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FEB 27 2019

S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY

COURT OF COMMON PLEAS

J. DERHAM COLE, CIRCUIT COURT JUDGE

2015-CP-40-0771

Zacoata Lopey,.....Petitioner.

vs

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

NOTICE OF APPEAL

John Barnes appeals the Honorable J. Derham Cole's February 12, 2019 Order of Dismissal. Undersigned counsel received notice of entry of the order on February 21, 2019. A copy of the order on appeal is attached to this notice.

Respectfully submitted,

Anna R Browder

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February 27, 2019

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IN THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY

COURT OF COMMON PLEAS

J. DERHAM COLE, CIRCUIT COURT JUDGE

2015-CP-40-07771

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FEB 27 2019

S.C. SUPREME COURT

Zacoata Lopey,.....Petitioner.

vs

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

PROOF OF SERVICE

I, Anna Browder, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of record, Kelly Oppenheimer, P.O. Box 11549, Columbia, South Carolina 29211-1549. I further certify that all parties required by Rule to be served have been served this 27th day of February 2019.

Respectfully submitted,

Anna R Browder

Anna R. Browder, Esquire
PO Box 7284
Columbia, South Carolina 29202

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Zacoata Lopey, #354734, Applicant, v. State of South Carolina, Respondent.	Case No. 2015-CP-40-07[illegible] **ORDER OF DISMISSAL**

This matter comes before this Court by way of an application for post-conviction relief filed by Zacoata Lopey (Applicant) on February 5, 2015. The State (Respondent) made its return on June 10, 2015, requesting an evidentiary hearing be held. Thereafter, through counsel, Applicant filed an amended application for post-conviction relief on August 31, 2015. An evidentiary hearing into the matter was convened on February 1, 2016, at the Richland County Courthouse before the Honorable J. Derham Cole. Applicant was present at the hearing and represented by Anna R. Good, Esquire. Assistant Attorney General J. Clayton Mitchell, III of the South Carolina Attorney General's Office represented Respondent.

Following a thorough review of the record in its entirety, and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations and denies this application with prejudice.

PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was initially charged in Family court for armed robbery (2010-JU-40-1520), first-degree burglary (2010-JU-40-1521), kidnapping (2010-JU-40-1522), and first-degree criminal sexual conduct (2010-JU-40-1523). Waiver hearings were held before the Honorable James F. Fraley, Jr., family court judge, on February 21-22, 2012, and March 27-March 29, 2012. Applicant was present at those hearings and represented by James H. May, Esquire, and Joanna K.

Delany, Esquire. Assistant Solicitors Kathryn Luck Campbell, Joanna McDuffie, and Meghan Walker, all of the Fifth Circuit Solicitor's Office, represented Respondent. After hearing all arguments and testimony presented at the waiver hearing, Judge Fraley issued a written order on April 11, 2012, transferring the case to the court of general sessions and finding it was in the best interest of Applicant and the community to transfer jurisdiction. Subsequently, during its April 2012 term, the Richland County Grand Jury indicted Applicant for first-degree burglary (2012-GS-40-01922), armed robbery (2012-GS-40-01923), kidnapping (2012-GS-40-01924), and first-degree criminal sexual conduct (2012-GS-40-01925). Joanna K. Delany, Esquire, and Jennifer C. Davis, Esquire, represented Applicant on these charges. On March 12, 2013, Applicant appeared before the Honorable Thomas W. Cooper, Jr., circuit court judge, and pled guilty as indicted to all charges. Judge Cooper sentenced Applicant to concurrent terms of imprisonment of thirty years for first-degree burglary, thirty years for armed robbery, and thirty years for first-degree criminal sexual conduct. Judge Cooper also sentenced Applicant to a consecutive term imprisonment of fifteen years for kidnapping.

Applicant filed a timely notice of appeal, and Appellate Defender Susan B. Hackett, of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, filed an *Anders*[1] brief on Applicant's behalf. On appeal, Applicant raised the following issue:

> [Applicant's] due process rights pursuant to Fourteenth Amendment of the United States Constitution and Article I, Section three of the South Carolina Constitution were violated by the statutory requirement that he register for life as a sex offender and provided no judicial review after a term of years to determine whether [Applicant] should remain on the registry.

