

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC SUPREME COURT

Appeal from Beaufort County

Honorable Roger L. Couch, Circuit Court Judge

RION BEATY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000492

A P P E N D I X

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STATE OF SOUTH CAROLINA) COURT OF GENERAL SESSIONS
) FOURTEENTH JUDICIAL CIRCUIT
 COUNTY OF BEAUFORT) CASE NO.: 2012-GS-07-1999

STATE OF SOUTH CAROLINA)
)
 VS.)
)
 RION BEATY,)
)
 DEFENDANT.)

PLEA

held before the Honorable J. Ernest Kinard, Jr.
 Mia Perron, Circuit Court Reporter, 9th Judicial Circuit
 in the Beaufort County Courthouse
 Beaufort, South Carolina
 on Monday, April 22, 2013, Commencing at 2:50 p.m.

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EXHIBITS

[None]

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PROCEEDINGS

MR. SHELTON: Thank you, Your Honor. May it please the Court.

Mr. Beaty is standing before you today with his attorney, Mr. Donald Colongeli of the Beaufort County private bar.

The indictment numbers in this case are 2012-GS-07-1999, GS-07-200 and GS-07-2107. That's for armed robbery, possession of a weapon during the commission of a violent crime, and kidnaping respectfully, Your Honor.

Your Honor, there is no negotiated sentence and there's no recommendation in this case. We are pleading straight up and both parties are asking for what they would like to see, Your Honor, is my understanding.

And I'll be happy to give you the facts for the case and the basis of the plea whenever you're ready.

Your Honor, there are victims here, as well, whenever you would like to hear from them.

THE COURT: All right. I'm just checking over what you've got right now.

MR. SHELTON: All right. Yes, sir.

[Whereupon, the Court reviews documents]

THE COURT: Okay. You are Rion Beaty?

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1 MR. BEATY: Yes, sir.

2 THE COURT: You're not too big. How tall are
3 you?

4 MR. BEATY: Like five six, five seven.

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

6 MR. BEATY: Twelfth grade.

7 THE COURT: Have you been locked up?

8 MR. BEATY: Yes, sir.

9 THE COURT: Have you been locked up?

10 MR. BEATY: Yes, sir.

11 THE COURT: How long?

12 MR. BEATY: Seven months.

13 THE COURT: All right. They handed up these
14 indictments. I don't know anything about the case.
15 But apparently you committed an armed robbery
16 involving South Beach General Store; is that right?

17 MR. BEATY: Yes, sir.

18 THE COURT: And then they've got an add-on,
19 possession of a weapon at the time you committed the
20 armed robbery. And another charge, kidnaping. There
21 must have been somebody in the store I guess: Michael
22 Hartley? Do you know who he was?

23 MR. BEATY: Yes, sir.

24 THE COURT: All right. The bad news is that
25 kidnaping and armed robbery are crimes of violence

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1 most serious offences that constitute strikes. You've
2 heard that about one strike you're out, two strikes
3 you're out?

4 MR. BEATY: Yes, sir.

5 THE COURT: You're picking up two strikes if you
6 plead to these charges. What that means is if in the
7 future if you get out and commit another crime that
8 the legislature classifies as a violent crime or a
9 most serious offense, the State can ask for life
10 without parole even though the penalty for that crime
11 might not be that much. Like some drug-trafficking
12 statutes just carry like up to seven years but they're
13 called crimes of violence so the State can ask for
14 life without parole. Do you understand that?

15 MR. BEATY: Yes, sir.

16 THE COURT: Now, whatever sentence I give you on
17 the kidnaping and armed robbery you have to serve at
18 least eighty-five percent of it. Do you understand
19 that?

20 MR. BEATY: Yes, sir.

21 THE COURT: And then even if you get out, which
22 not to say you'll get out, after eighty-five percent
23 you're out on like supervised release, which is pretty
24 tough. If you look at somebody cross-eyed, more of
25 less, they put you back in and you have to serve it

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1 day for day. Do you understand that?

2 MR. BEATY: Yes, sir.

3 THE COURT: Now, you've talked this over with
4 your lawyer, I guess?

5 MR. BEATY: Yes, sir.

6 THE COURT: And you say you finished the twelfth
7 grade. So you can read and write the English
8 language?

9 MR. BEATY: Yes, sir.

10 THE COURT: You went over this advisement of
11 rights form?

12 MR. BEATY: Yes, sir.

13 THE COURT: Are all of your answer correct on
14 here?

15 MR. BEATY: Yes, sir.

16 THE COURT: To any of the three charges that you
17 would tender the plea of not guilty you would be
18 entitled to a jury trial on. You waive a jury trial
19 anytime you plead guilty. Do you understand that?

20 MR. BEATY: Yes, sir.

21 THE COURT: It's all listed on this advisement
22 of rights form. But, basically, you're presumed
23 innocent in a trial. You don't have any obligation to
24 prove you're not guilty. In order to obtain a
25 conviction, the State has got to convince twelve

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1 jurors unanimously, beyond a reasonable doubt, that
2 you committed the crime. Do you understand that?

3 MR. BEATY: Yes, sir.

4 THE COURT: You have the right to be present in
5 the courtroom, observe all that transpires. You get
6 to question all the State's witnesses. You personally
7 can testify or not. That would be your choice. You
8 have the right to put up a defense if you want to.
9 And you've been over this advisement of rights form
10 with your attorney; right?

11 MR. BEATY: Yes, sir.

12 THE COURT: You do understand you waive all
13 your trial rights, the right to call witnesses and so
14 forth --

15 MR. BEATY: Yes, sir.

16 THE COURT: -- if you plead guilty.

17 THE COURT: Now, I don't know whether you've
18 made any statements to law enforcement or not
19 indicating that you were guilty but if you had and you
20 elected to testify, they could bring that out. If
21 you've elected not to testify, you would be entitled
22 to a hearing on whether or not the jury could consider
23 it. But if you plead guilty, you just waive those
24 rights and if you've made any statements to law
25 enforcement, they can just read it to me right now.

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1 Do you understand that?

2 MR. BEATY: Yes, sir.

3 THE COURT: Anything you don't understand?

4 MR. BEATY: No, sir.

5 THE COURT: Armed robbery, you know, is ten to
6 thirty -- talking about years -- kidnaping is up to
7 thirty, and possession of a weapon during the
8 commission of a violent crime is up to five.

9 MR. BEATY: Yes, sir.

10 THE COURT: Okay.

11 MR. SHELTON: Thank you, Your Honor. May it
12 please the Court.

13 This crime occurred, Your Honor, as you read in
14 the indictment, at the South Beach General Store.
15 That's within Sea Pines Plantation, the south beach
16 area, next to multiple other stores including the
17 Lands End Tavern. It's also where the Salty Dog Café
18 is, that region, if you're familiar with it. The
19 Lands End Tavern and the Salty Dog Café are right --
20 excuse me. Lands End Tavern and the South Beach
21 General Store are right next to each other.

22 Mr. Beaty used to work at the Lands End Tavern
23 around a month before this incident. He was fired
24 from that location. Mr. Beaty in that time after that
25 obtained a gun from a guy named Earl Arage [phonetic],

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1 which has been proven in the case. He repeatedly
2 asked for it. And Mr. Arage's girlfriend would
3 testify to the fact that she heard him asking for his
4 gun.

5 Now, he walked into the General Store that night
6 with gloves on, a bandana around his neck not covering
7 his face, and a hat and a white shirt, spoke with the
8 victim, Mr. Hartley, Michael Hartley, who's in the
9 courtroom, for about a minute. Then he left. He came
10 back in moments later when he saw that Mr. Hartley was
11 inside the back room. There's no way out except for
12 that door that's attached to the back room. Stepped
13 down, asked Mr. Hartley if he's sure he doesn't have
14 any better merchandise in the store, lifted up his
15 shirt, pulled out a black pistol, pointed it at
16 Mr. Hartley and then told him to give him everything
17 in the safe. You can see the safe from the door to
18 the back room.

19 Mr. Hartley is the manager. He's the only
20 keyholder that night. So he picked out the right
21 person. We don't think that was by accident. He
22 opened the top of the safe, Mr. Hartley did, based on
23 the threats made to him with a gun, gave him almost
24 \$4,000. This was over Labor Day weekend, September
25 the 2nd, so they had drops from Friday night and

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1 Saturday night.

2 After he gave him that, Mr. Beaty told him, no,
3 I want it all, referring to what's in the bottom of
4 the safe, two different doors to the safe, as well as
5 the register, possibly. Mr. Hartley told him, you've
6 got it all, and Mr. Beaty threatened to kill him.
7 Held the gun right in his face and kept him back there
8 for a considerable amount of time, according to
9 Mr. Hartley and according to the videotape. He
10 couldn't leave. It was a closed-in area. There was
11 no way out besides going through the defendant holding
12 a gun in his face.

13 When he left, Mr. Beaty folded the bank bag over
14 the gun and walked out in a hurried manner. Never
15 fully covered his face. You can see him walking out
16 on the video, on one part of the store, which was the
17 front door, bumped into the front door, left.

18 There's another witness, Ms. Kesha McCullum, who
19 was working that night at the store. She saw him.
20 She saw him the first time he came in, the second time
21 he came in, and then saw him as soon as he walked out
22 the front door.

23 As he left, he passed by the Lands End Tavern,
24 which is right next door. A former employer of the
25 Lands End Tavern, Ms. Jessica Pearce, saw him, goes to

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1 her manager, says, I think Rion Beaty just robbed the
2 General Store, he's standing right outside with a gun.

3 Michael Edwards [phonetic] calls police. They
4 have the suspect's name at that point. The police
5 respond. They aren't able to apprehend him that
6 night, however they do find the bandana in the parking
7 lot. And DNA evidence cannot exclude him. There's
8 multiple contributors to this bandana and that's one
9 of the reasons the State believes the findings aren't
10 as conclusive as they could be.

11 Both of those witnesses picked him out of a six-
12 card line-up on September the 4th and then September
13 the 5th.

14 Further, Your Honor, that same witness that will
15 testify that he was asking for a gun shortly before
16 the robbery confronted him after having conversations
17 with her boyfriend, who's a felon in jail -- calling
18 him from the jail, went to him, confronted Beaty,
19 asked for his gun back and he says, I've got it but
20 it's not with me. So he confirmed to her that he had
21 the gun.

22 That's one of the reasons the State has taken
23 such a hard line on this case, Your Honor,
24 respectfully.

25 His record is trespassing, disturbing schools,

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1 carrying weapons on school property, which was a
2 knife, not a gun. He's also charged with discharging
3 a firearm inside city limits, and unlawful possession
4 of alcohol. He has a YOA on his record.

5 But the fact of the matter is that this gun was
6 obtained from a convicted felon who has a firearms
7 conviction.

8 He has the gun. He commits this -- it's really
9 a heinous armed robbery. It's not the worse you ever
10 heard but it is -- he knew what he was doing. He knew
11 how to hide himself from everyone else in the store,
12 and he did so with absolutely no remorse whatsoever.
13 The first sign of remorse is he's here today, and the
14 State has given him some credit for that.

15 Now, according to the defendant talking to the
16 guy he got the gun from, while he was talking to him
17 in a jail, that gun is in another convicted felon's
18 hands. And that convicted felon is now in jail on a
19 burglary first charge where he had a gun shortly after
20 Mr. Beaty's arrest. We still don't know where the gun
21 is. And it's a cycle that's very preventable if that
22 gun is not obtained in the first place.

23 We're asking -- before I ask for what time we
24 would like to have -- would like to see in this case,
25 we do have the victims here, Mr. Alex Brown of Camp

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1 Hilton Head. He's the vice president of the store.

2 THE COURT: All right.

3 MR. SHELTON: You can stand there.

4 MR. BROWN: Well, Your Honor, I would just like
5 you to take into consideration not just Mr. Hartley
6 but the other twenty-plus employees that I have that
7 have been around. Our company has been in business
8 for thirty-one years and this -- we've never had an
9 incident of this magnitude happen. And it's been very
10 troubling. I still have a very difficult time getting
11 people to come to work comfortably and doing their
12 jobs the way that they need to.

13 MR. SHELTON: And Mr. Michael Hartley is the
14 victim who was there as the manager that night at the
15 South Beach General Store.

16 Would you like to speak, Mr. Hartley?

17 MR. HARTLEY: I just wanted to say, Judge, that
18 I went to work that night like I normally did. And it
19 was towards the end of the season. We had had a good
20 season. And when he approached me, I gave him the
21 same customer service that I have always given
22 everybody else. And even doing that, in the back of
23 his mind he knew what he was going to do and when the
24 opportunity presented itself and he got me in the back
25 room with a gun stuck to your head, I just thank God I

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1 did what he asked me to do.

2 If I had made a wrong move, I may not be here
3 today. And it makes me have mistrust in people. It's
4 made me put in a security system. It makes me want to
5 get a gun. And it's a shame that I have to feel that
6 way, you know, based on what happened. And I don't
7 wish it on, you know, anybody. And I'm just glad that
8 I -- you know, that I got out.

9 MR. SHELTON: Thank you, Your Honor.

10 It's a straight-up negotiation. We always trust
11 the Court's judgment in fashioning a sentence. We do
12 -- we would like to see twenty-five years. Not
13 thirty, but -- if it was -- after a trial, we ask for
14 twenty-five and that's what we're going to ask for
15 now.

16 MR. COLONGELI: May it please the Court, Your
17 Honor.

18 Your Honor, you've heard the facts. And I can
19 tell you I'm court appointed on this case. I've been
20 involved with Mr. Beaty now for quite some time,
21 several months. He's present in court today with his
22 family, who has been actively involved with my
23 representation and their son, including his mother, a
24 very well-respected pastor, his brother, sister, the
25 mother of his son, five-year-old son, who's here,

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1 grandmother and stepdad. I've spoken to them at
2 length. And I can tell you he is very fortunate to
3 have them in his life. They all care and love him a
4 great deal. That does not take away from the
5 unfortunate incident that occurred on September the
6 2nd of last year.

