrest and voluntariness of his statement, 2) failure to prepare or utilize applicant or his parents as witnesses, and 3) failure to make an argument to the court against waiver; and
2. Ineffective assistance of counsel Jerry Finney for: 1) failure to conduct an independent investigation and properly prepare Applicant for trial; 2) failure to file pre-trial motions regarding Applicant's arrest, statement, and waiver hearing; and 3) advising Applicant to plead guilty, which waived his ability to challenge his statement and waiver hearing on appeal.

Applicant proceeded on these grounds as set forth in his amended application at the evidentiary hearing, as well as an oral amendment that trial counsel was ineffective for failing to notify Applicant and his parents of the guilty plea proceeding.

SUMMARY OF FACTS ADDUCED AT THE GUILTY PLEA

On the evening of September 14, 2008, Applicant, along with a co-defendant, broke into the home of an elderly couple, Mr. and Mrs. Bennett, aged 69 and 70, of Irmo, South Carolina while they were preparing for bed. Tr. p. 31-32. Applicant began to beat Mrs. Bennett about the face with a closed fist, and then proceeded to drag her from the bed and continued to attack her. Tr. p. 32. Simultaneously, Applicant's co-defendant began to physically assault Mr. Bennett, who suffers from Alzheimer's disease. Tr. p. 32. During the violent attack, Applicant's co-defendant pleaded with Applicant to stop assaulting Mrs. Bennett, who was recovering from a recent hip surgery. Tr. p. 34-35.

Applicant and his co-defendant asked Mrs. Bennett if she had any jewelry in her home, to which she replied yes and showed them where her jewelry and other belongings were located. Tr. p. 33. Applicant and his co-defendant ransacked the house, eventually stealing a television, a D.V.D. player, jewelry, and cash. Applicant and his co-defendant also stole Mrs. Bennett's cell phone and broke the landline phone to prevent her from calling for assistance. Tr. p. 34-35.

After Applicant and his co-defendant fled the residence, Mrs. Bennett was able to drive the very short distance to her son's home to seek assistance. Tr. p. 35. Mrs. Bennett and her son called 911 and returned to the Bennett's home, where they were met by the Irmo Police Department. Tr. p. 35-36. Law enforcement entered the Bennett home, where they found Mr. Bennett bleeding from his injuries with a "goose egg on his head." Tr. p. 36. EMS was called and the Irmo Police Department began to process the scene and surrounding neighborhood. Tr. p. 36-37. Mrs. Bennett gave a detailed oral statement that was recorded by the Irmo Police Department. Tr. p. 37.

During the investigation, Jessica Mayweather, the girlfriend of Applicant's older brother, Victor, approached law enforcement and stated that she knew who committed the assault and home invasion. Tr. p. 38-39. She provided the name of Applicant and his co-defendant, which was confirmed by her brother, D.J. Tr. p. 39. D.J. confirmed that he saw Applicant and his co-defendant carrying the stolen television back to Applicant's home and discussing the offense. Tr. p. 39. D.J. elaborated that earlier that day, he heard Applicant and his co-defendant discussing that they intended to commit a crime to elevate their rank within their gang. Tr. p. 39.

Based on this information, the Irmo Police Department canvassed the area for Applicant. Tr. p. 39. Law enforcement identified Applicant while he was fleeing his home. Applicant then approached law enforcement and stated "I've done something wrong." After this admission, the officers advised Applicant of his Miranda rights and took him to a police cruiser to take a recorded statement. Tr. p. 39. Following two additional readings of his Miranda warnings, Applicant waived his rights and gave a verbal statement implicating himself in the crimes and describing the location of the stolen property in and around his home. Tr. p. 39-40. Applicant's eighteen year old brother, Victor, approached the police cruiser and was allowed to sit in the back and speak with Applicant. Victor encouraged his brother to be cooperative with law enforcement. Tr. p. 41.

Following his discussion with his brother, officers transported Applicant to the Irmo Police Department. Tr. p. 41-42. Applicant was once again advised of his Miranda warnings and signed a waiver of rights form. Tr. p. 42. Applicant then proceeded to give a detailed statement of the crime during a forty-two minute interview with Sergeant Brian Wilson of the Irmo Police Department that was recorded by video camera.[2] During this interview, Applicant acknowledged that he understood his rights, including his right to remain silent and to an attorney, and that he wanted to speak with law enforcement. Tr. p. 42. Applicant gave a detailed confession to the crimes and confirmed that they were gang related. Tr. p. 42. At that time, Applicant was placed under arrest and detained as a juvenile. Tr. p. 42.

Several days later, Applicant's co-defendant, Gregory Hardee, was arrested. Tr. p. 42. Hardee gave a statement to law enforcement consistent with Mrs. Bennett's statement to law enforcement, implicating Applicant as the initial aggressor who attacked Mrs. Bennett. Tr. p. 43. Hardee confirmed that this incident was gang-related and committed at the request of more senior gang members. Tr. p. 43. Law enforcement also re-interviewed Jessica and D.J. Mayweather, who both again confirmed that this was gang related. Tr. p. 43-44. All sources suggested that Mr. and Mrs. Bennett were targeted because the gang believed that they were an elderly couple with money. Tr. p. 44.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified on his own behalf and presented testimony from his mother, Chrise Nesmith. Applicant also presented six exhibits in support of his application.[3] Respondent presented testimony from former attorneys, Luke A. Shealey, Esquire, and Mitzi Campbell-Williams, Esquire, and plea counsel, Jerry L. Finney, Esquire (hereinafter

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[2] A complete copy of this forty-two minute interview was introduced as Applicant's Exhibit No. 1 at the evidentiary hearing.

[3] Applicant's exhibits are as follows:
No. 1, a forty-two minute video of the interview of Applicant by Sgt. Wilson of the Irmo Police Department;
No. 2, a Forensic Evaluation of Applicant by Alicia V. Hall, Ph.D. and Barbara Christensen, LISW-CP, dated Feb. 18, 2009;
No. 3, the Family Court Waiver Order dated February 25, 2009;
No. 4, a two paged handwritten letter by Applicant to an unknown court in reference to counsel Shealey's representation;
No. 5, two letters, both dated May 5, 2010, sent by Counsel to Richland County Central Court and the Solicitor's office notifying the entities of his representation of Applicant; and
No. 6, a letter dated July 1, 2010 from prosecuting Assistant Solicitor Luck Campbell to Counsel notifying him of Applicant's trial date.

"Counsel"), as well as the Preadjudicatory Transfer (Waiver) Evaluation of Applicant.[4] This Court also had before it Applicant's Family Court waiver hearing transcript, Applicant's guilty plea and sentencing transcripts, the records from the Richland County Clerk of Court regarding the subject convictions, and Applicant's records from the South Carolina Department of Corrections.

