

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Honorable Larry B. Hyman, Circuit Court Judge

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S.C. SUPREME COURT

KENNETH NELSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001066

APPENDIX

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1 STATE OF SOUTH CAROLINA }
2 COUNTY OF SPARTANBURG } COURT OF GENERAL SESSIONS
3
4 STATE OF SOUTH CAROLINA,)
5 PLAINTIFF,)
6 VS.)
7 KENNETH WAYNE NELSON,)
8 DEFENDANT.)
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TRANSCRIPT

OF

RECORD

2013-GS-42-2868
2012-GS-42-5000
2012-GS-42-5000(A)

October 10th, 2013
Spartanburg, South Carolina

B E F O R E:

THE HONORABLE ROGER L. COUCH, Judge.

A P P E A R A N C E S:

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Attorney for the State

JAMES CHEEK
ASSISTANT PUBLIC DEFENDER
Attorney for the Defendant

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Circuit Court Reporter
Seventh Judicial Circuit

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E X H I B I T S

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C-1	Statement		29
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P R O C E E D I N G S

THE COURT: All right. You may call the case.

SOLICITOR WELBORN: Thank you, Your Honor.

Before you is Kenneth Nelson represented by James Cheek.

Mr. Nelson is before the Court on 2013-GS-42-2868, lewd act on a minor.

Also two counts of exposure of private parts, 2012-GS-42-5000 and 5000(A).

The recommendation from the State is a cap of ten years on the lewd act with the two counts of exposure of private parts to run concurrent. And, for the record, Your Honor, the State's dismissing an indictment for criminal sexual conduct with a minor in the second degree as part of this plea agreement.

THE COURT: Thank you.

MR. CHEEK: Your Honor, due to a drinking problem with my client, these charges are offered for a plea under Alford versus the State of North Carolina if the Court would allow us.

THE COURT: Is the State willing to accept a plea in that fashion?

SOLICITOR WELBORN: Yes, Your Honor. I failed to mention that.

1 THE COURT: All right. Thank you, Mr. Cheek.

2 Please swear the defendant.

3 THE CLERK: Yes, sir.

4 (WHEREUPON, the defendant was placed under oath at this
5 time.)

6 THE COURT: Is your name Kenneth Wayne Nelson?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Mr. Nelson, you're in front of me today on
9 three charges. I'm going to go over the charges with you
10 and to be sure you understand the, the nature of the
11 charges.

12 First of all, Case Number 2013-2868, that's a charge
13 for lewd act upon a minor. That particular charge carries a
14 possible sentence of up to 15 years and/or a fine in the
15 discretion of the Court. I will tell you that that
16 particular offense carries with it a plea in the case or a
17 conviction in that case would carry with it a requirement of
18 mandatory GPS monitoring for life.

19 Do you understand that, sir?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: The case has been indicted by the Grand
22 Jury. The State has made a recommendation of sentencing in
23 your case. It is a recommendation and I certainly will
24 consider it. However, I'm not required to follow that. I
25 could sentence you up to the full 15 years and a fine.

1 Do you understand that, sir?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Now, the other charges, they're both the
4 same, the cases are 2012 Number 5000 and 5000(A). Those
5 particular cases are for exposure of private parts in a lewd
6 and a lascivious manner. Those both carry up to six months
7 and/or a fine of up to \$500. They both have been indicted
8 by the Grand Jury. There is a recommendation of concurrent
9 sentencing in those cases with the first one that I just
10 went over.

11 Are you aware of that?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: All right. Now, sir, do you suffer from
14 any mental, physical, or nervous problems that would affect
15 your ability to reason or make good decisions today?

16 THE DEFENDANT: No, sir.

17 THE COURT: Have you taken or used any drugs,
18 medications, or other substances that might have that
19 effect?

20 THE DEFENDANT: No, sir.

21 THE COURT: So, do you understand what you're doing?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Are you able to handle your plea today?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: You're here with Mr. Cheek.

1 Is he your lawyer on the charge?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Are you satisfied with his services?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Is there anything else you'd like to talk
6 with him about?

7 THE DEFENDANT: No, sir.

8 THE COURT: And is there anything else you feel that he
9 should do for you before we go forward with these pleas?

10 THE DEFENDANT: No, sir.

11 THE COURT: All right. Now, it's my understanding,
12 Mr. Nelson, that, from Mr. Cheek, is that you are here to
13 offer a plea under the case of North Carolina -- Alford
14 versus North Carolina, is that correct?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Now, that tells me that you are intending
17 to plead no contest to these charges.

18 Is that true?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Now, it also means to me, Mr. Nelson, that
21 you and your lawyer, Mr. Cheek, have gone over the evidence
22 that's in the possession of the State, and based upon your
23 review of that evidence, it's your belief, as well as
24 Mr. Cheek's belief, that, if that evidence were presented to
25 a jury during a trial, that it would more than likely result

1 in your conviction, and that, although you're not admitting
2 guilt, you are not contesting the charge for that reason.

3 Is that correct?

4 THE DEFENDANT: Correct.

5 THE COURT: Now, I will advise you, Mr. Nelson, that an
6 Alford plea carries the same sentencing possibilities as a
7 guilty plea.

8 Do you understand that?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Also, I will tell you that it will appear
11 as a conviction on your record for these charges.

12 Do you understand that as well?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: All right. Now, Mr. Cheek, have you
15 discussed with Mr. Nelson the nature of the charges?

16 MR. CHEEK: I have, Your Honor.

17 THE COURT: Have you discussed with him the potential
18 penalties that are involved?

19 MR. CHEEK: I have, Your Honor.

20 THE COURT: Have you explained to him any defenses he
21 may of had to the charges?

22 MR. CHEEK: Yes, sir, Your Honor, we've done that.

23 THE COURT: And have you also explained to him the
24 other possibilities or methods of pleading the case?

25 MR. CHEEK: Yes, sir, I have.

1 THE COURT: Have you gone over with him his
2 Constitutional rights as they relate to these charges?

3 THE DEFENDANT: I have, Your Honor.

4 THE COURT: And is he aware of any defenses that you
5 understand that he might have?

6 MR. CHEEK: Yes, sir, he is aware.

7 THE COURT: He tells me he's made a decision to offer a
8 no contest plea.

9 Do you agree with the decision he made?

10 MR. CHEEK: I do, Your Honor.

11 THE COURT: And has he been able to assist you in his
12 defense in this process?

13 MR. CHEEK: Yes, sir, he has.

14 THE COURT: Now, Mr. Nelson, you are 45 years of age.
15 Is that accurate?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: How far did you go in school?

18 THE DEFENDANT: Tenth grade.

19 THE COURT: Did you ever get your GED?

20 THE DEFENDANT: No, sir.

21 THE COURT: Are you married?

22 THE DEFENDANT: No, sir.

23 THE COURT: Do you have children?

24 THE DEFENDANT: One.

25 THE COURT: What age is that child?

1 THE DEFENDANT: She's sixteen right now.

2 THE COURT: All right. Does that child live at your
3 home or the home of someone else?

4 THE DEFENDANT: The home of my ex-wife.

5 THE COURT: All right. Did you have employment before
6 you were arrested?

7 THE DEFENDANT: I did.

8 THE COURT: And where did you last work?

9 THE DEFENDANT: Pickens Roofing and Sheet Metal.

10 THE COURT: Okay. Now I'll let Mr. Cheek take care of
11 that with you.

12 Go ahead and do that.

13 (Pause.)

14 THE COURT: All right. Now, sir, is anyone done
15 anything to you such as threaten you or put pressure on you
16 or done something to try to force you to offer these pleas?

17 THE DEFENDANT: No, sir.

18 THE COURT: So, are you doing this freely and
19 voluntarily?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Have you had enough time to think about
22 these charges?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Have you had enough time to prepare a
25 defense to the charges if you wanted to do that?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Has anyone made any promises, guarantees,
3 or assurances to you about any matters whatsoever in
4 connection with these pleas?

5 THE DEFENDANT: No, sir.

6 THE COURT: And, specifically, has anyone made any
7 promises or guarantees or assurances about such things as
8 pardon, parole, probation, length of sentence, early
9 release, anything of that nature?

10 THE DEFENDANT: No, sir.

11 THE COURT: So, you're not relying on any promises or
12 guarantees whatsoever in offering the pleas?

13 THE DEFENDANT: No.

14 THE COURT: Now, when you offer a, a Alford plea such
15 as you have offered, you give up or you waive your
16 Constitutional rights as they relate to these charges. I
17 have to be sure that you understand what you're giving up
18 and do that freely and voluntarily. For that reason I'm
19 going to explain your rights to you. Then I'll give you a
20 chance to ask questions once I finish.

21 We've talked about two of your rights already. First
22 of all, you have the right to have the Grand Jury consider
23 these cases before they come here. The cases have been
24 indicted by the Grand Jury. So, that's already happened.

25 You have a right to a lawyer and you've told me you're

1 satisfied with your attorney, and Mr. Cheek is present and
2 available should you need him.

3 You have a right to request or demand a jury trial, and
4 I will tell you, at that jury trial, you would be presumed
5 to be innocent. That would remain true until the State
6 proved your guilt and their obligation of proof is to prove
7 that guilt beyond a reasonable doubt. You would not be
8 required to prove anything at a trial. You are presumed to
9 be innocent.

10 Do you understand the trial and how that would be done?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: You also, at a trial, would have the right
13 to have the clerk issue subpoenas to witnesses to require
14 their attendance. Possibly they could be required to
15 testify.

16 You would have the right also to confront or question
17 anyone who did testify at your trial. You would have the
18 right, at your trial, to present any defense you might have
19 to these charges. Also, at your trial, you'd be given the
20 opportunity to try to suppress any and all evidence in the
21 possession of the State against you, and that would include
22 any statements that you might have previously made.

23 You, at all times, Mr. Nelson, have the absolute right
24 to remain silent. That's at every stage of a criminal
25 proceeding, and if you choose to remain silent during your

1 trial, the judge conducting that trial is required to
2 instruct the jury that your silence could not be used
3 against you in any manner whatsoever.

4 Now, Mr. Nelson, do you understand those rights?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Do you have any questions about any of
7 them?

8 THE DEFENDANT: No, sir.

9 THE COURT: Do you realize that, by pleading no
10 contest, you are waiving or giving up those rights as they
11 relate to these charges?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Does the fact that you are doing that, does
14 that cause you to want to change or amend or alter your plea
15 in any fashion whatsoever?

16 THE DEFENDANT: No.

17 THE COURT: All right. I'm gonna ask the solicitor to
18 go over the facts they're alleging. Listen to what she
19 tells me because I'll have some questions about those facts
20 when she finishes.

21 Yes, Ms. Welborn.

22 SOLICITOR WELBORN: Thank you, Your Honor.

23 On January 28th, 2011, the victim's aunt called
24 police to report a sexual assault of her niece. The
25 defendant's 12 year old stepdaughter was sent to the

1 Children's Advocacy Center and the defendant's sixteen year
2 old daughter also went. The defendant's daughter disclosed
3 that the defendant had exposed himself to her. The
4 defendant's stepdaughter disclosed one incident of digital
5 penetration.

6 She said it happened when she was at the house in
7 September of 2009 home alone with her step-dad. She said
8 she was drinking -- that he was drinking and watching TV.
9 She said he told her to clean her room, and she told him
10 that she wanted to wait until her mother was home. She said
11 he got mad and hit her and pushed her on the ground and then
12 pulled down her shorts and put his fingers inside her. She
13 said she was scared. So she did not, did not tell anyone
14 for a while. But then she finally decided to confide in her
15 aunt.

16 This case was investigated for about a year and a half
17 before the defendant was arrested for this charge. This
18 investigation was still ongoing when officers got another
19 report about the defendant exposing himself.

20 On August 11th, 2012, the defendant exposed his penis
21 to two children in a lewd manner. The defendant's brother
22 called to report the incident. The two girls, who were ages
23 nine and eleven at the time, were cleaning the defendant's
24 camper. The eleven year old is the defendant's niece and
25 the nine year old is a friend of hers. The girls both wrote

1 voluntary statements for the police.

2 They said the defendant told them that they had left
3 their cleaning supplies behind and asked them to come back
4 into the camper to get them. When they walked back inside,
5 the defendant was sitting on the bed wearing only boxers.
6 The girls said that he had his penis in his hand and started
7 wiggling it at them. They both ran out of the room crying
8 and went straight to their father who called police. The
9 father later told police the defendant had apologized to him
10 and the children and said that he was drunk when he did
11 this.

12 The defendant was Mirandized and initially denied the
13 incident and denied apologizing to the victims. Officers
14 asked him about the allegation of digital penetration from
15 his stepdaughter. He denied ever touching her
16 inappropriately. However, he then confessed that he did
17 expose himself to the two girls in his camper and said it
18 was because of his drinking problem. He also said he had
19 been drinking heavily on the night that his stepdaughter
20 claimed that this had happened, and that he has a drinking
21 problem.

22 THE COURT: Mr. Nelson, did you hear what the solicitor
23 told me?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Did you understand what she said?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Is that the information that you and your
3 lawyer have reviewed, and based upon that review, you've
4 made the decision to offer a no contest plea?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: And is it your belief that if that
7 information were presented to a jury that it would more than
8 likely result in a conviction?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Mr. Cheek, do you agree that's the
11 information that you've reviewed with your client and made
12 this decision?

13 MR. CHEEK: Yes, sir, Your Honor.

14 THE COURT: Now, Mr. Nelson, have you told me the truth
15 today?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Did anyone tell you how to answer my
18 questions?

19 THE DEFENDANT: No, sir.

20 THE COURT: So, the answers I've received from you have
21 been your own, is that correct?

22 THE DEFENDANT: Correct.

23 THE COURT: Is there any part of what you and I have
24 discussed today that you'd like to go back and amend or
25 change any answer that you've given me?

1 THE DEFENDANT: No, sir.

2 THE COURT: All right. Then I'm going accept the plea
3 as having been freely and voluntarily given. You're aware
4 of the charge, the penalties. You've had the advice of an
5 attorney you're satisfied with. There's a factual basis for
6 him to offer the Alford plea.

7 Now, Mr. Cheek, it's your opportunity to speak for Mr.
8 Nelson.

9 MR. CHEEK: May it please the Court, Your Honor.

10 THE COURT: Yes, sir.

11 MR. CHEEK: Your Honor, Mr. Nelson and his wife, Stacy,
12 formed a marriage. They -- there were many allegations in
13 the past on both sides of the family regarding sexual abuse.

14 We are asking the Court to consider several things.
15 First of all, these charges are being offered for a plea
16 under Alford versus The State of North Carolina for a very
17 good reason, Your Honor.

