

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE SIXTH JUDICIAL CIRCUIT
COUNTY OF CHESTER)	Case No. 07-CP-12-00444
)	
CHRISTOPHER F. PITTMAN,)	
#307734,)	
)	
Applicant,)	
)	ORDER GRANTING APPLICANT'S
)	PETITION FOR
vs.)	FOR POST-CONVICTION RELIEF
)	
)	
STATE OF SOUTH CAROLINA,))	
)	
Respondent.)	
_____)	

STATEMENT OF THE CASE

The Applicant Christopher Pittman ("Pittman") was convicted of two counts of murder and sentenced by the trial court judge to the mandatory minimum sentence of concurrent 30 year sentences of imprisonment. Pittman appealed his conviction and, pursuant to Rule 202(b) of the South Carolina Appellate Court Rules, the South Carolina Supreme Court ordered an expedited appeal and heard the appeal itself directly, and thereafter affirmed Pittman's convictions. *State v. Pittman*, 373 S.C. 527, 544, 647 S.E.2d 144, 153 (2007). Pittman then filed a petition for writ of certiorari in the United States Supreme Court, which the Court denied without comment. *Pittman v. South Carolina*, 128 S. Ct. 1872 (2008) (No. 07-8436).

Following the South Carolina Supreme Court's affirmation, Pittman filed a timely Application for Post-Conviction Relief in this Court on September 5, 2007. Pittman subsequently filed an Amended Application on July 20, 2009, which principally asserted two claims of ineffective assistance: (1) that Pittman's counsel at the transfer hearing was ineffective because he failed to meaningfully contest the State's evidence and failed to introduce any

evidence on Applicant's behalf, despite the availability of lay and expert witnesses who would have offered favorable testimony; and (2) that Pittman's trial counsel was ineffective because of his failure to advise Pittman's *guardian ad litem* of a possible plea to voluntary manslaughter, and because he neither sought nor obtained the *guardian ad litem's* approval before abandoning that alternative.

This Court conducted a 3-day evidentiary hearing in Winnsboro from August 26-28, 2009. After hearing the evidence and reviewing the entire record in this matter, the Court concludes that the transfer hearing counsel was constitutionally ineffective; however, the Applicant has failed to meet the burden of proving the outcome of the Family Court proceedings would have been any different. As to the second ground seeking relief, the Court concludes trial counsel was constitutionally ineffective and that this deficiency prejudiced the Applicant. Therefore, the Application should be granted, the conviction vacated, and the matter returned to the Circuit Court for further proceedings.

PROCEDURAL HISTORY

Family Court Proceedings

Pittman was arrested on November 29, 2001 and, because he was only twelve years old at the time, was charged the next day in a juvenile summons with two counts of murder, in violation of S.C. CODE ANN. § 16-3-10, and one count of first degree arson, in violation of S.C. CODE ANN. § 16-11-110. That same day Pittman appeared in Family Court where Family Court Judge Walter Brown appointed Yale Zamore, the Chester County Public Defender, to represent him. Judge Brown also appointed Milton Hamilton, a Chester attorney, as Pittman's *guardian ad litem*.



On December 28, 2001, the State filed a timely motion to transfer jurisdiction to the Court of General Sessions. On January 29, 2002, Zamore moved for a continuance of the waiver hearing. Zamore's requests for delay continued for a year and a half and were granted by Judge Brown.

The waiver hearing took place on June 25, 2003. At the hearing, the State presented the testimony of three witnesses: two law enforcement officers and a psychological expert. Zamore, offered no evidence on Pittman's behalf.

On June 27, 2003, Judge Brown issued an order waiving all the charges to the Court of General Sessions. The Chester County Grand Jury then indicted Pittman on two counts of murder and one count of arson.

Court Of General Sessions Proceedings

Pittman's legal representation changed in the Court of General Sessions. Zamore was relieved on September 10, 2004, and Pittman was thereafter represented by a team led by Andy Vickery and Paul Waldner, of the Texas firm of Vickery, Waldner & Mallia, LLP. They were assisted by Karen Menzies of the California Bar and Henry Mims of the Greenville County Bar who served as local counsel.

On June 2, 2004, following discovery litigation involving Pfizer, Judge Paul Short issued an Order in which he recused himself from the case due to a potential conflict because his wife owned Pfizer stock. The South Carolina Supreme Court then appointed Judge Daniel F. Pieper to preside over the case.

The defense team filed a motion to remand the case to Family Court. Following an evidentiary hearing on December 3, 2004, Judge Pieper issued a written order dated January 14, 2005, denying the motion, except as to the charge of second degree arson, which was remanded



because the Court of General Sessions lacked jurisdiction. In doing so, Judge Pieper did not conduct a *de novo* review but rather held that the Family Court's decision was procedurally proper. Judge Pieper also ruled, alternatively, that he was "satisfied that the family court had before it a sufficient basis upon which to transfer the murder charges."

Pittman was then tried before a jury from January 31 to February 15, 2005, which returned a verdict of guilty on both counts of murder. Judge Pieper then sentenced Pittman to concurrent statutory mandatory minimum sentences of 30 years imprisonment on each count.

Post-Conviction Proceedings

Pittman filed a series of post-trial motions, all of which Judge Pieper denied. Pittman also filed a timely notice of appeal, which the South Carolina Supreme Court heard on an expedited schedule pursuant to Rule 202(b) of the South Carolina Appellate Court Rules. On June 11, 2007, the South Carolina Supreme Court affirmed Pittman's convictions in a 4-1 decision. *State v. Pittman*, 373 S.C. 527, 544, 647 S.E.2d 144, 153 (2007). Pittman then filed a petition for *certiorari* with the United States Supreme Court, arguing that the imposition of a mandatory 30-year sentence on a 12-year old child violated the Eighth Amendment. In an order dated April 18, 2008, the United States Supreme Court denied the petition without comment. *Pittman v. South Carolina*, 128 S.Ct. 1872 (2008) (No. 07-8436). Pittman then filed a *pro se* Application for Post-Conviction Relief on September 5, 2007, and his current counsel filed an Amended Application on July 20, 2009. The State filed an Amended Return on August 25, 2009. This Court then held an evidentiary hearing from August 26-28, 2009.

FINDINGS OF FACT



Based upon the evidence in the record, including evidence at the transfer hearing, the removal hearing, the General Sessions trial, and the PCR hearing, the Court makes the following findings of facts:

1. Christopher Pittman was born on April 9, 1989 in Huntsville, Alabama, to Hazel and Joe D. Pittman, Jr. At the time, Hazel and Joe were only 18 and 20 years old, respectively. Shortly after his birth, Pittman's mother abandoned him and his older sister, Danielle.

2. During the next several years, Pittman and his sister, Danielle, alternatively lived with their maternal and paternal grandparents while their father served in the military overseas during the Persian Gulf conflict. After their father returned to the United States in 1992, he again took custody of Pittman and his sister. However, Pittman's home life over the remainder of his childhood was unstable, as his father went through a series of failed relationships, including marriages to Pam Bunting and Kimberly Fletcher that both ended in divorce. During this period, Pittman and his sister often resided with their paternal or maternal grandparents, including for a period of time after Ms. Bunting filed domestic violence charges against their father.

3. When Pittman's father did care for his children himself, he often treated them harshly. He not only whipped both young children with belts but was verbally abusive to them and inflicted militaristic punishments on Pittman, such as awakening him at 5:00 a.m. to do push-ups and run on a road. In the event that Pittman's push-ups were unsatisfactory, his father would strike him with a belt, paddle, or on one occasion, a two-by-four. When Pittman became older, in addition to whipping him, his father sometimes choked Pittman, as well.

4. In July 2001, Pittman's mother, Hazel, whom he did not remember and with whom he had no contact since he was a baby, suddenly reappeared in his life. Hazel, who had remarried and had at least five other children, both in and out of wedlock, moved back to Florida near where Pittman and his sister were living with their father, and began a new relationship with Pittman's father.

