

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County

S.C. Supreme Court

Robin B. Stilwell, Circuit Court Judge  
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TIMOTHY LEE OWENS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001950  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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INDEX

INDEX ..... 1

ISSUE PRESENTED ..... 2

STATEMENT ..... 3

ARGUMENT

The PCR court erred in finding plea counsel effective where there was no probative evidence that plea counsel timely or fully communicated the State’s plea offer of a twelve year cap to Petitioner and plea counsel took no action to address the State’s failure to make any recommendation at the plea hearing such that Petitioner received a sentence of eighteen years, six years greater than the plea offer ..... 4

Relevant Facts ..... 4

Discussion ..... 10

A. There is no probative evidence that plea counsel timely communicated the State’s plea offer to Petitioner ..... 12

B. There is no probative evidence that plea counsel fully communicated the State’s plea offer such that Petitioner could make an informed decision, especially where the possibility of life without parole was not discussed until after expiration of the offer ..... 13

C. Plea counsel failed to object to the State’s renege plea agreement or move to withdraw Petitioner’s plea ..... 16

D. Petitioner was prejudiced by plea counsel’s deficient conduct in that he received an eighteen year sentence rather than the maximum twelve year sentence in the State’s plea offer ..... 19

CONCLUSION ..... 21

ISSUE PRESENTED

Whether the PCR court erred in finding plea counsel effective where there was no probative evidence that plea counsel timely or fully communicated the State's plea offer of a twelve year cap to Petitioner and plea counsel took no action to address the State's failure to make any recommendation at the plea hearing such that Petitioner received a sentence of eighteen years, six years greater than the plea offer?

## STATEMENT

On November 20, 2012, Petitioner Timothy Owens was indicted by the Greenville County grand jury for one count of burglary second degree (violent), two counts of grand larceny between \$2,000 and \$10,000 (third offense), and three counts breaking and entering a motor vehicle, all alleged to have occurred on May 27, 2012.<sup>1</sup> App. 77 – 78, 80 – 81, 83 – 84, 86 – 87, 89 – 90, and 92 – 93. The State filed its Notice of Intent to Seek Life Without Parole on November 21, 2012.

On December 5, 2012, Owens appeared before the Honorable William H. Seals, Jr. and pled guilty to the above-listed offenses. Owens was represented by Larry Cooke and the State was represented by assistant solicitor Jennifer Tessitore. App. 1. Judge Seals sentenced Owens to thirteen years for second degree burglary and one year on each of the remaining offenses, all to be served consecutively, for a total of eighteen years. App. 18, ll. 16-21.

On June 10, 2013, Owens filed an application for post-conviction relief. App. 20 – 26. The State filed its Return on October 18, 2013. App. 27 – 31. On June 17, 2014, an evidentiary hearing was held before the Honorable Robin B. Stilwell. Owens was represented by Caroline M. Horlbeck, and the State was represented by Assistant Attorney General Karen Ratigan. App. 32. The witnesses at the hearing included Owens and plea counsel, Larry Cooke.

On August 13, 2014, Judge Stilwell issued an Order of Dismissal denying Owen's application for post-conviction relief.

This Petition for Writ of Certiorari follows.

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<sup>1</sup> As part of the plea agreement, the State dismissed two counts of auto-breaking, one count of grand larceny, one count of possession of burglary tools, and one count of resisting arrest. App. 10, ll. 12-18.

## ARGUMENT

**The PCR court erred in finding plea counsel effective where there was no probative evidence that plea counsel timely or fully communicated the State's plea offer of a twelve year cap to Petitioner and plea counsel took no action to address the State's failure to make any recommendation at the plea hearing such that Petitioner received a sentence of eighteen years, six years greater than the plea offer.**

### Relevant Facts

#### *Guilty Plea Hearing*

After the clerk recited the indictments to which Owens was pleading guilty, the solicitor indicated that "there is no recommendation." App. 3, ll. 6-23. She then stated that "the State will have a position as to sentencing of course." App. 3, l. 25 – 4, l. 1. When asked if his lawyer had answered all of his questions, Owens responded "uh, no, sir, I don't --- know why." App. 5, ll. 17-20. Plea counsel then informed the court that Owens had a question about parole eligibility, which counsel does not give advice on but instead leaves up to the Department of Corrections. App. 6, ll. 2-4. The court took a break so that Owens could speak with his attorney. App. 6, ll. 5-11. When they came back on the record, plea counsel indicated that Owens still wanted to pled guilty and the court conducted the remainder of the plea colloquy. App. 6, l. 22 – 7, l. 2.