Applicant's mother, Chrise Nesmith, testified first on her son's behalf. She was working the evening shift when her son was arrested, as was her husband. Her son was fifteen years old at the time of his arrest. She first learned of her son's arrest from her older son, Victor, who left her a message shortly after Applicant's arrest that Applicant had been arrested by the Irmo Police Department, he would be taken to the Alvin S. Glenn Detention Center, and she could call and speak with Sergeant Wilson of the Irmo Police Department. A few hours later, she received a message from Applicant, confirming that he had been arrested and would be detained at the Alvin S. Glenn Detention Center. She called the detention center, but was told that her son was still in booking. The next morning she called Sergeant Wilson, who told her Applicant would be taken to court shortly. She was not contacted by law enforcement regarding her son's arrest or the search of their home. She believes they should have contacted her immediately upon her son's arrest. It was eight hours before she knew where he was and he had already been interrogated by police and gave a statement.

She testified that Mitzi Campbell-Williams, Esquire, was appointed to represent her son and that she spoke with Campbell-Williams before her son's initial court appearance. Campbell-Williams informed her that the State was seeking to move her son's charges to General Sessions and that a waiver hearing would be held to determine if her son would be tried in General Sessions. She was interviewed as part of the pre-waiver evaluation and was able to discuss her son's history and character traits that made him a viable candidate for rehabilitation within the Family Court system. She spoke with Campbell-Williams the day before the hearing and was told to bring clothing for Applicant to wear. She told Campbell-Williams that she wanted to address the court to let the court know that she could help to rehabilitate her son and to speak in defense of her son. Campbell-Williams told her it was not possible to address the court unless she was called as a witness. She testified that Applicant did not understand what was going on

[4] This exhibit was part of the record before the Family Court and is referenced not only during the waiver hearing but in the Waiver Order introduced as Applicant's Exhibit No. 3.

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during the hearing. The information she wished to convey to the court was included in her son's pre-waiver evaluation. Additionally, she acknowledged that her son had four prior juvenile cases, beginning when he was eleven years old and averaging one case a year since. She also acknowledged that the cases have increased in severity and that her son had never faced charges as serious as those before the court.

Applicant's mother testified that she was displeased with her son's counsel, Luke Shealey, and stated that he did not meet with Applicant enough. She and her husband decided to retain private counsel because they "could not come to any sort of an agreement" with Shealey. She acknowledged that her son was the client, not her or her husband. They hired Jerry Finney ("Counsel") to represent her son because she knew him and he attended the same church as her family. She met with Counsel several times. She was at the beach on a family vacation the day her son pled guilty and had no idea he would be pleading that day. Counsel called her the morning of the plea and asked her to come back to Columbia as soon as possible because her son would be pleading guilty that day. She was not able to make it back in time for the plea and this upset her because she wanted to be able to discuss it with her son ahead of time and address the plea court. Counsel had sentencing deferred so that the family could attend and she did speak to the plea court during the sentencing proceeding. She also acknowledged it was her son's decision to plead guilty and she understood his guilty plea was entered pursuant to negotiations between her son and the State for a determinate sentence range.

Following his mother's testimony, Applicant testified on his own behalf. He testified that the incident giving rise to these charges occurred on September 14, 2008 when he was fifteen years old. He was approached by officers for the Irmo Police Department around 10:15 p.m. Although he voluntarily spoke with law enforcement, he did not know he was being recorded in the police cruiser. He told law enforcement that he had done something wrong and gave consent to search his home. He gave a statement implicating himself in the home invasion and assault, which he admitted was truthful. While speaking with law enforcement, his older brother, Victor, came up to the cruiser and law enforcement allowed the two of them to speak. Victor was eighteen years old at the time. Neither of his parents was present because both were at work.

Following these discussions, he was transported to the Irmo Police Department. Applicant testified that he asked to speak to his parents upon arrival at the police department but his request was denied. He gave a statement lasting approximately forty-five minutes to

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Sergeant Wilson, which was recorded. In the statement he admitted the home invasion and assault. A copy of this interview was admitted into evidence as Applicant's Exhibit No. 1. He acknowledged that this statement was given after he was read his rights and signed a written waiver of rights, indicating that he wanted to speak with law enforcement and did not want to invoke his right to counsel. He understood those rights, but he did not understand the legal system. During the interview, the officer was "overly friendly" and encouraged him to "snitch" on his co-defendant. Sergeant Wilson asked him about other crimes in the area, but the only crime he could recall on the stand was a fight earlier in the evening amongst fellow young men in the neighborhood. He thought he needed to tell the truth to law enforcement, which induced him into making his statement. He called his mother while at the Irmo Police Department and left her a message informing her that he would be taken to the Alvin S. Glenn Detention Center and instructing her to call Sergeant Wilson for additional information. He thinks his parents should have been called by law enforcement and been present for his interview because he was a juvenile. Based upon prior incidents with juvenile court he was always able to talk with his parents. He acknowledged he had been in trouble several times before and that this was not his first run-in with law enforcement. He was surprised he was not allowed to go home following his interview, but acknowledged that this was the most serious crime he had ever been involved in and that none of the other crimes involved the home invasion and assault of an elderly couple. His statement was accurate and he admitted he was guilty of these charges.

These were his fifth set of juvenile charges. The previous offenses were for: Disturbing schools in June 2003, when he was eleven years old; Assault and Battery, Disturbing Schools, and Unlawful Use of a Telephone in December 2004, when he was twelve years old; Unlawful Possession of Alcohol in February 2007, when he was thirteen years old; and Willfully Burning the Lands of Another in March 2008, when he was fourteen years old. He was adjudicated delinquent for all offenses. At the time of the arrest he was suspended from school for fighting another student.

Applicant testified that Mitzi Campbell-Williams was appointed to represent him shortly after his arrest and that he met with her several times. She advised him the first time that they met that the State could seek to move his charges to General Sessions, which would occur in a waiver hearing. Campbell-Williams informed him that the State was seeking waiver at a later meeting and that he would be evaluated prior to the waiver hearing. A three page summary of a

competency evaluation, conducted on February 18, 2009, was introduced as Applicant's Exhibit No. 2. He was evaluated additional times in preparation for the waiver hearing. Campbell-Williams was present for most of these evaluations. His mother was also interviewed for his pre-waiver evaluation.

Applicant wanted to speak at the waiver hearing, and call his parents as witnesses, which he told Campbell-Williams. Campbell-Williams did call witnesses on his behalf; she did not allow him or his parents to testify. He testified that he wanted to speak to the court so that he could tell the court that he had admitted to his mistakes, so the matter should be kept within Family Court jurisdiction. Campbell-Williams told him and his mother that they could not talk. He denied that Campbell-Williams told him that it was his decision whether to testify or call his mother as a witness. His case was waived to General Sessions and the Waiver Order is Applicant's Exhibit No. 3.