18 Mr. Nelson had a very severe drinking problem. Now, I
19 will say for him, throughout all of this, he was able to
20 maintain employment, provide for his family to some degree
21 as a mechanic, did a lot of things, but apparently was at
22 least a, what I term a weekend drinker, and on those
23 weekends things got completely out of control for him with
24 his drinking.

25 Your Honor, most of what he has alleged to law

1 enforcement, from the conversations I've had with him, is
2 trying to piece together things that people told him
3 happened while he was in a drunken stupor or several drawn
4 stupors. He related things to the police -- they kept
5 questioning him. He kept responding to them.

6 we talked about his right to remain silent. We talked
7 about what would happen if he were to go to Court with any
8 kind of pretrial motions, particular motions to suppress,
9 what could happen regarding any comments he made to law
10 enforcement. Your Honor, however he did make similar
11 statements to the Department of Social Services, he
12 cooperated with them in their investigation of these
13 allegations, particularly the ones regarding his daughter
14 and stepdaughter.

15 If I could pass up, Your Honor, a determination of fact
16 sheet from the Department of Social Services, and along with
17 that, Your Honor, I'll be passing up some progress reports
18 from Spartanburg Alcohol & Drug Abuse Commission showing
19 both that he was on a regular schedule of cooperating with
20 them, attending their classes, attending with their
21 therapies, and, Your Honor, the only thing he did not do was
22 the last psychosocial evaluation where they would of
23 required that he pay a substantial amount of money upfront,
24 which, at that time, he did not have because he was going
25 through the divorce and he did not have \$400. So, he was

1 not able to complete the last step, but everything else,
2 Your Honor, that was required of him he cooperated and did
3 try to put things right and put things back together.

4 THE COURT: Well, now, Mr. Cheek, I'm looking at this.
5 Just one second and be sure I'm saying this right.

6 The plea sheets on the lewd act indicates the date of
7 the offense is January 27th of 2011.

8 MR. CHEEK: Yes, sir, Your Honor. He was involved with
9 the Department of Social Services as early as 2010.

10 THE COURT: Well, it says here that they begin a
11 decision that investigator services initiated on
12 November 24th of '09.

13 MR. CHEEK: Yes, sir, that was a prior allegation, Your
14 Honor. He did cooperate with the Department of Social
15 Services.

16 THE COURT: I see.

17 So, there's some other things that were alleged?

18 MR. CHEEK: Yes, sir.

19 THE COURT: And then his SADAC report indicates
20 February of 2010, January, February of 2010.

21 MR. CHEEK: Yes, sir.

22 THE COURT: Okay. Go ahead.

23 MR. CHEEK: Your Honor, he was cooperating with them,
24 going through his drinking classes. I believe, Your Honor,
25 a lot of the things that were alleged happened after the

1 initial reports were made. Things were, I think, encouraged
2 by Stacy Nelson, the mother, when she was seeking finally a
3 divorce from him. That is why he's offering, Your Honor, a
4 plea under Alford because they've already gone through a
5 divorce, they've already separated whatever properties they
6 had among each other. He's been incarcerated now 435 days
7 in this whole situation, and he just wants to, for, for
8 himself as well as his family, to finally start the last
9 stage of healing.

10 He knows he'll be removed from the situation. No
11 contact with them, able to move on with his life, allow them
12 to move on with their lives, Your Honor.

13 He's also asking the Court to take into consideration
14 that he has reviewed everything and just feels like his
15 drinking contributed to all of this. Some of the
16 allegations, particularly the ones that were brought by the
17 two little girls who were neighbors, once he moved out of
18 that situation, he doesn't know where all of that came from,
19 but he also believes that, that there's been some contacts
20 for people to exacerbate the situation.

21 He can not offer a defense because many times he was
22 just, as he said, flat out drunk, and he does not want to
23 move forward with the trial in the case. He feels like it
24 will be difficult for him to offer a defense in the case
25 because I've explained to him that voluntary drinking---

1 THE COURT: Is not a defense---

2 MR. CHEEK: ---is not a defense.

3 THE COURT: ---in South Carolina.

4 MR. CHEEK: He understands that.

5 Your Honor, he just finds himself in a situation where
6 he can hopefully move out of the way, allow his daughter,
7 his stepdaughter, the neighbors, everyone around him, to
8 move on with their lives, give him a chance to try to move
9 on with what's left to try to restore what he can in his own
10 life.

11 The solicitor's Office has shared with me today a very
12 fine essay written by his daughter. It talks about healing,
13 talks about her expectations. It talks about where she
14 finds herself. I, I commend her on how she's made a move,
15 move forward from this, and, Your Honor, it causes some
16 pause with me because, in the comments she makes in her
17 essay, I believe that there's still hope for her and it
18 causes some question as to whether or not the father engaged
19 in the extent of these allegations against him that maybe a
20 lot of this, I'm thinking, was trumped up by the ex-wife.

21 I don't know, Your Honor. I was not there. My client
22 was in a drunken stupor. We don't know what all happened.
23 He can not offer a defense to all these charges, but he
24 wants to go ahead and move forward. The State is made him
25 an offer to a lesser charge. He understands and appreciates

1 it's gonna require sex offender registration. He knows what
2 that's gonna require of him in the future. He understands
3 he's got to participate in classes at the Department,
4 Department of Probation, Parole & Pardon Services. A lot of
5 things to move forward to try to make as much healing in all
6 of the situation as possible, and he believes that going to
7 trial is not gonna be beneficial to anybody in this case.
8 He doesn't want to bring any of these young ladies into
9 Court to testify in this situation and open up what has
10 appeared to be started to be closing up of the wounds, Your
11 Honor.

12 We just ask the Court for mercy for him. We ask the
13 Court to be as lenient as possible in sentencing for him.
14 We ask for concurrent sentencing because I don't believe the
15 State is opposed to concurrent sentencing. He's actually
16 served 435 days towards sentencing. We ask the Court to
17 take that into consideration as the Court fashions the
18 sentence out of these charges, Your Honor.

19 We are just, just asking for mercy for, for my client,
20 Your Honor.

21 THE COURT: Thank you.

22 Mr. Nelson, anything you want to tell me?

23 THE DEFENDANT: No, sir.

24 THE COURT: Prior record.

25 SOLICITOR WELBORN: Yes, Your Honor.

1 1988, fraudulent check times two.

2 1989, grand larceny times two, fishing without
3 permission, use of vehicle without consent times two,
4 driving under suspicion -- suspension.

5 1990, petty larceny.

6 1991, DUI, DUS, driving uninsured.

7 1995, DUS, DUI.

8 And, Your Honor, also---

9 THE COURT: Victims wish to be heard?

10 MR. CHEEK: Yes, Your Honor. That's what I was gonna
11 say.

12 THE COURT: All right.

13 MR. CHEEK: We do have a few family members of the
14 victim here.

15 THE COURT: All right. One at a time please.

16 SOLICITOR WELBORN: And, Your Honor, I will -- if you'd
17 like for me to go ahead and pass up the essay Mr. Cheek was
18 referring to.

19 THE COURT: Thank you, ma'am.

20 Your name?

21 MS. ASHLEY: My name is Hannah Ashley.

22 THE COURT: And your relationship to this?

23 MS. ASHLEY: My granddaughter.

24 THE COURT: All right. I'll be happy to hear from you.

25 MS. ASHLEY: Thank you.

1 The afternoon of September the 7th began, began a
2 nightmare for my daughter, my granddaughters, [REDACTED] and
3 [REDACTED] This was in 2009. At that time they revealed to us
4 the sexual misconduct that had been given -- done to him
5 (sic) by Mr. Nelson for several years. The afternoon became
6 months of emotional and mental distress.

7 Therapy with Ms. Rosenberg for [REDACTED] [REDACTED], and
8 [REDACTED] was for over a year. D.S.S. was involved. The girls
9 lived with my husband and me for 14 months, and it took them
10 well over a week, when we went to bed at night, for them to
11 get over the anxiety that they were gonna be safe, that they
12 were not gonna be interrupted or manhandled or whatever
13 during the night.

14 After some time in therapy, therapy, [REDACTED], the older
15 girl, was released, but Mr. Roseboro (sic) felt like [REDACTED]
16 had not told everything, which she hadn't. It was much more
17 graphic than what she had revealed. She did not want her
18 family to know to the full extent. [REDACTED] went through
19 months on end with depression and thoughts that she did not
20 want to live, and we had to watch her carefully.

21 Through prayer, lots of love, and encouragement, she
22 gradually began to respond and wanted to be around other
23 people. She made the biggest progress in this when Kenny
24 was incarcerated.

25 For the past year or so she has become the old [REDACTED]

1 knowing she was safe from sexual abuse. She's a grade A/B
2 student, jolly, mischievous at times, but she's back to
3 the -- our old [REDACTED] and we feel like we're on the right
4 track.

5 No child should ever have to endure what these girls
6 lived in. Home is suppose to be the safest heaven and
7 parents should be their protector, not their molester. I
8 pray this Court will invoke the maximum sentence possible.
9 He should never ever have the opportunity to put his hands
10 on another child, and the reason they did not come forth,
11 they were afraid. This had been going on months before
12 2009.

13 Thank you, sir.

14 THE COURT: Thank you, ma'am.

15 MS. ASHLEY: Appreciate your patience.

16 THE COURT: Yes, ma'am.

17 You name is?

18 MS. TINSLEY: I'm Stacy Tinsley.

19 THE COURT: And your relationship?

20 MS. TINSLEY: [REDACTED] s my daughter.

21 THE COURT: All right. Be happy to hear from you,
22 ma'am.

23 MS. TINSLEY: Thank you.

24 what he's done to my kids has devastated them. [REDACTED]
25 has been very withdrawn, would not come out of her bedroom,

1 and this is been going on four years, and she's just now to
2 the point that she comes out of her bedroom.

3 She's almost failed grades five through eight, had to
4 go to summer school every year just to pass because she
5 could not do well in school. She was harassed and bullied
6 because he has done this to not only my daughters, but my
7 daughter's friends. My daughter's friends knew what was
8 going on, and spread it all through school. I was at the
9 principal's office about everyday. My daughter would wake
10 up crying, go to school, coming home crying to school.

11 The girls on the playground made fun of her, laughed at
12 her, and she could not go to school because everybody knew
13 what happened to her. I had to change her school her ninth
14 grade year to put her in a school where nobody knew her and
15 nobody knew what happened to her. It took her to the
16 eleventh grade, which she's in now, to finally pass. She's
17 making straight A's and B's as of this year. But from the
18 fifth grade to the tenth grade, she has been in summer
19 school. Even her ninth and tenth grade year she had to
20 complete one class of summer school every year.

21 She's come a long way in the past four years, but she
22 still needs a lot of counseling that she's right now
23 refusing to go to. She has issues with trust. She has
24 issues with relationships. She has attitude problems at
25 times that is hard for me to handle. She's done great so

1 far this year, and I'm very proud of her, and she's finally
2 not scared to walk outside, to go to school.

3 He just does not know what he's done to my child the
4 past going on five years from the eighth grade to the
5 eleventh grade. And I don't -- I was blamed for all of this
6 at the beginning. He blamed -- told everybody that it was
7 all my fault. Three years later, after we'd been divorced
8 for two years, he does this to two other little girls, and
9 I'm nowhere around for three years.

10 What's his excuse for this one?

11 I want to know.

12 That's all.

13 THE COURT: Thank you, ma'am.

14 Any other family members wish to be heard?

15 SOLICITOR WELBORN: No, Your Honor.

16 THE COURT: Okay.

17 SOLICITOR WELBORN: And I did want to just clarify one
18 thing.

19 THE COURT: Yes, ma'am.

20 SOLICITOR WELBORN: This charge is only relating to one
21 incident, and I just wanted to clarify that cause I know
22 they're talking about a several year time span. But when
23 the child went to the Children's Advocacy Center, she did
24 only disclose one incident of digital penetration.

25 THE COURT: Thank you.

1 (Pause.)

2 THE COURT: Mr. Nelson, my order will include a
3 direction to you that you are not to have no contact with
4 the victims or the victim's family.

5 I want to stress to you that this judge, when, when he
6 orders no contact, he means that explicitly. That includes
7 indirect contact as well. Indirect contact would be
8 situations where someone may send someone a text message, an
9 email, a letter, have a friend to go over and speak to
10 someone on your behalf, any -- a posting on a social website
11 directed to or about a victim would be a violation of my no
12 contact order.

13 I could tell you that -- Mr. Cheek will tell you that
14 if you violate a no contact order that I've issued and you
15 come in front of me, I will put you in jail for everyday
16 that I can put you there for.

17 Do you understand what that means?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: So, when I say no contact, that's exactly
20 what it means. None. And if you have contact, I will
21 see -- and I find that you have violated my order, I will
22 see that you are properly punished.

23 Do you understand that?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Okay. So I mean it. I'm not kidding about

1 that.

2 THE DEFENDANT: Yes, sir.

3 THE COURT: And there are no excuses.

4 If a victim called you, hang up the phone, don't say a
5 word. They came to your door and knocked at your door,
6 don't open the door. You see them in the public later on,
7 and it's gonna be a while, you see them in the public later
8 on, you turn and go in the opposite direction without saying
9 a word to those people.

10 You understand what no contact means?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Okay. We've got an understanding. So,
13 when you come back in front of me, we won't have to discuss
14 what I told you to do, will we?

15 THE DEFENDANT: No, sir.

16 THE COURT: Okay.

17 MR. CHEEK: Your Honor, I know the Courts about to
18 announce sentencing. I've had some conversation with
19 Mr. Nelson --

20 THE COURT: Yes, sir.

21 MR. CHEEK: -- in the interim.

22 Your Honor, we had reviewed a statement prepared by the
23 grandmother, and just for, just for housekeeping, Your
24 Honor, I do want to go ahead and submit a copy of that
25 statement because, as early as October of 2010, there were a

1 lot of comments made that I think were not reflective inside
2 that family of what Mr. Nelson was trying to accomplish by
3 healing and move on with everything.

4 THE COURT: All right.

5 MR. CHEEK: I also pass up, Your Honor, because as
6 early as 2010 there was an awful lot of healing that had
7 happened in that short period of time that, that I think is
8 important as the Court considers what actually may have
9 happened in this incident or these various incidents
10 regarding the allegations against my client. I just ask the
11 Court to at least review these statements, Your Honor --

12 THE COURT: Pass it up.

13 MR. CHEEK: -- before the Court passes sentence.

14 THE COURT: Any objection to my seeing that?

15 SOLICITOR WELBORN: No, Your Honor.

16 MR. CHEEK: which is why he's offering under Alford,
17 Your Honor, that statement.

18 THE COURT: I understand.

19 That needs to be made an exhibit for the hearing. Give
20 that to Pam. That's the statement from the victim.

21 (WHEREUPON, the statement of the victim was marked as
22 Court's Exhibit No. 1 and received into evidence at this
23 time.)

