

Lowcountry Law Office

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December 4, 2017

**RECEIVED**

DEC 06 2017

S.C. SUPREME COURT

The Honorable Daniel E. Shearhouse  
Clerk, Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

RE: Brian Spann v. State of South Carolina; Case #: 2015-CP-08-1059

Dear Mr. Shearhouse:

Enclosed for filing is the Notice of Appeal (original and clocked copy) in the above Post-Conviction Relief (PCR) case. Also enclosed are the following:

- (1) Proof of service of the Notice of Appeal on the Respondent;
- (2) The Order of Dismissal; and
- (3) A Request for Representation on Appeal.

The Applicant - Appellant was represented by me as indigent, pursuant to my contract with the South Carolina Commission on Indigent Defense (SCCID) to handle PCR cases. By copy of this letter, I am forwarding a duplicate set of documents to the SCCID.

The Request for Representation on Appeal and the Affidavit in Support, thereof, are signed by me as attorney for Applicant - Appellant. Should you need anything further, do not hesitate to contact me.

Thank you for your time and attention to this matter.

Sincerely,



Rodney D. Davis  
South Carolina Bar #: 12396  
4000 Faber Place Drive, Suite 300  
Charleston, SC 29405  
(843) 323-4353  
[Davis@LowcountryLawOffice.com](mailto:Davis@LowcountryLawOffice.com)

✓ Enclosure(s). As stated above.  
RDD/mmt

cc: Megan H. Jameson, Assistant Attorney General  
Kimberly McCall, Appellate Division, SCCID

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

DEC 06 2017

APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

S.C. SUPREME COURT


The Honorable William H. Seals, Jr.

Case #: 2015-CP-08-1059

NOTICE OF APPEAL

Brian Spann appeals the denial of his Post Conviction Relief application in this case. The Application for relief was denied, following an evidentiary hearing before the William H. Seals, Jr., on April 6, 2017.

November 7, 2017



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Rodney D. Davis  
400 Faber Place Drive, Suite 300  
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Attorney for Appellant

Other Counsel of Record:  
Alicia Olive, Assistant Attorney General  
Office of the Attorney General, State of South Carolina  
P.O. Box 11549  
Columbia, SC 29211-1549  
Attorney for Respondent

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DEC 06 2017

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

The Honorable William H. Seals, Jr.

Case #: 2015-CP-08-1059

Brian Spann,

Appellant.

v.

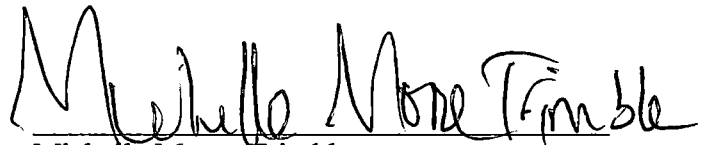
State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State by mailing a copy, via US Mail, to the address of record, Megan H. Jameson, P.O. Box 11549, Columbia, South Carolina 29211-1549, on November 8, 2017.

November 8, 2017



Michelle Moore Trimble  
Paralegal to Rodney D. Davis  
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Attorney for Appellant

Other Counsel of Record:  
Alicia Olive, Assistant Attorney General  
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Columbia, SC 29211-1549  
Attorney for Respondent

STATE OF SOUTH CAROLINA )  
COUNTY OF BERKELEY )  
)   
Brian Spann, SCDC # 320123, )  
)   
Applicant, )  
)   
v. )  
)   
State of South Carolina, )  
)   
Respondent. )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2015-CP-08-1059

**ORDER OF DISMISSAL**

MARY P. BROWN  
CLERK OF COURT  
BERKELEY COUNTY

2017 NOV - 1 AM 11:46

**FILED**

This matter comes before the Court by way of an application for post-conviction relief filed April 30, 2015, by Brian Spann (Applicant) alleging ineffective assistance of counsel, unreasonable search and seizure, and “protecting my rights.” Respondent made its Return on April 6, 2016, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened January 13, 2017, at the Berkeley County Courthouse. Applicant was present at the hearing and represented by Rodney D. Davis, Esquire. Assistant Attorney General Alicia Olive from the South Carolina Attorney General’s Office appeared on behalf of the State. Following the evidentiary hearing, this Court denied the application. This order follows.