After waiver hearing, Luke Shealey was appointed to represent Applicant. He met with Shealey "about five times" and reviewed all discovery with Shealey, which included his statements, the videotaped statement, his co-defendant's statement, and other witness statements. He never discussed suppression of his multiple statements with Shealey. He thinks his statements could have been suppressed because law enforcement was "too friendly" with him. Shealey reviewed the elements of the four charges with him and explained what the State would be required to prove if he went to trial. Shealey also explained the potential sentences for all four offenses, including that Burglary in the First Degree carries a potential sentence of life imprisonment without parole. Shealey also had him evaluated again. He told Shealey that he wanted to plead guilty and that he wanted Shealey to secure a favorable plea for him. Shealey presented him with a "fifteen year open plea" but Applicant could not explain what that meant or when Shealey presented this offer to him. He recalled an offer for a negotiated sentence between twenty to twenty-five years imprisonment. He never wanted a trial and wanted to plea pursuant to a favorable negotiation with the State.

Applicant testified that he "felt uncomfortable" with Shealey and did not think Shealey was giving his case enough time. In support of this, he introduced a two paged handwritten letter to an unknown court in reference to counsel Shealey's representation as Applicant's Exhibit No. 4. In this letter, Applicant states: "I know I committed a violent crime, but I've learned from my mistakes and I've matured." Applicant goes on to write that he wants his charges dropped back

down to juvenile offenses because he does not want to spend a significant portion of time incarcerated and he expressed his disdain for Shealey.

Applicant's family retained Counsel in May 2010 because they were concerned about Shealey's representation. He knew Counsel previously, as they attended the same church. He met with Counsel several times after an initial meeting in June 2010. He did not review discovery with Counsel until shortly before his guilty plea. He was surprised when he was taken to court in August 2010, where he again met with Counsel. Counsel presented him with a plea offer from the State for a negotiated sentence of between twenty to twenty-five years within the court's discretion, the same offer previously presented by Shealey. He did not have a good conversation with Counsel because he wanted less time. Counsel advised him that it was in his best interest to accept this plea offer. He was not able to discuss the plea offer with his parents, who were out of town at the beach. Counsel told him that there was not enough time before the plea offer would expire and his case would be called for trial. Both Counsel and Shealey discussed the plea offer with him and advised him to accept the offer or he would be convicted at trial and face a possible life sentence. Applicant testified that he felt forced to accept the plea offer because he did not think Counsel was ready for trial. However, he never told Counsel that he wanted to proceed to trial.

Applicant pled guilty on August 11, 2010, but sentencing was deferred until a later date so that his parents and additional witnesses could be present. He acknowledged that he was under oath during his guilty plea and admitted he told the plea court he was guilty of all four crimes. He testified that he is indeed guilty of all four crimes. He recalled apologizing to the elderly victims during the plea and sentencing proceedings. Applicant understood that if he pled guilty, he would receive a sentence between twenty to twenty-five years imprisonment pursuant to his negotiation with the State and acknowledged that he received a twenty-two year sentence. He never told Counsel he wanted to proceed to trial but rather wanted Counsel to secure him a favorable plea offer. However, now he wants to proceed to trial.

Applicant testified that Counsel never showed him the video of his interview with Sergeant Wilson and never discussed suppression of his various statements to law enforcement. Counsel never discussed his appellate rights with him, including how he could challenge his waiver to General Sessions and the admission of his statements if he proceeded to trial. He believes his statements should have been suppressed because law enforcement was "too friendly"

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and told him that he was "facing big boy charges." Counsel should have investigated his waiver hearing more to see if waiver could have been appealed.

Following Applicant's testimony, the State called Mitzi Campbell-Williams, Esquire to testify. Campbell-Williams has been practicing law for fifteen years and at the time of Applicant's representation, she was employed as a Richland County Public Defender representing juveniles in Family Court proceedings. She was appointed to represent Applicant in September 2008, the Tuesday after he was arrested. This was Applicant's fifth set of juvenile charges and he was familiar with the juvenile system. She met with Applicant more than twenty times, as well as met with his mother and other family members. In juvenile cases, the State has forty-eight hours from the time of arrest to bring a juvenile offender before the court for a detention hearing. She met with Applicant before his initial court appearance and explained to him that the State would likely seek to waive his charges to General Sessions. She received a copy of all available discovery except the videotape of the confession prior to the detention hearing. A copy of the videotape of Applicant's confession was obtained later. She reviewed all materials with Applicant, but the primary focus early on was keeping Applicant's case within the jurisdiction of the Family Court. Although there was not a strong likelihood of suppression of Applicant's statements, such an argument would be made prior to a hearing on the merits, which would have come after any detention or waiver hearings.

At the initial hearing, the State gave notice that it was seeking waiver of Applicant's charges to General Sessions. Waiver is one of the most serious actions that can occur in Family Court pertaining to a juvenile offender, which she explained to Applicant and his parents. When the State seeks to waive a juvenile to General Sessions, a waiver hearing is conducted following an extensive pre-waiver evaluation and report. This evaluation report is crucial for the waiver hearing and relied on heavily by the family court when making its determination on whether to waive a juvenile to General Sessions. The standard by which a court determines if a juvenile should be waived is based on the eight factors set forth in Kent v. United States.[5] The Kent

[5] These factors are: (1) The seriousness of the alleged offense; (2) whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; (3) whether the alleged offense was against person or against property, greater weight being given to offenses against persons especially if personal injury resulted; (4) the prosecutive merit of the complaint; (5) the desirability of trial and disposition of the entire offense in one court; (6) the sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living; (7) the record and previous history of the juvenile, including previous contacts with law enforcement agencies, prior periods of probation, or prior commitments to juvenile institutions; and (8) the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the

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factors are analyzed in the report and positive and negative factors are set forth regarding whether the family court should retain jurisdiction. She explained this to Applicant and his family and told them that the evaluation would be an opportunity for them to provide information about Applicant and his likelihood of being rehabilitated within the Family Court system. Applicant was evaluated and interviewed several times for the pre-waiver evaluation report and she was present for a significant majority of those. Applicant's mother was also interviewed. Following all interviews and evaluations, a Preadjudicatory Transfer (Waiver) Evaluation was compiled. See Respondent's Exhibit No. 1. This evaluation lists four negative factors and five positive factors that should be considered in determining whether the family court should retain jurisdiction. This report was completed well in advance of the waiver hearing and provided to all parties, including the court, which she discussed with the State and the Court in advance of the hearing.