The Court asked Owens if his lawyer had done everything that he asked and if he needed more time, at which point plea counsel said "Time to – hey, If you got a complain, it's time to, time to do is not not [sic] later, now is the time to do it." App. 7, ll. 7-12. Owens indicated that he was ready to proceed and understood that his attorney's hands are tied and the solicitor is in control of his case. App. 7, ll. 14-24. The Court then asked if anyone has promised Owens any type of reward or gift to get him to plead guilty, to which Owens responded:

Only the fact, your Honor, is if I don't plead guilty today they're seekin' [sic] life without the possibility of parole next week. Uh, the solicitor's office have sent me two pleas, one was a[n] open plea and I had no information on that and I couldn't get any and I wrote the

solicitor's office and asked for a, uh, to let me plead guilty to a non-violent 10. She came back and said that, uh, she would put a 12-year cap on it and, uh, I was wrastlin' [sic] with that because, uh, she's also tacking on the violence of the, of the second degree burglary which it wasn't a violent crime and I I'm not a violent person but uh, you know, under the circumstances I just want to get this over with, I wanna [sic] get everything behind me so I can go on and make my life better in the future, you know, I'm tired of tyin' [sic] up the county's time and money, I just wanna [sic] get it all over with. I've made a lotta [sic] mistakes in my life and I'd just like to get it all behind me.

App. 8, l. 16 – 9, l. 1. The Court then asked “well other than negotiations regarding this plea, has anybody promised you any money or gifts --- anything like that to induce you into pleading guilty?” Owens responded “no.” App. 9, ll. 8-13. After the remainder of the colloquy, the State recited its version of the facts of the case and Owen's criminal history. App. 10, l. 18 – 14, l. 9. The State requested imposition of a “significant sentence.” App. 14, ll. 9-21. The Court accepted Owen's plea, finding that it was given freely, intelligently, and with advise of competent counsel. App. 14, ll. 22-23.

Regarding sentencing, plea counsel said:

[W]e had this thing down to a a a ceiling of of 12 years at one point in time and, uh, we couldn't, we couldn't get together on the violent as opposed to non-violent, uh, then she [the solicitor] sprung that to, she [the solicitor] sprung that life without parole on me and a course that's my my doin[g], I mean, my, of course my client, I was havin[g] to negotiate at his directions most [of] the time but anyhow she served that on me and I didn't have any choice...”

App. 15, l. 23 – 16, l. 5. He then emphasized to the court that Owens is fifty years old such that a long sentence is the equivalent of a death sentence. App. 16, ll. 9-13. Owens then addressed the court, stating that despite his criminal record, he had gotten his life back on track after his release in 2009. However, in September 2011 things began to unravel when his mother fell ill and moved into a nursing home, his wife left him, and he violated his probation when he fell back into drugs. He

returned to his home to find it vandalized and his truck stolen. Owens began staying at the Salvation Army and finding work where he could, but continued to struggle with his addiction. App. 16, l. 15 – 18, l. 5. He asked the court for mercy. App. 18, ll. 5-15.

The court imposed consecutive sentences of thirteen years for second degree burglary and one year on each of the remaining offenses, for a total of eighteen years. App. 18, ll. 16-21.

### ***PCR Hearing***

Both Owens and plea counsel, Larry Cooke, testified at the June 17, 2014 PCR hearing. Owens testified that he did not receive the State's second plea offer of either "straight up to 5 of 11 charges OR if you want a cap . . . 12 years" until after expiration of the acceptance deadline of October 27, 2012. App. 36, l. 1 – 37, l. 14; App. 38, l. 21 – 39, l. 5; see App. 65-66 (Pet'r's Ex. 1, amended offer letter, Oct. 4, 2012). He said that the plea offer was enclosed with discovery materials mailed to him on November 27, 2012. App. 37, l. 20 – 38, l. 20; App. 47, l. 25 – 48, l. 10; 49, ll. 18-25; see App. 67 (Pet'r's Ex. 2, cover letter, Nov. 27, 2012). Owens wanted to accept the twelve year plea offer but said that no one from the public defender's office meet with at the jail to review it. App. 39, l. 15 – 40, l. 9. He said that he called to speak to Cooke numerous times but was only able to speak with any investigator named Robin, who said she would relay his messages. App. 40, ll. 12-24. A visitation log from the Greenville County Detention Center was admitted into evidence and reflected that Cooke made only two visits to see Owens, one on August 8, 2012 and the other on December 4, 2012. App. 41, ll. 6-23; see App. 68 (Pet'r's Ex. 3, visitation log). Owens also recalled that he was served at the end of November with a notice that the State was seeking life without parole. App. 42, ll. 18-23; App. 46, l. 22 – 47, l. 3.