Following a review pursuant to *Anders*, the South Carolina Court of Appeals dismissed Applicant's appeal and granted appellate counsel's request to withdraw by unpublished opinion

[1] *Anders v. California*, 386 U.S. 738 (1967).

on January 14, 2015. *State v. Lopey*, Op. No. 2015-UP-012 (S.C. Ct. App. filed January 14, 2015). The Remittitur was issued on March 10, 2015.

CURRENT APPLICATION

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

1. Ineffective Assistance of Counsel 6th Amendment;
   a. Strickland v. Washington.
2. Newly discover [sic]; [and]
   a. Jamison v. State (Opinion No. 27454.
3. Minor being trial [sic] as an adult (8th Amendment.
   a. Alabama v. Miller [sic], United States Supreme Court (2013).

In his amended application, Applicant raises the following additional grounds for relief:

1. Ineffective assistance of appellate counsel – appellate counsel failed to properly argue the statement for basis of appeal, including but not limited to, the selective application of the solicitor's office to waive the applicant being tried as an adult; and
2. Ineffective assistance of trial counsel—trial counsel failed to have the applicant testify as to his statement regarding the charges during the underlying waiver hearing.

At the evidentiary hearing, Applicant proceeded forward on the allegations raised in his amended application for post-conviction relief.

STATEMENT OF FACTS

On December 14, 2010, at 8:45 in the evening, eighty-year-old Elaine Henrick (Victim) was watching television and talking with a friend of hers on the phone. R. 409. When Victim hung up the phone, she heard a noise in her sunroom. R. 409. She went to investigate, and two males entered her house through the sunroom, one carrying a shotgun. R. 409. They told Victim

not to move and asked her where she kept her valuables. R. 410. They then ransacked the home, searching for anything of value and handing the gun off amongst each other. R. 410.

After the robbers found some money, they told Victim to go into the bathroom and remove her clothes. R. 410. The robbers then took Victim from the bathroom to her bedroom, where they instructed Victim to lie on the bed. R. 410. Applicant's co-defendant, Larry Prophet, then passed the gun to Applicant, climbed on top of Victim, and sexually assaulted her. R. 410. After Prophet was finished, Applicant handed the gun back to him and attempted to sexually assault Victim. R. 410. Victim pled with Applicant, whom she referred to as the young one,[2] for mercy and asked him if he would do the same thing to his grandmother. R. 410. Applicant then turned Victim over and sexually assaulted her in the anus. R. 410.

Applicant and Prophet then left the home, and Victim called 911. R. 410-11. When Investigator John Mauldin arrived, the house was in disarray. R. 409. Drawers had been pulled out, cabinets had been opened, and their contents were thrown all over the floor. R. 409. Investigator Mauldin also observed a stain on the floor of the bedroom and on the sheets, which Victim advised was potentially semen. R. 409.

As the investigation continued, Richland County law enforcement officers received information about Applicant from Deputy Ben Fields, the school resource officer (SRO) at Spring Valley High School. R. 412. Law enforcement then proceeded to Spring Valley in order to speak with Applicant. R. 412. Applicant informed law enforcement officers he was responsible for these crimes, along with Prophet. R. 412. Law enforcement then picked up Prophet, and both Applicant and Prophet were taken to be fingerprinted in the Sheriff's Office. R. 412-13. While in a room in the Sheriff's Office, Investigator Mauldin observed Applicant and Prophet laughing, rapping, dapping each other up, and joking about the crimes they had committed and that they were going to prison. R. 413.

In addition, Applicant's semen was found in the rectum of Victim, as well as the tissue she had used to clean blood between her legs. R. 414. Prophet's semen was also found on the carpet of Victim's bedroom, where he ejaculated. R. 414.

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[2] Applicant was fourteen years old at the time of these crimes. R. 398.