24 THE COURT: At Mr. Cheek's request, that will be made
25 an exhibit for the plea.

1 MR. CHEEK: Thank you, Your Honor.

2 (WHEREUPON, the statement was marked as Court's Exhibit
3 No. 2 and received into evidence at this time.)

4 THE COURT: All right. Mr. Nelson, on the two charges
5 of exposure of private parts, the Sentence is six months.
6 I've given you credit for the time you served. Run that
7 concurrently with the Sentence in the lewd act case.

8 In the lewd act case, the Sentence is that you be
9 confined in the State Department of Corrections for a period
10 of 15 years. I have suspended that to service of ten with
11 probation for five. I've ordered the GPS monitoring, 434,
12 35 days of credit, sex offender registration, ATU
13 recommended, no contact with the victims, and payment of
14 public defender's fees.

15 Good luck to you, sir.

16 MR. CHEEK: Thank you, Your Honor.

17 SOLICITOR WELBORN: Thank you, Your Honor.

18

19 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

20

21

22

23

24

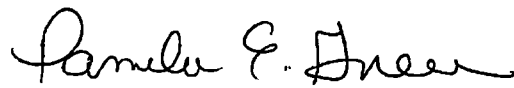
25

C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 25th day of October, 2013.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

July 10th, 2014



PAMELA E. GREEN, Court Reporter

2014-CP-42-1532

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)# 163540)

Full name and prison number (if any) of Applicant.)

KENNETH W. NELSON)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

INDICTMENT / CASE #

2013 GS 4202868S.C. CODE 16-15-0140

APPLICATION FOR

CDR CODE #468

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

- 29512
1. Place of detention EVANS CORR INST. 610 HIGHWAY 9 WEST
 2. Name and location of Court which imposed sentence SPARTANBURG County GENERAL SESSION
 3. Name(s) of co-defendant(s) (if any) NONE
 4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed: INDICTMENT / CASE #
 - (a) SEX / LEWD ACT 2013 GS 4202868
 - (b) No CONTACT with victims or THEIR family
 - (c) EXPOSURE 2012 GS 4205000
 5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 10/25/13 CHARGE & 10 YR ADJN VIOLENT
 - (b) (ATTN) RECOMMENDED) Sup. 5 YR PROBATION

Revised 3/2003

1 OF 12

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2014 APR 15 PM 2:46
M. HOPE BLACKLEY

- (c) SEX OFFENDER REGISTRATION REQUIRED
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty APPLICANT PLEAD GUILTY
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?

8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. NO
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. NA
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. NA
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. NA
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) NA
- (b) MY LAWYER TOLD ME NOT TO APPEAL
- (c) _____

State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: INEFFECTIVE ASSISTANCE OF COUNSEL

COMPIL MISCONDUCT

PROSECUTORIAL MISCONDUCT

Revised 3/2003

(a) _____

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) SEE ATTACH motion IN SUPPORT

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? NO(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO(d) any other petitions, motions or applications in this or any other Court? NO

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. N/A

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NONE

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. NONE

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) NONE

(b) _____

(c) _____

7. Were you represented by an attorney at any time during the course of: YES

- (a) your arraignment and plea? YES
- (b) your trial, if any? YES
- (c) your sentencing? YES
- (d) your appeal, if any, from the ju
sentence? YES
- (e) preparation, presentation or consideration of any petitions, motions or applications
with respect to this conviction, which you filed? NO

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
- i. MR. JAMES CHEEK
 - ii. SOLICITORS OFF. 180 MAGNOLIA ST.
 - iii. SPARTANBURG S.C. 29306
- (b) the proceedings at which each such attorney represented you:
- i. TRIAL / SENTENCING
 - ii. _____
 - iii. _____

19. State clearly the relief you seek in filing this application:

CASE OVERTURNED W/PREJUDICE / NEW TRIAL

20. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA

County of SPARTANBURG

VERIFICATION

I, Kenneth W. Nelson, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Kenneth W. Nelson

SWORN to and subscribed before me this 10th
day of April, 2014.
SSD

S. Bullock (L.S.)
Notary Public

My Commission Expires: 2/24

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2014 APR 15 PM 2:46
M. HOPE BLACKLEY

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Kenneth W. Nelson, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Kenneth W. Nelson
Applicant

SWORN or affirmed to and subscribed before me this
10th day of April, 2014

J. Outlaw
Notary Public

My Commission Expires: 2/24

FILED
CLERK OF COURT
SPRINGFIELD COUNTY
2014 APR 15 PM 2:46
M. HOPE BLACKLEY

7.25.12

GROUND #4

4. THE APPLICANT CONTENDS THAT THE SOLICITOR HAS THE RESPONSIBILITY TO PROSECUTE WITH AGGRESSIVENESS! HOWEVER IN THIS CASE, THE SOLICITOR KNOWINGLY AND WITH MALICE, ALLOWED THE APPLICANT TO PLEAD GUILTY, WHEN THE MAN SHOULD HAVE NOT BEEN ALLOWED TO.

FURTHER, THE SOLICITOR IGNORED THE APPLICANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL, IN THAT HE WORKED WITH THE APPLICANT'S ATTORNEY OF RECORD MR JAMES CHEEK IN TAKING THE APPLICANT IN TO A GUILTY PLEA.

FURTHER, THE APPLICANT STATES EMPHATICALLY, THAT HAD HE BEEN TOLD (A) OF THE ACTUAL EVIDENCE AGAINST HIM

(B) OF THE ACTUAL CHARGES AND WHAT THEY MEANT CONCERNING HIM.

(C) THAT HIS ATTORNEY AND THE SOLICITOR WERE WORKING AGAINST HIS CONSTITUTIONAL RIGHTS

(D) THAT HE HAD OTHER RECOURSE, HE WOULD NOT HAVE PLEAD GUILTY AND WOULD HAVE IN FACT ASK FOR A TRIAL.

(E) THAT HIS ATTORNEY AND THE SOLICITOR BOTH KNEW THIS AND TRIED TO HIDE HIS CONSTITUTION RIGHTS FROM HIM

(F) APPLICANT KENNETH W. NELSON HAD ASKED HIS ATTORNEY MR JAMES CHEEK FOR HIS MOTION FOR DISCOVERY BEFORE HE WENT TO COURT BUT THE APPLICANT DID NOT RECEIVE ANY PAPER WORK PERTAINING TO HIS MOTION OF DISCOVERY UNTIL AFTER HE WAS COERCED INTO TAKING A PLEA BARGAIN

GROUND #5

RULE 5. A. B. C. D APPLICANT ASSERTS THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BY THE ATTORNEY ON RECORD MR JAMES CHEEK, PERTAINING TO THE SOUTH CAROLINA RULES OF CRIMINAL PROCEDURE. RULE 5 DISCLOSURE OF EVIDENCE IN CRIMINAL CASES. STATEMENT OF DEFENDANT, UPON REQUEST BY DEFENDANT. THE PROSECUTOR SHALL PERMIT THE DEFENDANT TO INSPECT AND COPY OR PHOTOGRAPH ANY WRITTEN OR RECORDED STATEMENT MADE BY THE DEFENDANT OR COPIES THERE OF IN CUSTODY OR CONTROL OF PROSECUTION. TUCKER V PRELESNICK 181 F3D 747 757 (6th CIR 1999)

HART V GOMEZ 174 F3D 1067 1073 (9th CIR 1999)

BRADY V MARYLAND 373 US 83 (1963)

G. GLO V STATE 405 US 105 (1972)

STICKLAND SUPRA, IN RE V STATE, 286 SC 441 339

STATE V PENDERGRASS, 270 S.C. 423 SE 2D 750 (1972)

STATE OF SOUTH CAROLINA
 COUNTY OF SPARTANBURG
 IN THE COURT OF GENERAL SESSIONS

#163540
 KENNETH W. NELSON
APPLICANT

MOTION IN SUPPORT OF
 POST CONVICTION RELIEF
 CASE NUMBER 201365420286

-VERSUS-

STATE OF SOUTH CAROLINA
RESPONDENT

NOW COMES THE APPLICANT, WHO FILES APPLICATION FOR
 POST CONVICTION RELIEF PRO-SE AND WITH THE ASSISTANCE
 OF A COMPETENT ATTORNEY, WHO DEPOSES, THAT IN RESPONSE TO
 QUESTIONS 9 & 10 ON THE ATTACHED PCR APPLICATION,
 THE APPLICANT LISTS THE BELOW LISTED GROUNDS FOR HIS
 CONSIDERED BY THIS HONORABLE COURT;

GROUND #1

1 THE APPLICANT CONTENDS THAT HE WAS NEVER ADVISED
 ON THE EVIDENCE COMPILED AGAINST HIM BY HIS ATTORNEY
 OF RECORD, MR. JAMES CHEEK, AND WAS THE APPLICANT QUESTIONED
 AT ANY TIME, ON HIS UNDERSTANDING OF THE CHARGES BEING
 BROUGHT AGAINST HIM. HAD THE APPLICANT KNOW ABOUT THE
 HOSPITAL RESULTS, AND OF WEAKNESS OF EVIDENCE AGAINST HIM,
 HE (THE APPLICANT) WOULD HAVE NEVER PLEAD GUILTY.

NOR WAS THE APPLICANT PREPARED FOR COURT BY HIS ATTORNEY OF RECORD, OTHER THAN A FIFTEEN MINUTE TALK, JUST PRIOR TO STEPPING BEFORE THE COURT, IN WHICH THE ATTORNEY OF RECORD STATED, THAT THE SOLICITOR WAS A GOOD FRIEND OF HIS AND THAT HE, THE (ATTORNEY) BELIEVED WHAT THE SOLICITOR HAD TO AND FELT THE APPLICANT WAS INDEED GUILTY. THAT THE ONLY AND BEST HE HAD WOULD BE TO ENTER A PLEA OF GUILTY. THE APPLICANT CONTENDS THAT THE ATTORNEY OF RECORD (MR JAMES CHEEK) WAS ACTING IN HIS BEHALF UNDER AN ACTUAL CONFLICT OF INTEREST WHE HE THE APPLICANT WAS CONCERNED.

THE APPLICANT MAINTAINS THAT THE SUPREME COURT UPHELD IN STICKLAND-VS-WASHINGTON THAT THE APPLICANT IS ENTITLED AND SHOULD BE PROVIDED WITH AN EFFECTIVE TRIAL COUNSEL, WHICH IN CASE MR JAMES CHEEK CERTAINLY HAS SHOWN HE WASNT.

GROUND #2

2. THE APPLICANT CONTENDS THAT NOT ONLY WAS MR JAMES CHEEK (TRIAL COUNSEL) INEFFECTIVE IN HIS REPRESENTATION OF MR KENNETH W. NELSON, THAT HE WAS ALSO BLANTLY IRRESPONSIBLE AND CRIMINAL IN HIS MISCONDUCT, IN THAT HE WITHHELD BRADY EVIDENCE (BRADY-VS-USA) THE TRIAL COUNSEL NOT ONE TIME SPOKE TO MR. NELSON ABOUT THE HOSPITAL'S EVIDENCE BEING NEGATIVE. NOR, DID MR. JAMES CHEEK, AT ANY TIME, SPEAK TO APPLICANT ABOUT ANY DEFENSIVE STRATEGY, NOR DID MR CHEEK, AT ANY TIME, SPEAK ABOUT THE APPLICANTS TESTIMONY TO HIM OR ABOUT DOING ANY INVESTIGATION ON HIS OWN.

FURTHER, THE APPLICANT MAINTAINS THAT THERE HE WAS NEVER AFFORDED THE INFORMATION NEEDED TO KNOWINGLY SUBMIT A GUILTY PLEA. FURTHER, THE APPLICANT MAINTAINS THAT A FACTUAL BASIS OF HIS GUILT, NOR CULPABILITY IN THE STATED CRIME WAS EVER SHOWN TO HIM BY HIS ATTORNEY, THE SOLICITOR NOR COURT.

THE APPLICANT HAD 'NO' BUSINESS ENTERING A PLEA, THE SOLICITOR AND THE ATTORNEY OF RECORD BOTH KNEW THIS AND COERCED THE APPLICANT (THROUGH (THE ATTORNEY) ON RECORD MR JAMES CHEEK) INTO EXCEPTING A PLEA BARGAIN. THE CONDUCT OF BOTH THE ATTORNEY OF RECORD AND THE SOLICITOR WERE CRIMINAL IN THEIR MISCONDUCT. THE APPLICANT DIDN'T HAVE THE EDUCATION OR COMMON KNOWLEDGE TO MAKE AN EDUCATED DECISION TO PLEA OR NOT.

THE APPLICANT MAINTAINS THE THE BRADY-VS-USA GUARANTEES THE APPLICANT SEE ALL EVIDENCE HELD AGAINST HIM, WHERE HE AND A COMPETENT ATTORNEY CAN PLAN A DEFENSE IN THE APPLICANT'S BEHALF. MR. JAMES CHEEK HAD INFORMATION THAT WOULD HAVE MADE A BIG DIFFERENCE IN WHAT AND OF SENTENCE THE APPLICANT RECEIVED.

GROUND #3

3 FURTHER, THE SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT MAINTAIN THAT MR JAMES CHEEK TOOK THE APPLICANT'S CASE, HE WAS TO AFFORD THE APPLICANT WITH THE UTMOST OF THE BENEFIT OF ALL OF HIS LEARNED ABILITY. NOT TO HIDE EVIDENCE FROM THE APPLICANT, NOT TO SEEK THE EASY WAY ~~TO~~ NOT TO SEEK A PLEA KNOWING THE EVIDENCE AGAINST HIS CLIENT WAS NOT THERE, TO SUPPORT A CHARGE OF RAPE IN ANY DEGREE. THE APPLICANT MAINTAINS THAT MR. JAMES CHEEK, WAS NOT ONLY EFFECTIVE BUT CRIMINAL IN HIS MISCONDUCT IN HIS SERVICE TO THE APPLICANT.