Regarding his understanding of his case status based on his December 4, 2012 visit from Cooke, Owens said that he "was going in front of the judge for a plea offer and [he] was to plead

guilty and accept the 12-year cap.” App. 42, l. 2-9; App. 43, ll. 4-17; App. 53, ll. 3-17. However, he testified that the State did not uphold the offer at the hearing but instead asked for a lengthy sentence. App 43, ll. 18-20; App. 45, ll. 3-13. He said that when he talked to plea counsel at the break, Cooke said “I got this . . . . Just let me handle this, I got this, everything’s going to be all right. We’ve got a good judge. Everything’s going to be all right.” App. 44, ll. 7-17. He said that after the judge sentenced him, he told Cooke “this is not our agreement” and asked to withdraw his plea but was advised that all he could do is file for PCR. App. 44, ll. 20-25. Owens testified that had he known that there was no recommendation for twelve years, he would not have pled guilty and that he told Cooke on numerous occasions that he would not take a plea without a cap. App. 46, ll. 11-19. Owens also said that the “without recommendation” box was not checked on the sentencing sheet when he signed it. App. 49, ll. 9-12.

At the beginning of his testimony, plea counsel explained that he did not have Owens’ case file because it could not be located in storage, so he could testify based only on the investigator’s notes in the public defender database.<sup>2</sup> App. 52, l. 25 – 53, l. 8. Cooke had no independent recollection of receiving the amended plea offer, saying “[i]f it came, then fine. I don’t know” but that he does not dispute it. App. 53, ll. 17-22. He testified that his “standard practice” is to send a copy of any plea offer from the State to the client either by mail or by having an investigator take it to the jail. App. 53, l. 23 – 54, l. 4. He also said “[u]sually, we’ll end up talking about it at some point in time.” App. 54, ll. 5-6.

Plea counsel testified that the defender data notes reflect that he contacted the solicitor on June 15, 2012 to request a plea offer. App. 53, ll. 9-13. On July 30, 2012, the client called and

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<sup>2</sup> Cooke testified that he works at the public defender’s office “part-time.” App. 54, l. 4. He is an attorney in private practice who accepts contract cases from the public defender’s office.

requested drug court and a jail visit. App. 54, ll. 8-10. On August 27, 2012, he wrote to Owens and told him that the solicitor would not give any better plea offer than “no recommendation” because of his criminal record. App. 54, ll. 10-14. Cooke said that he did not know “what that’s all about” because he did not have his personal notes. App. 54, ll. 14-16. Though there was a note about a letter e-mailed from the solicitor’s office on October 5, 2012, there was no information regarding the content of the correspondence. App. 54, ll. 17-20. There was also a note that on October 10, 2012, Robin, the investigator, sent a copy of a plea offer to Owens, but Cooke could not confirm that it was actually sent or received. App. 54, ll. 20-22; App. 58, l. 2 – 59, l. 19. Plea counsel “surmised” that the entries were referring to the amended plea offer since it was dated October 4, 2012. App. 54, l. 24 – 55, l. 1.