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified on his own behalf and presented the testimony of plea counsel Joanna K. Delany (Counsel Delany). Respondent presented testimony from plea counsel Jennifer C. Davis (Counsel Davis). This Court also had before it a copy of the Applicant's plea transcript, a copy of the transcripts from Applicant's waiver hearings in Family Court, the records of the Richland County Clerk of Court regarding the subject convictions, Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant testified at the time of his arrest he was fourteen years old and in the ninth grade at Spring Valley High School. He testified at the time, he was in self-contained classes. He also testified he understood the reasoning behind the waiver hearing on his charges. He further testified there was a *Jackson v. Denno*[3] hearing as to the admissibility of a statement he gave while in the school resource officer's classroom. He explained he was pulled out of his class at the time. He further explained Ben Fields was the SRO, but he is no longer employed as such. Applicant elaborated when he arrived at the classroom, Officer Fields was the only one in the room, but two investigators arrived after he was in the classroom for one or two hours. He further elaborated Officer Fields asked him a lot of questions, but they did not discuss anything in detail. He testified he asked for his mother twice before he started talking to law enforcement, but she did not arrive until after he was being escorted to the police station. He further testified when he asked for his mother, the investigators never told him they would let his mother talk to him before they did. He explained the bulk of his testimony would have been concerning the fact he wanted his mother present before he talked to law enforcement. He testified at the *Denno* hearing every witness testified he did not ask for his mother, and he would have been the only one to testify that he had asked for his mother, which would have supported his argument to suppress his statement.

Applicant also testified he was advised of his *Miranda*[4] rights, but law enforcement coerced him into signing a form waiving his rights. He testified, however, he signed the form. He further

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[3] 378 U.S. 368 (1964).

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

testified he was not familiar with whether or not the information regarding his *Miranda* rights and the waiver of those rights arose during the *Denno* hearing. Applicant also testified he was not familiar with whether or not he gave two statements to law enforcement, but he admitted to committing these crimes in his statements. He also testified his co-defendant, Larry Prophet, also implicated him in these crimes, and there was DNA evidence found at the scene linking him to the crimes.

Applicant testified he informed Counsel Delany of this conversation with the investigators, but he could not recall whether or not they discussed him testifying during the *Jackson v. Denno* hearing. He elaborated he wanted to testify, but at the time, he did not know what was going on and did not know what he was going to do. He further elaborated had he testified he would have testified that he was fourteen years old, in self-contained classes, and had asked for his mother. Applicant also testified his counsel asked every witness at the *Denno* hearing how old Applicant was and what grade he was in in school. He testified the family court and the plea court both knew all about his background.

He also testified there was a pre-trial hearing involving the solicitor's decision to waive him up to the court of general sessions. He testified that hearing focused on the fact the Richland County Solicitor's Office had not waived up a Caucasian defendant since 1992 and every defendant who had been waived up was African-American. He further testified his counsel argued that point in great detail, but the judge ruled against them.

He also testified his counsel did not advise him it would be in his best interest to plead guilty. He testified, however, he spoke with counsel about whether to plead or whether to proceed to trial. Applicant explained in those conversations, his counsel did not advise him to plead guilty. He further explained his counsel did not advise him, but rather gave him their advice and told him it was his decision. He testified counsel explained the benefits of everything with him, but they did not advise him if he pled guilty he would likely receive a lower sentence than if he went to trial. He testified counsel told him to proceed to trial because he "would have a better chance to do this," but he did not understand everything they explained to him. He further testified had he proceeded to trial, he was facing a life sentence. Applicant explained the reason he decided to plead guilty was because he did not know what was going on; and his counsel told him if he did

not take the plea, the solicitor was prepared to take his case to trial. He further explained he was worried about facing a lengthy prison sentence. Applicant testified, however, it was not accurate to say he pled guilty in order to avoid a trial and facing all of his charges in full. He further testified he did not want to proceed to trial because the State was ready to try his case and his sentence could be significant and could have been much worse than the sentence he actually received.

Applicant testified after his plea, his appellate counsel, Appellate Defender Hackett, came onto his case, but they never spoke about his case. He further testified appellate counsel did not raise the issue concerning discrimination in waiver hearings, but rather raised an issue concerning GPS monitoring. He elaborated had he known he had to proceed to trial in order to appeal any of his waiver hearing issues, he would have gone to trial and would not have pled guilty. He further elaborated he was not familiar with whether or not counsel advised him he would not be able to raise his appellate issues if he pled.