5. During this period, Pittman saw his mother and his step-siblings frequently, even staying for overnight visits. The developing bond between Pittman and his mother was abruptly shattered, however, when his mother greeted Pittman and his sister one afternoon at the door to her trailer and told them that they could not come in and would never see her again. Hazel then abandoned Pittman and his sister once more, moved back with her other children to her husband in Virginia, and cut off contact with Pittman and Danielle.

6. This renewed rejection by his mother had a devastating effect on Pittman and was exacerbated by his rocky relationship with his father. Not long after, in October 2001, Pittman ran away from home. Pittman did not get far and the police found him at a truck stop approximately 15 miles away, and returned him to his father. Distraught at the prospect of having to remain with his father, Pittman threatened to kill himself.

7. Pittman's father responded to Pittman's threat by committing him to LifeStream, an in-patient psychiatric hospital. While at LifeStream, Pittman was diagnosed with depression and prescribed Paxil, an anti-depressant from a class of drugs known as Selective Serotonin Reuptake Inhibitors ("SSRIs"). Pittman remained in LifeStream for only five days before his father removed him - against doctor's advice - on October 29, 2001. After his removal from LifeStream, Pittman continued to take Paxil but received no counseling or psychiatric or psychological follow-up care.



8. Pittman's doctors at LifeStream did not want Pittman to return to living with his father and understood that when Pittman left LifeStream he would be going instead to live with his grandparents, Joe and Joy Pittman, in South Carolina. As a result, Pittman moved into the Pittman's house in Chester. There, although he continued to take Paxil, he still received no counseling or follow-up psychiatric or psychological care. Instead, Joy Pittman took Pittman to see a general practitioner who, after giving him a cursory examination, prescribed a different SSRI, Zoloft, simply because he did not have any Paxil available.

9. Neither the Paxil nor the Zoloft did anything to improve Pittman's condition, and friends and family who observed him during this period noticed a marked contrast in his mood and manner from the sweet and friendly disposition that he had displayed before his mother abandoned him a second time. Indeed, Pittman had only been living with his grandparents for a short time when, on November 27, 2001, he got into an altercation with another child on the school bus. Pittman's conduct resulted in his grandparents being summoned to the school the next day by the assistant principal who told them that Pittman's bus privileges would be suspended. That evening, Pittman and his grandparents attended a choir practice at their church where Pittman was disruptive.

10. Pittman's grandparents drove him home after choir practice. Joe Pittman, who at times exhibited an explosive temper, then beat the Applicant with a wooden paddle - the same paddle that Applicant's father had beaten him with in the past. Pittman responded by shooting and killing his grandparents that evening. He then used some candles to set fire to the house, and drove off in his grandparents' SUV until he became stuck in the woods in Cherokee County. Two hunters found Pittman there early the next morning. Pittman initially told the hunters and



then law enforcement that an intruder had killed his grandparents and kidnapped him; however, after being questioned a second time a few hours later, he admitted to the killings.

11. Yale Zamore, the local public defender, represented Pittman throughout the waiver proceedings in Family Court. Zamore made several requests for continuances to delay the waiver hearing.

12. Zamore's stated purpose for these continuances was to prepare for the waiver hearing. For example, in a March 14, 2003 letter to Judge Brown, Zamore stated, "[F]or the Defense, the Transfer Hearing is the most critical part of this case and Kent does not give me much room within which to work. Therefore, my main preparation is for this Transfer Hearing as I will be in a world of hurt in the Court of General Sessions."

13. In the meantime, Dr. Pam Crawford, a forensic psychiatrist, was appointed by the court to examine Pittman for competency to stand trial and criminal responsibility.

14. Zamore received court authorization to engage Dr. Lanette Atkins, a forensic psychiatrist, as an expert witness on the issue of Pittman's criminal responsibility for committing the murders, specifically on the issue of whether Pittman's taking Zoloft prevented him from knowing the difference between moral and legal right and moral and legal wrong when he killed his grandparents.

15. Zamore consulted with Pittman and the *guardian as litem* Hamilton about whether and to what extent they should contest the transfer of the charges from the Family Court to General Sessions Court. Both agreed on Zamore's course of conduct in his decision to not actively contest the State's evidence or to call any witnesses. Zamore's stated reason was his belief that the case was going to be transferred to General Sessions regardless of any evidence he



possessed at that time, and he did not want to tip the Solicitor as to any defenses or evidence he may wish to present at trial.

16. Judge Brown conducted the waiver hearing on June 25, 2003, and issued an Order transferring Applicant to General Sessions Court two days later.

17. In May 2004, attorneys Andy Vickery, Paul Waldner (who subsequently suffered an incapacitating brain injury and was unable to testify at the PCR hearing), and Karen Menzies took over representation of Applicant. Henry Mims, of the Greenville Bar, was appointed as local counsel.

18. Due to the health problems of Sixth Circuit Solicitor John Justice, Fifth Circuit Solicitor Barney Giese was appointed to prosecute the case in September 2004.

19. Vickery and Solicitor Giese had met privately before the trial to discuss a plea bargain; however, the discussions were fruitless because Vickery essentially wanted the case returned to the Family Court

20. The General Sessions trial on the two murder indictments took place from January 31 to February 15, 2005.

21. From the outset, this case captured an enormous amount of media attention. Even before Vickery's team took over, the case drew media attention. After Vickery's team took over, the media attention grew exponentially greater, in large part because the defense team cultivated it in order to draw attention to the side effects of SSRI drugs such as Zoloft. Vickery even invited the TV show *48 Hours* to attend defense team meetings before and during the trial. The trial was also broadcast live on Court TV.

22. With the exception of local counsel Mims, the defense team was comprised of out-of-state civil attorneys whose practices were primarily civil tort claims against drug



manufacturers like the manufacturer of Zoloft. Menzies candidly testified the publicity surrounding Pittman's case may have been helpful in attracting future clients for civil litigation against Zoloft manufacturers, but she came to believe it was not necessarily helpful to Pittman. In fact, Menzies testified she believed the media attention was "detrimental" to Pittman's case. Among other things, the media attention likely made it more difficult for the parties to negotiate a disposition free from the glare of publicity. It also created at least the appearance that Vickery and the defense team were not motivated solely by Pittman's best interests.

23. Towards the end of trial, Judge Pieper met with counsel in chambers in an off-the-record discussion to ask about plea negotiations. Judge Pieper proposed a plea to two counts of voluntary manslaughter, with sentencing left to the court within the range of the statutory terms of 2-30 years of imprisonment.

24. There are differing accounts about exactly how the Solicitors and the defense team reacted to the judge's inquiry. What is clear is that Solicitor Giese indicated he might be willing to discuss a plea to voluntary manslaughter as long as the sentence was for the maximum of 30 years. Vickery's response essentially shut down any negotiations because he would only recommend Pittman plead guilty if the sentence resulted in him being released from prison at the age of 21, which is when he would have been released if he had been tried and convicted in Family Court.

25. It is uncontroverted that no formal plea offer was extended by the State as a result of these discussions.

26. While voluntary manslaughter is a "no-parole" offense in South Carolina, a prisoner is eligible for release after serving 85% of his sentence if (s)he earns credit for good behavior while incarcerated. Pittman was on trial for murder, which carries a sentence of 30-

years to life without parole and there is no reduction for early release; because of this the sentence is said to be “day-for-day”.

27. After the meeting with Judge Pieper concluded, Vickery and Mims spoke directly to Pittman about the plea discussions with the judge. Pittman testified that Mims told him he thought Judge Pieper would give him a sentence in the area of ten years if sentencing were left to him; Mims’s recollection was not as clear on that point.

28. What is clear from the evidence is that while Vickery told Pittman the decision was ultimately his, Vickery made it clear that he did not recommend or desire that Pittman pursue further plea negotiations because he felt Pittman would be acquitted. This fact is buttressed by Vickery’s televised statement to *48 Hours* that he could not imagine a jury convicting Pittman. Furthermore, both Mims and Vickery testified they still hold the belief that Pittman is innocent of the murder charges.