Cooke had no notes regarding whether Owens wanted to accept or reject the plea. However, the public defender’s office received a letter from Owens on October 22, 2012 requesting a jail visit, which Cooke assumed had to do with the plea offer. App. 55, ll. 2-9; App. 63, ll. 2-9. Even so, Cooke could not recall if visited Owens in response to the letter, and later admitted that the detention center visitation log shows that his only visits were on August 8, 2012 and December 4, 2012. App. 55, ll. 6-8; App. 60, ll. 2-15; see App. 68 (Pet’r’s Ex. 3, visitation log). There were also no entries in the database notes regarding any video conference with Owens. App. 60, l. 15 – 61, l. 5. Based Owens’ letter requesting a jail visit on October 22, 2012 and the State’s filing of the notice of intention to seek without parole on November 26, 2012, plea counsel said:

And, *apparently* – and this is just what *I’m surmising*. That was on 10/22, he wanted a jail visit. Well, on 11/26 -- *apparently* between 10/22 and 11/26, I told the solicitor that he was not going to accept the plea offer. And from reading the transcript, *I think* it had a lot to do with violent or nonviolent, how much time he was going to have to serve of the 12 years. And I never could get her off of the violent part. And that’s, basically, *I think* his whole objection during this whole thing.

So she finally got aggravated with me, *I guess*, or my client, but she wasn't going to come off of the violent. And that's when she served us notice with the intention to seek life without parole and it was put on the trial docket, no more negotiations. *I'm guessing that*. That's kind of how things go, *I'm just guessing*.

App. 55, ll. 8-23.

Though he had no independent recollection, Cooke said that Owens "would know" that there was no negotiated recommendation because his case was put on the trial docket. App. 56, ll. 2-12. He also did not "think" that he would have told Owens that the twelve year cap was still available. App. 56, ll. 2-16. With respect to the November 27, 2012 letter, Cooke said that if the plea offer had been included in the accompanying packet, it would have been specified in the letter. App. 56, l. 22 – 57, l. However, he admitted that he did not sign the letter and that it is "just something that's generated by the investigators and secretaries." App. 57, ll.

#### ***Order of Dismissal***

On August 13, 2014, Judge Stilwell issued an Order of Dismissal, denying Owens' PCR application. App. 69 – 75. The court found that "Applicant failed to meet his burden of proving plea counsel did not properly convey the plea offer in this case." App. 73. He found plea counsel's testimony "more credible." App. 73. He further found that Owens "rejected any and all plea offers made by the State and was well aware on the day of the guilty plea that he would be pleading guilty without a sentence recommendation." App. 73. The court also stated that Owens' allegations are refuted by the guilty plea transcript. App. 73. Consequently, the PCR court found that Owens failed to meet the requirements of the Strickland<sup>3</sup> test to prove that plea counsel was ineffective. App. 73.

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<sup>3</sup> Strickland v. Washington, 466 U.S. 668 (1984).

## Discussion

The State made a favorable plea offer to Owens for a cap of twelve years. App. 65-66 (Pet'r's Ex. 1, amended offer letter, Oct. 4, 2012). Plea counsel failed to timely and meaningfully convey that offer to Owens, especially where plea counsel did not advise Owens of the potential that the State could seek life without the possibility of parole based on Owens's criminal record. Plea counsel did not object to the State's failure to uphold the offer, and when Owens alerted plea counsel to his understanding that he was accepting the offer of the twelve year cap at the plea hearing, plea counsel failed to make a motion to withdraw the guilty plea. Due to plea counsel's deficient representation, Owens entered a guilty plea without a recommendation and was sentenced to a total of eighteen years. Thus, the PCR court erred in finding that plea counsel rendered effective assistance of counsel.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether 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.' " Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668).

First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687-88. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland,

466 U.S. at 688). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The United States Supreme Court has held that "[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results." Brady v. United States, 397 U.S. 742, 758 (1970).

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial.

Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (quoting Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)); see also Hill, 474 U.S. at 59 (footnote omitted).

This Court has also held that "a defendant has the right to effective assistance of counsel during the plea bargaining process." Davie v. State, 381 S.C. 601, 607, 675 S.E.2d 416, 419. "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Missouri v. Frye, 132 S.Ct. 1399, 1408; see also Davie, 381 S.C. at 609, 675 S.E.2d at 420 (2009) (adopting "rule that counsel's failure to convey a plea offer constitutes deficient performance" and holding "counsel is required to *fully communicate* with the client so that the client can make an *informed decision* regarding any proposals by the State" (emphasis added)).

The Frye Court noted that the plea bargaining can benefit both parties by providing "[t]he potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing." 132 S.Ct. at 1407. The Court further stated

that “[i]n order that these benefits can be realized, however, criminal defendants require effective counsel during plea negotiations.” *Id.* at 1407-08. “Anything less might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him.” *Id.* at 1408 (internal citations and quotations omitted).