FURTHER THE APPLICANT BELIEVES THAT HIS TRIAL COUNSEL WAS SO INEFFECTIVE THAT HIS CONDUCT PREJUDICED THE APPLICANT'S RIGHT TO AN UNPREJUDICED AND FAIR TRIAL. THE ATTORNEY WHO REPRESENTED CAN NOT CONTEST NOR CAN THE STATE OF SOUTH CAROLINA THAT HE WAS DILIGENT IN HIS REPRESENTATION OF THE APPLICANT. THE APPLICANT HOLDS THAT THE COUNSEL'S (MR CHEEK) ASSISTANCE AND THE MISCONDUCT OF BOTH MR JAMES CHEEK AND THE SOLICITOR ARE SO CRIMINAL AS TO REQUIRE A REVERSAL OF HIS CONVICTION WITH PREJUDICE.

SUMMARY

IN AN APPLICATION FOR POST CONVICTION RELIEF, IT IS INCUMBENT UPON THE APPLICANT TO MAKE A LEAST A PRIMA FACIE SHOWING WHICH WOULD ENTITLE HIM TO RELIEF BEFORE AN EVIDENTIARY HEARING WILL BE SCHEDULED AND HELD.

THE APPLICANT BELIEVES HE HAS MET THE PRIMA FACIE SHOWING AND SHOULD BE GRANTED AN EVIDENTIARY HEARING AS HELD IN WELCH -VS- MACDONALD, 246 S.C. 258, 143 S.E. 2D 455 (1965) BLANDSHAW -VS- STATE, 243 S.C. 384, 140 S.E. 2D 784 (1965) THE APPLICANT, THEREFORE REQUEST THAT THIS COURT CONVENE AND EVIDENTIARY HEARING FOR THE APPLICANT ON ALL THE ISSUES SET FORTH IN HIS APPLICATION. FURTHER THE APPLICANT RESERVES TO AMEND HIS APPLICATION AT A LATER DATE.

RELIEF SOUGHT

THE APPLICANT MOVES HIS HONORABLE COURT FOR AN EVIDENTIARY HEARING AND FOR IMMEDIATE DISMISSAL AND REVERSAL OF CHARGES AGAINST HIM WITH PREJUDICE THAT IN THE VERY LEAST, THE APPLICANT DESERVES A NEW TRIAL TO DETERMINE HIS INNOCENCE. WHEREFORE, HAVING MADE ITS APPLICATION, THE APPLICANT FOREVER PRAYS.

S. Kenneth W. Nelson

KENNETH W. NELSON
PRO-SE APPLICANT

SWORN TO AND SUBSCRIBED BEFORE ME
ON THIS 5TH DAY MARCH 2014

S. Gulton

NOTARY PUBLIC

MY COMMISSION EXPIRES 2/24

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	2014-CP-42-1532
Kenneth W. Nelson., #163540,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Respondent, making its Return to the application for post-conviction relief (PCR) filed April 15, 2014 would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted at the October 2012 term of the Spartanburg County Grand Jury for two counts of exposure of private parts in a lewd and lascivious manner (2012-GS-42-5000, -5000(A)). The Applicant was subsequently indicted at the June 2013 term of the Spartanburg County Grand Jury for committing or attempting to commit a sexual/lewd act upon a child under the age of sixteen (2013-GS-42-2868). The Applicant was represented by James Cheek, Esquire. On October 10, 2013, the Applicant pled guilty to all charges as indicted pursuant Alford v. NC. The Honorable Roger L. Couch sentenced Applicant to fifteen years for sexual/lewd act upon a minor, with the balance to be suspended after the service of ten years imprisonment, to five years of probation; and six months imprisonment on each charge of exposure of private parts in a lewd and lascivious manner. Pursuant to the State's recommendation, Judge Cole ordered that all sentences run concurrently. The Applicant did not appeal his sentence or convictions.

Attached herewith and incorporated herein are the records of the Spartanburg County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reason:

1. Ineffective assistance of counsel; specifically:
 - a. Failure to advise Applicant on the evidence compiled against him;
 - b. Failure to question Applicant on his understanding of the charges being brought against him;
 - c. Failure to sufficiently confer with Applicant;
 - d. Failure to request and provide discovery materials to Applicant;
 - e. Counsel misconduct;
 - f. Conflict of interest in that Counsel was friends with the Solicitor;
2. Involuntary guilty plea; specifically
 - a. Applicant "was never afforded the information needed to knowingly submit a guilty plea."
3. Prosecutorial misconduct.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Respondent interprets Applicant's attached motion in support of his Application to also allege that he did not plead guilty knowingly or voluntarily. The State submits this allegation

has no merit. To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

The State submits the transcript reflects that the pleas were knowingly and voluntarily entered with a full understanding of the charges and consequences of the plea. Boykin, supra; Dover, supra. Further, because a guilty plea is a solemn, judicial admission of the truth of the charges against the individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 317 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976). The State submits the Applicant should not be allowed to depart from the truth of the statements he made during his guilty plea hearing.

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). Given the Applicant's burden of proof and the analysis to be applied to this claim, the Respondent submits that the Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and it should therefore, be treated as such.

V.

Applicant also alleges prosecutorial misconduct. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). The Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). Further, the Applicant has failed to set forth any specific allegations of the nature of the evidence. The Uniform Post-Conviction Procedure Act requires that the Applicant must "specifically set forth the grounds upon which the application is based." Section 17-27-50 of the Code of Laws of South Carolina (1976). In an application for post-conviction relief, it is incumbent upon Applicant to make at least a prima facie showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965).

VI.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

VII.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held solely on the claims of ineffective assistance of counsel and involuntary guilty plea.

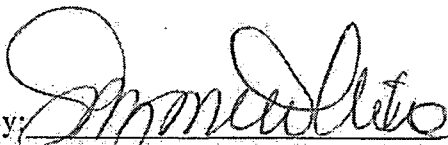
Respectfully submitted,

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October 23, 2014.

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

KENNETH W. NELSON, #163540)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS

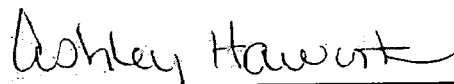
2014-CP-42-1532

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Ms. Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
PO Box 1015
Rock Hill, SC 29730

DATED this 23RD day of October, 2014.



Ashley Haworth, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

KENNETH NELSON,)
)
APPLICANT,)
)
-VS-)
)
STATE OF SOUTH CAROLINA,)
)
RESPONDENT.)
_____)

2014-CP-42-01532

TRANSCRIPT OF RECORD

NOVEMBER 13, 2015
SPARTANBURG, SOUTH CAROLINA

BEFORE:

THE HONORABLE LARRY B. HYMAN, JR.

APPEARANCES:

ATTORNEY FOR APPLICANT:

LEAH B. MOODY, ESQUIRE

ATTORNEY FOR RESPONDENT:

ALICIA A. OLIVE
ASSISTANT ATTORNEY GENERAL

SUSAN W. HUDGINS
CIRCUIT COURT REPORTER

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EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVIDENCE</u>
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(No Exhibits Were Presented During This Hearing)

1 (Whereupon court convened at 10:05 am)

2 **THE COURT:** All right. Ms. Moody, is that Mr. Harris
3 with you?

4 **MS. MOODY:** No, sir, Your Honor. It's Mr. Nelson.

5 **THE COURT:** Oh, Mr. Nelson. Okay.

6 **MS. OLIVE:** To give a brief procedural history on this
7 one, this is Kenneth Nelson versus State, 2014-CP-42-1532.
8 Mr. Nelson filed this PCR on April 15th, 2014. He was
9 indicted in October of 2012 for two counts of exposure of
10 private parts in a lewd and lascivious manner. He was
11 subsequently indicted June of 2013 for committing or
12 attempting to commit a sexual or a lewd act upon a child
13 under the age of sixteen. Mr. Cheek represented him on
14 those charges.

15 On October 10th, 2013 he pled guilty on all charges --
16 pled guilty to all charges as indicted pursuant to Alford v.
17 North Carolina. Judge Couch sentenced him to fifteen years
18 for the lewd act with the balance to be suspended on the
19 service of ten years to five years of probation. And he
20 sentenced him to six months on each charge of the exposure
21 of private parts in a lewd and lascivious manner. Pursuant
22 to the State's recommendation, those sentences were run
23 concurrently. And he did not appeal his sentence or
24 conviction.

25 The matters that he stated in his PCR application -- or

1 the allegations, rather, were ineffective assistance of
2 counsel, involuntary guilty plea and prosecutorial
3 misconduct. It's my understanding we would just be going
4 forward on the ineffective assistance of counsel claim
5 today, but I'll let -- I'll turn it over to Ms. Moody at
6 this time.

7 **THE COURT:** All right, Ms. Moody.

8 **MS. MOODY:** I'm not sure -- Your Honor, I believe he's
9 going forward on the involuntary plea, ineffective
10 assistance of counsel and prosecutorial misconduct. He has
11 alleged prosecutorial misconduct within this proceeding.

12 **THE COURT:** Okay.

13 **MS. MOODY:** And he does wish to go forward. My first
14 witness would be Mr. Kenneth Nelson.

15 **THE COURT:** All right. Mr. Nelson, before we get
16 started let me advise you of something. This is a Post
17 Conviction Relief application. It's not an appeal. I
18 understand that you did not appeal your case.

19 If I were to grant your relief, if I were to do
20 everything that I could for you, your case does not get
21 dismissed. I could only set aside your conviction or your
22 plea. And what would happen then is it would be remanded
23 back, and you would start all over again. You would start
24 from square one.

25 I think initially you were charged -- what was he

KENNETH NELSON - DIRECT EXAMINATION BY MS. MOODY

6

1 charged with initially? Indicted on?

2 **MS. OLIVE:** Your Honor, he was -- he pled guilty as
3 indicted, but he was also indicted for criminal sexual
4 conduct with a minor in the second degree. And that was
5 dismissed as part of this ---

6 **THE COURT:** And that carried?

7 **MS. OLIVE:** Your Honor, I'm ---

8 **THE COURT:** Is that twenty-five? Twenty?

9 **MS. MOODY:** It was twenty.

10 **THE COURT:** That carries twenty years. Okay. So Mr.
11 Steve, excuse me, Mr. Harris, if you had any charges like
12 that one dismissed or any charges reduced, you would be
13 facing those charges again. Essentially, you don't get the
14 benefit of the deal on a remand.

15 Also, the trial judge, if you were convicted, is not
16 required to give you the same sentence. He could give you
17 the absolute max. He could even run them consecutively if
18 he wanted to. Do you understand me?

19 **MR. NELSON:** Yes, sir.

20 **THE COURT:** So you're at risk if you go back at the
21 very least. Do you wish to proceed with your Post
22 Conviction Relief application?

23 **MR. NELSON:** Yes, sir.

24 **THE COURT:** All right. I'll hear from you then.

25 **Kenneth Nelson, being**

KENNETH NELSON - DIRECT EXAMINATION BY MS. MOODY

7

1 duly sworn testified as follows;

2 Direct Examination by Ms. Moody:

3 Q. Mr. Nelson, could you please state your full name for
4 the record?

5 A. Kenneth Wayne Nelson.

6 Q. And where are you currently incarcerated?

7 A. Evans Correctional Center.

8 Q. And what is your current sentence?

9 A. Ten years suspended to five, five years probation.

10 Q. Okay. And is that on one charge or is that multiple
11 charges?

12 A. That's just that one charge.

13 Q. Okay. But you pled to how many charges?

14 A. Just one.

15 Q. Okay. And the specific charge that you pled to, ---

16 A. It was ---

17 Q. --- could you state for the Court?

18 A. Yeah. It was fifteen years. It was the max. And he
19 dropped it down to ten years.

20 Q. No, I'm saying the title of the charge.

21 A. Oh, it was criminal sexual conduct with a minor.

22 Q. Okay. And during that case who was your attorney?

23 A. Roger Poole to start with. And ---

24 Q. All right. So that's who you initially began your
25 discussions with on your case?

KENNETH NELSON - DIRECT EXAMINATION BY MS. MOODY

8

1 A. Yes, ma'am.

2 Q. Okay. And at some point -- because in your application
3 you allege James Cheeks. At some point you came in contact
4 with Mr. Cheeks.

5 A. Yes. He had come down to the jail house and talked to
6 me.

7 Q. Okay. And why did he come to the jail house to talk to
8 you?

9 A. He come down there and went over my case with me. And
10 then he told me that Roger Poole would be back. And --
11 since I didn't want to sign the papers. Because he went
12 over the piece of paper there with me and said there was no
13 evidence. He said, you don't have to sign it. So I did not
14 sign it. He said Roger Poole would be back later on. And
15 then -- within the week, and then you can talk to him about
16 if you want to go to trial or not.

17 Q. Okay. So the papers that you're referring to -- are
18 you referring to what is known as your discovery?

19 A. Yes, ma'am.

20 Q. Okay. So you discussed your case with Mr. Cheeks. And
21 you subsequently discussed your case with Mr. Poole ---

22 A. I ---

23 Q. --- based on those documents?

24 A. I have not talked to Mr. Poole. The only one I talked
25 to was James Cheeks.

KENNETH NELSON - DIRECT EXAMINATION BY MS. MOODY

9

1 Q. Okay. So you decided, obviously, that you wanted to
2 plea?

3 A. I didn't want to plea. I was at the jail house, and
4 when I was -- got to go up there, they said that I was on
5 the docket to go to court. So I went up there.

6 That's when James Cheeks brought me into the room up
7 there and asked me, he said, you know, you don't have to
8 sign that. I said, I don't want to sign this. He said,
9 well, come here, let me talk to you. So I had went in the
10 room.

11 He said if you take this plea of time served, then, he
12 said, I will go in there and talk to the judge. So I went
13 ahead and signed the paper. I didn't know what I was
14 signing. I signed the paper.

15 And then when he come back he said, the judge said that
16 he wasn't taking no more pleas today. And so I went ---

17 Q. Let me ---

18 A. --- went back to ---

19 Q. --- ask you this. Who provided you with the plea offer
20 from the State?

21 A. James Cheeks.

22 Q. Okay. Did you discuss your documents with Mr. Poole at
23 any point in time?

24 A. No, ma'am.

25 Q. Okay. Did he make any offer to you?

KENNETH NELSON - DIRECT EXAMINATION BY MS. MOODY

10

1 A. No, ma'am.

2 Q. So the only offer that you received was when you
3 received it from Mr. Cheeks?

4 A. James Cheeks up there in the room, up there today. I
5 mean, you know, where we talked.

6 Q. All right. So did you sign up for any kind of
7 discussion so that you could discuss your case with Mr.
8 Cheeks?

9 A. He never did make no arrangements for me to do that. I
10 mean, I didn't neither.

11 Q. Well, I'm asking did you sign up for the opportunity to
12 speak with Mr. Cheeks?

13 A. Not to my knowledge, I didn't.

14 Q. Okay. So Mr. Cheeks just came and spoke with you?

15 A. Just come on down there and spoke to me because he said
16 something about Roger Poole would come in within the next
17 week and talk to me. And a lot of times Roger Poole had
18 come into the jail cell to talk to other people. And I was
19 asking him about my case.