29. There is no evidence in the record that any member of the defense team of attorneys explained to Pittman the difference between a 30-year sentence for murder and a 30-year sentence for voluntary manslaughter.

30. Based upon Vickery’s statement of his belief that Pittman would be acquitted and the fact that no one explained the difference between a 30-year sentence for murder and a 30-year sentence for voluntary manslaughter, Pittman did not request his attorneys pursue any further plea negotiations.

31. Hamilton had never been relieved as Pittman’s *guardian ad litem* and continued in that role throughout the General Sessions proceedings. He was present in the courtroom throughout the trial. No member of the defense team told Hamilton about the plea discussions with the judge, nor was he in the room with the judge when the discussions took place.



32. Hamilton would have recommended to Pittman that he plead to voluntary manslaughter because even if he received the maximum sentence, it would have been advantageous to him over what he felt was going to be a near-certain conviction for murder based upon the evidence.

33. Pittman credibly testified that he would have pleaded guilty to voluntary manslaughter if someone would have explained the 85% implication to him, but since no one did and Vickery was so confident that he would be acquitted, he did not consider asking his lawyers to pursue further plea negotiations.

34. The jury then convicted Applicant of both counts of murder, and Judge Pieper sentenced the Applicant to the minimum sentence of two concurrent terms of 30 years imprisonment.

STANDARD OF REVIEW

Pittman's application asserts claims of ineffective assistance of counsel, which must be examined under the standard established in *Strickland v. Washington*, 466 U.S. 668 (1984).

The Sixth Amendment right to effective assistance of counsel is violated where an applicant can show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. To meet this standard, an applicant must demonstrate that "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." *Id.* at 687; accord *Custodio v. State*, 373 S.C. 4, 9, 644 S.E. 2d 36, 38 (2007). Stated differently, the applicant first "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." *Id.* at 687-88. Judicial scrutiny of counsel's performance is highly deferential and not subject to the distorting effects of hindsight, and counsel may



reasonably choose from a wide range of acceptable strategies. *Strickland*, 466 U.S. at 689; *Burket v. Angelone*, 208 F.3d 172 (4th Cir. 2000). In assessing whether counsel's conduct was reasonable, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and "might be considered sound trial strategy." (citation omitted) *Id.* at 689. A sound strategy, however, cannot be found when a decision made by counsel is invalid under an objective standard of reasonableness. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995).

If an applicant meets the first prong of showing deficiency in counsel's performance, an applicant must then establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* It is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. *Id.* at 693. An applicant bears the "highly demanding" and "heavy burden" in establishing actual prejudice. *Williams v. Taylor*, 120 S.Ct. 1495, 1513-14 (2000). Prejudice is established if "but for counsel's errors there is a reasonable probability the result at trial would have been different." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

In the context of the particular errors alleged here - Family Court counsel's failure to provide adequate representation at the waiver hearing and General Sessions trial counsel's failure to properly negotiate and communicate a plea offer - this standard requires Applicant to show a reasonable probability that either (1) the Family Court would have reached a different result in deciding whether to transfer his case to General Sessions court, or (2) that he would have



accepted a plea offer to voluntary manslaughter and received a more favorable sentence than he did for the murder convictions.

ANALYSIS OF FAMILY COURT ISSUES

The Applicant's argument about ineffective assistance of counsel at the Family Court level is based upon Applicant's attorney, Yale Zamore, spending over a year preparing for the waiver hearing, which he openly acknowledged was crucial to his client's defense; however, Zamore then essentially conceded to his client's transfer to General Sessions court on the grounds of trial strategy. There is no dispute of the fact that Zamore did not challenge the waiver position of the State or introduce any evidence whatsoever on behalf of Pittman. Indeed, at the PCR hearing, Zamore conceded that he, "did not actively oppose [Pittman] being waived up." Applicant argues this failure to actively contest the waiver hearing was both objectively unreasonable and prejudicial to Pittman.

The general rule in South Carolina is that a child under the age of 14 cannot be tried as an adult. S.C. CODE ANN. § 63-19-1210 (2008). The relevant statute was substantially identical at the time of Pittman's 2003 waiver hearing. *See* S.C. CODE ANN. § 20-7-7605 (2003) (repealed and replaced with the virtually identical § 63-19-1210 in 2008). A limited exception allows Family Courts to transfer jurisdiction of cases involving allegations of murder or criminal sexual conduct to the Court of General Sessions. In such cases, transfer allows the State to proceed "against the child as a criminal rather than as a child" within the purview of the South Carolina Children's Code. S.C. CODE ANN. § 20-7-7605(6) (2003).

To transfer such a case to the Court of General Sessions, a waiver hearing to determine whether a child should be tried as an adult criminal is conducted by the Family Court. A waiver hearing is a "critically important action determining vitally important statutory rights of



the juvenile." *Kent v. United States*, 383 U.S. 541, 556 (1966). Whether a child should be tried as adult criminal depends primarily on the factors announced in *Kent* and endorsed by the South Carolina Supreme Court in *State v. Corey D.*, 339 S.C. 107, 529 S.E.2d 20, (2000) The *Kent* court specified eight factors for a family court to consider in determining whether to try a child in adult court: The eight factors are:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.

2. Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner.

3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if injury resulted.

4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment.

5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults.

6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

7. The record and previous [criminal or adjudicative] history of the juvenile.

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

Kent, 383 U.S. at 566-67; *State v. Corey D.*, 339 S.C. 107, 117, 529 S.E.2d 20, 26 (2000).



At the waiver hearing on June 25th, 2003, the defense stipulated that Applicant was competent to stand trial, so the State did not call Dr. Crawford but only submitted her report. Dr. Crawford's report contained very damaging information about Applicant's behavior and the manner in which he committed the crimes. He also told Dr. Crawford he wanted to kill people in Department of Juvenile Justice (DJJ) who made him angry, had a plan to do, so but just lacked the materials. The State called Chester Sheriff Deputy McKellar and South Carolina Law Enforcement (SLED) agent Williams, who briefly summarized the investigation and evidence leading to the arrest of Applicant. Specifically, they noted that Applicant had lied to the hunters, gotten in trouble at school the day of the murders, and confessed to killing his grandparents. Agent Williams described the burning of the house and the injuries to the grandparents. Finally, the State called Dr. Barbara Hartt, a clinical psychologist with the Department of Juvenile Justice, who described Applicant's chaotic early life, conflicts with his father, the prior running away incident, his suicide threat, his placement at Lifestream, and his unwillingness to return to his father. Applicant admitted to Hartt that his grandparents told him he might be returned home or placed in DJJ for choking the second grader. Applicant and his grandfather then watched TV that night. Everyone went to bed, but Applicant got up later and killed them.

Dr. Hartt testified that Applicant had average intellectual functioning and was capable of comprehending rehabilitation programs. Moreover, he had no prior history of adjudications or arrests. She thought his desire for attention could be redirected positively. However, she noted that Applicant had 28 institutional disciplinary reports against him in DJJ over the course of 15 months. She testified that Applicant did not seem motivated for rehabilitation – complaining about his life but not acknowledging problems with his own

behavior. This lack of family support, inability to refrain from negative behavior, history of depression and risk of emotional problems, all worked against Applicant remaining in the juvenile system. Finally, Applicant only expressed regret for his past actions in terms of the consequences for getting caught. Dr. Hart's report also contained other damaging information, such as Applicant stole her pen during one of their sessions and manufactured it into a shank in DJJ, and that he only felt regret in the context of the consequences of his actions.

Two days later, Family Court Judge Brown transferred jurisdiction to General Sessions court, finding, *inter alia*, that the gravity of the crimes required waiver for protection of the community, and that Applicant would not likely be rehabilitated in the juvenile justice system.

