

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable William H. Seals, Circuit Court Judge

BRIAN DELONTE SPANN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002480

APPENDIX

VICTOR R. SEEGER
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR PETITIONER

ALAN WILSON
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ATTORNEYS FOR RESPONDENT

RECEIVED

MAY 29 2018

S.C. SUPREME COURT

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STATE OF SOUTH CAROLINA COURT OF GENERAL SESSIONS
COUNTY OF BERKELEY 2014-GS-08-0496
 2014-GS-08-0497

STATE OF SOUTH CAROLINA)
) TRANSCRIPT OF RECORD
)
) August 28, 2014
)
BRIAN SPANN,)
) Moncks Corner, South Carolina
)
) Defendant.)

B E F O R E:

The Honorable Roger M. Young, Sr., Judge.

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

Brian Alfaro, Assistant Solicitor
Attorney for the State

Lisa Gay, Esquire
Attorney for the Defendant

1 (August 28, 2014.)

2 THE COURT: Brian Delonte Spann, is that you?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Mr. Spann, you're here today on
5 two charges. You've got a charge of -- it originally was
6 armed robbery, 10 to 30 years. The State is letting you
7 plead to strong-arm robbery, which is zero to 15. You
8 want to plead guilty to strong-arm robbery?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: And then you got a straight up
11 plea to kidnapping. You could get up to 30 years for
12 that. Do you want to plead guilty to that?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: All right. Now, this kidnapping
15 charge is a strike offense. I'm sure your lawyer went
16 over that with you, but I want to go over that with you
17 while we're on the record.

18 Do you know the game of baseball, where they
19 say three strikes and you're out?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Well, we have those. You take
22 that phrase, bring it over here to the law, and then,
23 basically, strikes means how many convictions you can
24 get. Out means life without parole.

25 We have two-strike and three-strike offenses.

1 If you get three of the serious offenses, you can get
2 life without parole. If you get two of the most serious
3 offenses, you go to jail without the possibility of
4 parole.

5 This kidnapping charge is one of the two
6 strike, most serious types, so after today, you're going
7 to have one strike against you, and if you ever get
8 another one, you're going to go to jail for the rest of
9 your life, and there is no possibility you get out on
10 parole.

11 Do you understand that?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: All right. You have the right to
14 a jury trial. You give up your right to a jury trial
15 when you plead guilty. If you want a trial, stop me and
16 we'll arrange that for you. The State has to present
17 enough evidence to convince 12 jurors you're guilty
18 beyond a reasonable doubt. All jurors have to agree
19 you're guilty in order to convict you, and, if convicted,
20 you would have the right to appeal. You can challenge
21 the State's evidence, put up evidence of your own,
22 testify if you want. If you don't want to testify, the
23 judge will tell the jury not to hold that against you
24 while deliberating.

25 Do you understand those rights?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: You want to give those rights up
3 and plead guilty today?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Are you pleading guilty because
6 you're guilty?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Are you under the influence of
9 drugs or alcohol today?

10 THE DEFENDANT: No, sir.

11 THE COURT: Do you need any more time with
12 your lawyer?

13 THE DEFENDANT: No, sir.

14 THE COURT: Are you satisfied with her
15 representation?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: The State is recommending I give
18 you 15 years on each charge and run them concurrent.
19 Other than that and the reduction from armed robbery to
20 strong-arm robbery, did anybody promise you anything or
21 threaten you to get you to plead guilty?

22 THE DEFENDANT: No, sir.

23 THE COURT: How old are you?

24 THE DEFENDANT: Thirty-two.

25 THE COURT: How far did you get in school?

1 THE DEFENDANT: Graduated.

2 THE COURT: Did you work before you got
3 arrested?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: What did do you?

6 THE DEFENDANT: Electrician.

7 THE COURT: Are you married?

8 THE DEFENDANT: No, sir.

9 THE COURT: Any children?

10 THE DEFENDANT: Three.

11 THE COURT: Does this gentleman understand
12 what he's doing here today?

13 MS. GAY: Yes, he does, Your Honor.

14 THE COURT: I find that his plea is freely,
15 voluntarily, and intelligently made.

16 What would the State like to tell me about
17 the case?

18 MR. ALFARO: Thank you, Your Honor. The
19 incident took place on October 13, 2013 at approximately
20 10:30 a.m. The defendant entered the Exxon gas station
21 on North Highway 52 here in Moncks Corner, Berkeley
22 County. The victim in this case is the clerk of the
23 store, Mr. Patel. He was working behind the counter when
24 the defendant walked into the store, walked towards the
25 back, and went into the bathroom.

1 When the defendant came out of the bathroom,
2 he had the sleeve of his sweatshirt pulled down over his
3 hand to make it appear as if he had a gun in his
4 possession. He walked directly behind the counter,
5 blocking Mr. Patel in behind the counter, and gestured
6 with the hand that had the sweatshirt pulled over it as
7 if he had a gun and demanded that Mr. Patel give him the
8 money from the cash register.

9 The victim believed that the defendant was,
10 in fact, armed and complied with the directions, gave the
11 defendant approximately \$200 in cash from the register.
12 The defendant then told Mr. Patel to open the safe. When
13 he said that he couldn't, the defendant told him to give
14 him whatever he had in his pockets, at which time the
15 victim gave him some more money from his pockets.

16 His prior record is a 2012 strong-arm
17 robbery; 2007 assault and battery of a high and
18 aggravated nature; 2008 burglary second, violent. Based
19 off his prior record, the State is asking for the maximum
20 sentence on the strong-arm robbery of 15 years and 15
21 years concurrent on the kidnapping as well.

22 THE COURT: Ms. Gay?

23 MS. GAY: I think my client is a little
24 confused about what his recommendation is. I've
25 explained to him that these offenses carry whatever -- up

1 to the maximum sentences of 15 and 30, and certainly
2 there's a range in the middle that you could consider
3 somewhere in there that you could choose. He understands
4 that the solicitor is asking you to sentence him to 15.
5 Obviously, he wants me to ask you to consider something
6 else.

7 Mr. Spann told you, Your Honor, that he's 32.
8 He had been working at the Google plant, had a really
9 good job at some point at the time of his arrest, but the
10 problem was is that he just found out he was having
11 another child. He has three already, and then he's got a
12 pregnant girlfriend who could be delivering any day.
13 She's not here for health reasons.

14 His mother is employed at MUSC, and we
15 thought she was going to be here, but I guess she
16 couldn't arrange to make it from her schedule, Your
17 Honor. She's also working very hard to help support his
18 children with their mother having a baby.

19 The thing about him, Your Honor, that he
20 tells me -- I want to tell you a little bit, just about
21 the strong arm, because I think this really is a strong
22 arm. There is a video, or an interview done of the
23 victim, and he does say everything that the solicitor
24 said, but he also basically admits that he knew that the
25 guy didn't have a gun but that he was scared and he

1 wasn't sure what would happen if he didn't comply, and so
2 that it was based on what was going on in terms of the --
3 you know, the incident itself, Mr. Alfaro and I have had
4 discussions about the victim's perception and did he
5 really believe there was a gun or not or could he have
6 even believed there was a gun based on the facts, but
7 there really was no gun, and the circumstances are such
8 that a reasonable-minded person would have probably
9 assumed that there wasn't.

10 So I do believe this is a real strong-arm
11 robbery, and he is -- you know, the recommendation is he
12 was indicted for kidnapping, which he's pleading guilty
13 to. We would ask you -- he wants to ask you to please
14 suspend his sentence now. He tells me that the reason he
15 did this was because he has family that lives out of
16 state and that he just felt so overwhelmed and he was
17 trying to get money to be able to leave the area to
18 relocate his family to somewhere where they could get
19 more assistance.

20 And, Your Honor, I basically said to him in
21 the back, you know, you need to claim your stupidity and
22 you need to admit to the judge that you made the worst
23 mistake of your life.

24 Mr. Spann's problem, which is what I have
25 also talked about, is the fact that he does have this

1 record, and that record is old, and so he has spent a
2 good bit of his time doing really good, productive stuff,
3 and so he would ask you to please consider being as
4 lenient as possible.

5 I know he wants to address the Court, Your
6 Honor, and as lenient as can you be, we would just ask
7 you to please consider not giving him the 15-year
8 sentence.

9 All right, Mr. Spann. Your turn.

10 THE COURT: What do you want to say?

11 MS. GAY: He said hold on a second.

12 THE COURT: What do you want to say,
13 anything?

14 THE DEFENDANT: I would -- first, I would
15 like to apologize to the Court, but like she was saying,
16 I am guilty of what I did. I'm taking my action for it.
17 The reason why I did it is that I was going through some
18 things with my family, and I'm not from here. I'm from
19 out of state. I'm from Washington, and I was trying to
20 get back up there.

21 I meant no harm to him when I did commit the
22 crime, and I was just trying -- that's why I went in
23 there without a gun. I mean, I have a lot of family out
24 here too, it's just since I been in the State of South
25 Carolina, I've been incarcerated, been in trouble. It's

1 my fault. I'm admitting to all that, and I just ask you
2 to please be a little lenient on me.

3 MS. GAY: If the Court would consider the
4 possibility of some type of split sentence, just to try
5 to deal with the amount of time, if the Court would
6 consider that.

7 THE COURT: Well, you know, if this was your
8 first offense and you had a good story, maybe, but that
9 record is something you cannot ignore, and it comes back
10 to haunt you.

11 You already had a strong-arm robbery and an
12 ABHAN and a burglary violent, so, you know, you used up
13 all the goodwill you got with the Court. You're lucky
14 you'll be getting 15 only.

