

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Greenville County

G. Edward Welmaker, Circuit Court Judge

---

**RECEIVED**

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**S.C. Supreme Court**

KEVIN K. FOWLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001069

---

APPENDIX

---

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|--------------------------|---|----------------------------|
| STATE OF SOUTH CAROLINA  | ) | COURT OF GENERAL SESSIONS  |
|                          | ) |                            |
| COUNTY OF GREENVILLE     | ) | Case No(s) : 2011GS2308819 |
|                          | ) |                            |
| State of South Carolina, | ) |                            |
|                          | ) |                            |
| Plaintiff,               | ) |                            |
|                          | ) |                            |
| -VS-                     | ) | TRANSCRIPT OF RECORD       |
|                          | ) |                            |
| Kevin K. Fowler,         | ) |                            |
|                          | ) |                            |
| Defendant.               | ) |                            |
|                          | ) |                            |

February 06, 2012  
Greenville, South Carolina

B E F O R E:

HONORABLE LETITIA H. VERDIN, Judge.

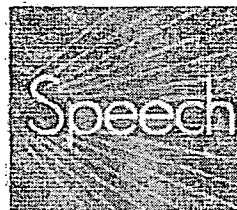
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## STATE EXHIBITS

(No exhibits offered.)

## DEFENSE EXHIBITS

(No exhibits offered.)

## COURT EXHIBITS

(No exhibits offered.)

P R O C E E D I N G S

(WHEREUPON, the proceedings begin on the 23rd day of February, 2012 at approximately 3:17 p.m.)

**MRS. HODGE:** Kevin Fowler.

**THE CLERK:** Your Honor, this is indictment 2011-GS-23-8819, Kevin K. Fowler indicted for Criminal Sexual Conduct with a Minor second degree. Pleading to the same, and it's a true bill.

(WHEREUPON, the defendant is duly sworn.)

**THE COURT:** All right. Mr. Fowler, you are here today to plead to Criminal Sexual Conduct with a Minor with the victim being 11 to 14 years of age. That's second degree. Is that your understanding?

**MR. FOWLER:** Yes, ma'am.

**THE COURT:** And you understand it carries up to 20 years. Is that also your understanding?

**MR. FOWLER:** Yes, ma'am.

**THE COURT:** Have you discussed these charges with your lawyer?

**MR. FOWLER:** Yes, ma'am.

**THE COURT:** Are you happy with what your lawyer's done for you?

**MR. FOWLER:** Yes, ma'am.

**THE COURT:** Do you have any complaint to

1 make against law enforcement, the Solicitor's  
2 office or your lawyer whatsoever?

3 MR. FOWLER: No, ma'am.

4 THE COURT: Has anyone forced you to plead  
5 guilty?

6 MR. FOWLER: No, ma'am.

7 THE COURT: Has anyone promised you anything  
8 to get you to plead guilty?

9 MR. FOWLER: No, ma'am.

10 THE COURT: Are you under the influence of  
11 drugs or alcohol?

12 MR. FOWLER: No.

13 THE COURT: When you plead guilty, you give  
14 up certain constitutional rights. One is your  
15 right to remain silent about these charges. Do you  
16 understand that?

17 MR. FOWLER: Yes, ma'am.

18 THE COURT: You also give up your right to a  
19 jury trial. At that trial, the State can call  
20 witnesses against you, but your attorney would have  
21 the opportunity to cross-examine those witnesses.  
22 And he would have the opportunity to call witnesses  
23 for you. When you plead guilty, you give up that  
24 right. Do you understand that as well?

25 MR. FOWLER: Yes, ma'am.

1           **THE COURT:**     Are you pleading guilty because  
2           you are guilty?

3           **MR. FOWLER:**     Yes, ma'am.

4           **THE COURT:**     All right.   Yes, ma'am.

5           **MRS. HODGE:**     Thank you, Your Honor.   May it  
6           please the Court.   On May the 6th of 2011,  
7           Investigator Heather Hubert with the Sheriff's  
8           Office was called out to Woodmont High School in  
9           reference to a student disclosing sexual abuse.  
10          The victim in this case, initials Minor, was 16 at  
11          that time.   She had been placed in the custody of  
12          her female cousin when she was in the 5th or 6th  
13          grade.   She stated that her cousin was married to  
14          the defendant.

15                 And basically from the time that she was 12  
16          and in the 6th grade, the defendant had been  
17          sexually abusing her.   She stated that, uh, he  
18          would tuck her in at night.   She would go and lay  
19          down on the bed and he would be standing over her.  
20          There were times he would start to rub on her  
21          stomach and pubic area over and under the clothes,  
22          would vaginally penetrate with her -- with his  
23          fingers.   Remember him saying that he just couldn't  
24          help it because she was so beautiful and maybe even  
25          apologize for it, that he wouldn't do anything like

1           that again. And he did not until the 7th grade.

2           This would occur at the residence. That he  
3 performed oral sex on the victim. And she would  
4 attempt to stop him at times and tell him that was  
5 wrong. Then he would then -- things would get  
6 difficult in the house. He would be mad or mean.  
7 If she didn't try to stop him, then he would be  
8 happy and things would be easier on her in the  
9 home.

10           She stated that about two weeks prior to her  
11 finally disclosing, uh, her cousin, whose name I  
12 believe is Allison, had to go to work that day.  
13 And they were watching the other children. He came  
14 into her bedroom and again performed oral sex on  
15 her at that time. And that there were times when  
16 he would -- she has "get on top of me with clothes  
17 on". That he'd ejaculate and that one time it got  
18 on the side of the bed. She told him that -- or he  
19 told her that she needed to get up and go clean  
20 herself up.

21           This might be some out of order. It seems  
22 like there's some timeframes that are going back  
23 and forth. There -- it was consistent up to the  
24 point of the day that the child came forward and  
25 knew that she needed to tell. She could not do

1           that anymore. He had gotten into the shower with  
2           her that very morning and attempted to have sex  
3           with her. She stated that she knew she needed to  
4           leave. She could not maintain this any longer and  
5           she told a friend at school. And the friend urged  
6           her to tell relatives and law enforcement, which  
7           she did.

8                     She is here, Your Honor. She doesn't wish to  
9           address the court. She's had a very difficult  
10          time. That -- as a prosecutor speaking, in  
11          general, I've known that she has been placed in a  
12          couple of different places since this incident  
13          happened. This was her home. What she told me at  
14          one point was this is what she really thought was  
15          her home. There were a lot of things that were  
16          good about the family life, but then she was also  
17          being sexually abused at the same time.

18                    So it's been very conflicting for her. There  
19          are feelings, I think, that she does not want to  
20          see his other children suffer. She's put a lot of  
21          this on herself as far as not wanting them, anybody  
22          else to hurt anymore. She's asked to pass a letter  
23          up to you about her thoughts about what should or  
24          should not happen with the defendant.

25                    (WHEREUPON, Solicitor passes letter to Judge.)

1           **MRS. HODGE:**     Again, I advised her that I  
2           thought she was being extremely kind, but this was  
3           his decision, his choices and he's going to have to  
4           accept responsibility of his actions.   It's not on  
5           her.

6           The State would be asking for an active jail  
7           sentence in this case.   He does not have a prior  
8           record.   And the State would be dismissing a Lewd  
9           Act charge as part of that.

10          **THE COURT:**     Well, I know that you've talked  
11          to her.   I know you've talked to her.   And I hope  
12          that she's in some counseling and would imagine  
13          that she is in some counseling with regards to  
14          this.   This is in no way her fault.   She was in a  
15          vulnerable situation where someone could take  
16          advantage of that situation.   That had nothing to  
17          do with her whatsoever.   He was the adult.   He was  
18          the one that held all the cards.   There was nothing  
19          she could do.   He made those choices.   (Reading.)

20          I don't know who she is, and I don't want to  
21          certainly call her out in court.   But she is an  
22          extremely forgiving individual and extremely caring  
23          individual about his children, which is an amazing  
24          thing.   She does say that she would not want to put  
25          someone in a place like prison.   I want to say to

1 her she didn't do it. She didn't do any of this.  
2 I don't know what I'm ultimately going to do. I  
3 haven't heard. I just want to say some words to  
4 her to say she didn't do it. Whatever ultimately  
5 happens to him, he did it. All right.

6 Yes, sir.

7 **MRS. HODGE:** Thank you, Your Honor.

8 **MR. KAPPEL:** Thank you, Your Honor. May it  
9 please the Court.

10 **THE COURT:** Yes, sir.

11 **MR. KAPPEL:** Judge, my client is 40 years  
12 old. He and his wife contacted me when this report  
13 was first made. I would beg the Court's  
14 indulgence.

15 If everyone here on behalf of Kevin Fowler, if  
16 y'all would stand up for just a brief second.  
17 Thank you very much.

18 Judge, this is just an indication of the kind  
19 of support that he has in his community. What -- I  
20 would like to try to take as little time -- of your  
21 time as possible. But Judge, the report was being  
22 made with law enforcement. Obviously, my client  
23 knew the report was being made. Both he and his  
24 wife came together to hire me. They initially  
25 hired me on the DSS safety plan, obviously, with

1 the concomitant criminal investigation as well.

2 They have complied with the DSS safety plan  
3 from the very beginning. Kevin moved out of his  
4 house. To this day, he only sees his children  
5 about one hour every two weeks. We'd been begging  
6 DSS to go ahead and file the papers because it's an  
7 indicative case, of course. But they still have --  
8 after almost a year, DSS has not filed their  
9 Summons and Complaint to get us into court where we  
10 can try to modify their arrangement. Of course, as  
11 you well know, the safety plan has expired, but  
12 we're not doing anything in derivation of what DSS  
13 is doing. Respecting them, we are still complying  
14 with it.

15 But Judge, they've hired me. We started  
16 communicating with DSS. We start communicating  
17 with Heather Hubert with the sheriff's office. The  
18 investigation lasted probably for several months.  
19 And at the time when the case was being made, Ms.  
20 Hubert from the sheriff's office gave us the  
21 privilege of turning ourselves in to accept the  
22 charges and we were able to agree on a bond. Kevin  
23 was out on a bond from the very beginning. He  
24 continues to be very mindful of this process and  
25 the DSS process in being respectful and trying his

1 level best to comply with all the stipulations.

2 In addition, Judge, he has been evaluated by  
3 Dr. Gunner. So we took that initiative to have him  
4 evaluated to see what else could be determined.  
5 Dr. Gunner determined that he was not, uh, uh, a  
6 safety risk to children, which is basically his  
7 note. I've got his little paragraph here, in case  
8 the Court needs to see it.

9 In addition, he is going to Dr. Gunner's  
10 classes and doing all the things that he is  
11 required. We have a note from the case worker from  
12 the Department of Social Services. It's kind of a  
13 plain manilla letter. Obviously, they are not  
14 going on the record one way or the other. However,  
15 they are, uh, complimentary of him in terms of  
16 doing the things that they ask and complying with  
17 their, uh, uh, programs.

18 The other comment that I want to make, Judge,  
19 is I have a note from ReWa, Renewable Water  
20 Resources. It's a very good company. It's a  
21 company in which Kevin has worked for over three  
22 and a half years. This one, I would like to pass  
23 up to the court. It's very complementary of him  
24 and his work ethic. They, too, would not quite go  
25 on the record. I can say this, they are very much

1       aware of him being in court today. In fact,  
2       Kevin's photograph was published in a newspaper  
3       publication, you know, where they publish everyone.  
4       They are very much aware of what's happening today.  
5       They couldn't, for their employment laws, go on the  
6       record and say, look, you've got a job for here on  
7       out. But for them to write that letter knowing  
8       full well what's going forward today, I think, is  
9       pretty compelling to say that, uh, if the Court is  
10      inclined to let him leave this courthouse on  
11      probation, he will have a job tomorrow and continue  
12      to work.

13             Judge, as you saw from the courtroom, he has a  
14      great support group. It starts with his wife.  
15      Allison Fowler is here. From anyone on our side of  
16      the case, for anyone that would really be angry and  
17      upset and having a difficult time coping with this,  
18      it would be Allison. She's -- there's no question  
19      she's had a difficult time with it. But her  
20      support of her husband has never wavered. They are  
21      still married and she is in the courtroom on his  
22      behalf. I think that speaks very highly of Kevin  
23      and the quality of person he is aside from this,  
24      uh, occurrence.

25             Finally, Judge, I would point out that there's

1 a few people that do wish to address the Court.  
2 I've asked -- there are three of them. I've asked  
3 each of them to spend less than a minute if the  
4 Court is inclined to hear from them. Jamie Rector,  
5 which is my client's best friend he's known his  
6 entire life would like to address the court for 30  
7 seconds.

8 **THE COURT:** I normally don't do that, but  
9 I'll hear from them briefly.

10 **MR. KAPPEL:** Would you like us just to  
11 select one person then?

12 **THE COURT:** No, that's fine. They can  
13 speak. They can speak.

14 **MR. KAPPEL:** All right. Please come on up  
15 and state your name. Just state your name.

16 **SPEAKER:** My name is Jamie Rector. I've  
17 known Kevin for 35 years. We grew up together,  
18 went to school together, played sports together.  
19 Uh, I've always known him to be a trustworthy, kind  
20 person and helped others. Very family oriented.  
21 Good person as far as I know.

22 **THE COURT:** I thank you, sir, for being  
23 here.

24 **MR. KAPPEL:** Judge, the family's minister,  
25 Dan Green, would like to speak very briefly.

1           **SPEAKER:**     Good afternoon. My name is Dan  
2           Green. I'm the pastor of Sandy Springs Church.  
3           I've known Kevin and Allison for approximately six  
4           years. In that time period, Kevin and Allison had  
5           become active members of the church attending  
6           almost regularly. Kevin rose to serve as deacon in  
7           our church.

8                       Prior to working for ReWa, Kevin owned a  
9           masonry company. He and his employees dedicated a  
10          considerable amount of time and energy in doing  
11          some construction work for the church. I will tell  
12          you, Kevin had been -- and Allison both had been  
13          very active in activities in the church, helping  
14          with multiple things throughout the church. Up  
15          until this occurrence, Kevin had -- I could say  
16          nothing negative about Kevin and Allison in their  
17          participation and service to the church.

18          **THE COURT:**    I thank you, sir, for being  
19          here.

20          **MR. KAPPEL:**    And then finally, Kevin's  
21          mother would like to speak for just a very brief  
22          second.

23          **SPEAKER:**     My name is Nancy Fowler. I'm  
24          Kevin's mother. I would like to say Kevin has  
25          always been very kind, thoughtful, caring person,

1 very family-oriented person. And he's not a bad  
2 person just because you might do something stupid  
3 if he has done these stupid things, but that  
4 doesn't make him bad. That doesn't make him mean.  
5 He's still a good person.

6 **THE COURT:** I thank you, ma'am, for being  
7 here.

8 **MR. KAPPEL:** Judge, I know that Kevin would  
9 like to say a few words too. Then I'll just wrap  
10 up.

11 **THE COURT:** Yes, sir.

12 **MR. FOWLER:** I know I've been irresponsible.  
13 I know I've made bad decisions. And because of  
14 that, I've hurt family and friends. And I'm sorry  
15 for that. I know that I've hurt the victim deeply.  
16 I'm truly sorry for that. That was never -- I  
17 never intended for that to be. I just hope that  
18 someday in their heart, they can find a place to  
19 forgive me.

20 **MR. KAPPEL:** Finally, Judge, just to wrap,  
21 uh, Kevin and I have had sufficient time to review  
22 all the evidence in the file. We appreciate the  
23 consideration the State has given us. They've been  
24 very good to work with on the case. This is a  
25 terrible situation. There's just no getting around

1 it. It is a terrible situation to have legal  
2 custody of this young girl and have this happen.  
3 There's just no way to mitigate it. There's no way  
4 to try to explain it. It's just terrible.

5 But I would say to the Court the following,  
6 notwithstanding what has happened, Kevin remains  
7 with a very supportive group in his community and  
8 they will be with him with whatever decision the  
9 Court makes. I offer that to the Court by saying  
10 the following, he has been very, very hard on  
11 himself. I know that a lot of people will say he  
12 shouldn't be hard on himself. I might be right  
13 there with them. I'm not going to try to excuse  
14 it. But he has been very, very hard on himself.  
15 This case has been ongoing for 11 or 12 months.  
16 He's been extraordinarily upset and remorseful and  
17 has been very hard on himself.

18 It's been very hard on his family. It's been  
19 very hard on his two small children. The strain  
20 that this has placed on his marriage and his family  
21 and just his overall well-being has been  
22 extraordinary. I don't wish to try to minimize  
23 what the victim has gone through.

24 **THE COURT:** Oh, certainly.

25 **MR. KAPPEL:** I'm not trying to do that at

1 all. All I'm trying to do is say to the Court the  
2 following, I think if the Court were to consider  
3 probationary sentence or some sort of home  
4 incarceration sentence, I think the public can be  
5 well protected by placing him on some intensive  
6 probation, making him continue with what the DSS  
7 treatment plan will be. It's kind of a -- kind of  
8 a loose arrangement right now because we're not in  
9 court over there. But they will be following him  
10 for a long time. The sex offender registry will be  
11 following him very closely. I believe that, uh, if  
12 the court were to place him on a probationary  
13 sentence, the public would be adequately protected,  
14 particularly in light of Dr. Gunner's words that he  
15 doesn't find him to be a safety risk to children.

16 Finally, Judge, he does have a job as the  
17 letter indicates that he could continue working and  
18 supporting his family and supporting his children  
19 albeit he won't be in their household until --  
20 assuming he's on probation until DSS, you know,  
21 determines otherwise. I offer that to you because  
22 it shows that he has a level of respect for the  
23 authorities that have been involved in this case  
24 from the very beginning and following their  
25 directions and complying with what programs they

1 are offering.

2 So to me, what that tells me is it tells me  
3 about a person that recognizes how horrendous this  
4 is, has clued into what the appropriate course is.  
5 You'll never fix it, but you'll try to make things  
6 right or better. He knows that process. He's in  
7 route to completing that process over a long period  
8 of time. It's not something that will happen  
9 today, tomorrow or next week or next month. And  
10 he'll comply with whatever conditions the court  
11 sees fit. Quite frankly, that's all I have. I  
12 just ask the Court to consider a probationary  
13 sentence and thank you for your time.

14 **THE COURT:** Anything from the State in  
15 reply?

16 **MRS. HODGE:** No, Your Honor. Uh, it just --  
17 maybe it's just a choosing of words. But things  
18 don't just happen. There are choices. And there  
19 are repeated choices and actions. They don't just  
20 happen. So...

21 **THE COURT:** I agree. Again, I also agree  
22 that probably a choice of words. But I will note  
23 that this goes beyond irresponsible. This is not  
24 irresponsible. This is, this is hurting someone in  
25 a vulnerable position who can not do anything --

1           who can not do anything about it. She knew her  
2           life would be better when she went along with it.  
3           Cause when she didn't, her life was worse. She had  
4           no choices. She already had come and had been  
5           placed -- I don't know the reason that she was  
6           placed in your home. She had come there obviously  
7           from a difficult situation. This was the person --  
8           this was a person who needed to be protected.  
9           Protected more than anything. Instead, you  
10          exploited the situation that she was in.

11                 I will be honest with you, Mr. Fowler, though  
12          this is not going to be my sentence. I'll be  
13          honest with you that if I heard just your conduct  
14          and not the words that your attorney had said and  
15          people that came with you today had said, if I had  
16          just heard those things and I had not heard the  
17          heartbreaking plea in a letter from the victim  
18          thinking about your family, then I would have given  
19          you 20 years. I think that your conduct warrants  
20          the maximum sentence in this case. This was  
21          ongoing repeated long-term abuse that was in a  
22          vulnerable position. But I think that your mom's  
23          right. I do not think that you are a bad person.  
24          I think you have done some terrible, horrible,  
25          awful things and you did them over a period of time

1 and had a choice to quit, to stop at any time and  
2 you didn't.

3           Though it pains me to give you this and give  
4 you a reduced sentence, I am going to give you a  
5 reduced sentence based on some of the things that  
6 I've heard. But most importantly, based upon the  
7 words of the victim. I am going to take that into  
8 consideration. I don't know if it will help her in  
9 any way for her to know that she helped you get a  
10 lighter sentence. I don't know if that will help  
11 her. But if it will, I want to do what I can to  
12 help her, even if it pains me to do that.

13           I can not put you on probation. I will not  
14 put you on probation. This is not a probationary  
15 case. The sentence of the court is eight years.  
16 Good luck to you.

17           **MRS. HODGE:** Thank you, Your Honor.

18           **(WHEREUPON,** the proceedings conclude at  
19 approximately 3:41 p.m.)

20

21

22

23

## CERTIFICATE

STATE OF SOUTH CAROLINA     )  
                                          )  
COUNTY OF GREENVILLE     )

I, the undersigned, Teresa B. Johnson, Official Court Reporter for the Thirteenth 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 Court of General Sessions for Greenville, South Carolina, on this 23rd day of February, 2012.

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

---

Teresa B. Johnson  
Circuit Court Reporter

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )

IN THE COURT OF COMMON PLEAS  
 THIRTEENTH JUDICIAL CIRCUIT

KEVIN K. FOWLER, 349603, )  
 Applicant, )  
 )  
 v. )  
 )  
 THE STATE OF SOUTH CAROLINA, )  
 Respondent. )

2012-CP-23-

APPLICATION FOR  
 POST-CONVICTION RELIEF

FILED  
 CLERK OF COURT  
 GREENVILLE, S.C.  
 2012 JUN 19 AM 11:07

### 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 it clear to which question any such continued answer refers.

Since every application must be sworn to 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 applicant 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 applicant was convicted.