A year later, in June 2004, Applicant's new counsel filed before Judge Pieper a motion to remand the case to family court, in which he argued that the Circuit Court had to perform "meaningful review" of the waiver. The defense argued Judge Pieper should consider subsequent evidence, including the Zoloft defense, as well as Applicant's recent behavior.

At a pretrial motions hearing on December 3rd, 2004, the defense argued the family court had not fully investigated the case and had not complied with procedural due process requirements. The defense offered Dr. Atkins as "new" testimony to be considered. Dr. Atkins testified in a manner consistent with her trial testimony that Applicant was essentially a good kid whose problems were caused by a manic and psychotic reaction to Zoloft. She stated that while he was far behind in school when he first arrived, he had made tremendous progress and now received all "A's". On cross, she attempted to explain away



Applicant's prior difficulties, noting that family members initially expressed concern that Applicant had limited prospects for rehabilitation in DJJ, but once they were exposed to the "available literature" on Zoloft, their opinions changed. The defense also proffered maternal grandmother Duprey, who stated that Applicant was extremely quiet, shy, and non-aggressive.

On January 14th, 2005, Judge Pieper rejected Applicant's request to remand. Judge Pieper concluded he could determine whether a case had been "properly" transferred to him as a procedural matter, but he rejected the defense contention that the procedural review would also allow substantive review of the transfer decision, including new evidence. Having decided the scope of review, Judge Pieper noted that the murder charge was transferable, and that the State and the Family Court had complied with all the procedural requirements for completing a transfer. Judge Pieper also addressed the *Kent* factors in the alternative and found sufficient evidence to support the Family Court decision. He stated the mere existence of a possible Zoloft defense did not preclude waiver, as it was a matter to be resolved at trial. Even if Applicant's recent behavioral improvement weighed in favor of rehabilitation, "such a conclusion [was] not entirely clear." He also pointed out the "new" evidence contained information that Applicant threatened staff members and was caught in the process of making a shank.

The South Carolina Supreme Court also later rejected a claim that the waiver was improper, concluding:

Further, Appellant's argument that the court erred in finding that he would not benefit from the rehabilitation program at DJJ is not convincing. Because we review the lower court's decision only for an abuse of discretion, this Court would have to find the family court's order wholly unsupported by the record in this regard to find error. Instead, we find that this record contains a great deal of evidence supporting the family court's decision. Looking at events occurring both before the waiver hearing



and after, while there is evidence in the pre-trial motions hearings which suggests that Appellant was cooperative and capable of rehabilitation, the record also reflects that Appellant engaged in escape plans, made shanks, and caused other disruptions while in the custody of DJJ.

Accordingly, regardless of whether the Court considers just the facts in existence at the time of the waiver hearing or the additional facts which occurred after the waiver hearing, we find that sufficient evidence exists to support the satisfaction of the eight Kent factors. Therefore, the family court did not err in waiving its jurisdiction to the circuit court.

State v. Pittman, 373 S.C. 527, 560, 647 S.E.2d 144, 161 (2007).

At the PCR hearing, Applicant presented a substantial body of helpful evidence bearing on six of the eight *Kent* factors that was available to Zamore at the time of the waiver hearing and should have been presented by him to the Family Court. Specifically, Applicant argues Zamore could have presented evidence suggesting that Pittman (1) did not pose a future threat to his community, (2) did not act in a premeditated manner, (3) could only have been prosecuted for all of the charges against him in Family Court, (4) was neither sophisticated nor mature enough to be treated as an adult, (5) had no previous record, and (6) could have been rehabilitated through the procedures and services available to the Family Court. Applicant further argues this evidence would not have disclosed or limited the Zoloft defense that Zamore was considering advancing on Pittman's behalf at trial, and therefore, there was no legitimate strategic reason not to present it. The evidence is summarized as follows:

First, Zamore conducted no cross-examination of Deputy McCellar or Agent Williams. He did conduct a brief cross-examination of Dr. Hartt but, in doing so, made only a few, limited points, including that Pittman had cooperated with Dr. Hartt during interviews; that his behavior had improved; and that there was no indications that Pittman had a substantial problem with drug abuse. Zamore offered no affirmative evidence on Pittman's behalf.



At the PCR hearing, Zamore explained his decision was strategic, or as he called it, "keep our powder dry," *i.e.*, avoid revealing his tactics and evidence at this hearing in order to preserve the element of surprise for a defense at trial. Applicant argues that evidence at the PCR hearing clearly established that such a strategy was objectively unreasonable in light of (1) the substantial evidence that Zamore could have presented on *Kent* factors independent of guilt or innocence; (2) the undisputed fact, recognized by Zamore himself in correspondence to the Family Court, that Pittman's best chance for avoiding a lengthy prison sentence was to avoid transfer to General Sessions; and (3) the fact that the trial strategy of the Zoloff defense was already widely known at the time of the transfer hearing.

Second, Applicant argues Zamore's erred in failing to correct the incomplete testimony offered by McCellar about Christopher Pittman's custodial statement. Specifically, McCellar's testimony suggested that Christopher Pittman shot his grandparents and did not express remorse, but omitted entirely Pittman's explanation of the provocation that led him to do what he did. Zamore could have elicited the additional details set forth in Pittman's written statement that described the events leading up to the shootings:

[My grandparents] told me they was going to lock me in my room. They locked me in there after we talked until about 11:30. My grandpaw said if I came out he was going to beat me with the paddle. I came out about 10 something. I was going to get something to drink. My granddad got the paddle. I tried to get my shotgun. He hit me on my back and my butt. Then he said if I came out anymore he said he would hit me across the head with it. He had beat me back into my room. He hit me 5 or 6 times. That's what my dad used to hit me with. When they went to bed I waited until about ten minutes. I got the shotgun out of the cabinet. I took it in my room and loaded it. I took a box of shells from the cabinet. I put three in it. Jacked one and put another one in it. I went in their room. I just aimed at the bed. I shot four times.

Applicant argues this evidence would have been highly relevant to the Court's assessment of both the second *Kent* factor (whether the alleged offense was committed in an



aggressive, violent, premeditated or willful manner) and the eighth (the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation) because it would have demonstrated that the killings were not purely evil acts but, rather, the relatively spontaneous response of an emotionally scarred child to a beating.

Third, Applicant argues Zamore did not need to rely merely on cross-examination to make these points since there were multiple available witnesses who could have offered affirmative evidence on these issues as well. These witnesses included Delnora Duprey (Pittman's maternal grandmother), Reverend Christopher Snelgrove (his pastor) and Dr. Julian Sharman (another DJJ psychologist).

Applicant argues Duprey's testimony would have been highly relevant to the issues of future dangerousness and potential for rehabilitation, as well as to the issue of Pittman's sophistication and maturity. As her testimony in the Remand Hearing demonstrated, she would have testified that Pittman was a "quiet" and "shy" child, who was "non-aggressive," even in the face of confrontation. Significantly, Duprey, who knew Pittman since he was an infant and spent considerable time with him during his childhood, testified that she would have allowed Pittman to live with her if he were released from prison. In particular, Duprey testified, "I would have no hesitancy. I have always teased him when I visit him that if he fit in my pocket I would take him home with me."

Applicant argues Rev. Snelgrove's testimony would have been to similar effect. Because he was not simply Pittman's pastor, but also the father of one of Pittman's closest friends in Chester, Rev. Snelgrove had ample opportunity to observe Christopher Pittman, both in church and outside of church, including times when he was Pittman's primary adult supervisor. Rev. Snelgrove described Pittman as a "gregarious, fun loving, polite," "extremely well-mannered,"

"well-behaved young man" whom he never observed engaged in violent or devious behavior. Rev. Snelgrove testified that he had interacted with several thousand children in his career as a minister and volunteer work as a coach. He testified that, "in terms of behavior and character and even potential, I would put him [Pittman] right up among the top of any of those youth." Rev. Snelgrove even went so far as to say that he had "viewed Christopher as actually somebody that I had been praying for, for my son as a friend, and I hoped that it would go on for a lifetime."