15 Fifteen on both. They'll run concurrent.
16 305 days' credit. Good luck.

17 MR. ALFARO: Your Honor, just one thing for
18 the record. The kidnapping is not a sexually based
19 offense, so no register would be required.

20 THE COURT: All right. I'll mark on here
21 it's not a sexually based offense, and he won't have to
22 register as a sex offender.

23 MR. ALFARO: Thank you, Your Honor.

24 - - -

25 (Whereupon, the proceedings were concluded.)

I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Berkeley County, South Carolina, on the August 28, 2014.

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

July 13, 2015

Amanda K. Haffenden

Circuit Court Reporter

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF)

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

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2015-CP-08-1059
1059
1060

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 Berkeley County Detention Center
2. Name and location of Court which imposed sentence Berkeley County Courts 300 California Ave
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) Armed Robbery 2014650800496
 - (b) Kidnapping 2014650800497
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) Aug. 29, 2014 Sentence to 15 years ran Concurrent
 - (b) _____

2015 APR 30 AM 11:16
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

FILED

- (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
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. Berkeley County Courts
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. A withdraw it was denied
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. Oct. 1, 2014
- 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) 6th amendment
- (b) 4th amendment
- (c) 14 amendment

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

- (a) Ineffective Assistance of Council
- (b) Unreasonable of Search and Seizure
- (c) Protecting my Rights

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. _____

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

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. Melissa Gay
 - ii. Debbie Little Sohn
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. Sentencing by Melissa Gay found Guilty
 - ii. Debbie Little Sohn was Relieved from Case
 - iii. _____

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

Reconsideration

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

No

17
2015-CP-08-1060
1059

STATE OF SOUTH CAROLINA)
)
County of)

VERIFICATION

I, Brian, 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.

Brian Jones
Brian Jones

SWORN to and subscribed before me this 28
day of April, 2015.

Debra Jones (L.S.)
Notary Public

My Commission Expires: 11-4-2015

FILED
2015 APR 30 AM 11:16
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

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

I, Brian, 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.

Brian Jones
Applicant

SWORN or affirmed to and subscribed before me this
28 day of April, 2015.

Debra Surles
Notary Public

My Commission Expires: 11-4-2018

2015 APR 30 AM 11:16
 MARY P. BROWN
 CLERK OF COURT
 BERKELEY COUNTY, SC

FILED

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Brian Spann, #320123,

2015-CP-08-1059

Applicant,

v.

RETURN

State of South Carolina,

Respondent.

The Respondent, making its Return to the application for Post-Conviction Relief (PCR) filed April 30, 2015, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. The Applicant was indicted at the April 2014 term of the Berkeley County Grand Jury for Armed Robbery (2014-GS-08-0496) and Kidnapping (2014-GS-08-0497). Melisa Gay, Esquire, represented the Applicant. On August 28, 2014, the Applicant pled guilty to Strong Arm Robbery as a lesser included offense and to kidnapping as indicted. The Honorable Roger M. Young, Sr. sentenced the Applicant to confinement for fifteen (15) years for kidnapping and strong armed robbery; sentences to run concurrently. Applicant did not appeal his convictions or sentence.

Attached herewith and incorporated herein are the records of the Berkeley County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, 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(sic)"
2. "unreasonable search and seizure"
3. "protecting my rights"

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 allegations are 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.

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

[Signature on Following Page]

V.

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

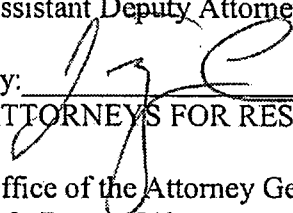
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

JOHANNA VALENZUELA
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

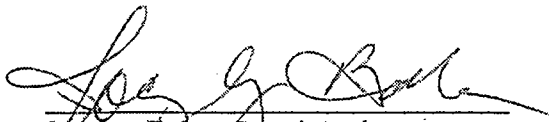
APRIL 6th, 2016.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	)	
	)	
	)	2015-CP-08-1059
	)	
BRIAN SPANN, #320123	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

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:

Rodney D. Davis, Esquire
Lowcountry Law Office
4000 Faber Place Drive, Suite 300
Charleston, SC 29405

DATED this 6th day of April, 2016.


 Jocelyn Baker, Legal Assistant
 For Respondent

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF BERKELEY) Court of Common Pleas
3 _____) Case No. 2015-CP-08-1059
4 BRIAN SPANN,)
5 Plaintiff,)
6 vs.) Transcript of Record
7 STATE OF SOUTH CAROLINA,)
8 Defendant.) DATE: January 13, 2017
9 _____)

10 B E F O R E:

11 THE HONORABLE WILLIAM SEALS
12

13 A P P E A R A N C E:

14 RODNEY DAVIS
15 Attorney for the Plaintiff

16 ALICIA OLIVE
17 Attorney for the Defendant

18
19 Karen V. Andersen, RMR, CRR
20 Circuit Court Reporter
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1 MS. OLIVE: Thank you, Your Honor. May it please
2 the Court. This is Brian Spann, 2015-CP-08-1059. Mr. Spann
3 was indicted in April 2014 for armed robbery and kidnapping.
4 Melissa Gay represented him on those charges. On August
5 28th, 2014, he pleaded guilty to strong-arm robbery as a
6 lesser-included offense and to kidnapping as indicted. That
7 was before Judge Roger Young.

8 Judge Young sentenced him to 15 years for kidnapping
9 and 15 years for strong-arm robbery to run concurrently. He
10 did not appeal his conviction or sentence.

11 He filed this application on April 30th, 2015,
12 alleging ineffective assistance of counsel. He also alleged
13 unreasonable search and seizure and "protecting my rights".

14 Your Honor, the State would move to dismiss those
15 last two allegations, the unreasonable search and seizure as
16 a direct appeal issue, and "protecting my rights" as an
17 overly vague claim.

18 THE COURT: Any objections to that?

19 MR. DAVIS: No, Your Honor.

20 THE COURT: Granted.

21 MS. OLIVE: Thank you, Your Honor. And Mr. Spann is
22 present in the courtroom today and represented by Rodney
23 Davis. I will turn it over to Mr. Davis at this time.

24 THE COURT: Mr. Davis.

25 MR. DAVIS: Thank you very much, Your Honor. May it

1 please the Court. I do represent Mr. Spann. We are prepared
2 to go forward. I simply ask you to do the risk questions
3 with him, please.

4 THE COURT: Armed robbery carries up to how much
5 time?

6 MR. DAVIS: Armed robbery is 10 to 30, Your Honor.

7 THE COURT: 10 to 30. And kidnapping is?

8 MR. DAVIS: 0 to 30, Your Honor.

9 THE COURT: 0 to 30. All right.

10 Mr. Spann, I want you to understand what you are
11 doing here today and what you stand to gain or lose. All
12 right? If you have any questions, you just ask me.

13 First thing I want to tell you is, this is a
14 post-conviction relief hearing. And if you win your
15 post-conviction relief hearing, all it means is that you just
16 start over. Do you understand? In other words, you can go
17 back and you could be facing armed robbery and kidnapping.
18 All right? If the State wanted to, they could take to you to
19 trial for armed robbery, which means a minimum of 10 years
20 and a maximum of 30 years. And you could be facing the
21 kidnapping as well, which is a maximum of 30 years.

22 Do you understand that?

23 MR. SPANN: Yes, sir.

24 THE COURT: Technically, you could be facing up to
25 60 years in jail. Do you understand that?

1 MR. SPANN: Yes, sir.

2 THE COURT: So I just want you to know that if you
3 win your post-conviction relief hearing, it doesn't always
4 mean things get better. You could actually be worse off than
5 you are now. Do you understand that?

6 MR. SPANN: Yes, sir.

7 THE COURT: Have you talked to your lawyer about
8 that?

9 MR. SPANN: Yes, sir.

10 THE COURT: Has he explained that to you?

11 MR. SPANN: Yes, sir.

12 THE COURT: Do you have any questions for him or me
13 at this time?

14 MR. SPANN: No, sir.

15 THE COURT: All right. Do you want to go ahead and
16 go forward with your post-conviction relief hearing?

17 MR. DAVIS: May we have just one second?

18 THE COURT: Yes.

19 MR. DAVIS: Your Honor, thank you for the extra
20 time. I apologize, but thank you. We were able to chat. I
21 do not believe he needs to talk to me more, but I think we
22 paused before you were done with all your questions. So he
23 does understand what you asked so far. If you have any other
24 questions as a follow-up, he's ready to proceed forward.

25 THE COURT: I'm ready when you are. Call your first

1 witness.

2 MR. DAVIS: We would call Mr. Spann as our first
3 witness.

4 BRIAN SPANN,
5 having been duly sworn, testifies as follows:

6 THE CLERK: I need you to state your full name and
7 spell your last name for the record.

8 THE WITNESS: Brian Delanie Spann.

9 DIRECT EXAMINATION

10 BY MR. DAVIS:

11 Q. Spell your last name.

12 A. S-p-a-n-n.

13 Q. Mr. Spann, just a little background before we get
14 started, if you don't mind. How old are you today?

15 A. 34.

16 Q. And how far did you go in school?

17 A. 11th.

18 Q. Now, you did not get your -- you did not graduate,
19 but you either are working on or got your GED?

20 A. I have it.

21 Q. And what kind of work were you doing before you were
22 arrested?

23 A. Electrician work.

24 Q. And there's no medical issues or any medication you
25 are taking today that would affect what we are doing today?

1 A. No, sir.

2 Q. All right. Judge Seals just talked to you about
3 your charges and the potential punishment of your original
4 charges. Let me start there. Can you tell the judge when
5 you were first arrested, what is the charge you were arrested
6 for?

