

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT.

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MAY 18 2015

S.C. Supreme Court

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Certiorari to Greenville County

Robin B. Stilwell, Circuit Court Judge  
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KEVIN LEE KEITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001952  
\_\_\_\_\_

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

LAURA R. BAER  
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## ISSUE PRESENTED

Whether Petitioner was denied his right to effective assistance of counsel where Petitioner pled guilty without any recommendation and was sentenced to eighteen years incarceration after (1) plea counsel failed to timely communicate acceptance of the State's plea offer to a recommended sentence of fifteen years despite Petitioner's instruction to do so, or (2) alternatively, plea counsel incorrectly advised Petitioner that the State's offer was still available to accept on the day of the plea hearing?

## STATEMENT OF THE CASE

On November 20, 2012, the Greenville County grand jury indicted Petitioner Kevin Keith for three counts of first degree burglary, one count of financial transaction card theft, and one count of strong armed robbery. App. 67 – 76.

On January 7, 2013, Keith appeared before the Honorable Letitia Verdin and pled guilty to the above offenses.<sup>1</sup> Keith was represented by Symmes Culbertson and the State was represented by assistant solicitor Mark Moyer. App. 1. Judge Verdin sentenced Keith to concurrent terms of eighteen years for each of the first degree burglary offenses, fifteen years for the strong armed robbery, and five years for the financial transaction card theft. App. 12, ll. 13-25.

On April 24, 2013, Keith filed an application for post-conviction relief. App. 15 – 24. The State filed its Return on October 18, 2013. App. 25 – 29. On June 17, 2014, an evidentiary hearing was held before the Honorable Robin Stilwell. Keith was represented by Caroline Horlbeck and the State was represented by Karen Ratigan. App. 30. Keith and plea counsel Culbertson both testified at the PCR hearing.

On August 11, 2014, Judge Stilwell issued an Order of Dismissal denying Keith's PCR application. App. 60 – 70.

This petition for writ of certiorari follows.

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<sup>1</sup> The State nol prossed the following additional charges: 3 counts of financial transaction card fraud (2012-GS-23-2030, and -2031 and -5058); 1 count of financial transaction card theft (2012-GS-23-5057); 2 counts of criminal conspiracy (2012-GS-23-2032 and -2037); 1 count of petit larceny (2012-GS-23-2033); 1 count of petit larceny, third offense (2012-GS-23-5056); and 2 counts of first degree burglary (2012-GS-23-2039 and -2035).

## ARGUMENT

**Petitioner was denied his right to effective assistance of counsel where Petitioner pled guilty without any recommendation and was sentenced to eighteen years incarceration after (1) plea counsel failed to timely communicate acceptance of the State's plea offer to a recommended sentence of fifteen years despite Petitioner's instruction to do so, or (2) alternatively, plea counsel incorrectly advised Petitioner that the State's offer was still available to accept on the day of the plea hearing.**

### **Relevant Facts**

The solicitor made an offer to Petitioner Keith to plead guilty for a recommended sentence of fifteen years. According to plea counsel Culbertson's testimony at the PCR hearing, Keith signed a notice accepting that offer on September 18, 2012. App. 51, ll. 2-18. On November 30, 2012, Culbertson received a letter from the solicitor indicating that someone in the public defender's office had told him that Keith "will not accept my plea offer of 15-year recommendation and wants a trial." The solicitor stated that if Keith changed his mind, he could still accept the offer and plead guilty during the December 10<sup>th</sup>, 2012 term of court. App. 45, l. 18 – 46, l. 7; App. 50, l. 4 – 51, l.1. Keith testified that it was his belief that when he went to the plea hearing that he would not be sentenced beyond the fifteen year recommendation. App. 33, l. 22 – 34, l. 4; 35, ll. 7-22; App. 36, ll. 7-12. Culbertson provided no testimony or documentation that Keith ever reneged on his earlier acceptance of the plea offer and could not recall whether he told Keith that the fifteen year cap was "still on the table" at the time of the plea hearing. App. 50, l. 4 – 51, l. 23. Ultimately, the State did not make any recommendation at the plea hearing and Keith was sentenced to eighteen years. App. 1 – 13.