Applicant argues that this testimony, particularly when combined with Rev. Snelgrove's testimony about his interactions with Pittman after Pittman had been detained at DJJ, would have cast doubt on the perception that, at the time of the transfer hearing, Pittman presented such an on-going threat to society that he could not be rehabilitated within the juvenile justice system. Instead, Rev. Snelgrove's testimony evidenced the likelihood that the homicides were an aberrational act of violence. Thus, Rev. Snelgrove testified that when Pittman came to South Carolina to live with his grandparents in the fall of 2001, "it was plain that something terrible had happened, something awful." Although Rev. Snelgrove himself did not know the details at the time, other evidence (including Dr. Hartt's report) established that the "something awful" was Pittman's abandonment by his mother who had unexpectedly reappeared in Pittman's life after leaving him as an infant only to announce suddenly after several months that she was leaving and that he could never see her again. Applicant's theory has always been that it was this emotional shock, coupled with Pittman's harsh treatment at the hands of his father, that began the chain of events that led Pittman to run away from home and threaten suicide. This resulted in Pittman's grandparents bringing him back to South Carolina, where Rev. Snelgrove observed, "A change had come over Christopher. He was sullen." Rev. Snelgrove's testimony also would have provided important confirmation for Pittman's explanation about the trigger for



the homicides, *i.e.*, his reaction to being beaten by his grandfather, Joe Pittman. Rev. Snelgrove personally witnessed the grandfather's violent temper firsthand when, in a church meeting, Joe Pittman hurled a hymnal at Rev. Snelgrove and then repeatedly charged and bumped him.

Fourth, Applicant argues Rev. Snelgrove's testimony about his observations of Pittman at DJJ also would have provided significant evidence of the aberrational nature of the killings. After some months, and after Pittman visited with his aunt, Rev. Snelgrove's relationship with Pittman returned to what it had been, leading Rev. Snelgrove to testify that he did not believe Pittman to present a danger to the community or to society, or "that he would ever harm anybody else." Indeed, when asked if he would have taken Pittman into his home or been willing to serve as legal guardian in June 2003, Rev. Snelgrove's response was similar to Duprey's: "I was discussing it with him all the time, that if – he seemed to be concerned that he would get released and no one would be there to take him home because they live in Florida. I would tell him that well, come – you know, come stay with me. If it's a temporary thing, it is, and if it needs to be longer, we can arrange something[.]

Fifth, Applicant argues Rev. Snelgrove's testimony also directly contradicted Dr. Hartt's findings in at least two material respects. First, although Dr. Hartt indicated that Pittman did not express remorse for his behavior except in terms of the consequences to himself, Rev. Snelgrove testified in detail about Pittman's feelings of guilt (expressed in terms of wanting to remain in detention "forever" and "suffer" and "be punished"). Second, Rev. Snelgrove expressly rebutted Dr. Hartt's conclusion that Pittman did not have the support of his relatives, testifying that Pittman "had the full support of his family, and listing several specific family members who were particularly supportive as examples.



Sixth, Dr. Julian Sharman was a psychologist at the Juvenile Detention Center where Pittman was held after his arrest. Dr. Sharman, who testified for the State at trial, saw Pittman throughout the period of his detention and, like Rev. Snelgrove, would have contradicted several of Dr. Hartt's findings. First, Dr. Sharman confirmed that Pittman had the support of his family, testifying that, as of June 2003, "he had the support of his extended family," and that, in particular, "he had a very good relationship with his grandmother" and that "[s]he was a support for Chris." Second, in contrast to Dr. Hartt's findings that Pittman was "unable to respond to internal injunctions against negative behavior," and that he had "difficulty complying with the requirements of [his] incarceration," Dr. Sharman testified that Pittman "was able to control himself in his dealings with [Dr. Sharman]."

In addition, Dr. Sharman could have provided important testimony to confirm the aberrational nature of Pittman's wrongdoing. Not only would Dr. Sharman have testified to Pittman's improved behavior over the course of his time in detention, but he would also have testified about the extreme psychological stresses that affected Pittman at the time of the homicides, beginning with the background of the trauma of re-abandonment by his mother and physical abuse by his father, including whipping Pittman until he "turned black and blue," "hitting [him] with boards and a paddle," choking him, and throwing him.

Seventh, Applicant argues Zamore also could have, and should have, called expert witnesses to counter the State's suggestion that the severity of the wrongdoing itself indicated that Pittman could not be rehabilitated in the juvenile justice system. In particular, two witnesses at the PCR hearing, Dr. Marie Banich and Dr. Eric Trupin, testified about scientific evidence, already well-established in June 2003, that pre-teenage juveniles such as Pittman are particularly good candidates for rehabilitation.



Dr. Banich is a professor in the Department of Psychology and Psychiatry at the University of Colorado and was qualified as an expert in cognitive neuroscience and adolescent brain development. Dr. Banich testified that the last part of the adolescent brain to develop is the frontal lobe, which controls executive function, which Dr. Banich defined as "the ability to inhibit things, to deal with novel situations, and also the ability, not only to understand about yourself but to understand what actions [*sic*] your actions will have on other people." As a result, a twelve year-old (Pittman's age at the time of the killings), has far less ability to override and control impulses than a 21-year old. This finding suggests that the biological growth process itself would significantly improve Pittman's ability to control any violent impulses as part of a person's natural ability to improve as part of the maturation process.

Dr. Trupin is a Professor at the University of Washington School of Medicine in the Department of Psychiatry and Behavioral Sciences and was qualified as an expert in the field of juvenile rehabilitation. Dr. Trupin explained that none of the factors cited by Dr. Hartt, either individually or collectively, justified the conclusion endorsed by Judge Brown that there was "little likelihood" that Pittman could be rehabilitated in the South Carolina Juvenile Justice System. To the contrary, Dr. Trupin testified unequivocally that Pittman could have been effectively rehabilitated in South Carolina while maintaining the safety of the community. In particular, Dr. Trupin observed that age 12 "is the time when the impact is most effective" for rehabilitation programs and that research had demonstrated that programs available in South Carolina in 2003 had shown "significant positive effects" on pre-adolescents, such as Pittman.

Dr. Trupin testimony also undercut the significance of two factors emphasized by Dr. Hartt: Pittman's behavior problems while in juvenile detention and the severity of the offense. With respect to the behavior problems, Dr. Trupin noted first that behavior problems are not



unusual among juvenile detainees and are not generally a barrier to rehabilitation. In Pittman's case, Dr. Trupin noted that Dr. Sharman's testimony and notes indicated that Pittman had become "less oppositional and less defiant," over time, and that such behavioral improvement "flies in the face of the . . . hypothesis that this was . . . a negative factor." With respect to the severity of the offense, Dr. Trupin indicated that, although this was a factor in rehabilitation, frequency of deviant antisocial events is in fact a far more significant determinant of susceptibility to rehabilitation. He noted Pittman's lack of a prior record and the "relatively low frequency of events in his life where he got into trouble" as significant and positive factors.

Based on all of this available evidence, Applicant argues that Zamore's strategic decision to limit his presentation at the transfer hearing in order to avoid telegraphing his trial strategy was objectively deficient since none of the evidence described above would have revealed either the fact of the Zoloft defense or any details about how it would be presented. In other words, none of this evidence even touched on the central issue at trial, *i.e.*, whether Pittman knew right from wrong when he killed his grandparents. Applicant also argues that even if presentation of some of the evidence would have signaled reliance on the Zoloft defense, Zamore's failure to adduce it would still have been objectionably unreasonable because it was not sufficient for Pittman to establish merely that Zoloft caused his conduct. Rather, under well-established South Carolina law, Pittman also needed to demonstrate that, because of the Zoloft, he did not know moral or legal right from moral or legal wrong at the time of the killings. *See State v. Pittman*, 373 S.C. 527, 576-77, 647 S.E.2d 144, 170 (2007). Because of Pittman's post-arrest statements, his flight, his apparent attempt to conceal the homicides by burning down the house, and his false statements about being kidnapped by a black man, it was virtually impossible for Pittman to meet this standard. Applicant argues that evidence of Zoloft's effect on



Pittman's behavior could have had a significant impact on Judge Brown's transfer decision as it would have had direct relevance to the judge's evaluation of future dangerousness and potential for rehabilitation.