7 A. When I first was arrested in October of 2013, I was
8 arrested for armed robbery.

9 Q. The incident was in October. You were arrested
10 early November; do you recall?

11 A. November 3rd.

12 Q. Of 2013?

13 A. 2013.

14 Q. Arrest warrant for armed robbery, correct?

15 A. Correct.

16 Q. There was no other charge that you were arrested on;
17 is that right?

18 A. Correct.

19 Q. After you were first arrested, did you hire an
20 attorney or was an attorney appointed for you?

21 A. I had a public defender, Ms. Debby Littlejohn.

22 Q. And now, ultimately, though, when you went to court
23 to resolve the case, you had hired an attorney; is that
24 right?

25 A. Yes, sir.

1 Q. And who did you hire?

2 A. Lisa Gay.

3 Q. Do you see her in the courtroom here today?

4 A. Yes, in the back.

5 Q. How long do you recall that it was that you worked
6 with Ms. Littlejohn at the public defender's office before
7 you hired Ms. Gay; do you recall?

8 A. From November when I was appointed to her -- she was
9 appointed to me November, I believe. And I hired the
10 attorney Ms. Lisa probably -- I want to say June, either late
11 June or the beginning of July of 2014.

12 Q. Okay. And then, ultimately, you go to court in
13 front of Judge Young in August of 2014; is that right?

14 A. Correct.

15 Q. Now, you have some complaints about how Ms. Gay
16 handled the case leading up to the guilty plea; is that
17 right?

18 A. Yes.

19 Q. First of all, how many -- prior to the guilty plea
20 with Judge Young, how many times did you meet with Ms. Gay?

21 A. Prior to, none.

22 Q. And can you tell the judge, were you able to make
23 bond on the armed robbery, or did you remain in the county
24 jail?

25 A. I remained in the county jail, but I was going -- I

1 asked for bond reduction. That's the reason why I was going
2 to court, was for reduction.

3 Q. We will get to that in just a second. So the judge
4 will understand, you were here at the Hill Finklea Detention
5 Center from your arrest date all the way up until your guilty
6 plea date; is that correct?

7 A. Correct.

8 Q. And if you hired Ms. Gay in the summertime of 2014,
9 from then until August, she did not come to visit you at the
10 county jail?

11 A. No. The first time I seen her is after I pled
12 guilty. And I stayed in the county before I went up the
13 road.

14 Q. Okay. So let's talk about when you actually came to
15 court in August 2014. You just mentioned it, but explain to
16 the judge, what was it that you understood you were coming
17 across the walkway from the jail to the courthouse for in
18 August 2014, for what purpose?

19 A. I was coming for the purpose for a bond reduction.

20 Q. Okay. And once you arrived at the court, did you
21 have a chance to talk to Ms. Gay?

22 A. We talked briefly. And she was letting me know that
23 the judge that I was going in front of, basically, I wasn't
24 going to get a reduction, but the judge, he was a lenient
25 judge and he was going to give me, you know, a good chance of

1 not too much time, or whatever, but I had a good chance of
2 getting a little bit of time than what I was going to get.

3 Q. Okay. So let me stay on that point for a second.
4 You came over thinking you were going to try to get released
5 on bond, but then the conversation changed to resolving your
6 case through guilty plea; is that right?

7 A. Correct.

8 Q. What was Ms. Gay's advice about whether you should
9 plead guilty or have your bond hearing that day?

10 A. Well, with the bond hearing, she basically just said
11 I wasn't going to get that. But since it was a good judge,
12 he's a lenient judge, that I should go forth with it, with
13 what I was going to court for.

14 Q. Did she give you any indication what the judge would
15 do as far as sentencing if you did plead guilty?

16 A. She didn't never say specifically how much he was
17 going to give me or anything like that, but she said he was a
18 good judge to go in front of and wasn't going to be a time
19 that the charges carry.

20 Q. Was there any mention of going home or being put on
21 probation rather than being sentenced to prison?

22 A. No, she never said that.

23 Q. Okay. Was it your understanding that she felt you
24 ought to plead guilty that day or not?

25 A. Yeah.

1 Q. It was your understanding that she felt you should
2 plead guilty that day?

3 A. Yeah.

4 Q. Now, I need to go over some specific things. During
5 that conversation then, was there ever any discussion about a
6 defense to your charge of armed robbery?

7 A. No.

8 Q. During that discussion with Ms. Gay, was there
9 any -- let me back up for a second. Were you provided your
10 Rule 5 materials in this case, the discovery materials?

11 A. From her or ...

12 Q. Did you receive --

13 A. Yeah, I have one.

14 Q. Now, did you get that from Ms. Gay or did you get
15 that from Ms. Littlejohn?

16 A. I believe I got it from both of them.

17 Q. And are you aware, from reviewing those materials,
18 that there was a video involved in your case?

19 A. Correct.

20 Q. And this video, the State indicated that the
21 employee would be able to identify you. Is that your
22 understanding from my reviewing the materials?

23 A. That the employee?

24 Q. Uh-huh.

25 A. No. It was implied to me that the officer was going

1 to testify.

2 Q. About who it was on the video? Okay. Did you and
3 Ms. Gay ever discuss that issue about the identification?

4 A. No.

5 Q. Okay. Was there ever any discussion about if you
6 went to trial, how she might try to block that identification
7 and not to let the jury hear that?

8 A. No. She never -- we never spoke on that
9 specifically. I did ask her about going to trial. But, you
10 know, it was kind of money issues and didn't have the money
11 to go to trial.

12 Q. Let's talk about that for a second. If you were
13 incarcerated, was it family or friends or whatever that were
14 coming up with the money to hire Ms. Gay?

15 A. Yes, sir.

16 Q. Do you know whether they had paid her in full or not
17 as of the August date?

18 A. No, they didn't pay her in full, but they were
19 paying her, I believe, monthly.

20 Q. There was an issue you had with the evidence in the
21 case. There was a search of a vehicle; is that right?

22 A. Correct.

23 Q. Can you tell Judge Seals what your complaint is
24 about that issue.

25 MS. OLIVE: Your Honor, I would object to this

1 testimony.

2 THE COURT: How is that relevant? How is that
3 relevant?

4 BY MR. DAVIS:

5 Q. Let me ask a more specific question then.

6 Did Ms. Gay talk to you at all about attempting to
7 block any evidence seized through a search by the police?

8 A. No.

9 Q. You were aware some evidence was seized, by reading
10 your discovery?

11 A. Evidence as far as dealing with the case, no. There
12 wasn't no evidence of the case involved in it. I mean, me
13 and Ms. Gay never talked about anything as far as the case.

14 Q. To be specific then, did she discuss the elements of
15 armed robbery with you?

16 A. Armed robbery? Not that I recall.

17 Q. Did she discuss with you what the State would have
18 to prove to a jury to convict you of armed robbery?

19 A. No.

20 Q. How about strong-arm robbery, did she talk to you
21 about the elements of strong-arm robbery?

22 A. No.

23 Q. How about what the State would have to convince a
24 jury -- what evidence the State would have to prove to a jury
25 to convict you of strong-arm robbery?

1 A. No.

2 Q. Did you try to have a discussion -- let me ask you
3 this. Who was the -- do you recall who the arresting agency
4 was, meaning what law enforcement agency arrested you?

5 A. I want to say it was Moncks Corner. I think it was
6 Berkeley. I can't remember. Moncks Corner, I believe it was
7 Moncks Corner Police Department.

8 Q. Speak up a little bit.

9 A. I believe it was Moncks Corner Police Department.

10 Q. But you are also aware that there was a SLED agent
11 involved in this in some way?

12 A. Correct.

13 Q. Did you try to have a discussion with either of your
14 attorneys about why a SLED agent was involved?

15 A. No. When I had Littlejohn, she never discussed
16 anything to me. That's why I actually tried to hire an
17 attorney, Ms. Lisa Gay. And when I brung (sic) that to her
18 attention, she basically told me that it had nothing to do
19 with the case.

20 Q. So you never got a clear answer on why a SLED agent
21 was involved in this case from either of your attorneys?

22 A. No.

23 Q. Let's go back a second. Just to make this clear,
24 while working with Ms. Littlejohn, did she have an
25 investigator who was working with her?

1 A. Yes, ma'am (sic).

2 Q. Were there discussions then with Ms. Littlejohn
3 about the difference between armed robbery and strong-arm
4 robbery?

5 A. Yes, ma'am (sic) -- yes, sir.

6 Q. And where did that ultimately lead the discussions
7 with Ms. Littlejohn about the strong-arm robbery charge?

8 A. Basically, Ms. Littlejohn, or investigator and my
9 mother was there, and we all talked. And she basically just
10 told me that she was going to give me some time as far as
11 taking the 15 years. They were trying to give me 0 to 15 for
12 strong-arm. They were going to drop the armed robbery to
13 strong arm robbery. And they offered me 0 to 15. And she
14 told me they were going to come back before they go to court
15 for the court session to see what I was going to do, either
16 take the plea or take it to trial. And she never came back.

17 Q. What time frame would that have been?

18 A. It was in April, April 2014. She told me that she
19 was coming back during that court term to see if I was going
20 to take the 15 years -- not 15, 0 to 15 years for strong-arm
21 robbery or take it to trial. And at that time, I was -- I
22 didn't know what I wanted to do. So she said she was going
23 to give me a few days when the court starts up and I would
24 know what to do then.

25 And next thing I know, she come back and bring me

1 papers for indictment for kidnapping.

2 Q. And when you say "she", that is --

3 A. Ms. Littlejohn.

4 MR. DAVIS: Your Honor, can I have just one moment,
5 please?

6 THE COURT: Sure.

7 BY MR. DAVIS:

8 Q. All right. Let's walk through that again so that's
9 clear. You were talking with Ms. Littlejohn about strong-arm
10 robbery, correct?