7 I spent a great deal of time with Rion and was
8 at the jail late last evening, until about eleven
9 o'clock, going over everything with him. We had gone
10 into this anticipating the possibility of a trial,
11 only in that a young man of his age obviously is
12 extremely frightened of what lays ahead. And he's
13 here before you and confessing his guilt and throwing
14 his mercy at the Court in the hopes that he can put
15 this chapter of his life behind him.

16 He's twenty-four years of age. As I've said to
17 you, he does have a five-year-old son he actively is
18 involved with and raises and supports. And as I said,
19 the girlfriend/mother of that child is here also.

20 It's been a pleasure to work with Mr. Shelton to
21 the extent that he has been extremely straightforward
22 in handling this matter. There have been no
23 difficulties I've had whatsoever. I want to thank the
24 State for that.

25 I'm here to respectfully ask Your Honor to

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1 consider -- what occurred obviously there's no way to
2 make an excuse for or to lessen how serious it is or
3 how serious it could have become. Mr. Beaty realizes
4 that. You've heard some of the facts by the State.
5 What we would tell you is notwithstanding a
6 surveillance video -- and Mr. Hartley himself, which
7 obviously a great deal of respect and sympathy from
8 Mr. Beaty goes to for what occurred that night.

9 The other people you'll hear from here, Jessica
10 Pearce, has crimes of moral turpitude in her
11 background. There are some other things that we had
12 to work with here. There's criminal records of some
13 of these other people. However, Mr. Beaty did not
14 want to use that. Those are things we possibly would
15 have used at trial if he chose to go forward. We're
16 not doing that. But we think the Court should be
17 aware of that.

18 The DNA in this, obviously there were four to
19 five contributors on that bandana. I think the State
20 has its own theory that Mr. Beaty may be holding the
21 bag, so to speak, here, which obviously we're not
22 concerned about anyone else but him, and he's here to
23 accept his responsibility as far as what occurred.

24 He has done about seven months. You heard his
25 criminal history. And I share the concerns of the

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1 State, as a citizen of this community, as a father
2 myself. But I can tell you, and I think Your Honor
3 knows, after having been around and seeing a great
4 deal of things much, much worse, that this was an
5 incident -- and I can tell you from watching the
6 video, one of the things shocking to me was when this
7 went down, you have -- I don't know if this makes it
8 better or worse, but you had families in there,
9 children, that nobody actually knew what happened in
10 that back room. They were going about their shopping.
11 And thank God what happened was between him and Mr.
12 Hartley, as wrong as that was, and he left, he quickly
13 left the store, and went about wherever he was going
14 that evening.

15 So I would take the position that it wasn't as
16 aggravated as it very well could have been, thank
17 goodness. And I don't believe, having grown to know
18 Rion, that he had any intentions whatsoever of hurting
19 anyone. That doesn't make it right. But I know him
20 to the extent now. And I can tell you his family is
21 shocked -- more shocked than I, as far as the
22 character he portrayed that evening.

23 I can only ask Your Honor -- and based on his
24 criminal history and the other things that I've told
25 you, and the fact that he has come before Your Honor

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1 and accepting his justice, accepting his cross to
2 bear, so to speak this week, that you take all these
3 things into consideration and use your great wisdom
4 and mercy in sentencing him. I always like to say --
5 one of my favorite, Judge Clarence Darrell, once said
6 mercy is the highest attribute of man. And obviously
7 that's what Mr. Beaty is hoping for more than anything
8 here today.

9 I think he's salvageable. I think the question
10 becomes at what point isn't he salvageable anymore.
11 The State wants twenty, twenty-five years, and maybe
12 in some world that is appropriate. I think at that
13 point in time, Mr. Beaty is no longer salvageable.

14 He has a family that loves him. He has a son
15 that was counting on him. And he failed his son by
16 what he did that night. But his son I think would
17 hope one day he could come out and prove himself to be
18 a father. And I'm asking this Court to do that.

19 THE COURT: Any of the family members want to
20 speak or are they just here?

21 MR. COLONGELI: If you could just state your
22 name.

23 MR. WASHINGTON: Yes, sir. To the judge and to
24 the Court, Pastor Robert Washington.

25 That's my little cousin there. Your Honor,

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1 first I want to apologize to the Court and to the
2 victim and the family for the act of my little cousin
3 there. But I hope that it will take into
4 consideration that, you know, sometimes they get up
5 and they do things that are really stupid that they
6 shouldn't do. But it wasn't a way of life for him.
7 It was a one-time thing. And we're asking for any
8 kind of leniency or mercy that you could have toward
9 him, because he do have a five-year-old son. And then
10 he has the support of his family right behind him.
11 And I don't think it's so bad where he can't be
12 rehabilitated if we stick with and help him. So
13 anything you can do to help him, we would greatly
14 appreciate it and we will support that. And thank
15 you.

16 THE COURT: All right.

17 MR. COLONGELI: Would anyone else like to say
18 anything briefly?

19 MS. GREEN [PHONETIC]: I'm Sandra Green. I'm
20 the mother of his son and every since my son has been
21 born, he's been there for him every day -- he's been
22 there, get him ready for school, get him off the bus.
23 With my, you know, working and stuff, he's been there.
24 My son depends on him. Counsels him. They're really
25 close. They do everything together. I just want you

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1 to understand how close he is to my son.

2 THE COURT: Mr. Beaty, you have the right to
3 speak if you would like.

4 MR. BEATY: I know what I did was very wrong,
5 but I want to apologize. I really been going through
6 a lot during those times and I just want to apologize
7 for what I did. I made a mistake, and it's costing
8 me.

9 MR. COLONGELI: Your Honor, very briefly. I
10 don't mean to interrupt.

11 THE COURT: That's fine.

12 MR. COLONGELI: One of the things you mentioned
13 I found interesting: you started this whole thing out
14 by saying he's not a very big fellow. I'm not a very
15 big fellow, either. And I think that's one thing that
16 he's been scared to death about.

17 THE COURT: I understand. It's frightening to
18 go into a population.

19 MR. COLONGELI: Yes, sir.

20 THE COURT: I mean, I've been doing it a long
21 time. I don't know how many armed robberies I've
22 sentenced. But last week I gave a nineteen-year-old
23 boy thirty years. A little different, though. It was
24 his second armed robbery, one; and, two, he went in a
25 restaurant and shot a bunch of times, when it was

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1 filled with people, and almost killed somebody in
2 there.

3 So Mr. Hartley, most of my armed robberies that
4 I have done involve convenience store, late at night,
5 one person in there. And by the time they plead
6 guilty or have a trial, the person that handed over
7 the money no longer works in a convenience store, you
8 know, because they have such -- they just can't be
9 there by themselves again because they keep thinking
10 it's going to happen again. I mean, there's nothing I
11 can do to alleviate your fear. You may even dream
12 about it at night, you know, but that's -- you just
13 have to live with that. It doesn't matter, you know.
14 What I do, I recognize your plight and I recognize the
15 store's concern that they would be arrested.

16 He finished the twelfth grade. I don't know
17 anything about him. He's not bright. I don't mean to
18 knock his family down, but if you're going to rob
19 something you don't rob a place where people know you
20 and you are of a size that you can be identified.
21 That's just -- he had no chance, mask or no mask.
22 He's what you call a useable suspect under those
23 circumstances and eventually he would have been
24 apprehended.

25 He's small. It's tough. He's only twenty-four.

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1 That doesn't justify anything. I went to a conference
2 put on by Emory University week before last. Had a
3 bunch of psychiatrists and doctors there talking to
4 about twelve judges about mental health problems. He
5 obviously doesn't have any that would justify it. And
6 one of the guys -- doctors from Harvard says females
7 become adults about twenty-two, twenty-two-and-a-half,
8 males about a little over twenty-five. One of the
9 judges says, what are your stats on that twenty-five.
10 He says, I don't have any stats. Can a twenty-five-
11 year-old boy rent a car? No. It's been established
12 elsewhere. They don't really obtain adulthood until
13 they're twenty-five. Not to justify it, just to
14 explain it.

15 He has to serve eighty-five percent of any
16 sentence I give. I don't know about justice, even
17 though I've been doing it twenty-five years. And one
18 year I sentenced eighty-two homicide cases over in
19 Columbia. I hate to think how many armed robberies I
20 have sentenced them. If you take into account the
21 armed robberies that are reduced to strong arm
22 robberies just to get the person to plea, innumerable.
23 You do each sentence based on all the facts. Got to
24 serve eighty-five percent. He's going to really have
25 a hard time in prison.

1 I just give him a flat fifteen years on the
2 kidnaping, fifteen on the armed robbery. Those are
3 strikes. Five years on the gun charge. Everything is
4 concurrent. And good luck when you get out.

5 MR. COLONGELI: Thank you, Your Honor.

6 MR. SHELTON: Thank you, Your Honor.

7 THE COURT: One other thing. If I don't write
8 on here that it was not sexual in nature, he has to
9 register --

10 MR. SHELTON: Right. Thank you.

11 THE COURT: -- as a sex offender. I'm only
12 saying that because that's how it works. If I don't
13 write it on there, I have to make a finding on the
14 record.

15 MR. COLONGELI: Thank you, sir.

16 MR. SHELTON: Thank you, Your Honor, for
17 remembering that.

18 THE COURT: Right.

19 [PLEA CONCLUDES AT 3:16 P.M.]
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Plea
April 22, 2013

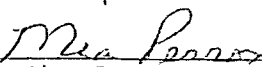
C E R T I F I C A T E

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

I, the undersigned Mia Perron, Circuit Court Reporter for the 9th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the hearing before the Honorable J. Ernest Kinard, Jr., on Monday, April 22, 2013.

I do further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Dated this 10th day of August, 2014.


Mia Perron, CVR-CM-M
Circuit Court Reporter
9th Judicial Circuit

MIA PERRON, CVR-CM-M

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Beaufort County
Honorable Roger L. Couch, Circuit Court Judge

RION BEATY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000492

A P P E N D I X

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Attorney Deputy General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

2014-CP-07-14927
AW 14

FORM 5

STATE OF SOUTH CAROLINA)

County of Beaufort)

_____)

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

Rion Beaty 337153)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

BEAUFORT COUNTY, S.C.
CLERK OF COURT

2014 JUN 23 PM 4:35

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Leiber Correctional Institution
2. Name and location of Court which imposed sentence Beaufort County
General Sessions Court in Beaufort South Carolina
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) Armed Robbery (2012A0720300110)
 - (b) Possession of a Firearm During a Violent Crime
2012A0720300111

- (c) Kidnapping 2012G50702107
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) April 22, 2013 15 years 85%10
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty ☒ _____
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes, but my lawyer did the paperwork wrong
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective Assistant Counsel

(b) Violation of 5th Amendment

(c) Violation of 6th Amendment

(d) Violation of 14th Amendment

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

(a) 1. Filed my motion of reconsideration wrong 2. Got convicted of a charge I never had a chance for.

(b) 3. Promised me 10 years 4. Never told me my rights to an appeal.

(c) If it wasn't for my lawyer's error's the outcome would of been differ

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

(a) any petition in a State Court under South Carolina Law? NO

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO

(d) any other petitions, motions or applications in this or any other Court? NO

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

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

I was charged with separate³ offenses which was all one crime and my lawyer never ask me anything about the case like, where I have been at the time of the crime and who could back that up. Neither on the date of the trial. He left me to be a witness to myself.

Ineffective Assistant Counsel

- * I got convicted of a charge I never had a warrant for and my lawyer, the month before we went to the trial date said "He didn't know or see when in my Rule 5 it states when I was arrested I had 3 active warrants which were Armed Robbery, commission of a Firearm during a violent crime, and Grand larceny."
- * I got promised a 10 year sentence by him * He never asked me about any alibi's or witnesses.
- * I made a request for a preliminary hearing and never got one (A waiver of my rights)
- * I file for a motion of reconsideration and they filed the paperwork wrong for an appeal
- * Failed to investigate and retain expert on DNA Evidence
- * He violated ~~Rule 5b~~ + ~~6th~~ Amendment
- * He didn't tell me what an open plea was he just said when I go up there the Judge will give you "Ten years" when in all actuality I didn't want to plea guilty
- * He told me if I didn't take the open plea that Judge Mullens would of been the Judge on my case and she would of made sure I got 30 years because that was her area that got robbed.
- * I sat 7 months before he came to see me
- * I never got my Sentencing sheet
- * He told me he showed the picture of the suspect in the robbery to people on the streets and he asked his ("homeboys") if they were me would they take "10 years" and they said yes to try to convince me to take the "10 years"
- * Never sent the paperwork for the first plea they offered from the first solicitor
- * Never got all my indictments in my Rule 5

5th Amendment

- * He violated the 5th Amendment because he tried to influence or encourage a guilty plea by opportunity or promise of leniency. A guilty plea must be voluntary "not" with the counsel saying if you go to trial you are going to get "30 years". It must not be extracted by any sort of threats or violence nor obtained by any direct or implied "promises", however slight, nor by the exertion of any improper influence". He did that by telling me to take a 10 year plea and making me go for an open plea by telling me if I go to trial Judge Mullens would make sure I get thirty years because she stays in the area where the crime was committed. He also violated it because he bring me to trial to ~~be~~ witness against myself.

6th Amendment

- * He violated the 6th Amendment because "Never had my witnesses" come to court on my behalf. Neither did he even ask me about my alibi or where I was during this crime and I had one. He deprived me of those rights and wasn't assisting me in my defense. His statements was he didn't want to go to trial.