Following Applicant's testimony, Counsel Delany testified. Counsel Delany testified she was formerly employed with the Richland County Public Defender's Office, and she worked there for approximately seven years. She further testified she represented Applicant; and he was initially charged in family court because he was fourteen years old, but the Solicitor's Office filed a waiver for Applicant. She testified she was lead counsel in family court and remained on the case as second chair in the court of general sessions. She explained at the time, she handled a lot of family court cases. She further explained waiver hearings are unusual in and of themselves, so most family court judges take more time with them.

She testified one issue which concerned her and her co-counsel was whether or not a Caucasian child had ever been waived, and they decided to research this issue further when discussing trial strategy. She explained they began discussing with people who had worked in the courthouse and at the Department of Juvenile Justice (DJJ) for a long period of time. She further explained based on these conversations, they learned the Solicitor's Office had filed waivers for white children in the past but then withdrew the waiver and allowed the child to plead in family court. She testified because of this information, she filed a pre-trial motion, and the judge ordered DJJ turn over a list of all of the children who had been waived in Richland County. She further testified after the records pulled confirmed that every defendant who was waived up was either

African-American or Latino. She testified, therefore, she had concerns about Equal Protect, and she believed this was a strong issue. She further testified she made a number of motions on this issue and filed memoranda with the court, which were made part of the record. She testified had this case proceeded to trial, she would have raised and made the same record regarding this issue in the court of general sessions as she did in family court.

She testified she also made an argument during the waiver hearing there was no uniform application in waiving up defendants, thereby making the waiver statute unconstitutional. She explained she relied on *Bush v. Gore*[5] in making this argument. She further explained there are no standard guidelines instructing the solicitor which cases apply for waiver, and it is within the discretion of the solicitor to determine whether or not to waive a defendant. Counsel Delany testified had the case proceeded to trial, she would have raised this issue, and she was prepared to raise that issue if Applicant had not pled guilty.

Counsel Delany also testified Applicant's statement was considered in the probable cause factor of the waiver hearing. She also testified there is not much case law regarding the standard of a *Denno* hearing in family court, as family court cases are not often appealed. Counsel Delany testified she had conversations with Applicant about him asking for his mother when he was interviewed by law enforcement. She did not recall whether or not she presented any evidence during the *Denno* hearing about Applicant asking for his mother, but there was testimony Applicant's mother was in the police station hallway asking for Applicant, to which one of the investigators testified. She testified law enforcement did not let Applicant and his mother see each other until after Applicant gave his statement. She further testified Applicant did not testify at the *Denno* hearing, and she did not recall whether or not they discussed the possibility of him testifying. She further testified Applicant's intellectual functioning would have led her to call him as a witness during the *Denno* hearing, as that is one of the factors considered during a waiver hearing. She testified had Applicant told her he wanted to testify at the hearing, she would have had him testify. She testified on cross-examination of one of the officers, she was able to glean information about Applicant, specifically that he was fourteen years old, he was in ninth grade,

[5] 531 U.S. 98 (2000).

and he was in special education classes. She further testified she did not specifically recall whether or not she asked an investigator during the hearing whether or not Applicant asked for his mother.

She explained they believed they had a good suppression issue, and they decided to save that argument for a trial in the court of general sessions. She further explained Applicant's age, the fact he was borderline intellectual functioning, the fact he asked for his mother, and the fact he was taken out of class by the SRO and the SRO spoke with him for about an hour prior to investigators arriving all were strong arguments in favor of suppression when looking at the factors concerning juvenile confessions and whether or not Applicant was free to leave.

She further testified she and Applicant discussed the motion to suppress and trial, but Applicant wanted to plead guilty. She testified she explained to Applicant what could happen if he pled and what could happen if he proceeded to trial. She explained she told Applicant what they would do if he decided to plead and what they would do if he went to trial. She further explained she believed they had a good motion to suppress, and there was no plea offer. She testified if the motion to suppress was unsuccessful, the evidence against Applicant was strong. She explained everything came from that initial encounter. She further explained there would have been no DNA evidence if law enforcement had not gotten a buccal swab from Applicant when they were questioning him, because it would have been fruit of the poisonous tree. She also testified law enforcement got the co-defendant's statement from Applicant's statement. She testified Applicant lived very close to Victim.