**PROCEDURAL HISTORY**

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. During its April 2014 term of court, the Berkeley County Grand Jury indicted Applicant for armed robbery (2014-GS-08-0496) and kidnapping (2014-GS-08-0497).

On August 28, 2014, Applicant appeared in the Berkeley County Court of General Sessions before the Honorable Roger M. Young, Sr., circuit court judge. Applicant was

represented by Melissa Gay, Esquire. Assistant Solicitor Brian Alfaro represented the State. At this hearing, Applicant pled guilty to kidnapping as indicted, and the lesser-included offense of strong arm robbery. The court advised Applicant of the potential sentences he faced and the possible enhancement ramifications of his guilty plea for any future offenses. (Plea Tr. 2-3). The court also advised Applicant of his constitutional rights and Applicant informed the court he understood those rights and wanted to waive these rights to enter a guilty plea. (Plea Tr. 3-4). Applicant informed the plea court he understood what he was doing and was satisfied with counsel's representation. (Plea Tr. 4). The State recommended a fifteen years imprisonment for each offense, with the sentences to be served concurrently. (Plea Tr. 6-7). Applicant addressed the plea court, admitted his guilt, and apologized for his actions. (Plea Tr. 9-10). Plea counsel asked the court to consider a sentence below the State's recommendation, including the possibility of a split sentence with a term of probation. (Plea Tr. 9-10). The court rejected counsel's plea for a reduced sentence, noting Applicant's serious and violent prior record. (Plea Tr. 10). The plea court sentenced Applicant to fifteen years imprisonment for each offense with the sentences to be served concurrently. Applicant did not appeal his guilty pleas or sentences.

### **FACTUAL HISTORY**

These charges arise from an incident on October 13, 2013, at approximately 10:30 a.m. at an Exxon gas station in Moncks Corner. Applicant entered the station, walked towards the back, and went into the bathroom. When he emerged from the restroom, Applicant he had the sleeve of his sweatshirt pulled down over his hand to make it appear as if he was holding a gun. He walked directly to the counter, where he blocked in the store clerk, gestured with the hand he was intimating a gun, and demanded the clerk give him all the money in the cash register. The victim

believed Applicant was armed and gave him approximately two-hundred dollars from the register. Applicant then demanded the victim open the safe and when the victim replied that he was unable to open the safe, Applicant demanded the victim empty out his pockets and took the money. (Plea Tr. p. 5-6).

### **ALLEGATIONS RAISED**

In his application, Applicant alleged, he is being held in custody unlawfully based on allegations of “ineffective assistance of coun[sel], unreasonable search and seizure, and protecting my rights.” At the start of the evidentiary hearing, Respondent moved to dismiss Applicant’s allegations of “unreasonable search and seizure, and protecting my rights” as non-cognizable grounds for post-conviction relief. Applicant stated he had no objection to the State’s motion to dismiss and this Court dismissed these allegations.

At the hearing, Applicant asserted trial counsel was ineffective for failing to advise him he would be required to serve eight-five percent of his sentence before being eligible for early release based on the kidnapping conviction and asked this court to grant post-conviction relief only as to the kidnapping conviction.

### **SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING**

At the evidentiary hearing, Applicant testified on his own behalf. Applicant testified he has his GED and was working as an electrician before he was arrested. (PCR Tr. 6). Applicant testified he was arrested for armed robbery on November 3, 2013. (PCR Tr. 7). He testified he was appointed public defender Debby Littlejohn, but eventually retained plea counsel Melissa Gay. (PCR Tr. 7-8). He testified he thought he was going to court for a bond reduction motion on the day he entered his guilty plea. (PCR Tr. 8-9, 23). He testified when he got to the courthouse,

plea counsel advised him that he would not likely be released on bond, but that the presiding judge was "a lenient judge" and he had "a good chance of not too much time." (PCR Tr. 9-10). He clarified that counsel never promised him a particular sentence or that he would be released on probation without any active sentence within the Department of Corrections. (PCR Tr. 10). He testified he was only represented by plea counsel for approximately three weeks and they only spoke a few times. (PCR Tr. 23-24).