11 A. Correct.

12 Q. She had some conversation with you in April of 2014
13 about pleading guilty to strong-arm robbery?

14 A. 0 to 15, yeah.

15 Q. She indicates she will give you a few days to think
16 about it. And then when you next meet with her, what
17 happened?

18 A. The next time she said when she comes back and I
19 decide not to take the 0 to 15, then I believe his name was
20 Brian Alfaro, the solicitor, said he would give me a chance
21 to take 0 to 15; if not, then they were going to indict me on
22 a kidnapping charge.

23 Q. And so the next time you saw Ms. Littlejohn, what
24 was the conversation?

25 A. Indictment papers for kidnapping and armed robbery.

1 Q. Were you ever taken to court by Ms. Littlejohn?

2 A. My preliminary hearing; that was before all that,
3 though.

4 Q. Okay. Okay. All right. And so that was April. So
5 a month or two later, you are hiring Ms. Gay; is that
6 right?

7 A. Correct.

8 Q. Did you and Ms. Gay ever discuss the kidnapping
9 charge?

10 A. No.

11 Q. When did you first have any conversation about the
12 kidnapping charge with Ms. Gay? Was it in the courtroom?

13 A. It was in the courtroom, but that was the time of
14 the bond hearing, when I had my bond.

15 Q. The day you were supposed to come over for your bond
16 and the day that turned into the guilty plea? I need you to
17 answer out loud.

18 A. Yes.

19 Q. Did Ms. Gay ever talk to you about the fact that the
20 kidnapping charge was a no-parole offense?

21 A. No, we never talked about that.

22 Q. Or an an 85 percent offense?

23 A. Never talked about that.

24 Q. When did you first hear about kidnapping carrying
25 the 85 percent sentence?

1 A. She also had another client that was sitting next to
2 me after I came from out of the courtroom and she was
3 explaining to him his charges. And we had the same exact
4 charges. And that's when she explained to him about the 85.
5 And that's when I said something to her, stopped her. And I
6 was like, well, Ms. Gay, I didn't know nothing about this.
7 And that's when she got up and she ran in the courtroom, and
8 I guess she talked to the judge. And she came back out and
9 said she's going to try to put in for a withdraw of the
10 sentence.

11 Q. And so the judge will understand it, maybe he
12 already does, that conversation happened after your guilty
13 plea, but here at the courthouse?

14 A. Yes, sir.

15 Q. Did Ms. Gay ever indicate to you that kidnapping was
16 a most serious offense or a strike offense?

17 A. I can't remember. I can't remember if she asked me
18 that question, but I know she didn't let me know that it was
19 85 percent.

20 Q. Did you and Ms. Gay at any time talk about plans for
21 a trial?

22 A. We did over the phone, but she was -- basically,
23 told me that I wasn't going to win it.

24 Q. Did you have any discussions with her that would
25 lead you to believe that she was preparing for a trial?

1 A. No, no, sir.

2 Q. Did she ever talk to you about the process on how
3 trials are presented in South Carolina state court?

4 A. No, sir.

5 Q. What was her advice to you about your case, to fight
6 it or to enter a guilty plea?

7 A. Honestly, we never even talked about that. I mean,
8 I talked to her paralegal. You know what I mean? Me and her
9 paralegal were talking. He was basically telling me that we
10 had a good chance. As far as seeing or talking to Ms. Gay,
11 never did answer that day in court. So me and her never
12 discussed anything further than what she said.

13 Q. I think there was just one more issue, Mr. Spann.
14 After the plea and after that conversation about the 85
15 percent, was there another court proceeding after that?

16 A. We came back for the withdrawal of the sentence a
17 month later.

18 Q. So Ms. Gay did file a motion to withdraw your guilty
19 plea; is that right?

20 A. She did.

21 Q. And you came back in front of Judge Young about a
22 month later?

23 A. Uh-huh, yes, sir.

24 Q. And what was her indication to you about the
25 potential outcome of that hearing?

1 A. We talked briefly. And she basically said that, you
2 know, since things happen in that order like that, that I
3 had, like, 80 percent chance of getting it overturned; not go
4 home, but get it overturned and come back. She explained to
5 me as far as coming back to the county, how the proceeding
6 goes, come back here, start all over, just like how you told
7 me earlier. She did explain that to me.

8 Q. So let me review again. If she had discussed with
9 you any defenses to the kidnapping charge, would you have --
10 before I get into that.

11 Mr. Spann, are you ultimately going to ask this
12 Court to vacate and undo both convictions or the kidnapping
13 conviction?

14 A. Just the kidnapping.

15 Q. Okay. So as to that charge, if Ms. Gay had talked
16 to you about any potential defenses to the kidnapping, would
17 you have pled guilty or would you have gone to trial?

18 A. I would have gone to trial.

19 Q. If Ms. Gay had discussed with you about how she
20 might try to block the identification of you, would you have
21 pled guilty to kidnapping or gone to trial?

22 A. I would have gone to trial.

23 Q. If she had warned you that it was a most serious or
24 one-strike offense, would you have pled guilty or gone to
25 trial?

1 A. Went to trial.

2 Q. If she had not indicated it's a lenient judge, you
3 will probably only get a few years, would you have pled
4 guilty to kidnapping or gone to trial?

5 A. I would have went to trial.

6 Q. And, finally, I think for you the biggest one, if
7 you had been warned that the kidnapping charge, whatever
8 sentence you got, you must serve it 85 percent, would you
9 have pled guilty or gone to trial?

10 A. Gone to trial.

11 Q. One last question. If, and this gets back to --
12 forgive me, but this gets back to -- two more questions.
13 This gets back to the indictment on the kidnapping. Were you
14 ever given the opportunity to accept or reject the
15 0-to-15-year offer on the strong-arm robbery?

16 A. No, I was not. Ms. Littlejohn was supposed to be
17 coming back to let me know and to see what I was going to do.
18 She never came back. When she came back, that's when she
19 came back with an indictment papers.

20 MR. DAVIS: Thank you, Mr. Spann.

21 Your Honor, this may or may not be the appropriate
22 time, but I would ask leave to the Court to amend based on
23 that testimony. We just had the prior case and --

24 THE COURT: Any objection to that from the State?

25 MS. OLIVE: Amend? I'm sorry. What are you saying?

1 MR. DAVIS: What I would seek to do is, based on
2 Mr. Spann's testimony about an offer that was made by the
3 State through his original attorney that he was not given a
4 chance to accept or reject -- forgive me, Judge. But based
5 on that, and we just dealt with that issue, I would, under
6 *Frye* and *Lafler*, move to amend the application to conform it
7 to the testimony today to allow us to make the argument. And
8 I will need to talk to him in a moment before I summarize in
9 the end. But I, as his lawyer, know that's now a potential
10 available argument.

11 MS. OLIVE: I would object to amending at this
12 point, because we don't have his original trial counsel to
13 provide testimony about that. Clearly, the offer was
14 communicated and he then retained different counsel.

15 THE COURT: I'm going to overrule the objection.
16 It's a little late in the ball game to be doing something
17 that significant with a lawyer that's not even here.

18 MS. OLIVE: Thank you, Your Honor.

19 MR. DAVIS: Thank you, Your Honor. That's all the
20 questions I would have.

21 THE COURT: All right. Cross?

22 CROSS-EXAMINATION

23 BY MS. OLIVE:

24 Q. Good morning, Mr. Spann.

25 A. Good morning.

1 Q. So when you went -- did you ever have the bond
2 hearing that day?

3 A. No, I did not.

4 Q. And you stated -- first you stated that the first
5 time you ever saw Ms. Gay was after your plea, but then you
6 said that you talked to her before your plea.

7 A. Before the plea, yes. It was actually the bond
8 hearing. I was going for a bond reduction. That's when I
9 saw her.

10 Q. Okay. And she explained to you that even though you
11 were there for a bond reduction, she -- if you wanted to
12 enter a guilty plea that day, that that judge might be a good
13 judge to go in front of?

14 A. Yes, ma'am.

15 Q. Did you tell her that you wanted a trial?

16 A. We did -- we did talk about it, but she told me I
17 would lose.

18 Q. Okay. So your testimony before was that you never
19 talked about it, but now -- so you did talk about going to
20 trial?

21 A. Yeah, over the phone. We wasn't in front of each
22 other. It was over the phone.

23 Q. Okay. How many phone conversations did you have
24 with her; do you remember?

25 A. I would say one or two.

1 Q. Just one or two?

2 A. One or two.

3 Q. During her whole representation of you?

4 A. Yes. She only represented me for, like, three
5 weeks. I only had her for, like, three weeks.

6 Q. And during those conversations, she said that you
7 wouldn't win if you went to trial?

8 A. She said she didn't think I would win.

9 Q. But did she tell you that it was your decision
10 whether to go to trial?

11 A. We didn't talk further than that. After she said I
12 wouldn't win, we jumped off that subject and went back to
13 bond reduction.

14 Q. Now, when she told you that she didn't think you
15 would win, did she explain to you that that was based on the
16 evidence that the State had against you?