### ***Guilty Plea Hearing***

Following the plea colloquy, Culbertson told the plea judge that he was "not sure exactly what's going to sway you from your decision about giving this man as much time as the solicitor is asking for." App. 10, ll. 3-6. However, he then said that it was "straight up plea" and said that what

he meant is that he and the solicitor “have been around and around about potential sentences and how we were going to structure this, what we could do and whatnot.” App. 10, ll. 7-17. He advised the court that Keith has a very serious drug addiction problem and was anxious to get help. App. 10, l. 17 – 11, l. 7. Keith also addressed the court, stating that he was “sorry for what [he] did” and “got strung out there on crack for 26 years.” App. 11, ll. 23-24.

The solicitor responded that Keith did express interest in drug court but that based on his current charges and his record,<sup>2</sup> that was not something that the State could offer. He also advised that Keith confessed to one of the incidents and named the co-defendant in that case. App. 12, ll. 3-10.

The plea judge explained that she wanted to give Keith some opportunity “to get out and have something of a productive life.” However, given Keith’s record and the serious nature of the charges to which he was pleading guilty, he “kind of put us all in a box.” She then sentenced him to concurrent sentences, with the longest sentence being eighteen (18) years. App. 12, ll. 13-25.

### ***PCR Hearing***

At the PCR hearing, Keith testified that while he could not recall exactly when the plea offer was communicated to him, he was given approximately one month to think about it.<sup>3</sup> App. 44, l. 10 – 45, l. 10. Keith testified that Culbertson came to see him on January 7, 2013, the day before the

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<sup>2</sup> Keith’s prior convictions include: in 1990, forgery and prostitution; in 1991, distribution of cocaine; in 1992, shoplifting, two counts of grand larceny, and common law robbery; in 1994, possession of contraband, simple possession of marijuana, breach of peace, receiving stolen goods, failure to stop, two counts of second degree burglary, and two counts of petty larceny; in 2004, parole revocation; in 2009, possession of hypodermic needle and false information; in 2010, stealing dogs and petty larceny; and in 2011, malicious injury to personal property, petty larceny, and hindering an officer. App. 9, l. 11 – 10, l. 1.

<sup>3</sup> This is consistent with Culbertson’s notes that reflect Keith wanted more time to consider the offer after their meeting on August 22, 2012. Almost one month later, on September 18, 2012, Keith indicated that he wanted to accept the fifteen year offer. App. 51, ll. 12-17.

trial was set to begin in one of his cases. When Keith asked whether the fifteen (15) year plea offer was “still on the table,” Culbertson said “yes.” App. 33, ll. 17-24. Keith testified “that’s the only reason why I went ahead and went along with the plea at the time because, you know, I felt I could have probably got more time.” App. 33, l. 24 – 34, l. 2. He told Culbertson that he wanted to “go ahead with it [the plea]” if he was going to receive the fifteen (15) years. App. 34, ll. 2-4. Keith testified that Culbertson told him that the State would recommend fifteen (15) years and that he could not get any less. If he went to trial, it was going to be more than fifteen (15) years. App. 35, ll. 16-22. He said that he hoped that he would be able to do drug court, but that was not an option, so he accepted the plea to the fifteen (15) years. App. 35, l. 23 – 36, l. 3. In Keith’s mind, “this 15 years was a done deal.” He testified that had he known that there was no recommendation, he would not have pled guilty but would have instead gone to trial. App. 36, ll. 7-12. While Culbertson advised him that it was fifteen-year recommendation, “he said he was more than sure [Keith would] get it.” App. 41, ll. 11-14. Keith did not recall Culbertson telling the plea judge that the plea was “straight up without a recommendation” and did not notice that the “without recommendation” box was checked on the sentencing sheet. App. 41, l., 20 – 42, l. 3.

While the PCR judge found that Keith’s testimony is not credible, she found that that plea counsel Culbertson’s testimony was credible. App. 63. Culbertson testified that there were several offers extended to Keith during the pendency of his case, including an offer for fifteen (15) years. App. 44, ll. 11-23. Culbertson’s notes reflect that Keith rejected the State’s prior offers. App. 45, ll. 4-6. Regarding the fifteen (15) year offer, that offer was made on June 18, 2012. The solicitor indicated that if Keith would enter a plea to a number of charges that he would recommend a fifteen year sentence. App. 45, ll. 9-17. On November 30, 2012, Culbertson received a letter from solicitor

Moyer that stated:

Tracy Burkett from the public defender's office told me yesterday that your above-referenced client [Keith] will not accept my plea offer of 15-year recommendation and wants a trial. If he has a change of mind and wishes to plead guilty, he must do so during the December 10<sup>th</sup>, 2012 term of court. This case is subject to being placed on the trial docket any time starting with the January 7th, 2013 term of court.