14th Amendment

- * He violated ~~Rule 14th~~ Amendment because my lawyer didn't defend me to the best way possible and didn't work for my innocent. So he denied me my civil rights because he didn't follow the due process. He was ineffective Assistant Counsel.
- * I didn't get my appeal because he did the paperwork wrong. * I got charged for something I didn't even have a warrant for neither did he know of. My civil rights were denied because he didn't follow the right due process in this case if he did the outcome would of been different.
- * He didn't follow the right due process in this case if he did the outcome would of been different.
- * He didn't follow the right due process in this case if he did the outcome would of been different.

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

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

- i. _____
- ii. _____
- iii. _____
- iv. _____

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

NO

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

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

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

- i. _____
- ii. _____
- iii. _____

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

(Ineffective Assistant Counsel) (a) I didn't know anything until after sentencing.
 (Violation of 6th Amendment) (b) My lawyer stated he would handle everything.
 (Violation of 6th Amendment) (c) I'm stating them now in PCR Procedure.

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

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

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

- (a) the name and address of each attorney who represented you:

i. Donald Colongeli, 112-A Arrow Rd. Hilton Head Island, SC 29928

ii. _____

 iii. _____

- (b) the proceedings at which each such attorney represented you:

i. _____

 ii. _____

 iii. _____

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

Reduced or Vacate Sentence

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

NO

STATE OF SOUTH CAROLINA)

County of Beaufort)

VERIFICATION

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

Rion Beatty

SWORN to and subscribed before me this 18
day of June, 2014.

Charles B. White (U.S.)
Notary Public

My Commission Expires:

5/1/2018

Revised 3/2003

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

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

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

Rion Beaty

Applicant

SWORN or affirmed to and subscribed before me this

18 day of June, 2014.

A. C. B. B. B.
Notary Public

My Commission Expires: 5/1/2015

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. The Applicant was indicted at the October 2012 term of the Beaufort County Grand Jury for kidnapping (2012-GS-07-2107) armed robbery (2012-GS-07-1999), and possession of a weapon during the commission of a violent crime (2012-GS-07-2000). Donald Colongeli, Esquire, represented the Applicant. On April 22, 2013, the Applicant pled guilty as indicted before the Honorable J. Ernest Kindard, Jr.. Judge Kinard sentenced the Applicant, pursuant to negotiations, to terms of confinement for fifteen (15) years for kidnapping, fifteen (15) years for armed robbery, and five (5) years for possession of a weapon during the commission of a violent crime. These were to run concurrently.

The Applicant filed a notice of appeal on May 2, 2013; however, this was untimely as the court did not receive the notice until the following day, after the allotted time to file had passed. By Order dated July 8, 2013, the South Carolina Court of Appeals dismissed the appeal.

2013-CP-07-1651

The Applicant filed an application for Post-Conviction Relief on June 25, 2013, while his appeal was still pending. In light of this, the State filed a Return and Motion to Dismiss. By Order dated August 28, 2013, the Honorable Carmen T. Mullen dismissed with application without prejudice.

Attached herewith and incorporated herein are the records of the Beaufort County Clerk of Court regarding the subject conviction(s), the application, and the plea transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. "Ineffective Assistance of Counsel"
 - a. "[Counsel] filed my motion of reconsideration wrong"
 - b. "Got convicted of a charge I never had a warrant for"
 - c. "Promised me 10 years"
 - d. "Never told me my rights to appeal"
 - e. "Promised me a 10 year sentence and to go for an open plea"
 - f. "If it wasn't for my lawyer's errors the outcome would of [sic] been different"
2. "Violation of 5th Amendments"
 - a. "I was charged with separate offenses which was all one crime and my lawyer never ask me anything about the case like where I have been at the time of the crime and who could back that up."

Neither on the date of the trial. He left me to be a witness to myself"

3. "Violation of 6th, 14th Amendments"

- a. Never asked about witnesses or alibi in my favor. He just said we [are] going to trial. He never even called anyone to try and see if I had witnesses"

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at evidentiary hearing. All amendments should be made well in advance of hearing and should be filed as required by Rule 11, SCRCP(a).

III.

The Applicant's first and third claims are allegations of ineffective assistance of plea counsel. The Respondent submits plea counsel rendered effective assistance of counsel. In a Post-Conviction Relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, 334 S.E.2d 813.

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

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was

deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

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

IV.

The Respondent interprets the Applicant's second claim is an allegation of due process violations. The Applicant's allegations claim infringement of his rights under certain amendments to the United States Constitution. However, the Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that the Applicant must "... specifically set forth the grounds upon which the application is based." S.C. Code § 17-27-50 (2003). In an application for post-conviction relief, it is incumbent upon the Applicant to make at least a *prima facie* showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385,

140 S.E.2d 784 (1965). Since the Applicant has failed to make even a *prima facie* showing, the Respondent would submit that this allegation should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. This allegation is so vague that it is impossible for the State to respond.

V.

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

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

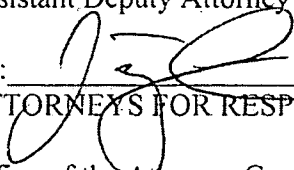
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Assistant Deputy Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

August 28, 2015.

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

RION BEATY, #337153

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

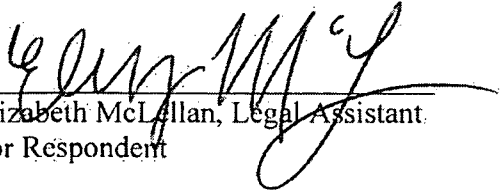
2014-CP-07-1495

AFFIDAVIT OF SERVICE BY MAIL

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

James K. Falk, Esq.
 Falk Law Firm, LLC
 PO Box 1058
 Charleston, SC 29402

DATED this 28th day of August, 2015.


 Elizabeth McLellan, Legal Assistant
 For Respondent

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In the Court of Common Pleas for the
State of South Carolina, County of Beaufort

Case No.: 2014-CP-07-1495

Rion Beaty,

Plaintiff(s),

vs.

Transcript of Record

State of South Carolina,

Defendant(s).

October 20, 2015

Beaufort, South Carolina

BEFORE:

The Honorable Roger L. Couch

APPEARANCES

1

2

PLAINTIFF'S ATTORNEY:

3

James K. Falk, Esquire

4

Falk Law Firm

5

PO Box 1058

6

Charleston, SC 29402

7

843-606-6007

8

jfalklaw@gmail.com

9

10

DEFENDANT'S ATTORNEY:

11

J. Rutledge Johnson, Esquire

12

Office of The Attorney General

13

PO Box 11549

14

Columbia, SC 29211

15

803-734-1867

16

rjohnson@scag.gov

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1 PROCEEDINGS

2 MR. JOHNSON: May it please the Court, Your
3 Honor. This is Rion Beaty versus State of South
4 Carolina. It is Case number 2014CO071495.
5 Mr. Beaty was indicted at the October 2012 term of
6 the Beaufort County Grand Jury for kidnapping, armed
7 robbery, and possession of a weapon during
8 commission of a violent crime. On April 22nd, 2013
9 he plead guilty as indicted before the Honorable
10 Judge J. Kinard, Junior and Judge Kinard sentenced
11 him pursuant to negotiations, confinement to 15
12 years for kidnapping, 15 years for armed robbery,
13 and 5 years for possession of weapon during
14 commission of a violent crime, all run concurrently.
15 He filed a notice of appeal, however this was
16 untimely as the Court did not receive notice until
17 the following day after the allotted time had
18 passed.

19 On July 8th, 2013 the Court of Appeals
20 dismissed the appeal. He filed a 2013 PCR;
21 however, that was still -- the appeal was still
22 pending and Judge Mullen dismissed the application
23 without prejudice. He then filed this incident
24 action June 23rd, 2014. The State filed its
25 return on August 28, 2015. And he's represented

COLLOQUY

1 here today by Mr. Jim Falk. But I understand -- I
2 just was told that he has additional witnesses
3 other than counsel that are going to come testify
4 on his behalf and I would ask to sequester those
5 witnesses during any and all other testimony.

6 THE COURT: Any objection to the witnesses
7 being sequestered?

8 MR. FALK: No, Your Honor.

9 THE COURT: All of those who are present who
10 will be serving as witnesses in the Beaty case, I'll
11 ask you to step outside the courtroom, wait outside.
12 During that time please do not discuss your
13 testimony with each other or with anyone else. If
14 you are going to testify in the Beaty case step
15 outside of the courtroom.

16 MR. JOHNSON: Your Honor, since these
17 allegations are against Mr. Colongeli, I would ask
18 that he stay in the courtroom.

19 THE COURT: All right. Any objection to that,
20 counselor?

21 MR. FALK: No, Your Honor.

22 THE COURT: All right. We will allow him to
23 stay.

24 THE COURT: All right. Mr. Falk, your client
25 is proceeding in this matter; is that correct?

COLLOQUY

1 MR. FALK: Yes, Your Honor.

2 THE COURT: What grounds is he pursuing today?

3 MR. FALK: He's pursuing that he had asked for
4 an appeal. Asked for counsel to file an appeal of
5 his plea.

6 THE COURT: All right.

7 MR. FALK: He has evidence that he communicated
8 to them and that was filed outside of the time, so
9 there was no plea. And he's asserting that this was
10 an involuntary plea, it was not made -- it was made
11 under pressure that he was receiving from his
12 counsel. And he believes that his counsel was not
13 prepared to go to trial that day, therefore, he felt
14 pressured that he had to take the plea, otherwise he
15 would be going to trial with an unprepared counsel.

16 THE COURT: I heard, I believe, and I just
17 wanted to make sure I heard it correctly. It said
18 that it was a plea pursuant to negotiations; was it
19 a negotiated sentence that was presented to the plea
20 judge?

21 MR. JOHNSON: That may be in error, Your Honor.
22 That may be in error that I spoke too soon on that
23 one.

24 THE COURT: So it was a straight-up plea?

25 MR. JOHNSON: I believe so.

COLLOQUY

1 MR. FALK: Your Honor, that is one of the
2 issues.

3 THE COURT: I see. All right. You may
4 proceed.

5 MR. FALK: I'm going to go a little bit out of
6 order, just because his mother wants to be here for
7 that, and that was his mother and stepfather, so I
8 am going to bring them in first.

9 THE COURT: All right. You may call her, if
10 you would like.

11 Thereupon,

12 CAROL ANN MITCHELL

13 was called as a witness, having been first duly sworn,
14 was examined and testified as follows:

15 THE COURT: Ma'am, if you will pull that
16 microphone down. Correct.

17 DIRECT EXAMINATION

18 BY MR. FALK:

19 Q Ms. Mitchell, could you explain to the Court
20 how you are related to my client?

21 A Rion Beaty is my son.

22 Q Okay, thank you. And you were obviously aware
23 that he was facing criminal charges; is that correct?

24 A Yes.

25 Q Did you have any contact with his attorney?

TESTIMONY OF CAROL ANN MITCHELL

1 A I had -- before the -- before he was going to
2 go to court that day, I tried to contact --

3 Q Let me back you up just a little bit. What
4 was your first -- when did you first try and contact his
5 attorney?

6 A Like several weeks before the court date.

7 Q Okay. And what was the result of those
8 conversations?

9 A The result was every time I called Mr. Col -- I
10 can't pronounce his name. Anyway, every time I tried to
11 call him, I called and left several messages, and several
12 times that I called, sometimes I got his wife. There
13 were a lot of times, probably over 20 or 30 times I got
14 the voice mail. So I would leave messages and it was
15 very hard to get in contact with him. There were several
16 times that I did speak to his wife who told me that she
17 would give the message to him. And I think that I may
18 have spoken to him maybe two times and he let me know
19 that he was representing my son and then that he would
20 get in contact with me if he needed to.

21 Q Thank you. Now, then you were beginning to
22 talk about seeing him the day of the trial?

23 A Yes.

24 Q Can you tell me about that conversation?

25 A Well, at the day of the trial, because I

TESTIMONY OF CAROL ANN MITCHELL

1 didn't -- I never met with Mr. Colongeli so I didn't know
2 what he looked like or who he was and so I never saw him
3 until the date of the court. And then I guess by my son
4 pointing us out to him, that is how he knew who I was.
5 And the day of the court he told us that -- he had us out
6 in the lobby, me and the other family members, and the
7 day of the court he told us that my son will probably be
8 facing or getting ten years.

9 Q So, did you have an understanding that he had
10 negotiated a deal with -- on this case?

11 A Of ten years.

12 Q And when did he -- what did he ask you to do
13 with that information? Did he want you to convey any
14 message to my client?

15 A Yes, he did, to tell him to take the plea.
16 However, we were never able to speak with him.

17 Q Meaning my client?

18 A Rion.

19 Q Your son?

20 A Yes.

21 Q But however, based on that conversation, you
22 believed that y'all were talking about a ten-year deal
23 that day; is that correct?

24 A Absolutely, yes.

25 MR. FALK: Okay. No further questions.

TESTIMONY OF CAROL ANN MITCHELL

1 MR. JOHNSON: No questions for this witness,
2 Your Honor.

3 THE COURT: Thank you, ma'am. You may step
4 down.

5 MR. FALK: My next witness will be Lee
6 Mitchell.

7 THE COURT: Okay. You may call him.

8 Thereupon,

9 LEE MITCHELL

10 was called as a witness, having been first duly sworn,
11 was examined and testified as follows:

12 DIRECT EXAMINATION

13 THE COURT: All right. Your witness,
14 counselor.

15 BY MR. FALK:

16 Q Mr. Mitchell, can you explain to the Court
17 your relationship to my client?

18 A He is my stepson.

19 Q Thank you. So, you are married to Carol Ann
20 Mitchell?

21 A Yes.

22 Q You are obviously aware of his criminal trial.
23 Were you in court the day that he was sentenced?

24 A Yes, I was.

25 Q Did you have any conversations with his lawyer

TESTIMONY OF LEE MITCHELL

1 that day, or were you -- did you speak with him or . . .

2 A Yes, he came to us, we was in a group outside
3 in the lobby. He came up to us and said that he was
4 going to get ten years, shooting for ten years for him.