There is no doubt that Zamore himself realized at the time that the transfer hearing was Pittman's best hope for a favorable outcome. Indeed, that was the very reason Zamore expressed in his March 14, 2003 letter to Judge Brown requesting a continuance of the transfer hearing, explaining that "the transfer hearing is the most critical part of this case" and "my main preparation is the transfer hearing as I will be in a world of hurt in the Court of General Sessions."

Applicant argues that, given the admitted importance of the transfer hearing, Zamore's failure to present available evidence was unjustifiable. He also argues this failure was all the more unreasonable because, even if the Zoloft defense were viable and some advantage could have been gained by not disclosing the defense to the prosecution until trial, it was hardly a secret to the prosecution by the time of the transfer hearing that Pittman would be relying on the Zoloft defense at trial. During the lengthy interval between Pittman's arrest and the waiver hearing, a number of media articles were published proclaiming the likely use of a Zoloft defense. The State also received notice of the potential defense well before the waiver hearing, namely from Zamore himself: first, during his initial appearance on Pittman's behalf, and later when Zamore informed the state's expert, Dr. Crawford, that Zoloft might be part of Pittman's defense. Because the Zoloft defense was factually doomed, and was no secret to the State, Applicant argues there was no strategic rationale for failing to contest the waiver hearing. *See Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (S.C. 1995) (finding counsel ineffective where professed strategy was invalid under an objective standard of reasonableness).



Finally, Applicant also argues there no strategic justification for Zamore’s closing argument, which Applicant claims advanced the State’s case more than it did his. For instance, at one point, Zamore described Christopher’s actions as “heinous.” He then went on to describe his client’s conduct as “an exceptional [*sic*] severe provocation with regard to society as a whole” and stated that the severity of the case was “quite frankly, in my nearly 20 years practicing law . . . beyond most of the cases I have handled And it would rank, I am sure, as one of the worst the solicitor has dealt with as well” Zamore then stated, “under the prevailing law, more of the factors mentioned by the Supreme Court in [*Kent*] speak to the solicitor’s issue than speak to mine”

In summary, Applicant argues that the evidence that Zamore should have presented at the waiver hearing would have in no way limited the subsequent assertion of a Zoloft defense. As demonstrated at the PCR hearing, the evidence available to Zamore at the time of the waiver hearing included: (1) lay and expert testimony regarding Pittman’s potential for rehabilitation, (2) evidence that Pittman’s actions were aberrant and did not suggest that he would be dangerous in the future, (3) details regarding Pittman’s harsh family life, and (4) scientific evidence that, as a 12-year-old boy, Pittman was neither sophisticated enough nor mature enough to be treated as an adult. None of this evidence has anything to do with an involuntary intoxication defense, nor would the assertion of it have telegraphed or compromised a flawed *M’Naughten* defense.

The Court finds Zamore’s errors resulted in the omission of significant evidence and arguments relevant to a number of *Kent* factors, including the first (seriousness of the offense; protection of the community), second (nature of the offense), sixth (sophistication and maturity), seventh (previous record), and eighth (ability of the juvenile system to provide adequate protection to the community and likelihood of reasonable rehabilitation).



As noted earlier, judicial scrutiny of counsel's performance is highly deferential and should not be subject to the distorting effects of hindsight. Where strategic decisions must be made, counsel may reasonably choose from a wide range of acceptable strategies. *Strickland*, 466 U.S. at 689; *Burket v. Angelone*, 208 F.3d 172 (4th Cir. 2000). In assessing whether counsel's conduct was reasonable, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and "might be considered sound trial strategy." (citation omitted) *Id.* at 689. A sound strategy, however, cannot be found when a decision made by counsel is invalid under an objective standard of reasonableness. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995).

The circumstances of this case leads this Court to conclude that Zamore's decision to present no evidence whatsoever on Pittman's behalf at the waiver hearing in Family Court and to make no meaningful effort to challenge any evidence offered by the State was objectively unreasonable. Given that Zamore acknowledged the importance of success at the waiver hearing for his client to avoid facing a double murder charge in General Sessions court, his assertion that he did not want to reveal his possible trial strategy makes no sense. To the contrary, failing to provide a meaningful challenge to the State's case guaranteed Pittman would lose the waiver hearing and face charges in General Sessions court. The so-called "Zoloff" defense strategy was also publicly well known by the time of the waiver hearing in part to Zamore's disclosure of it to the State. This decision to concede the waiver hearing in order to "keep our powder dry" strategy was not sound under these circumstances and was objectively unreasonable. Therefore, the Court finds Applicant has met the burden of demonstrating Zamore's performance was deficient.



However, not only must Applicant demonstrate that counsel's performance was deficient, he must also demonstrate that "the deficient performance prejudiced the defense." *Strickland* at 687. In the context of this case, Applicant must also show there is at least a reasonable possibility that the Family Court would have denied the transfer motion even if Judge Brown had the additional evidence Zamore should have presented. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* It is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. *Id.* at 693. The Applicant bears the "highly demanding" and "heavy burden" in establishing actual prejudice. *Williams v. Taylor*, 120 S.Ct. 1495, 1513-14 (2000). Prejudice is established if "but for counsel's errors there is a reasonable probability the result at trial would have been different." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

The Court finds that Applicant has not met this burden. While Judge Pieper did not conduct a *de novo* waiver hearing, he did hear most of the evidence in the form of arguments when the defense team later petitioned him to remand the case to Family Court. Furthermore, the South Carolina Supreme Court reviewed both proceedings and affirmed the outcome, stating it reviewed the facts available both before and after the waiver hearing. While this Court finds Zamore was deficient in failing to meaningfully challenge the State's case in Family Court, and Judge Brown no doubt would have benefited from hearing the evidence the Applicant presented at the PCR hearing, this case was from the beginning about a double murder, with strong evidence of premeditation. Therefore, the result is most likely the case end up in General Sessions court when considering the evidence the State had against Pittman. At any rate, the Applicant has not made a compelling enough case to convince this Court otherwise.



Therefore, while I find Applicant has demonstrate his counsel's performance at the Family Court waiver hearing was deficient, I find he has not met the burden of proving the deficient performance prejudiced him.

ANALYSIS OF GENERAL SESSIONS ISSUES

The Applicant's amended application alleges that the defense team's failure to engage the *guardian ad litem* in the plea negotiations or have the *guardian ad litem* discuss a possible plea offer with Pittman was deficient, and this failure led to Pittman's inability to receive objective advice about whether to pursue and accept a plea bargain to voluntary manslaughter. I find the defense team's failure to pursue a plea bargain to voluntary manslaughter under the circumstances of this case was deficient; however, I find it was for reasons not solely related to the failure to utilize the services of the *guardian ad litem*.

Pittman's lead trial counsel, Andy Vickery, was a Texas civil litigator whose practice focused on representing individuals who had used Zoloft or other SSRIs in litigation against pharmaceutical companies manufacturing those drugs. His previous criminal experience was extremely limited, primarily decades before in the military. Vickery had a very limited amount of experience in criminal matters involving the use of SSRI drugs, but he had no experience whatsoever in the use of the *M'Naughten* defense, in general, or as it is applied in South Carolina, in particular. Furthermore, none of the out-of-state lawyers had any experience in sentencing and parole-eligibility issues in South Carolina. While local counsel Henry Mims is a well-regarded criminal attorney; according to the record before this court he had not tried a murder case before this one. The other members of the defense team apparently had no experience in criminal trials before this case.