She testified juveniles cannot receive a life sentence on non-homicide crimes.[6] She further testified she explained to Applicant he could receive a sentence for a term of years, but could not receive a life sentence. She explained, however, Applicant could have received an effective life sentence. Counsel Delany testified she presented this to the plea court, specifically highlighting the average life expectancy of an inmate in the Department of Corrections was 52.6.

Counsel Delany also testified she discussed the appeal with Applicant, and she typically advises all of her clients it is very unlikely to get an appeal granted from a guilty plea. She testified she specifically laid out this Equal Protection issue in the notice of appeal, and she spoke with

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[6] *See Graham v. Florida*, 560 U.S. 48 (2010) (the Eighth Amendment prohibits imposition of a life without parole sentence on a juvenile offender who did not commit homicide).

Appellate Defense about this issue. She also testified in her basis for the appeal, she argued the waiver statute violated Equal Protection on the grounds of systemic racial bias in the Solicitor's Office, to keep Applicant under family court jurisdiction, the arbitrariness of the application of the waiver statute under *Bush v. Gore*, an Eighth Amendment violation based on his sentencing in general sessions due to his age, and the sex offender registry was unconstitutional because there had not been a finding Applicant was likely to reoffend. She testified in her opinion, the Equal Protection issue should have been raised on appeal, and many of the issues she argued in her notice of appeal were not raised. She testified, however, in order to appeal the waiver, a defendant has to proceed to trial, which she explained to Applicant. She further testified she and her co-counsel put a lot of things on the record during the plea in order to attempt to preserve them for appeal. She explained she made an argument a lifetime GPS requirement was unconstitutional, and she was aware this was the issue raised in the *Anders* brief.

Following Counsel Delany's testimony, Applicant rested and Respondent presented the testimony of Counsel Davis. She testified she was appointed to represent Applicant once the waiver hearing was conducted and he was waived up to general sessions. She testified Applicant was evaluated for competency prior to her appointment, but he was found to be competent. She further testified she was appointed right after the waiver, which would have been about eleven months prior to the plea.

She testified she and Applicant had numerous conversations about a trial versus a plea, but she and Counsel Delany never told him he should definitely choose one or the other. She explained they laid out the benefits and consequences of both decisions for Applicant. She further explained although there was no plea offer in this case, she and Counsel Delany knew the State would ask for a sentence as close to life as they could get. Counsel Davis also testified they wanted to be clear with Applicant a straight-up plea was still risk, and they did not know exactly what the end result would be. She testified they also explained to Applicant what they would attempt to do at trial, including the motion to suppress his statement and the evidence thereafter. She specifically recalled explaining to Applicant if they proceeded to trial and lost the motion to suppress, that could have been an appellate issue; and explained in order to do so, they would have to go to trial. She testified she and Counsel Delany left the decision whether or not to plead guilty up to

Applicant. She further testified Applicant was concerned if he proceeded to trial, he would receive significantly more time. She testified another concern of Applicant's was putting Victim and her through a trial, and he was particularly hesitant to do that after the waiver hearing. She explained the waiver hearing was a good preview of what the trial would have been like. She also testified there was no discussion with Applicant about a conditional plea. She testified she could not specifically recall whether or not she discussed with Applicant his ability to appeal the waiver hearing issues from family court, but she specifically recalled explaining to him he would need to proceed to trial if he wanted to preserve the suppression issue.

She further testified at the plea, she and Counsel Delany attempted to object and preserve anything that could be put in the appeal. Counsel Davis explained she objected to Applicant being sentenced as an adult, as well as the sex offender registry and GPS monitoring, and raised an issue the plea court had the ability to transfer jurisdiction back to family court. She further explained generally, if she appeals a guilty plea and there is anything during the plea she objected to, she tries to specifically set those objections out in her notice of appeal. She explained she tries to keep the record as preserved as possible. She testified she filed the notice of appeal and tried to include everything in her basis for the appeal, including the waiver issues concerning Equal Protection and *Bush v. Gore*. She further testified she included a letter with her notice of appeal, which Applicant requested. Counsel Davis also testified she discussed the appeal with Appellate Defense.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant's allegations are two-fold: (1) ineffective assistance of plea counsel for failing to have Applicant testify regarding his statement to law enforcement at the waiver hearing in family court; and (2) ineffective assistance of appellate counsel for failing to properly argue the

statement for basis of appeal, specifically the selective application of the Solicitor's Office to waive Applicant to the court of general sessions.