5 Q So, it was your understanding that day that
6 your stepson was walking in for a 10-year deal?

7 A Yes.

8 Q Did he want you to make any recommendations
9 about that?

10 A That is what he said, ten years.

11 MR. FALK: No further questions.

12 CROSS EXAMINATION

13 BY MR. JOHNSON:

14 Q Just to clarify Mr. Mitchell. You just said
15 that the attorney said that he would shoot for ten
16 years.

17 A Well, you know.

18 Q Try to get him ten years?

19 A Try to get him ten years.

20 MR. JOHNSON: All right. Thank you, sir.

21 THE COURT: Anything further counselor,
22 redirect?

23 REDIRECT EXAMINATION

24 BY MR. FALK:

25 Q You thought that he was getting a ten-year

TESTIMONY OF LEE MITCHELL

1 deal that day; is that correct?

2 A Yes.

3 Q Based on your conversations with the lawyer?

4 A That's right.

5 THE COURT: No further questions.

6 THE COURT: You may step down, sir. You may
7 call your next witness.

8 MR. FALK: I call Rion Beaty to the stand.

9 THE COURT: Come forward, sir, to be sworn.

10 Thereupon,

11 RION BEATY

12 was called as a witness, having been first duly sworn,
13 was examined and testified as follows:

14 THE COURT: All right. Counselor, your
15 witness.

16 DIRECT EXAMINATION

17 BY MR. FALK:

18 Q Mr. Beaty, when you were sentenced on, what
19 was the date here, April 22nd, 2013, after your
20 sentencing did you ask your lawyer to file a motion to
21 reconsider?

22 A Yes, sir.

23 Q And what was -- what was that discussion
24 about?

25 A I kept talking to his wife, which is the

TESTIMONY OF RION BEATY

1 secretary. She told me that she put --

2 MR. JOHNSON: Objection, Your Honor, that is
3 hearsay.

4 THE COURT: I'll sustain the objection as to
5 what his wife might have said.

6 THE WITNESS: That is his secretary.

7 BY MR. FALK:

8 Q Did you have conversation with her?

9 A Yes, all week.

10 Q Did you have conversations with him?

11 A No, I had a conversation with his secretary.

12 She said that she filed --

13 THE COURT: Mr. Beaty, you are not allowed to
14 quote what other people said to you, that is
15 hearsay. There's a rule against that. And I have
16 ruled that you cannot quote what she said. You may
17 proceed counselor.

18 BY MR. FALK:

19 Q Did you leave a message with his secretary,
20 his wife?

21 A No, I talked to her.

22 Q Okay. So, did you want -- was that the only
23 way that you had to contact your lawyer?

24 A I called his office.

25 Q And she answered the phone?

TESTIMONY OF RION BEATY

1 A Yes.

2 Q And when she picked up the phone, do you think
3 that she knew that you wanted to talk to your lawyer?

4 A Yes, I told her to put in the paperwork for a
5 motion for reconsideration.

6 Q Okay.

7 A Which I called him again and she told me --

8 MR. JOHNSON: Objection.

9 A My bad, I'm sorry.

10 THE COURT: Sustain the objection.

11 Q So, you called another time?

12 A Yes, and --

13 Q Without telling what she said, because it
14 doesn't really matter what she said.

15 A I was told that the paperwork was filed for a
16 motion for reconsideration.

17 Q Thank you. And what was the basis for the
18 motion for reconsideration?

19 A You said, what was the basis?

20 Q Yes, why did you think that you were entitled
21 to a motion for reconsideration?

22 A Because the work that my lawyer did.

23 Q Okay. Was there also discussion about filing
24 an appeal?

25 A I don't know. She told me that --

TESTIMONY OF RION BEATY

1 Q Again.

2 A My bad, I'm sorry.

3 Q Were you ever able to talk to your lawyer on
4 these telephone conversations?

5 A I never got to talk to him.

6 Q So, your only way of talking to him or
7 communicating with him was through the secretary?

8 A Yes, sir.

9 Q You wanted -- and you were not -- at sometime
10 did you tell her hopefully who would then relay the
11 message that you wanted a motion for reconsideration and
12 to file an appeal in this case?

13 A Uh-huh. (Indicating affirmatively.)

14 Q Okay. And after you made those conversations
15 with her, did you think that that message was going to
16 get passed along to him?

17 A Yes, that is the secretary.

18 Q Yes, you told the secretary and the reason --
19 why did you tell the secretary that? Was it your
20 expectation that she was going to tell him?

21 A They wouldn't let me get -- they wouldn't let
22 me talk to him.

23 Q Okay.

24 A They wouldn't let me talk to him at all.

25 Q Thank you.

TESTIMONY OF RION BEATY

1 A He didn't want to talk to me.

2 MR. JOHNSON: Objection, that is speculation.

3 THE COURT: Overruled.

4 BY MR. FALK:

5 Q Now, on the 22nd, were y'all ready to go to
6 trial that day? When you woke up on the 22nd, did you
7 think that you were going to trial that day?

8 A The night before, he came and saw me. He came
9 and pulled me out of my cell. It was nighttime. The day
10 before the trial. It was a Sunday. I went to trial that
11 Monday. He kept asking me would I take -- if he could
12 get me ten years, would I take it. And I was like, I
13 don't know, you know what I am saying, so the next day in
14 court he started talking to my family I guess to try to
15 persuade them to get me to take some time. So, when they
16 came, he was like, the ten is still up on the table, do
17 you want to take it? And I was like, run it, you know
18 what I am saying. That is what I mean, and he knew what
19 I was talking about when I said it. And he was like,
20 okay. And then he came back. And he said the Judge
21 wanted -- he's got to hear the case first.

22 So, when we came back, they had a break,
23 and we came back at two or three o'clock and he was
24 like, the best thing for us to do is to go for an open
25 plea. And I turned back and I looked at my family and

TESTIMONY OF RION BEATY

1 I said, See, he lied, he said I was getting ten years.
2 And he started signing the paper and he said, This is
3 the best way buddy. But I am out of it, you know what
4 I am saying, everything that he's saying I'm just
5 listening to what he's going for. So he is like, okay
6 he just wants to hear the case. And that is what
7 happened. When he heard the case, I got 15 years. He
8 kept talking to my family and talking to me, like
9 trying to persuade me to take the ten years and I told
10 him, Yeah. But I didn't get ten years or whatever he
11 said he was going to do for me.

12 Q So, when you took the plea --

13 A I didn't take a plea. They gave me the time.

14 Q Excuse me. On the day that you were
15 sentenced, the Judge asked you some questions about your
16 lawyer?

17 A Yes, they asked me about my lawyer, but at the
18 same time I told you, sir, I was out of it.

19 Q What do you mean "out of it"?

20 A I was so hysterical about the time.

21 Q Okay. But you thought that morning that you
22 were going to trial that day?

23 A Yes, they dressed me out.

24 Q Okay. They put you in street clothes?

25 A Yes, I was dressed up suit and tie. My thing

TESTIMONY OF RION BEATY

1 is, sir, that he didn't -- the whole time that I was in
2 the County I didn't see him. I went to court within
3 seven months and I didn't see him until the sixth month.
4 And when I went in front of the court he didn't notice
5 that I did a kidnapping charge. When I came and I got
6 arrested I had three outstanding warrants.

7 MR. JOHNSON: Objection, Your Honor, that is
8 not in response to a question. I move to strike.

9 THE COURT: Sustain the objection. Ask a
10 question.

11 MR. FALK: Let me go back.

12 Q How much communication did you have with your
13 lawyer?

14 A I said, not much because he didn't know that I
15 even had a kidnapping on my record six months prior to me
16 being in the County.

17 Q Okay. So, how many times do you estimate that
18 he came and saw you in the jail?

19 A The one time he came, he came because he had
20 other people in the dorm that he had to see and he knew
21 that he couldn't see them without seeing me, because I
22 was calling him like that. When I came to see him he
23 didn't really talk to me about the case. He came another
24 time, which was the Sunday before trial to talk about my
25 case.

TESTIMONY OF RION BEATY

1 Q Did he ever go over the discovery with you?

2 A I mean, a little bit. I mean, he didn't really
3 say much. It was like he just threw me out there.
4 Because, like I told you, I had three outstanding
5 warrants when I got locked up, which was armed robbery,
6 commission of a firearm during a violent crime, and grand
7 larceny. I never had no kidnapping on my record. Six
8 months to me going to court they called me for trial the
9 next month saying that I had a kidnapping. And so I'm
10 looking at him crazy and he's like, I don't know what is
11 going on. And all of a sudden he should have seen that I
12 had a kidnapping, how is that? The whole time that I was
13 in the County, and the jail log and everything, I never
14 had a kidnapping on my record. They never served me a
15 warrant for it, period.

16 Q Do you recall on the day that you took your
17 plea that you actually were arraigned on the kidnapping
18 charge on that same day, when you were sentenced?

19 A I didn't understand the situation about the
20 kidnapping, because the whole time, like I told you, I
21 only had three charges, which did not include kidnapping.

22 Q So, did you ever have an opportunity to
23 present any defenses regarding kidnapping?

24 A No, sir.

25 Q Okay. And again, relative to the 22nd, which

TESTIMONY OF RION BEATY

1 was the day that you were sentenced, how many
2 conversations did you have with your lawyer about the
3 kidnapping charge?

4 A You saying after I got sentenced?

5 Q No, before the day that you were sentenced?

6 A Before he came to see me. I went to court
7 on -- I went to court within seven months. The sixth
8 month they called me to a court session to say that I was
9 going to trial the next month. And that is when they
10 said something about they read out my charge and they
11 said something about kidnapping. He didn't even know
12 that they had a kidnapping on -- that, whatever that was
13 on my record.

14 MR. JOHNSON: Your Honor, at this point I'm
15 going to ask, what kidnapping is he speaking of, the
16 one that you plead guilty to or is there a separate
17 kidnapping? If there's a second kidnapping, it is
18 irrelevant to this hearing.

19 THE WITNESS: No, no, the kidnapping that is on
20 my record right now.

21 MR. JOHNSON: The one from South Beach General
22 Store?

23 THE WITNESS: Yes.

24 MR. JOHNSON: Okay.

25

TESTIMONY OF RION BEATY

1 BY MR. FALK:

2 Q Did you ever communicate with him, or did he
3 ever ask you about whether or not you had any alibi
4 witnesses?

5 A He asked me that, but he didn't -- he didn't
6 talk to them.

7 Q Did he ever show you any of the evidence that
8 the State had?

9 A Yeah, he showed it to me.

10 Q All right. What did he show you?

11 A He showed me evidence of -- he showed me the
12 statement, the statement -- I had gotten my motion of
13 discovery. He sent me that.

14 Q Did he show you the tapes?

15 A I didn't actually see the tapes.

16 Q Okay.

17 A I was showed pictures of it.

18 Q Okay. So, if you thought that you were going
19 to trial that day, why did you enter a plea? I mean,
20 excuse me, if you thought that you were going to trial
21 that day, why did you go before the Judge for
22 sentencing?

23 A He said that was the best way, that he couldn't
24 beat the case. How am I supposed to go to trial with a
25 lawyer that is telling me he can't beat the case and he

TESTIMONY OF RION BEATY

1 didn't want to go to trial because he didn't want --
2 whatever his situation was.

3 Q He explained to you that he --

4 A He didn't want to go to trial. So he said that
5 was the best way.

6 Q Did he ever talk to you about the possible
7 defenses that you would have?

8 A Yes.

9 Q What were those?

10 A I guess the tapes and stuff like that. I
11 guess, witnesses.

12 Q Okay. But he never, again, you didn't see the
13 videotapes?

14 A Of? No, I didn't see no videotapes. I just
15 seen photos of the videotape.

16 Q Okay. So, you said -- there's a --

17 MR. FALK: May I approach the witness?

18 THE COURT: You may.

19 Q Can you -- have you ever seen that document
20 before?

21 A Yes, I have seen it.

22 Q Can you explain -- what can you tell me about
23 it?

24 A That was after -- when he was talking to me and
25 I was hysterical about the time, me getting 15 years.

TESTIMONY OF RION BEATY

1 And he kept talking to me writing and then he passed me
2 the pen. And so I started writing while he was talking
3 to me. And he was like, Do you understand that. I was
4 like, Yeah, but at the same time he was talking to me and
5 I was like, What happened to the ten? He was like, Well,
6 this is the best way, just do it like this, such and
7 such, so I'm following what he's saying.

8 Q How did you know the answers to the questions?

9 A Because I read it.

10 Q And you knew the time that you were -- the
11 first question asked how many years you were facing, and
12 you knew that?

13 A Yes, he told me that.

14 Q He told you, okay. And that has your
15 signature on the back?

16 A Uh-huh. (Indicating affirmatively.)

17 Q Now, about the third question --

18 THE COURT: Is that a yes?

19 THE WITNESS: Yes, sir.

20 THE COURT: Thank you.

21 BY MR. FALK:

22 Q About the third question down it says, Have
23 there been any negotiations? I'll show you. See.
24 Excuse me. That third question, can you read that?

25 A "The State agreed to recommend a sentence to

TESTIMONY OF RION BEATY

1 the Judge."

2 Q And what was your answer?

3 A I put, No, but at the same time, like I tell
4 you, he was talking to me at the same time that I was
5 doing the paper, and I was talking to him.

6 Q And you were just doing --

7 A Yes, if I would have seen that, I would have
8 wrote that, wrote what he told me, but the ten years --
9 he knew.

10 Q Okay.

11 MR. FALK: Your Honor, the document that he's
12 looking at I believe is already a part of the
13 record.

14 THE COURT: I believe that it is a pre-plea
15 rights advisory. I read that Judge Kinard had asked
16 him whether he had read it, signed it, and whether
17 the answers were correct. And he indicated he had
18 read it, signed it, and the answers were correct.