***A. There is no probative evidence that plea counsel timely communicated the State’s plea offer to Petitioner.***

In the present case, the PCR court found plea counsel Cooke “more credible” than Owens despite the absence of the case file and the lack of any independent recollection of the case. Cooke repeatedly said that he was guessing, surmising, assuming, or did not know in response to the questions at the PCR hearing. App. 53, ll. 19-20; App. 54, ll.14-16 and ll. 24-25; App. 55, ll. 8-9 and ll. 18-23; App. 58, l. 10; App. 59, l. 7-19; App. 60, ll. 15-22; App. 61, ll. 18-21. This type of ambiguous testimony does not provide the probative evidence required to support a PCR court’s findings. See *Simuel v. State*, 390 S.C. 267, 271 n.2, 701 S.E.2d 738, 740 n.2 (2010) (finding no probative evidence that trial counsel advised Simuel of his right to direct appeal or that Simuel waived his right to direct appeal because counsel’s testimony that he “probably” spoke with Simuel about an appeal “is not the same as affirmatively stating he spoke with Petitioner about an appeal”).

The only evidence that plea counsel presented regarding communication of the plea offer was a defender data note indicating that his investigator, Robin, sent a copy of a plea offer on October 10, 2012. Cooke said that he “*guess[es]*” that would have been the amended plea offer letter since it was received by his office five days prior. App. 54, l. 10 – 55, l. 1; App. 58, ll. 19-24; see App. 65 – 66 (Pet’r’s Ex. 1, amended offer letter, Oct. 4, 2012). However, prior to that Cooke testified that he *did not recognize* the plea offer letter. App. 53, ll. 17-22. Owens testified that he did not receive the plea offer until after November 27, 2012, when the plea offer letter was sent

along with a letter enclosing discovery. App. 37, l. 20 – 38, l. 20; App, 47, l. 25 – 48, l. 10; 49, ll. 18-25; see App. 67 (Pet’r’s Ex. 2, cover letter, Nov. 27, 2012). Owens admitted that the November 27, 2012 did not list the offer letter as one of the items enclosed but stated that he was “pretty sure” that the two came together and that he keeps copies of all of his paperwork. App. 38, ll. 7-13. Cooke testified that he “guarantee[s] nothing goes out of [the public defender’s] office without it being mentioned in the cover sheet.” There is, of course, no basis for such a guarantee, especially since plea counsel admitted that he did not send the November letter himself. App. 57, ll. 7-10. Thus, the record does not support the Court’s finding that the amended plea offer was sent to Owens on October 10, 2012.

***B. There is no probative evidence that plea counsel fully communicated the State’s plea offer such that Petitioner could make an informed decision, especially where the possibility of life without parole was not discussed until after expiration of the offer.***

Even if this Court finds that there was sufficient evidence to support the PCR court’s finding that a copy of the offer letter was sent out on October 10, 2012, the inquiry as to plea counsel’s effectiveness should not end there. Assuming *arguendo* that the offer was sent to Owens on October 10, 2012, the evidence reveals that Cooke failed to discuss the plea offer with Owens prior to its expiration. Additionally, Owens was not advised of the potential of a life without parole sentence until it was too late to accept the State’s plea offer.

In Davie v. State, this Court held that “counsel is required to *fully communicate* with the client so that the client can make an *informed decision* regarding any proposals by the State.” 381 S.C. at 609, 675 S.E.2d at 420. Plea counsel in Davie admitted that he never communicated the State’s plea offer to Davie due to its being sent to his prior post office box. 381 S.C. at 606, 675 S.E.2d at 419. Thus, in light of the complete absence of communication, Davie did not address what is required to “fully communicate” an offer so that a client can make an “informed decision.”

Undoubtedly, full communication requires that it be timely and more than simply forwarding the State's offer letter to the client.

There is no probative evidence that Cooke had any discussion with Owens about the plea offer prior to its expiration. Owens testified that he made many attempts to contact plea counsel but he was never available to accept his call. App. 40, ll. 12-24. Though he did not know the subject matter that Owens wanted to discuss, Cooke testified to a defender date notation that they received a letter from Owens requesting a jail visit on October 22, 2012. App. 55, l. 9; App. 59, 2-15. Despite the expiration of the State's offer on October 27, 2012, plea counsel did not visit Owens until December 4, 2012. App. 68 (Pet'r's Ex. 3, visitation log). Plea counsel had no record of any other video conference or other communication with Owens regarding the plea offer. App. 60, l. 15 – 61, l. 16. Further, plea counsel's general statement that he "usually" "end[s] up" talking about a plea offer with his client "at some point" is not the same as affirmatively stating that he fully communicated the plea offer to Owens. See App. 54, ll. 5-6.