Vickery as well as the other members of the defense team fervently believed Zoloft could cause otherwise law-abiding citizens to become violent, and further that it caused Pittman to kill his grandparents. However, as Vickory admitted during the PCR hearing, what he did not understand was under South Carolina law, it did not matter if Zoloft “caused” Pittman to kill his grandparents unless he could also show at the time of the killings Pittman did not know it was morally or legally wrong to kill them. Confident in the strength of this flawed defense, Vickery took an aggressive posture in plea discussions with the Solicitor, Barney Giese, suggesting at the outset that Giese should agree to remand the case to Family Court and allow Pittman to plead guilty to a sentence allowing him to be released at age 21. Giese expressed no interest in Vickery’s proposal, so no further discussions about a plea arose prior to the trial.

Although the specifics about who attended the meeting were disputed, the witnesses all agreed the possibility of a plea was discussed again in chambers with Judge Pieper towards the very end of the trial. Those discussions were the subject of extensive testimony at the PCR hearing. Each of the three prosecutors (Giese, Deputy Solicitor John Meadors, and Assistant Solicitor Dolly Justice Garfield) and three members of the defense team (Vickery, Karen Barth Menzies, and Hank Mims) testified, as did Pittman.

It is undisputed that Judge Pieper initiated the discussions by calling the parties into his chambers. Vickery, Waldner and Mims were present from the defense team. Hamilton, who was generally not consulted by the defense team on any matters, was not present at this chambers meeting. On the prosecution side, Giese, Meadors and Garfield were all present. Judge Pieper asked the parties whether there had been any discussions of a possible plea. Vickery explained there had been, but he had been unable to interest the Solicitor. Vickery noted his goal was to find a resolution allowing Pittman to get out of jail by age 21. When Giese indicated that he was



not interested in any such resolution, Judge Pieper suggested a plea to voluntary manslaughter with sentencing to be left up to him. The prosecutors did not formally extend such an offer, but they did make clear that they would probably allow Pittman to plead to voluntary manslaughter if the sentence maximum sentence of 30 years imprisonment.¹ It is undisputed that no formal offer was extended because Vickery made it plain he was not interested in any plea that did not result in Pittman being released from prison near the age of 21.²

Nevertheless, it is uncontroverted that Vickery discussed this possibility of a voluntary manslaughter plea with Pittman directly and with family members present. Other members of the defense were also present and participated in the discussions to a lesser extent. Most importantly, there is no evidence anyone explained the implications of an 85% sentence to voluntary manslaughter versus a day-for-day sentence for murder to Pittman. As noted, if Pittman would have pleaded guilty to voluntary manslaughter, he would be eligible for release after serving 85% of his sentence, or approximately 25.5 years if he had received the maximum 30-year sentence, which is still a benefit to him because he must serve every day of the entire 30-year sentence he received for murder.

¹ A criminal defendant has the right to plead guilty to the indicted charge; however, a defendant has no right to plead to a lesser charge without the State's consent. Under South Carolina law and practice, there are usually three types of guilty pleas: (1) a negotiated plea where the State and the defendant agree upon the sentence to be imposed; (2) a plea with a recommendation for a sentence by the State; and (3) a plea without a recommendation by the State. In a negotiated plea, the agreed-upon sentence is presented to the judge who is free to accept or reject the sentence; however, if the judge rejects the sentence, the defendant is free to withdraw the guilty plea. In the other two instances, the sentence is left entirely to the discretion of the judge. The judge is free to give the State's recommendation whatever weight (s)he deems appropriate.

² There were disputed recollections about whether Giese responded to Judge Pieper's suggestion by indicating he would need to first get the approval of Solicitor Justice. Giese himself testified that he only would have wanted to inform Justice about any plea bargain offer as more or less a professional courtesy. No plea offer would have been conditioned upon Justice's approval. Giese's testimony was unequivocal that any decision regarding a plea bargain offer was his responsibility alone.

The Court finds a preponderance of evidence shows that Vickery actually recommended Pittman not plead guilty to voluntary manslaughter because he was confident Pittman would be acquitted. This finding is buttressed by Vickery's astonishing PCR admission that he did not understand his entire theory of involuntary intoxication or his *M'Naughten* defense was flawed until Judge Pieper presented the jury charges to him at the end of the trial. This admission came in the following exchange at the PCR hearing:

Question by AG Waters: Did you understand in South Carolina that to succeed on voluntary intoxication, you would have to show that the defendant did not know moral or legal right from moral or legal wrong?

Answer by Vickery: It wasn't entirely clear to me at that time at all. I don't think it was clear to anybody until Judge Pieper formulated the charge.

PCR Transcript Page 371, lines-12-18

Clearly, this admission casts serious doubts over whether the defense team ever understood why this theory of a "Zoloft defense" did not comport with the *M'Naughten* rule under the facts of this case. While it is true Pittman recently had his medication switched to Zoloft, which could have seriously and adversely affected his thinking and actions at the time of the killings, there was little evidence this made him psychotic enough not to understand killing his grandparents was morally or legally wrong, making it a practical certainty Pittman was going to be convicted of murder. This lack of understanding explains the advice about his chances of conviction being given to him by his defense team. Coupled with the fact no one explained to him the implications of the 85% early release on a 30-year sentence for voluntary manslaughter, it should come as no surprise that Pittman, who was only 15 years old at the time of the trial,

elected not to plead or pursue further plea negotiations. The Court finds performance by the defense team was objectively unreasonable and deficient.

As noted, Applicant raised the issue that it was deficient performance by the defense attorneys to not include the *guardian ad litem* in the plea discussions with Pittman. It is uncontroverted that neither Vickery nor any other member of the defense team revealed the possibility of a voluntary manslaughter plea to Hamilton, and, as a result, Hamilton was unaware of it until after the verdict when Pittman commented to him that he should have taken the deal. I find that the defense team's failure to pursue and correctly inform Pittman about a possible viable plea bargain is the basis for my determination of objectively unreasonable and deficient performance. It is this deficiency that exists independent of whether the defense attorneys had a legal obligation to inform the *guardian ad litem* about the plea discussions so that he could discuss the plea and its ramifications with Pittman. As a practical matter, engaging the *guardian ad litem* might have brought their errors to their attention and perhaps saved them from its consequences. However, I want to make it clear that the failure to engage the *guardian ad litem* is not the basis of my finding. Nevertheless, since the issue was raised in the application, I will discuss it as an alternative basis for relief.

An attorney has an obligation to convey a plea offer to the client, and the failure to do so constitutes deficient performance. *Davie v. State*, 381 S.C. 601, 675 S.E.2d 416 (2009). The South Carolina Supreme has made it clear that "counsel is required to fully communicate with the client so that the client can make an informed decision regarding any proposals by the State." 381 S.C. at 609, 675 S.E.2d at 420. Whether this extends to imposing upon counsel a duty to confer with a judicially appointed *guardian ad litem* in a General Sessions case so the *guardian*



ad litem may assist the client in making an informed decision is a matter of first impression in this state.

In the present case, the Family Court appointed Hamilton as appointed as *guardian ad litem* for Pittman on November 30, 2001, the day after the killings. Hamilton remained in that role throughout not only the Family Court proceedings but also the General Sessions proceedings. Normally, a *guardian ad litem's* authority and participation begins and ends in the Family Court. There was no formal order in the record appointing Hamilton as *guardian ad litem* in General Sessions court by either Judge Short or Judge Pieper. However, despite this ambiguity about whether Hamilton's role as *guardian ad litem* was *de jure* or *de facto*, the record contains numerous actions reflecting the court's acknowledgment of Hamilton in the General Sessions portion of the proceedings. The record does not reflect any of the lawyers or the trial court ever questioned his authority or role in the case. Left with this unusual set of facts, this Court finds the situation analogous to the tort concept of duty to come to the aid of someone in distress: one may not have any such duty (or role), but if undertaken, the law recognizes that consequences may arise from such an undertaking.