He testified he received all of his discovery materials from Littlejohn, the public defender who first represented him, and plea counsel. (PCR Tr. 11-12, 24). He elaborated he was given a physical copy of the discovery materials and knew the evidence the State would present against him. (PCR Tr. 24-25). However, he testified he never saw the surveillance video of the robbery. (PCR Tr. 12). He testified he spoke to plea counsel about going to trial, but that there were "money issues" that prevented him from going to trial. (PCR Tr. 12). He elaborated that he was paying plea counsel monthly installments but had not paid her full fee. (PCR Tr. 12). However, he later testified he discussed a trial with counsel and she told him he would not win if he proceeded to trial. (PCR Tr. 18, 23-24). He testified plea counsel never discussed the elements of armed robbery or strong arm robbery with him. (PCR Tr. 13-14). However, he testified he discussed the differences between armed robbery and strong arm robbery with Littlejohn. (PCR Tr. 15). Applicant testified Littlejohn had a private investigator with whom he met. (PCR Tr. 15). He testified Littlejohn presented him with the State's plea offer to allow him to plead to the lesser-included offense of strong arm robbery for a sentence of up to fifteen years in April of 2014. (PCR Tr. 15). He testified she told him to think about whether he wanted to take the offer or proceed to trial, but she never followed-up with him about it. (PCR Tr. 15-16). He testified the

next time he saw Littlejohn, she presented him with the indictment for kidnapping and he was not given an opportunity to accept the State's original plea offer to the strong arm robbery charge. (PCR Tr. 15-16, 21). He testified he only went to court with Littlejohn for a preliminary hearing. (PCR Tr. 16-17). He testified he hired plea counsel a month or two later. (PCR Tr. 17).

He testified a SLED agent was involved in his case and he brought this up to plea counsel, who told him this was not an issue. (PCR Tr. 14). He testified he and plea counsel never discussed whether the two charges were no-parole offenses or that he would be required to serve eighty-five percent of his sentence before being eligible for early release. (PCR Tr. 17). He testified he first learned about the eighty-five percent requirement immediately after his plea when plea counsel was explaining it to another client. (PCR Tr. 17-18). Applicant testified he asked counsel about this, causing her to get up, run into the courtroom, and talk to the judge. (PCR Tr. 18). He testified she then came back and told Applicant she would try to withdraw his sentence. (PCR Tr. 18). He testified he went back before the plea court a month later on a motion to withdraw his guilty plea. (PCR Tr. 19, 25-26).

He testified he is only asking this Court to grant post-conviction relief as to his kidnapping charge. (PCR Tr. 20). He testified he would have gone to trial if plea counsel had explained the elements of kidnapping, what the State would be required to prove at trial, possible defenses (including attacking the victim's identification of him), and potential sentences and parole restrictions. (PCR Tr. 20-21). He acknowledged he has prior convictions for second-degree burglary (violent) and assault and battery of a high and aggravated nature, for both of which he served time within the Department of Corrections. (PCR Tr. 26-27). He testified he served less than eighty-five percent of his sentences for both of those offenses. (PCR Tr. 29-30).

Applicant testified he did not know he would have to served eighty-five percent of his sentence for kidnapping before becoming eligible for early release and he would not have pled guilty if he had known this. (PCR Tr. 27-29). He acknowledged the plea court advised him his kidnapping sentence would count as a strike for future enhancement and the maximum and minimum sentences he faced. (PCR Tr. 28).

Plea counsel Melissa Gay testified next. She testified her long-term investigator, Brooks, visited Applicant in the detention center on May 20, 2014, after he contacted her office. (PCR Tr. 31). She testified her investigator and Applicant spoke about his case, including that he was represented by Littlejohn but she had not been able to secure a plea offer to strong arm robbery. (PCR Tr. 31). She testified she called Littlejohn and discussed the case, during which Littlejohn told her she thought the case was factually a strong arm robbery because Applicant did not have a weapon, although he told the victim he was armed. (PCR Tr. 31-32). She testified she was formally retained on June 28, 2014, and spoke with Applicant numerous times by telephone both before and after she was retained. (PCR Tr. 32, 34, 43-44). She testified Applicant's main focus was moving his case quickly and getting out of the Berkeley County Detention Center. (PCR Tr. 43-44). She said the primary focus on Applicant and his family was securing a favorable plea offer to avoid a trial. (PCR Tr. 43-44, 49). However, counsel testified she would have been prepared for trial if she had not been able to secure a favorable plea offer and would have argued this was not an armed robbery and kidnapping. (PCR Tr. 49-50).