1. Place of detention: Allendale Correctional Institution, P. O. Box 1151, Hwy 47, Fairfax, SC 29827.
2. Name and location of Court which imposed sentence: Greenville County General Sessions Court, 305 E. North Street, Greenville, SC 29601
3. Name(s) of co-defendant(s) (if any): N/A
4. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
  - (a) 2011-GS-23-8819 Criminal Sexual Conduct with Minor 2<sup>nd</sup> Degree
5. The date upon which sentence was imposed and the terms of the sentence:
  - (a) February 6, 2012 - Eight years

6. Check whether a finding of guilty was made
  - (a) after a plea of guilty YES
  - (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. South Carolina Court of Appeals
    - ii. N/A
    - iii. N/A
  - (b) the result in each such Court to which you appealed:
    - i. Withdrew the appeal.
    - ii. N/A
    - iii. N/A
  - (c) the date of each such result:
    - i. June 29, 2012
    - ii. N/A
    - iii. N/A
  - (d) if known, citations of any written opinion or orders entered pursuant to such results:
    - i. Order of the South Carolina Court of Appeals entered June 29, 2012.
    - ii. N/A
    - iii. N/A
9. If you answered "no" to (7), state your reasons for not so appealing:
  - (a) Direct Appeal withdrawn because issues the Applicant sought to have reviewed are not appropriate review on direct appeal. Collateral review through an Application for Post-Conviction Relief is the proper avenue for review of claims Applicant desires to raise.

(b) N/A

(c) N/A

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

(a) The Applicant received Ineffective Assistance of Counsel prior and during his plea in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution.

(b) The Applicant's plea of guilty was not voluntary and intelligently entered. The judgments and sentences against the Applicant were entered in violation of his rights to due process of law and effective assistance of counsel.

(c) \_\_\_\_\_

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

(a) Trial Counsel failed to adequately investigate the Applicant's charges, failed to investigate and interview potential witnesses and failed to give his client adequate legal advise prior to the Applicant's guilty plea proceeding. Trial counsel failed to fully advise the Applicant of the consequences of his plea and further failed to investigate defenses against the charge against the Applicant. Trial Counsel neglected to adequately review discovery materials with the Applicant.

(b) Counsel failed to provide client effective assistance of counsel prior to and during his guilty plea proceeding. The Applicant's plea of guilt were coerced by counsel's failure to provide adequate representation.

(c) \_\_\_\_\_

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

(a) any petitions in a State Court under South Carolina law? N/A

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief? N/A

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A

(d) any other petitions, motions or applications in this or any other Court? N/A

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. N/A

ii. N/A

iii. N/A

iv. N/A

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

i. N/A

ii. N/A

iii. N/A

iv. N/A

(c) the disposition thereof:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(d) the date of each such disposition:

i. N/A

ii. N/A

iii. N/A

iv. N/A

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

i. N/A

ii. N/A

iii. N/A

iv. N/A

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. N/A

ii. N/A

iii. N/A

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

i. N/A

ii. N/A

iii. N/A

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) Post-Conviction Relief action presents first appropriate opportunity for review of these collateral issues.

(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? n/a

(c) your sentencing? yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? n/a

(e) preparation, presentation or consideration of any petitions, motions, or applications with respect to this conviction, which you filed? n/a

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. Shawn M. Campbell, Esquire, 104 N. Daniel Morgan Ave., Ste. 201,  
Spartanburg, South Carolina, 29306

ii. N/A

iii. N/A

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

i. Guilty Plea and Sentencing

ii. \_\_\_\_\_

iii. \_\_\_\_\_

19. State clearly the relief you seek in filing this application. Vacation of judgment and sentence. Applicant seeks a new trial.

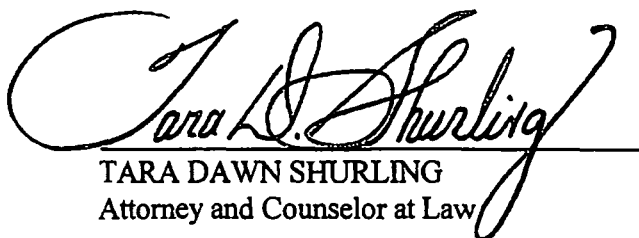
20. Are you now under sentence from any other court that you have not challenged? no

STATE OF SOUTH CAROLINA

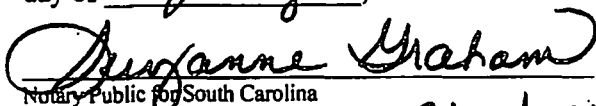
## VERIFICATION

COUNTY OF GREENVILLE

I, Tara Dawn Shurling, *retained* counsel for the Applicant, 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. The Applicant *does not* desire the assistance of a court-appointed PCR attorney

  
TARA DAWN SHURLING  
Attorney and Counselor at Law

SWORN to and subscribed before me this 10<sup>th</sup>  
day of July, 2012.

  
Notary Public for South Carolina

My Commission Expires: 3/12/2013

|                          |   |                              |
|--------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA  | ) | IN THE COURT OF COMMON PLEAS |
|                          | ) | C.A. No. 2012-CP-23-4612     |
| COUNTY OF GREENVILLE     | ) |                              |
|                          | ) |                              |
| Kevin K. Fowler,         | ) |                              |
| S.C.D.C. No. 349603,     | ) |                              |
|                          | ) |                              |
| Applicant,               | ) |                              |
|                          | ) | <b>RETURN</b>                |
| v.                       | ) |                              |
|                          | ) |                              |
| State of South Carolina, | ) |                              |
|                          | ) |                              |
| Respondent.              | ) |                              |
|                          | ) |                              |

In response to the post-conviction relief application filed July 19, 2012, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Applicant was indicted at the November 2011 term of the Greenville County Grand Jury for second-degree criminal sexual conduct with a minor (2011-GS-23-8819). Shawn M. Campbell, Esquire represented the Applicant.

On February 6, 2012, the Applicant pled guilty. The Honorable Letitia H. Verdin sentenced the Applicant to eight (8) years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. The Applicant was represented by Tara D. Shurling, Esquire. The Court of Appeals granted the Applicant's request to withdraw his appeal by order filed June 29, 2012.

Attached herewith and incorporated herein by reference are the records of the Greenville County Clerk of Court regarding the subject convictions, the Applicant's records from the South

Carolina Department of Corrections, and the appellate records. The plea transcript will be forwarded upon receipt.

## II.

In his application for post-conviction relief the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel:
  - a. "Trial Counsel failed to adequately investigate the Applicant's charges, failed to investigate and interview potential witnesses and failed to give his client adequate legal advise [sic] prior to the Applicant's guilty plea proceeding. Trial counsel failed to fully advise the Applicant [sic] of the consequences of his plea and further failed to investigate defenses against the charge against the Applicant. Trial Counsel neglected to adequately review discovery materials with the Applicant."
2. Involuntary guilty plea:
  - a. "Counsel failed to provide client effective assistance of counsel prior to and during his guilty plea proceeding. The Applicant's plea of guilt were [sic] coerced by counsel's failure to provide adequate representation."

## III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation

within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983).

#### IV.

The Applicant's assertion that his guilty plea was involuntary is without merit. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as

one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). An Applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the Applicant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted). An Applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985); Bennett v. State, 371 S.C. 198, 204, 638 S.E.2d 673, 675 (2006).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. See Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969). In Boykin, the United States Supreme Court held that before a court can accept a guilty plea, a criminal defendant must be advised of the constitutional rights he is waiving. Id. at 243, 89 S. Ct. at 1712. Specifically, the accused must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. Id. Moreover, a criminal defendant entering a guilty plea "must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citation omitted). A criminal defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea "must be established by a complete record, and may be accomplished by colloquy

between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000).

When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000).

The Respondent submits the record fully supports the knowing and voluntary nature of the Applicant's plea. However, allegations regarding ineffective assistance of counsel and the voluntariness of the plea may raise a question of fact that is not conclusively refuted by the record. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. at 265, 305 S.E.2d at 248 (1983).

V.

The Respondent denies each allegation not expressly admitted, qualified or explained.

VI.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held on the issues raised in the PCR application.

Respectfully submitted,

ALAN WILSON  
Attorney General

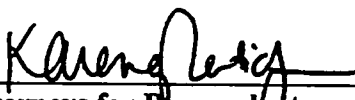
JOHN W. McINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Assistant Deputy Attorney General

KAREN C. RATIGAN  
Assistant Deputy Attorney General

P.O. Box 11549  
Columbia, S.C. 29211

By:

  
Attorneys for Respondent

Nov. 30, 2012

STATE OF SOUTH CAROLINA )

COUNTY OF GREENVILLE )

IN THE COURT OF COMMON PLEAS

2012-CP-23-4612

KEVIN K. FOWLER, 349603 )

Applicant, )

vs )

AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA, )

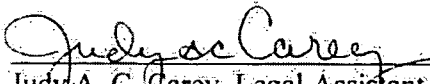
Respondent. )

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:

**Tara Dawn Shurling, Esquire**  
**3614 Landmark Drive; Suite A**  
**Columbia SC 29204**

NOV 30 2012

DATED this 30th day of November, 2012.

  
 Judy A. C. Carey, Legal Assistant  
 For Respondent

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
 COUNTY OF GREENVILLE ) THIRTEENTH JUDICIAL CIRCUIT

KEVIN K. FOWLER, 349603,  
 Applicant,

2012-CP-23-4612

v.

AMENDED APPLICATION FOR  
 POST-CONVICTION RELIEF

THE STATE OF SOUTH CAROLINA,  
 Respondent.

FILED-CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL B. WICKENSIMER  
 2013 DEC 27 AM 11:39

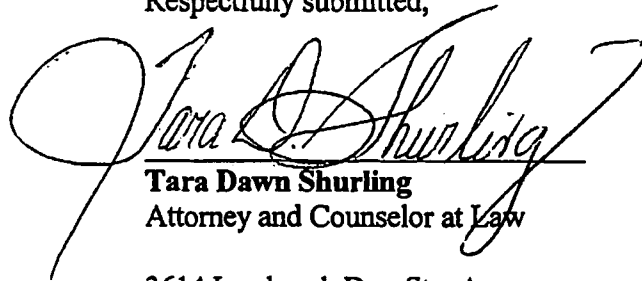
The Post-Conviction Relief Application previously filed on July 19, 2012 under docket number 2012-CP-23-4612 is hereby amended to include the following additional allegations:

1. Plea Counsel was ineffective for failing to communicate to him a written plea offer from the State which would have been beneficial to the Applicant and which he would have accepted.
2. Plea Counsel was ineffective for failing to discuss with the Applicant the possibility of attacking the mandatory electronic monitoring provision of the Sex Offender Registration law on constitutional grounds if he pleaded guilty to, or was convicted of, Lewd Act on a Minor.
3. Plea Counsel was ineffective for failing to ask for specific enforcement of the State's agreement not to make a recommendation as to sentence if the Applicant entered a plea of guilty.
4. Plea Counsel was ineffective for failing to fully review the discovery materials in this case with the Applicant before requiring him to make a decision about entering a plea of guilty in this case.
5. Plea Counsel was ineffective for failing to provide the Court with a copy of the full report issued by the mental health expert hired by the defense in this case.

The Applicant has no further amendments at this time. For the reasons set forth herein, as well as those set forth in his original application, the Applicant asserts that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth

Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, was violated prior to and during his guilty plea proceeding in the Court of General Sessions. Copies of these amendments have been served on opposing counsel, Karen C. Ratigan, Senior Assistant Deputy Attorney General, and Plea Counsel, Matthew J. Kappel, Esquire.

Respectfully submitted,



**Tara Dawn Shurling**  
Attorney and Counselor at Law

3614 Landmark Dr., Ste. A  
Columbia, SC 29204  
803-738-8622  
803-738-1600 (Fax)

This 11<sup>th</sup> day of December, 2013.

**ATTORNEY FOR APPLICANT**

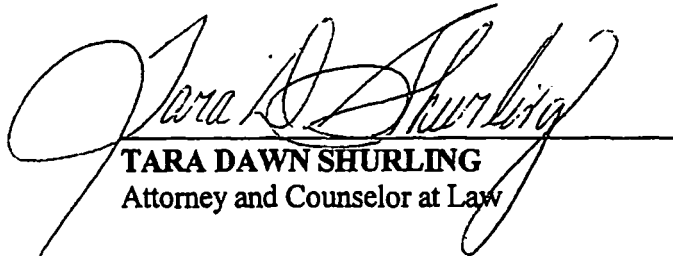
STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
 COUNTY OF GREENVILLE ) THIRTEENTH JUDICIAL CIRCUIT

KEVIN K. FOWLER, 349603, )  
 Applicant, ) 2012-CP-23-4612  
 )  
 v. ) **CERTIFICATE OF SERVICE**  
 )  
 THE STATE OF SOUTH CAROLINA, )  
 Respondent. )  
 \_\_\_\_\_ )

The undersigned attorney hereby certifies that a true copy of the Amended Post-Conviction Relief Application in the above matter has been emailed on this 11<sup>th</sup> day of December, 2013 to:

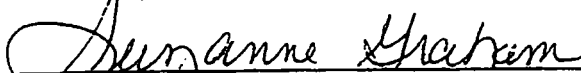
Matthew J. Kappel, Esquire  
 P. O. Box 10334  
 Greenville, SC 29603  
[mkappel@kappellaw.net](mailto:mkappel@kappellaw.net)

The original having been sent to the Greenville County Clerk of Court for filing.

  
**TARA DAWN SHURLING**  
 Attorney and Counselor at Law  
 3614 Landmark Drive, Suite A  
 Columbia, S.C. 29204  
 (803) 738-8622  
 (803) 738-1600 Fax

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 11<sup>th</sup> day of  
 December, 2013.

 (L.S.)  
 Notary Public for South Carolina  
 My Commission Expires: 2/28/2024

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
 COUNTY OF GREENVILLE ) THIRTEENTH JUDICIAL CIRCUIT

KEVIN K. FOWLER, 349603,  
 Applicant,

2012-CP-23-4612

v.

**CERTIFICATE OF SERVICE**

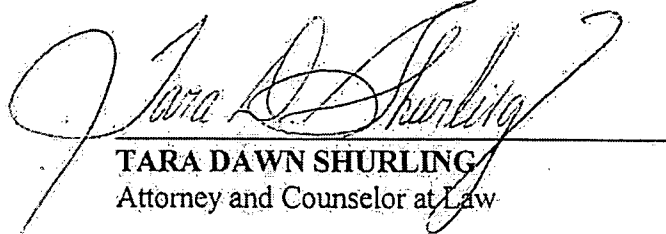
THE STATE OF SOUTH CAROLINA,  
 Respondent.

FILED-CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL B. WICKENSIMER  
 2013 DEC 27 AM 11 39

The undersigned attorney hereby certifies that a true copy of the Amended Post-Conviction Relief Application in the above matter has been emailed on this 11<sup>th</sup> day of December, 2013 to:

Karen C. Ratigan  
 Senior Assistant Deputy Attorney General  
 P. O. Box 11549  
 Columbia, SC 29211  
[kratigan@scag.gov](mailto:kratigan@scag.gov)

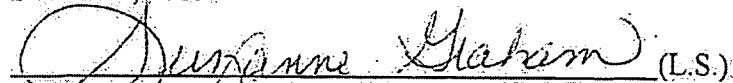
The original having been sent to the Greenville County Clerk of Court for filing.

  
**TARA DAWN SHURLING**  
 Attorney and Counselor at Law

3614 Landmark Drive, Suite A  
 Columbia, S.C. 29204  
 (803) 738-8622  
 (803) 738-1600 Fax

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 11<sup>th</sup> day of  
 December, 2013.

 (L.S.)  
 Notary Public for South Carolina  
 My Commission Expires: 2/28/2024

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

KEVIN K. FOWLER,

PLAINTIFF,

-VS-

STATE OF SOUTH CAROLINA,

DEFENDANT.

2012-CP-23-04612

DECEMBER 18, 2013

TRANSCRIPT OF RECORD

BEFORE:

THE HONORABLE G. EDWARD WELMAKER, JUDGE

APPEARANCES:

TARA DAWN SHURLING, ESQUIRE  
ATTORNEY FOR THE PLAINTIFF

KAREN RATIGAN, ESQUIRE  
ATTORNEY FOR THE DEFENDANT

DANETTE P. HANKS  
CIRCUIT COURT REPORTER

**INDEX**

| <b>WITNESSES</b>                         | <b>DIRECT</b> | <b>CROSS</b> | <b>REDIRECT</b> | <b>RECROSS</b> |
|------------------------------------------|---------------|--------------|-----------------|----------------|
| Matthew J. Kappel<br>Shurling<br>Ratigan | 5             | 27           | 31              |                |
| Allison Fowler<br>Shurling               | 35            |              |                 |                |
| Nancy Fowler<br>Shurling                 | 43            |              |                 |                |
| Kevin Fowler<br>Shurling<br>Ratigan      | 45            | 52           | 57              |                |
|                                          |               |              |                 |                |
|                                          |               |              |                 | <b>PAGE</b>    |
| Certificate of Reporter                  |               |              |                 | 68             |

## PLAINTIFF'S/ EXHIBITS

| NO  | DESCRIPTION                                                 | ID | EV |
|-----|-------------------------------------------------------------|----|----|
| P-1 | Letter from Kris Hodge to Matthew Kappel dated 10/3/11      | 16 | 16 |
| P-2 | Letter from Dr. Paul Gunter to Matthew Kappel dated 6/28/11 |    |    |

## DEFENDANT'S EXHIBITS

|  |        |  |  |
|--|--------|--|--|
|  | (NONE) |  |  |
|  |        |  |  |

## COURT'S EXHIBITS

|  |        |  |  |
|--|--------|--|--|
|  | (NONE) |  |  |
|  |        |  |  |

1

**DECEMBER 18, 2013**

2

(WHEREUPON, court convened with all parties present

3

and the following proceedings were had.)

4

THE COURT: Okay. Mr. Ratigan.

5

MS. RATIGAN: Thank you, Your Honor. May it

6

please the court. This is the case of Kevin Fowler

7

versus the State of South Carolina. The docket number

8

is 2012-CP-23-4612. Mr. Fowler was indicted for second

9

degree criminal sexual conduct with a minor and lewd

10

act. He was represented by Mr. Kappel on these charges.

11

He pled guilty on February 6th of 2012 to CSC second

12

with a minor. The state nol prossed that charge. Judge

13

Verdin levied an eight year sentence. He did file an

14

appeal at the Court of Appeals. He subsequently

15

requested to withdraw the appeal and the Court of

16

Appeals issued an order to that effect June 29th of

17

2012. His application was timely filed and the state is

18

ready to proceed.

19

THE COURT: Ms. Shurling.

20

MS. SHURLING: Thank you very much, Your

21

Honor. One moment's indulgence. I apologize.

22

Something is misfiled. My apologies, Your Honor.

23

Your Honor, we're proceeding today on the original

24

application, as well as the amended application for post

25

conviction relief that's been served on opposing

*Kevin K. Fowler -vs- State of South Carolina (2012-CP-23-04612)*

5

*Kevin Fowler - Direct Examination by Ms. Shurling*

1 counsel. And, of course, on trial counsel so that they  
2 can be prepared for today's proceeding. I assume that a  
3 copy of that amended application is in Your Honor's  
4 package.

5 THE COURT: It is.

6 MS. SHURLING: Thank you, Your Honor. At this  
7 time we would call Matt Kappel who was the applicant's  
8 plea counsel to the stand.

9 THE COURT: All right. Mr. Kappel, if you'd  
10 come around to be sworn, please.

11 THE CLERK: Place your left hand on the bible.  
12 Raise your right hand.

13 You do solemnly swear or affirm that the testimony  
14 you're about to give in this case will be the truth, the  
15 whole truth and nothing but the truth, so help you God?

16 THE WITNESS: I do.

17 THE CLERK: Thank you. You may be seated.  
18 Please state your full name for the record.

19 THE WITNESS: It's Matthew J. Kappel.

20 THE CLERK: Thank you. You may be seated.

21 **MATTHEW J. KAPPEL,**

22 **HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:**

23 **DIRECT EXAMINATION**

24 **BY MS. SHURLING:**

25 Q. Good afternoon.

1 A. Good afternoon.

2 Q. Mr. Kappel, do you recall representing Kevin  
3 Fowler?

4 A. Of course.

5 Q. And were you hired by Kevin or by his family? By  
6 his parents?

7 A. Well, I think the initial contact was through his  
8 wife, Allison. I don't recall specifically who hired  
9 me. Obviously, it was -- the family was working  
10 together. I assume they worked together to hire me.

11 Q. Certainly. And do you recall how long after Kevin  
12 Fowler's initial arrest you were retained in this  
13 matter?

14 A. I was retained actually well before his arrest.

15 Q. Okay.

16 A. I was retained initially after DSS came to the  
17 house. He wasn't arrested for six months or so after  
18 that.

19 Q. You anticipate my next line of questioning. You  
20 were actually initially retained with regard to family  
21 court proceedings?

22 A. I was retained because of the allegations that  
23 were lodged with the Department of Social Services.  
24 Clearly that would indicate a family court proceeding.  
25 And given the nature of the allegations, a criminal case

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1 was, in my view, eminent.

2 Q. I understand.

3 A. Although we did try to -- anyway, go ahead.

4 Q. And what were the charges that were ultimately  
5 lodged against Mr. Fowler?

6 A. Criminal sexual conduct.

7 Q. And was there also a count of lewd act on a minor?

8 A. I don't think so. I think -- as best I recall it  
9 was criminal sexual conduct.

10 Q. All right. After his initial arrest was he  
11 subsequently indicted for lewd act on a minor, in  
12 addition to the second degree criminal sexual conduct?

13 A. Once again, I don't recall. I think there was a  
14 plea offer that was made, you know, well before we went  
15 to court that offered a plea to lewd act on a minor and  
16 dismissal of the criminal sexual conduct charge. Now,  
17 the specifics as to whether or not both cases had been  
18 filed initially or not, I mean, I can look in the file  
19 and tell you. But my -- I don't have a recollection of  
20 that.

21 Q. Certainly. The plea in this case took place in  
22 February 2012. Do you have a copy of the plea  
23 transcript?

24 A. I do not, but I'm familiar with it. I've read it.

25 Q. A moment's indulgence. Yes, I have an extra copy.

1 MS. SHURLING: May I approach, Your Honor?

2 THE COURT: You may.

3 Q. I'm actually not referring to it at the moment,  
4 but I might, so I want to give you your own copy.

5 A. Thank you.

6 Q. Can I ask you to identify this document for me,  
7 please?

8 A. It's a plea offer that's made by the solicitor's  
9 office.

10 Q. And what was the date on that?

11 A. October 3rd, 2011.

12 Q. Thank you. Do you recall receiving this plea  
13 offer?

14 A. I did.

15 Q. Excuse me. When you received this plea office --  
16 pardon me, my mouth's not working -- this plea offer  
17 from Kris Hodge, did you provide your client with a copy  
18 of this letter?