She explained to Applicant and his parents that witnesses could be called on Applicant's behalf at the waiver hearing. The decision was solely Applicant's to make and she explained the positive and negative factors to calling him or his parents as witnesses. Applicant told her that there were a great deal of problems in the home at that time and he blamed himself for adding to the stress. Applicant was adamant that he did not want his dad called as a witness, elaborating that he told her that his father was on drugs and had caused an abundance of family strife. Applicant's mother wanted to testify, but Applicant ultimately decided not to call her as a witness because he thought it would cause her more stress being subject to cross-examination from the State. Campbell-Williams testified adamantly that she never told Applicant's mother that she could not testify as a witness, but rather, told her that it was her son's decision to make. She did tell Applicant's mother she could not merely get up and address the court during the hearing, explaining that to address the court she would need to be called as a witness and would be subject to cross-examination from the State. Applicant wanted to testify that he had done wrong. She told him he could not do that at this hearing. Applicant also decided not to testify because he did not want to face cross-examination either. Campbell-Williams discussed calling community members to testify on Applicant's behalf with Applicant and he gave her several names. She interviewed these witnesses, but all consistently told her that Applicant was in a

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juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available. Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966).

gang and frequently in trouble. Any benefit from the testimony of these witnesses would be outweighed by the detriment of the court hearing information on Applicant's gang affiliation. She did not call them as witnesses. She elected to call his teachers from the detention center and other employees to testify about Applicant's progress and positive attitude while detained in an effort to show that he could be rehabilitated within the juvenile system.

Campbell-Williams asked the prosecuting Assistant Solicitor several times if the State would withdraw its waiver motion and allow Applicant to plead guilty, as requested by Applicant. The State was unyielding and insisted that it was seeking waiver due to the severity of the crimes. This was not her first waiver hearing, and although waiver hearings are rare, she has had three total in her career. The other waiver hearings in which Campbell-Williams participated resulted in a denial of waiver and the family court keeping jurisdiction of the juvenile, but those were primarily property offenses. One of the largest impacts in Applicant being waived to General Sessions was that the victims in this case were "very sympathetic" and the crimes were very serious. The victims were present at the waiver hearing.

Campbell-Williams spent a significant portion of time talking to Applicant and explaining various aspects of the waiver process to him. She explained to him that waiver was not immediately appealable, but that if he was waived to General Sessions and found guilty following a trial, he could argue that his waiver was improper on appeal. She elaborated that as a waiver hearing is strictly jurisdictional and not a hearing on the merits, it cannot be appealed until a final disposition of the charges is reached. The waiver hearing is not the appropriate time to challenge evidence, such as the videotaped interview of Applicant. All of this was explained to Applicant and his parents.

Applicant questioned Campbell-Williams about the propriety of his arrest under juvenile statutes and the lack of immediate contact to his parents. She is intimately familiar with the statutes in question and that no statutes were violated by law enforcement regarding Applicant's arrest, including any statutes regarding the notification of Applicant's parents. Law enforcement was "compliant" with South Carolina law and if she had seen any errors with his arrest, she would have brought it to the attention of the court and challenged his arrest. Campbell-Williams did not want Applicant to be waived to General Sessions; she believes "all children's cases should be handled in family court" because there is a better likelihood of rehabilitative services

available for juveniles compared to the adult system. Her representation of Applicant ceased when he was waived to General Sessions and was assigned a new attorney.

Luke Shealey testified that he has been practicing law since 2006 and was employed at the Richland County Public Defender's Office during his representation of Applicant. He was appointed immediately after Applicant's waiver to General Sessions. Although he has represented more than five thousand clients, he recalled Applicant's case well because it was so memorable due to the severity of the crimes and the sympathetic victims. Shealey represented Applicant for approximately a year-and-a-half and met with him an average of once a month, likely between twelve to fifteen times. He also met with Applicant's parents three to four times. Once he was appointed, he filed all necessary discovery motions and received all discovery materials soon thereafter. All discovery materials were reviewed with Applicant and discovery was "not at issue in the present case." This was a "tough case" with numerous statements from Applicant, as well as statements from his co-defendant, the elderly victims, and other witnesses. There was also a photo line-up where the victim identified Applicant and his co-defendant. The statements from Applicant were "incriminating" and Shealey described Applicant's videotaped confession as "the strongest evidence against him" and "powerful evidence for the State." He testified that it is rare to have a videotaped confession, as many law enforcement agencies do not record interviews with suspects. In this case, having a video recording of the confession was detrimental to Applicant because it exemplified that Applicant's confession was freely and voluntarily given after an informed waiver of his rights. He discussed possible suppression of this confession and his other statements with Applicant, but advised him that suppression was not likely. Shealey elaborated that there were no legitimate grounds on which the tape could be suppressed, as he was clearly advised of his rights, waived his rights, and signed a written waiver, all on camera, before giving a free and voluntary confession without any threats, force, or coercion. He testified that this was a "slam dunk case based on the evidence" and advised Applicant that he would likely be convicted if he proceeded to trial. Applicant had no alibi or other type of defense that he could likely set forth at trial. He advised Applicant that if Applicant wanted to proceed to trial, he would move for a hearing to attempt to suppress his confessions, but that if he did so, all plea offers would likely be withdrawn at that time. Shealey testified that he has never attempted to suppress a statement based on "friendliness" or heard of any other

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attorneys in the area attempting to do so, and does not think that suppression based on such a ground would be successful.

Applicant told him numerous times that he did not want a trial and wanted Shealey to secure the best plea offer possible. He negotiated a plea with the State that would allow Applicant to receive a sentence within the range of twenty to twenty-five years, which he presented to Applicant. Applicant turned this offer down and stated that although Applicant clearly did not want to proceed to trial, he appeared to "want a different outcome" where his charges just went away.

Shealey had Applicant evaluated by Dr. Donna Schwartz-Watts for mitigation to be used at a guilty plea proceeding. Dr. Schwartz-Watts found that Applicant was both criminally responsible and competent. He intended to present Dr. Schwartz-Watts during the mitigation portion of Applicant's guilty plea.

Shealey's representation of Applicant ceased in May 2010 when Jerry Finney was retained. Although he does not have any independent recollection of discussing the case with Finney, he is sure he did because the two know each other well and he typically gives new counsel a copy of his file and any discovery. Although he was no longer counsel of record, he happened to be in the courtroom for Applicant's guilty plea. He testified that he also discussed the State's plea offer with Applicant and Counsel shortly before Applicant's plea and was asked to do so by Counsel due to his familiarity with the case.

Counsel (Jerry Finney) testified that he has been practicing law for twenty years and that most of his practice is criminal defense. Applicant was well known by Counsel because of their church. He was retained by Applicant's family in May 2010 and immediately thereafter he sent out a letter of representation to all parties and requested a preliminary hearing.[6] He also immediately visited with Applicant and his parents. This case was very important to law enforcement and the solicitor's office due to the severity of the crimes and the victims.