17 A. Yes, ma'am.

18 Q. And you stated that both these attorneys provided
19 the Rule 5 discovery to you?

20 A. I did get from both of them.

21 Q. You did?

22 A. Yes, ma'am.

23 Q. And you had a chance to review that?

24 A. You said, did I have a chance?

25 Q. You had it in your possession?

1 A. Yeah.

2 Q. So you looked at it?

3 A. Yes, ma'am.

4 Q. So you knew what the State's evidence -- you knew
5 what the evidence was against you?

6 A. Yes, I knew.

7 Q. Okay. And the State made a recommendation of 15
8 years in this case?

9 A. Correct.

10 Q. And that was recommendation of 15 years concurrent
11 on both the strong-arm robbery and kidnapping?

12 A. Yes, ma'am.

13 MS. OLIVE: Beg the Court's indulgence, Your Honor.
14 BY MS. OLIVE:

15 Q. And you said that you had a subsequent hearing after
16 your plea. Was that to withdraw your plea or was that a
17 motion to reconsider the sentence; do you remember?

18 A. Say that again, ma'am.

19 Q. You said that you went back before a judge after
20 your guilty plea. And that was -- was that a motion to
21 reconsider your sentence or was that to actually withdraw
22 your plea?

23 A. I believe she said it was a withdrawal sentence.

24 Q. Okay. You don't think it was a motion to reconsider
25 your sentence?

1 A. No. She told me it was a sentence of withdrawal,
2 withdrawal of sentence. That's what she told me.

3 Q. So you did not -- your testimony was that you did
4 not know going into court that the 15 years on the kidnapping
5 was going to be a no-parole?

6 A. Correct.

7 Q. And you had prior convictions for burglary second,
8 violent, assault and battery of a high and aggravated nature;
9 is that right?

10 A. Correct.

11 Q. Did you do active time on those?

12 A. What do you mean by active time?

13 Q. Were you sentenced to active time in the Department
14 of Corrections for those?

15 A. Yes.

16 Q. Did you know that those were no-parole at that time?

17 A. Correct, yes, I did. Oh, excuse me.

18 MR. DAVIS: Your Honor, I'm going to object to that.
19 That's an inaccurate statement of law.

20 THE COURT: She asked the question.

21 THE WITNESS: What was the question again?

22 MR. DAVIS: Then I would object. It calls for a
23 legal conclusion.

24 THE COURT: She was asking what he knew about the
25 law. I'm going to overrule it.

1 THE WITNESS: Can you ask me that question again?

2 THE COURT: He can explain all he wants.

3 BY MS. OLIVE:

4 Q. You previously had a conviction for burglary second,
5 violent, and you said you served active time in the
6 Department of Corrections?

7 A. Right.

8 Q. So you were familiar going into this plea that there
9 was a difference between no-parole offenses, 85 percent --

10 A. Yeah, because I was told. You know what I'm saying?
11 My lawyer talked to me about all of this.

12 Q. But, again, going into this plea, there were no --
13 your testimony is you had no discussions with your attorney
14 about 85 percent on kidnapping?

15 A. No, I did not.

16 Q. What was your expectation about how much time you
17 were going to serve?

18 A. What was my expectation?

19 Q. Right. The State recommended 15 years, right?

20 A. Correct.

21 Q. What was your expectation about how much time you
22 were going to serve?

23 A. You are talking from my lawyer or --

24 Q. I'm saying going into your plea, just what was your
25 knowledge in terms of what sentence you were going to serve

1 based on the 15-year recommendation?

2 A. I'm thinking running concurrent, I didn't know that
3 the 85 percent was for kidnapping. So I'm thinking, okay,
4 well, 15 years, you will do 65 percent off 15 years and you
5 can get credit to work it down to 51 percent.

6 Q. And you stated that she didn't explain to you that
7 that was a strike?

8 A. The judge explained it to me.

9 Q. So the judge explained that to you?

10 A. Yeah.

11 Q. And the judge did also go over the charges with you
12 and the maximum sentence that you could face on those
13 charges?

14 A. He did.

15 Q. Did you discuss your version of the facts with Ms.
16 Gay?

17 A. Of the charges?

18 Q. Right. Did you discuss with her your version of
19 what happened?

20 A. To her paralegal, yeah.

21 Q. Ultimately, it was your decision to plead guilty?

22 A. I mean, I pled guilty because she said the judge is
23 going to be lenient. I was ready to go. I mean, I wanted to
24 get everything behind me, but I didn't know the outcome was
25 going to be that.

1 And, honestly, I didn't know that the kidnapping,
2 you know, that they stood on that, because I never was talked
3 to about it. All that was do (sic), I was served the
4 indictment papers from Littlejohn, and that's it. Never
5 really talked to about it.

6 Q. And you indicated to the judge in your plea that you
7 were satisfied with your attorney?

8 A. I believe I did. I believe I did.

9 MS. OLIVE: That's all the questions I have.
10 Mr. Spann, thank you.

11 THE COURT: Any redirect?

12 MR. DAVIS: Yes, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. DAVIS:

15 Q. On that last question, when you answered the judge
16 about whether you were satisfied with Ms. Gay or not, was
17 that before or after you knew that the kidnapping was 85
18 percent?

19 A. Before.

20 Q. She can't take us both down at the same time. So
21 let me finish first. Thank you.

22 Second of all, on your prior record, the attorney
23 general brought up about your prior record for burglary
24 second, violent, and assault and battery of a high and
25 aggravated nature. You went to prison for those charges?

1 A. Yes, I did.

2 Q. Did you serve 85 percent or something less than 85
3 percent?

4 A. Less than 85 percent.

5 MR. DAVIS: Thank you, Mr. Spann. That's all the
6 questions I have.

7 THE COURT: All right. Any recross?

8 MS. OLIVE: No, Your Honor. Thank you.

9 THE COURT: You may step down. Thank you.
10 Call your next witness.

11 MR. DAVIS: If I can have just a moment, Your Honor.
12 Your Honor, that's the applicant's presentation.

13 THE COURT: Okay. The State will call their first
14 witness.

15 MS. OLIVE: Thank you, Your Honor. The State would
16 call Melissa Gay.

17 MELISSA GAY,
18 having been duly sworn, testifies as follows:

19 THE CLERK: Please state your name for the record
20 and spell your last name.

21 THE WITNESS: My name is Melissa Gay, G-a-y.

22 DIRECT EXAMINATION

23 BY MS. OLIVE:

24 Q. Good morning, Ms. Gay. I believe it's just about
25 afternoon. You represented Mr. Spann on these charges?

1 A. I did. And maybe it would be easier if I just
2 explained to you how the representation went.

3 Q. Yes, ma'am. Can you briefly explain how you came to
4 represent Mr. Spann.

5 A. Yes. I looked through my file. And I have an
6 investigator that has worked for me for probably 20-something
7 years. His name is Brooks. He often goes to the jail to see
8 an individual when they've -- someone's contacted our office.
9 And he is -- he goes to the jail probably more often than I
10 do, because he's more able to do that because I'm in court a
11 lot.

12 So it appears from my paperwork that in May of '14,
13 5/20/14 -- we date lots of things on the top page so we
14 know -- he went and met with Mr. Spann and found out a little
15 bit about what was going on.

16 At that time, I also have -- okay. So, Mr. Spann,
17 his family had contacted us because he was represented by
18 Debby Littlejohn. And she wasn't getting anywhere on the
19 plea offer.

20 And this discussion that he had about how there was
21 some plea offer that he had been offered and whether or not
22 he had the ability to take that plea offer or not, Debby
23 Littlejohn never got a strong-arm robbery offer out of the
24 case. That was the reason that it wasn't going well. And so
25 when I spoke with Debby, she said, you know, this is

1 strong-arm robbery, they are saying armed robbery.

2 And this case factually was kind of on the fence.
3 It is an armed robbery based on the fact that he indicated to
4 the victim that he had a weapon. But there was information
5 also in the file that the witness was saying, well, I didn't
6 think it was a weapon. But, you know, he was acting like
7 there was one. So it was one of those, there wasn't a
8 weapon, but it appeared to be to the victim that there was a
9 weapon. He made -- when Mr. Spann came in, he intentionally
10 did some acts to make it look like he had a weapon.

11 So Debby felt like it should have been reduced to a
12 strong-arm. She and I discussed the case. That was our
13 thoughts as well.

14 And so I ended up getting involved in the case. And
15 I was hired -- I have a copy of that. I was hired on June
16 28th, 2014. And at that time, his mother, I believe, is the
17 person that came in and talked with me. And it might have
18 been a girlfriend or his wife maybe, but so someone else
19 other than him. So from the time that my investigator talked
20 with him in May to the time that we were retained, I
21 personally spoke to him on the phone a number of times. I
22 also know that my investigator spoke to him on the phone a
23 number of times. But we didn't get retained until some time
24 in June.

25 His case was a pretty clear-cut situation. They had

1 the video that showed him doing acts. And they had the
2 victim, who had then pointed him out of a lineup based on
3 seeing him in the video and things.

4 His, I think, wife and mother had both seen the
5 video. And they had talked to him and said, we've seen the
6 video, you know. So the family members had already seen the
7 video and identified him on the video to me. You know, hey,
8 yeah, we saw him on the video committing this act.

9 So I went up -- so I'm getting involved. I'm
10 getting the discovery. I'm sending the discovery to him. Of
11 course, I talked to Debby Littlejohn and she talked to me
12 about the kidnapping indictment.

13 For some reason, in Dorchester and Berkeley County,
14 they don't do it as much now, if a person was charged with
15 armed robbery, they would indict him as a kidnapping. And
16 maybe their facts were that their position was that if they
17 acted like they wanted to rob somebody, that the victim is
18 being kidnapped because the victim was told to stay still,
19 not move, those kinds of of things. So that was the facts
20 alleged in the kidnapping.

21 And their position was that if they indicted him in
22 kidnapping, the kidnapping carried 0 to 30, not necessarily
23 10 to 30 like the armed robberies. And there were a number
24 of people that I pled to reduce to strong-arm and a
25 kidnapping with the understanding that there was some

1 possibility that they could get less than 10 years. And even
2 though it would be still a significant sentence, it wouldn't
3 be the whole mandatory minimum 10 years.