19 A. I don't recall. I know that we reviewed it. I'm  
20 sure we reviewed it.

21 Q. You think you reviewed the physical letter with  
22 your client or just the offer?

23 A. I'm not sure.

24 Q. Okay. And as you understood the offer conveyed in  
25 this letter, what were its terms?

1 A. It was a plea to lewd act on a minor. I mean,  
2 that would be the -- the CSC would be dismissed.

3 Q. And what agreement, if any, did the state make  
4 with regard to sentencing in connection with this plea  
5 offer?

6 A. Well, I believe at the bottom of that she had said  
7 that they would remain silent on sentencing or not make  
8 a recommendation as to sentencing.

9 Q. And did I leave a copy with you at the bench?

10 A. You didn't, but I've got one.

11 Q. I can hand you one. I have several.

12 A. It's okay. It's right here.

13 Q. Okay. If I could get you when you -- it really  
14 might be easier, Mr. Kappel, here. Save you the  
15 trouble.

16 A. Sure.

17 Q. If you would, please look at the second page of  
18 this letter at the top. What does it indicate the shelf  
19 life of this plea offer is?

20 A. May 1st, 2012.

21 Q. And again, this plea was in February 2012?

22 A. That's correct.

23 Q. Okay. Now, when you reviewed this plea offer with  
24 your client, did he agree to accept it?

25 A. I think -- I'm sorry. I'm trying to remember the

1 best that I can. I think the notion was to plead.  
2 There was a question as to pleading to lewd act or  
3 pleading to the criminal sexual conduct. And prior to  
4 the plea, we had a meeting with the family and Kevin  
5 downstairs in the attorneys' lounge prior to court. One  
6 of the principal issues that we discussed was the  
7 lifetime ankle monitoring. That was the, that was the  
8 factor.

9 THE COURT: Judge, for your convenient  
10 reference, I'm going to hand you up a copy of 23-3-540.  
11 And if I may, Your Honor, I'll hand you a copy to make  
12 it easy for everybody.

13 Q. And it was the mandatory lifetime electronic  
14 monitoring for lewd act that became the sticking point  
15 in this plea?

16 A. I wouldn't say a sticking point. It became a  
17 subject of conversation.

18 Q. Okay. Well, how did it come about that your  
19 client ended up in February, well before this offer  
20 expired in May, entering a plea to second degree  
21 criminal sexual conduct, as opposed to lewd act, which  
22 is what the original offer was?

23 A. Why we were in court in February as opposed to  
24 May? Is that the first question?

25 Q. Well, my first question, how did you go from an

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1 offer to plead to lewd act with no recommendation as to  
2 sentence, to pleading to second degree criminal sexual  
3 conduct with a solicitor that was clearly asking for  
4 hard time?

5 A. Right.

6 Q. How did that happen?

7 A. Well, I had met with the solicitor on a number of  
8 occasions to discuss the case to try to figure out the  
9 best way to go forward. And it was in my view that a  
10 trial was not going to be a positive experience for us,  
11 that we would have gotten a bad result. The offer that  
12 was made to lewd act was made, I guess, you know,  
13 October. And I think I met with her -- I'd have to look  
14 back at my calendar, but I met with her, I know, before  
15 the offer and quite possibly extensively after we  
16 arrived at a court date, because that was a plea week  
17 that we felt there was -- well, I think we believed or I  
18 believed that the judge that was holding court that week  
19 would be one that might be acceptable to, you know, an  
20 argument on Kevin's behalf. So that's why court was set  
21 that week.

22 Q. Okay.

23 A. The -- how we got from lewd act to criminal sexual  
24 conduct is quite simply -- and I'll talk to you about  
25 the recommendation in a moment. The family and I met

1 downstairs where we discussed pleading to lewd act. My  
2 understanding of the law then -- I had confirmed it with  
3 probation to be on the safe side -- was that lewd act  
4 carried with it lifetime ankle monitoring. And I said,  
5 if you want my opinion, I'll offer you my opinion. But  
6 based on -- my opinion was, I would not want lifetime  
7 ankle monitoring. That's just basically what I told  
8 them. I would not want to be seventy years old with a  
9 bracelet around my leg. And ultimately, you know, the  
10 decision was his. I mean, I didn't make the decision  
11 for him. I told him what I thought and the decision was  
12 made. The -- so consequently the plea was, the plea was  
13 to criminal sexual conduct. And the recommendation and  
14 Ms. Hodge asking for a jail sentence was my oversight.  
15 That's the only way I can explain it. You know, I see  
16 the plea offer. It states that she would remain silent  
17 on the sentence. And I should have held her to it, and  
18 I did not.

19 Q. Okay. Do you have any recollection of any  
20 specific conversations with the prosecutor in this case  
21 and when she conditioned her agreement not to make a  
22 recommendation as to sentence to him pleading to lewd  
23 act as opposed to criminal sexual conduct second degree  
24 with a minor?

25 A. No. I mean, no, I think -- if you want to know

1 what I think, I'll tell you what I think. We came into  
2 court and she announced that she was going to be asking  
3 for a jail sentence. I think she probably forgot what  
4 she wrote in the offer and in the heat of the moment I  
5 had forgotten.

6 Q. Okay. So if I understand you correctly, when you,  
7 when you went to court in February, at what point had  
8 you advised the solicitor's office that your client was  
9 not willing to plead to lewd act but rather wanted to  
10 plead to the CSC second charge?

11 A. I don't, I don't remember.

12 Q. Well, according to the letter that you have before  
13 you, there were actually arrest warrants on both  
14 charges. The warrant ending in 628 was for lewd act and  
15 warrant ending in 627 was the criminal sexual conduct  
16 with a minor charge; correct?

17 A. Okay.

18 Q. So wouldn't the solicitor's office have to have  
19 agreed to allow him to plead to only one of the two  
20 charges?

21 A. Well, I mean, their offer was to plead to the lewd  
22 act and they would dismiss the other. I mean, it seemed  
23 quite logical that they were looking for simply one  
24 conviction. Ultimately the question was, what  
25 conviction would it be? And the central discussion was

1 regarding the lifetime ankle monitoring.

2 Q. Okay. What did you tell your client and his  
3 family -- most importantly your client -- with regard to  
4 the distinction between sentencing exposure for second  
5 degree criminal sexual conduct as opposed to lewd act  
6 with a minor?

7 A. Well, I told them that the criminal sexual conduct  
8 with a minor would require more -- a greater percentage  
9 of the sentence to be served.

10 Q. All right. And you discussed with him the  
11 electronic monitoring issue?

12 A. Yes.

13 Q. Did you discuss with him a possible distinction in  
14 his exposure to an effort by the state to characterize  
15 him as a violent sexual predator on the back end of his  
16 sentence?

17 A. I don't recall if we discussed that or not.

18 Q. Okay. And what did you tell your client in terms  
19 of his literal sentencing exposure, statutory exposure  
20 for penalties on lewd act versus criminal sexual conduct  
21 with a minor second degree?

22 A. Well, I certainly advised that there was a greater  
23 maximum sentence for the criminal sexual conduct.

24 Q. Okay.

25 A. And I'm sure I let him know that there was a

1 higher percentage of the sentence to be served.

2 Q. Okay. Did you think it would really make any  
3 difference in terms of the penalty imposed from the  
4 bench what label got put on the activity?

5 A. I really didn't think that it would make a whit of  
6 difference what the charge was.

7 Q. In other words, you anticipated that the court was  
8 going to hear the factual basis for the plea; correct?

9 A. Yes.

10 Q. And regardless of which named offense he was  
11 pleading to, the sentencing judge was going to hear all  
12 the dirty details of the factual foundation for both  
13 charges, basically?

14 A. Yes.

15 Q. Okay. And again, you've been forthright. I just  
16 want the record to be really clear. You just forgot  
17 that she had agreed not to recommend a sentence?

18 A. I should have paid -- I should have looked at this  
19 document. What more can I tell you? I ---

20 Q. I understand. I'm just trying to make it clear.

21 A. But I think when you read the transcript of the  
22 hearing and the reaction from the court as to the case,  
23 you know, I've thought about it at great length, but I'm  
24 not sure that it made that much of a difference whether  
25 the solicitor was silent or not. Now, I can't say for

1 sure. Maybe it would have, I don't know. What I'm  
2 saying is, I'm not sure if it would have or would not  
3 have made much of a difference.

4 Q. I understand.

5 MS. SHURLING: Before we go any further, Your  
6 Honor, I would move to introduce the letter dated  
7 October 3rd, 2011 as Applicant's 1.

8 MS. RATIGAN: No objection.

9 THE COURT: Without objection it'll be marked  
10 as Exhibit 1 and admitted.

11 (WHEREUPON, Plaintiff Exhibit Number 1 was marked  
12 and admitted into evidence.)

13 Q. Did you -- I don't need to turn my back when I'm  
14 speaking. Did you file a motion to reconsider sentence  
15 in this case?

16 A. I don't believe that I did.

17 Q. Did you at any time after Mr. Fowler's sentencing  
18 in this case realize that the state had actively pursued  
19 prison time in this case when they had agreed not to  
20 make a recommendation?

21 A. I mean, I discovered that upon reviewing the file  
22 at a much later date. So ...

23 Q. Let's talk for a moment about Dr. Gunter. He was  
24 an expert that you hired to evaluate your client and  
25 provide an expert opinion, I gather, in terms of his

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1 continued dangerousness to the community, his likelihood  
2 of recidivism? Is that ---

3 A. Well, it was, it was -- we hired Dr. Gunter very  
4 early on in the case. It was to show that he was not a  
5 threat or a danger to children.

6 Q. And during the plea proceeding, you referenced to  
7 the court the fact that you have gotten the opinion of  
8 Dr. Paul Gunter and you say that you'll hand up the  
9 little paragraph if the court wants to see it; or  
10 language to that effect. Do you recall that?

11 A. Yes, ma'am.

12 MS. SHURLING: Your Honor, I apologize. My  
13 flag fell off. One moment I'll find that for you.

14 MS. RATIGAN: Page 12.

15 MS. SHURLING: I thought it was 12, but I  
16 don't see -- there it is. It is page 12, Your Honor,  
17 lines 9 through -- oh, excuse me. Basically starting 1  
18 through 17, basically.

19 Q. Is ---

20 MS. SHURLING: Pardon me, if I may, Your  
21 Honor.

22 THE COURT: Yes, ma'am.

23 Q. Is this the paragraph you were referring to in  
24 court, this letter, the document you were referring to  
25 on page 12?

1 A. Yes, ma'am.

2 THE COURT: Your Honor, I would move to  
3 introduce this as Applicant's 2.

4 MS. RATIGAN: No objection.

5 THE COURT: Without objection, Exhibit 2 is  
6 admitted into evidence.

7 (WHEREUPON, Plaintiff Exhibit Number 2 was marked  
8 and admitted into evidence.)

9 MS. SHURLING: And again, Your Honor, just for  
10 your convenience, I have an extra copy of that.

11 Q. Looking at the body of this very brief letter, Dr.  
12 Gunter says, further information is forthcoming in a  
13 full report. Do you see that portion of the letter?

14 A. I mean, you took the copy from me. I can pull it  
15 out of my file.

16 Q. Oh, I'm sorry.

17 A. That's okay. I remember it.

18 Q. I gave everybody else a copy and not you.

19 A. That's okay.

20 Q. Here you go.

21 A. I mean, I remember the statement that he made.

22 Q. Okay. And again, this letter is dated June 2011.  
23 And this plea didn't take place until February 2012.  
24 Did you ever follow up with Dr. Gunter and get a full  
25 report from him?

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1 A. I don't recall that I did. I probably would not  
2 have wanted a full report simply because what I really  
3 wanted was the opinion that he offered in this document,  
4 which was that Kevin's primary sexual interests fall  
5 without the range of normal heterosexual males.

6 Q. Do you have any specific recollection as to  
7 whether you ever followed up with Dr. Gunter?

8 A. I don't.

9 Q. Did you have any discussions that you can recall  
10 with Dr. Gunter concerning what further information  
11 would be in a full report were he to issue such a  
12 report?

13 A. I can tell you what my think was, if that's what  
14 you would like to know. Dr. Gunter was hired for an  
15 assessment of Kevin. He issued a very general but  
16 helpful finding to our position, which is contained in  
17 this letter. It was not my interest in getting a full  
18 breakdown and providing that to anyone. I did not want  
19 that produced, nor did I want that sent to the  
20 solicitor's office so they could dissect it and try to  
21 make whatever they could from it.

22 Q. I understand. During this time period, about what  
23 percentage of your practice involved criminal law?

24 A. Eighty percent.

25 Q. And do you frequently hire experts in various

1 areas to assist you in preparing defenses?

2 A. Sure.

3 Q. And do you often get verbal reports from experts  
4 before you decide whether or not you want a written one?

5 A. Well, I can say this. We certainly look at  
6 working with experts and with an eye toward our  
7 responsibilities for discovery. And in this case I  
8 asked Dr. Gunter to do an assessment. I asked him to  
9 give me an accurate opinion and I would let him know if  
10 we wanted a full report at some point. And I'm certain  
11 that I did not call him and ask him for a full report.

12 Q. Okay. Now, and I know you're trying very hard to  
13 be forthcoming, and I apologize if I sound like I'm  
14 being challenging. But Dr. Gunter doesn't say, let me  
15 know if you want a report. He says, a full report is --  
16 more information is forthcoming in a full report;  
17 doesn't it?

18 A. Yeah. But I don't think that he ever did one.

19 Q. Do you know why he didn't do one?

20 A. I do not.

21 Q. Okay. And you have no recollection of ever  
22 following up with him ---

23 A. I do not.

24 Q. --- after receiving this letter?

25 A. I do not.

1 Q. And this letter, standing alone, does not provide  
2 the reader with any information concerning how this  
3 expert came to these conclusions; does it?

4 A. Well, it says he used the Abel assessment for  
5 sexual interests.

6 Q. I understand.

7 A. So Dr. Gunter is a very well known doctor in  
8 Greenville or he's in Greer. His opinion is widely  
9 respected in family courts where most of these  
10 assessments are done. And it was my opinion that this  
11 was sufficient.

12 Q. Was adequate?

13 A. Sufficient, adequate, however you want to describe  
14 it.

15 Q. Thank you. Did you discuss Dr. Gunter's opinion  
16 when it came in in June of 2011 with your client and his  
17 family?

18 A. I'm sure I did. I don't have any specific  
19 recollection of it, but I'm sure I said, I've got the  
20 initial opinion of Dr. Gunter and it's favorable.

21 Q. And again, if I'm being redundant, I apologize,  
22 I'll move on. But I don't believe you answered the  
23 specific question I had, which is, do you have any  
24 recollection of any discussion with this doctor in which  
25 information was revealed that you wouldn't have wanted

1 in writing?

2 A. I don't have any recollection of any discussion  
3 with Dr. Gunter where information was provided to me  
4 that I would not have wanted reduced to writing.

5 Q. Thank you. That's what I needed. Thank you very  
6 much. Let's talk about this lifetime registration  
7 requirement that is found in 23-3-540. Have you ever  
8 dealt with the issue of mandatory lifetime registration  
9 for someone with a judgment for lewd act before this  
10 case?

11 A. I don't recall. I know the lifetime ankle  
12 monitoring at the time was a byproduct of the guilty  
13 plea to lewd act. And I advised Kevin of that.

14 Q. Were you surprised, like I freely admit myself, to  
15 find that first degree criminal sexual conduct with a  
16 minor and lewd act with a minor required lifetime  
17 electronic monitoring; whereas it was optional for  
18 second degree?

19 A. Yeah. I remember specifically discussing it with  
20 the family. I remember specifically discussing it with  
21 Allison when she said that you didn't know that lewd act  
22 carried lifetime ankle monitoring. So it's a very  
23 unusual area. It seems nonsensical, but that's, at  
24 least at the time, the way that it was.

25 Q. Prior to entering a plea to second degree criminal

1 sexual conduct with a minor, had you discussed with Mr.  
2 Fowler the fact that although it wasn't mandatory, that  
3 there was still a possibility that electronic monitoring  
4 might be ordered for life even on second degree?

5 A. I think I indicated that the judge could order it  
6 at the plea.

7 Q. What, if any, discussions did you have with your  
8 client concerning the possibility of challenging the  
9 authority of the state to order lifetime electronic  
10 monitoring without judicial review?

11 A. I am not a hundred percent certain, but it's very  
12 likely that we did not discuss a constitutional  
13 challenge to lifetime ankle monitoring. I think the  
14 discussion centered strictly on what the law was and how  
15 it was being applied.

16 Q. I understand. At this point in time, have you  
17 ever done any work with cases where the state was  
18 seeking to have someone civilly committed as a violent  
19 sexual predator?

20 A. I have not had any cases on that.

21 Q. Have you ever had occasion to research the law  
22 concerning the authority of the state to civilly commit  
23 someone who has finished their penalty for their ---

24 A. I'm familiar with the statute. I'm familiar with  
25 where it is in the code. I have looked at it. I have

1 never been hired for a civil commitment proceeding.

2 Q. Okay. And I understand your answer that you

3 believe that you probably did not discuss a

4 constitutional challenge with Mr. Fowler?

5 A. With regard to the lifetime ankle ---

6 Q. Yes?

7 A. You know, it's -- I'll just be very honest with

8 you. You know, if I discussed with him that there's a

9 constitutional challenge and that constitutional fails,

10 then I get blamed or providing false hope for

11 challenging something with the Supreme Court. If I

12 don't do it, then I'm at fault too. And you know, I

13 guess the best way to deal with it is to simply say, it

14 carries with it lifetime ankle monitoring. It's a

15 pretty draconian thing. You can try to challenge it

16 with the Supreme Court and you can take your chances.

17 And perhaps that's what I should have said.

18 Q. And are you familiar with the Supreme Court of

19 South Carolina's decision just last year in State v.

20 Dykes?

21 A. Yeah. You gave me a copy of it.

22 Q. And of course, I freely admit, this case was just

23 decided last year. But when that case came out, did you

24 give any consideration to the possible application that

25 case might have had to the facts of Mr. Fowler's case?

1 A. No, I did not.

2 Q. Because he, in fact, was not actually ordered to  
3 take part in lifetime monitoring on his second degree  
4 sentence; was he?

5 A. No, he was not.

6 Q. Okay. If you had remembered before this plea  
7 proceeding that the state had actually agreed, in  
8 writing, that if he pled before May of the following  
9 year, they would make no recommendation as to sentence,  
10 would you have brought that to the solicitor's  
11 attention?

12 A. Yes.

13 Q. And if the solicitor had insisted in vehemently  
14 requesting prison time, as she did in this case, would  
15 you have made a motion for specific enforcement of the  
16 plea?

17 A. Yes.

18 Q. And again, no tactical or strategic reason for not  
19 having done so?

20 A. That's correct.

21 Q. All right. Did you -- prior to the plea  
22 proceeding in February, did you review the discovery  
23 materials completely with Mr. Fowler?

24 A. I'm sure I did. I don't have any specific  
25 recollection, but we met, I don't know, dozens of time

1 in my office. I mean, I'm not sure what else we would  
2 do ---

3 Q. Sure.

4 A. --- except to go through the file and talk about  
5 where we were with it.

6 Q. I understand. But again, you have no recollection  
7 of having shared the written plea offer with your  
8 client?

9 A. I don't have any recollection of that. I'm sure  
10 we discussed it. It's quite possible we went through  
11 the paperwork. But do I have a specific memory of doing  
12 that, no.

13 Q. Okay. Have you reviewed your file to see if you  
14 have any sort of transmittal letter that would indicate  
15 that you sent him a copy of it?

16 A. No. I think most of our -- most, if not all, of  
17 our discussions were in my office, so ... We would meet  
18 and talk and go through the file and go through the  
19 procedure and what our options were.

20 MS. SHURLING: One moment's indulgence, Your  
21 Honor.

22 THE COURT: Yes, ma'am.

23 MS. SHURLING: No further questions, Your  
24 Honor, thank you.

25 THE COURT: You may cross examine.

1 MS. RATIGAN: Thank you.

2 CROSS EXAMINATION

3 BY MS. RATIGAN:

4 Q. So, Mr. Kappel, as part of your representation,  
5 would you have filed the usual Brady and Rule 5 motions?

6 A. Yes, ma'am.

7 Q. And you would have received those materials from  
8 the state?

9 A. Yes, ma'am.

10 Q. Do you recall receiving all those materials or was  
11 there anything you never got from Ms. Hodge?

12 A. No. I've got all the materials.

13 Q. And very briefly, can you summarize the nature of  
14 the evidence against your client?

15 A. Well, there were a number of factors that were a  
16 significant problem for our case. One was there was an  
17 initial statement that Kevin gave to the caseworker for  
18 DSS that responded to the scene to take the initial  
19 report. And then, of course, I think the most  
20 significant memory I have of the evidence that was  
21 provided was the cell phone records. And there was a  
22 series of text messages that were going back and forth  
23 between Kevin and the minor child. And those were  
24 pretty devastating. I probably should point out, as  
25 well, that the overall gist of the case was of a real

1 problem, as well, and that was the child was taken into  
2 Kevin and Allison's home because of prior abuse.

3 Q. And did you review with Mr. Fowler all the state's  
4 evidence?

5 A. I did.

6 Q. Did you discuss with him the harmful impact his  
7 initial statement to the caseworker had upon your case?

8 A. I did. And I think my comments were that it  
9 wasn't very helpful.

10 Q. And did you go through those text messages with  
11 Mr. Fowler?

12 A. I did.

13 Q. And again, did you discuss with him the overall  
14 detrimental impact they had on the case?

15 A. Yes. I think my comment was, if we're going to  
16 trial, we need to have some sort of explanation that's  
17 logical and, of course, truthful and factual. But I was  
18 not quite sure how to explain the text messaging.

19 Q. And did Mr. Fowler, in talking about the case, did  
20 he tell you his version of the case, basically?

21 A. Sure.

22 Q. And based on the state's evidence and Mr. Fowler's  
23 discussions with you, were you able to formulate any  
24 kind of viable defense?