Counsel also sent discovery motions to the solicitor's office in accordance with his customary practice. He discussed the case with Shealey at length and had "a good idea of what evidence the State had" against Applicant. He received discovery in mid-July and reviewed the materials with Applicant. Applicant informed him that he had viewed all discovery materials with Shealey and knew what evidence the State would present against him at trial. Counsel is

[6] These letters were introduced as Applicant's Exhibit No. 5.

"absolutely" certain that he showed Applicant a copy of his videotaped statement, recalling that he met with Applicant in the multipurpose room at Alvin S. Glenn Detention Center twice so that he could view the videotape. He did not think the statements would likely be suppressed, which he explained to Applicant. Counsel elaborated that the statements were made after being advised of his rights several times, giving oral and written waivers of these rights, and after Applicant was allowed to speak to his adult brother. No threats were made nor was any coercion present and Applicant's statements were freely and voluntarily made. He also explained to Applicant that he could seek to suppress the statement prior to trial in a hearing, but once he moved for suppression, all plea offers would be withdrawn by the State. Counsel explained that he has worked with this particular prosecuting assistant solicitor several times throughout his career and that her standard practice is that all plea offers are withdrawn once pre-trial motions are made, such as a motion to suppress. He testified that Applicant never indicated that he wanted a trial and stated that "Nick always wanted a plea."

Counsel also discussed the elements of the four offenses with Applicant, as well as what the State would be required to prove at trial. He also reviewed the potential sentences with Applicant, including that Burglary in the First Degree carries a maximum sentence of life imprisonment. Applicant never denied his involvement in the crime and wanted to accept responsibility and plead guilty from the beginning of his representation. The evidence against Applicant was "extremely strong" and would likely result in conviction if he proceeded to trial, which he explained to Applicant and his family. Counsel entered into plea negotiations with the State and received an offer of twenty to twenty-five years imprisonment. He conveyed this offer to Applicant and advised him to accept this offer. He tried to get a better offer from the State to no avail.

In terms of investigation, there was not much to investigate, as all witnesses had provided statements to law enforcement and those statements were produced in discovery. He was unable to interview Applicant's co-defendant because he was represented by counsel and was also awaiting disposition of his charges. Counsel did not think a private investigator was necessary for this case, but that if Applicant or his parents wanted to retain an investigator, he would have found and worked with an investigator at their cost as agreed when Counsel was retained.

Counsel was notified by the State in early July that Applicant's case would be called for trial that month or shortly thereafter.[7] Counsel informed Applicant and his family that Applicant's trial date was imminent and that everyone needed to be prepared. Because Applicant had always intended to plead guilty, Applicant and his family understood that a plea would happen soon before the case was called to trial. Applicant's parents understood this but elected to take a family vacation to Myrtle Beach the week of Applicant's plea. He knew Applicant's parents were at the beach and called them the morning of the plea to ask them to return to Columbia as soon as possible. He informed Applicant and his parents that he would try to seek a continuance, but that everyone needed to be prepared in the event that the continuance was denied by the court. Counsel moved for a continuance on August 9, 2010, on the basis that he had just recently received discovery from the State and that Applicant's parents and other witnesses were unavailable. He testified that the court denied his continuance request but allowed him two days to review discovery and prepare. That day was the first time Applicant ever indicated he wanted to proceed to trial. Counsel testified that until that point Applicant had consistently stated that he wanted to plead guilty. Applicant was facing a significant period of incarceration and was hesitant to accept the guilty plea as it got closer to his trial date. Although the plea offer from the State was favorable, it was "a hard pill to swallow" for Applicant and his parents because of Applicant's age. Counsel again advised Applicant that he would likely be convicted at trial based on the State's overwhelming evidence, but advised him of all trial and appellate rights. Counsel advised Applicant again that if he proceeded to trial, Counsel would seek to suppress his statements, which could then be raised on appeal. Counsel testified that he also explained to Applicant that he could challenge his waiver if he proceeded to trial and was convicted.

To prepare Applicant for his guilty plea, Counsel again reviewed all the discovery with Applicant. Between August 9th to 11th all of the time was spent preparing Applicant for his guilty plea. Shealey also spoke with Applicant regarding the State's plea offer at Counsel's request and in his presence, because he felt so strongly that Applicant would be convicted at trial and face a much harsher sentence if he did not accept the State's favorable plea offer. Ultimately it was Applicant's decision to plead guilty, and that once Applicant decided to do so, Counsel

[7] Applicant introduced a letter from prosecuting Assistant Solicitor Luck Campbell to that effect dated July 1, 2010 as Applicant's Exhibit No. 6.

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spoke with the court and State to arrange for deferred sentencing to allow Applicant's parents and additional witnesses to be present. Sentencing deferred until September 1, 2010, which provided additional time to subpoena all necessary witnesses and have Applicant's parents present. Counsel presented several witnesses on Applicant's behalf in mitigation, including Dr. Schwartz-Watts, Applicant's pastor, Applicant's mother, and an employee from the Alvin S. Glenn Detention Center. Counsel advised Applicant that he should apologize and accept responsibility at his guilty plea hearing. He testified that the court sentenced Applicant to twenty-two years pursuant to negotiations, which he was "very, very fortunate" to receive.

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 evidentiary 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. This Court finds that the testimony of Counsel, Campbell-Williams, and Shealey is credible and should be afforded great weight; in contrast, this Court finds that the testimony of Applicant and his mother to be primarily self-serving and therefore lacking somewhat in credibility. 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 his or her application. Rule 71.1(e), SCRCP; 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 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 that 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 that 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. Where there is overwhelming evidence of guilt, an applicant cannot show that but for counsel's alleged errors, the result of the proceeding would have been different. Harris v. State, 377 S.C. 66, 79-80, 659 S.E.2d 140, 147 (2008).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L. Ed. 2d 162 (1970)).

After careful review based on the standard discussed above, this Court finds that Applicant has failed to carry his burden in this action. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel:

Allegations against Family Court Counsel

Applicant alleges that family court counsel was ineffective in preparation for and during the waiver hearing held on February 24, 2009. Specifically, Applicant alleges that counsel failed to: address the legality of Applicant's arrest and voluntariness of Applicant's statement; prepare or utilize Applicant or his parents as witnesses on Applicant's behalf at the waiver hearing; and make an effective argument against waiver. This Court finds that the credible testimony of Campbell-Williams strongly refutes these allegations, which must be denied and dismissed with prejudice.

In regards to Applicant's first allegation that counsel failed to address the legality of Applicant's arrest, this Court finds that this allegation is clearly refuted both by the testimony presented and applicable case law and statutes. Applicant's mother testified that she was notified

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by her adult son Victor that Applicant had been taken into custody by the Irmo Police Department at midnight, less than two hours from when law enforcement first approached Applicant regarding the incident. The Irmo Police Department also allowed Applicant to call his mother at approximately 3 a.m. based on the testimony of Applicant and his mother. Applicant left a message to advise her that he was being taken to the Alvin S. Glenn Detention Center and instructed her to call Sergeant Wilson for more information. Applicant's mother testified that she spoke with Sergeant Wilson at 8 a.m. the following morning. Campbell-Williams testified that she is intimately familiar with the various sections of the South Carolina Code pertaining to juvenile arrests and detainment and that Applicant's detainment, questioning, and arrest were in compliance with South Carolina law.