Ineffective Assistance of Counsel

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

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

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. In order to satisfy the prejudice prong of this test following a guilty plea, the applicant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

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

Counsel Delany's alleged failure to have Applicant testify

Applicant alleges Counsel Delany was ineffective for failing to have Applicant testify during the waiver hearing in family court. Specifically, Applicant contends Counsel Delany was ineffective for failing to present to the family court his testimony that he asked for his mother prior to giving his statement to law enforcement and that he was fourteen years old at the time, in ninth grade, and taking special education classes. Applicant testified he did not recall whether or not he and Counsel Delaney discussed the possibility of him testifying during the *Denno* hearing, but he wanted to testify. He explained, however, he "was green, so [he] didn't know what was going on. [He] didn't know that [he] was going to do." Indeed, Applicant wholly failed to testify that he had, in fact, told Counsel Delany he wanted to testify during the *Denno* hearing. Counsel Delany, on the other hand, testified although she did not specifically recall discussing with Applicant whether or not he would testify at this hearing, she would have called him as a witness if he had expressed a desire to testify. This Court finds Counsel Delany's testimony with respect to this allegation very credible, whereas Applicant's testimony is not credible. Based on the foregoing testimony and the fact Applicant wholly failed to express a desire to testify, this Court further finds Applicant has failed to establish any deficiency on the part of Counsel Delany.

Similarly, this Court finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. "Admissions and confessions of juveniles require special caution." *In re Gault*, 387 U.S. 1, 45 (1967). "Although courts have given confessions by juveniles special scrutiny, courts generally do not find a juvenile's confession involuntary where there is no evidence of extended, intimidating questioning or some other form of coercion." *State v. Pittman*, 373 S.C. 527, 568, 647 S.E.2d 144, 165 (2007). Indeed:

> "[A] minor has the capacity to make a voluntary confession . . . without the presence or consent of counsel *or other responsible adult*, and the admissibility of such a confession depends not on his age alone but on a combination of that factor with such other circumstances as his intelligence, education, experience, and ability to comprehend the meaning and effect of his statement."

In re Williams, 265 S.C. 295, 300, 217 S.E.2d 719, 722 (1975) (emphasis added) (quoting *People v. Lara*, 432 P.22 202, 215 (Cal. 1967)). Here, Deputy Joe Clarke, of the Richland County Sheriff's Office, testified at the waiver hearing he partook in the interview of Applicant at Spring Valley High School. R. 42-43. He further testified he was aware Applicant was fourteen and in the ninth grade. R. 43, 53, 142. He was unaware, however, Applicant was a special needs student and also unaware Applicant was in a self-contained classroom. R. 53-54, 147-48. He further testified Applicant appeared to understand everything as it was explained to him, and Applicant even took the time to read the Advice of Rights form himself prior to signing it. R. 43, 48, 54, 134, 141. Applicant did not specifically ask for his mother, nor was his mother present during questioning; but he was provided the opportunity to speak with her at the school. R. 45-46, 50-51, 138-39, 141, 148, 151. Furthermore, Applicant was not threatened, intimidated, or coerced in any way. R. 45, 58-59, 140-41. Based on the totality of the circumstances, there was no indication Applicant's confession was not voluntarily given—he chose to waive his rights and speak with law enforcement after being thoroughly advised of such and made no indication he wanted to speak with his mother or anyone else. Accordingly, this Court finds this allegation must be denied and dismissed with prejudice.