25 A. No.

1 Q. And would you, in the course of your representation  
2 of Mr. Fowler, explain and review with him the elements  
3 of both the lewd act and the CSC second charges?

4 A. Yes.

5 Q. And would you also have reviewed with him the  
6 sentencing ranges for each of these charges?

7 A. Yes.

8 Q. And your testimony on direct is that you explained  
9 to both Mr. Fowler and the family, after receiving this  
10 plea offer, about the lifetime GPS for the lewd act?

11 A. Yes.

12 Q. And ---

13 A. And I probably should point out, I still have the  
14 voice mails on my telephone, even right now, from Jenny  
15 -- I don't know Jenny's last name, I'm sorry, I've known  
16 her for years -- the probation officer that sits in the  
17 general sessions court, I have the voice mail messages  
18 from her prior to the plea, still on my phone, where she  
19 describes that lifetime ankle monitoring comes with lewd  
20 act.

21 Q. And is that the basis for Mr. Fowler having  
22 rejected the plea, or did he tell you why he rejected his  
23 plea?

24 A. I assume that was what it was for, because that  
25 was what our discussion was downstairs, was based on

1   lewd act -- I mean, based on lifetime ankle monitoring.

2   Q.     And do you recall when it was that you spoke with  
3   Ms. Hodge about basically getting rid of this first plea  
4   agreement and having him -- basically switching the  
5   order, having him plead to the CSC and dismissing the  
6   lewd act? Do you remember when that would have  
7   happened?

8   A.     I'm not sure.

9   Q.     Okay. But obviously at some point she agreed to  
10  go along with this new recommendation rather than the  
11  other?

12  A.     Yes, ma'am.

13  Q.     And you would have explained to Mr. Fowler what he  
14  was pleading guilty to that day?

15  A.     Yes, ma'am.

16  Q.     Okay. And did you know prior to the plea that the  
17  victim had indicated she did not want him to get a lot  
18  of jail time?

19  A.     Yeah. She wrote a letter, in fact.

20  Q.     And you had discussed that with Mr. Fowler?

21  A.     Yes, ma'am.

22  Q.     Now, Exhibit 1, which is the October 2011 plea  
23  offer, it does say there's no recommendation as to  
24  sentence. But isn't it true that you didn't actually --  
25  that Mr. Fowler didn't actually plead under this offer

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1 because he did not plead to lewd act and CSC second?

2 A. I mean, that's a very technical way to look at it,  
3 but yes, that is true. But I'm sorry, I'm going to have  
4 to explain. You know, pleading under the other charge,  
5 I mean, I would have held her to the same notion that  
6 she would make a recommendation on probation.

7 Q. Right.

8 A. And I think that was what was -- what I was  
9 thinking. She advised us she was not, and I just, for  
10 whatever reason, I did not recall the actual specific  
11 note at the bottom of the file -- or the bottom of that  
12 letter.

13 Q. Okay. In your opinion was there anything else  
14 that you could have done in terms of presentation of  
15 mitigation evidence for Mr. Fowler?

16 A. No. I mean I read the transcript a couple of  
17 weeks ago, and there wasn't anything that I felt that I  
18 should have done or didn't do, aside from this issue  
19 regarding sentencing. But my personal feeling is, is  
20 that based upon the judge's reaction to the case, I'm  
21 not sure that it really made that much of a difference.

22 MS. RATIGAN: Thank you, Your Honor. That's  
23 all I have.

24 THE COURT: Any redirect?

25 **REDIRECT EXAMINATION**

1 **BY MS. SHURLING:**

2 Q. I will certainly count on His Honor to read the  
3 plea transcript himself, but it's fair to say that the  
4 solicitor was pretty vehement about seeking prison time  
5 in this case during this plea; wasn't she?

6 A. Sure.

7 Q. And it is true that the victim in this case had  
8 written letters saying that she did not want to see him  
9 go to prison?

10 A. That's correct.

11 Q. And I am, after thirty-four years practicing law,  
12 I certainly know what the definition of sexual battery  
13 is. But just for the benefit of the court, this was not  
14 a case that actually involved intercourse with the  
15 child?

16 A. No. There as digital penetration is what my  
17 recollection was.

18 Q. But there was no actual sexual intercourse? No  
19 copulation?

20 A. No penal penetration: Digital penetration.

21 Q. Exactly. I understand. I've just got to ask. I  
22 mean, during this fairly lengthy plea proceeding when  
23 Kris Hodge is crying for blood basically, asking for  
24 serious prison sentence here, that just didn't jog your  
25 memory at all that she had agreed not to make a

1 recommendation?

2 A. It did not.

3 Q. Okay. And again, at no time that you can recall  
4 had you advised your client that switching from lewd act  
5 to CSC, in terms of what he was willing to plead to,  
6 would result in a change in the state's position?

7 A. Well, again, I'm going to try to understand your  
8 question.

9 Q. Okay. I'll rephrase it if ---

10 A. I've already answered it, but I'll answer it again  
11 if you would like me to.

12 Q. Well, I think it was poorly worded. Let me give  
13 another shot at it.

14 A. Sure.

15 Q. Did you ever -- do you recall any discussions with  
16 your client in which you advised him that the state's  
17 position on not recommending a penalty might change  
18 based on him agreeing to plead to second degree as  
19 opposed to lewd act on a minor?

20 A. No, we did not discuss that.

21 Q. Thank you. No further -- oh, one thing. You  
22 mentioned that this young lady had come from a  
23 background of abuse. Isn't it true that she had been  
24 living with an elderly grandmother who was no longer  
25 able to take care of her?

1 A. Maybe.

2 Q. Based on your earlier testimony did you think you  
3 had recollection of her having been physically abused in  
4 a previous placement?

5 A. I think she was.

6 Q. And can you enlighten us as to what that's based  
7 on?

8 A. My discussions with my client and his wife.

9 Q. Okay. So this young lady was your client's wife's  
10 cousin?

11 A. Niece.

12 Q. Niece. And they had taken legal guardianship of  
13 her when the grandmother was no longer able to care for  
14 her?

15 A. You know, I don't have the specifics on -- that  
16 girl had been through a number of placements and she  
17 came to Allison and Kevin's. And when this happened she  
18 was moved into another aunt's house or something. And  
19 that didn't work and -- I mean, I don't know. But there  
20 was prior abuse, which is what I -- did I go out and  
21 verify it? No. But that's what I was told. That's why  
22 they had this girl in the first place.

23 Q. And the record will reflect this. But your client  
24 didn't have a prior record of anything even vaguely  
25 resembling this kind of charge; did he?

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1 A. No. No, he did not. Or any record, for that  
2 matter.

3 Q. And no record at all and no even discussion of  
4 previous allegations, even ones that had not risen to  
5 the level of criminal charges; isn't that true?

6 A. He had no prior record of any sort at all.

7 Q. Okay. Thank you. No further questions.

8 THE COURT: All right. Thank you, sir. You  
9 may step down.

10 MS. SHURLING: Your Honor, my next witness  
11 will be Allison Fowler.

12 THE COURT: All right. Come around and be  
13 sworn, please, ma'am.

14 THE CLERK: Place your left hand on the bible.  
15 Raise your right hand.

16 You do solemnly swear or affirm that the testimony  
17 you're about to give in this case will be the truth, the  
18 whole truth and nothing but the truth, so help you God?

19 THE WITNESS: I do.

20 THE CLERK: Thank you. Please state your full  
21 name for the record.

22 THE WITNESS: Allison Lane Fowler.

23 THE CLERK: Thank you. You may be seated.

24 **ALLISON FOWLER,**

25 **HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:**

1

**DIRECT EXAMINATION**2 **BY MS. SHURLING:**

3 Q. Ms. Fowler, at the time these allegations were  
4 made, were you married to Kevin Fowler?

5 A. Yes, ma'am.

6 Q. And the young lady who made the allegations  
7 against Kevin was your niece; is that correct?

8 A. No, ma'am. She is my second cousin.

9 Q. That's what I thought I remembered. Okay. So she  
10 was a second cousin. And why was she placed in your  
11 home? Why were you asked to take her in?

12 A. Because she was living with my aunt at the time,  
13 who was her grandmother, and she was just becoming a  
14 little unruly. They were having a -- or she was having  
15 a hard time keeping control of her. And they felt like  
16 she would be -- would do better in a home a little more  
17 controlled or stable, I guess. She was just having a  
18 hard time with her.

19 Q. Okay. And you and your husband, Kevin, agreed to  
20 take her in your home?

21 A. Yes, ma'am.

22 Q. And did you actually go through the legal process  
23 of becoming her guardians?

24 A. Yes, ma'am.

25 Q. Okay. When these allegations came to light, was

1 Kevin remorseful?

2 A. Yes.

3 Q. And there's been discussion about a trial.

4 Basically, did Kevin ever seriously entertain -- I'll  
5 rephrase that in a minute. Let's fast forward to after  
6 the charges have been brought and you've hire Mr.

7 Kappel. Do you recall at some juncture him coming to  
8 you and recommending that your husband plead guilty?

9 A. Yes.

10 Q. And did you have meetings with Mr. Kappel with  
11 your husband or did he at times meet with you alone?

12 A. I believe I did meet with him maybe a time or two  
13 alone, but mostly it was both of us.

14 Q. Were you present when Mr. Kappel discussed an  
15 offer from the state for your husband to plead guilty?

16 A. Yes.

17 Q. I should back up for a second. You and Kevin are  
18 no longer married; are you?

19 A. That's correct.

20 Q. Are you still on good terms?

21 A. Yes.

22 Q. But you're legally divorced?

23 A. That's correct.

24 Q. What did Mr. Kappel tell you was being offered by  
25 the state in terms of a plea negotiation or plea

1 bargain?

2 A. The way I understood it, and I believe both of us  
3 understood it, was that he was charged with criminal  
4 sexual conduct second degree, but that they would allow  
5 him to plead to lewd act on a minor, but that did  
6 require lifetime ankle monitoring, and that whichever  
7 one we -- that Kevin actually decided to plead to, that  
8 he felt like it would make no difference in time because  
9 they were not going to ask for time. So he could get  
10 probation with either one, was the way that we were --  
11 but that the lewd act did -- would definitely be  
12 lifetime ankle monitoring.

13 Q. Did you have discussions with him as to why lewd  
14 act with a minor would require lifetime monitoring,  
15 whereas second degree criminal sexual conduct would not?

16 A. We, of course, asked that question. And I didn't  
17 understand it. But -- and honestly, I don't think Matt  
18 really understood why -- I'm sorry, Mr. Kappel really  
19 understood why they chose to put lifetime ankle  
20 monitoring for lewd act but not for CSC two.

21 Q. But it's your recollection that he said he didn't  
22 think it would make any difference how much time he got?

23 A. Because they were not going to be asking for time.  
24 It was going to be at the judge's discretion, of course,  
25 and that either charge you could -- you know, one was

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1 zero to twenty, one was zero to fifteen. You could get  
2 probation with either one. You could get time with  
3 either one. And that it didn't really matter which one  
4 he pled guilty to.

5 Q. And it was your understanding that the state was  
6 not going to ask for active prison time either way?

7 A. Uh-huh (affirmative).

8 Q. Okay. After Kevin actually got a prison sentence  
9 in this case, was there any further discussion with  
10 Attorney Kappel about that being in violation of what  
11 the state had agreed to, their asking for time? Was  
12 there anything -- any discussion with him about that?

13 A. Well, actually it was right before the hearing  
14 started, maybe just a couple of minutes before the  
15 hearing started, if I remember correctly, it seemed like  
16 he at that time said, I think I misunderstood. I think  
17 they might be asking for time.

18 Q. He said he thought he had misunderstood?

19 A. Right.

20 Q. Prior to him making that remark to you, had you  
21 had any knowledge of the prosecutor in this case having  
22 written a letter in which she put in writing the terms  
23 of the plea bargain?

24 A. No. We never -- I never laid eyes on a plea  
25 bargain in writing.

1 Q. Okay.

2 A. I thought it was all through discussion with him

3 and ---

4 Q. And whether you ---

5 A. --- the prosecutor.

6 Q. I'm sorry. Madam Court Reporter, I'm sorry.

7 Whether you physically saw the letter or not, were you  
8 ever made aware that the state had put in writing their  
9 agreement not to make a recommendation as to sentence?

10 Did you ever know the state had actually put in writing  
11 the fact that if he pleaded there would be no  
12 recommendation as to sentence?

13 A. I didn't know that it was in writing.

14 Q. Okay.

15 A. I just knew that Mr. Kappel said, they're not  
16 going to recommend a sentence. They're not asking for  
17 time.

18 Q. And immediately prior to the plea he told you he  
19 thought he was mistaken, that they were going to ask for  
20 time?

21 A. That's correct.

22 Q. Okay. I don't want to beat a dead horse, but I  
23 mean, was there any discussion about trying to ask the  
24 judge to hold the state to the terms of a plea bargain  
25 that your husband had agreed to?

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1 A. No.

2 Q. When you were discussing the lifetime monitoring,  
3 was there any discussion about possibly challenging the  
4 constitutionality of that statutory provision?

5 A. Not that I recall, no.

6 Q. Were you aware that Mr. Kappel had hired Dr. Paul  
7 Gunter ---

8 A. Yes.

9 Q. --- in your husband's case? Did you pay for Dr.  
10 Gunter?

11 A. Probably.

12 Q. Did you ---

13 A. I'm sure we did.

14 Q. Did you and your former in-laws share the cost of  
15 the legal defense?

16 A. Yes.

17 Q. And you were aware that Dr. Gunter had been hired?

18 A. Yes.

19 Q. Were you aware, prior to the entry of the plea,  
20 that Mr. Kappel had not ever gotten a full written  
21 report from Dr. Gunter?

22 A. No. I didn't know that there was a full written  
23 report forthcoming.

24 Q. Had you seen this letter or memo to Matt Kappel  
25 from Dr. Gunter prior to the date of the plea?

1 A. I don't remember if I saw the -- I don't recall  
2 seeing the letter. I just remember Mr. Kappel telling  
3 us what it said.

4 Q. Okay. And was there any discussions once Kevin  
5 got the sentence that he got, was there any discussion  
6 about potentially filing a motion to reconsider  
7 sentence?

8 A. No.

9 MS. SHURLING: A moment's indulgence.

10 THE COURT: Yes, ma'am.

11 Q. One last question. When you were discussing the  
12 plea bargain that had been offered by the state with Mr.  
13 Kappel, were your in-laws present?

14 A. I believe we did discuss it right before the  
15 hearing with everyone who was here to support Kevin.

16 Q. Well, specifically was Nancy Fowler in the room?

17 A. Yes.

18 Q. Thank you. No further questions.

19 MS. RATIGAN: I don't have any questions for  
20 Ms. Fowler.

21 THE COURT: Thank you. You may step down.

22 MS. SHURLING: Your Honor, I call Nancy  
23 Fowler.

24 THE COURT: Come around and be sworn, please.

25 THE CLERK: Place your left hand on the bible.

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1 Raise your right hand.

2 You do solemnly swear or affirm that the testimony  
3 you're about to give in this case will be the truth, the  
4 whole truth and nothing but the truth, so help you God?

5 THE WITNESS: I do.

6 THE CLERK: Thank you. You may be seated.

7 Please state your full name for the record.

8 THE WITNESS: Nancy Harper Fowler.

9 THE CLERK: Thank you.

10 **NANCY FOWLER,**

11 **HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:**

12 **DIRECT EXAMINATION**

13 **BY MS. SHURLING:**

14 Q. Ms. Fowler, are you Kevin's mother?

15 A. Yes, ma'am.

16 Q. When discussions began about Kevin entering pleas  
17 or a plea on the charges brought against him, what do  
18 you recall Attorney Kappel telling you about the state's  
19 plea offer?

20 A. First of all, usually it was Kevin and Allison  
21 that met with Mr. Kappel and I was not present. They  
22 were the clients, so to speak.

23 Q. Yes.

24 A. The only time that I recall anything coming up  
25 about that was when we were downstairs before we came

1 into the courtroom, us and the other people that were  
2 with us, character witnesses, the preacher, friends, and  
3 so forth, was when we were discussing the lewd act  
4 versus the criminal sexual assault. And that's really  
5 the first time I recall being present when that was  
6 discussed. And then, of course, when we came up into  
7 the courtroom right before the judge came out is when he  
8 came out and told us that he misunderstood Ms. Hodge,  
9 that she was going to ask for time.

10 Q. Prior to telling you he had misunderstood Ms.  
11 Hodge, that she was going to ask for time, in that  
12 earlier conversation did you hear him say -- him being  
13 Attorney Kappel -- that the state was not going to ask  
14 for time?

15 A. I don't, I don't remember him saying that  
16 downstairs. I think he had said that previously to  
17 Allison and Kevin. I don't remember that day him  
18 specifically saying that downstairs.

19 Q. So you remember the inverse. You remember when  
20 you got upstairs him telling you that, oh, I was wrong?

21 A. We discussed it downstairs about one versus the  
22 other. But I don't remember it coming up about them not  
23 asking for time.

24 Q. So the first thing you remember about any  
25 discussion concerning the state asking for time was

1 upstairs in the courtroom immediately before the plea?

2 A. Correct.

3 Q. And at that point he told you he was mistaken and

4 he thought they were going to ask for time?

5 A. Correct.

6 Q. Nothing further. Thank you.

7 MS. RATIGAN: I have no questions for Ms.

8 Fowler.

9 THE COURT: Thank you, Ms. Fowler. You may

10 step down.

11 MS. SHURLING: Your Honor, I would call Kevin

12 Fowler to the stand.

13 THE COURT: Come around, please, sir.

14 THE CLERK: Place your left hand on the bible.

15 Raise your right hand.

16 You do solemnly swear or affirm that the testimony

17 you're about to give in this case will be the truth, the

18 whole truth and nothing but the truth, so help you God?

19 THE WITNESS: I do.

20 THE CLERK: Thank you. Please state your full

21 name for the record.

22 THE WITNESS: Kevin Keith Fowler.

23 THE CLERK: Thank you. You may be seated.

24 **KEVIN FOWLER,**

25 **HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:**

1

**DIRECT EXAMINATION**2 **BY MS. SHURLING:**

3 Q. Mr. Fowler, can you tell us for the record, as  
4 clearly as you can remember, what Mr. Kappel told you  
5 the state was offering you as a plea bargain?

6 A. Well, I had discussed my situation with my work,  
7 and they had informed me that if I didn't receive any  
8 prison time that they knew my character and that I was a  
9 good employee and that I would be no liability, that I  
10 would be able to stay employed. So when I conveyed that  
11 to Mr. Kappel, he had spoke with the solicitor's office  
12 and had come back and said that she -- in light of that  
13 then she offered I could plead to lewd act and they  
14 would drop the CSC second.

15 Q. And did -- what did he tell you concerning  
16 sentencing? Did he say the state had agreed to ask for  
17 any particular sentence? Agreed not to make a  
18 recommendation? I mean, what did he tell you the state  
19 had agreed to do when it came to sentencing?

20 A. Well, at that time he just said that I could --  
21 you know, if I pled to the lewd act they would drop the  
22 CSC.

23 Q. Did he tell you the state was not going to ask for  
24 prison time?

25 A. He had mentioned that if I pled that, you know,

1 she would not recommend any prison time.

2 Q. Okay. Now, you understood that you're not  
3 claiming that Mr. Kappel promised you probation; are  
4 you?

5 A. No, ma'am.

6 Q. But he told you it was a possibility?

7 A. Either way he said that it was a possibility to  
8 get probation.

9 Q. Either charge; either lewd act or criminal sexual  
10 conduct?

11 A. Right. Because they both carried a zero minimum.

12 Q. Kevin, the nice lady sitting in front of you has  
13 to write down every word we say.

14 A. Yes, ma'am.

15 Q. And I'm bad about talking over you and I do it and  
16 I'm in court every week, so I know it's hard. But try  
17 to let me finish and then you answer me, because it's  
18 hard for her to try to write it down if we're both  
19 talking at the same time; okay?

20 A. Yeah.

21 Q. So when did you become aware that if you pled to  
22 lewd act with a minor that would come with a mandatory  
23 lifetime electronic monitoring?

24 A. Actually we -- Mr. Kappel had called two weeks  
25 prior to the court date and that's when we had started

1 discussing it. And at that time he said, I'm not sure,  
2 I don't think that's so. And my wife had been looking  
3 into it and she said, you know, I think it does. So he  
4 said, well, let me contact someone at the probation  
5 office. And then the day of the court, when we're in  
6 the conference room, is when he comes back and he said,  
7 this, you know, I've received an answer back. It does  
8 carry lifetime GPS ankle monitoring and, you know, it  
9 costs like two hundred and seventy dollars a month and  
10 you'll be stuck with that the rest of your life.

11 Q. And at that point did he recommend that you  
12 consider pleading to, logically the more serious charge  
13 of second degree criminal sexual conduct with a minor?

14 A. Yes, ma'am. He said they both -- one carried a  
15 zero to fifteen, one carried a zero to twenty. That,  
16 you know, either way I could get probation or they could  
17 give me time. But that, you know, I wouldn't have to  
18 deal with the lifetime ankle monitoring.

19 Q. Did he ever tell you -- well, what did he advise  
20 you in terms of his professional opinion as to whether  
21 it would make any difference in the length of your  
22 sentence as to what label you put on your actions;  
23 whether you pled to lewd act or whether you pled to the  
24 CSC?

25 A. He didn't. He just said one carried zero to

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1 fifteen years and one zero to twenty.

2 Q. Did he tell you he felt like you would get more  
3 time if you pled to CSC second?

4 A. No, ma'am.

5 Q. What did he say with regard to that?

6 A. He -- again, he said, you know, they both have a  
7 zero minimum. One had fifteen and one had twenty. That  
8 either way I could get probation or I could get time.

9 Q. Okay. Were you ever aware of the letter back from  
10 October 2011 from the solicitor's office setting forth  
11 the written -- a written plea offer? Were you ever  
12 aware of that letter?

13 A. No, ma'am.

14 Q. At any future date, even after the letter had been  
15 received, did Mr. Kappel ever go over that letter with  
16 you?