App. 45, l. 18 – 46, l. 7; App. 50, l. 4 – 51, l.1.

Culbertson confirmed Keith's testimony that they met on January 7, 2013, the same day as the plea, though he could not recall when he notified Keith that his case was placed on the trial docket. App. 46, l. 17 – 47, l. 3. Though his recollection was not clear, based on the file and his memory, Culbertson believed that Keith was transported to the courthouse on January 7, 2013 for the purpose of pleading guilty. App. 47, ll. 4-9. Assistant Attorney General Ratigan asked Culbertson three times about what he and Keith discussed on the day of the plea. Originally, he testified that he would have told Keith that the 15-year offer was still available on January 7, 2013 because "that was the only offer [he] knew was out there." App. 47, ll. 10-16. When asked "even though he had rejected it and it was placed on the trial docket, you would have told him the day of the plea that offer was still valid," Culbertson responded that he did not remember. App. 47, ll. 17-20. Culbertson then apologized for being confusing and said that it is not his general practice to tell a client that an offer is still available, especially once it's been placed on the trial docket. He said "the standard policy is once it's been placed on the trial docket, any previous offers fall by the wayside." App. 47, l. 24 – 48, l. 8.

On cross-examination, Culbertson testified that he believed he reviewed the November 30, 2012 letter from the solicitor with Keith, but could not point to any note reflecting when or by what means he reviewed it with him. His notes instead reflected that on August 22, 2012, he went to the jail to meet with Keith, who "signed a plea sheet at that time and wanted to discuss the offer with

me further.” Then, on September 18, 2012, his notes reflect that “Keith signed the plea sheet and wants the zero to 15 nonviolent sentence.” Culbertson said that was the last of his handwritten notes in Keith’s file. App. 51, ll. 2-18. When asked for the fourth time about whether he advised Keith that the 15 year offer was “still on the table” on January 7, 2013, Culbertson said that he did not recall if he specifically told him that or not. App. 51, ll. 19-23.

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

The PCR judge found that Keith failed to meet his burden of proving plea counsel misadvised him about the sentence he would receive if he pled guilty. The court did not find credible Keith’s testimony that he believed that he was pleading guilty in exchange for a fifteen-year plea recommendation. It noted that the “without negotiations or recommendation” box was checked on the sentencing sheet and that the November 30, 2012 letter from the solicitor reflected the solicitor’s understanding that Keith rejected the fifteen-year plea offer. The PCR judge further found that because the case was on the trial docket, Keith knew he was pleading guilty without a recommendation. App. 64.

The PCR judge also wrote that even assuming *arguendo* that plea counsel misadvised Keith about the recommendation, any error was cured by the plea colloquy because Keith did not object when Culbertson said it was “a straight up plea” or after the imposition of the eighteen year sentence. App. 64. Additionally, because Keith gave an incriminating statement related to one burglary charge and was caught in the residence related to another burglary charge, the PCR judge did not find Keith’s assertion that he would not have plead guilty had he known that he would not receive a fifteen year sentence credible. App. 64 – 65. Accordingly, the PCR court found that plea counsel did not fail to render reasonably effective assistance under prevailing professional norms and that Keith was not prejudiced by plea counsel’s performance. App. 65.

## **Discussion**

The PCR court erred in finding that Culbertson provided reasonably effective assistance under prevailing professional norms based on Culbertson's vacillating testimony. The only definitive evidence presented was that Keith indicated his desire to accept the State's plea offer of a recommended fifteen year sentence to Culbertson on September 22, 2012, and that on November 30, 2012, the solicitor wrote to Culbertson indicating that he was notified the day prior that the offer was rejected. Solicitor Moyer said that Keith could still accept the offer through the December 10, 2012 term of court, but his case could be placed on the trial docket beginning with the January 7, 2013 term of court. Culbertson provided no explanation for his failure to communicate acceptance of the plea offer in September or for why someone else in his office communicated a rejection of the offer to the solicitor on November 29, 2012. Even so, to the extent that Keith later waived in his acceptance, Culbertson was deficient in advising Keith that the fifteen year offer was still available on January 7, 2013. Neither the sentencing sheets nor the plea colloquy cured Culbertson's deficiency.