4 So during this period of time, a bunch of people
5 were given that deal, that if it was a pretty clear-cut armed
6 robbery, that they would allow them to -- they would agree to
7 reduce it to strong-arm with a kidnapping plea. That's why
8 he said that there was another person in the room pleading to
9 the same thing, because that was something that Mr. Alfaro
10 was feeling like it was okay to offer to a bunch of people
11 that were charged with that kind of stuff.

12 So in his case, I got the discovery. And I spoke to
13 him a number of times. We discussed the facts. I talked to
14 his -- this is one of the people that, you know, his people
15 would call me at ten o'clock at night and he would be on the
16 phone three-way and we talk. He'd call me, you know, over a
17 weekend. I mean, I generally answered the phone. So I had a
18 number of conversations with him about his facts.

19 When he -- we did file -- we did discuss the fact
20 that it was going to be brought over in front of Judge Young
21 initially for a bond hearing. But what happened was, I had
22 been asking Mr. Alfaro to give me something that wasn't an
23 armed robbery, you know, to reduce it down to something that
24 he could plead to. And he made the decision that week to do
25 it.

1 In my file, I have some other notes from a different
2 day. I'm trying to see what day that was. I came -- must be
3 over here. I came and looked at the video. I watched the
4 video with him, Mr. Alfaro. And it was -- his plea was in
5 August. But it was in June, June 28th, 2015, I came and
6 watched the video and talked to Mr. Alfaro about the case,
7 and would have spoken to the family, would have spoken to him
8 three-way on the phone a bunch of times. Because, as I said,
9 his family had seen the video. So they knew and they talked
10 to him a number of times about what they had seen.

11 So I used their credibility on him to discuss the
12 fact that -- it's actually extremely difficult to bring up
13 some type of video thing in the Berkeley County jail. I
14 think I was intending to do it the day I watched it with
15 Mr. Alfaro, but didn't work out because they didn't have
16 space available or something. So I felt confident that
17 Mr. Spann was aware that he was on the video doing what it is
18 that they alleged that he did. But he is right that I never
19 showed it directly to him.

20 So on the week of court, the week that he came up
21 and Judge Young was here, Mr. Alfaro had agreed to do this
22 plea that -- this type of plea that I had heard before. And
23 I felt like, if you read the transcript, I wanted the judge
24 to give him something less than the 15-year sentence that was
25 being asked for. And the problem was that Mr. Spann has a

1 very bad record. And that was the reason that Judge Young,
2 who is a very good sentencer, said that he felt like he was
3 going to take -- you know, give him the whole 15 years.

4 At that point, if he had not taken the plea, he
5 would have been -- if he had gone to trial, what I kept
6 telling Mr. Spann is, you are not going to win, because
7 you've got a movie of you doing the crime.

8 Now, the legal issue is about whether or not that
9 movie is admissible or not or whether the victim can ID him
10 in open court or not. Those, they do exist. But I didn't
11 believe in any way that Mr. Spann had any type of valid
12 constitutional rights that he could challenge the admission
13 of those things. I didn't see any way he could have
14 challenged the admission of the video that was the security
15 video. I didn't see any way that he could challenge the
16 admission of the, you know, of the man coming in to identify
17 him as the party. Because, of course, the man had seen the
18 video, but they had also given him a lineup.

19 So in my professional opinion, it was a dog trial
20 that he was not going to win. And I made that clear to him.
21 So I was telling him often that you need to work something
22 out, the only way we are going to be able to figure this out
23 is do some kind of plea that you can live through, basically,
24 what I would say.

25 So when Mr. Alfaro gave me the plea opportunity that

1 I thought was the best one he was going to get, I pled the
2 case and argued for what I believed to be a more lenient
3 sentence. Unfortunately, you know, the judge picks the
4 sentences, not me.

5 Now, the part about after the fact and him not
6 knowing that it was 85 percent, I don't recall discussing
7 that with him beforehand; I don't. I mean, just that part of
8 the plea, I don't recall discussing it. And it was kind of
9 one of those things, I was really busy and there were a
10 couple of people that I was pleading, and I just don't
11 remember that coming out of my mouth, you know, before we
12 walked in the room.

13 Now, when the judge talked to him, he said, you
14 know, this is a violent, most serious violent offense, 85
15 percent. Obviously, Mr. Spann at that point didn't grab my
16 arm and say, oh, I don't want to plead to this.

17 I did create a document. Honestly, I can't remember
18 what happened, but I created a document called a motion to
19 withdraw guilty plea. I don't know that I filed the
20 document.

21 I think that what happened is, after he was
22 sentenced, he was calling me from the Berkeley County jail.
23 His family was all upset. And I said, well, you know, I can
24 file a motion to withdraw.

25 I do have something in my file that says that on

1 10/1/14, that I met with his family. They came to my office
2 and met with me and said, you know, what do you think about ,
3 this motion to withdraw; this sentence didn't seem fair. And
4 I said, well, it could get worse, you know. It could be that
5 he would have to go to trial. And I told them that he could
6 file a PCR, because that's what he could do, but that I
7 didn't really think that the motion would make -- I believe I
8 might have even -- I have it September 18th, so it's possible
9 I did file something.

10 But when I met with the family in October, I said,
11 you know, I don't know that it's going to change anything,
12 because all it would do is start over with an armed robbery.
13 And that, you know, the likelihood that he would be convicted
14 of armed robbery was pretty high.

15 Now, what he says about the fact that I never told
16 him anything about his defenses or the elements of the
17 robbery, that's not true. I explained to him what all that
18 was. His issue was that he did not have a weapon. He really
19 didn't have a weapon. And in the plea colloquy, you can see
20 that I said, this is a general strong-arm robbery. This
21 isn't somebody that we are just reducing it down. I think he
22 was overcharged.

23 If we had gone to trial, the conversations I had
24 with him would have been, yeah, you are right, there is no
25 weapon, but, unfortunately, that's not the law in South

1 Carolina. The law in South Carolina says that the jury could
2 still convict you and they can still prosecute you as an
3 armed robbery. And so there was a lot of risk to going to
4 trial for armed robbery.

5 But so -- and as I said, in this case, he had a
6 record for strong-arm robbery. So, you know, the nicest man
7 in the state of South Carolina, in my opinion, nothing
8 personal, very, very good sentencer was not willing to give
9 him something less than what the State recommended, or might
10 have even given him more if there hadn't been a
11 recommendation, because of his record.

12 But I felt like when he went before the judge, that
13 he got a hefty sentence. And, you know, maybe the five
14 minutes before we walked in, he wasn't aware that that
15 kidnapping was going to be an 85 percent charge until we
16 started the plea. And I don't remember discussing that with
17 him. There was a lot of other things, that we were going on
18 to try to avoid an armed robbery.

19 And so, you know, in retrospect, since he got an an
20 85 percent sentence, maybe he should have gone to trial and
21 maybe he would have only gotten 10. And that's a
22 possibility.

23 But that's after the fact. I felt like we were
24 trying to mitigate the situation and trying to get something
25 on the table that he could live through without being -- with

1 his record, without being convicted of armed robbery and the
2 kidnapping.

3 I didn't create the kidnapping indictment. As he
4 testified, Ms. Littlejohn gave him that indictment. I
5 wasn't -- that already existed before I came along. She told
6 me -- I know Debby. She told me --

7 MR. DAVIS: Objection, Your Honor, hearsay.

8 THE COURT: Sustained.

9 THE WITNESS: Well, it was my understanding there
10 had been discussions with him why there was a kidnapping
11 indictment. And that's, I mean --

12 BY MS. OLIVE:

13 Q. You stated that you don't recall specifically
14 discussing with him the 85 percent. Is that -- did you have
15 conversations with him either directly before the plea or at
16 some point in your representation about what charges he was
17 facing and the minimum and maximum sentences on those
18 charges?

19 A. Yes. But I don't remember discussing the fact that
20 it was -- you know, it's a 0- to 30-year offense. I know
21 when you do the sentencing sheets, it's checked "violent" and
22 some things like that. We would have gone over that. I
23 can't remember from the plea -- I read it, but I can't
24 remember if the judge said this is going to be 85 percent or
25 not. As I said, he didn't say, stop, wait a minute, I don't

1 want to do this.

2 The minute we came back in -- and he is right, we
3 had some conversation. And I went, oh, maybe I didn't say
4 that right before the plea. But it was definitely a serious,
5 violent, offense, most serious violent felony.

6 Q. Do you recall what your conversation -- when you did
7 relay this plea offer to him, what, if anything, you advised
8 him about the recommendation of 15 years?

9 A. That it was a lot better than 30.

10 Q. Did you just tell him that the State was
11 recommending 15 years?

12 A. Yes. And I told him that, you know, that we could
13 ask for less. And I said -- basically, what I would have
14 said is, hey, listen, you can take this plea today and we've
15 got a really good judge, you could ask for less or you could
16 wait and have the bond hearing. And, you know, my
17 professional opinion was he probably wasn't going to get a
18 bond that he could make, and then have the case set later for
19 a trial.

20 I had been asking for a plea offer. So when
21 Mr. Alfaro came up with something that we could live through
22 instead of an armed robbery, when Mr. Alfaro took the armed
23 robbery off the table, I felt like it was in his best
24 interest to go forward in front of Judge Young.

25 But, you know, I was surprised that Judge Young gave

1 him so much time.

2 Q. Did you ever have any discussions with him about how
3 much time he would be potentially serving of the 15-year
4 sentence?

