

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to York County

J. Michael Baxley, Circuit Court Judge  
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S.C. Supreme Court

RICHARD KEITH POE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000737  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
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ROBERT M. DUDEK  
Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

# INDEX

INDEX.....	1
ISSUE PRESENTED.....	2
STATEMENT OF FACTS.....	3
ARGUMENT.....	8
CONCLUSION.....	10
PETITION TO BE RELIEVED AS COUNSEL.....	11

ISSUE PRESENTED

Was defense counsel ineffective for failing to convey to petitioner that the state had offered a negotiated sentence of five years imprisonment in exchange for his burglary plea since petitioner was ultimately sentenced to thirteen years imprisonment, and petitioner would have accepted the five year offer had it been relayed to him?

## STATEMENT OF FACTS

Petitioner was indicted by the York County Grand Jury for the offenses of burglary in the first degree, petit larceny, and criminal conspiracy. Supp. app. 1-6.. His case was called to trial on June 4, 2013 before the Honorable John C. Hayes, III. Sean Francis Cronin represented petitioner. Misty Horton-Shelton was the assistant solicitor. App. 1.

A Jackson v. Denno hearing was held prior to the trial. Detective Ralph Gurganus of the York County Sheriff's Department testified he questioned petitioner about the burglary in this case. Petitioner had been living in the victim's home on a temporary basis. Mr. Stiles was the victim. App. 5, l. 24 – 9, l. 14.

Gurganus testified that petitioner told him that co-defendant Lisa McDonald needed "some type of pain medications and they didn't have any money and they started talking about how they could obtain money and they went outside." App. 15, ll. 6-10. Gurganus said petitioner admitted they forcefully entered "the victim's storage, locked storage building..." Gurganus recalled that petitioner admitted "taking some tools that belonged to Mr. Stiles. Also going into the truck and removing a chainsaw. And he went through the details of going to Piedmont with Ms. McDonald, obtaining a prescription and going to the pawn shop the following morning and selling the items that were taken from Mr. Stiles' building." App. 15, ll. 6-20.

Prior to ruling on the admissibility of petitioner's statement the judge stated he wanted to conduct a Blair hearing. The judge referenced the competency report which stated that petitioner had the capacity to understand the proceedings, and to assist in his defense. App. 24, l. 16 – 26, l. 8. Petitioner at first indicated he would testify at the Jackson v. Denno hearing but defense counsel Cronin shortly thereafter told the judge: "The defendant has decided not to testify for the Denno

hearing.” App. 26, l. 11 – 27, l. 16. The judge then ruled that petitioner’s statements to Detective Gurganus were freely and voluntarily given. App. 28, l. 2 – 29, l. 19.

Assistant Solicitor Shelton then told the judge she wanted to put on the record the plea negotiations. She stated that petitioner was originally offered a twelve-year sentence in return to a guilty plea to burglary in the second degree, violent. After talking with the victim, she realized he was very ill and did not wish to testify so she had reduced the plea offer to five years. She claimed she was informed petitioner rejected that offer. App. 31, l. 2 – 32, l. 10.

Shelton also offered that defense counsel Cronin later asked her to reopen plea negotiations, and this time she offered a sentence of between twelve years for a burglary second violent or for a fifteen year sentence for burglary second non-violent with a consecutive six months sentence for conspiracy. Shelton admitted that she refused to let petitioner enter Drug Court because of his violent convictions, and a charge that he had intimidated a witness. App. 31, l. 2 – 32, l. 10.

Shelton asked Defense counsel Cronin to acknowledge this was the extent of the plea negotiations. Cronin then stated that petitioner may have had some problems recalling discussions about plea negotiations, but Cronin claimed he discussed them with petitioner. App. 32, ll. 8-24.

Immediately before jury selection began the solicitor informed the judge that petitioner would plead guilty to burglary in the second degree violent with a recommendation of a sentence of between twelve and fifteen years. App. 35, l. 24 – 26, l. 8.

The judge informed petitioner that burglary in the second degree was considered a violent offense. Petitioner said he understood, “to the best I can, Yes, sir.” App. 36, l. 15 – 37, l. 10. The judge further told petitioner he had looked at petitioner’s psychiatric history, but noted he had found petitioner competent to go forward that day. App. 39, l. 20 – 40, l. 8.