19 MR. FALK: I'm just saying why I'm not
20 introducing it into evidence.

21 THE COURT: Okay. But I think that that's the
22 document that you handed him.

23 MR. FALK: Yes, Your Honor.

24 THE COURT: Okay. I understand what it is.

25

TESTIMONY OF RION BEATY

1 BY MR. FALK:

2 Q You were asked whether or not you were
3 satisfied with your attorney, and what was your answer
4 at the plea? I mean, when you were sentenced?

5 A I said, Yeah.

6 Q But what would your answer be now?

7 A Being that I -- no, not at all.

8 Q Why is that?

9 A Because when you first -- when you first come
10 down, you are not really knowing anything about the law.
11 When you are blind about the law and when you really see
12 what is going on and you can bring that up, right? That
13 is what happened.

14 Q Uh-huh. Is there anything other than his
15 representations to you about how much time you were
16 going to get, what else were you dissatisfied about?
17 How many . . .

18 A I was dissatisfied about my charges, like I
19 told you. I didn't even know that I had a kidnapping on
20 my record. I had three outstanding warrants, which tells
21 you that in my motion to discovery. And I was wondering
22 how this charge got swapped out. That was all I was
23 wondering.

24 Q Did he explain to you the results of any
25 investigation that he had done on your case?

TESTIMONY OF RION BEATY

1 A No. He was telling me about he got his
2 private -- I mean, he was supposed to get something done
3 for the bandana. I'm not sure. He said that there was a
4 bandana that he said he was supposed to get sent to his
5 own lab. I'm not sure if that was done.

6 Q Do you think that he was talking about DNA
7 testing?

8 A Yes.

9 Q Again, I'm asking you this question because I
10 know that Mr. Johnson is going to ask you the same
11 question. Why is your testimony today different than it
12 was on the 22nd?

13 A I mean, it is not that much different. What I
14 came here for was why he didn't -- did my paperwork right
15 for my motion for reconsideration and how did my charges
16 get swapped out.

17 Q Okay. And so, you were --

18 A And I was never served a warrant for -- I mean,
19 he didn't even know that when we went to the court. So,
20 how was he ready to take me to trial?

21 Q After your conversations with his secretary,
22 did you believe that some type of appeal was in the
23 works?

24 A She told me that she did the paperwork.

25 Q Without her saying that.

TESTIMONY OF RION BEATY

1 A I was told that the paperwork was done fine.

2 Q So you thought -- you had conversations and
3 after those conversations you felt that it was in the
4 works?

5 A Yes, the jail log. They have a jail log that
6 has the time. It'll tell you the call was placed.

7 Q That applies to the motion to reconsider and
8 the appeal?

9 A Uh-huh. (Indicating affirmatively.) I was
10 told that the paperwork was done.

11 MR. FALK: No further questions. Answer
12 Mr. Johnson's questions.

13 THE COURT: You may cross-examine.

14 MR. JOHNSON: May it please the Court, Your
15 Honor.

16 THE COURT: Yes, sir.

17 CROSS EXAMINATION

18 BY MR. JOHNSON:

19 Q Mr. Beaty, You stated that there were jail
20 logs that prove that you contacted counsel in this case?

21 A Yes, sir.

22 Q Do you have those here today to prove that?

23 A I don't have it, y'all have it.

24 Q You also say that you plead guilty because you
25 were blind to the law in this case, right?

TESTIMONY OF RION BEATY

1 A Yes.

2 Q This isn't your first rodeo in the criminal
3 justice system, is it?

4 A No, it's not.

5 Q You also say that your answer would have been
6 different today had you known certain things, correct?

7 A Yes.

8 Q So, when the Judge asked you at the plea that,
9 had you gone over a plea affidavit and answered all
10 things truthfully, that wasn't the truth was it?

11 A No.

12 Q So you lied under oath at your guilty plea?

13 A No, I didn't lie. Actually I was going on the
14 word of my lawyer because I am thinking that he was going
15 to do the best possible thing for me.

16 Q If it's not the truth, it is a lie?

17 A Yes, but I didn't lie.

18 Q But you want us to believe you here today?

19 A Listen I told you --

20 Q You want this Court to believe you here today?

21 A Yes, I'm not lying to you.

22 Q You are aware that if you are successful here
23 today, you go back and face 65 years in prison?

24 A Yeah.

25 Q And that there are two eye witnesses that

TESTIMONY OF RION BEATY

1 identify you. That the victim in this case knew you.

2 A But how do they know their words were that
3 credible?

4 Q Sir, you held someone at gun point at the back
5 of a store and got stuff out of the safe?

6 A That is what y'all saying I did.

7 Q That is what you agreed to at the guilty plea;
8 is it not? When the Solicitor read the facts, that is
9 what you agreed to, correct?

10 A Correct.

11 Q These alibi witnesses that you speak of, are
12 they here to testify on your behalf?

13 A No.

14 Q And during the plea, now you are stating that
15 you would have signed this completely differently,
16 correct?

17 A Uh-huh. (Indicating affirmatively.)

18 Q Is that a yes?

19 A You said what?

20 Q You would have signed it differently if you
21 could do it all over again, correct?

22 A. Would I sign it differently?

23 Q Yes.

24 A When he was talking to me right there, we was
25 in a situation just like that, or a setting, he was

TESTIMONY OF RION BEATY

1 signing the paper at first and then he gave it to me and
2 he was talking to me at the same time. I'm hysterical
3 about the time that I'm getting. I'm not really paying
4 attention to this paperwork.

5 Q So you are saying that you were hysterical?

6 A Yes.

7 Q Did you ever tell the plea Judge that? Did
8 you ever say, Stop, I don't know what's going on, I am
9 bugging out right now?

10 A No, I didn't say that.

11 Q Even though you were facing jail time?

12 A Yes.

13 Q You actually apologized for your actions in
14 this case, did you not?

15 A Yeah. I apologized for what had happened.

16 A You say, I know what I did was very wrong and I
17 I want to apologize. I really been going through a lot
18 these times and just want to apologize for what I did. I
19 made a mistake and it's costing me. Those are your
20 words, correct?

21 A Yes, sir.

22 MR. JOHNSON: No further questions, Your Honor.

23 THE COURT: Recross? I mean, redirect, I'm
24 sorry. I'll get it right in a minute.

25 MR. FALK: Yes, Your Honor.

TESTIMONY OF RION BEATY

1 REDIRECT EXAMINATION

2 BY MR. FALK:

3 Q Mr. Johnson asked you why you didn't put the
4 brakes on the whole process that day; did you know that
5 that was possible?

6 A I mean, not like that, no, I didn't. No.

7 MR. FALK: No further questions.

8 RE-CROSS EXAMINATION

9 BY MR. JOHNSON:

10 Q Just to reiterate. This isn't your first
11 rodeo in the criminal justice system, is it?

12 A This is the first time that I went this far.

13 Q You had --

14 A And a lot of charges that y'all have on my
15 record I never was convicted for. It ain't my first --
16 it ain't my first rodeo, but this is the first time that
17 I went this far.

18 MR. JOHNSON: No further questions.

19 MR. FALK: Nothing further.

20 THE COURT: The form that you are talking
21 about, gentlemen, I assume that it is a form that is
22 filled out before the plea?

23 MR. JOHNSON: I would assume so, Your Honor.

24 THE COURT: Now, is it done in his handwriting,
25 or should I ask that question? I would like to know

TESTIMONY OF RION BEATY

1 whether he filled out the answers or whether the
2 answers were filled out by someone else.

3 MR. FALK: I believe that his answer was that
4 his lawyer started filling it out and then he handed
5 it to him.

6 THE COURT: Okay. I would like to know where
7 that switch-over took place? Do you have a copy of
8 the form?

9 MR. JOHNSON: Yes, sir, I was going to cover
10 that with counsel, but I can ask him if you would
11 like me to.

12 THE COURT: I would like for you to. I would
13 like to know about that form and who filled it out.

14 BY MR. JOHNSON:

15 Q Sir, what part is your handwriting and what
16 part is counsel's handwriting?

17 A I guess at the top. He was signing it first
18 and then he handed it to me. As he was talking to me, he
19 handed it to me asking me the questions, and I am like,
20 yeah, yeah, no, do you know what I am saying. But it's
21 not like I'm really understanding what is going on. I am
22 just here -- I am just asking him like -- the whole time
23 I'm asking him, why didn't I get the ten years.

24 MR. FALK: Did he tell you what to fill in the
25 blanks?

TESTIMONY OF RION BEATY

1 THE WITNESS: You say did he tell me?

2 MR. FALK: Yeah.

3 THE WITNESS: He was like -- he can explain
4 what he did.

5 MR. JOHNSON: May I approach the witness, Your
6 Honor?

7 THE COURT: Please.

8 BY MR. JOHNSON:

9 Q Mr. Beaty, just to clarify, this is his
10 handwriting and this is your handwriting?

11 A Uh-huh. (Indicating affirmatively.)

12 Q Okay.

13 MR. JOHNSON: Your Honor, let the record
14 reflect that the top of it is Mr. Colongeli's
15 handwriting.

16 THE COURT: When you say the top of it, that is
17 the name of the case, the parties involved, the
18 charges involved and the -- I guess down through it
19 says the charges I guess is where he finished?

20 MR. JOHNSON: Yes, sir. And then the numbered
21 questions --

22 THE COURT: The numbered paragraphs, which are
23 the questions

24 MR. JOHNSON: Would be Mr. Beaty's handwriting.

25 THE COURT: He indicated that he filled those

TESTIMONY OF RION BEATY

1 out?

2 MR. JOHNSON: Yes, sir.

3 THE COURT: All right. That answered my
4 question. You may step down, sir.

5 THE COURT: That is a part of the record. I
6 don't need to make it part of the record, correct?

7 MR. JOHNSON: Yes, Your Honor, it is part of
8 the packet.

9 THE COURT: Thank you. Applicant call your
10 next witness.

11 MR. FALK: We would call Mr. Colongeli to the
12 stand.

13 THE COURT: Come forward and be sworn, please.

14 WITNESS: Yes, Your Honor.

15 Thereupon,

16 DONALD C. COLONGELI

17 was called as a witness, having been first duly sworn,
18 was examined and testified as follows:

19 THE COURT: Sir. If you will have a seat
20 please.

21 WITNESS: Yes, sir.

22 THE COURT: Thank you. Counselor, your
23 witness.

24 DIRECT EXAMINATION

25

TESTIMONY OF DONALD C. COLONGELI

1 BY MR. FALK:

2 Q Mr. Colongeli, how did you come about to
3 represent my client?

4 A Mr. Beaty was court appointed.

5 Q Okay. So, you were on a 608 list?

6 A I believe that's correct.

7 Q Okay. What other criminal experience do you
8 have?

9 A Primarily that is all that I have practiced
10 since I was admitted to the Bar in 1993 or '94.

11 Q Okay. How many times did you speak with my
12 client in the jail?

13 A I typically keep very good notes as to my jail
14 visits. And I'll be extremely honest, in this file I
15 have a list where jail visits are listed chronologically,
16 and they are not. I would have to guess, from the best
17 of my recollection, anywhere between half of a dozen to a
18 dozen times, but I could only -- that would only be a
19 guess. It could be at a minimum of six to the most being
20 12 over the course of my representation.

21 Q My client -- you heard my client's testimony?

22 A I did.

23 Q He had testified that you talked to him one
24 time briefly when you were visiting other clients. And
25 I believe that he testified that you came and saw him at

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1 the jail the night before?

2 A I would have to state, that is incorrect. The
3 one thing that he did say about meeting him the night
4 before, anyone in my course of practice for 20 some odd
5 years I've made it a habit to go see the client the night
6 before, particularly when they are looking at serious
7 charges. I did go that evening, which is unusual, but
8 the jail staff knows me quite well and they allow me to
9 go in there and spend some time with the client, because
10 obviously it is an extremely important night, the eve of
11 trial. I did do that as he stated. I can tell you, in
12 going through my file, we did correspond a great deal by
13 mail, by phone, and like I said, I don't -- I can't stand
14 here and truthfully say that I went any time -- any less
15 than six times or any more than ten during the course of
16 my representation of him.

17 Q Did you have an opportunity to share with him
18 the videotapes?

19 A I don't believe we ever -- my notes don't
20 reflect me ever having the ability to sit down with a
21 laptop and actually showing him the tape. My
22 recollection seems to say that I did. But what I know
23 that I did in fact do is show him still frames and a
24 great many of still frames which were extremely pertinent
25 to identification in this case, and actually the swaying

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1 factor for not only Mr. Beaty but for his family.

2 Q And how were they pertinent?

3 A Mr. Beaty, at the time -- there you go, there
4 it is, I'm sorry. Mr. Beaty at the time obviously has --
5 I wouldn't say unique features, but obviously as far as
6 stature goes, I am a short guy, and he's, I would say,
7 probably a little shorter than me. He also had at the
8 time what I would call a billy goat's type goatee and one
9 of the still frames I have with me, and there is quite a
10 few and he was privy to all of these, but there's one
11 which is a profile shot which, I mean, this is what my
12 opinion and professional advice to him was what
13 potentially could make him, for lack of a better phrase,
14 dead in the water.

15 This profile shot here is extremely --
16 was extremely damaging. He saw that, and I can tell
17 you obviously I know and sympathize with the family in
18 all of these cases, the family was extremely upset at
19 first, but I can tell you that once they saw that still
20 frame there was a moment of pause that was almost
21 eerie.

22 They both -- all of them stopped in
23 their tracks at that point and said, whoa, we better
24 re-think this. And I'm putting words in their mouth.
25 They didn't say that, but that is what I felt. So, he

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1 was privy to everything that I had. Whether I showed
2 him the actual footage, I can't tell you. I don't
3 remember. And I don't have notes that reflect that I
4 did.