20 And he always would write it down on a piece of paper,
21 and he never would get in touch with me or -- I sent him
22 letters and everything else. And he never would respond to
23 my letters.

24 Q. Okay. And so you're here today on your application
25 against Mr. Cheeks. What are your grounds of ineffective

KENNETH NELSON - DIRECT EXAMINATION BY MS. MOODY

11

1 assistance of counsel that you allege against Mr. Cheeks?

2 A. Because he knew that when we went into court that there
3 was no evidence, me committing this crime, and he allowed
4 the case to go on. And he never did want it to even go to
5 trial.

6 And he had told me when we was, I believe, in the
7 little room up there, coming down the hall, he said, you
8 know, the judge do not have to accept this plea offer. And
9 I said, okay. And he said, 'cause -- he said, it all
10 depends on what you say. He said if you, you know, kind of
11 agree to everything, he probably will or then he won't.

12 So here I was -- had it that I had to agree to all this
13 just to try to get that time served that I thought that I
14 was going to get, but it never was -- he never did have no
15 piece of paper or nothing that I seen that had it on there.

16 Q. Okay. So you understood that you had a recommendation
17 from the State, correct?

18 A. Yes, ma'am.

19 Q. And you understood that you had multiple charges that
20 you were charged with?

21 A. I didn't know I was -- I knew of the charges, yes,
22 because ---

23 Q. You got the warrants. They ---

24 A. Well, yeah.

25 Q. And when you got arrested, you ---

KENNETH NELSON - DIRECT EXAMINATION BY MS. MOODY

12

1 A. I knew then, yes. Yeah.

2 Q. Okay. And you're telling this Court today that you
3 pled to only one charge?

4 A. I signed the plea. I don't know what ---

5 Q. No, no. You just -- I'm just going back to what you
6 said. In your testimony you just told the Court that you
7 pled to one charge ---

8 A. One charge, yes, ma'am.

9 Q. Okay. And that charge was the CSC with a minor?

10 A. Yes, ma'am.

11 Q. Okay. And as you're relating it to us -- the Court
12 today, you didn't talk to your attorney, Mr. Poole, about
13 any offer?

14 A. No, ma'am.

15 Q. All right. And you talked to Mr. Cheeks about an
16 offer. And he explained to you that it was a
17 recommendation?

18 A. He never explained anything to me. I mean, the only
19 thing he explained to me, if I signed it, then he was going
20 to give me time served and I would go home that night. And
21 that's the only thing he had told me. And that's when I
22 went to the courtroom over there.

23 Q. Okay. And so that's the basis of the ineffective
24 assistance of counsel?

25 A. And then when we got up there he never went over the --

KENNETH NELSON - DIRECT EXAMINATION BY MS. MOODY

13

1 none of the process like the Apple [sic] plea. I didn't
2 know nothing about the Apple [sic] plea. He wanted me to
3 plea under the Apple [sic] plea, ---

4 **THE COURT:** What kind of plea?

5 A. The Alpha.

6 **THE COURT:** Alford?

7 A. Alford, Alpha. Okay. I didn't know what it was, see.
8 I mean, I -- he wanted me to plea to that. And I -- he
9 never explained to me what that meant. And I didn't know
10 what that meant.

11 Q. Okay. What other grounds are you alleging against Mr.
12 Cheeks?

13 A. I don't know if they had anything going on with him and
14 the solicitor. I mean, I don't know what was going on, but
15 I just didn't feel like that I wasn't represented the way I
16 was supposed to been represented. I mean, whether I was
17 being charged with this crime or not being charged with this
18 crime. I mean, ---

19 Q. Well, in your application you indicated that your
20 attorney failed to advise you on the evidence compiled
21 against you.

22 A. Yes, ma'am.

23 Q. So you did not -- either you did go over the discovery,
24 the documents against you, with Mr. Cheeks or you did not?

25 A. I did not. The only one that I went -- Roger Poole was

KENNETH NELSON - DIRECT EXAMINATION BY MS. MOODY

14

1 the one that went over the discovery with me. Other than
2 that, that was it.

3 Q. You just testified that Mr. Cheeks went over the
4 discovery with you. Who went over the discovery with you,
5 Mr. -- you said Mr. Poole did not go over it with you, but
6 Mr. Cheeks went over ---

7 A. Yeah.

8 Q. So who went over your discovery?

9 A. Roger Poole.

10 **THE COURT:** You told me earlier that you never saw
11 Poole. Now which is it, Mr. ---

12 A. I did. I saw Poole. Yeah, I told you I saw Poole.

13 Roger Poole, he had come down there. I mean, I'm talking --
14 Roger Poole, only time I seen him is when we went for a
15 preliminary hearing.

16 Q. But you -- you testified ---

17 A. Yeah, ---

18 Q. --- that you met with Mr. Cheeks.

19 A. James Cheeks, yeah.

20 Q. And Mr. Poole never came or responded to your letters.
21 He would always write it down on a piece of paper.

22 A. Right. Right.

23 Q. Okay. So you went over your discovery with Mr. Cheeks.

24 A. Mr. Cheeks.

25 Q. And so who are you saying failed to advise you on the

KENNETH NELSON - DIRECT EXAMINATION BY MS. MOODY

15

1 evidence compiled against you?

2 A. Mr. Cheeks.

3 Q. But you went over the discovery with him.

4 A. But ---

5 Q. That's the evidence.

6 A. But he never did -- the only thing he said -- and then
7 when he said, well, you know, there's no evidence on you.

8 He said, you don't have to sign this. But ---

9 Q. So he did advise you on it?

10 A. At that time when I was talking to him at the jail. He
11 talked to me then, at the jail.

12 Q. Okay. You also state in your application that -- well,
13 excuse me, your attorney failed to question you on your
14 understanding of the charges being brought against you. Can
15 you please tell the Court what you mean by that?

16 A. Well, I mean, like the -- on one of the charges on
17 there, it's like the criminal sexual conduct, okay, on that
18 one right there he didn't tell me -- like I was seeing like
19 all the charges was being brought up against me on it. He
20 didn't explain that to me.

21 Q. Okay. And then you state that your counsel failed to
22 sufficiently confer with you. What do you mean by
23 conferring with you? Meet with you?

24 A. Well, I mean, you know, he never -- only time he'd talk
25 to me is, like I said, when he went over the rule 5 or

KENNETH NELSON - DIRECT EXAMINATION BY MS. MOODY

16

1 whatever. That's the only time he talked to me. Other than
2 that, he -- I never did talk to him. He never did let me
3 know what was going on or ---

4 Q. Let me stop you right there. When you say he, are you
5 talking about Mr. Poole or are you talking about Mr. Cheeks?

6 A. Mr. Cheeks.

7 Q. Because Mr. Poole was your attorney ---

8 A. Mr. Cheeks.

9 Q. Okay. Then you also alleged your attorney failed to
10 request and provide discovery materials to you.

11 A. No, I got it. I got it.

12 Q. You got your discovery ---

13 A. I did. I got it. I finally got it.

14 Q. So that's not -- you don't want to go forward on ---

15 A. No, ma'am, I got that.

16 Q. Okay. And then you said that your attorney had some
17 level of misconduct. What do you mean by the misconduct?

18 Can you tell the Court?

19 A. I -- I don't even know. I mean, I don't know. I guess
20 I'll just scratch that one, too. I don't know.

21 Q. And then you indicated there was a conflict of interest
22 that your attorney was friends with the solicitor.

23 A. Well, I mean, you know, they -- I don't know if he was
24 or if he wasn't, but they, you know, the way they are, they
25 talk, I mean, they got ---

KENNETH NELSON - DIRECT EXAMINATION BY MS. MOODY

17

1 Q. They were cordial to each other?

2 A. Yeah, they got to talk or whatever, but, I mean, I
3 don't know. In some situations, you know, they'll say,
4 well, you'll let this one here slide, we'll get him ---

5 Q. You're saying they did that?

6 A. I don't know if they did or not, but, I mean, I ain't
7 got no proof that they did or if they didn't. I mean, you
8 know, that's the way they do some things, you know. They'll
9 get one, then let two or three slide, you know.

10 Q. Okay. Then you indicate that you had an involuntary
11 guilty plea, specifically that you were never afforded the
12 information needed to knowingly submit a guilty plea. What
13 information are you speaking of?

14 A. The evidence. I didn't have no -- they didn't have no
15 evidence sheets in my motion when they give me the
16 paperwork.

17 Q. But you received the discovery from Mr. Cheeks?

18 A. But it didn't -- I'm saying it didn't have no -- the
19 only time I got the evidence sheet is when you sent me the
20 papers.

21 Q. Okay. Just so we're clear on the record, you discussed
22 the discovery or evidence with Mr. Cheeks.

23 A. Um-hum (affirmative).

24 Q. He gave you his opinion as to what he felt about the
25 evidence.

KENNETH NELSON - DIRECT EXAMINATION BY MS. MOODY

18

1 A. Yeah, but he never did have no ---

2 Q. I'm just -- I'm just trying to make sure I'm clear on
3 this. He gave you his opinion, what he felt about the
4 evidence.

5 A. Right.

6 Q. The documents that made the -- or that was -- compiled
7 the evidence, considered the discovery or the evidence, you
8 did not receive those documents?

9 A. No, ma'am.

10 Q. Okay. And so you're saying that because you didn't
11 receive them, you couldn't make an informed decision as to
12 whether or not to plead guilty?

13 A. Well, I know I didn't do the crime, but I was trying to
14 find out if they had anything or not, you know. I mean,
15 they got to have something. But I know they didn't have no
16 evidence 'cause I didn't do it.

17 Q. Okay.

18 A. But ---

19 Q. Go ahead. I'm sorry.

20 A. But, you know, but then James Cheeks talked me in to
21 signing that plea.

22 Q. Okay. And Mr. Cheeks just came up to you to talk to
23 you about your case?

24 A. Well, he was already over here at the courthouse. And
25 then they come and got me out of the jail cell. And they

KENNETH NELSON - DIRECT EXAMINATION BY MS. MOODY

19

1 told me I needed to be in court, that I was on the docket.

2 And when I come over here I talked to Mr. Cheeks in that
3 little room up there. And he told me to come on in there
4 and that he would give me time served.

5 Well, he asked me first, he said, do you want to plead
6 to this? I said, no, I don't want to plead to this. And we
7 went in there and that's when he had told me that if I
8 signed this plea, then he would give me time served.

9 Q. Okay.

10 A. But at the time I didn't know what time served meant.
11 So I was signing a piece of paper, but he didn't say nothing
12 about all the other -- that I was going to get ten years.
13 He didn't say it had a ten year cap, five, fifteen year,
14 none of that on there.

15 Q. Okay. Well, did y'all discuss the amount of time that
16 you were exposed to on the charge?

17 A. No, ma'am. I mean, 'cause only thing, like I said, the
18 only thing I thought I was doing was signing the time
19 served. And he didn't go over the other charges with me and
20 the stipulation of the penalty or what have you.

21 Q. Okay. And then you -- lastly you allege prosecutorial
22 misconduct. What do you mean by that?

23 A. Well, I mean, it was -- I feel like it was his job to
24 go over everything with me and question me to make sure I
25 explain -- that, you know, he explained everything to me and

KENNETH NELSON - DIRECT EXAMINATION BY MS. MOODY

20

1 ---

2 Q. Wait a minute. When you say prosecutorial misconduct,
3 you talking about the solicitor or are you talking about Mr.
4 Cheeks?

5 A. Well, you know, the solicitor 'cause he should have, I
6 guess, you know, went over things with me, too. And --
7 because, like I said, I mean, it's my fault that I don't
8 know nothing about the law. It's my fault. I mean, I ---

9 Q. Okay.

10 A. I don't know nothing. So, I mean, I could have got
11 information from either one of them, you know, probably
12 would have been helpful. But, I mean, they didn't give me
13 nothing. I didn't know nothing.

14 Q. Okay.

15 A. I mean, I just got a seventh grade education. I mean,
16 that don't -- that don't stand for a whole lot, but when you
17 ain't got no -- when you can't half read and write, don't do
18 me a whole lot to go to no law library when I can't read or
19 write.

20 Q. Okay. So is there anything else you want to convey to
21 the Court about your ineffective assistance of counsel?

22 A. No, ma'am.

23 Q. Anything else you want to convey to the Court in terms
24 of your involuntary guilty plea?

25 A. No, ma'am.

KENNETH NELSON - DIRECT EXAMINATION BY MS. MOODY

21

1 Q. Anything else you want to relay to the Court about
2 prosecutorial misconduct?

3 A. No, ma'am.

4 Q. Okay. So now that's all -- you're saying your lawyer
5 was ineffective in those regards.. How did that prejudice
6 you or how did that hurt you or your case?

7 A. Well, see, if we'd went on to trial, I think the
8 outcome would have been different due to the fact there was
9 no evidence. And with him not suggesting that we go to
10 trial, then ---

11 Q. When you say him, who?

12 A. Oh, James Cheeks. I'm sorry.

13 Q. Okay.

14 A. James Cheeks. When he -- when James Cheeks didn't
15 suggest that we go to trial, I felt like, you know, that I
16 could have maybe beat this, or got a lesser sentence, or,
17 you know, I mean, 'cause it was just -- don't make, I mean,
18 it's hard to explain, but I felt like that I could have done
19 better, maybe.

20 Q. All right. So now when you talked to the judge and he
21 asked you questions, did you answer those questions on your
22 own?

23 A. Well, I done it under the advisement of James Cheeks.

24 Q. So when the judge asked you a question, you talked to
25 James Cheeks in between each question?

KENNETH NELSON - DIRECT EXAMINATION BY MS. MOODY

22

1 A. Sometimes and sometimes no.

2 Q. Okay. And during that time did Mr. Cheeks help you
3 come up with an answer?

4 A. No -- on some of them he didn't, but he advised me
5 before I went in there that he does not have to accept this
6 plea and for me to be -- my best interest, it would be to
7 answer the questions as he presented them to me.

8 And I felt, you know, if I answered them that I would
9 get the sentence of time served. He never did tell me that
10 I wasn't even going to get time served or nothing. I mean,
11 he never just -- that was never brought up again after he
12 said that.

13 Q. Okay. And is -- what relief are you seeking from the
14 Court here today?

15 A. Either to try to get another trial ...

16 Q. Or get -- you didn't go to trial, but you're trying to
17 get a trial?

18 A. Trying to get a new trial.

19 Q. Okay. And ---

20 A. Or get it dismissed or whatever -- seek some kind of
21 relief 'cause I felt like I could do better maybe if I go to
22 trial.