As noted, neither Vickery nor any other member of the defense team ever advised Hamilton of the possibility for Pittman to plead guilty to voluntary manslaughter. There was no tactical justification for Vickery's failure to do so, nor did Vickery or the State suggest one at the PCR hearing. Instead, Vickery admitted that he did not inform Hamilton simply because he believed it was unnecessary for him to do so. Specifically, Vickery testified, "at this point in time with Del [Duprey] having been given parental rights and with an aggressive team of experienced people working for Christopher [Pittman], [he] did not perceive that [Pittman] would need a separate attorney as an attorney ad litem or a guardian ad litem." He even testified



he recalled jokingly asking another member of the defense team about what Hamilton role was at the trial.

Under South Carolina law, a *guardian ad litem* is not another attorney on the defense team. Rather, a *guardian ad litem's* role is to look after defendant child's best interests and to assist him in making decisions entrusted to the client. In most Family Court cases, the child's parents or other family members act in this role as advisor. However, Hamilton was appointed in the Family Court because of the conflicts that Pittman's father and most other family members had as a result of their status as relatives of both the victims and the accused. By the time the case got General Sessions court, there was also another potential conflict: Vickery and other members of the defense team might be more interested in waging a battle against the Zolof manufacturers nationally in civil suits at the expense of their interest in Pittman's individual criminal case. While Vickery adamantly denied any such conflict, one member of the defense team, Karen Menzies, testified she became concerned about exactly that as the trial wore on as she observed Vickery's handling of the trial and the plea negotiations.

By failing to inform Hamilton of the potential plea, Vickery prevented him from fulfilling a vital role as someone who had no interest other than Pittman's at heart. The South Carolina Rules of Professional Conduct indicate a lawyer should as far as possible accord the guardian the status of client, particularly in maintaining communication, and should ordinarily look to the guardian for decisions on behalf of the client. MODEL RULES OF PROFESSIONAL CONDUCT R. 1.14(a) cmt. 4 (2007); accord SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT § 1.14, cmt. 3; S.C. Ethics Op. 98-02 (1998). Ignoring the *guardian ad litem* takes on added significance because of Vickery's advice to Pittman that he could not imagine a jury convicting him. Putting to one side the recklessness of such an



unequivocal prediction in any double murder case, it is clear Vickery based his legal advice on what he wished the law were, rather than on what it was. Vickery acknowledged that "[i]f we couldn't persuade the judge of the moral rectitude of our position, then he would adhere to the McNaughten [*sic*] test, which, as we all know, is late 19th century." However, Vickery was trying this case in a court of law, not in the court of public opinion. The courts of law in this state have "continuously utilized the *M'Naughten* test in criminal cases where issues of mental capacity are implicated." *State v. Pittman*, 373 S.C. at 577, 647 S.E.2d at 170. Vickery's belief that a court would simply ignore precedent because of his arguments about "moral rectitude" was wholly unreasonable, and the corresponding advice he provided to Pittman was deficient. *See Kollie v. State*, 386 S.C. 578, 690 S.E.2d 73 (2010) (granting PCR application based the finding that "counsel was deficient in advising [defendant] the State's initial plea offer was 'not a good deal'"); *Julian v. Bartley*, 495 F.3d 487 (7th Cir. 2007) (counsel found ineffective for dramatically underestimating potential sentence, causing client to reject plea); *see also Larson v. State*, 766 P.2d 261 (Nev. 1988) (counsel found ineffective for instructing client to withdraw plea based on his desire to establish as law a novel defense, previously unaccepted within the state). Ignoring the available, independent services of the *guardian ad litem* simply compounded the error.

Pittman testified convincingly that he would have agreed to the plea offer had he the benefit of Hamilton's advice. Pittman's explanation - that he would have pleaded guilty had he understood the jury could have convicted him even if it believed Zolof caused his behavior - is



both logical and believable, as is his recognition of the benefit of the lesser penalty for voluntary manslaughter.³

It also is reasonable to conclude the State would have accepted a voluntary manslaughter plea if Pittman had told his lawyers to pursue it. To begin, the prosecutors' response to Judge Pieper's suggestion left both Vickery and Mims with the clear impression the state would have accepted this plea with a 30-year negotiated sentence, which the Defense team considered to be unacceptable. This comports with the testimony of every member of the prosecution's team. Again, even if the plea negotiations had resulted in a worst-case scenario of a 30-year sentence, Pittman would have benefited by being eligible for release after serving 85% of 30 years as opposed to every day of the 30-year sentence he received for the murder convictions.

Viewing the circumstances surrounding the aborted plea negotiations in totality, it is clear Pittman's Defense team did not appreciate how unlikely the "Zoloft defense" would result in an acquittal of Pittman for the murders. As a result, it is clear the Defense team did not seriously pursue negotiations for a plea to voluntary manslaughter, which had been suggested by the trial judge, a suggestion that was not unfavorably received by the prosecution. Finally, any sentence for voluntary manslaughter imposed by the trial judge - even if the maximum allowed by law - would have been more beneficial to the Applicant than the sentence received for the murder convictions. Therefore, making it likely Applicant would have accepted such a plea bargain if explained the benefits to him after realistically assessing his chances of conviction on the murder indictments.

³ Hamilton understood the significance of the potential plea bargain and testified at the PCR hearing he would have advised Pittman to accept it for exactly the reasons outlined above.

Accordingly, I find the Applicant has met the burden of proving that his defense team's conduct in failing to pursue negotiations for a plea to voluntary manslaughter as suggested by the trial court was objectively unreasonable, and therefore deficient. Further I find Applicant has met the burden of proving he was prejudiced by this deficient performance by demonstrating it was highly likely that had plea negotiations been pursued as suggested by the judge, he and the State would have agreed to a guilty plea to voluntary manslaughter, which would have resulted in a sentence more favorable to the Applicant than he received as a result of being convicted of murder.

CONCLUSIONS OF LAW AND REMEDY

As to Applicant's first allegation of constitutional violation of Sixth Amendment right to effective assistance of counsel, the Court finds Applicant demonstrated his counsel's performance at the Family Court waiver hearing was deficient; however, he has not met the burden of proving the deficient performance prejudiced him. Therefore, as to the first allegation, the application for post-conviction relief is denied.

As to Applicant's second allegation of constitutional violation of Sixth Amendment right to effective assistance of counsel, the Court finds Applicant demonstrated his counsel's performance at the General Sessions trial was deficient, and further the deficiency resulted in prejudice to the Applicant. Therefore, as to the second allegation, the application is granted, and his convictions for the two indictments of murder are vacated.

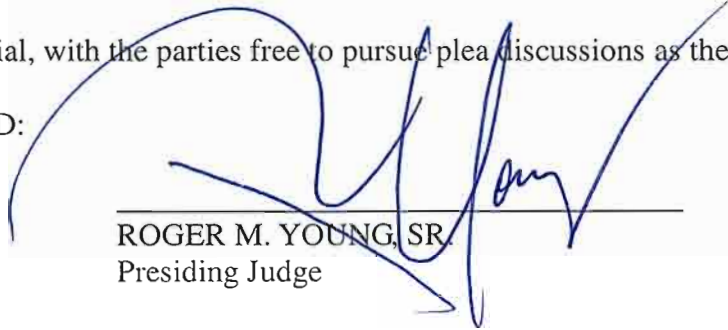
With respect to the second allegation, Applicant urges the Court to permit Pittman to enter a plea of voluntary manslaughter, with sentencing to be left to the discretion of the trial

Based on Hamilton and Pittman's testimony it is entirely reasonable to conclude that Pittman



judge. However, this remedy is not available to the Applicant since no such offer was ever extended. The only remedy this Court can order is to vacate the convictions. The Applicant must be afforded a new trial, with the parties free to pursue plea discussions as they see fit.

IT IS SO ORDERED:



Handwritten signature of Roger M. Young, Sr. in blue ink, written over a horizontal line.

ROGER M. YOUNG, SR.
Presiding Judge

July 27, 2010

would have followed Hamilton's advice since they enjoyed a good relationship.