The solicitor then gave the judge the state's rendition of facts. She told the judge that petitioner was staying with the victims who were friends of petitioner. She said that petitioner and co-defendant, Lisa McDonald, broke into the victim's shed and stole an air compressor, battery charger, a toolbox loaded with tools and a chainsaw. App. 40, l. 18 – 41, l. 12.

Petitioner and McDonald pawned these items but later got them out of the pawnshop and sold them to another man. App. 41, l. 13 – 42, l. 15. She stated petitioner confessed to the crime. App. 42, ll. 10-15.

Defense counsel Cronin said he could not agree completely with the solicitor's version of the facts, but stated that he "generally agreed." Petitioner only admitted to taking certain items out of an "out building." App. 42, l. 25 – 43, l. 3. Judge Hayes sentenced petitioner to thirteen years imprisonment for burglary in the second degree, and he imposed concurrent time for the conspiracy and enhanced petit larceny counts. App. 50, ll. 9-13.

Petitioner filed an application for post-conviction relief on July 3, 2013. He alleged he was ineffectively represented. App. 52-58; 60; 89. Petitioner filed additional documents with the court on October 7, 2013. App. 91-102.

An evidentiary hearing was convened on January 22, 2014 before the Honorable J. Michael Baxley. Michael Hemlepp represented petitioner and J. Rutledge Johnson was the assistant attorney general. App. 103.

Petitioner testified that defense counsel relayed to him a negotiated plea of twelve years imprisonment for burglary in the second, violent. Petitioner said he declined this offer. App. 111, ll. 2-14. Petitioner repeatedly insisted that the proper charge for going into the shed in this case was burglary in the third degree. App. 115, ll. 6-11; App. 140, ll. 13-17.

Petitioner had only gone to the eighth grade, and he could only read and write “to an extent.” App. 141, ll. 1-6. He had been evaluated by the Department of Mental Health and he admitted to prior suicide attempts during those evaluations. He refused to plead guilty because he was not guilty of burglary in the first degree where he only broke into a storage shed, and “not a home, not a house. It was not attached to the house.” App. 125, l. 15 – 127, l. 19. He told the PCR judge that the entry into the shed happened in the morning when it was daylight. App. 127, ll. 17-22.

Defense counsel Cronin testified that his research showed the building broken into was within the curtilage of the home “and it was within the statutory definition of burglary first degree.” App. 144, ll. 10-22. Defense counsel also explained that petitioner had two prior burglaries which met the statutory definition of burglary in the first degree. App. 144, l. 25 – 145, l. 3. The indictment alleged that the burglary occurred in the nighttime, and that petitioner had two prior burglary convictions. Supp. App. 2.

Defense counsel testified that the solicitor insisted that petitioner do some jail time because she “felt like he was a danger to the community.” App. 145, ll. 2-20. He acknowledged that petitioner insisted the only crime he committed in this case was burglary in the third degree. App. 147, ll. 10-13. Defense counsel alleged that petitioner turned down a five-year offer, and that he discussed that offer with petitioner. App. 146, ll. 2-7.

PCR counsel called petitioner in reply regarding the alleged five-year offer. Petitioner testified: “I was never offered a five-year sentence. Mr. Cronin never mentioned it because considering the circumstances I would have taken it.” App. 160, l. 23 – 161, l. 6.

The assistant attorney general then recalled defense counsel Cronin. The state introduced a letter from petitioner to defense counsel wherein he wrote, inter alia, “This bull crap has gone on

long enough” and further wrote that he would not accept a sentence of more than two years. Supp. App. 7.

It is not clear when this letter was written in relation to the five-year offer that petitioner said was never conveyed to him. In short, the five year offer petitioner testified under oath he never received could have been made to defense counsel by the solicitor after petitioner wrote this letter. Judge Baxley ruled from the bench that petitioner had two prior burglaries on his record already, and he therefore faced an LWOP sentence if convicted following a trial, and that defense counsel did not perform deficiently under the circumstances in representing him. App. 165, l. 9 – 166, l. 5.

An order of dismissal was filed on March 14, 2014. The order noted that defense counsel had testified that the state offered petitioner a negotiated plea of five years which petitioner rejected. App. 178-179. The order also noted that petitioner was recalled at the PCR hearing, and petitioner testified he only learned of the five-year offer at the plea hearing itself, not before. App. 180. The PCR Court wrote that it found petitioner’s testimony not credible and counsel’s testimony credible. App. 182. The PCR judge denied relief. App. 183.