17 A. No, ma'am.

18 Q. When did you become aware of that letter's  
19 existence?

20 A. I never knew there was a letter.

21 Q. Well, who showed it to you for the first time?

22 A. You did when you come to visit me.

23 Q. Okay. If you had been aware that the state had  
24 agreed in writing in a written plea offer not to make a  
25 recommendation as to sentence if you pled to lewd act,

1 would you have taken the deal and pled to lewd act?

2 A. Yes, ma'am.

3 Q. And -- but up to the time of your plea, you had  
4 been led to believe the state wasn't going to ask for  
5 time regardless of which charge you pleaded to; right?

6 A. That's how I understood it, yes, ma'am.

7 Q. And before you actually entered your plea, did Mr.  
8 Kappel tell you anything different from that?

9 A. No, ma'am. I actually signed the plea the day of  
10 the hearing. So, I mean, he had not advised me any  
11 differently.

12 Q. Okay. But what I'm trying to get at is, before  
13 you actually went through the process of entering the  
14 plea, at some point do you recall Mr. Kappel telling you  
15 that he thought he had misunderstood the solicitor or  
16 that they were going to ask for time?

17 A. Yes, ma'am. When we actually were sitting waiting  
18 for the judge to come out, they had come out of a  
19 chambers and he came straight over to me and said that I  
20 must have misunderstood, she's asking for prison time.

21 Q. And at that point did he enter into further  
22 discussion with you about the fact that, you know, if  
23 you went back to the original offer and pled to lewd  
24 act, he could ask the court to enforce her agreement not  
25 to ask for time?

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1 A. No, ma'am. He never mentioned that.

2 Q. And again, if you had known that there was a firm  
3 written offer that if you pled to lewd act the state  
4 would not ask for active prison time, regardless of the  
5 electronic monitoring issue, would you have pled to lewd  
6 act?

7 A. Yes, ma'am.

8 Q. Was there ever any discussion about how -- about  
9 the problems there appeared to be with the electronic  
10 monitoring statute? That you can recall, did he ever  
11 discuss with you, for example, that it seemed odd that  
12 you would have to register for lewd act -- have  
13 mandatory lifetime registration for lewd act but not for  
14 second degree CSC with a minor? Do you recall any  
15 discussions like that?

16 A. He -- once when my wife brought up, you know, that  
17 she had looked and believed that it carried. And you  
18 know, he seemed like he didn't know that it did. And  
19 then once he researched and found out, he did say that,  
20 you know, I don't understand that. That seems kind of  
21 strange, but it does carry lifetime GPS monitoring.

22 Q. And at that point was there any discussion with  
23 you about the possibility of challenging the  
24 constitutionality of that particular law?

25 A. No, ma'am.

1 MS. SHURLING: A moment's indulgence, Your  
2 Honor.

3 THE COURT: Yes, ma'am.

4 Q. Would you have pleaded guilty to second degree  
5 second criminal sexual conduct with a minor, knowing as  
6 you've been told just right before the plea that the  
7 state was going to ask for time, would you have entered  
8 that plea if you had known that the state had offered to  
9 not ask for time if you pled to lewd act?

10 A. No, ma'am.

11 Q. No way?

12 A. No.

13 Q. Thank you. No further questions.

14 THE COURT: You may cross examine.

15 MS. RATIGAN: Thank you, Your Honor. I'll be  
16 brief.

17 **CROSS EXAMINATION**

18 **BY MS. RATIGAN:**

19 Q. Mr. Fowler, did you look through the state's  
20 evidence and discuss it with your attorney?

21 A. Yes, we did.

22 Q. Okay. And did you tell him what had happened to  
23 the victim?

24 A. Yes, ma'am.

25 Q. Okay. And you testified you discussed this offer

*Kevin K. Fowler -vs- State of South Carolina (2012-CP-23-04612)*  
*Kevin Fowler - Cross Examination by Ms. Ratigan*

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- 1 with Mr. Kappel, you just didn't see the letter?
- 2 A. After I spoke with my work, he told us that the  
3 solicitor said if I pled that they would not recommend  
4 any prison time.
- 5 Q. And he told you that when you talked about this  
6 October plea offer? About pleading to lewd act and  
7 dismissing CSC?
- 8 A. (No verbal response.)
- 9 Q. Let me rephrase it. You said you discussed the  
10 plea offer with him at some point?
- 11 A. Well, he -- after I spoke with my work he come  
12 back and said that if I pled ---
- 13 Q. Pled to what?
- 14 A. Well, at the time I thought that ---
- 15 Q. Pleading to lewd act or pleading to CSC? I'm just  
16 confused.
- 17 A. Well, he said if I pled to lewd act they would  
18 drop the CSC.
- 19 Q. Okay. That's what I'm asking. So he told you the  
20 state had made an offer and if you pled to lewd act they  
21 would dismiss the CSC?
- 22 A. Yes.
- 23 Q. Y'all talked about that?
- 24 A. Yes, ma'am.
- 25 Q. Okay. And he told you at that point the state

1 would not ask for any kind of sentence?

2 A. Yes. Yes, ma'am.

3 Q. You just never actually saw the physical letter,  
4 like you never saw the written letter until Ms. Shurling  
5 gave it to you?

6 A. Yes, ma'am. I never saw the letter.

7 Q. So after y'all discussed pleading to lewd act, why  
8 did you decide not to plead to lewd act?

9 A. Because he had -- the day of the trial he had said  
10 that I would be stuck with this lifetime ankle  
11 monitoring and it costs two hundred and seventy dollars  
12 a month.

13 Q. Okay.

14 A. That would be for the rest of my life, that I  
15 would never be able to get off of that. And that CSC  
16 second doesn't carry that.

17 Q. Okay. So you rejected that plea offer because you  
18 didn't want the lifetime GPS?

19 A. Well, because that and he said they both carry  
20 zero to twenty. That I could get probation with either  
21 one.

22 Q. And so Mr. Kappel had told you how much time you  
23 faced on all these charges?

24 A. Yeah. He had said they carry a minimum and a  
25 maximum. Yes, ma'am.

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*Kevin Fowler - Cross Examination by Ms. Ratigan*

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1 Q. So you didn't want to plead to the lewd act. You  
2 decided that day that instead you would plead to the CSC  
3 and the state would drop the lewd act?

4 A. That I never ...

5 Q. So what did you ---

6 A. He said I could plead to one or the other. Yes,  
7 ma'am.

8 Q. So what did you think you were pleading to that  
9 day? I'm confused. You just told us you rejected the  
10 lewd act.

11 A. I was pleading to CSC second with a minor.

12 Q. Okay. When did you decide to do that?

13 A. The day of the hearing.

14 Q. Okay. And you basically decided to plead to the  
15 CSC because you didn't want to plead to lewd act because  
16 of the lifetime GPS and the fact that they both carried  
17 probation; is that correct?

18 A. The fact that they both carried time and -- yes,  
19 they both carried probation. I could possibly ...

20 Q. What you've told the court today was that if you  
21 had known the state agreed not to make a sentence  
22 recommendation regarding lewd act, you would have pled  
23 to the lewd act?

24 A. Yes, ma'am.

25 Q. But didn't you just tell me a few minutes ago that

1 when you discussed the offer to lewd act with Mr.

2 Kappel, he told you the state would not make a sentence

3 recommendation? Didn't he tell you that when you talked

4 about it?

5 A. The day that he told -- I thought that either way

6 I pled that there would be no recommendation for time.

7 Q. So he had told you that?

8 A. He said if I pled instead of going to trial that

9 there would be no recommendation for time.

10 Q. So why are you arguing today that you just found

11 out about this prior offer to make no sentence

12 recommendation?

13 A. Because I didn't know -- I though either way that

14 I pled there would be no recommendation for time. I

15 didn't know that there was a written offer.

16 Q. So you knew about it. You just never saw it in

17 writing?

18 A. No, I didn't know specifically that -- I though

19 either way, if I pled that there would be no

20 recommendation for time.

21 Q. And you're saying today that you would have pled

22 to lewd act, even with the lifetime GPS, if you had

23 known there would be no sentence recommendation?

24 A. Yes, ma'am. Because I could have possibly kept my

25 job and I could have ...

1 Q. Even though one of the reasons you decided not to  
2 take the original offer was because of lifetime GPS, you  
3 were willing to face that if you could potentially keep  
4 your job?

5 A. Could you say that again, please?

6 Q. You just testified that one of the reasons you  
7 rejected pleading to lewd act was because it carried  
8 lifetime GPS. But you're saying now you actually would  
9 have pled to lewd act with lifetime GPS if you thought  
10 there was a possibility you could have kept your job?

11 MS. SHURLING: Your Honor, this has been asked  
12 and answered three time.

13 THE COURT: I overrule your objection.

14 A. Yeah. Yes, ma'am.

15 Q. Okay. That's all I have, Your Honor.

16 THE COURT: Any redirect?

17 **REDIRECT EXAMINATION**

18 **BY MS. SHURLING:**

19 Q. Mr. Fowler, what did your lawyer tell you the  
20 state was going to do about asking for any particular  
21 sentence if you pleaded to either one of these crimes?

22 A. He didn't say.

23 Q. Okay. You said a little while ago that he told  
24 you they weren't going to ask for time if you pleaded to  
25 what?

1 A. Well, he just said if I pled she wasn't going to  
2 recommend any time.

3 Q. Okay. So it was your understanding that it didn't  
4 matter whether you pled to second degree criminal sexual  
5 conduct with a minor or lewd act, the state had agreed  
6 not to ask for prison time?

7 A. Yes, ma'am.

8 Q. And you never knew specifically that they had only  
9 concretely agreed not to make a sentencing  
10 recommendation if you pleaded to lewd act?

11 A. That's correct.

12 Q. Okay. So, you know, the state's got me a little  
13 jumbled up here. But at the time you pled to CSC with a  
14 minor ---

15 A. Yes.

16 Q. --- you did not know that the state had agreed  
17 that they wouldn't ask for prison time if you pled to  
18 lewd act?

19 A. Yes, ma'am.

20 Q. So I'm kind of comparing apples and oranges here.  
21 You thought if you pled to either one of those crimes --  
22 originally, you thought if you pled to either one of  
23 them, the state wasn't going to ask for time.

24 A. Yes, ma'am. That's my understanding.

25 Q. And then you get upstairs and your lawyer says, I

1 must have misunderstood. She's going to ask for time?

2 A. Yes, ma'am.

3 Q. Okay. And at that point you still knew lewd act  
4 carried lifetime electronic monitoring; right?

5 A. Yes, ma'am.

6 Q. And that CSC second didn't; correct?

7 A. Right.

8 Q. And your lawyer told you he didn't think it was  
9 going to make any difference in terms of the sentence  
10 the judge gave you which one you pled to; right?

11 A. Yes, ma'am.

12 Q. Okay. So the missing piece of the puzzle that you  
13 didn't know was that the state had actually agreed, in  
14 writing, not to make the sentencing recommendation if  
15 you pleaded to lewd act?

16 A. That's correct.

17 Q. And if you had known that, lifetime electronic  
18 monitoring or not, you would have pled to lewd act  
19 instead of CSC second?

20 A. Yes, ma'am.

21 Q. And if you had known that, you would have wanted  
22 your lawyer to make a motion to enforce that plea  
23 bargain?

24 A. Yes, ma'am.

25 Q. And if you had ever seen that letter, you would

1 have known that the offer was open until May of 2012;

2 right?

3 A. That's correct.

4 Q. And you would have asked him, no, I'm going to

5 accept it just the way they offered it so they won't

6 recommend prison time?

7 A. Yes, ma'am.

8 Q. Thank you. No further questions.

9 THE COURT: All right, sir. Thank you. You  
10 may step down.

11 MS. SHURLING: No further witnesses, Your  
12 Honor.

13 MS. RATIGAN: Beg the court's indulgence. One  
14 second, Judge.

15 THE COURT: Yes, ma'am.

16 MS. RATIGAN: Your Honor, the state will rest  
17 based on the record before Your Honor and Mr. Kappel's  
18 testimony.

19 THE COURT: All right. Let me just ask for a  
20 couple of clarifications. Did either of you wish to  
21 make a statement?

22 MS. RATIGAN: I don't feel one is necessary.  
23 It's pretty obvious, Your Honor.

24 THE COURT: Mr. ---

25 MS. SHURLING: Your Honor, I apologize. I

1 didn't mean to interrupt.

2 I think what is crucial here is the understanding,  
3 and I think with all due respect, Mr. Kappel's own  
4 testimony backs us up, that he thought himself that the  
5 state wasn't going to ask for time, whichever crime he  
6 pled to, whether it was lewd act or second degree  
7 criminal sexual conduct. I think he referred to that as  
8 being a logical inference. And it's equally clear that  
9 he's admitted that at the time of the plea proceeding,  
10 he said, I must have been confused, I must have  
11 misunderstood, words to that effect, she's going to ask  
12 for time. He admits, for whatever reason, he simply  
13 didn't remember that there had been a written offer  
14 extended that had a shelf life that was open until May,  
15 that if he entered the plea to lewd act that there would  
16 be no recommendation as to sentencing made by the state.

17 It's clear that my client thought he was comparing  
18 apples and apples, when he was actually comparing apples  
19 and oranges. That if he had known that if he pled to  
20 CSC with a minor second degree, yes, he was going to get  
21 away from mandatory electronic monitoring but there was  
22 no agreement on the part of the state not to ask for  
23 prison time. Whereas, if he pled to lewd act with a  
24 minor, he was exposing himself to lifetime electronic  
25 monitoring, but the state had agreed not to make any

1 recommendation as to penalty.

2       And my client has clearly testified that had he  
3 known that he would have accepted the written offer  
4 extended by the state, that he would have pled to lewd  
5 act regardless of the electronic monitoring requirement.  
6 And I believe that that revelation, as fully articulated  
7 by the testimony, -- I mean fully supported, rather, by  
8 the testimony here today, supports the allegation by my  
9 client that his plea was not knowingly, voluntarily and  
10 intelligently entered. There's ample case law that says  
11 that a plea has to be entered with a comprehensive  
12 understanding of the consequences of the plea. This  
13 ranks of the state's case. And any plea offers that are  
14 on the table and terms and conditions thereof.

15       And it's clear that even Mr. Kappel was acting  
16 under the assumption that the agreement not to seek  
17 active prison time -- or not to make a recommendation,  
18 rather. I don't want to overstate my case. The  
19 agreement not to make a recommendation as to sentence  
20 would apply equally, whether he pled to second degree  
21 criminal sexual conduct with a minor or lewd act. He  
22 conveyed that to the client. The client relied upon  
23 that in making the decision to plead to second degree  
24 criminal sexual conduct with a minor when that was, in  
25 fact, not accurate. The actual written plea agreement

1 -- plea offer clearly evidences that the only commitment  
2 made by the state was that they would not make a  
3 recommendation as to sentence if he pled to lewd act,  
4 which of course, carried electronic monitoring.

5       For that reason I believe his pleas are not valid.  
6 They were entered without the requisite understanding of  
7 the options before him. And for that reason, Your  
8 Honor, we would ask that that judgment be set aside and  
9 that he be granted a new trial. And specifically, Your  
10 Honor, we would ask that Your Honor find that counsel  
11 was ineffective in failing to accurately and completely  
12 convey to Mr. Kevin Fowler the terms of the state's  
13 written plea offer as set forth in the exhibit that's  
14 been introduced in court here today. We ask for the  
15 court's finding that his plea was a product of  
16 ineffective assistance of counsel. There is case law in  
17 this state that says the sixth amendment right to  
18 effective assistance of counsel certainly extends to  
19 sentencing proceedings. So we would ask for a reversal  
20 of the judgment and sentence and a remand for further  
21 proceedings consistent with the plea offer that the  
22 client did not have an adequate due process opportunity  
23 to respond to because of the lack of advice by counsel.  
24 And at that point Mr. Fowler would seek specific  
25 enforcement of the original plea bargain. Thank you.

1           THE COURT: Mr. Fowler, you can remain seated.  
2   You don't need to stand up. I just want to make sure  
3   that -- I'm sure that you and your attorney have talked  
4   about it, and I haven't looked at all the paperwork.  
5   I'll need to do that and review again the transcript.

6           But if the relief is granted and a judge then hears  
7   substantially the same thing that the judge heard the  
8   first time, except anything from the state, pleading to  
9   this charge you could receive twenty years in jail. Do  
10   you understand that? Not the eight. If I grant you the  
11   relief, then if we go back and there's another plea,  
12   that a judge could sentence you up to twenty years.  
13   You're aware of that?

14           MR. FOWLER: Yes, sir.

15           THE COURT: I just want to make sure on the  
16   record that if the relief is granted that you're fully  
17   aware that that will be the exposure you have if the  
18   same case is brought by the state and the duct tape is  
19   put on the solicitor's mouth or whatever, the judge  
20   could give you probation; could give you eight years,  
21   could give you anywhere in between up to twenty years.  
22   You're aware of that?

23           MR. FOWLER: Yes, sir.

24           THE COURT: You've explained that to him.

25           MS. SHURLING: Yes, sir, Your Honor. And I

1 just want to state for the record that I've explained to  
2 him that while I believe there are some very valid  
3 arguments that can be made for specific enforcement of  
4 the original plea offer in this case on the facts and  
5 circumstances of this case, that there are absolutely no  
6 guaranteed he would prevail on that argument at trial.

7 I've also explained to him that while there is a  
8 guarantee of a right to trial by a jury, there is  
9 ironically no guarantee of a right to a plea bargain and  
10 that were the court to find that he doesn't have a right  
11 to specific enforcement of the original plea offer,  
12 because he was deprived of the opportunity to fairly  
13 respond to it in time after adequate advice of counsel,  
14 if the court were not to agree with his position on that  
15 argument, then we would go back to square one and there  
16 would be an opportunity, potentially, to argue that  
17 issue on appeal, but also there's also the very real  
18 possibility that the state would not engage in further  
19 plea negotiations with him and that they might decide to  
20 prosecute him for the second degree, which does carry up  
21 to twenty years. I've explained all of that to him and  
22 made very certain that he is fully cognizant of the  
23 risks involved.

24 THE COURT: Okay. I was confident you had  
25 done that, but I just wanted to make sure the record

1 reflected that.

2 Ms. Shurling, the transcript of record -- again,  
3 I'll review it again, and I'm sure you're real familiar  
4 with it -- page nine, lines six to nine, and page  
5 nineteen, lines sixteen to twenty, are those -- are  
6 there other instances where the solicitor asks for blood  
7 in this case, other than those? I just want to make  
8 sure I haven't missed anything.

9 MS. SHURLING: Your Honor, I believe, while  
10 those are certainly accurate, I think there is at least  
11 one other place where the state is actively arguing for  
12 time. I'll be happy ---

13 THE COURT: I can look again. But those are  
14 the ones I had marked, but I ---

15 MS. SHURLING: And I apologize if my  
16 characterization was overly dramatic. But clearly they  
17 are actively seeking prison time here.

18 THE COURT: Well, I just wanted to make sure  
19 that I hadn't missed any. I have read the transcript,  
20 but I'll certainly want to read it again; particularly  
21 in light of the judge's finding.

22 I'll take this under advisement and try to issue an  
23 order. In the near future I will issue an order. I'll  
24 try not to make it too long.

25 MS. SHURLING: Would Your Honor like to

*Kevin K. Fowler -vs- State of South Carolina (2012-CP-23-04612)*  
*Kevin Fowler - Redirect Examination by Ms. Shurling*

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1 receive proposed orders?

2 MS. RATIGAN: I'm not doing that, Your Honor.

3 I ---

4 THE COURT: I'll either let one of you prepare  
5 the order or I'll do it myself, one or the other. I'll  
6 send notice to both of you based on my ruling. Thank  
7 you.

8 MS. SHURLING: Thank you very much, Your  
9 Honor.

10

11 [END OF REQUESTED TRANSCRIPT OF RECORD]

1 CERTIFICATE OF REPORTER

2 I, the undersigned Danette P. Hanks, Official Court  
3 Reporter for the Thirteenth Judicial Circuit of the  
4 State of South Carolina, do hereby certify that the  
5 foregoing is a true, accurate, and complete transcript  
6 of record of all the proceedings had and evidence  
7 introduced in the trial/hearing of the captioned case,  
8 relative to appeal, in the Court of Common Pleas for  
9 Greenville County, South Carolina, on the 18th day of  
10 December, 2013.

11 This transcript may contain quoted material. Such  
12 material is reproduced as read by the speaker.

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

15 August 28, 2014

16

17

18

19

20

A handwritten signature in cursive script, reading "Susan Danette Hanks", is written over a horizontal line.

Circuit Court Reporter

**COMMON PLEAS**  
**EXHIBIT RECORD AND RECEIPT FORM**  
 Kevin K. Fowler -vs- State (2012-CP-23-4612)

PLAINTIFF'S EXHIBITS

| NO  | DESCRIPTION                                              | ID | EV |
|-----|----------------------------------------------------------|----|----|
| P-1 | Letter from Kris Hodge to Matthew Kappel dated 10/3/11   | x  | x  |
| P-2 | Letter from Dr. Paul Gunter to Matt Kappel dated 6/28/11 | x  | x  |
|     |                                                          |    |    |

DEFENDANT'S EXHIBITS

|  |        |  |  |
|--|--------|--|--|
|  | (NONE) |  |  |
|  |        |  |  |

COURT'S EXHIBITS

|  |        |  |  |
|--|--------|--|--|
|  | (NONE) |  |  |
|  |        |  |  |

*Dequette Hankins* 12-18-13  
 COURT REPORTER DATE

*Jan C. White* 12-18-13  
 CLERK OF COURT DATE

**ENTERED COMPUTER**

110

**Center for Positive Family Living, Inc.**

Dr. Paul S. Gunter, LMFT, LPC  
311 Bennett Center Drive, Greer, SC 29650  
Phone: 864-968-9687  
Fax: 864-968-9449  
doctor\_g53@hotmail.com

June 28, 2011

To: Attorney Matt Kappel

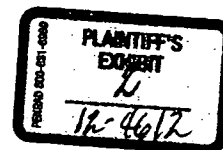
From: Dr. Paul Gunter, LMFT, LPC

Re: Kevin Fowler's psychosexual assessment

As you requested, the objective measure of the Abel Assessment for Sexual Interest indicates that your client's primary sexual interests fall within the range of normal heterosexual males. There is no evidence from the report that would indicate he was a safety risk to children. Further information is forth coming in a full report. If I can be of further assistance please let me know.