Ineffective Assistance of Appellate Counsel

A defendant is entitled to effective assistance of appellate counsel. *Tisdale v. State*, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing *Southerland v. State,* 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999)). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice. *Southerland*, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent he would have been successful on appeal, he is entitled to a new trial. *See Ezell v. State*, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); *Southerland*, 337 S.C. 615-16, 524 S.E.2d at 836. *See also Simpkins v. State,* 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

Although ineffective assistance of appellate counsel claims for failure to raise a particular

issue on direct appeal can be successful, the Supreme Court has reiterated it is "difficult to demonstrate that counsel was incompetent." *Smith v. Robbins*, 528 U.S. 259, 288 (2000). While appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." *Thrift v. State,* 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing *Jones v. Barnes,* 463 U.S. 745 (1983)). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." *Jones,* 463 U.S. at 754. Additionally, our Supreme Court has expressly rejected the notion appellate counsel has an obligation to raise all meritorious issues on appeal. *Tisdale*, 357 S.C. at 476, 594 S.E.2d at 167. "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" *Smith v. Robbins*, 528 U.S. at 288 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)).

In order to meet his burden, an applicant must establish a reasonable probability that, but for appellate counsel's failure to raise a specific issue on appeal, he would have prevailed on his appeal. *Smith*, 528 U.S. at 285-86.

Appellate Counsel's alleged failure to properly argue the statement for basis of appeal

Applicant alleges appellate counsel was ineffective for failing to argue on appeal the selective application of the Solicitor's Office to waive defendants up to the court of general sessions. Both the United States Supreme Court and the South Carolina Supreme Court have consistently ruled that appellate counsel has no duty to raise all meritorious issues on appeal. *See Jones*, 463 U.S. 745; *Smith*, 528 U.S. at 288; *Tisdale*, 357 S.C. 474, 594 S.E.2d 166. When appellate counsel reviews all possible issues and elects to raise those issues she deems most meritorious, she has performed in accordance with professional standards and is not deficient. Moreover, if counsel finds an appellant's case "to be wholly frivolous, after a conscientious examination of it, [s]he should so advise the court and request permission to withdraw," with an

accompanying brief "referring to anything in the record that might arguable support the appeal." *Anders*, 386 U.S. at 744. The court must then fully examine all of the proceedings and the record to determine whether or not the appeal is frivolous. *Id.* Here, appellate counsel submitted an *Anders* brief on behalf of Applicant, raising one issue that could be arguable on appeal. Following the submission of said brief, the Court of Appeals underwent a thorough review of the record and, ultimately, concluded the appeal lacked merit. Based on the foregoing, this Court finds Applicant has failed to establish the requisite deficiency of appellate counsel. This Court finds Applicant has failed to show appellate counsel's performance was deficient, where there is no standard requiring appellate counsel to brief every possible meritorious issue, and her performance was in accordance with professional norms.

Additionally, this Court finds Applicant has failed to establish any prejudice from counsel's alleged deficiency. Conditional guilty pleas are not recognized in South Carolina. *State v. Truesdale*, 278 S.C. 368, 370, 296 S.E.2d 528, 529 (1982). Furthermore, "a guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." *State v. Rice*, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485 (2013). Because of this, in order to challenge the transfer from family court to the court of general sessions, a juvenile must proceed to trial. *Id.* at 333, 737 S.E.2d at 486. Here, Applicant was waived up from family court to the court of general sessions, after making an Equal Protection argument and other arguments the waiver statute was unconstitutional. Applicant testified had he known he had to proceed to trial in order to challenge the waiver on appeal, he would have proceeded to trial. However, although Counsel Davis could not specifically recall whether or not she discussed with Applicant his ability to appeal the waiver hearing issues from family court, she specifically recalled explaining to him he would need to proceed to trial if he wanted to preserve the suppression issue. Similarly, Counsel Delany testified she explained to Applicant he would need to proceed to trial if he wanted to appeal the waiver. She also testified she discussed the appeal with Applicant, and she typically advises all of her clients it is very unlikely to get an appeal granted from a guilty plea. This Court finds Counsel Delany's and Counsel Davis's testimony with respect to this allegation very credible, whereas Applicant's testimony is not. Based on the foregoing, this Court finds Applicant had a clear understanding he had to proceed to trial in order to appeal the waiver and voluntarily and

intelligently chose to enter a guilty plea. Accordingly, this allegation must be denied and dismissed with prejudice.

CONCLUSION

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

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

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to and remain in the custody of the State

AND IT IS SO ORDERED this 12 day of February, 2019.

J. DERHAM COLE
Presiding Judge
Fifth Judicial Circuit

_____, South Carolina