From this order petitioner is seeking a writ of certiorari pursuant to Rule 243 of the SCACR.

## ARGUMENT

Defense counsel ineffective for failing to convey to petitioner that the state had offered a negotiated sentence of five years imprisonment in exchange for his burglary plea since petitioner was ultimately sentenced to thirteen years imprisonment, and petitioner would have accepted the five-year offer had it been relayed to him

As seen, petitioner testified that the five-year offer was never relayed to him, and that he would have accepted it had he been aware of it. In Davie v. State, 381, S.C. 601, 675 S.E.2d 416 (2009) our Supreme Court held that defense counsel performed deficiently by failing to communicate a plea offer to her client.

The Court noted in similar contexts it had found a defendant was entitled to post-conviction relief where the state failed to honor a plea agreement, Sprouse v. State, 355 S.C. 335, 340, 585 S.E.2d 298, 281 (2003); where trial counsel failed to object to the solicitor recommending the maximum sentence in violation of the plea agreement, Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); and where counsel failed to move to withdraw the plea after the state reneged on a plea offer, Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988).

The Court held defense counsel's failure to communicate the state's initial offer in Davie constituted deficient performance. The Court also stated a finding of prejudice from failure to convey a plea offer would be decided on a case-by-case basis. The Court did note that in some cases a defendant's statement that he would have accepted the offer standing alone would be sufficient to demonstrate prejudice. See Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000).

In Bell v. State, Op. No. 5277, Shearouse's Adv. Sh. 44, 2014 WL 5654265 (Ct.App. November 5, 2014), the Court also held that defense counsel's failure to convey a plea offer to a

defendant constituted deficient performance, and it found that the defendant showed he was prejudiced by counsel's deficient failure to convey the plea offer.

Here, similarly, petitioner testified unequivocally that he would have accepted the five-year prison sentence negotiated plea offer if it had been conveyed to him. Petitioner ultimately was sentenced to thirteen years imprisonment, and was obviously prejudiced by counsel's failure to convey the five-year plea offer. Petitioner would have accepted the plea offer had it been conveyed to him, and his guilty plea therefore should be vacated, or his case remanded to the trial court with instructions to impose a five-year prison term. See Davie v. State, supra.

CONCLUSION

Based on the foregoing arguments, a writ of certiorari should be granted to allow full briefing on this issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R M Dudek", written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of November, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO YORK COUNTY  
J. MICHAEL BAXLEY, CIRCUIT COURT JUDGE

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RICHARD KEITH POE,

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2014-000737

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PETITION TO BE RELIEVED AS COUNSEL

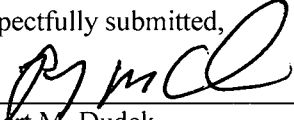
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Counsel for Richard Keith Poe states:

1. He is an Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on January 22, 2014, and the entirety of the Appendix in this case. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Richard Keith Poe.

Respectfully submitted,

  
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Robert M. Dudek  
Chief Appellate Defender  
ATTORNEY FOR PETITIONER

This 21st day of November, 2014

STATE OF SOUTH CAROLINA

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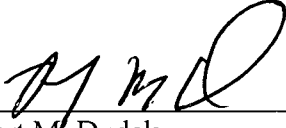
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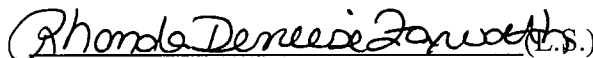
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CERTIFICATE OF SERVICE  
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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire and Richard Keith Poe, #259297, at Evans Correctional Institution this 21st day of November, 2014.

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day  
of November, 2014.

  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: October 17, 2021.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to York County  
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RICHARD KEITH POE,

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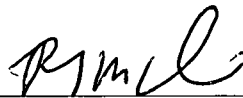
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CERTIFICATE OF SERVICE

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I certify that a true copy of the supplemental appendix in this case have been served on J. Rutledge Johnson, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Richard Keith Poe, #259297, at Evans Correctional Institution this 21st day of November, 2014.

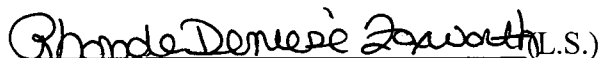


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Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day  
of November, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 17, 2021.