In support of his position that his arrest was illegal, Applicant cites to S.C. Code Ann. § 63-19-810 (A), which states that law enforcement "shall notify the parent, guardian, or custodian of the child as soon as possible." However, no time limit is provided within the statute and Applicant cites to no case law or other authority to support his position that notification within hours of his detention does not comply with the statute. The South Carolina Supreme Court examined the issue of parent notification and illegal custody in In re Williams, 265 S.C. 295, 298-9, 217 S.E.2d 719, 721 (1975), and held: "[W]e conclude that the record fails to sustain the claim that the parents of appellant were not notified of his arrest "as soon as possible" within the meaning of [the statute]." Williams' mother appeared at the jail about five hours after he had been arrested. She received information about the arrest some time prior to her appearance at the jail. There was no testimony or evidence about who notified her or when she was notified. Based upon Williams, notification within several hours of detention is sufficient.

Additionally, Applicant's older brother who was 18 years old was listed by law enforcement as Applicant's guardian. See Juvenile Petition attached Preadjudicatory Transfer (Waiver) Evaluation (Respondent's Exhibit 1). Victor was aware that Applicant was in the custody of law enforcement and contacted his parents. This Court finds that the necessary parties were notified of Applicant's detainment within the period as proscribed by law and that Applicant's detention and subsequent arrest was valid and legal. Therefore, this Court finds that counsel was not deficient for failing to challenge his valid and legal arrest. This Court finds that Applicant has failed to meet his burden of establishing that family court counsel was ineffective

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for failing to challenge the legality of his arrest and that this allegation must be denied and dismissed with prejudice.

In regards to Applicant's second allegation that counsel was ineffective for failing to challenge the voluntariness of his statement, this Court finds that Applicant has failed to meet his burden in regards to this allegation. Campbell-Williams testified that almost immediately upon her appointment, the State informed her that it was seeking waiver of the charges to General Sessions and that her primary focus was keeping Applicant's case within family court jurisdiction. She testified that a waiver hearing is purely jurisdictional in nature and challenging Applicant's confession would not have been appropriate at that time. Campbell-Williams testified that she reviewed all of Applicant's statements to law enforcement and did not think suppression was likely, but nonetheless, would have made such an argument at the appropriate time before a hearing on the merits had the case not been waived to General Sessions. This Court agrees with counsel and finds that Applicant's waiver hearing was not the appropriate time to raise a challenge to the voluntariness of Applicant's statements, as the hearing was not on the merits and merely to determine which court would have jurisdiction over Applicant in regards to these four offenses.

Applicant has alleged that counsel should have addressed the voluntariness of his statement. The Court in In re Williams further reasoned:

> Assuming however that appellant was held in illegal custody, such fact alone does not render his inculpatory statement inadmissible. We have held that every statement or confession made by a person in illegal custody is not involuntary and inadmissible, 'but the facts and circumstances surrounding such arrest and the in-custody statement should be considered in determining whether the statement is voluntary and admissible. Voluntariness remains as the test of admissibility.' State v. Funchess, 255 S.C. 385, 179 S.E. (2d) 25; State v. Bishop, 256 S.C. 158, 181 S.E. (2d) 477.

265 S.C. at 299-300, 217 S.E.2d at 721.

The voluntariness of statements of juveniles is reviewed under the totality of the circumstances. In State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007), the South Carolina Supreme Court instructed:

> In determining whether a confession was given "voluntarily," this Court must consider the totality of the circumstances surrounding the defendant's giving the confession. Schneckloth v. Bustamonte,

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> 412 U.S. 218, 226, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). As the United States Supreme Court has instructed, the totality of the circumstances includes "the youth of the accused, his lack of education or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep." Id. (Internal citations omitted). Furthermore, no one factor is determinative, but each case requires careful scrutiny of all the surrounding circumstances. Id.

373 S.C. at 566. The Applicant approached law enforcement informing them of the wrongful acts he had committed. He was advised of his rights not once but twice before he gave any statements. The interrogation by law enforcement was videotaped during which the advice of rights was read a second time and a written waiver was obtained. Applicant acknowledges that he understood those rights. He stated that he wanted to talk to Investigator Wilson. Applicant answered all questions and gave information relating to the events without coercion. Although Applicant states that he requested to talk with his parents, he did not make such a request to Investigator Wilson who was questioning him. The detention was not lengthy and there was not prolonged or lengthy questioning of Applicant. There is no evidence on the video that he was deprived of any physical comforts. Based upon the videotape and the transcript of record of the waiver hearing, this Court agrees that it was unlikely that the statements made by Applicant would be excluded. This Court finds that counsel's performance was not deficient and therefore this allegation must be denied and dismissed with prejudice.

This Court also finds that Applicant's allegations that counsel was ineffective for failing to prepare or utilize Applicant and his parents as witnesses for the waiver hearing is without merit. Campbell-Williams testified that she met with Applicant over twenty times and met with Applicant's family on several occasions. She discussed calling Applicant and his parents as possible witnesses at his waiver hearing and that she reviewed the positives and negatives with Applicant. Specifically, she advised Applicant that if he or his parents testified in his defense, they would be subject to cross-examination by the State. According to Campbell-Williams, Applicant was adamant that he did not want his father to testify due to substance abuse and other personal problems. Applicant ultimately did not want his mother to testify due to concerns that cross-examination from the State would put too much stress on her. She also testified that Applicant decided not to testify as well because he did not want to be subject to cross-

examination from the State. Campbell-Williams testified that it was Applicant's decision alone to decide whether or not he or his parents would testify at the waiver hearing, which she explained to Applicant's mother.

Campbell-Williams strongly refuted the claims made by Applicant's mother that she would not allow Applicant's mother to speak at the hearing and explained that she told Applicant's mother that she could not make a statement to the court without being called as a witness and subject to cross-examination. Further, Applicant wanted to admit the allegations during the waiver hearing. Campbell-Williams testified that the Assistant Solicitor would not withdraw the waiver of the charges to General Sessions even if Applicant admitted wrongdoing. Thus, there was no benefit to Applicant to allow him to further incriminate himself at the waiver hearing when that testimony could be used against him at any trial. As previously determined, this Court finds Campbell-Williams' testimony to be credible and her explanation as to why Applicant and his parents were not called as witnesses to be reasonable and logical given the circumstances of Applicant's case. Therefore, this Court finds that counsel was not deficient in regards to this allegation.