5 Q How was he identified in this case?

6 A Through surveillance footage in the store. And
7 in the particular case, what made it much more difficult,
8 was that he had just been fired. He had just -- he had
9 been employed there. I don't know the length of time
10 that he had been employed there, but it was a significant
11 amount of time. He had been let go, I'm not sure if he
12 quit or if he was fired, I don't -- I think that was
13 irrelevant at the time. But not only did they have the
14 surveillance footage, everyone in the store that night
15 had worked with him at a certain point in time while he
16 was employed.

17 Q How many people were in the store that night?

18 A I'm sorry?

19 Q How many people were in the store that night?

20 A To the best of my recollection, three that I
21 can recall. Two being young females. One would have
22 been behind the register. One was at the front door
23 locking up trying to get patrons out of the store locking
24 the door as they were going out. Who they perceived and
25 alleged to be Mr. Beaty came in at some point during her

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1 opening the door and locking it. At that point in time
2 is when he -- you can see by the transition of these
3 still frames that he walked through the door, or a person
4 appearing to be him walked through the door towards the
5 corner office, which is where the kidnapping charge came
6 about, where the manager was supposedly held by gun
7 point, or at least that is what he claimed. You couldn't
8 see any of this. It was his testimony that he was held
9 by gun point by Mr. Beaty in the corner office where the
10 safe was and then made his exit.

11 Q How did you go from -- or how did the
12 investigation go from the video that you are showing
13 there to his arrest? Who looked at the video and said
14 that is --

15 A Well, honestly, at this point in time I haven't
16 reviewed my notes enough to see how the investigation
17 went that led to his arrest. My recollection does serve
18 me to the extent that the manager and the two females in
19 the store were immediately aware of who that individual
20 was and reported that to law enforcement. Law
21 enforcement followed up on leads, conducted an
22 investigation, and Mr. Beaty was arrested on those
23 charges.

24 Q Was there a photo pack?

25 A There was a photo line-up. Is that what you

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1 mean?

2 Q A photo pack, the pictures. I mean, it wasn't
3 a live line-up, it was somebody shown in pictures?

4 A That's correct.

5 Q Yeah.

6 A That's correct.

7 Q Now, after the -- after the sentencing was
8 over, did my client ever express to you that he wanted
9 you to file a motion to reconsider?

10 A I honestly don't recall specifically him
11 mentioning that. But I will -- I will allow or give him
12 the benefit of the doubt as to that and say now that,
13 even though I can't specifically recollect that, I don't
14 doubt that he did. I know that he was extremely upset.
15 As far as being hysterical, I have seen hysterical and I
16 don't think that he was quite hysterical. Maybe he
17 considered himself to be, but there was no doubt that he
18 was upset. As far as him specifically saying that he had
19 a motion to reconsider, I think that that may have come
20 after the fact.

21 Q Do you have a voice mail at your office?

22 A I do.

23 Q What is the procedure when somebody calls your
24 office and they want to leave you a message?

25 A I'm trying to think of the time frame -- this

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1 was April 2013, correct? It is typically my wife and
2 myself that's been a sole proprietorship for 15, 16 years
3 now. And prior to that I was a public defender. She
4 would relay the messageies to me each day. I always tell
5 my clients upon being retained to give me at least 24 to
6 48 hours to get back to them. It always poses a problem
7 when you have a jail client, as far as getting to them in
8 that time frame, particularly with the schedule that I
9 carry. I'm in three places at once, as most lawyers are,
10 on many days of the week. But I do try to get to them as
11 quickly as I can, either by message through the phone
12 systems or through the family.

13 So, here, as far as an open line of
14 communication, I don't ever remember it being
15 difficult. I mean, I have letter upon letter from
16 Mr. Beaty that obviously was very concerned about his
17 case, as was I. He brought up a lot of good points.
18 But as his attorney I advised him what I thought of
19 those points and what I thought as things progressed
20 closer to the day of trial. I spent a great deal of
21 time with him, particularly the night before, which
22 resulted in a visit from the Solicitor himself, the
23 Assistant Solicitor who tried this case who earlier
24 that week, the prior week, came to my office and laid
25 out everything that he had or claimed to have for

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1 trial.

2 And I told Mr. Beaty, as I told his
3 family, and in approximately 20 years of doing this
4 I've never seen such a very well-prepared case for the
5 prosecution. Not saying that means that he was guilty.
6 I'm saying that the evidence was overwhelming, in my
7 opinion. And that's why I told him the night before to
8 sleep and pray on it. I told him who our Judge was and
9 I told him what my best advice was at the time, in that
10 they were not allowing any sort of leeway on their
11 recommendation and that to let me get into court that
12 next morning, see if I could get in chambers with Judge
13 Kinard with the State and feel Mr. Kinard or Judge
14 Kinard out as to the possibilities of what he might do.

15 Because Judge Kinard, rest his soul, was
16 a wonderful man and also a wonderful judge, who would
17 talk to you about the fact pattern and kind of give you
18 an idea of what your client was looking at. So, that
19 is what we did. If there was a problem with
20 communication, I apologize about that, but I didn't
21 think that there was that problem going on in this
22 case. I can tell you -- and I don't want to put any
23 dismerit toward the family, I did not meet his
24 immediate family until the day of trial. I may have
25 spoken to them by phone, but I never had any request to

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1 meet them. I met them that day.

2 Q So, a client calling your office when you are
3 not there, leaving a message with your wife, that would
4 be a procedure for leaving word for you, leaving a
5 message with whoever answered the phone?

6 A I'm sorry?

7 Q If a client calls your off -- I just want to
8 make sure -- what is your standard operating
9 procedure -- did you need something?

10 A I was hoping to get a glass of water here.
11 That's okay. Go ahead, I am sorry.

12 Q Are they immediately transferred to voice
13 mail, or is it typical that they would leave a message
14 with whoever is answering the phone?

15 A It would either be voice mail or if my wife
16 answered, obviously she would make a list of calls and at
17 the end of day I would come home, go over the calls and
18 make my return calls. With Mr. Beaty obviously I
19 couldn't call him back, he was incarcerated. There were
20 times that I could get through to him. I want to say
21 that there were a couple of times that I could get
22 through to him at the jail. It is not easy, but I've
23 been able to do it.

24 I don't specifically recall speaking to
25 him, as in initiating a call. But I do know that I

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1 spoke with him several times from him initiating calls
2 to my office. So, there was a great deal of back and
3 forth. This was not a case where -- and I can tell you
4 in my years of practice I would be the first to admit
5 I've probably been more guilty than not in being in
6 touch with my clients as much as I feel I should have.
7 This was not one of those cases. I do think there was
8 a great deal of miscommunication between Mr. Beaty and
9 myself to the extent that he was locked in on that
10 ten-year figure.

11 I apologized and felt bad afterwards,
12 but tried to explain to them that that was a
13 possibility, there was never any guarantee that ten
14 years would be given, even after coming out after --
15 from speaking in chambers with Judge Kinard, I told him
16 that ten years was not locked in by any means. And
17 there was, I think, a correction made on the record
18 earlier, this was not a recommendation, this was a
19 straight-up, non-negotiated plea. So, it took a great
20 deal of strength on Mr. Beaty's part and faith to make
21 that plea.

22 Q Did you -- but you did file an appeal in this
23 case?

24 A In looking through my notes, I did file an
25 appeal. I was concerned, because I think that there was

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1 an issue as to the timing. I have my own copy of the
2 notice of intent to appeal, which was dated May 2nd of
3 2013. I think that the problem may have been -- that
4 would have exactly been ten days, however with mailing
5 maybe that is the problem that occurred as far as its
6 being late. Because I looked at the calendar, that year
7 it would have been exactly ten years to the day if it was
8 received on May 2nd, but I doubt that it was.

9 Q So, there's no question that my client wanted
10 an appeal?

11 A Well, actually there was. We went back and
12 forth on that. And I told, as I do everyone --

13 Q But you ultimately filed an appeal?

14 A I'm sorry?

15 Q You filed an appeal?

16 A I did.

17 Q But the appeal -- the appeal notice was
18 untimely?

19 A I later learned that it was.

20 Q Okay. On the 22nd, were you ready to go to
21 trial that day?

22 A Absolutely.

23 Q Who had you subpoenaed to testify?

24 A There were no subpoenas sent. I typically do
25 not subpoena people. In many of my cases, in my practice

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1 of law, I typically do not send subpoenas and there is a
2 certain strategy to my extent as to why I do that or
3 don't. Obviously there are cases where I do. In this
4 case there would have been no witnesses that I thought
5 were necessary to subpoena without putting the State on
6 notice, so I had no intent to subpoena anyone, therefore,
7 no one was subpoenaed.

8 Q If you had gone to trial that day, what was
9 your strategy?

10 A I'll be honest with you, and that is what I
11 told the family, it really was a toss-up. I did tell
12 them, as I had said before, and I hate to say this, but
13 this prosecutor, this was every defense lawyer's
14 nightmare, this case was solid. In my opinion they left
15 no leaf unturned, no paper unturned, their Ts were
16 crossed, their Is were dotted. And in my opinion, and
17 for lack of a better phrase, this was a slam dunk for the
18 State. I was very concerned with the exposure of time
19 that Mr. Beaty was looking at, particularly in light of
20 his criminal history, that he would have gotten
21 potentially more time than Mr -- sorry, Your Honor, the
22 Honorable Judge Kinard gave him.

23 And as a matter of fact, if you have
24 time to read the colloquy of Judge Kinard's discussion
25 with Mr. Beaty, he went out of his way, because I was

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1 actually quite shocked that he did get 15, but Judge
2 Kinard enlightened me as to why he gave him the 15.
3 And as a matter of fact, he used a case in Columbia he
4 had just tried and it was a similar situation where two
5 people ended up dead. Now, whether, obviously, that
6 was in the sound discretion of the trial court, but he
7 saw it to be potentially a very serious situation. He
8 said that on any other day he more likely would have
9 given Mr. Beaty 30 if I -- and I stand to be corrected,
10 but I'm most almost positive that is what he said in
11 his sentencing.

12 Q When you said that you were shocked, were you
13 shocked that 15 was too high or too low?

14 A Personally, I thought that it was too high but
15 that's, I guess, me being a defense lawyer all of these
16 years. You know, in retrospect, I fight very hard for my
17 clients, I care for my clients maybe more than I should.
18 And I'm not saying that to be self-serving as much as it
19 sounds self-serving, I wanted the right thing for Rion
20 and I still do, but I honestly think that we did the
21 right thing that day. If he had gone to trial we would
22 have lost. And I gave him my professional opinion as to
23 that fact. And truly believed in my heart that not only
24 would we lose, but he would be suffering a much greater
25 length of incarceration.

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1 MR. FALK: May I have a moment, Your Honor?

2 THE COURT: Yes, sir.

3 BY MR. JOHNSON:

4 Q When you read the transcript in this case,
5 there was some kind of confusion about this kidnapping
6 charge?

7 A Yes. To the extent -- and I apologize I didn't
8 read it as closely as I should have. My notes all
9 reflect -- and I have notes prior to trial of what were
10 going on and one page is always dedicated specifically to
11 the charges. Armed robbery, possession of a weapon
12 during violent crime, manufacture and possession of other
13 substance, one, two, three, and then Lorazepam, and now
14 PWID and kidnapping. So, I had the charges listed.
15 There was some confusion with a separate kidnapping, I
16 believe, but there was never any confusion as to the
17 kidnapping in the store. I think where that came from is
18 that both Mr. Beaty and myself thought that it was maybe
19 a little bit of a stretch for the amount of time that
20 transpired, as far as the allegations and the time line
21 of what happened in that store that it amounted to a
22 kidnapping.

23 I told him that, if anything, that that
24 charge would be one that might possibly fall by the way
25 (ck) side. However, after looking at it longer and

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1 harder before I visited him that Sunday night, I tried
2 to explain to him specifically that I did think they
3 could meet the elements based on what the State's
4 evidence was and what the allegations would be from the
5 witnesses. I also did do the best investigation that I
6 could based on the resources that I had that these were
7 all very extremely willing witnesses and that they
8 wanted to be heard and that they were going to be here
9 to testify. So, there was no sort of question as to
10 possibility of witnesses not showing. I researched
11 that to the best of my ability, that is why I was
12 concerned. And I think spent part of my Sunday night
13 there with him trying to make him understand what
14 kidnapping was and the fact that it didn't take a whole
15 lot to actually be charged with it and ultimately
16 potentially convicted of it.

17 Q But he was indicted that morning on the
18 kidnapping charge; is that correct?

19 A I honestly can't tell, in my notes I honestly
20 cannot tell you if that was the case. And if that was --
21 and if so, I think that was due to some clerical error on
22 the Prosecutor's part. But there was never any -- I
23 don't think that there was ever any surprise to me that
24 kidnapping was part of his charges based on the police
25 investigation, based on the incident report. Whether or

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1 not it had actually gotten indicted may have been an
2 oversight on my part, but I don't think that it was ever
3 a surprise that that was one of the charges.

4 Q Were you prepared to go forward with the
5 defense on the kidnapping charges?

6 A I think that I was adequately prepared at that
7 time to be able to -- under the guidelines of Strickland,
8 I think that I could have adequately prepared myself and
9 been prepared to go forward on the kidnapping based on
10 what I had learned the witness was going to say and what
11 the State had given me in the last week.

12 MR. FALK: No further questions.

13 THE COURT: You may cross-examine.

14 MR. JOHNSON: May it please the Court, Your
15 Honor.

16 THE COURT: Yes, sir.

17 CROSS EXAMINATION

18 BY MR. JOHNSON:

19 Q Mr. Colongeli --

20 MR. JOHNSON: May I approach the witness, Your
21 Honor?

22 THE COURT: You may.

23 MR. JOHNSON: Your Honor, this is already in
24 the record, as it is in your judicial packet. Let
25 the record reflect I'm showing him the indictment of

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1 the sentencing sheet from the kidnapping charge that
2 Mr. Beaty pled to.