Sincerely,

Dr. Paul Gunter, LMFT, LPC  
Professional Member, American Association of Sex Educators, Counselors and  
Therapists



State of South Carolina  
Solicitor, Thirteenth Judicial Circuit

Telephone: 864-467-8647  
Telefax: 864-467-8610



Greenville County Courthouse  
305 E. North Street, Suite 325  
Greenville, SC 29601-2185

Solicitor  
W. Walter Wilkins

10/3/2011

MATTHEW KAPPEL  
POST OFFICE BOX 10334  
GREENVILLE, SC 29601

RE: Plea Offer for State v. Kevin K Fowler

Dear Matthew Kappel :

I am willing to make the following proposal to your above-referenced client in order to dispose of these charges by way of a guilty plea:

The Defendant will plead guilty to the following:

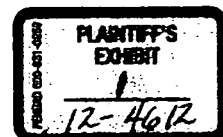
| Warrant Number: | Charge:                                                                              |
|-----------------|--------------------------------------------------------------------------------------|
| I434628         | Sex / Lewd Act, committing or attempting lewd act upon child under 16 (June 4, 1996) |

The State will dismiss the following:

| Warrant Number: | Charge:                                                                                          |
|-----------------|--------------------------------------------------------------------------------------------------|
| I434627         | Sex / Criminal sexual conduct with minor - victim 11 to 14 yrs of age inclusive -<br>Second deg. |

The State will make the following sentence recommendations/negotiation:

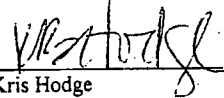
No recommendation as to sentence.



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Please contact me as soon as possible with your client's response as plea negotiations must be concluded and the guilty plea entered before 5/1/2012 or this and any other offers are automatically withdrawn. If your client does not plead guilty by this date, the case(s) will be placed on the trial calendar for disposition without further negotiation.

Yours very truly,

A handwritten signature in black ink, appearing to read "Kris Hodge", written over a horizontal line.

Kris Hodge  
Assistant Solicitor

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE )

C.A. No. 2012-CP-23-4612

Kevin K. Fowler,  
S.C.D.C. No. 349603,

Applicant,

v.

State of South Carolina,

Respondent.

**ORDER OF DISMISSAL**FILED CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSINER  
2014 JAN 25 PM 12 35

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed July 19, 2012. The Respondent made its return on November 30, 2012. An evidentiary hearing into the matter was convened on December 18, 2013 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Tara D. Shurling, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying were: Allison Fowler, Nancy Fowler, and the Applicant's plea counsel, Matt Kappel, Esquire. The Court had before it the transcript of the guilty plea hearing, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the original and amended PCR applications, the return, the appellate records, and Applicant's Exhibits 1-2.

**PROCEDURAL HISTORY**

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the November 2011 term of the Greenville County Grand Jury for lewd act upon a minor

1  


(2011-GS-23-8818) and second-degree criminal sexual conduct (CSC) with a minor (2011-GS-23-8819). He was represented by Matt Kappel, Esquire.

On February 6, 2012, the Applicant pled guilty to second-degree CSC with a minor.<sup>1</sup> The Honorable Letitia H. Verdin sentenced the Applicant to eight years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. The Applicant was represented by Tara D. Shurling, Esquire. The Court of Appeals granted the Applicant's request to withdraw his appeal by order filed June 29, 2012.

### ALLEGATIONS

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

1. Ineffective assistance of counsel:
  - a. "Trial Counsel failed to adequately investigate the Applicant's charges, failed to investigate and interview potential witnesses and failed to give his client adequate legal advise [sic] prior to the Applicant's guilty plea proceeding. Trial counsel failed to fully advise the Applicant [sic] of the consequences of his plea and further failed to investigate defenses against the charge against the Applicant. Trial Counsel neglected to adequately review discovery materials with the Applicant."
2. Involuntary guilty plea:
  - a. "Counsel failed to provide client effective assistance of counsel prior to and during his guilty plea proceeding. The Applicant's plea of guilt were [sic] coerced by counsel's failure to provide adequate representation."

In an "Amended Application for Post-Conviction Relief" dated December 11, 2013, the Applicant made the following allegations:

1. Ineffective assistance of plea counsel:
  - a. Failed to communicate a written plea offer from the State which would have been beneficial to the Applicant and which he would have accepted.

---

<sup>1</sup> The State not prossed the charge of lewd act upon a minor. (Plea transcript, p.9, lines 8-9).



- b. Failed to discuss with the Applicant the possibility of attacking the mandatory electronic monitoring provision of the Sex Offender Registration law on constitutional grounds if he pled guilty to, or was convicted of, lewd act upon a minor.
- c. Failed to ask for specific enforcement of the State's agreement not to make a recommendation as to sentence if the Applicant pled guilty.
- d. Failed to fully review the discovery materials in this case with the Applicant before requiring him to make a decision about entering a guilty plea.
- e. Failed to provide the plea judge with a copy of the full report issued by the mental health expert hired by the defense.

At the PCR hearing, the Applicant proceeded solely upon the allegations in the Amended Application for Post-Conviction Relief.

#### **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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

#### **Ineffective Assistance of Counsel**

The Applicant alleges his guilty plea was involuntary and that he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under

prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The Applicant stated he reviewed the State's evidence with plea counsel and relayed his version of events. The Applicant stated plea counsel explained the maximum sentences for each of the charges. The Applicant stated he told plea counsel that he would be able to keep his job if he did not receive prison time. The Applicant stated he and plea counsel discussed the State's offer for him to plead guilty to lewd act and that plea counsel said the State would not request a prison sentence. The Applicant stated he rejected the plea offer because of the lifetime GPS (and its cost). The Applicant stated plea counsel never mentioned challenging the constitutionality of the GPS statute. The Applicant stated that he never saw the written plea offer. The Applicant stated he decided to plead guilty to CSC instead of lewd act on the day of the plea hearing (and after plea counsel recommended he do so). The Applicant stated, however, that he would have rather pled guilty to lewd act without a sentence recommendation from the State (even with lifetime GPS monitoring) because he believed he could have kept his job. The Applicant stated plea counsel told him the day of the plea hearing that he had misunderstood and that the State would be requesting a prison sentence.

Allison Fowler, the Applicant's ex-wife and the victim's cousin, stated she met with the Applicant and plea counsel. Allison Fowler stated plea counsel told the family before the plea

<sup>4</sup> *AWA 4*

hearing that the Applicant could plead guilty to lewd act with lifetime ankle monitoring but that – regardless of what charge the Applicant pled guilty to – the State would not ask for a prison sentence. Allison Fowler stated that, before the plea hearing, plea counsel advised them that he had misunderstood and that the State would be asking for a prison sentence. Allison Fowler stated there was no discussion of challenging the constitutionality of the GPS statute..

Nancy Fowler, the Applicant's mother, stated plea counsel had a discussion with everyone before the plea hearing. Nancy Fowler stated plea counsel discussed the differences between lewd act and CSC with a minor. Nancy Fowler stated plea counsel told them in the courtroom that the assistant solicitor would ask for a prison sentence.

Plea counsel testified he filed discovery motions and received full discovery. Plea counsel testified he reviewed the discovery materials with the Applicant and the impact of this evidence. Plea counsel testified he reviewed the elements of both charges and the sentencing ranges. Plea counsel testified the Applicant relayed his version of events and that there were no viable defenses. Plea counsel testified he met with the assistant solicitor numerous times about this case. Plea counsel testified there was a plea offer from the State (in a letter<sup>2</sup> dated October 3, 2011) for the Applicant to plead guilty to lewd act in exchange for the dismissal of the CSC charge and no recommendation from the State. Plea counsel testified he reviewed the offer with the Applicant, who rejected it. Plea counsel stated he met with the Applicant and his family in the courthouse on the day of the plea hearing and discussed that CSC had a greater maximum sentence (with a larger percentage of the sentence that must be served) but that a lewd act conviction involved lifetime GPS monitoring and a second-degree CSC with a minor conviction did not. Plea counsel testified they likely did not discuss making a constitutional challenge to

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<sup>2</sup> Applicant's Exhibit 1.

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lifetime GPS. Plea counsel testified the Applicant agreed to plead guilty to the second-degree CSC with a minor charge. Plea counsel confirmed the Applicant did not plead guilty pursuant to the original plea offer but that he felt he should have objected when the assistant solicitor requested a prison sentence. Plea counsel testified, however, that he did not believe the assistant solicitor's request made a difference to the plea judge. Plea counsel testified he hired Dr. Gunter to evaluate the Applicant in order to show he was not a danger to children. Plea counsel testified that, while a letter<sup>3</sup> from Dr. Gunter referenced a full report he did not recall receiving a report. Plea counsel testified, however, that he did not want a full report – he just wanted the information referenced in the letter. Plea counsel testified he was sure he had discussed Dr. Gunter's letter with the Applicant.

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds the Applicant's testimony is not credible, while also finding plea counsel's testimony is credible. The Applicant admitted to the plea judge that he was guilty of second-degree CSC with a minor. (Plea transcript, p.6). The Applicant did not dispute the assistant solicitor's recitation of the facts. The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced or made any promises in exchange for his guilty plea. (Plea transcript, pp.4-5).

This Court finds the Applicant failed to meet his burden of proving plea counsel did not review the discovery materials. The Applicant admitted on cross-examination that he reviewed the State's evidence with plea counsel. Plea counsel testified they reviewed all of the discovery materials together. Plea counsel advised the plea judge that he and the Applicant "have had

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<sup>3</sup> Applicant's Exhibit 2.

sufficient time to review all of the evidence in the file" and the Applicant did not refute this. (Plea transcript, p.16, lines 21-22). This Court finds the Applicant has failed to articulate either what discovery materials he did not review with plea counsel or the alleged prejudice he would have suffered as a result.

This Court finds the Applicant failed to meet his burden of proving plea counsel was deficient in not providing a written report from Dr. Gunter to the plea judge. Plea counsel testified that the purpose of hiring Dr. Gunter to evaluate the Applicant was to be able to demonstrate to the judge that the Applicant was not a danger to children. Plea counsel testified this conclusion was contained in Dr. Gunter's letter and that he did not believe a full report was necessary. Plea counsel testified he had several conversations with Dr. Gunter following the evaluation, but that they producing nothing worth reducing to writing. This Court finds plea counsel's testimony is credible. This Court notes plea counsel relayed the information in Dr. Gunter's letter to the plea judge and made it available to the judge if she wished to read it. (Plea transcript, p.12, lines 2-8). This Court finds the Applicant has failed to meet his burden of proving either that plea counsel should have obtained a written report or that the failure to obtain such prejudiced his case.

This Court finds the Applicant failed to meet his burden of proving plea counsel did not communicate the written plea offer. The Applicant testified he and plea counsel discussed the State's original offer for him to plead guilty to lewd act upon a child (and that the State would be silent as to a sentence recommendation). The Applicant admitted he rejected this plea offer. Plea counsel confirmed he reviewed this plea offer with the Applicant. This Court finds plea counsel conveyed the plea offer contained in the assistant solicitor's October 3, 2011 letter to the Applicant and that they discussed it. This Court finds plea counsel has fulfilled his obligation in

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this regard. See Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (holding counsel's failure to convey the State's plea offer to defendant constituted deficient performance).

This Court finds the Applicant failed to meet his burden of proving plea counsel should have objected when the assistant solicitor requested an active prison sentence. This Court notes the original plea offer from the State was for the Applicant to plead guilty to lewd act upon a child and that the State would not make a sentence recommendation. The Applicant, however, rejected this plea offer and it was not in place when he eventually pled guilty. When the Applicant pled guilty, it was with the understanding that it would be to the charge of second-degree CSC with a minor and that the State would dismiss the lewd act charge. The Applicant admitted he was advised prior to the guilty plea hearing that the State would not be silent about a sentence recommendation, yet he chose to proceed with the guilty plea hearing. Plea counsel was not deficient in his representation.<sup>4</sup> Regardless, the Applicant cannot prove he was prejudiced. The assistant solicitor had no obligation to refrain from seeking an active jail sentence because, as noted supra, the Applicant did not enter his guilty plea to second-degree CSC with a minor pursuant to the October 3, 2011 plea offer. Further, the assistant solicitor's request for active time had, at most, a minimal effect on the ultimate sentence imposed. Contrary to the Applicant's assertions at the PCR hearing, the assistant solicitor only requested an active jail sentence once during the plea hearing. (Plea transcript, p.9, lines 6-7). This Court finds a thorough review of the plea transcript reveals the assistant solicitor's request had a negligible effect on the plea judge's decision, as the plea judge relieved heavily on both the

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<sup>4</sup> This Court is familiar with the recent Court of Appeals decision of Smith v. State, Op. No. 5194 (S.C. Ct. App. filed February 5, 2014) (Shearouse Adv. Sh. No. 5 at 41). Although the facts of Smith are similar, this Court believes Smith is distinguishable because the Applicant in Smith plead pursuant to a plea agreement and was assured by plea counsel that the State would not be making a sentencing recommendation in contrast to the facts of the instant case.



arguments of plea counsel and the victim's input. (Plea transcript, pp.19-21). Specifically, the plea judge stated:

I'll be honest with you that if I heard just your conduct and not the words that your attorney had said and people that came with you today had said, if I had just heard those things and I had not heard the heartbreaking plea in a letter from the victim thinking about your family, then I would have given you twenty years. I think that your conduct warrants the maximum sentence in this case. . . . I can not put you on probation. I will not put you on probation. This is not a probationary case.

(Plea transcript, pp.20-21). This Court notes that, given the plea judge's comments, it is likely the outcome of this case would have remained the same even if the Applicant had pled guilty pursuant to the original plea agreement.

This Court finds the Applicant failed to meet his burden of proving plea counsel was deficient in not discussing whether to challenge the constitutionality of the GPS statute. Both the Applicant and plea counsel testified a main reason for the Applicant's rejection of the State's initial plea offer was that the charge of lewd act upon a minor carried mandatory lifetime GPS monitoring.<sup>5</sup> At the time of the commission of the offenses in this case, mandatory GPS monitoring was in effect for all persons convicted of lewd act upon a child. S.C. Code Ann. § 24-3-540(C) (Supp. 2011). This mandatory GPS monitoring was for the defendant's lifetime. S.C. Code Ann. § 24-3-540(H) (Supp. 2011). The recent case of State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013) found subsection (C) was constitutional but found the two offenses affected by that subsection could not be barred from judicial review under subsection (H). This Court, however, does not find plea counsel was deficient in not challenging the constitutionality of lifetime GPS monitoring. Counsel is not required to be clairvoyant about

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<sup>5</sup> The offense of second-degree CSC with a minor has never required mandatory lifetime GPS monitoring.

changes in the law. See State v. Gilmore, 314 S.C. 453, 445 S.E.2d 454 (1994). "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland v. Washington, 466 U.S. at 690, 104 S. Ct. at 2066. Based upon the state of the law at the time of the Applicant's charges, this Court finds it was not reasonable for plea counsel to have challenged the constitutionality of S.C. Code Ann. § 24-3-540. This is especially true because of: (1) the overwhelming evidence of the Applicant's guilt and (2) the Applicant's key concern at the time (based upon the Applicant's own testimony) was the possibility of attaining a probationary sentence.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that plea counsel committed either errors or omissions in his representation of the Applicant. This Court finds plea counsel conveyed the original plea offer to the Applicant – as well as the offer he eventually pled guilty to – and discussed the advantages and disadvantages of each. This Court finds plea counsel properly advised the Applicant about the collateral issue of mandatory GPS monitoring with a conviction for lewd act upon a child. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by plea counsel's performance. The Applicant has failed to present any credible evidence or testimony to support his claim that the outcome of his case would have been different but for counsel's representation.

This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

**All Other Allegations**

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

**CONCLUSION**

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED** this 11 day of MARCH, 2014.



G. Edward Welmaker  
Presiding Judge  
Thirteenth Judicial Circuit

Pickens

, South Carolina.

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )

KEVIN K. FOLWER, 349603, )  
 Applicant. )

v. )

THE STATE OF SOUTH CAROLINA, )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 THIRTEENTH JUDICIAL CIRCUIT

2012-CP-23-4612

RULE 59(e) SCRPC, MOTION TO  
 ALTER OR AMEND

FILED-CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL B. OICKENSHNER  
 JUN 11 40

NOW COMES the Applicant in the above-captioned case, acting by and through undersigned counsel, respectfully moving this Court pursuant to Rule 59(e), SCRPC, to alter or amend its Order of Dismissal filed March 25, 2014 and received by Counsel for the Applicant on March 31, 2014. The Application for Post-Conviction Relief in this matter was filed on July 19, 2012 and was amended on December 27, 2013. The State filed its Return on November 30, 2012. An evidentiary hearing was convened on December 18, 2013 at the Greenville County Courthouse. The Respondent was represented at that proceeding by Assistant Attorney General, Karen Ratigan and the Applicant was represented by Tara Dawn Shurling, Esquire (PCR Counsel) of the Richland County Bar. In support of this motion, the Applicant would address the portions of the Order which he submits need to be altered or amended under the same subject heading as they appear under in the Order of Dismissal. After Counsel received the Form 4 issued by the Court in this matter outlining the Court's rulings in denying relief in this case, Counsel advised the Court on January 7, 2014, that certain aspects of the Petitioner's arguments, as advanced during his PCR hearing, did not appear to have been considered in that ruling. Counsel for the Applicant and Counsel for the Respondent were subsequently advised by the Court, on January 13, 2013, that the issues Counsel set forth in her response to the Form 4 Order would be incorporated in the Order of Dismissal. Counsel for the Applicant has now thoroughly reviewed the Order of Dismissal and has found that the arguments addressed by Counsel in her response to the Form 4 Order have not been addressed by the Court in

the Order of Dismissal filed in this matter on March 25, 2014. Specifically, the Applicant would ask that his Court reconsider its decision to deny relief based upon the following.

Plea Counsel admitted in his PCR testimony that he did not bring the Solicitor's original agreement not to recommend active prison time to her attention at the time of the plea proceeding. During the PCR hearing, there was testimony that, following an in chambers conference, Plea Counsel came out and told the Applicant and his family that he "was wrong and the prosecutor was going to ask for time." Plea Counsel testified that at that time he simply forgot the prosecutor's previous commitment not to seek an active prison sentence under the terms of the original plea bargain advanced by her. Admittedly, the Applicant did not take the first offer put forth by the State, which was to plead to Lewd Act on a Minor, however, he did plead to the more serious charge of Second Degree Criminal Sexual Conduct with a Minor. Plea Counsel's testimony raises two important issues. One is his failure to object when the State requested an active sentence and second, is his failure to remind the prosecutor of her original agreement when it became clear, in chambers, that she was going to ask for time. It is not clear from the record whether the Prosecutor was planning to ask for an active sentence because the Applicant was pleading to Second Degree Criminal Sexual Conduct with a Minor, as opposed to Lewd Act on a Minor, or whether she had simply forgotten her commitment not to ask for an active sentence. The Applicant would assert that if Plea Counsel had presented the prosecutor's letter wherein she agreed *not* to ask for active time *in either context, either in chambers when the prosecutor made clear her intent to ask for an active jail sentence or in Court when she did ask for an active term*, it would have had three possible positive effects for the Applicant.

- a. The prosecutor may have agreed, after having her recollection refreshed, not to ask for an active sentence;
- b. Bringing the prosecution's agreement not to seek active time if he pleaded to Lewd Act to the attention of the Court may have impacted the Judge's sentencing decision

even though the plea ended up being the more serious charge of second degree CSC with a minor, or;

- c. If the prosecutor had responded that she would *only* agree to not seek time if he pleaded to Lewd Act, then the Applicant would have had the opportunity to make an informed choice between a plea to Lewd Act and a Plea to CSC with a minor, 2<sup>nd</sup> degree.

This leads to another important point which is not addressed by this Court's Order. The Applicant expressly testified that he would have taken *the specific deal* offered by the State if he had ever understood that the State's agreement not to ask for time was contingent upon that specific plea. He testified that once his lawyer told him the prosecutor was going to ask for time, he never understood that her change in positions was due to him pleading to Second Degree Criminal Sexual Conduct with a Minor versus Lewd Act. *He very clearly testified that he would have pleaded to Lewd Act if he had understood that distinction.* The written plea offer indicated that that offer was open until the *May*, which was *after the plea date*, and there is no evidence that it was ever withdrawn. The testimony of Plea Counsel at the PCR proceeding very clearly establishes that he *assumed* the prosecutor's agreement with regard to a sentence recommendation would apply to a plea to *either* charge and he did *nothing* to verify that factor with the prosecutor. This testimony is consistent with the Applicant's testimony that he was lead to believe the prosecutor was going to ask for time no matter which offense he pleaded to. Defense Counsel's *assumption* that the State would not ask for active time if the Applicant pleaded to either charge evidently caused him not to clarify this critical point with the Applicant.

The Applicant is aware of this Honorable Court's observations regarding the plea judge's comments at the time of sentencing. He would respectfully note however, that those remarks were based upon the information before the Court at the time of sentencing. He would ask that Your Honor note that judges generally give serious consideration to the recommendations of the State regarding sentencing matters. This is particularly true, he would submit, when a prosecutor is either asking for time *or* is silent on sentencing and thereby sends a message regarding their lack of

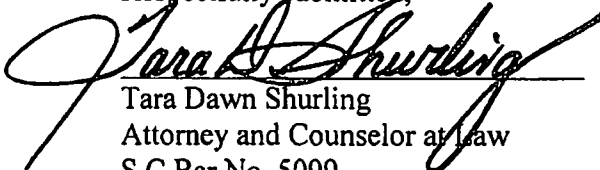
objection to a lenient penalty. The Applicant would further argue that this would be particularly true where neither the victim, nor her family, were apparently pushing for the Applicant to get an active prison sentence.

The Applicant prays that this Court might reconsider its decision to deny relief based on the factors addressed herein. In the alternative, he seeks an Amended Order addressing these matters with appropriate findings of fact and rulings of law.