Furthermore, the Court finds that Applicant has failed to establish any resulting prejudice from this alleged deficiency of counsel. Applicant and his mother both testified that they were deprived of their opportunity to address the court and argue against waiver by counsel's decision not to call either as witnesses during the waiver hearing. However, this Court is not persuaded by this argument, as both Applicant and his mother were interviewed extensively during the pre-waiver evaluation process and input from both is readily evident in the Preadjudicatory Transfer (Waiver) Evaluation (Respondent's Exhibit No. 1). This report was part of the family court record and was utilized by the family court in its decision, as evidenced in the Waiver Order (Applicant's Exhibit No. 3). Additionally, Campbell-Williams testified that such reports are heavily relied on in waiver hearings and that Applicant's report was provided to the court well in advance of the hearing and discussed with all parties thoroughly. This Court finds that Applicant has failed to meet his burden of establishing any prejudice from this alleged deficiency and this allegation must be denied and dismissed with prejudice.

Finally, Applicant alleges that counsel was ineffective for failing to make an effective argument to the family court against waiver. However, the family court waiver hearing transcript and the credible testimony of Campbell-Williams refute this allegation. The transcript

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reveals that Counsel called various witnesses to testify on Applicant's behalf in regards to various Kent factors that were to be analyzed by the court, including Applicant's maturity, intelligence, and likely success for rehabilitation. Counsel testified that she considered calling additional witnesses from the community, but after interviewing such witnesses as recommended by Applicant and his parents, she made a strategic decision not to call them as all stated that Applicant was a known gang member who was frequently in trouble. This Court finds that counsel made a strategic decision in what witnesses to call, and more importantly, in regard to what witnesses not to call, on Applicant's behalf. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992); see also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005), McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Additionally, the record reveals that Campbell-Williams made an argument against waiver to the court and this Court finds nothing in this argument to be deficient or improper. Furthermore, Applicant has failed to cite to any additional argument or additional witness (beyond his parents) that Campbell-Williams could have or should have made on his behalf. The mere contention that counsel must have made an ineffective argument against waiver because the argument was unsuccessful is not persuasive to this Court. This Court finds that Counsel's performance was reasonable and effective and that this allegation must be denied and dismissed with prejudice.

Based on the foregoing reasons, this Court finds that Counsel's performance was within the range of competency required and that Counsel's performance was not deficient. Additionally, this Court finds that Applicant has failed to establish any resulting prejudice from Counsel's alleged deficiencies. Applicant has failed to meet his burden as required by Strickland; this Court finds that the allegations against family court counsel must be denied and dismissed with prejudice.

Allegations against General Sessions Counsel Jerry Finney

Applicant alleges that Counsel rendered ineffective assistance throughout his representation. Specifically, Applicant alleges that Counsel was ineffective for: failing to conduct an independent investigation and properly prepare Applicant for trial; failing to file pre-trial motions regarding Applicant's arrest, statement and waiver hearing; failing to notify Applicant and his parents regarding the scheduling of the plea proceeding and to ensure that

Applicant's plea was freely and voluntarily made; and for advising Applicant to plead guilty, thereby waiving his ability to challenge his arrest, statement and waiver hearing on appeal. As discussed above, this Court finds Counsel's testimony, along with the testimony of former counsel Luke Shealey, to be credible and relevant. This Court finds that Applicant has failed to meet his burden in regards to all of these allegations against Counsel and that these allegations must be denied and dismissed with prejudice.

In regards to Applicant's first allegation that Counsel was ineffective for failing to conduct an independent investigation and properly prepare Applicant for trial, this Court finds that Applicant has failed to establish that Counsel was deficient. Counsel testified that he met with Applicant numerous times before his guilty plea and reviewed all offenses with him, discussed possible sentencing ranges, and reviewed various trial and appellate rights with him, as well as explained how those rights would be impacted if Applicant elected to forgo a trial and enter a guilty plea. Counsel testified that he reviewed all discovery materials with Applicant more than once before his guilty plea, including showing him the videotaped confession twice. Additionally, Counsel and Shealey testified consistently that Applicant had already reviewed all discovery materials extensively with Shealey and that Applicant was well aware of what evidence the State had against him. This Court is not persuaded by Applicant's self-serving statements that he had not reviewed discovery before his guilty plea, particularly when Applicant was represented by three attorneys who all consistently testified that they showed all available discovery materials to him numerous times. This Court finds that Counsel's performance was reasonable and effective and that Applicant has failed to meet his burden of establishing deficiency in regards to preparing Applicant for his guilty plea.

Furthermore, this Court finds that Applicant has failed to show what additional investigation could have been performed or how it would have had any impact on his case. When questioned as to what additional investigation he wanted Counsel to conduct, Applicant stated he "wanted Counsel to look at waiver hearing to see if it could be appealed" and stated that there really was no other investigation that Counsel could have accomplished. Counsel testified that there was not much investigation that could have been done when he took over the case, as Applicant's co-defendant was represented by counsel and would not speak to him and all other witnesses had given statements he received in discovery. This Court finds that Applicant

has failed to establish any deficiency or resulting prejudice in regards to this allegation, which must be denied and dismissed with prejudice.

Regarding Applicant's allegation that Counsel was ineffective for failing to file pre-trial motions to challenge Applicant's arrest, statement, and waiver hearing, this Court again finds that Applicant has failed to satisfy his requisite burden of proof. As discussed above in regard to family court counsel, this Court finds that Applicant's detention and arrest were valid, and therefore, Counsel cannot be deemed deficient for failing to challenge a lawful arrest.

As to his statement, Applicant alleges that the statement should have been deemed involuntary and suppressed based on excessive friendliness and a lack of parental presence. This Court is not persuaded by this argument. This Court has reviewed the forty-two minute interview of Applicant by Sergeant Wilson. Sergeant Wilson's demeanor cannot be characterized as "excessively friendly." Sergeant Wilson's conduct was appropriate in dealing with a teenager, especially one accused of serious crimes. Furthermore, this Court does not find any other factors present that commonly support suppression, such as threats or coercion, excessively long detention, depravation of creature comforts, and low intellect. See State v. Pittman, supra (reviewing the factors for a court to consider when determining if a juvenile's statement is voluntary based on a totality of the circumstances). This Court notes that in Pittman, our Supreme Court held that a twelve year old minor's confession to murdering his grandparents was admissible despite his youth and that the absence of counsel, parent, or other interested adult did not render confessions of juveniles per se involuntary. In the present case, Applicant was advised numerous times of his right to counsel and voluntarily elected to waive those rights and provide statements to law enforcement on more than one occasion and after speaking with his adult brother. Counsel and Shealey both testified that they discussed suppression of his statement with Applicant and advised Applicant that they would make such a motion and argue for suppression if Applicant elected to proceed to trial. Both Counsel and Shealey testified and this Court agrees that suppression would not have been likely, particularly when the videotaped confession provides strong support that the statement was freely and voluntarily given. This Court finds that Applicant has failed to meet his burden of establishing deficiency of Counsel for failing to move to suppress his statements. Additionally, this Court finds that Applicant has failed to establish any resulting prejudice, as such a motion would not have been granted had it been made.