The plea transcript does indicate that both Owens and Cooke were aware of the offer at some point prior to the plea hearing. See App. 8, l. 21 – 9, l. 2; App. 15, l. 23 – 16, l. 3. The statements made by Owens and plea counsel at the plea hearing are significant. Chiefly, contrary to the PCR court's findings, Owens' PCR allegations are not "refuted by the guilty plea transcript." See App. 73 (Order of Dismissal, p. 5). His statement that he was "wrestlin' [sic] with" the amended offer because of the classification of the crime as violent was not an indication of his rejection of the plea. App. 8, ll. 21-25. He then said that "under the circumstances I just want to get this over with," indicating that he decided to accept the offer even with the violent classification. App. 9, ll. 1-2. The court asked Owens if "*other than negotiations regarding this plea*, has anybody promised you any money or gifts, -- anything like that to induce you into pleading guilty,"

to which Owens responded “no.” App. 9, ll. 8-13 (emphasis added). No one took the opportunity to clarify to Owens that the twelve year cap was no longer a part of the plea deal. Plea counsel’s and Owens’ later requests for mercy is also consistent with Owens’ belief that the negotiation was for a twelve year cap, such that the court could give him less than the twelve year maximum. App. 16, l. 10-14; App. 18, ll. 13-15.

Though Cooke’s statements indicated that the twelve year offer was in the past, he spoke only after the court accepted Owens’ plea. App. 14, ll. 22-24; App. 15, l. 23 – 16, l. 1. Further, Cooke’s testimony only reflects his belief as to the status of the plea negotiations, not the understanding and belief of Owens. App. 42, l. 2 – 43, l. 25; App. 50, ll. 13-17. The plea transcript further reflects that Cooke did not properly advise Owens of the risk of life without the possibility of parole. Plea counsel said at the plea hearing “she [the solicitor] sprung that to, she [the solicitor] *sprung that that life without parole on me and a course that’s my my doin’.*” App. 16, ll. 1-3 (emphasis added). The testimony at the PCR hearing revealed that the notice of intent to seek life without parole (LWOP) was served at the end of November 2012. Plea counsel “surmised” that he told the solicitor that his client was not going to accept the plea offer sometime between October 22, 2012 and November 26, 2012 and “guessed” that the LWOP notice was likely the result of the solicitor’s aggravation with him or his client. App. 55, ll. 7-23. However, as discussed supra, this speculative testimony is not the type of probative evidence properly relied upon to support a PCR court’s findings. See Simuel, 390 S.C. at 271 n.2, 701 S.E.2d at 740 n.2. Notably, Cooke did not provide any documentation or independent recollection related to his purported communications with the solicitor. See App. 55, l. 10-12. The only indisputable interpretation of plea counsel’s statements and testimony are that he was surprised by the State’s LWOP notice. If Cooke was surprised, there can be no doubt that Owens was just as surprised, if not more so.

However, even prior to service of the LWOP notice, plea counsel should have been well aware of the potential of LWOP based on Owens' lengthy record and the broad parameters and minimal notice requirements of S.C. Code Ann. § 17-25-45. Knowledge of the maximum potential sentence is an essential part of evaluating a plea offer such that the potential of LWOP should have been explained to Owens. There is no doubt that such advise would have affected Owens' decision, as his ultimate decision to plead guilty was at least in part based on the threat of LWOP. See App. 8, ll. 16-18; App. 9, ll. 16-17; App. 51, ll. 12-19 ("That [avoiding LWOP] was one of the reasons I was willing to take the 12-year cap").