3 BY MR. JOHNSON:

4 Q Does that look familiar?

5 A Yes, sir.

6 Q If you will turn the page. Does that look
7 familiar?

8 A Yes, sir.

9 Q Is that the indictment that you were prepared
10 for in the case?

11 A Yes, sir.

12 Q And can you read the indictment on when it was
13 actually true billed?

14 A October 18th, 2012.

15 Q And when did Mr. Beaty plead guilty?

16 A My notes, I believe, would have been April 22nd
17 of 2013.

18 Q Okay. Thank you, sir. So, he wasn't indicted
19 on this kidnapping the day of the plea, correct?

20 A I'm kind of confused on that. I guess that I
21 really can't honestly answer yes or no to that. I'm
22 completely confused. I thought that it was always a part
23 of the record. As far as something being indicted as far
24 as kidnapping that day, I'm confused. I was never aware
25 of him pleading to another kidnapping other than what was

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1 a part of this case.

2 Q But this is the kidnapping that you prepared
3 for, in this instance case?

4 A Correct.

5 Q Okay. And As far as the motion for
6 reconsideration, would you agree with me that Judge
7 Kinard has discretion in the kidnapping of 0 to 30
8 years?

9 A Absolutely.

10 Q And the armed robbery is 10 to 30 years?

11 A Correct.

12 Q And the possession is 5 years?

13 A That's correct.

14 Q So those are legal sentences?

15 A That's correct.

16 Q So you didn't have a legal basis to file a
17 motion for reconsideration?

18 A In all honesty I didn't believe that I did.
19 That is what I tried to explain to, not only Mr. Beaty,
20 but to his family. And particularly based on the
21 discussion Judge Kinard was kind enough to go through
22 with us during sentencing. It was very apparent that I
23 hate to say -- I hate to reduce a client's chance at
24 anything even if you know that it may be zero, but I can
25 tell you based on what Judge Kinard said that day I knew

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1 that that would have not -- would not have passed muster,
2 and I would have been embarrassed bringing that. And I
3 think, in my opinion, I think that my, as far as lawyer
4 strategy, I was within my bounds to advise my client not
5 to do that.

6 Q And it's also your testimony here today that
7 you never promised him a ten-year sentence?

8 A Absolutely not. I would have never promised.
9 Have never promised a client any sort of sentence. I
10 know that's a very dangerous business to get into. And
11 in my discussions with any client that attempts to retain
12 me, one of the very first things that I tell them is that
13 I cannot guarantee you an outcome on this case. If I
14 could I would be -- I would be retired by now. There's
15 no guarantees as to an outcome. It's up in the air.
16 This is a straight-up sentence. It is one of the most
17 dangerous types of sentences and types of pleas that
18 require a great deal of strength on a client's part to go
19 up there and throw himself, basically, at the mercy of
20 the Court.

21 Had I hoped that -- had I truly hoped
22 that it was going to be ten, and did I possibly make
23 the mistake of giving the family too much hope that it
24 would have been ten, or my client too much hope, I'll
25 go so far out on a limb as to say that, knowing Judge

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1 Kinard as long as I practiced law, that I truly hoped
2 that it would be but I never told them that that is
3 what it was going to be. I said, He could go anywhere
4 from ten -- did I think that he would go past 30, no,
5 but I said a range of ten to 30.

6 Q As far as the plea affidavit, do you remember
7 going over that with Mr. Beaty?

8 A I do. And I will tell you both that I
9 apologize to Mr. Beaty's attorney today. He had sent me
10 an email early on that I didn't get a chance to respond
11 to specifically as to this advisement of rights, and I
12 believe that you asked me to and I apologize if I didn't
13 get back to you soon enough.

14 One of the things that confused me is
15 that I couldn't find my advisement of rights form. And
16 I typically, ever since Justice Beaty has been around,
17 Justice Beaty was one of the judges I think that
18 started that and required every, every Defendant who
19 pled to fill that out regardless. And I have a file
20 folder in my briefcase, if I'm carrying it, that has
21 that during a term of court.

22 In this case, I believe that Judge
23 Kinard, what happened -- if I can make a correction, my
24 handwriting doesn't appear anywhere on that advisement
25 of rights except for the date and signature of mine. I

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1 believe what you see at the top, that is not my
2 handwriting, I believe that it's Judge Kinard's clerk's
3 handwriting or a clerk's handwriting. Everything in
4 between would have been Mr. Beaty's.

5 I did go over every specific question
6 with him. Asked him if he understood it. I knew that
7 he wasn't happy to any of the answers, to any of them.
8 But did thoroughly go through it and was satisfied as
9 an attorney, as his attorney, that he did understand
10 what he was signing.

11 Q And you didn't tell him how to answer these
12 questions?

13 A Absolutely not.

14 Q Did you tell him how to answer the questions
15 during the guilty plea?

16 A Other than to say, yes, sir, yes, Your Honor,
17 or no, Your Honor, no. No.

18 MR. JOHNSON: The Court's indulgence, Your
19 Honor?

20 THE COURT: Yes, sir.

21 (Pause.)

22 BY MR. JOHNSON:

23 Q Did you ever threaten Mr. Beaty to plead
24 guilty?

25 A No, sir.

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1 Q Did you promise him anything to plead guilty?

2 A No, sir.

3 Q Did you advise him in this case based on your
4 experience as a trial attorney?

5 A I did.

6 Q On the facts of the case?

7 A I did.

8 Q And on the information that he provided to you
9 as a client?

10 A Yes, sir.

11 MR. JOHNSON: That is all that I have at this
12 time, Your Honor.

13 THE COURT: Redirect.

14 REDIRECT EXAMINATION

15 BY MR. FALK:

16 Q It's your testimony that you didn't tell him
17 how to answer any questions on the form?

18 A I didn't tell him how to answer the questions,
19 unless he had a question, no.

20 Q I mean, how did he know what the maximum
21 penalties were; did you tell him what they were?

22 A Forgive me, I would have told him what they
23 carried. If he asked me I would have told him what they
24 carried. We had gone over the night before in length
25 what the charge carried, because my concern was the

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1 maximum exposure that I said. Whether he remembered that
2 or not the next day, I don't know. But I would have
3 answered that type of question, a legal question.

4 Q And is it a fair characterization of your
5 testimony that you came and talked to him the night
6 before saying that kidnapping was back on the table?

7 A I never knew that it was off of the table.

8 Q Well didn't you -- didn't you testify earlier
9 that you weren't sure that they could initially make the
10 case for kidnapping based on the time?

11 A We did discuss the strengths and merits of the
12 specific charge of kidnapping, correct.

13 Q Okay.

14 A Out of all of the charges, I thought that that
15 was one that possibly we could argue, but I think that --
16 under the totality of the circumstances, I think that was
17 neither here nor there at that point. Obviously if we
18 lost on the others, kidnapping wouldn't have mattered at
19 that point, in my opinion.

20 MR. FALK: No further questions.

21 MR. JOHNSON: Last question.

22 RE-CROSS EXAMINATION

23 BY MR. JOHNSON:

24 Q Whose decision was it to plead guilty in this
25 case?

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1 A Mr. Beaty's.

2 MR. JOHNSON: Nothing further, Your Honor.

3 THE COURT: You may step down.

4 WITNESS: Thank you, Judge.

5 THE COURT: Yes, sir.

6 THE COURT: The applicant may call his next
7 witness.

8 MR. FALK: No further witnesses.

9 THE COURT: Any further witnesses?

10 MR. JOHNSON: No, Your Honor. We ask that
11 Mr. Colongeli be excused.

12 THE COURT: Any objection?

13 MR. FALK: No, sir.

14 THE COURT: You are free to go. Thank you very
15 much. I'll hear argument from the applicant.

16 MR. FALK: Your Honor, I think that there was
17 sufficient and clear testimony that there was
18 communication between my client and Mr. Colongeli
19 that they wanted to file an appeal in this case.
20 Mr. Colongeli did file an appeal in this case, so
21 presumably that certainly gives credence to the fact
22 that that communication was given from my client to
23 Mr. Colongeli and no appeal was ever filed.

24 The appeal was -- no timely appeal was filed.
25 And we would ask under -- that he be permitted to

TESTIMONY OF DONALD C. COLONGELI

1 file -- be granted permission to file a late
2 appeal in this case. And regarding his other
3 claims of ineffective assistance of counsel, there
4 was testimony that my client believed that he was
5 getting a ten-year sentence that day, that that
6 was what was on the table. We heard two other
7 witnesses that confirmed that there was
8 conversations from Mr. Colongeli about a ten-year
9 sentence. My client walked -- testified that he
10 walked into court that day thinking that it is a
11 ten-year deal. I think that it's understandable
12 under that situation, 'you are going to do whatever
13 your lawyer tells you to do.

14 He testified from the stand that the only
15 advice he gave my client was when he answered the
16 Judge, Yes, sir. Possibly that is an explanation
17 to his answers to the plea colloquy. My client
18 did not feel that they were prepared for trial
19 that day.

20 My client testified that he knew nothing
21 about the kidnapping charge until the night before
22 and that he had fear that he was going into trial,
23 going into trial facing the kidnapping charge
24 without his attorney being prepared to defend the
25 case. Because it was his testimony that

TESTIMONY OF DONALD C. COLONGELI

1 Mr. Colongeli came and talked to him that night
2 saying that, you know -- about this kidnapping
3 charge.

4 And it was my client's testimony that that
5 was the first that he heard about it. So, we
6 would ask for additional grounds, for relief in
7 this case, that his application for PCR be granted
8 based on the ineffective assistance of counsel.

9 THE COURT: I will hear from the State.

10 MR. JOHNSON: May it please the Court, Your
11 Honor.

12 THE COURT: Yes, sir.

13 MR. JOHNSON: First as a matter, the State does
14 not contest that he is entitled a delayed appeal of
15 direct appeal issues pursuant to White versus State.
16 That is the first thing.

17 But as far as all of the other claims, Your
18 Honor, I hope that this Court finds Mr. Beaty not
19 credible. He admitted to lying at the guilty
20 plea, that his answers were not correct. He is
21 saying that counsel promised him ten years and
22 counsel clearly stated, I never promised any
23 clients, you know, any set sentence. He said, I
24 was hoping ten years, I was hoping that Judge
25 Kinard would do that; however, I advised him that

TESTIMONY OF DONALD C. COLONGELI

1 he was facing 65 and I thought Judge Kinard may
2 even go to 30. He said, I was surprised by the 15
3 years.

4 So, I don't think that he has met his burden
5 of proof as to that allegation. As far as counsel
6 telling him how to answer the questions, his
7 testimony was that he told him to answer yes, sir
8 or no, sir, not just yes, sir. I think that was
9 misconstrued by counsel. And I also find that
10 counsel is credible and find that applicant is
11 not.

12 He said that he didn't know about the
13 kidnapping; however, counsel's testimony clearly
14 was that, I was prepared for this. I asked
15 counsel about the indictment. This indictment was
16 the one that he was prepared for based on
17 Mr. Beaty's actions in the back of the store that
18 night. There were two eye witnesses in this case
19 that saw Mr. Beaty. They knew him. He worked
20 prior, either in that store or the one next to it.
21 So, this is not a case of who done it.

22 As counsel stated there is overwhelming
23 evidence of guilt in this case. The State submits
24 that Mr. Colongeli acted in the norms of
25 Strickland versus Washington and that he, and that

TESTIMONY OF DONALD C. COLONGELI

1 Mr. Beaty can prove no resulting prejudice
2 therefrom. We ask you to deny this application.

3 THE COURT: I'll take the matter under
4 advisement. I should be able to give you a decision
5 this week. Thank you very much.

6 (Hearing concluded.)

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TESTIMONY OF DONALD C. COLONGELI

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2 CERTIFICATE

3

4 STATE OF SOUTH CAROLINA:

5 COUNTY OF BEAUFORT:

6 I, MONA L. MANLEY, Court Reporter, certify that I was
7 authorized to and did stenographically report the foregoing
8 proceedings and that the transcript is a true and complete
9 record of my stenographic notes.

8

DATED this 10th day of July, 2016.

9

10

11

Mona L. Manley /s/

12

MONA L. MANLEY

13

Official South Carolina Court Reporter

Circuit Reporter for the 14th Circuit

(850) 893-6662

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mmanley@sccourts.org

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STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

Rion Beaty, #337153,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

2014-CP-07-1495

ORDER OF DISMISSAL AND
GRANT OF APPEAL PURSUANT
TO WHITE V. STATE

FILED 19 FEB 19 PM 3:58
CLERK OF COURT
JAMES K. FALK, ESQUIRE
J. RUTLEDGE JOHNSON, ESQUIRE
DONALD COLONGELI, ESQUIRE

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed June 23, 2014. The State filed its Return on August 28, 2015. An evidentiary hearing was held at the Beaufort County Courthouse on October 20, 2015. The Applicant was represented by James K. Falk, Esquire. The Respondent was represented by J. Rutledge Johnson, Esquire, Assistant Deputy Attorney General. Applicant, Applicant's mother, and Lee Mitchell testified on Applicant's behalf. Donald Colongeli, Esquire, also testified.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. The Applicant was indicted at the October 2012 term of the Beaufort County Grand Jury for kidnapping (2012-GS-07-2107) armed robbery (2012-GS-07-1999), and possession of a weapon during the commission of a violent crime (2012-GS-07-2000). Donald Colongeli, Esquire, represented the Applicant. On April 22, 2013, the Applicant pled guilty as indicted before the Honorable J. Ernest Kinard, Jr. Judge Kinard sentenced the Applicant to terms of confinement for fifteen (15) years for

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kidnapping, fifteen (15) years for armed robbery, and five (5) years for possession of a weapon during the commission of a violent crime. These sentences were to run concurrently.