The PCR court also erred in focusing on the weight of the supposed evidence against Keith in her analysis of prejudice, leading it to find that he would not have gone to trial instead of pleading guilty. In the present case, Keith intended to accept the fifteen year plea offer and thought that he had done so. Thus, he was prejudiced by Culbertson's deficient representation in that he pled guilty with no recommendation and received a sentence three years longer than the negotiated recommendation.

### ***Right to 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). An “unsound result” occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. See Boykin v. Alabama, 395 U.S. 238 (1969). Therefore, in the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); see also Hill v. Lockhart, 474 U.S. 52, 56 (1985) (“The longstanding test for determining the validity of a guilty plea is ‘whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.’ ” (quoting North

Carolina v. Alford, 400 U.S. 25, 31(1970)). “The second, or ‘prejudice,’ requirement ... focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. at 59. In other words,

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 (2009). “[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 (2012); 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).

### ***Deficiency of Plea Counsel's Representation***

There is no probative evidence that Keith changed his mind about accepting the State's plea offer or that counsel informed Keith that the offer expired when the case was put on the trial docket. It is undisputed that on June 18, 2012, the State made a favorable plea offer to Keith for a recommended sentence of fifteen years. App. 45, ll. 9-17. Culbertson made a notation in Keith's file that he met with Keith at the jail on August 22, 2012, at which time Keith said that he wanted to discuss the offer with him further and inquired again about drug court. App. 51, ll. 12-15. Subsequently, on September 18, 2012, Culbertson's notes reflect that "Keith signed the plea sheet and wants the zero to 15 nonviolent sentence." App. 51, ll. 15-17. Culbertson said that was the last of his handwritten notes in Keith's file. App. 51, ll. 17-18. Inexplicably, on November 30, 2012, Culbertson received a letter from solicitor Moyer that stated:

Tracy Burkett from the public defender's office told me yesterday that your above-referenced client [Keith] will not accept my plea offer of 15-year recommendation and wants a trial. If he has a change of mind and wishes to plead guilty, he must do so during the December 10<sup>th</sup>, 2012 term of court. This case is subject to being placed on the trial docket any time starting with the January 7<sup>th</sup>, 2013 term of court.

App. 45, l. 18 – 46, l. 7; App. 50, l. 4 – 51, l.1. Culbertson said that he "believed" he sent a copy of that letter to Keith, but when asked when and by what means, Culbertson had no notes or independent recollection. App. 51, ll. 2-18.

Culbertson also gave several inconsistent responses regarding whether he advised Petitioner that the State's offer for a fifteen year recommendation was still valid at the time of the plea hearing. Culbertson affirmatively testified that he would have told Keith that the offer was still available in January, but later said that he did not remember if he told him that the offer was still valid and that he could not recall specifically if he told Keith the offer was "still on the table" at the plea hearing. App. 47, ll. 10-20; App. 51, ll. 19-23. He also said:

I'm trying to think back to that conversation. *Generally*, it's not my practice to tell a client that an offer is still available, especially once it's been placed on the trial docket. The *standard policy* is once it's been placed on the trial docket, any previous offers fall by the wayside.

App. 47, l. 24 – 48, l. 8 (emphasis added). Even this testimony regarding general practice and standard policy is not sufficient to support the PCR court's findings that Keith knew that the offer had expired at the time that he entered his guilty plea because one of his cases was set to begin trial the day after entry of the plea. 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"). Culbertson's notes reflected that Keith indicated his desire to accept the plea in September 2012. There was no explanation of what happened such that someone from the public defender's office would have told the solicitor that the Keith was rejecting the plea offer on November 29, 2012. PCR counsel had no documentation or independent recollection that the November 30, 2013 letter from the solicitor regarding rejection of the offer was ever given to Keith. Thus, while the November 30, 2013 letter sheds light on what the solicitor thought regarding the plea, it does nothing to show Keith's understanding.