Neither the guilty plea transcript nor the PCR hearing transcript indicate any explicit rejection of the State's plea offer by Owens. Therefore, there was no probative evidence to support the PCR court's finding that Owens "*rejected* any and all plea offers made by the State and was *well aware* on the day of the guilty plea that he would be pleading guilty without a sentence recommendation." App. 73 (emphasis added). Even if this Court finds that the offer was timely sent to Owens, his attorney was required to do more than just forward the State's letter. See Davie, 381 S.C. at 609, 675 S.E.2d at 420. The probative evidence reflects that Cooke failed to discuss the plea offer with Owens prior to its expiration. Moreover, any discussions that they did have did not include the risk of a mandatory sentence of life without parole. Due to Cooke's deficient representation, Owens pled guilty with no recommendation rather than a cap of twelve years. Had he been fully advised prior to October 27, 2012, Owens could have timely accepted the State's plea offer.

***C. Plea counsel failed to object to the State's reneged plea agreement or move to withdraw Petitioner's plea.***

Plea counsel was further deficient in failing to object to the reneged upon plea agreement when the State made no recommendation and it was clear that Owens thought the State would

recommend a twelve year cap. Owens testified that after the plea hearing he asked Cooke to move to withdraw his plea because that was not the deal that they had with the State. He said that plea counsel told him he would have to file for PCR. App. 44, ll. 20-25. Cooke did not refute Owens' testimony at the PCR hearing.

In Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988), the petitioner collaterally attacked his guilty plea by contending that his attorney was ineffective. At the PCR hearing, plea counsel testified that Jordan intended to proceed to trial but after plea negotiations agreed to plead guilty based on the solicitor's agreement to neither recommend nor oppose probation. 297 S.C. at 53, 374 S.E.2d at 684. However, a different solicitor represented the State at the plea hearing and "vigorously opposed probation." Id. Plea counsel "neither requested to withdraw the guilty plea nor did he point out to the judge that the solicitor had changed his plea agreement." Id. Though plea counsel did raise the matter of the unfulfilled plea agreement in chambers, the judge refused to reconsider the sentence because he said "that the solicitor's opposition to probation did not influence his decision." Id.

This Court held that plea counsel's conduct in Jordan "fell below prevailing professional norms" where *he did not protect his client's right to enforce the plea agreement.* Id. at 54, 374 S.E.2d at 685. "When the solicitor disregarded the agreement, Jordan's attorney failed to draw Judge Eppes' attention to the plea bargain and then failed to move to withdraw Jordan's guilty plea." Id. This Court further held that, in light of Jordan's "original vehemence" to pursue his right to a jury trial, there was a reasonable probability that but for plea counsel's deficient conduct, Jordan would not have pled guilty but instead proceeded to trial. Id. at 54-55, 374 S.E.2d at 685.

In State v. Rikard, 371 S.C. 295, 638 S.E.2d 72 (2006), the Court of Appeals distinguished this Court's decision in Jordan. The court noted that in Rikard the State did not promise anything in exchange for the plea and Rickard "acknowledged during the plea hearing that it was a 'straight-up' plea without any negotiations."<sup>4</sup> 371 S.C. at 3030 n.4, 638 S.E.2d at 76 n.4. Such is not the case here, where there was a formal plea offer whereby Owens would receive a maximum twelve year sentence in exchange for pleading guilty. See App. 65-66 (Pet'r's Ex. 1, amended offer letter, Oct. 4, 2012). Additionally, the plea transcript does not reflect that Owens ever acknowledged that the plea was "straight up" or "without recommendation."

As discussed supra, based on plea counsel's statements at the plea hearing, it is apparent that he no longer believed that the twelve year offer was available. See App. 15, l. 23 – 16, l. 5. However, Owens' statements prior to the court's acceptance of the plea indicate that he believed that he was accepting the twelve year offer despite his disagreement over whether the burglary was violent. See App. 8, l. 16 – 9, l. 1. One logical explanation for Cooke's failure to object to the reneged upon plea agreement is that he knew that he misadvised his client regarding the plea negotiations and hoped that the court might issue a sentence of twelve years or less, rendering any prejudice negligible. Alternatively, the miscommunication between Owens and Cooke could have been innocent. However, even if that were the case, once Owens told Cooke after the plea hearing that he wanted to withdraw his plea, plea counsel should have made the proper motion on the record. See App. 44, ll. 20-24. The plea court would have been in a much better position to address the matter of withdrawal then. Instead, he inaccurately told Owens that his only option was PCR.