23 Q. Okay. And you realize that the Judge here today cannot
24 give you a reduced sentence?

25 A. Okay.

KENNETH NELSON - DIRECT EXAMINATION BY MS. MOODY

23

1 Q. Is there anything else you wish to tell the Court?

2 A. No, ma'am.

3 Q. Okay.

4 **MS. MOODY:** No further questions for this witness.

5 **THE COURT:** Mr. Nelson, let me be clear. You know, I
6 tried to explain this to you a moment ago. I can't reduce
7 your sentence. All I can do is send you back. And if you
8 go back, you're going to be tried for criminal sexual
9 conduct with a minor in the second degree. And that carries
10 -- again, it's second degree. How much does that -- isn't
11 that twenty?

12 **MS. OLIVE:** I believe so, Your Honor.

13 **MS. MOODY:** Yes, sir.

14 **THE COURT:** You're looking at a twenty year sentence.
15 That's what you can be tried for. And you'll be tried for
16 the lewd acts or the indecent exposure. Do you understand?

17 A. Um-hum (affirmative).

18 **THE COURT:** You may even be tried for lewd act. And
19 reading your transcript, there may even be other charges.
20 Do you understand that?

21 A. Okay.

22 **THE COURT:** Okay. That's what'll happen if I rule in
23 your favor. Do you understand? Do you understand me?

24 A. Okay.

25 **THE COURT:** Okay. All right.

KENNETH NELSON - CROSS EXAMINATION BY MS. OLIVE

24

1 Cross Examination by Ms. Olive:

2 Q. Good morning, Mr. Nelson.

3 A. Good morning.

4 Q. Do you remember your guilty plea hearing?

5 A. Do I remember it?

6 Q. Yeah, do you remember ---

7 A. Oh, remember going to court? Yes, ma'am.

8 Q. Okay. Well, if there's anything that you forget as we
9 go over it, I've got the transcript here. So we can clarify
10 anything that we need to. Now, you testified earlier that
11 you only pled to one charge, but the judge actually went
12 over -- you actually pled to three charges, correct?

13 A. Okay.

14 Q. The judge actually -- and if you need to see the
15 transcript, I can -- I can show it to you. But the judge
16 actually went over all these charges with you, right?

17 A. Yes, ma'am.

18 Q. And he -- he did explain to you that you could be
19 sentenced for up to fifteen years for the lewd act on a
20 minor charge?

21 A. Yes, ma'am.

22 Q. And he explained to you that the State had made a
23 recommendation for sentencing, but that he was not required
24 to follow it. Correct?

25 A. Yes, ma'am.

KENNETH NELSON - CROSS EXAMINATION BY MS. OLIVE

25

1 Q. And that he could actually sentence you up to the full
2 fifteen years?

3 A. Yes, ma'am.

4 Q. And he asked you if you understood that. And you said
5 yes.

6 A. Um-hum (affirmative).

7 Q. And the recommendation that was in place was a ten
8 year, concurrent sentence, correct?

9 A. Yes, ma'am.

10 Q. Okay. And is that, in effect, what you received?

11 A. Nah, that's what he gave me.

12 Q. Okay. So the judge went over those charges with you.
13 He also went over the exposure of private parts and that
14 that carried up to six months, correct?

15 A. Yes, ma'am.

16 Q. Okay. And you already testified that Mr. Cheek did go
17 over the discovery with you, correct?

18 A. Yes, ma'am.

19 Q. You just don't feel like there was evidence there?

20 A. There was no evidence 'cause I never done it.

21 Q. Okay. But there was -- there were victims that came
22 forward regarding these charges. And they went -- they had
23 a forensic interview done, right?

24 A. Yes, ma'am. I mean, I'm assuming they did.

25 Q. Okay. Now did you discuss with Mr. Cheek your version

KENNETH NELSON - CROSS EXAMINATION BY MS. OLIVE

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1 of what happened? Was it -- did you ---

2 A. He never did question me on -- he never did ask me, not
3 one time, what happened. I didn't have to explain nothing
4 to him. He didn't ask me.

5 Q. Okay. And you pled pursuant to Alford, correct?

6 A. Yes, ma'am.

7 Q. Okay. And the judge explained to you what that meant,
8 didn't he?

9 A. I didn't -- yeah, I didn't know what it was until the
10 judge had explained it to me. If I'd knowed that, I
11 wouldn't have signed it. I wouldn't agree to it.

12 Q. But he then asked you if you still wanted to plead
13 guilty, correct?

14 A. Yeah, I know it, but I wasn't -- I wasn't thinking, I
15 guess.

16 Q. Okay. But he did ask you as well whether you suffered
17 from any mental, physical or nervous problems that would
18 affect your ability to reason that day?

19 A. Yes.

20 Q. Okay. And you told him no?

21 A. Yes.

22 Q. And you never told him that you needed more time to
23 consider whether to plead guilty?

24 A. No, ma'am.

25 Q. Okay. And he asked you if you were satisfied with your

KENNETH NELSON - CROSS EXAMINATION BY MS. OLIVE

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- 1 lawyer?
- 2 A. He did.
- 3 Q. And you said yes?
- 4 A. Yes, ma'am.
- 5 Q. And he asked you if there was anything else you think
- 6 that he should do?
- 7 A. Yes, ma'am.
- 8 Q. And you said no?
- 9 A. Um-hum (affirmative).
- 10 Q. Okay. And he also asked you if you'd had enough time
- 11 to think about the charges?
- 12 A. Yes, ma'am.
- 13 Q. And you said yes?
- 14 A. Um-hum (affirmative).
- 15 Q. Okay. And he asked you if anyone had made any
- 16 promises, or guarantees or assurances about your guilty
- 17 plea?
- 18 A. Yes, ma'am. And I told him that, no, they haven't, but
- 19 that's when I should have said something then.
- 20 Q. But he asked you again, you're not relying on any
- 21 promises or guarantees whatsoever in offering the pleas.
- 22 A. Yes. When I got up there -- I get -- I get nervous.
- 23 And I don't know, I get -- I don't think right sometimes.
- 24 Q. Okay. Did you tell your lawyer about any potential
- 25 defenses you might have? Any witnesses that you might have?

KENNETH NELSON - CROSS EXAMINATION BY MS. OLIVE

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1 A. No, ma'am.

2 Q. Okay. And it was ultimately your decision to plead
3 guilty, right?

4 A. Yes, ma'am.

5 Q. And again, you were initially charged with criminal
6 sexual conduct in the second degree? And ---

7 A. Yes, ma'am.

8 Q. --- that charge was dismissed as a result of this
9 guilty plea?

10 A. Yes, ma'am.

11 Q. And you, again, understand that you would have been
12 facing up to twenty years on that charge if you were to go
13 to trial?

14 A. Yes, ma'am.

15 Q. And the judge went over what rights you were waiving by
16 pleading guilty, correct?

17 A. No, ma'am. See, if I'd knowed all that, I wouldn't
18 have -- I wouldn't have signed the -- wouldn't signed it.
19 He didn't go over nothing with me. I didn't know.

20 **THE COURT:** Mr. Nelson, you keep saying I wouldn't have
21 signed it. What are you talking about?

22 A. I wouldn't have signed the plea, the Alpha plea, Alford
23 plea, whatever that was. I wouldn't have signed it.

24 **THE COURT:** You mean your sentencing sheet? You
25 wouldn't have signed ---

KENNETH NELSON - CROSS EXAMINATION BY MS. OLIVE

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1 A. Yes, sir, that's what it is. The sentencing sheet, I
2 wouldn't have signed it.

3 **THE COURT:** But you did?

4 A. But I did, yes, sir.

5 **THE COURT:** Go ahead.

6 Q. But the judge did inform you that he didn't have to
7 accept the guilty plea, did he not?

8 A. Yes, ma'am.

9 Q. Okay. And -- okay. So he didn't tell you that you had
10 the right to -- but he did tell you that you had the right
11 to a jury trial, right?

12 A. No, ma'am. He never did discuss it.

13 Q. Are you talking about the judge or ---

14 A. James Cheeks, he never did discuss it.

15 Q. Okay. But the judge at your guilty plea ---

16 A. Oh, yes, ma'am. Yeah, he did.

17 Q. He went over those with you?

18 A. Yes, ma'am.

19 Q. Your right to a jury trial, your right to confront your
20 accusers and your right to remain silent?

21 A. Yes, ma'am.

22 Q. And that you were waiving all those?

23 A. Yes, ma'am.

24 Q. By pleading guilty? And you knew that an Alford plea
25 meant that you were not admitting guilt, but that you were

JAMES CHEEK - DIRECT EXAMINATION BY MS. OLIVE

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1 admitting that the State could prove that you were guilty if
2 you were to go to trial?

3 A. Yes, ma'am.

4 Q. Okay. And the judge actually did ask you if you
5 believed that you would be convicted if you were to go to
6 trial, right?

7 A. I believe he did.

8 Q. Okay. And you said yes?

9 A. Yes, under the advisement of James Cheeks.

10 **MS. OLIVE:** I beg the Court's indulgence, Your Honor.

11 (Pause)

12 **MS. OLIVE:** That's all the questions that I have.

13 Thank you.

14 **THE COURT:** Any redirect, Ms. Moody.

15 **MS. MOODY:** No, sir, Your Honor.

16 **THE COURT:** You may step down, sir.

17 **MS. MOODY:** Your Honor, we have no further witnesses.

18 **THE COURT:** All right. Ms. Olive.

19 **MS. OLIVE:** Your Honor, the State would call James
20 Cheek.

21 **James Cheek,** being duly
22 sworn testified as follows;

23 **Direct Examination by Ms. Olive:**

24 Q. Good morning, Mr. Cheek.

25 A. Good morning.

JAMES CHEEK - DIRECT EXAMINATION BY MS. OLIVE

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1 Q. Mr. Cheek, can you describe your experience? How long
2 have you been practicing law?

3 A. Thirty-five years, maybe. Since 1977.

4 Q. Okay.

5 A. I've been employed with the public defender's office
6 now about eight or nine years. My employment with the
7 public defender's office is to be certain that we are fluid
8 in the way we handle the movement of cases of inmates as
9 well as persons who are at the detention facility as well as
10 at the jail.

11 I do not have an assigned case load. Each of the
12 clients of the public defender's office, once accepted for
13 representation, is assigned trial counsel. That trial
14 counsel has primary responsibility of preparing the cases,
15 interviewing -- second interview of the clients after the
16 investigator from our office interviews the clients.

17 At the time of the initial interview there will be
18 statements taken from the clients. And then that file is
19 then passed to trial counsel. Trial counsel has the
20 responsibility of appearing for all preliminary hearings
21 that are held in cases for our clients.

22 At that time there would be a discussion with the
23 client regarding any further involvement of that particular
24 attorney as well as the possibility of contact with me as a
25 member of the staff in order to generate and getting the

JAMES CHEEK - DIRECT EXAMINATION BY MS. OLIVE

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1 cases prepared that result in guilty pleas.

2 With that being said, Mr. Roger Poole of our staff was
3 the assigned counsel for Mr. Kenneth Nelson. And it's my
4 understanding Mr. Poole also attended the preliminary
5 hearing. And, of course, at the preliminary hearing Mr.
6 Poole would have gone over all the discovery that the State
7 had at that time and had been shared with Mr. Poole.

8 Mr. Poole would have gone over the penalties, as well
9 as the elements of the crime, as well as the evidence in the
10 case; evidence meaning both testimony evidence as well as
11 any other type of evidence in the case. Primarily in this
12 case it would have been testimonial evidence against Mr.
13 Nelson.

14 The facts of this case were as presented to our office
15 as was to Mr. Nelson that this resulted in an investigation
16 over a several year period when the step-daughter came
17 forward and made some revelations to the aunt of an incident
18 that happened at the home wherein she alleged that Mr.
19 Nelson was there, that she was there, that she'd been
20 instructed to clean up her room.

21 There'd been some drinking going on by Mr. Nelson and
22 that at some point Mr. Nelson had her to partially disrobe,
23 and he put his finger inside of her vagina. That was not
24 disclosed immediately. In fact, it was a significant period
25 of time or maybe a year before that was disclosed.

JAMES CHEEK - DIRECT EXAMINATION BY MS. OLIVE

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1 And then the other incident resulting in charges of the
2 lewd act being reduced -- the lewd act was being reduced
3 from -- where the State would have brought criminal sexual
4 conduct from that incident.

5 The other incidents resulted from two young girls being
6 at a camper where Mr. Nelson was living. And my
7 recollection was that the two girls asserted that Mr. Nelson
8 exposed his private parts to them.

9 The girls would have been cleaning up at his camper.
10 They left some items there that they were supposed to be
11 using as cleaning aids. And then he exposed himself, again,
12 drinking being involved on the part of Mr. Nelson.

13 Those girls ran to an adjoining trailer or somewhere
14 else in that area and told the father about what had
15 happened. And the father confronted Mr. Nelson at which
16 that time Mr. Nelson apologized for anything that could have
17 possibly happened that was offensive to the girls.

18 When the case came to my attention, there had already
19 been a preliminary hearing. Mr. Nelson had communicated
20 that he wanted to resolve his case, this is back and forth
21 with Mr. Poole. And Mr. Poole sent me to have a
22 conversation with Mr. Nelson both at the detention facility
23 as well as here at the courthouse on the day of the plea.

24 Now, I further recollect that the plea was supposed to
25 have been done the day before. And we did not reach Mr.

JAMES CHEEK - DIRECT EXAMINATION BY MS. OLIVE

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1 Nelson that day. And he was put on the jail chain to come
2 back the following day for entering of the plea.

3 Q. So it was Mr. -- so you came on the scene because Mr.
4 Nelson had requested to plea -- he had told Mr. Poole he
5 wanted to plead guilty?

6 A. Correct. Mr. Poole had also worked with the prosecutor
7 in the case in order to get the charge reduced and to move
8 forward with the plea to a lewd act as opposed to criminal
9 sexual conduct with a minor in the second degree, which, of
10 course, would add some great benefit to Mr. Nelson because
11 we're looking at a reduced sentence range as well as the
12 level of seriousness of the charge, which would have
13 affected the length of time and parolable opportunities for
14 the most serious charge. This would have been a much
15 different charge as far as the length of time served at the
16 department of corrections as well as the housing at the
17 department of corrections.

18 Q. Okay. And so you did -- you reviewed the ---

19 A. I reviewed the discovery with Mr. Nelson. I went over
20 the file with Mr. Nelson. In fact, I had the solicitor's
21 file that I went over with him. We reviewed everything.