Regarding Applicant's allegation that Counsel was ineffective for failing to file pre-trial motions challenging his waiver, this Court finds that this allegation is without merit and must be dismissed. A family court order transferring jurisdiction over a defendant to court of General Sessions is interlocutory and not subject to immediate appeal. State v. Lockhart, 275 S.C. 160, 267 S.E.2d 720 (1980). Before a final disposition on the merits, Applicant could not have challenged his waiver, either by a pre-trial motion or any other legal argument. This Court finds that Counsel was not deficient for not filing pre-trial motions challenging Applicant's waiver to General Sessions, and therefore, this allegation must be denied and dismissed with prejudice.

Additionally, Applicant alleges that Counsel was ineffective for failing to notify Applicant and his parents regarding the scheduling of the plea proceeding. This Court finds that the credible testimony of Counsel refutes this allegation, which must be denied and dismissed with prejudice. Counsel testified that he received notice from the State in early July that Applicant's case would be called for trial within the immediate future; this testimony is supported by Applicant's Exhibit No. 6. Counsel testified that he immediately informed Applicant and his parents that his case would be called for trial soon and that everyone needed to be prepared. Applicant consistently told his attorney he wanted to plead guilty and that based on these repeated assertions, Counsel continued to prepare Applicant for a guilty plea. Counsel testified that despite his conversations with Applicant's parents that their son's case would be called for trial soon, his parents elected to go on a family vacation. Counsel testified that on the morning of Applicant's plea, he called Applicant's mother and asked if they could return to Columbia at once. Counsel testified that he moved for a continuance based on the unavailability of Applicant's parents, which was denied, and then moved for and was granted a deferred sentencing to allow Applicant's parents to be present and address the court.

This Court finds that Counsel's performance was reasonable in accordance with professional norms and that Applicant has failed to establish deficiency in regards to this allegation. Furthermore, this Court finds that Applicant has failed to establish any resulting prejudice, as Counsel was able to defer sentencing to allow Applicant's parents to address the plea court on their son's behalf during sentencing. Additionally, Applicant and his parents were aware of the plea offer and had ample time to discuss the plea prior to the date of the plea. Therefore, this allegation must be denied and dismissed with prejudice.

In regards to Applicant's final allegation that Counsel was ineffective for advising Applicant to plead guilty, thereby waiving his ability to challenge his arrest, statement, or waiver on appeal, this Court finds that Applicant has again failed to establish his required burden of proof. Counsel testified that he advised Applicant of his appellate rights, including his ability to challenge his arrest, statement, and waiver to General Sessions if he proceeded to trial. Additionally, Campbell-Williams testified that she advised Applicant that he would be able to challenge his waiver on appeal if he proceeded to trial. This Court is confident that Applicant was well advised of his various appellate rights following this representation by three respected and well-seasoned criminal defense attorneys throughout his case. This Court finds that Applicant has failed to establish any deficiency of Counsel, and therefore, that this allegation must be denied and dismissed with prejudice.

Furthermore, this Court finds that Applicant has failed to establish any resulting prejudice from Counsel's alleged deficiency. As discussed above at length, this Court finds that challenges to Applicant's arrest and statement would not likely be successful, either as pre-trial motions or on appellate review. In regards to Applicant's waiver to General Sessions, this Court finds that Applicant again would not likely have been successful on appeal. The decision to transfer jurisdiction lies within the discretion of the family court and the appellate court will affirm the family court's decision absent an abuse of discretion. Pittman, 373 S.C. at 559, 647 S.E.2d at 161. In the present case, the family court issued an Order setting forth a sufficient statement for the transfer to General Sessions after hearing testimony at the waiver hearing and reviewing the required Preadjudicatory Transfer (Waiver) Evaluation. The Order is "sufficient to demonstrate that the statutory requirement of full investigation has been met and that the question has received full and careful consideration by the family court." Id. Applicant has failed to demonstrate to this Court that a challenge of his waiver would have been successful on appeal, and therefore has not met his requisite burden of prejudice.

Additionally, there is overwhelming evidence of Applicant's guilt in this case, and Applicant cannot demonstrate that but for counsel's alleged errors, the results of the proceeding would have been different. Based on the foregoing, this Court finds that Applicant has failed to meet his burden of proof of both deficiency and prejudice in regards to his allegations that Counsel was ineffective. Therefore, this Court finds these allegations must be denied and dismissed with prejudice.

CONCLUSION

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

This Court notes that 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 (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. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief shall be denied and dismissed with prejudice; and

2. The Applicant shall remain remanded to the custody of the State.

AND IT IS SO ORDERED.

ALISON RENEE LEE
Presiding Judge
Fifth Judicial Circuit

February 27, 2015
Columbia, South Carolina

arl #23

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FORM 4

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

JUDGMI `IN A CIVIL CASE

CASE NUMBER: 2011CP4000423

Nicholas #342520 Nesmith

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (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 _____

RICHLAND COUNTY FILED 2015 MAR 26 AM 11:34 JEANETTE W. GRAHAM CLERK OF COURT

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 (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ **day of** _____, **20** _____ and a copy mailed first class or placed in the appropriate attorney's box on this 26 March 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Nicholas #342520 Nesmith
Tricia A. Blanchette

Eleanor Duffy Cleary

Megan Harrigan Jameson

Nicholas #342520 Nesmith

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND**	**IN THE COURT OF COMMON PLEAS** **FIFTH JUDICIAL CIRCUIT**
Nicholas Nesmith, #342520, Applicant, v. State of South Carolina, Respondent.	Civil Action No.: 2011-CP-40-00423 **ORDER**

This matter comes before the Court on Applicant's Motion for Rehearing pursuant to Rule 59(a), SCRCP, and/or Motion to Alter or Amend pursuant to Rule 59(e), SCRCP. Applicant's application for post-conviction relief came before the court for an evidentiary hearing on March 19, 2014. Thereafter, the Court signed an Order of Dismissal on February 27, 2015, which was filed March 2, 2015. Applicant filed this motion on March 11, 2015.

After careful consideration of the motion made, memoranda submitted, and the record in this case, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby **DENIES** Applicant's Motion for Rehearing pursuant to Rule 59(a), SCRCP, and/or Motion to Alter or Amend pursuant to Rule 59(e), SCRCP. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

AND IT IS SO ORDERED.

ALISON RENEE LEE
Presiding Judge

March 25, 2015
Columbia, South Carolina