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<sup>4</sup> There was no formal plea offer made in Rikard. 371 S.C. at 300, 638 S.E.2d at 75. Rather, appellant argued that the State was prohibited from requesting the maximum sentence because "without negotiations or recommendation" was designated on the sentencing sheet. Id. The court found that such a designation means that either party can request a favorable sentence, as the State and the defendant have not agreed on sentencing. Id. at 302, 638 S.E.2d at 76.

App. 44, ll. 24-25. Cooke failed to protect Owens' right to enforce the plea agreement that Owens thought he had accepted. See Jordan v. State, 297 S.C. at 54, 374 S.E.2d at 685.

***D. Petitioner was prejudiced by plea counsel's deficient conduct in that he received an eighteen year sentence rather than the maximum twelve year sentence in the State's plea offer.***

Rather than applying a rule of presumed prejudice, this Court held in Davie that a defendant must show actual prejudice. 381 S.C. at 613, 675 S.E.2d at 422 (“We find a case-by-case approach is most consistent with our prior decisions and effectively achieves the ultimate goal of assessing whether but for counsel’s deficient performance a defendant would have accepted the State’s proposed plea bargain and that he would have benefited from the offer.”). This Court went on to say that “it is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice.” Id. “Instead, depending on the facts of the case, a defendant’s self-serving statement may be sufficient to establish actual prejudice.” Id. In finding prejudice in Davie, this Court found that the difference in the sentence that Davie received and the offer to be proof of prejudice. Id. at 614, 675 S.E.2d at 423.

In the present case, Owens testified that he wanted to and thought he had accepted the twelve year cap. App. 39, l. 15 – 40, l. 9; App. 42, l. 2-9; App. 43, ll. 4-17; App. 53, ll. 3-17. Owens testified that had he known that there was no recommendation, he would not have pled guilty and that he told Cooke on numerous occasions that he would not take a plea without a cap. App. 46, ll. 11-19. Owens further stated that he did not believe that it would come to a trial and was advised by Mr. Cooke “that if [he] held out that [they] would get a good judge and Mr. Cook [sic] would make a good plea deal.” App. 51, ll. 2-11. Moreover, even if the Court believes that Owens’ rejected the offer, any such rejection was not fully informed due to Cooke’s failure to advise him of the potential LWOP sentence. Owens made clear at the PCR hearing that the threat of LWOP was

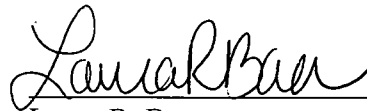
one of the reasons that he was willing to accept the plea offer. App. 51, ll. 12-19. Thus, regardless of the nature of plea counsel's deficiency, the fact remains that Owens was prejudiced. Instead of receiving a maximum twelve year sentence pursuant to the State's plea offer, he was sentenced to a total sentence of eighteen years.

Therefore, Owens satisfied both of the Strickland prongs and proved his claim of ineffective assistance of counsel. He showed that plea counsel was deficient by failing to timely and fully discuss the plea offer with Owens and failing to take any action to address the lack of recommendation by the State when Owens brought to his attention that he understood there to be a twelve year cap. He showed that he was prejudiced by counsel's deficient representation by his testimony that he wanted to and thought he was accepting the amended plea offer and would not have pled guilty had he known that there was no sentencing recommendation. Instead, he was sentenced to six years more than the offer. In finding otherwise, the PCR court erroneously relied upon the speculative evidence presented in the form of plea counsel's testimony. Owens is accordingly entitled to the grant of post-conviction relief and specific performance of the State's plea offer.

CONCLUSION

For the reasons set forth herein, Petitioner Timothy Lee Owns respectfully requests this Court grant certiorari to allow full briefing on this issue.

Respectfully submitted,

A handwritten signature in cursive script that reads "Laura R. Baer". The signature is written in black ink and is positioned above a horizontal line.

Laura R. Baer  
Appellate Defender

ATTORNEY FOR PETITIONER

This 14<sup>th</sup> day of April, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County

Robin B. Stilwell, Circuit Court Judge

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TIMOTHY LEE OWENS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

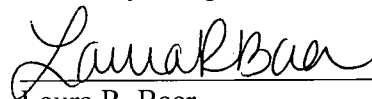
APPELLATE CASE NO. 2014-001950

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Timothy Lee Owens, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, on this 15<sup>th</sup> day of April, 2015.



Laura R. Baer

Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14<sup>th</sup> day  
of April, 2015.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 24, 2021.