22 We talked about the length of sentences, the difference
23 in the charges, the elements of the crime. We talked about
24 any potential defense he could have offered in either of the
25 cases.

JAMES CHEEK - DIRECT EXAMINATION BY MS. OLIVE

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1 In both incidents he asserted drinking, intoxication,
2 his inability for recollection of the events as to whether
3 it's his ability to offer any credible defense in the case
4 because he essentially had been drinking. I think that at
5 trial the father of the girls at the camper incident would
6 have asserted, again, that he had been drinking and that was
7 primarily the reason why he was not probably physically
8 assaulted by the father at the trailer because the father
9 recognized that there was a great degree of drinking.

10 Now, as far as the young girl, the step-daughter's
11 concerned, the incident happened a couple of years earlier.
12 Again, there'd been drinking. I think DSS made an
13 investigation into that case from what Mr. Nelson had told
14 me and that he went and got some help, sought some help
15 through Spartanburg Alcohol and Drug Abuse Commission as far
16 as therapies and counseling was concerned at that time.

17 Q. And you -- you actually -- did you bring that up in
18 mitigation, the fact that he had been attending this
19 counseling for the alcohol?

20 A. I did. And I did that in an effort to ask for mercy
21 and leniency in sentencing because at that point in time we
22 were essentially looking at maybe, hopefully a cap of ten
23 years. I was hoping the court might come in with something
24 less than ten once we explained that he took very seriously
25 his addressing his drinking problem.

JAMES CHEEK - DIRECT EXAMINATION BY MS. OLIVE

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1 Now the danger in that, of course, was that that was
2 over a two year period of time and he wound up back in the
3 same place again. He'd done relapsed or weekend drinking,
4 whatever he was doing.

5 So over a two year period of time his drinking probably
6 had escalated as opposed to diminished, but I still took the
7 chance. And then the court noted he did make some
8 considerable effort to address his drinking problem.

9 Q. Did you make any promises to him regarding what type of
10 sentence he would receive?

11 A. No. Had I done that, I would have put that on the
12 record. Not as a promise, but I would have put it on the
13 record that he had been advised that I would ask the court
14 for a specific range of sentencing or a specific sentence.

15 In this case, I would have tried to negotiate a
16 sentence as opposed to making a promise. If he'd indicated
17 that he wanted to negotiate a sentence, we would have tried
18 to do that, but no such request was ever made by him to me
19 regarding sentencing.

20 And I certainly never promised him as he has testified
21 here today that he would get a time served sentence. That
22 would have rarely happened, particularly since I knew that
23 the guardian or mother of one of the girls was going to
24 actually be present to speak in court and that there was
25 going to be some request for actual incarceration of time.

JAMES CHEEK - DIRECT EXAMINATION BY MS. OLIVE

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1 Q. And did they speak at court?

2 A. Yes.

3 Q. And did you discuss with Mr. Nelson the rights that he
4 would be waiving by pleading guilty?

5 A. Yes. I typically do that three times on all cases.
6 When I first entered the room to begin the conversation I
7 would say something very brief, like, you know, you have
8 every right to go to trial, requiring the State to prove you
9 guilty beyond a reasonable doubt. You don't have to prove
10 anything at trial.

11 Everything has to be proven by the State, however,
12 during the course of a trial you have an opportunity to put
13 up a defense, although, you're not required to put up a
14 defense. You do have the opportunity to subpoena witnesses
15 to come to court to testify on your behalf. But there would
16 be no such person in this case regarding someone coming
17 forward to testify because of the nature of the allegations.

18 I also, before they sign the sentencing sheet, I tell
19 them which rights they are waiving. And I also emphasize
20 that you are certainly given the right to remain silent, of
21 course, you've got to talk to the court. And you've got to
22 be honest with the court and be responsive to the court.

23 And I generally admonish them that you should be very
24 respectful to the court in your addressing the court, yes,
25 sir, no, sir, yes, Your Honor, no, Your Honor, those type

JAMES CHEEK - DIRECT EXAMINATION BY MS. OLIVE

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1 things.

2 And then prior to court starting and to be certain I've
3 not forgotten anything, I generally give a corporate speech
4 to all of the inmates that we represent so that I go over
5 everything that I can possibly think of. And I try to put
6 it in perspective that I think that they can understand.

7 And I generally start with describing to them where a
8 lot of this comes together, particularly from kindergarten
9 to the first grade, that they're to understand the pledge of
10 allegiance and how our government and our judicial system
11 results in liberty and justice for all just as the end of
12 the pledge of allegiance.

13 And I talk about things like our system of government
14 and what the Constitution means and what added on to means
15 by amendments, where those rights come from. So I do all I
16 can to make certain that every client, regardless of their
17 level of education, comprehension, at least understands what
18 a kindergartner or a first grader understands when they
19 pledge allegiance to the flag.

20 Q. Okay. Did you ever feel at any time that Mr. Nelson
21 had problems understanding the seriousness of the charges he
22 was facing, the penalties he was facing or the rights that
23 he was waiving?

24 A. I never had any concern whatsoever. In fact, I was
25 confident he understood what he'd be looking at at trial on

JAMES CHEEK - DIRECT EXAMINATION BY MS. OLIVE

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1 criminal sexual conduct with a minor in the second degree,
2 the reduced charge of lewd act, as well as the penalty for
3 exposure, as well as his understanding for his inability to
4 present any kind of defense because of his drinking, and the
5 state of intoxication and his recollection at the time these
6 incidents occurred. In fact, he was very, I thought, very
7 concerned that he would not be able to put up a criminal
8 defense. And he understood that.

9 Q. So you didn't -- and I believe you've already testified
10 to this. You didn't believe he had any defenses to these
11 charges?

12 A. Based on what he told me that he could put up at trial
13 and his recollection, I did not see. And I agreed with Mr.
14 Poole from which Mr. Poole had referred to me from their
15 conversations, particularly at the preliminary hearing
16 stage, that he had a defense he could offer to these
17 charges.

18 His only concern was he felt that some of the -- some
19 of the level of degree of the exchange may have been trumped
20 up, I think is a term I used, or encouraged by his wife
21 because she wanted to divorce him. But, of course, his wife
22 had no control over what happened at the trailer because
23 they were separated at that time. And, I mean, I'm not even
24 sure she would have knew these other girls that brought
25 these other charges on the exposure.

JAMES CHEEK - CROSS EXAMINATION BY MS. MOODY

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1 Q. Based on your review and understanding of the discovery
2 and facts in this case and your experience as an attorney,
3 did you feel he would have been successful if he had gone to
4 trial on these charges?

5 A. I feel the State would have been successful in
6 convincing a jury beyond a reasonable doubt that he had
7 committed these acts, particularly with his inability to
8 present any credible defense in the case, and with these
9 young children being -- testifying and with the forensic
10 results from the Children's Advocacy Center. I just felt
11 that it was an overwhelming case against him.

12 Q. And ultimately was it his decision to plead guilty?

13 A. Yes, it was.

14 MS. OLIVE: I beg the Court's indulgence for a moment,
15 Your Honor.

16 (Pause)

17 MS. OLIVE: That's all the questions I have. Thank
18 you.

19 THE COURT: Ms. Moody.

20 MS. MOODY: Thank you, Your Honor. May it please the
21 Court.

22 **Cross Examination by Ms. Moody:**

23 Q. Good afternoon -- good morning, Mr. Cheeks.

24 A. Good morning.

25 Q. Mr. Cheeks, at the time that you came in contact with

JAMES CHEEK - CROSS EXAMINATION BY MS. MOODY

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1 Mr. Nelson, I believe you testified that Mr. Nelson wanted
2 to plea. I just want to be clear, Mr. Nelson discussed the
3 plea offer that he ultimately pled to with Mr. Poole?

4 A. It's my understanding he discussed it with Mr. Poole.
5 Mr. Poole referred the matter to me indicating that he felt
6 Mr. Nelson understood everything, for me to communicate with
7 him and to get the plea ready to present in court.

8 Q. Okay. Now you discussed earlier that you typically go
9 over the client's rights at least three times. When you
10 discussed Mr. Nelson's rights with him and, I guess, the
11 penalties, did you ever discuss the time served issue or
12 your testimony earlier was that that was rare. Did you ever
13 discuss the time served with him?

14 A. I never discussed the time served with him. The only
15 thing that he could possibly, I think, be addressing is that
16 he was concerned about getting credit for the time that he
17 had been incarcerated.

18 I explained to him that by law you get credit for any
19 pre-sentence detention time and that I would also try to get
20 that time for the charges -- for all of the charges since we
21 were asking the court to run everything concurrent, that he
22 get credit for his time served, which was a considerable
23 length of time that he had been in custody.

24 Q. Okay. And so how long would you say that it was
25 between the time that Mr. Poole did the preliminary hearing

JAMES CHEEK - CROSS EXAMINATION BY MS. MOODY

42

1 and the time that you met him to prepare for the plea?

2 A. I don't know, but I talked with Mr. Nelson at least a
3 week prior to us coming to court and then the day before as
4 well as the day of.

5 Q. Okay. And so you're testifying that he had done a
6 considerable amount of time in jail and got credit for that.
7 So it's -- would you disagree with me that it was four
8 hundred and thirty-five days?

9 A. It was four hundred and thirty-five days.

10 Q. Okay.

11 A. It was over a year.

12 Q. Okay. And so the latter part of those four hundred and
13 thirty-five days, and I might be mistaken, you had spoke to
14 him a week prior to him pleading?

15 A. About a week before.

16 Q. A week before.

17 **MS. MOODY:** No further questions for this witness, Your
18 Honor.

19 **THE COURT:** Ms. Olive.

20 **MS. OLIVE:** Your Honor, I have no further questions.

21 And I would ---

22 **THE COURT:** You may step down, ---

23 **MS. OLIVE:** --- ask that this witness be excused.

24 **THE COURT:** --- Mr. Cheek. Thank you.

25 A. Thank you, Your Honor.

1 **THE COURT:** Witness, Ms. Olive?

2 **MS. OLIVE:** Your Honor, I would just ask that Mr. Cheek
3 be excused.

4 **THE COURT:** Any further witnesses?

5 **MS. OLIVE:** Oh, no. No, Your Honor.

6 **THE COURT:** All right. Ms. Moody, I'll hear from you.

7 **MS. MOODY:** Your Honor, I'd just restate for the Court
8 briefly, Mr. Nelson's request is that he would like to have
9 a new trial. He bases his position on his ineffective
10 assistance of counsel, and specifically he's talking about
11 his representation by Mr. Cheeks, ---

12 **THE COURT:** Let me get this straight. I understand
13 that the -- listening to his testimony and all that -- and
14 your questions, that he abandons prosecutorial misconduct
15 and misconduct on the part of trial counsel, right?

16 **MS. MOODY:** Yes, sir.

17 **THE COURT:** Okay. So we have ineffective assistance,
18 is that right?

19 **MS. MOODY:** Yes, sir.

20 **THE COURT:** Okay. Thank you. Go ahead.

21 **MS. MOODY:** Okay. And as to the ineffective assistance
22 of counsel, Your Honor, the grounds that are remaining, he
23 is asking the Court to rule on the failure to advise him of
24 his evidence against him as well as question him on his
25 understanding of the charges.

1 And then he alleges that Mr. Cheeks -- that Mr. Cheek
2 failed to sufficiently confer with him. When -- going into
3 his plea, he would ask the Court to rule on his involuntary
4 guilty plea, that he was never afforded the information that
5 he needed to properly submit to a guilty plea.

6 And that is the basis of his PCR application, Your
7 Honor. He'd ask, again, for the Court to grant him a new
8 trial as he feels that all those grounds, all those
9 allegations against Mr. Cheek prejudiced him in some form or
10 fashion.

11 **THE COURT:** All right, Ms. Olive.

12 **MS. OLIVE:** Thank you, Your Honor. Your Honor, first
13 I'll address the matter of an involuntary guilty plea
14 allegation. And a defendant who enters a guilty plea on the
15 advice of counsel may only attack the voluntary and
16 intelligent nature of the plea by showing that counsel's
17 representation fell below an objective standard of
18 reasonableness and that there's a reasonable probability
19 that but for counsel's errors he would not have pled guilty,
20 but would have insisted on going to trial. So essentially
21 it's framed as an ineffective assistance of counsel claim.
22 So I will address that allegation.

23 On Mr. Nelson's -- again, Your Honor, the standard is
24 that he has to show error and prejudice. On his allegation
25 that counsel failed to advise him of the evidence compiled

1 against him and failed to question him on his understanding
2 of the charges being brought against him, Mr. Cheek
3 testified that he went over the discovery with Mr. Nelson.
4 He testified he explained it to him. He testified that he
5 never felt Mr. Nelson did not understand. In fact, he felt
6 that he fully understood the charges against him and the
7 penalties as well as the nature of the defenses being that
8 because he had no recollection of the events, he had no
9 defense against those charges.

10 He testified that based on his experience and based on
11 the evidence before him, he felt that Mr. Nelson would not
12 have been -- that the State would have been successful in
13 proving beyond a reasonable doubt that he was guilty of
14 these charges.

15 And the additional allegations with ineffective
16 assistance of counsel was that he failed to sufficiently
17 confer with Mr. Nelson. And again, based on Mr. Cheek's
18 testimony and based on the testimony of Mr. Nelson as well,
19 their testimony indicates that Mr. Cheek did speak with Mr.
20 Nelson, go through all of the discovery with him as well as
21 the evidence against him and that he understood that. Mr.
22 Cheek testified that it was Mr. Nelson's decision to plead
23 guilty based on these discussions.

24 And, Your Honor, regarding the remaining claims of
25 ineffective assistance of counsel, specifically failure to

1 says that he went over the petitioner's rights with him and
2 he went over the discovery materials.

3 Looking at the transcript of the case, I think that Mr.
4 Cheek did a certainly good job -- certainly did a good job
5 negotiating a plea for Mr. Nelson. I take of the fact that
6 Mr. Nelson's charge as pled is one that puts him parole
7 eligible as opposed to a similar sentence, if he had
8 received it, for the lewd act charge, that's very, very
9 significant in these type cases.

10 So we're faced with Mr. Cheek's testimony on one hand
11 and Mr. Nelson's testimony on the other hand. Which shall I
12 believe? I look to the record. And Judge Couch went over
13 these matters with him. He asked him very clearly and
14 concisely if he understood that he could get a greater
15 sentence than the cap, if he understood his charges, if he
16 understood his constitutional rights, all of these things,
17 and he said he did.

18 I think that he has failed in establishing the
19 requirements for relief by a preponderance of the evidence,
20 and I, therefore, deny relief. Thank you.