5 A. No.

6 Q. Do you have -- is that a conversation -- do you
7 generally -- let me rephrase.

8 Is it in your general practice to discuss that with
9 your clients, about what percentage of their sentences they
10 would be serving?

11 A. Well, they serve -- I probably have told several
12 people before, 12 on 15. But I always say, I'm not the
13 Department of Corrections. I really don't know what's going
14 to happen. And so, you know, what I had hoped was that even
15 if he gave him the 15 on the strong-arm, that he would give
16 him some smaller -- he had the opportunity to give him some
17 smaller sentence.

18 The reason that Mr. -- it's my understanding that
19 this plea offer, the way these types of plea offers are
20 generated, is that you could get the majority of your time in
21 the 66 percent strong-arm robbery, but have sort of a tail or
22 a kick to have a little bit of a violent sentence also that
23 might keep you in jail a little bit longer. So that was
24 always what my understanding was.

25 Couple of times we would do it where the person

1 would get strong-arm robbery time with the consecutive, you
2 know, just to avoid that ability to have a big sentence on an
3 armed robbery.

4 Q. Did you advise him regarding the -- so the
5 recommendation was 15 years concurrent, but was he aware that
6 the judge could potentially sentence him to consecutive time,
7 or did you --

8 A. Obviously, when you do a plea, you have to say this
9 is the recommendation of the State. We get to ask for
10 something different. The judge could do whatever they wants.
11 And in the qualification of the plea process, the judge says,
12 hey, that's just a recommendation, you know, I could sentence
13 you up to, I guess, 60 years, whatever it was, 45 years in
14 this case. So I would never have told him -- I would have
15 told him he could have gotten more, yes.

16 Q. And you stated that you did not believe he had any
17 valid defenses or any valid challenges to the video or the
18 identification?

19 A. No, I didn't believe so.

20 Q. Did you discuss that with him?

21 A. I discussed a lot of things. I primarily talked to
22 him over the telephone. So I don't remember every word that
23 I said, but a lot of conversations over the phone. And most
24 of it was, you know, you've got a situation where you are
25 charged with something pretty bad, and we are trying to get

1 something on the table that -- Mr. Spann wanted to move
2 quickly. He didn't want to sit in the Berkeley County jail
3 for long period of time. When I got hired, it was, how fast
4 can we get something on the table that I don't have to sit
5 here?

6 And so I think that we all knew that there was going
7 to be a sentence, jail sentence, you know, something was
8 going to happen. So most of my conversations with the family
9 and him were not about a trial. They were about trying to
10 figure out some kind of plea offer that we could figure out.

11 And then, you know, in terms of a trial, we talked
12 about -- I told his family I saw the video. I told him I saw
13 the video. You know, he never seemed to want a trial then.
14 I mean, he wanted to plead out to something less because he
15 knew he didn't have a weapon, so he didn't understand why he
16 had to be prosecuted for armed robbery.

17 And then, like I said, because of the possibility --
18 this is another thing I think actually -- now that I really
19 think about it, because of the possibility that if he went to
20 trial, the jury may find him guilty of just a strong-arm.
21 You know, Mr. Alfaro indicts him on this most serious violent
22 felony kidnapping as another way to get some kind of, you
23 know, further conviction at trial on him that he could
24 probably get a larger sentence.

25 I mean, I wasn't involved when he was indicting the

1 case, but until the minute that I walked in that day to do
2 the plea and the day we went there, there wasn't discussion
3 about giving him a deal. There was discussion about, we are
4 trying this case because he has a terrible record.

5 And so as much as Ms. Littlejohn had tried and I had
6 tried, that was pretty much the first day he said we can do
7 this and we can do this today.

8 Q. And you said before in your testimony that you felt
9 that was the best offer he was going to get?

10 A. That was the best offer he was going to get. But,
11 you know, it was -- Brian was moving slow. So I said, well,
12 let's bring him over, I want to ask for a bond hearing, which
13 would bring Mr. Spann from the jail into the building. Once
14 you get him in the building, sometimes you can get solicitors
15 to move on the case, because they are present in the room.
16 And that's kind of how it went, is that Brian knew that I was
17 asking for him to give me some kind of option. And so by the
18 time he gets in the room, that's when he gave me the option.
19 He didn't even give me the plea offer the day before.

20 Q. By "Brian", you are referring to Mr. Alfaro?

21 A. Mr. Alfaro. So there wasn't -- I didn't have that
22 plea offer and sit on it for three weeks and whatever and not
23 go see Mr. Spann or not tell him about it or anything like
24 that. I walked in that morning and Brian said, we can do it
25 this way. And after I had seen the video and reviewed the

1 evidence and talked to Mr. Spann on the phone enough and had
2 my investigator go visit him and talk his wife and mother and
3 all these type of folks, I felt like, hey, I've done
4 everything diligently that I should do to get to the point
5 where, these are your options. And, of course, it's his
6 decision whether to plead guilty or not.

7 Q. Did you tell him that, that it was his decision?

8 A. Yeah.

9 Q. And he never indicated -- did he ever indicate to
10 you that he wanted to withdraw his plea?

11 A. Uh-huh, yes, he did.

12 Q. After the plea?

13 A. Yes. And I did go back in and talk to him about it.
14 And I came back and I said, you know, this is probably not
15 going to go very well. You know, I am not so sure --
16 honestly, I can't remember if I filed the piece of paper.
17 It's generated as a document. I just don't remember. I do
18 remember meeting with his family and telling them that I felt
19 like it was an issue for PCR.

20 And I distinctly remember not saying, "this is 85
21 percent" in the room before we walked out to do the plea. I
22 do remember that part. Because we had lots of discussion.
23 There was -- like typical Berkeley, there was 20 defendants
24 in there. It was kind of chaotic. And I was trying to get
25 everything figured out. Had to explain all of that to him.

1 And when we came back in, there was this conversation where
2 he goes, wait a minute, are you telling me I have to serve 85
3 percent? And I think that what I said to him is -- I didn't
4 recall the judge saying it.

5 What's in the record?

6 I can't remember. I didn't recall the judge saying
7 it. And so I went, well, maybe that's something that needs
8 to be figured out in the future, because maybe the judge
9 didn't mention it, because I don't remember everything. So
10 as I talk more, I kind of remember more.

11 But it's not -- I think, if I recall, I said to him,
12 I don't think the judge mentioned that, maybe that's an
13 issue. And I have it written down, "that's for PCR." So it
14 might be something that whatever that was is that -- but I
15 don't remember the judge mentioning it. And so when he said
16 to me, "whoa", I went, wait, I don't even think he mentioned
17 it.

18 MS. OLIVE: And I think that would be reflected
19 pages 2 and 3 of the transcript.

20 MR. DAVIS: Where?

21 MS. OLIVE: Pages 2 and 3 of the transcript.

22 BY MS. OLIVE:

23 Q. I think I'm agreeing with you that I don't believe
24 the judge did specifically say anything regarding the 85
25 percent.

1 A. He does discuss the fact that it is a most serious
2 violent felony. The problem is, when Mr. Spann said to me,
3 well, you didn't tell me that. Then I went, I didn't think I
4 heard that in the record, you know, and usually that happens.

5 Q. But you don't recall whether you had had this
6 discussion on any previous occasions?

7 A. I know that I had not had the discussion on any
8 previous occasions, because I had not really discussed
9 pleading the case with him, like what the offer was going to
10 be until the day we came in to court, because Mr. Alfaro
11 didn't give me that offer until that morning.

12 And as I said, he was coming up creatively with
13 indicting people for kidnapping on a lot of these robberies.
14 And so at that time -- I've pled a lot of people like that
15 since then. But at that time, it was one of the first few
16 people that I did that have those combinations.

17 And there's ways to do that now a little better.
18 You can ask for, okay, we will plead to kidnapping, but we
19 want a five-year cap, or something that makes it a little
20 easier for their sentences to not get how Mr. Spann's got.
21 But that was all new to me at that time. That was a new
22 process that we were doing.

23 But I definitely remember when he said -- he kind of
24 said to me after the fact, wait a minute. And I do remember
25 going back out to the court. And I did file -- get some kind

1 of written paperwork. And I did tell the family that it was
2 something that could be dealt with later, because I couldn't
3 recall whether or not the judge had said it.

4 All that, I did discuss this case with him. I did
5 go over the evidence. I did talk to him a bunch of times on
6 the phone. I felt like I had done diligence, due diligence,
7 to investigate his case at that point. I felt like he needed
8 to plea. I just think the judge's sentence wasn't great.

9 Q. Did Mr. Spann ever indicate to you that he would
10 rather go to trial than plead guilty?

11 A. Mr. Spann didn't want to go to trial. He wanted to
12 be able to say he was sorry and it had been a bad experience.
13 Whether he was -- up until the plea offer, we were having to
14 go to trial. I mean, I was discussing it as, you know, if we
15 go to trial, this will be what happens, but I'm trying to get
16 something on the table.

17 | So if you are asking me, had he resigned himself to
18 the fact he would be going to trial and was okay with it, no.
19 He wanted to come up with an alternative. But if that
20 alternative had not existed, I would have tried the case to
21 argue for strong-arm robbery, because there really wasn't a
22 weapon.

23 And I felt like, based on the information that I
24 knew, that the victim had said that he did not think it was a
25 weapon, but that, you know, it looked like one. He was

1 acting like it should be one. So my position is, if it was
2 about victim's perception, he never perceived a real weapon,
3 that's why I thought it should be a strong-arm.