Plea counsel described the case as "a pretty clear-cut situation" including video surveillance showing Applicant committing the robbery and an identification by the victim. (PCR Tr. 32-33). She testified it was standard practice in Berkeley County to indict a

defendant for kidnapping in addition to armed robbery because the victim is being told to stay still and not move, thereby satisfying the elements of kidnapping. (PCR Tr. 33). She testified in these situations, the State typically offered to allow defendants to plead to the lesser-included offense of strong arm robbery in addition to kidnapping, thereby removing the mandatory minimum sentence of ten years that accompanies armed robbery. (PCR Tr. 33-34). Plea counsel testified the State made this offer to Applicant on the day of his plea when he was scheduled to appear before Judge Young for a bond hearing. (PCR Tr. 34-35).

Plea counsel testified she received and reviewed all discovery, including the surveillance video. (PCR Tr. 34-35). She testified she was unable to personally show Applicant the video while he was in the detention center, but his family had watched the video and confirmed it was him and she is confident they had discussed the video's contents with Applicant. (PCR Tr. 35).

She testified she was hopeful Applicant would receive a sentence of less than the fifteen years the State was recommending, but that based on his "very bad record," Judge Young sentenced him to the full fifteen years. (PCR Tr. 35-36). However, she testified she told Applicant he would likely be convicted if he had proceeded to trial based on the video and the victim's identification of him. (PCR Tr. 36). She testified she did not have any valid claims on which she could attack either the video or the identification. (PCR Tr. 36, 43). She testified the plea offer was Applicant's best chance at receiving a lenient sentence and she argued he should receive a lesser sentence than the State's recommendation unfortunately without success. (PCR Tr. 37). She testified she does not recall discussing the eighty-five percent requirement with Applicant prior to his plea. (PCR Tr. 37, 39). She testified she could not recall if the plea court advised Applicant of this during his plea, but noted Applicant did not get her attention or

otherwise express surprise or displeasure. (PCR Tr. 37, 46-47). She testified her general practice is to tell clients that SCDC will calculate exactly how long an inmate will serve and that she cannot give them an expected term they will serve; however, she testified she does give general ranges one can expect with the ultimate determination coming from SCDC. (PCR Tr. 42).

She testified she spoke with Applicant by telephone and met with Applicant's family following the plea and they were upset with Applicant's sentence. (PCR Tr. 37-38). She testified she explained to them she could file a motion to withdraw the plea, but Applicant could potentially receive higher sentence. (PCR Tr. 38, 46). She advised Applicant's family he could file a PCR application if he wanted to challenge his conviction. (PCR Tr. 38, 46).

Counsel adamantly denied Applicant's allegations that she did not review the elements of the offenses with him. (PCR Tr. 38). She testified the biggest issue was that Applicant did not have a weapon and was overcharged. (PCR Tr. 38). She testified that based on South Carolina law, Applicant could and likely would have been convicted of armed robbery. (PCR Tr. 39). She testified she reviewed the possible sentences with Applicant, including the maximum and minimum potential sentences, prior to his guilty plea. (PCR Tr. 40-41). She testified she advised him to accept the State's plea offer because it would allow her to argue he should receive a sentence of less than the State's recommendation of fifteen years. (PCR Tr. 41).

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearings. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Applicant's sole allegation presented at the evidentiary hearing was that

plea counsel was ineffective for failing to advise him that he would be required to serve eight-five percent of his sentence for kidnapping before becoming eligible for early release and asked this Court to grant relief only as to his kidnapping conviction. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCPP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove 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, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

A guilty plea is not rendered involuntary if the defendant is not informed of the collateral consequences of his sentence, as parole eligibility is typically considered a collateral consequence of a sentence. Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174-75 (2002) (citing Brown v. State, 306 S.C. 381, 412 S.E.2d 399 (1991)). Plea counsel is not required to specifically advise a defendant of a collateral consequence of a plea, but when counsel undertakes to give advice on a collateral consequence and that advice is erroneous, grounds exist for post-conviction relief. See Smith v. State, 329 S.C. 280, 283, 494 S.E.2d 626, 628 (1997); Hinson v. State, 297 S.C. 456, 458, 377 S.E.2d 338, 339 (1989) (finding plea counsel ineffective for giving incorrect advice regarding parole eligibility). However, the applicant must prove he relied on the misinformation to receive post-conviction relief. Frasier, 351 S.C. at 389, 570 S.E.2d at 174-75 (citing Smith, 329 S.C. 280, 494 S.E.2d 626; Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)).