### CONCLUSION

For all the above reasons, the Applicant now prays that this Court might amend its Order pursuant to Rule 59(e), SCRPC, grant relief and remand the Applicant's case to the Greenville County Court of General Sessions for resentencing. In the alternative, he seeks an Amended Order addressing these matters with appropriate findings of fact and rulings of law.

Respectfully submitted,

  
Tara Dawn Shurling  
Attorney and Counselor at Law  
S.C Bar No. 5099

3614 Landmark Dr., Suite A  
Columbia, S.C. 29204  
(803) 738-8622  
(803) 738-1600 (fax)  
[tdslaw@shurlinglaw.com](mailto:tdslaw@shurlinglaw.com)

ATTORNEY FOR THE APPLICANT

This 8<sup>th</sup> day of April, 2014.

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )

IN THE COURT OF COMMON PLEAS

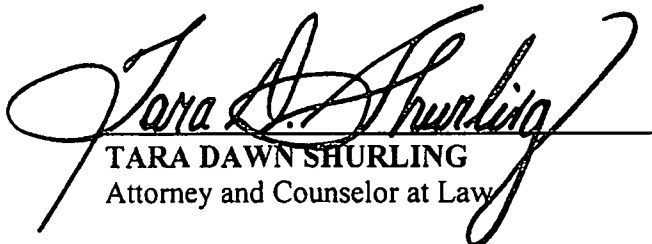
KEVIN K. FOWLER, #349603 )  
 Applicant, )  
 )  
 v. )  
 )  
 THE STATE OF SOUTH CAROLINA, )  
 Respondent. )  
 \_\_\_\_\_ )

2012-CP-23-4612

**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that one copy of the Rule 59(e) SCRPC, Motion to Alter or Amend in the above-entitled cause has been served upon, Senior Assistant Deputy Attorney General, Karen C. Ratigan, by depositing in the U.S. Mail, postage prepaid, on this the 8<sup>th</sup> day of April, 2014 to:

Karen C. Ratigan  
 Senior Assistant Deputy Attorney General  
 Office of the Attorney General  
 P. O. Box 11549  
 Columbia, SC 29211

  
**TARA DAWN SHURLING**  
 Attorney and Counselor at Law

3614 Landmark Drive, Suite A  
 Columbia, S.C. 29204  
 (803) 738-8622  
 (803) 738-1600 Fax

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 8<sup>th</sup> day of

April, 2014.

Doranne Graham (S.)  
 Notary Public for South Carolina  
 My Commission Expires: 2/28/24

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )

IN THE COURT OF COMMON PLEAS

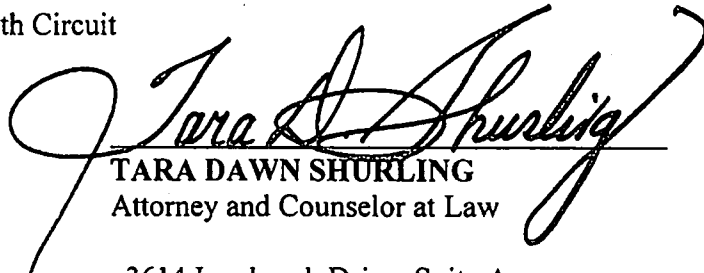
KEVIN K. FOWLER )  
 Applicant, )  
 )  
 v. )  
 )  
 THE STATE OF SOUTH CAROLINA, )  
 Respondent. )  
 \_\_\_\_\_ )

2012-CP-23-4612

**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that one copy of the Rule 59(e) SCRCR, Motion to Alter or Amend in the above-entitled cause has been served upon, the Honorable G. Edward Welmaker, Circuit Court Judge for the Thirteenth Judicial Circuit, by depositing in the U.S. Mail, postage prepaid, on this the 8<sup>th</sup> day of April, 2014 to:

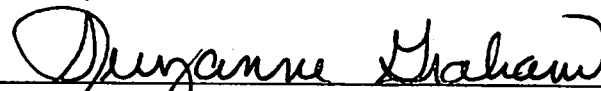
The Honorable G. Edward Welmaker  
 Circuit Court Judge for the Thirteenth Circuit  
 P. O. Box 899  
 Pickens, SC 29671

  
 TARA DAWN SHURLING  
 Attorney and Counselor at Law

3614 Landmark Drive, Suite A  
 Columbia, S.C. 29204  
 (803) 738-8622  
 (803) 738-1600 Fax

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 8<sup>th</sup> day of  
April, 2014.

 (L.S.)  
 Notary Public for South Carolina  
 My Commission Expires: 2/28/24

STATE OF SOUTH CAROLINA )  
COUNTY OF GREENVILLE )  
Kevin K. Fowler, )  
S.C.D.C. No. 349603, )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
C.A. No. 2012-CP-23-4612

**RETURN TO MOTION TO ALTER OR  
AMEND THE ORDER OF DISMISSAL**

**ENTERED COMPUTER**

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMER  
2014 APR 29 PM 3 09

Respondent, by and through undersigned counsel, making Return to Applicant's Motion to Alter or Amend, would respectfully show unto this Court:

1. The matter is before the Court by way of a post-conviction relief (PCR) action filed July 19, 2012.
2. An evidentiary hearing was convened on December 18, 2013 at the Greenville County Courthouse.
3. Applicant was present at the hearing and represented by Tara D. Shurling, Esquire. Applicant testified in his own behalf. Also testifying were Allison Fowler, Nancy Fowler, and the Applicant's plea counsel, Matt Kappel, Esquire.
4. After a full review of the evidence presented at the evidentiary hearing, the post-conviction relief court issued an order dated March 11, 2014 and filed March 25, 2014 denying the application for post-conviction relief.
5. Applicant – through counsel – submitted a Motion to Alter or Amend Judgment dated April 8, 2014 (which was received by Respondent on April 10, 2014). Applicant moves this Court to alter or amend the final order of dismissal. Applicant argues plea counsel should

have “presented the prosecutor’s letter wherein she agreed *not* to ask for active time *in either context, either in chambers when the prosecutor made clear her intent to ask for an active jail sentence or in Court when she did ask for an active term.*” (emphasis in original). Applicant also argues “he would have taken *the specific* deal offered by the State if he had ever understood that the State’s agreement not to ask for time was contingent upon that specific plea.” (emphasis in original). Applicant argues “judges generally give serious consideration to the recommendations of the State regarding sentencing matters.” Applicant asks for a reversal of the decision or for an amended order.

6. Respondent submits Applicant’s Motion to Alter or Amend Judgment should be denied. To the extent Applicant is requesting a reversal of this Court’s decision, he is clearly not requesting either an alteration or amendment to the final order. Rather, Applicant is asking the Court to grant post-conviction relief. Such a request is more properly addressed through the appellate process. See Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting the proper use of a Rule 59(e) motion is to preserve issues raised to but not ruled upon by the trial court).

7. To the extent Applicant is requesting an amended order, Respondent submits the order of dismissal reflected both the testimony and evidence presented at the PCR hearing and the intent of this Court. While Respondent submitted a proposed order of dismissal in this case, this Court made alterations to that order. If this Court desired to more specifically address the issues complained of by Applicant, it would have done so at that time.

8. Respondent submits the post-conviction relief court fully reviewed and properly ruled upon all issues and that the Motion to Alter or Amend should be denied.

Respectfully submitted,

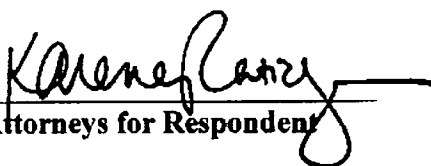
ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

KAREN C. RATIGAN  
Senior Assistant Deputy Attorney General

P.O. Box 11549  
Columbia, S.C. 29211

By:

  
Attorneys for Respondent

April 16, 2014

STATE OF SOUTH CAROLINA )  
 COUNTY OF GREENVILLE )

IN THE COURT OF COMMON PLEAS

KEVIN K. FOWLER, 349603 )

2012-CP-23-4612

Applicant, )

vs )

AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA, )

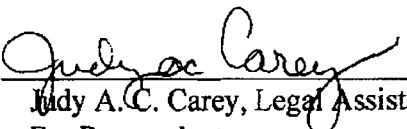
Respondent. )

FILED-CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL B. WICKENS  
 2014 APR 29 PM 3:09

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 to Motion to Alter or Amend the Order of Dismissal** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Tara Dawn Shurling, Esquire  
 3614 Landmark Drive; Suite A  
 Columbia SC 29204**

DATED this 16th day of April, 2014.

  
 Judy A.C. Carey, Legal Assistant  
 For Respondent

STATE OF SOUTH CAROLINA )  
COUNTY OF GREENVILLE )

KEVIN K. FOWLER, 349603, )  
Applicant. )

v. )

THE STATE OF SOUTH CAROLINA, )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
THIRTEENTH JUDICIAL CIRCUIT

2012-CP-23-112

REPLY TO STATE'S RETURN  
TO RULE 59(e) MOTION

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL S. WICKENS, JR.  
2014 APR 29 PM 3:03

The Applicant, acting by and through undersigned counsel, now responds to the State's Return to his Motion to Alter or Amend, pursuant to Rule 59(e), SCRCP. The Applicant's Motion to Alter or Amend was served on Respondent by mail on April 8, 2014. Respondent's Return to that motion was served on the Applicant on April 16, 2014, and was received by Counsel for the Applicant on April 17, 2014.

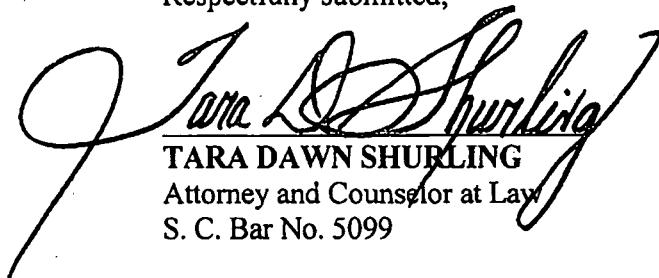
In the Applicant's 59(e) Motion, Counsel for the Applicant initially brought the Court's attention to the issues addressed in the motion by way of an email sent to the Court in response to the Court's letter dated January 3, 2014 which outlined the ruling of the Court in this Post-Conviction Relief matter. *Attachment A, Letter dated January 3, 2014 and Attachment B, Response to Letter dated January 3, 2014.* Counsel for the Applicant subsequently received an email from Hudson Smith, Law Clerk to the Honorable G. Edward Welmaker, dated January 13, 2014, which stated, "[I]t was the judge's intention in his letter that the order should encompass both factors that you have raised." See, *Attachment B.* As noted in the Motion to Alter or Amend, the issues addressed in Counsel's January 7, 2014 email are not covered by the Order subsequently signed by the Court.

The Applicant respectfully submits that the issues not covered by the Order of Dismissal, as filed, provide grounds upon which Post-Conviction Relief could, and should, be granted in this case. The Applicant does indeed ask that the Order be altered and amended to include appropriate findings of fact and rulings of law on those issues, and respectfully submits that the law supports the grant of relief on either one, or both, of these issues. In the alternative, the Applicant requests that an

Amended Order of Dismissal be issued making findings of fact and rulings of law on these aspects of the Applicant's case in order to preserve these issues for appellate review.

For all these reasons, as well as though expressed in the Applicant's original Motion to Alter or Amend, the Applicant requests that this Court issue an amended order granting relief on the grounds addressed in his Motion to Alter or Amend. Alternatively, he seeks an Amended Order of Dismissal which makes findings of fact and rulings of law concerning these issues.

Respectfully submitted,



**TARA DAWN SHURLING**  
Attorney and Counselor at Law  
S. C. Bar No. 5099

3614 Landmark Drive, Suite A  
Columbia, S. C. 29204  
(803) 738-8622  
(803) 738-1600 (FAX)

**ATTORNEY FOR APPLICANT**

This 17<sup>th</sup> day of April, 2014.

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )

IN THE COURT OF COMMON PLEAS

KEVIN K. FOWLER )  
 Applicant, )

2012-CP-23-4612

v. )

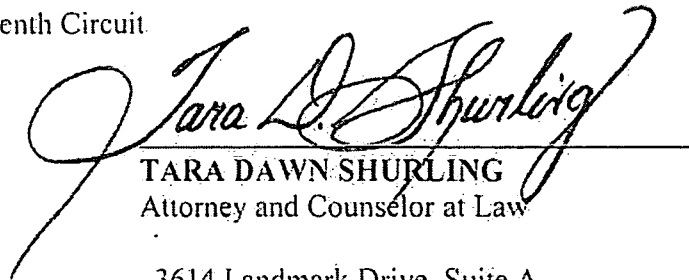
CERTIFICATE OF SERVICE

THE STATE OF SOUTH CAROLINA, )  
 Respondent. )

FILED-CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL B. WICKENSIMER  
 2014 APR 29 PM 3 03

The undersigned attorney hereby certifies that one copy of the Reply to the Return to the Rule 59(e) SCRCp, Motion to Alter or Amend in the above-entitled cause has been served upon, the Honorable G. Edward Welmaker, Circuit Court Judge for the Thirteenth Judicial Circuit, by depositing in the U.S. Mail, postage prepaid, on this the 17<sup>th</sup> day of April, 2014 to:

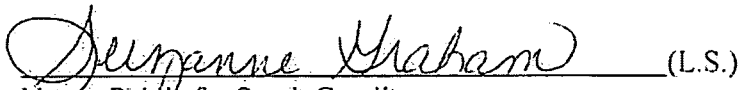
The Honorable G. Edward Welmaker  
 Circuit Court Judge for the Thirteenth Circuit  
 P. O. Box 899  
 Pickens, SC 29671

  
 TARA DAWN SHURLING  
 Attorney and Counselor at Law

3614 Landmark Drive, Suite A  
 Columbia, S.C. 29204  
 (803) 738-8622  
 (803) 738-1600 Fax

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 17<sup>th</sup> day of  
April, 2014.

 (L.S.)  
 Notary Public for South Carolina  
 My Commission Expires: 2/28/2024

STATE OF SOUTH CAROLINA )  
COUNTY OF GREENVILLE )

IN THE COURT OF COMMON PLEAS

KEVIN K. FOWLER, #349603 )  
Applicant, )

2012-CP-23-4612

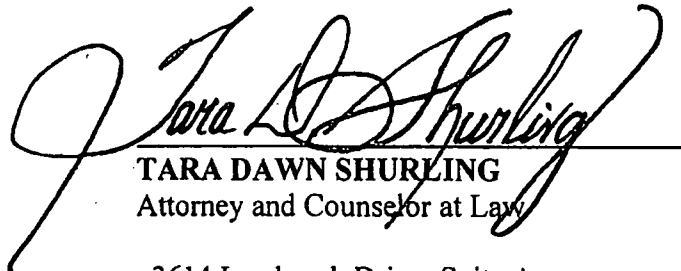
v. )

**CERTIFICATE OF SERVICE**

THE STATE OF SOUTH CAROLINA, )  
Respondent. )

The undersigned attorney hereby certifies that one copy of the Reply to the Return to the Rule 59(e) SCRCPP, Motion to Alter or Amend in the above-entitled cause has been served upon, Senior Assistant Deputy Attorney General, Karen C. Ratigan, by depositing in the U.S. Mail, postage prepaid, on this the 17<sup>th</sup> day of April, 2014 to:

Karen C. Ratigan  
Senior Assistant Deputy Attorney General  
Office of the Attorney General  
P. O. Box 11549  
Columbia, SC 29211

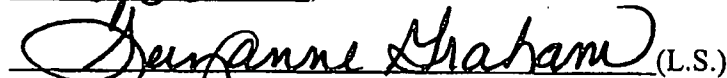
  
TARA DAWN SHURLING  
Attorney and Counselor at Law

3614 Landmark Drive, Suite A  
Columbia, S.C. 29204  
(803) 738-8622  
(803) 738-1600 Fax

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 17<sup>th</sup> day of

April, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: 2/28/2024



State of South Carolina  
The Circuit Court of the Thirteenth Judicial Circuit

G. EDWARD WELMAKER  
JUDGE

214 EAST MAIN STREET  
POST OFFICE BOX 899  
PICKENS, SOUTH CAROLINA 29671

January 3, 2014

Office of the Attorney General  
Attn: Karen C. Ratigan, Esquire  
P.O. Box 11549  
Columbia, SC 29211

RE: Kevin K Fowler vs. State of South Carolina  
2012-CP-23-4612

Dear Ms. Ratigan:

Having thoroughly reviewed the petitioner's application for post-conviction relief, respondent's return, the transcript of record, and considered the arguments of counsel as well as the testimony and exhibits presented at the hearing, I have determined that petitioner's application should be denied. Please draft an order for my signature reflecting the following points of law and fact as to the issues presented by petitioner:

- Petitioner claims ineffective assistance of plea counsel. First, the applicant must prove that counsel's performance was deficient. Here, the applicant has not shown that counsel acted unreasonable "under prevailing professional norms." *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The second prong of *Strickland* requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668 (1984); *Palacio v. State*, 333 S.C. 506, 511 S.E.2d 62 (1999). This, additionally, has not been shown by the applicant.
- Petitioner claims plea counsel rendered ineffective assistance when he advised Petitioner to plead guilty to Criminal Sexual Conduct with a Minor Second Degree ("CSC 2<sup>nd</sup>") and when plea counsel failed to object to the State requesting an active jail sentence. At the PCR hearing, Petitioner testified that he would have instead pleaded guilty to Lewd Act upon a Child ("Lewd Act") because he wanted to receive a probationary sentence. At the PCR hearing, trial counsel testified that the State offered to remain silent as to sentence

imposed if Petitioner would plead guilty to Lewd Act. Trial counsel testified that he advised his client to plea to CSC 2<sup>nd</sup> instead of Lewd Act because CSC 2<sup>nd</sup> did not require the additional burden of lifetime ankle monitoring. Trial counsel also testified that he believed the "name" of the charge would make little difference in the ultimate sentence imposed as both offenses carried the same minimum sentence with the possibility of a probationary sentence.

Even if counsel's conduct were to constitute unprofessional error, Petitioner has failed to demonstrate any prejudicial effect caused by counsel's conduct. First, the Solicitor had no obligation to refrain from seeking an active jail sentence because Petitioner did not enter his plea pursuant to plea negotiations. Second, the Solicitor's request of active time had at most a minimal effect on the ultimate sentence imposed. The State asked for an active jail sentence only once during the plea.<sup>1</sup> See Transcript of Record, p. 9. However, a thorough review of the transcript reveals this request had at most a minimal effect on the plea judge's decision as the plea judge relied heavily on the arguments of plea counsel and the testimony of the victim. See Transcript of Record, p. 19-21. Specifically, the judge stated, "I'll be honest with you that if I heard just your conduct and not the words that your attorney had said and people that came with you today had said, if...I had not heard the heartbreaking plea in a letter from the victim thinking about your family, I would have given you twenty years...I cannot put you on probation. I will not put you on probation. This is not a probationary case." See Transcript of Record, p. 20-21. Even if Petitioner had pleaded guilty according to the negotiated plea, it is likely the outcome would have remained the same with an active jail sentence imposed.

- Petitioner claims plea counsel rendered ineffective assistance when he failed to pursue further evidence from Dr. Gunter. At the PCR hearing, trial counsel testified that Dr. Gunter evaluated Petitioner and issued a brief letter regarding his findings. Trial counsel also testified that he had several conversations with Dr. Gunter following the evaluation, but the conversations produced nothing worth reducing to writing.

The proposed order should reflect the accurate facts, as presented at the hearing, along with pertinent statutory and case law relating to all issues raised. The proposed order should also be prepared in accordance with the guidelines of *Marlar v. State*, 375 S.C. 407; 653 S.E.2d 266 (2007). I will carefully review the proposed order and ensure that the facts and conclusions of law are as I find them to be.

I appreciate your prompt attention this matter. If you have any questions or concerns, please contact my law clerk, Hudson Smith.

---

<sup>1</sup> The Solicitor stated, "The State would be asking for an active jail sentence in this case." See Transcript of Record, p. 9, lines 6-7.

Sincerely,

G. Edward Welmaker  
Circuit Court Judge

cc: Tara Dawn Shurling

## ATTACHMENT B

## TDSLAW

**From:** Welmaker, G. Edward Law Clerk (Robert H. Smith) [REDACTED]

**Sent:** Monday, January 13, 2014 10:50 AM

**To:** TDSLAW; Welmaker, G. Edward

**Cc:** 'Karen Ratigan'

**Subject:** RE: Kevin Fowler v. State of South Carolina

Dear Ms. Shurling,

It was the Judge's intention in his letter that the order should encompass both factors that you have raised. When we receive the proposed order from Ms. Ratigan, Judge Welmaker will be sure to review the proposed order to ensure it thoroughly covers all points of law and fact.

Thanks,

---

**Hudson Smith**

Law Clerk for The Honorable G. Edward Welmaker

Post Office Box 899

Pickens, SC 29671

OFFICE: (864) 898-5790

FAX: (864) 898-5792

**From:** TDSLAW [REDACTED]

**Sent:** Tuesday, January 07, 2014 5:57 PM

**To:** Welmaker, G. Edward

**Cc:** Welmaker, G. Edward Law Clerk (Robert H. Smith); 'Karen Ratigan'

**Subject:** Kevin Fowler v. State of South Carolina

**Importance:** High

Dear Judge Welmaker:

I am in receipt of Your Honor's ruling in this case found in your letter dated January 3, 2014. Before a final order is signed I would like to respectfully ask that you reconsider your decision to deny relief based on two factors not specifically addressed by your letter.

1. Plea Counsel admitted in his PCR testimony that he did not bring the Solicitor's original agreement not to recommend active prison time to her attention at the time of the plea proceeding. There was testimony that following an in chambers conference Plea Counsel came out and told the Applicant and his family that he was wrong and the prosecutor was going to ask for time. Pleas Counsel testified that he just forgot her commitment not to seek an active prison sentence. Either way, there are really two issues. One is his failure to object when the State requested an active sentence, but also his failure to remind the prosecutor of her original agreement when it became clear, in chambers, that she was going to ask for time. Presenting the letter where she agreed *not* to ask for active time *in either context* would have had three possible positive effects for the Applicant.