The Applicant filed a notice of appeal on May 2, 2013; however, this was untimely, as the court did not receive the notice until the following day, after the allotted time to file had passed. By Order dated July 8, 2013, the South Carolina Court of Appeals dismissed the appeal. The Remittitur was issued on July 29, 2013.

First PCR Application: 2013-CP-07-1651

The Applicant filed an application for Post-Conviction Relief on June 25, 2013, while his direct appeal was still pending. In light of this, the State filed a Return and Motion to Dismiss. By Order dated August 28, 2013, the Honorable Carmen T. Mullen dismissed this application without prejudice.

Current PCR Application: 2014-CP-07-1495

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

1. "Ineffective Assistance of Counsel"
 - a. "[Counsel] filed my motion of reconsideration wrong"
 - b. "Got convicted of a charge I never had a warrant for"
 - c. "Promised me 10 years"
 - d. "Never told me my rights to appeal"
 - e. "Promised me a 10 year sentence and to go for an open plea"
 - f. "If it wasn't for my lawyer's errors the outcome would of [sic] been different"
2. "Violation of 5th Amendments"
 - a. "I was charged with separate offenses which was all one crime and my lawyer never ask me anything about the case like where I have been at the time of the

APL
12

crime and who could back that up. Neither on the date of the trial. He left me to be a witness to myself"

3. "Violation of 6th, 14th Amendments"

- a. Never asked about witnesses or alibi in my favor. He just said we [are] going to trial. He never even called anyone to try and see if I had witnesses"

SUMMARY OF TESTIMONY

At the hearing, Applicant's mother testified that she attempted to meet with Counsel several weeks before the court date and left several phone messages. Applicant's mother also stated she spoke with Counsel's wife, but did not meet Counsel until the day of the plea, whereupon Counsel stated Applicant would be receiving a 10 year sentence. She also testified Counsel told her to tell Applicant to take the plea.

Lee Mitchell, Applicant's stepfather, testified that he was in court on the day of the plea and spoke with Counsel, who stated he was shooting for 10 years. Mr. Mitchell thought Applicant was getting 10 years. On cross-examination, Mr. Mitchell admitted that Counsel stated he would attempt to get Applicant a 10 year sentence.

Applicant testified that he asked Counsel to file a motion to reconsider. Applicant stated he called Counsel, but spoke with his secretary. Applicant thought Counsel had appealed this case and that Counsel tried to persuade Applicant's family to get Applicant to accept the plea offer. Applicant claimed he was "out of it" during the plea and he received 15 years. Applicant then stated he did not have much contact with Counsel and that when Counsel came to see him, they did not talk much about the case. Applicant also testified that Counsel did not speak with Applicant's alibi witnesses, but that Counsel showed Applicant the evidence against him, including pictures from a video and statements made.

Applicant then claimed he pled guilty because Counsel stated that he could not defend the case; and Applicant did not want to go to trial. Applicant admitted that he and Counsel discussed possible defenses, including alibi witnesses. Applicant claimed he signed the plea affidavit because Counsel told him to, but admitted that he read the questions prior to signing the plea affidavit. Applicant then testified that his answers at the plea would be different because he was blind about the law. Applicant then stated Counsel did not explain his investigation to Applicant; but Counsel supposedly said that he was going to get DNA testing on a bandana.

On cross-examination, Applicant admitted this was not his first involvement with the criminal justice system. Applicant admitted that he did not tell the truth at the guilty plea while under oath. Applicant also admitted he did not tell the plea judge that he was "out of it." Applicant further admitted that he did not stop the plea court at any time to explain he did not understand what was occurring. Applicant then testified there were two eye witnesses to him committing the crimes and that he agreed to the facts as presented by the solicitor.

Counsel testified he was appointed to this case and has been in practice since 1993. Counsel stated he met with Applicant between 6 and 12 times and met with him the night before Applicant was scheduled to go to trial. Counsel also stated he corresponded with Applicant by mail and phone. Applicant testified he discussed the evidence and discovery with Applicant, showing still photos of Applicant that were taken from the video identifying Applicant. Counsel stated the swaying factor for Applicant pleading guilty was the photos. Counsel stated Applicant's family was upset, but once they saw the photos, they knew Applicant was a participant. Applicant was privy to his entire file. Counsel stated Applicant had been identified by surveillance footage and that Applicant had been employed at/near the store that he robbed.



Counsel then stated that there were three people in the store and that Applicant held Victim at gunpoint; Victim identified Applicant in a photo lineup.

Counsel then testified that he does not recall Applicant asking about a motion to reconsider and did not think Applicant was hysterical during the plea, as he had spent much time with Applicant prior to and during the plea. Counsel then testified that this was a very well prepared prosecution case, in that there was overwhelming evidence of Applicant's guilt. Counsel stated he gave Applicant the best advice possible and that he wanted to feel out the plea judge before the guilty plea. Counsel stated there may have been possible miscommunication about potential sentences because Applicant was locked in to a 10 year plea. Counsel stated the 10 year offer was not locked by any means, as there were no recommendations or negotiations in this case.

Counsel stated that he, in fact, filed an appeal, but that it was untimely, as there was some waffling by Applicant on whether he desired an appeal. Counsel admitted that he did not subpoena any witnesses to trial, as there were no necessary witnesses in this case. Counsel stated this case was a tossup because the State's case was solid; they "crossed every T and dotted every I;" this was a "slam-dunk" case. Counsel was concerned about the time Applicant was facing and that the plea judge went out of his way to explain the sentence to Applicant. Counsel stated the sentence was within the sound discretion of the plea judge and that he was shocked because he thought the sentence was too high. Counsel stated he still thinks a plea was the correct decision because he opined that Applicant would lose at trial and face a much harsher sentence.

Counsel testified as to the kidnapping charge that there was no confusion concerning the kidnapping in the store. Counsel stated he may have told Applicant discharge could fall away,



but explained that the State could meet the elements of kidnapping. Counsel stated he did the most thorough investigation he could based on evidence in the case and that he researched the case to the best of his ability. Counsel attempted to get Applicant to understand the kidnapping charge and was not surprised by this charge; he was adequately prepared.

On cross-examination, Counsel testified he was prepared for the kidnapping charge. He stated he did not have a basis for a motion to reconsider because the sentences were legal and the motion would not be successful. Counsel also testified he did not promise Applicant a 10 year sentence. Counsel also testified he thoroughly discussed the plea with Applicant and that Applicant understood the plea. Counsel then stated he did not tell Applicant how to answer the plea judge's questions, did not threaten the Applicant, and did not promise Applicant anything to get him to plead guilty. Counsel lastly stated he based his advice on the facts of the case, his experience as an attorney, and on the information that Applicant gave to him.

On redirect examination, Counsel testified he explained the maximum and minimum penalties to Applicant. Counsel also testified he never thought the kidnapping charge would come off of the table; he lastly discussed the strengths and merits of the kidnapping charge.

On re-cross examination, Counsel testified it was Applicant's decision to plead guilty.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must



prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

This Court finds Applicant's testimony regarding Counsel's ineffectiveness is not credible while also finding Counsel's testimony is credible.

This Court also finds Counsel provided effective assistance of counsel in this case. Counsel advised Applicant of all of the charges and the sentences the charges carried. Counsel

testified he did not promise Applicant a 10 year sentence and that the plea judge was well within his discretion to sentence Applicant to 15 years. Applicant admitted that nobody threatened him to plead guilty, and there were no promises to entice him to plead guilty. This Court finds Applicant made the decision to plead guilty on his own accord with the help of learned, prepared counsel. Additionally, this Court finds Applicant made this decision freely and voluntarily without any threats or promises from anyone else. Furthermore, this Court finds that it was ultimately the Applicant's decision to plead guilty.

This Court also finds the guilty plea transcript dispositive of this case, as it is a contemporaneous recording of the proceedings. This Court finds the Applicant waived his rights to challenge the video, the identification by the victim and statements made to law enforcement.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. Therefore, these allegations are denied.

White v State Claim

Nevertheless, this Court agrees that the allegation that the Applicant was denied a direct appeal is meritorious. In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal if requested or comply with the procedure required by Anders v.

A handwritten signature in black ink, appearing to be "P. J. [unclear]", is located in the bottom right corner of the page.

California, 386 U.S. 738, 87 S.Ct. 1396 (1967). White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Where the post-conviction relief judge determines that the Applicant did not freely and voluntarily waive his appellate rights, the Applicant may petition the South Carolina Supreme Court for belated review of direct appeal issues pursuant to White v. State. See Rule 227(g)(1), SCACR; Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986).¹

The Court affirmatively finds that the Applicant did not knowingly and voluntarily waive his right to a direct appeal. The Court concludes that the Applicant is entitled to a belated review of his conviction(s). A petition for belated review pursuant to White v. State can remedy the Applicant's lack of a direct appeal.

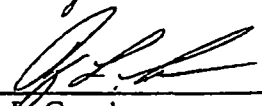
IT IS THEREFORE ORDERED:

1. That this current Application for Post-Conviction Relief be dismissed with prejudice.
2. That the Applicant is granted a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). Within thirty days of service of this Order, counsel for the Applicant must file a Notice of Appeal to secure the appropriate review of the Applicants' convictions. Counsel and the Applicant are directed to Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986) and South Carolina Appellate Court Rule 227(g) for the appropriate procedure for securing belated appellate review.
3. That Applicant be remanded to the custody of Respondent.

¹ "Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, the Applicant must petition this Court for a White v. State review." [Emphasis added]. Davis, 288 S.C. at 291, n. 1, 342 S.E.2d at 60.

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AND IT IS SO ORDERED this 12th day of February, 20 16.



Roger L. Couch
Presiding Judge
Fourteenth Judicial Circuit


_____, South Carolina.

2014-CP-07-1495

WITNESSES

Inv. J. Moran-BCSO

DOCKET NO. 2012GS0702107

The State of South Carolina

County of Beaufort

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

COURT OF GENERAL SESSIONS

October Term 2012

I
Hereby appear in my own proper person and plead guilty to the within indictment or to

ARREST WARRANT NUMBER

2012GS0702107

THE STATE

VS.

ACTION OF GRAND JURY

Indictment

Rion Beatty

Melvin D. Beatty

Foreperson of Grand Jury

OCT 18 2012

Defendant

VERDICT

Indictment for

Kidnapping / Kidnapping

Witness:

SC Code: 16-03-0910

CDR Code:0095

C.C.C. PLS. and G.S.

Foreperson of Petit Jury

Date:

INDICT

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

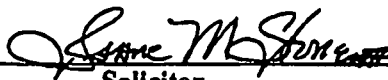
INDICTMENT
2012GS0702107

At a Court of General Sessions, convened on October 18, 2012, the Grand Jurors of Beaufort County present upon their oath:

Kidnapping / Kidnapping

That in Beaufort County, South Carolina, on or about September 2, 2012, the Defendant, Rion Beaty, unlawfully did seize, confine, inveigle, decoy, kidnap, abduct or carry away the victim, Michael Hartley, without authority of law; all in violation of Section 16-3-910 of the Code of Laws of South Carolina, (1976, as amended)

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


Solicitor

WITNESSES

J. Moran-BCSO

DOCKET NO. 2012GS0701989

The State of South Carolina

County of Beaufort

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

COURT OF GENERAL SESSIONS

October Term 2012

Hereby appear in my own proper person and plead guilty to the within indictment or to

ARREST WARRANT NUMBER

2012A0720300110

THE STATE

vs.

ACTION OF GRAND JURY

Rion Beatty

True Bill

William Beatty

Foreperson of Grand Jury

OCT 18 2012

Defendant

VERDICT

Indictment for

Robbery / Armed Robbery, robbery while armed or allegedly armed

Witness:

SC Code: 16-11-0330(A)

CDR Code:0139

C.C.C. PLS. and G.S.

Foreperson of Petit Jury

Date:

INDICT

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

INDICTMENT
2012GS0701999

At a Court of General Sessions, convened on October 18, 2012, the Grand Jurors of Beaufort County present upon their oath:

Robbery / Armed Robbery

That on or about September 2, 2012, in Beaufort County, South Carolina, the Defendant, Rion Beaty, at South Beach General Store, [REDACTED] Hilton, by use of force, threats or intimidation and while armed with a deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or other object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, did take and carry away goods and/or monies from the person or immediate presence of Michael Hartley with the intent to permanently deprive the victim of possession thereof, in violation of Section 16-11-330(A) of the South Carolina Code of Laws, 1976, as amended.

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

Lawrence M. Shuman

WITNESSES

Inv. J. Moran-BCSO

DOCKET NO. 2012GS0702000

The State of South Carolina

County of Beaufort

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

COURT OF GENERAL SESSIONS

October Term 2012

Hereby appear in my own proper person and plead guilty to the within indictment or to

ARREST WARRANT NUMBER

2012A0720300111

THE STATE

vs.

ACTION OF GRAND JURY

True Bill

Rion Bealy

Michael D. Beale
Foreperson of Grand Jury
Date: OCT 18 2012

Indictment for

Weapons / Poss. weapon during violent crime

SC Code: 16-23-0490
CDR Code:0549

Defendant

Witness:

Foreperson of Petit Jury

Date:

COINDICT

11

C.C.C. PLS. and G.S.

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

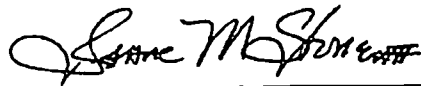
INDICTMENT
2012GS0702000

At a Court of General Sessions, convened on October 18, 2012, the Grand Jurors of Beaufort County present upon their oath:

Weapons / Poss. weapon during violent crime

That in Beaufort County, South Carolina, on or about September 2, 2012, the Defendant, Rion Beaty, did possess a weapon or visibly display what appeared to be a weapon during the commission, or attempted commission, of Armed Robbery, a violent crime. This is in violation of 16-23-490 of the South Carolina Code of Laws, (1976) as amended.

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



Solicitor