21 **MS. MOODY:** Thank you, Your Honor.

22 **MS. OLIVE:** Thank you, Your Honor.

23 (Hearing Ended at 11:03 am)

24 (End of Requested Transcript of Record)

Certificate of Reporter

I, The undersigned, Susan W. Hudgins, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Spartanburg County, South Carolina, on the 13th day of November 2015.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

July 23, 2016

A handwritten signature in black ink, reading "Susan W. Hudgins", written over a horizontal line.

Circuit Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Kenneth W. Nelson., #163540,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
IN THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2014-CP-42-1532

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed April 15, 2014. Respondent made its Return on October 23, 2014, requesting that an evidentiary hearing be held. An evidentiary hearing into the matter was convened at the Spartanburg County Courthouse before the undersigned on November 13, 2015. Applicant was present at the hearing and was represented by Leah B. Moody, Esquire. Alicia A. Olive, Esquire, represented Respondent.

At the evidentiary hearing, Applicant testified on his own behalf. The State presented testimony from James Cheek, Esquire. This Court also had before it the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the plea transcript, and the pleadings.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the October 2012 term of the Spartanburg County Grand Jury for two counts of exposure of private parts in a lewd and lascivious manner (2012-GS-42-5000, and -5000(A)). Applicant was subsequently indicted at the June 2013 term of the Spartanburg County Grand Jury for

committing or attempting to commit a lewd act upon a child under the age of sixteen (2013-GS-42-2868). Applicant was represented by James Cheek, Esquire ("Counsel"). On October 10, 2013, Applicant pleaded guilty to all charges as indicted pursuant North Carolina v. Alford, 400 U.S. 25 (1970).¹ The Honorable Roger L. Couch sentenced Applicant to concurrent terms of fifteen years for lewd act upon a minor, suspended on the service of imprisonment for ten years to five years of probation,² and imprisonment for six months on each charge of exposure of private parts in a lewd and lascivious manner. Applicant did not appeal his sentence or convictions.

Allegations

Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel; specifically:
 - a. Failure to advise Applicant on the evidence compiled against him;
 - b. Failure to question Applicant on his understanding of the charges being brought against him;
 - c. Failure to sufficiently confer with Applicant;
 - d. Failure to request and provide discovery materials to Applicant;
 - e. Counsel misconduct;
 - f. Conflict of interest in that Counsel was friends with the Solicitor;
2. Involuntary guilty plea; specifically
 - a. Applicant "was never afforded the information needed to knowingly submit a guilty plea."
3. Prosecutorial misconduct.

During his testimony, Applicant voluntarily withdrew his claims of prosecutorial misconduct, "counsel misconduct," conflict of interest, and failure of counsel to request or provide discovery.

¹ As part of the plea agreement, the State dismissed an indictment for criminal sexual conduct ("CSC") with a minor in the second degree.

² The State recommended a ten year cap and concurrent sentencing.

II. SUMMARY OF TESTIMONY PRESENTED

Applicant testified that he did not want to plead. Applicant testified he did not sign up for the opportunity to speak with Counsel, but that Counsel just showed up at the jail. Applicant testified that Counsel knew there was no evidence of a crime and he allowed the case to go on. Applicant testified that Counsel did not want the case to go to trial. Applicant testified that he thought the judge would sentence him to time-served. Applicant testified that Counsel said he did not have to accept the offer and that he would get time-served if he accepted the offer. Applicant testified Counsel did not discuss an Alford plea with him or explain what it meant. Applicant testified that he reviewed discovery with Counsel but did not review the evidence with him. Applicant testified that Counsel did not explain the charges to him. Applicant testified he did receive discovery materials. With regard to his allegation that Counsel had a conflict of interest, Applicant testified that Counsel was cordial with the State and that he did not know if there was a conflict and that he did not have proof.

Applicant testified that he did not have "evidence sheets" in the discovery materials, that he did not do the crime, and that the State did not have any evidence. Applicant testified Counsel did not discuss with him the sentences he faced. Applicant testified Counsel did not suggest that he go to trial. Applicant testified if he had gone to trial he could have beat the charge or received a lesser sentence. Applicant testified that he answered the plea judge's questions on the advice of Counsel. He testified that Counsel did not tell him how to answer, and told him that the judge did not have to accept his plea, so it was in his best interest to answer them.

On cross-examination, Applicant admitted that the plea judge reviewed the charges against him and told him that he could receive up to fifteen years on the lewd act charge. Applicant admitted that the plea judge also informed him that it did not have to follow the State's

recommended cap of ten years and that he could sentence him to up to fifteen years. Applicant also agreed that the judge reviewed the sentences he faced on the indecent exposure charges. Applicant agreed that Counsel reviewed discovery with him but that there was no evidence. Applicant agreed that the plea judge explained what an Alford plea was. Applicant admitted the plea judge asked him if anyone had made any promises or assurances to get him to plead, including any promises about length of sentence, and that he told the judge no. Applicant testified he should have told him a promise was made to him but that he got nervous. Applicant acknowledged that as part of the plea the State dismissed a charge of criminal sexual conduct with a minor, second degree. Applicant testified he did not know he was waiving his constitutional rights by pleading guilty and that Counsel never went over those rights with him. Applicant agreed that he agreed at the guilty plea hearing that he thought he would be convicted if he went to trial.

Counsel testified that Roger Poole initially represented Applicant and handled the preliminary hearing. Counsel testified that by the time the case was transferred to him, Applicant had already had his preliminary hearing and had decided to plead guilty. Counsel testified that Poole had worked with the State to get the charges reduced to lewd act instead of CSC with a minor, second degree, which reduced the sentencing range and seriousness of the conviction. Counsel testified that he never told Applicant he would receive a sentence of time-served. He stated that the only conversation they might have had with regard to time-served would have been a discussion about ensuring he received credit for the time he had already served. Counsel testified Poole and Applicant discussed the plea offer and then the case was referred to him. Counsel stated he spoke to Applicant a week before the plea, the day before the plea, and the day of the plea. Counsel testified that Applicant sought alcohol counseling and that he brought it up

at the plea hearing and provided the judge with written records evidencing that treatment. Counsel testified he hoped for less than ten years, but that he made no promises to Applicant with respect to what sentence he would receive. Counsel testified that sentences of time-served would rarely have happened, particularly in this case since one of the victim's guardians would be there and ask for time. Counsel testified that he explained to Applicant all of the rights he would be waiving by pleading no contest. He stated that he usually does this three times and makes sure that all of his clients, regardless of their level of education, understand what they are doing. Counsel testified he had no concerns about whether Applicant understood the rights he was giving up by pleading no contest.

Counsel testified he reviewed discovery with Applicant, discussed the elements of the charges as well as the potential penalties and potential defenses. Counsel testified that Applicant asserted he was intoxicated during these events and could not remember anything to be able to assert any kind of defense. Counsel testified he did not see how Applicant could have asserted any defense. He further testified that based on the evidence and based on the fact that Applicant had no recollection of the events due to his state of intoxication, he concluded that the State would have succeeded in showing that Applicant was guilty beyond a reasonable doubt. Counsel testified that there was no physical evidence but that there would have been testimonial evidence in the form of the victims' testimony and the forensic interviews. Counsel testified it was Applicant's choice to enter the plea.

III. 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, and closely pass upon their credibility. This Court

has weighed their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

As a matter of general impression, this Court finds Counsel's testimony to be more credible than Applicant's testimony.

A. Ineffective Assistance of Counsel

In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The applicant "must first demonstrate that counsel was deficient and then must also show the deficiency resulted in prejudice." Walker v. State, 407 S.C. 400, 404-05, 756 S.E.2d 144, 146 (2014). "The two-part test adopted in Strickland also applies to challenges to guilty pleas based on ineffective assistance of counsel." Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011).

The applicant must first show that counsel's performance "fell below an objective standard of reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, he would not have [pleaded] guilty, but would have insisted on going to trial." Thompson v. State, 340 S.C. 112, 116, 531 S.E.2d 294, 297 (2000).

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds Applicant has failed to meet his burden of proving either deficiency or prejudice. This Court finds that Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that is expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977). This Court finds that Counsel adequately conferred with Applicant in preparation for his plea. During these conferences with Applicant, Counsel discussed the pending charges, the elements of the charges and what the State was required to prove, the potential penalties, Applicant's constitutional rights, Applicant's version of the facts, and possible defenses or lack thereof. This Court further finds that Counsel conducted a proper investigation and provided thorough representation. This Court finds the record also reflects that the plea judge reviewed questions with Applicant and Applicant said he understood the nature of the charges against him and knew what evidence the State had against him. This Court finds that Counsel successfully negotiated a favorable plea offer for Applicant. Therefore, this Court finds Applicant failed to satisfy his burden of proving that Counsel rendered deficient performance.

This Court likewise finds that Applicant failed to satisfy his burden of proving prejudice. According to the testimony at the PCR hearing and the transcript of Applicant's guilty plea, the State agreed to dismiss an indictment for CSC with a minor in the second degree as part of Applicant's plea arrangement. This Court finds that the charge he pleaded to made him parole eligible, which was a significant benefit. This Court finds Counsel did not promise Applicant that he would receive a particular sentence. Counsel testified that the victims would have testified at Applicant's trial. In addition, based on the plea transcript, this Court finds that Applicant made multiple statements to law enforcement and to the Department of Social Services concerning

these events, and Counsel discussed those statements with Applicant, including the chances they could be used against him at trial. Based on the PCR hearing and the record, this Court finds Applicant has failed to show there is a reasonable probability that but for any alleged deficiency of Counsel, he would not have pleaded guilty but would have insisted on going to trial.

Accordingly, Applicant's allegations of ineffective assistance of counsel are denied and dismissed.

B. Involuntary Guilty Plea

Applicant claims his no contest plea was involuntary. An applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330. (1983); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Hill v. Lockhart, 474 U.S. 52; Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994)).

An applicant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. at 56. Applicant must also prove prejudice. Id. at 52. When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief

hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)). Admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

This Court finds that the record fully supports the knowing and voluntary nature of Applicant's guilty plea. Applicant has presented no reason why he should be allowed to depart from the truth of his statements made at the plea hearing. At his plea, Applicant admitted he believed that if the State's evidence, which was recited at the plea hearing, was presented to a jury, it would more than likely result in his conviction, and that he and Counsel reviewed that evidence in making the decision to offer a no contest plea. Applicant told the plea court that no one had threatened him or promised him anything, including a particular sentence, to plead guilty. Applicant has failed to show that Counsel's performance was deficient or that any alleged deficient performance prejudiced him. Accordingly, this Court hereby denies and dismisses Applicant's allegation that his guilty plea was involuntary.

C. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

IV. CONCLUSION

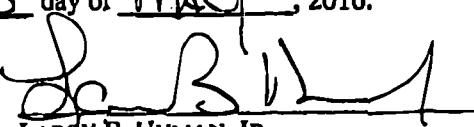
Based on the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, his application must be denied and dismissed with prejudice.

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 the 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 must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 3 day of May, 2016.


 LARRY B. HYMAN, JR.
 Presiding Judge
 Seventh Judicial Circuit

Conway, South Carolina

2016 MAY 12 AM 9:24
 CLERK OF COURT

WITNESSES

Spartanburg Co. Sheriff's Office

Kenneth Nelson

1. SENTENCE MADE

2. REPORT ENDED

3. CARD PULLED

4. INDEXED

ARREST WARRANT NUMBER

5. CHECKED WARRANTS

Direct Indictment

6. CHECKED SIGNATURE

7. ASSESSMENT AND

FINE CARD MADE

8. TRAFFIC VIOLATION COPY

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

Date:

JUN 13 2013

VERDICT

Foreperson of Petit Jury

Date:

DOCKET # **13-GS-42-2868**

The State of South Carolina

County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

JUN 17 2013

TERM

THE STATE
vs.

Kenneth Wayne Nelson

Indictment for

SEX/LEWD ACT, COMMIT/ATTEMPT
UPON CHILD <16

SC Code: 16-15-0140

CDR Code: 2468

Class FEL-D

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 JUN 20 PM 3:24
M. HOPE BLACKLEY

SCANNED

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT

JUN 13 2013

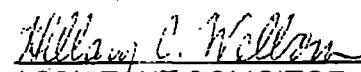
At a Court of General Sessions, convened on _____ the

Grand Jurors of Spartanburg County present upon their oath:

SEX/LEWD ACT, COMMIT/ATTEMPT UPON CHILD <16

That Kenneth Wayne Nelson, did in Spartanburg County, between the dates of August 9, 2008 and January 27, 2011 he being over the age of fourteen (14) years, willfully and lewdly commit or attempt to commit a lewd or lascivious act upon or with the body of one [REDACTED], a minor under the age of sixteen (16) years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or such child, of in violation of §16-15-0140, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



ASSISTANT SOLICITOR

WITNESSES

Spartanburg County Sheriff's Department

1. SENTENCE MADE

2. REPORT ENDED

3. CARD FILED

4. INDEXED

5. CHECKED WARRANTS

6. CHECKED SIGNATURE

7. ASSESSMENT MADE

FIVE CARD MADE

WARRANT NUMBER

8. TRAFFIC VIOLATION COPY

N-158857 - Count One

DIRECT INDICTMENT - Count Two

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date:

VERDICT

Foreperson of Petit Jury

Date:

DOC 12-GS-42-5000 (A)

The State of South Carolina

County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

OCT 31 2012

TERM

THE STATE

vs.

Kenneth Wayne Nelson

Indictment for

EXPOSURE OF PRIVATE PARTS IN A
LEWD AND LASCIVIOUS MANNER

SC Code: 16-15-365

CDR Code: 0377

Class: MISDEMEANOR

FILED
CLERK OF COURT
2012 OCT -2 PM 2:16
M. HOPE BLACKLEY

SCANNED

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)

INDICTMENT

SEP 18 2012

At a Court of General Sessions, convened on _____ the

Grand Jurors of Spartanburg County present upon their oath:

EXPOSURE OF PRIVATE PARTS IN A LEWD AND LASCIVIOUS MANNER

Count One

That Kenneth Wayne Nelson did in Spartanburg County on or about August 11, 2012, willfully and knowingly exposed the private parts of his person in a lewd and lascivious manner in the presence of another person, Tamara Bragg, in violation of §16-15-365, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

EXPOSURE OF PRIVATE PARTS IN A LEWD AND LASCIVIOUS MANNER

Count Two

That Kenneth Wayne Nelson did in Spartanburg County on or about August 11, 2012, willfully and knowingly exposed the private parts of his person in a lewd and lascivious manner in the presence of another person, Maribel Hand, in violation of §16-15-365, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


 ASSISTANT SOLICITOR