4/17/2014

- a. The prosecutor may have agreed, after having her recollection refreshed, not to ask for an active sentence;
  - b. Bringing the prosecution's agreement not to seek active time if he pleaded to Lewd Act to the attention of the Court may have impacted the Judge's sentencing decision even though the plea ended up being the more serious charge of second degree CSC with a minor, or;
  - c. If the prosecutor had responded that she would *only* agree to not seek time if he pleaded to Lewd Act, then the Applicant would have had the chance to make an informed choice between a plea to Lewd Act and a Plea to CSC with a minor, 2<sup>nd</sup> degree. Which leads to my second point.
2. The Applicant expressly testified that he would have taken *the specific deal* offered by the State if he had ever understood that the State's agreement not to ask for time was contingent upon that specific plea. He testified that once his lawyer told him the prosecutor was going to ask for time, he never understood that her change in positions was due to him pleading to CSC v. Lewd Act. *He very clearly testified that he would have pleaded to Lewd Act if he had understood that distinction.* The written plea offer indicated that that offer was open until the *May* after this plea date and there is no evidence that it was ever withdrawn. The testimony of Plea Counsel at the PCR proceeding very clearly establishes that he *assumed* the prosecutor's agreement with regard to a sentence recommendation would apply to a plea to *either* charge and he did *nothing* to verify that factor with the prosecutor. This testimony is consistent with the Applicant's testimony that he was lead to believe the prosecutor was going to ask for time no matter which offense he pleaded to. Defense Counsel's *assumption* that the State would not ask for active time if the Applicant pleaded to either charge evidently caused him not to clarify this critical point with the Applicant.

I am not ignoring Your Honor's observation regarding the plea judge's comments at the time of sentencing. I would note however, that those remarks were based upon the information before the Court at the time of sentencing. I would ask that Your Honor note that judges generally give serious consideration to the recommendations of the State regarding sentencing matters. This is particularly true, I submit, when a prosecutor is either asking for time or is silent on sentencing and thereby sends a message regarding their lack of objection to a lenient penalty. I would further submit that this would be particularly true where neither the victim, or her family, were apparently pushing for the Applicant to get an active prison sentence.

Thank you for your time in reviewing these points. I would ask that Your Honor reconsider your decision to deny Mr. Fowler relief. I would be happy to submit a proposed order for your consideration if Your Honor would like to review a submission from me.

Happy New Year. I hope you and your family had a lovely Christmas and I hope you have a happy and healthy 2014.

Tara Dawn Shurling

Law Office of Tara Dawn Shurling, PA  
3614 Landmark Drive  
Suite A  
Columbia, South Carolina 29204

4/17/2014

(803)738-8622 Phone  
(803)738-1600 Fax  
(803)446-3614 Business Cell  
[tdslaw@shurlinglaw.com](mailto:tdslaw@shurlinglaw.com)

**CONFIDENTIALITY NOTICE**

This electronic mail transmission and any accompanying documents contain information belonging to the sender which may be confidential and legally privileged. This information is intended only for the use of the individual or entity to whom it is addressed. If you are not the intended recipient, any disclosure, copying, distribution, or action taken in reliance on the contents of the information contained in this transmission is strictly prohibited. If you have received this transmission in error, please immediately notify us by telephone at (803)738-8622 and delete the message. Thank you

STATE OF SOUTH CAROLINA )  
 COUNTY OF GREENVILLE )

Kevin K. Fowler,  
 S.C.D.C. No. 349603 )

Applicant, )

vs. )

State of South Carolina, )

Respondent. )

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2012-CP-23-4632

**ORDER DENYING APPLICANT'S MOTION  
 TO ALTER/AMEND**

FILED-CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL B. WICKENSIMER  
 APR 15 2014 PM 2 44

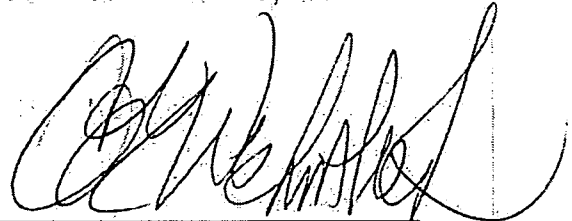
This matter comes before the Court by way of Applicant's Motion to Alter or Amend Judgment pursuant to Rule 59(e), SCRCP. Applicant asks this Court to reconsider its Order of Dismissal filed on March 25, 2014. Specifically, Applicant submits that the Order of Dismissal fails to incorporate his arguments that plea counsel rendered ineffective assistance of counsel when he failed to object to the Solicitor's recommendation for an active sentence and when counsel failed to remind the Solicitor of her previous agreement not to recommend an active sentence.

After careful consideration of the record in this case and the arguments of counsel, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby **DENIES** Applicant's Motion pursuant to Rule 59, SCRCP, to Alter or Amend Judgment of this Court's Order entered on or about March 25, 2014.

**IT IS SO ORDERED.**

April 15, 2014

Pickens, South Carolina



Honorable G. Edward Welmaker  
 Judge, Thirteenth Judicial

STATE OF SOUTH CAROLINA )  
 COUNTY OF GREENVILLE )

Kevin K. Fowler,  
 S.C.D.C. No. 349603 )

Applicant, )

vs. )

State of South Carolina, )

Respondent. )

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2012-CP-23-4612

**SUPPLEMENTAL ORDER DENYING  
 APPLICANT'S MOTION TO ALTER/AMEND**

FILED - CLERK OF COURT  
 GREENVILLE CO. S.C.  
 JUL 8 WICKENSIMMER  
 APR 29 PM 3 11

This matter comes before the Court by way of Applicant's Motion to Alter or Amend Judgment pursuant to Rule 59(e), SCRCP. An order was filed April 15, 2014, ruling upon this motion. Simultaneously, additional documents were being filed by both parties. Having thoroughly reviewed and considered this Court's prior orders, Respondent's Return dated April 16, 2014, and Applicant's Reply dated April 17, 2014, this Court finds that the Order of Dismissal filed March 25, 2014 accurately reflects the findings of the Court and properly ruled upon all issues. Accordingly, Applicant's Motion to Alter or Amend is DENIED with the following clarification:

First, Applicant argues that Plea Counsel rendered ineffective assistance when he failed to mention the October plea offer to the Solicitor prior to the plea and when he failed to object or mention the offer on the record. Second, Applicant argues that Plea Counsel rendered ineffective assistance when he lead Applicant to believe that the Solicitor would be seeking active time no matter what charge he plead to. Regardless of whether Plea Counsel committed unprofessional error, Applicant has suffered no prejudice by either alleged error because he would have received an active sentence even if Plea Counsel had performed to his satisfaction.

Addressing Applicant's first argument, this Court finds that the Solicitor's single request

*EWHP 1*

for an active sentence had, at most, a *de minimis* effect on the ultimate outcome. Applicant submits that Plea Counsel was ineffective in not objecting to the Solicitor's mention of an active jail sentence on the record and also by not reminding the Solicitor of the October plea offer during "an in chambers conference."<sup>1</sup> Argument that such action by Plea Counsel "may have" impacted the judge or "may have" caused the Solicitor to refrain from seeking active time does not meet the required standard of proof.<sup>2</sup> The assertion that Applicant would have pled to Lewd Act, in light of the all the evidence in the record, is not persuasive.

Moreover, Applicant seeks "judicial notice" by this Court that silence by the prosecution in a plea always "sends a message" for a lenient sentence. The experience of the undersigned does not support that premise. Just as a Solicitor's statement for "an active jail sentence" (as here) can mean 30 days or more, total silence by the prosecution can mean *substantial* time. Plea Counsel candidly admitted to seeking the most favorable judge to hear the plea. Ultimately, Applicant would have received an active sentence whether the Solicitor had remained silent or not as evidence by the comments of the Plea Judge. *See* Order of Dismissal, pp. 8-9. If anything, Plea Counsel's efforts, along with a letter written by the victim, actually served to reduce the Applicant's resulting sentence. *Id.*

Addressing Applicant's second argument, Applicant's assertion that he would have pleaded guilty pursuant to the October plea is not persuasive in light of all the evidence. Plea Counsel testified that no viable defense existed, and he testified that Applicant rejected the October plea offer due to the prospect of lifetime GPS monitoring for Lewd Act. In considering the sum of the evidence in this case, this Court finds that Applicant has failed to prove there is a

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<sup>1</sup> The notes kept by the undersigned do not reflect a conference with the judge prior to the hearing. Whether or not such conference occurred would not change the outcome.

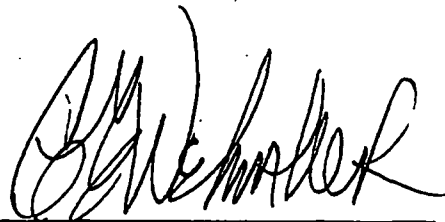
<sup>2</sup> The Assistant Solicitor did not testify at the PCR Hearing.

*EW 2*

reasonable probability the result would have been different but for Plea Counsel's alleged errors. *See Edwards v. State*, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011) (a PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome") (citations omitted).

**IT IS SO ORDERED.**

April 25, 2014  
Pickens, South Carolina

A handwritten signature in black ink, appearing to read 'G. Edward Welmaker', written over a horizontal line.

Honorable G. Edward Welmaker  
Judge, Thirteenth Judicial Circuit

## STATE OF SOUTH CAROLINA

## IN THE COURT OF GENERAL SESSIONS

COUNTY OF Greenville  
STATE VS.  
Kevin K Fowler

INDICTMENT/CASE#: 2011GS2308819

AKA: \_\_\_\_\_

A/W#: 1434627Race: WHITE Sex: M Age: 40Date of Offense: 8/14/2007DOB: [REDACTED] SS# [REDACTED]S.C. Code §: 16-03-0655(B)Address: [REDACTED]CDR Code #: 0396City, State, Zip: [REDACTED]DL#: [REDACTED]SID#: [REDACTED]

## SENTENCE SHEET

\*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

☐ CONVICTED OF or ☒ PLEADS

TO: Sex / Criminal sexual conduct with minor - victim 11 to 14 yrs of age inclusive - Second deg.

in violation of § 16-03-0655(B) of the S.C. Code of Laws, bearing CDR Code # 0396
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS/CSC ☐ §17-25-45  
w/minor 1st or Lewd Act)
The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: [Signature]

Hodge, Kris B.

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,  
for a determinate term of 6 days/months/years or ☐ under the Youthful Offender Act not to exceed \_\_\_\_\_ years  
and/or to pay a fine of \$ \_\_\_\_\_; provided that upon the service of \_\_\_\_\_ days/months/years and/or payment  
of \$ \_\_\_\_\_; plus costs and assessments as applicable\*; the balance is suspended with probation for \_\_\_\_\_

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

## SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

PTUP

Total: \$ \_\_\_\_\_ plus 20% fee: \$ \_\_\_\_\_

\_\_\_\_\_ days/hours Public Service Employment

Payment Terms: \_\_\_\_\_

Obtain GED ☐☐ Set by SCDPPPS

Attend Voc. Rehab. or Job Corp. \_\_\_\_\_

Recipient: \_\_\_\_\_

May serve W/E beginning \_\_\_\_\_

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ \_\_\_\_\_ beginning \_\_\_\_\_

\$ \_\_\_\_\_ paid to Public Defender Fund

Other: \_\_\_\_\_

\*Fine:

§ 14-1-206 (Assessments 107.5%) \$ \_\_\_\_\_

§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00

§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$ \_\_\_\_\_

§ 56-5-2995 (DUI Assessment) \$12 \$ \_\_\_\_\_

§ 56-1-286 (DUI Breath Test) \$25 \$ \_\_\_\_\_

Proviso 47.9 (Public Def/Prob) \$500 \$ \_\_\_\_\_

§ 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00

§ 14-1-213 (Drug Court Surcharge) \$150 \$ \_\_\_\_\_

§ 50-21-114 (BUI Breath Test Fee) \$50 \$ \_\_\_\_\_

§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$ \_\_\_\_\_

Proviso 90.5 (SCCA Surcharge) \$5 \$ 5.00

3% to County (if paid in installments) \$ \_\_\_\_\_

TOTAL \$ \_\_\_\_\_

☐ Appointed PD or appointed other counsel,  
§ 47.12 requires \$500 be paid to Clerk  
during probation.
Clerk of Court/Deputy Clerk: Paul B. WickensCourt Reporter: [Signature]

SCCA/217 (03/2011)

Presiding Judge: [Signature]Judge Code: 2162Sentence Date: 2-6-2012

20

DOCKET NO. 2011-GS-23-  
KBF 000018

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

November TERM 2011

THE STATE

vs.

KEVIN K. FOWLER

WITNESSES

H E Hubert

Greenville County Sheriffs Office

6/28/2011

ARREST WARRANT NUMBER

1434628

ACTION OF GRAND JURY

*TRUE BILL*  
*Roby Rasmussen*

Foreperson of Grand Jury

VERDICT

Indictment for

2468

LEWD ACT UPON A CHILD

VIOLATION § 16-15-140

Foreperson of Petit Jury

Date:

STATE OF SOUTH CAROLINA    )  
                                          )  
COUNTY OF GREENVILLE    )

INDICTMENT FOR  
LEWD ACT UPON A CHILD

At a Court of General Sessions, convened on **NOV 22 2011** the Grand Jurors of Greenville

County present upon their oath:

That KEVIN K. FOWLER did in Greenville County, between October 18, 2006 and October 17, 2010, being over the age of fourteen years, willfully and lewdly commit or attempt a lewd and lascivious act upon or with the body, or its parts, of Minor a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or such child. This is in violation of §16-15-0140 of the South Carolina Code of Laws (1976) as amended.

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

  
SOLICITOR

ARREST WARRANT  
\$322 1-434628 Entered 5/20/97 11-11

STATE OF SOUTH CAROLINA  
County/ ☒ Greenville  
Municipality of ☐

THE STATE  
against  
Kevin K Fowler

Address: [REDACTED]  
Phone: [REDACTED]  
Sex: M Race: W Height: 5 6 Weight: 180  
DL State: [REDACTED] DL #: [REDACTED]  
DOB: [REDACTED] Agency ORI #: SC0230000  
Prosecuting Agency: Greenville County Sheriffs Office  
Prosecuting Officer: H E Hubert - 498  
Offense: Sex / Lewd Act, committing or attempting lewd act upon child under 16 (June 4, 1996)  
Offense Code: 2468  
Code/Ordinance Sec: 16-15-0140

This warrant is CERTIFIED FOR SERVICE in the  
County/ ☐ Municipality of ☐  
The accused  
is to be arrested and brought before me to be  
dealt with according to the law.

(L.S.)  
Signature of Judge

RETURN  
A copy of this arrest warrant was delivered to  
defendant KEVIN FOWLER  
on 06/28/11

Signature of Constable/Law Enforcement Officer  
C. HAWKINS 0634/1532

RETURN WARRANT TO:  
Greenville General Sessions  
305 E. North Street  
Greenville County Courthouse  
Greenville, SC 29601-2120  
ORIGINAL ORIGINAL ORIGINAL

STATE OF SOUTH CAROLINA  
County/ ☒ Greenville  
Municipality of ☐

Person appearing before me the affiant  
duly sworn deposes and says that defendant Kevin K Fowler  
on 08/14/2007  
State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Greenville)  
in the following particulars:

DESCRIPTION OF OFFENSE Sex / Lewd Act, committing or attempting lewd act upon child under 16 (June 4, 1996)

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

Affiant has a statement from the victim, a sixteen year old female, implicating the defendant in this offense. The defendant did willfully commit a lewd or lascivious act upon the body of the victim by rubbing the victim's stomach and pubic area both over and under her clothing with his hand for the purpose of sexual arousal. This offense occurred between August 14, 2007 and November 17, 2007 in Greenville County, South Carolina.

Signature of Affiant  
[Signature] 4498 UNIT 633

STATE OF SOUTH CAROLINA  
County/ ☒ Greenville  
Municipality of ☐  
Affiant's Address 4 McGee Street  
Greenville, SC 29601-  
Affiant's Telephone (864)467-5300

COMPUTER ENTERED

ARREST WARRANT

JUN 27 2011

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

GREENVILLE COUNTY SHERIFF'S OFFICE  
on or about 8/14/2007 defendant Kevin K Fowler  
did violate the criminal laws of the State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Greenville) as set forth below.

DESCRIPTION OF OFFENSE: Sex / Lewd Act, committing or attempting lewd act upon child under 16 (June 4, 1996)

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable  
Sworn to and subscribed before me  
on 06/27/2011

Judge's Address 4 Mc Gee Street Room 116-A  
Greenville, SC 29601-2256

Judge's Telephone (864)467-5315

Signature of Issuing Judge  
Leila Foster  
Judge Code: 5762  
Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit  
ORIGINAL ORIGINAL ORIGINAL

DOCKET NO. 2011-GS-23-000019

KB

The State of South Carolina

County of Greenville

*Spil*

COURT OF GENERAL SESSIONS

November TERM 2011

THE STATE

vs.

KEVIN K. FOWLER

WITNESSES

H E Hubert

Greenville County Sheriffs Office

6/28/2011

ARREST WARRANT NUMBER

1434627

ACTION OF GRAND JURY

TRUE BILL

*Bohly*

Foreperson of Grand Jury

VERDICT

Indictment for

0396

CRIMINAL SEXUAL CONDUCT WITH A MINOR  
2ND DEGREE

VIOLATION § 16-03-0655(B)(1)

Foreperson of Petit Jury

Date:

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )

INDICTMENT FOR  
CRIMINAL SEXUAL CONDUCT WITH A MINOR 2ND DEGREE

At a Court of General Sessions, convened on

NOV 22 2011

the Grand Jurors of Greenville

County present upon their oath:

That KEVIN K. FOWLER did in Greenville County, between October 18, 2006 and October 18, 2009, commit a sexual battery on Minor who was fourteen years of age or less but who was at least eleven years of age. This is in violation of § 16-03-0655(B)(1) [formerly § 16-3-655(2)] of the South Carolina Code of Laws (1976) as amended.

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

  
SOLICITOR

ARREST WARRANT

532 1-434627 5609  
STATE OF SOUTH CAROLINA  
County/ ☐ Municipality of Greenville

THE STATE  
against  
Kevin K Fowler

Address: [REDACTED]  
Phone: [REDACTED]  
Sex: M Race: W Height: 5'6" Weight: 180  
DL State: [REDACTED] DL #: [REDACTED]  
DOB: [REDACTED] Agency/Office: SC0230000  
Prosecuting Agency: Greenville County Sheriffs Office  
Prosecuting Officer: H E Hubert - 498  
Offense: Sex / Criminal sexual conduct with minor - victim 11 to 14 yrs of age inclusive - Second deg.  
Offense Code: 0396  
Code/Ordinance Sec: 16-03-0655(B)  
This warrant is CERTIFIED FOR SERVICE in the  
County/ ☐ Municipality of Greenville  
is to be arrested and brought before me to be dealt with according to the law.

Date: \_\_\_\_\_ (L.S.)

RETURN

A copy of this arrest warrant was delivered to defendant Kevin K. Fowler on 06/27/2011

C.O. ROSEAN #7061532  
Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Greenville General Sessions  
305 E. North Street  
Greenville County Courthouse  
Greenville, SC 29601-2120  
ORIGINAL ORIGINAL ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of Greenville

Personally appeared before me the affiant H E Hubert being duly sworn deposes and says that defendant Kevin K Fowler did within this county and state on or about 08/14/2007 violate the criminal laws of the State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Greenville)

In the following particulars:

Sex / Criminal sexual conduct with minor - victim 11 to 14 yrs of age inclusive - Second deg.

wherein it is stated that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

Affiant has a statement from the victim, a sixteen year old female, implicating the defendant in this offense. The defendant did engage in a sexual battery with the victim by penetrating the victim's vagina with his finger. This offense occurred between August 14, 2007 and November 17, 2007 in Greenville County, South Carolina.

COMPUTER ENTERED

JUN 27 2011

GREENVILLE COUNTY

STATE OF SOUTH CAROLINA  
☒ County/ ☐ Municipality of Greenville

Affiant's Address 4 McGehee Street

Greenville, SC 29601-

Affiant's Telephone (864)467-5300

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 8/14/2007 defendant Kevin K Fowler did violate the criminal laws of the State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Greenville) as set forth below:

DESCRIPTION OF OFFENSE: Sex / Criminal sexual conduct with minor - victim 11 to 14 yrs of age inclusive - Second deg.

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me on 06/27/2011

Signature of Issuing Judge Lella Foster (L.S.)  
Judge Code: 5762

Judge's Address 4 Mc Gee Street Room 116-A  
Greenville, SC 29601-2256  
Judge's Telephone (864)467-5315  
Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit  
ORIGINAL ORIGINAL ORIGINAL

AFFIDAVIT ORIGINAL

\*Form Approved by  
U.C. Attorney General  
April 21, 2003  
SCCA 616 \*

General Sessions Tracking Sheet  
Indictment # 0000GS23Fixed  
to jail

Name: Fowler, Kevin K

Warrant/Ticket # I434628

AKA:

Date of Arrest: 06/28/2011

Addr: [REDACTED]

Date of Offense: 08/14/2007

Date Rcv by Clerk 07/06/2011

Magistrate: Taylor, Thomas E.

SSN# [REDACTED]

Counts: Code: 2468/Sex / Lewd Act, committing or attempting lewd act upon child under 16 (June 4, 1996)

Sex: M Race: W

DOB: [REDACTED]

DL# [REDACTED]

Indictment # 0000GS23

## Disposition Information

1. Transmitted to SOL & SCCA:
2. Disp Received by Clerk:
3. Date of Disposition: /

2011-8818

FEB 07 2012

- Disposition:
1. Guilty plea
  2. Trial - guilty
  3. Trial - not guilty
  - ☒ 4. Dism/Not Pros/Pros Ended
  5. Judicial Commitment
  6. Judicial Dismissal
  7. Remanded
  8. Dismissed at Prelim
  8. No Bill
  9. Failure to Appear
  10. Other

Explain: Plead to other charge (2011-8819) per  
plea agreement

Explain: \_\_\_\_\_

Explain: \_\_\_\_\_

Explain: \_\_\_\_\_

Explain: \_\_\_\_\_

Judge: \_\_\_\_\_

Court Reporter: \_\_\_\_\_

Defense Atty: Matthew Kappel

Solicitor: Kris Hodge

Counts: \_\_\_\_\_ Code: \_\_\_\_\_

Sentence: \_\_\_\_\_