After careful review of the entire record, including the testimony presented at the evidentiary hearing, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action in regards to his allegation of ineffective assistance of counsel. Although trial counsel testified she does not recall advising Applicant he would be required to serve eight-five percent of his sentence before becoming eligible for early release, there is nothing establishing she actively misadvised Applicant regarding parole eligibility. Rather,

Applicant testified counsel did not advise him regarding parole eligibility before his guilty plea, and therefore, he has not established that any misadvice regarding parole eligibility induced his guilty plea. Therefore, this Court finds Applicant has failed to meet his requisite burden of proof and that this application must be denied and dismissed with prejudice.

### CONCLUSION


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

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

### **IT IS THEREFORE ORDERED:**

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

AND IT IS SO ORDERED this 26 day of October, 2017.

  
WILLIAM H. SEALS, JR.  
Presiding Judge  
Ninth Judicial Circuit

\_\_\_\_\_, South Carolina



ALAN WILSON  
ATTORNEY GENERAL

October 30, 2017

The Honorable Mary P. Brown  
Clerk of Court, Berkeley County  
Post Office Box 219  
Moncks Corner, South Carolina 29461-0219

Re: Brian Spann, #320123 v. State of South Carolina  
2015-CP-08-1059

Dear Ms. Brown:

Enclosed please find the original Order of Dismissal signed by the Honorable William H. Seals, in the above-captioned case, for filing in your office.

Pursuant to Rule 71.1(f), of the South Carolina Rules of Civil Procedure, please "provide notice of entry of judgment and serve a copy of the order or judgment to the parties as provided in Rule 77(d), SCRCF."

In addition, please forward proof of service and a time stamped copy back to our office for our file.

Sincerely,

Megan Harrigan Jameson  
Senior Assistant Deputy Attorney General

MHJ/jaj



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Charleston, SC 29405

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**December 4, 2017**

Kimberly McCall  
South Carolina Commission on Indigent Defense  
PO Box 11433  
Columbia, SC 29211-1433

RE: Brian Spann v. State of South Carolina; Case #: 2015-CP-08-1059

Dear Ms. McCall:

Enclosed is a duplicate set of Appeal documents that I have forwarded to the Clerk of the Supreme Court of South Carolina concerning the above-listed Post Conviction Relief (PCR) case. I was appointed to the PCR cases pursuant to a contract that I have with your office. I have requested that your office assume the appeal of this case.

Should you have any questions, please do not hesitate to contact me.

Thank you for your assistance with this matter.

Sincerely,



Rodney D. Davis  
South Carolina Bar # 12396  
4000 Faber Place Drive, Suite 300  
Charleston, SC 29405  
[Davis@LowCountryLawOffice.com](mailto:Davis@LowCountryLawOffice.com)

Enclosure(s). As stated above.  
RDD/mmt

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

The Honorable William H. Seals, Jr.

Case #: 2015-CP-08-1059

FILED  
17 NOV 21 AM 8:54  
CLERK OF COURT  
BERKELEY COUNTY, S.C.

*Handwritten signature*  
FILED

NOTICE OF APPEAL

Brian Spann appeals the denial of his Post Conviction Relief application in this case. The Application for relief was denied, following an evidentiary hearing before the William H. Seals, Jr., on April 6, 2017.

November 7, 2017



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Attorney for Appellant

Other Counsel of Record:  
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Columbia, SC 29211-1549  
Attorney for Respondent

THE STATE OF SOUTH CAROLINA  
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APPEAL FROM BERKELEY COUNTY  
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The Honorable William H. Seals, Jr.

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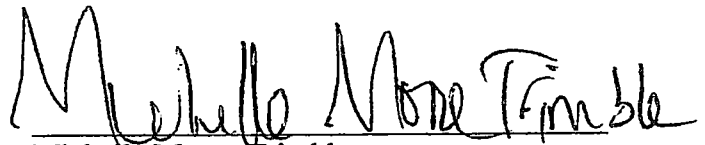
State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State by mailing a copy, via US Mail, to the address of record, Megan H. Jameson, P.O. Box 11549, Columbia, South Carolina 29211-1549, on November 8, 2017.

November 8, 2017



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Attorney for Respondent

FILED  
CLERK OF COURT  
BERKELEY COUNTY, S.C.

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FILED