4 Q. So if he had indicated to you that he wanted to go
5 to trial, would you have been prepare to try the case?

6 A. Yes, ma'am. That's what I do.

7 MS. OLIVE: Thank you. That's all the questions
8 that I have.

9 THE COURT: Cross.

10 CROSS-EXAMINATION

11 BY MR. DAVIS:

12 Q. If this had gone to trial, you would have also
13 argued that this factually was not a kidnapping; it was a
14 strong-arm robbery only and not a kidnapping?

15 A. Yes. It was a -- you know, yes, I think that there
16 is a very, very broad statute for kidnapping in South
17 Carolina. And how they would have argued it to the jury in
18 closing, I understood what they were trying to get to, but we
19 certainly would argue that that didn't happen. And that it
20 was just -- man was free to leave and never was actually
21 detained, or restrained may be the better word.

22 Q. Ideally, Mr. Spann wanted and would have pled to
23 strong-arm robbery solely? That would have been ideal?

24 A. That would have been ideal.

25 MR. DAVIS: Okay. No other questions. Thank you.

1 THE COURT: Anything further?

2 REDIRECT EXAMINATION

3 BY MS. OLIVE:

4 Q. Briefly. Was that an offer that was ever made to
5 you?

6 A. No.

7 MS. OLIVE: Thank you.

8 THE COURT: You may step down.

9 THE WITNESS: Am I excused, Your Honor?

10 THE COURT: You are excused unless somebody wants to
11 keep her.

12 THE COURT: Any other witnesses?

13 MS. OLIVE: Nothing from the State.

14 MR. DAVIS: If you'll hear from me briefly.

15 Judge, just finally, I certainly appreciate your
16 ruling on trying to amend it dealing with the other issue. I
17 think there's two ways of getting there based on the evidence
18 that's come out from Ms. Gay. We will focus on one issue,
19 Judge. It's what Mr. Spann ended with and the testimony Ms.
20 Gay has provided.

21 First and foremost, and this is, I would argue,
22 explained incorrectly a lot in South Carolina. We have
23 strike offenses, which leads to life without parole. We have
24 violent offenses, which leads to either the addition of
25 possession of a weapon during the commission of a violent

1 crime, or if you are second violent, it could up it to 65
2 percent. That's all "violent" does.

3 With a separate statute, there's the no-parole
4 offenses, the 85 percent offenses. All too often, clients,
5 not Mr. Spann directly, but clients, other attorneys, no
6 offense, I've even run into it with the bench, "violent",
7 while almost every no-parole offense is violent, just because
8 it's checked on the sentence sheet "violent", does not
9 indicate 85 percent. It's the no-parole offenses, things
10 that carry the possible punishment 20 years or more. And
11 that is just incorrectly explained a lot. I'm going to focus
12 on that issue.

13 As he testified, he has served a prior sentence
14 for -- prior to that robbery, assault and battery of a high
15 and aggravated nature. Those are not, were not no-parole
16 offenses.

17 Burg' second -- I may have misspoken there. Even
18 with it being violent, it's not a no-parole. So it's not 85
19 percent, mostly 65. And that's what he lived through and
20 testified through his own serving that sentence.

21 Kidnapping, 0 to 30, could get 20 years or more. It
22 is a no-parole offense. It is an 85 percent. He indicates
23 he did not know about it ever until he's sitting in a room
24 behind the courtroom after his guilty plea. Another
25 defendant is being talked to by Ms. Gay and they are talking

1 about 85 percent. That's the first he knows of it.

2 I will point out -- and appreciate the State's
3 acknowledging -- it's not mentioned on the record by Judge
4 Young. Respect him a bunch, great judge. He just didn't
5 review it at this time. It was not reviewed by the court
6 with my client. It was not reviewed, by Ms. Gay's testimony,
7 by her with my client. That is a collateral consequence he
8 has to understand before he enters the plea.

9 Normally, a client is asking for the vacation of all
10 of the charges that are holding him in prison. We are not.
11 And I think that adds to his credibility or his testimony
12 when you are trying to determine credibility, hearing what
13 actually happened. We are simply saying that on the
14 kidnapping case, which does carry the 85 percent service
15 requirement, he was not informed of that prior to the plea.

16 That is ineffective assistance of counsel. Without
17 knowing that, he pled guilty to that charge. He has always
18 said, and Ms. Gay corroborated, that strong-arm, fine. But I
19 didn't have a gun, I was just trying to rob a guy, wasn't
20 trying to kidnap him, wasn't trying to arm rob him.

21 If he had known that it was 85 percent before he
22 entered the plea, even saying what Ms. Gay did that, yes, it
23 does get him out from under the mandatory minimum of 10
24 years, certainly, the armed robbery down to strong-arm avoids
25 mandatory minimum and avoids 85 percent on the robbery, but

1 it does not avoid 85 percent, since the kidnapping was added.

2 Had he known, he would not have pled to that charge.

3 And that is his testimony. That is corroborated that he

4 was -- he did not have that information at the time of the

5 plea by Ms. Gay. And the record is absent as to that issue.

6 So he wasn't even informed of that issue at the guilty plea.

7 It's only afterward that he finds out, which then

8 also explains why he answers the question, are you satisfied?

9 Sure, he's satisfied with Ms. Gay. He didn't know. It's a

10 collateral consequence that must be explained. It wasn't.

11 We've met our burden of ineffectiveness. We've met

12 our burden that, had the outcome been different, he wouldn't

13 have pled, had he known it was 85 percent. For that reason,

14 we'd ask for relief as to the kidnapping charge itself.

15 The other one he pled. It was valid. He understood

16 all the consequences of it. He has an understanding of that.

17 But as to the kidnapping, we would ask for relief

18 based on his application. We think the evidence supports it.

19 Thank you.

20 THE COURT: Briefly.

21 MS. OLIVE: Your Honor, it's the State's position

22 that it's not deficient performance to fail to inform a

23 defendant of a collateral consequence of his plea. I believe

24 that the law is that it's deficient if the advice is given

25 and it's incorrect advice.

1 Regardless, in this case, Ms. Gay testified that
2 Mr. Spann did not want to go to trial. There was
3 overwhelming evidence against him, based on Ms. Gay's
4 testimony of what the State's evidence was. She had numerous
5 conversations with Mr. Spann about the evidence. There was a
6 video depicting Mr. Spann. She did not believe that she had
7 any valid challenges to the admission of that video, nor did
8 she believe she had any valid challenges to the victim
9 identifying Mr. Spann. Therefore, as I believe both of them
10 have testified, she advised him that it was not in his best
11 interest to go to trial.

12 She stated that he wished to resolve this through a
13 plea deal. And she testified that the best plea deal that --
14 first of all, the State was unwilling to make a plea offer up
15 until this day that he took the plea, and that she believed
16 that that was -- that he was not going to get anything better
17 than that, that that was the best he was going to get. He
18 knew going in that the State was recommending 15-year
19 concurrent sentence.

20 So, Your Honor, it's our position that there's
21 neither deficiency nor prejudice in this case.

22 THE COURT: Okay. I will take it under advisement
23 and let you know something soon. Thank you.

24 (Whereupon, proceedings are adjourned.)
25

CERTIFICATE OF REPORTER

I, Karen V. Andersen, Registered Merit Reporter,
Certified Realtime Reporter for the State of South Carolina
at Large, do hereby certify that the foregoing transcript is
a true, accurate and complete Transcript of Record of the
proceedings.

I further certify that I am neither related to nor
counsel for any party to the cause pending or interested in
the events thereof.


Karen V. Andersen
Registered Merit Reporter
Certified Realtime Reporter

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, SC

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 indicted 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), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, 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), SCRCP, 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), SCRPC."

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

ALF2013-11-02713

WITNESSES

Moncks Corner Police Department

AGENCY CASE NUMBER

13-2039

ARREST WARRANT NUMBER

2013A0820500291

DATE OF ARREST

November 2, 2013

ACTION OF GRAND JURY

True Bill

Thomas Mackis
Foreperson of Grand Jury

Date: 4-15-14

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2014GS0800496

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

April Term 2014

THE STATE

vs.

BRIAN DELONTE SPANN

DOB: 1982-[REDACTED]

B/M

Indictment for

Armed Robbery

CLERK OF COURT
JERRY P. BROWN
14 APR 15 PM 12:21

FILED

14 APR 15 PM 12:21

JH

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

INDICTMENT

At a Court of General Sessions, convened on April 15, 2014 the Grand Jurors of Berkeley County present upon their oath:

Armed Robbery

That on or about November 2, 2013, in Berkeley County, South Carolina, the Defendant, Brian Delonte Spann, 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 any 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 Kinjen Patel with the intent to permanently deprive the victim of possession thereof, in violation of §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.


BRYAN A. ALFARO
DEPUTY SOLICITOR

ALF2013-11-02713

WITNESSES

Moncks Corner Police Department

AGENCY CASE NUMBER

13-2039

ARREST WARRANT NUMBER

Direct Indictment

DATE OF ARREST

November 2, 2013

ACTION OF GRAND JURY

True Bill

Thomas Marshall
Foreperson of Grand Jury
Date: 4-15-14

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2014GS0800497

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

April Term 2014

THE STATE

vs.

BRIAN DELONTE SPANN

DOB: 1982-
B/M

Indictment for

Kidnapping

FILED

14 APR 15 PM 12:21

HARRY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

4/15

JH

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

INDICTMENT

At a Court of General Sessions, convened on April 15, 2014 the Grand Jurors of Berkeley County present upon their oath:

Kidnapping

That Brian Delonte Spann did in Berkeley County on or about November 2, 2013 willfully, unlawfully and feloniously kidnap, seize or confine Kinjen Patel without authority of law and against said Kinjen Patel's will and consent. This action is in violation of Section 16-3-910, 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.



BRYAN A. ALFARO
DEPUTY SOLICITOR