Further, while the PCR court noted that the "without negotiations or recommendation" box was checked on the sentencing sheets, it is notable that the "x" is handwritten. As such, the "without negotiations or recommendation" boxes were selected after the forms were printed, such that they could have been checked before or after Keith signed them. The PCR court further noted that Keith did not object when Culbertson said it was "a straight up plea" or after the imposition of the eighteen year sentence. The reference to the plea being "straight up" was after the colloquy between the court and the defendant and there was no explanation given of what that term meant.

App. 11, ll. 3-17. Keith was understandably relying on the assurances made by his attorney that he was accepting the State's fifteen year offer and would not be sentenced to more than fifteen years. Thus, despite seemingly inconsistent statements made during the plea hearing, Keith trusted that his attorney timely accepted the plea offer on his behalf. It will often not be until after a higher sentence is imposed that a defendant will realize that he did not get the deal for which he thought he bargained. To require that a defendant immediately stand up and seek withdrawal of his plea in such a circumstance would undermine both the attorney-client relationship and general courtroom decorum.

The probative evidence shows that Keith communicated his acceptance of the State's offer to Culbertson on September 22, 2012. For unknown reasons, that acceptance was not timely communicated to the State. Either due to his lack of understanding that the offer expired or in hopes that his deficiency would not be known if the court issued a sentence of fifteen years or less, Culbertson led Keith to believe that the State would make a fifteen year recommendation at the plea hearing. Therefore, the PCR court erred in finding that plea counsel was not deficient.

### ***Prejudice to Petitioner***

Petitioner was prejudiced by Culbertson's failure to timely accept the fifteen year plea offer in that he plead guilty without any recommendation from the State and was sentenced to concurrent sentences for a total incarceration of eighteen (18) years. In the PCR court's evaluation of prejudice, it focused on the fact that Keith gave a statement related to one burglary charge and was caught in the residence related to another burglary charge. It, thus, did not find Keith's assertion that he would not have plead guilty had he known that he would not receive a fifteen year sentence credible. App. 64 – 65. However, where Keith's testimony was that he intended to accept the fifteen year plea offer, the prejudice analysis is different than a standard Strickland analysis.

The present case, where plea counsel failed to timely accept the plea offer, is similar to cases involving plea counsel's failure to communicate the State's plea offer to their client. This Court noted that the question of prejudice due to this kind of deficient performance is the most difficult question of the analysis. Davie v. State, 381 S.C. 601, 611, 675 S.E.2d 416, 421 (2009). After reviewing the different approaches taken throughout the nation, this Court adopted a "case-by-case approach," finding it "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." Id. at 613, 675 S.E.2d at 422. This Court initially concluded "that the difference in the sentence Petitioner received and the plea offer is proof of prejudice." Id. at 614, 675 S.E.2d at 423. Further, in Davie, (1) the solicitor and plea counsel both acknowledged that the State originally offered a fifteen-year sentence; (2) plea counsel admitted that he failed to communicate this offer to Petitioner; (3) both plea counsel and Petitioner testified that had the offer been communicated, Petitioner would have accepted; and (4) had Petitioner accepted the original offer, he would have received a significantly lower sentence than the twenty-seven-year sentence imposed. Id.

In the present case, Keith was sentenced to eighteen years – a three year difference – which should be sufficient to prove prejudice. There is no dispute that the State made a plea offer for fifteen years. Instead of a failure to communicate the offer to Keith, Culbertson's failure was in not timely communicating acceptance of the offer to the solicitor and leading Keith to believe that the offer remained at the January 7, 2013 plea hearing. Though Culbertson discussed "standard practice," he never explained why after noting Keith's desire to accept the plea agreement in September, his office would have indicated a rejection of the plea to the

solicitor in November. Lastly, there is no doubt that the fifteen year offer was a good one, especially considering Keith's lengthy criminal history and the numerous charges pending against him. Thus, Keith intended and attempted to accept the State's offer. He was prejudiced when he received a greater sentence than that of the offer.

Further, though the strength of the State's case against Keith is not dispositive of whether he was prejudiced by counsel's deficient representation, the circumstances cited by the PCR court are not sufficient to find that Petitioner's averment that he would not have plead guilty without the fifteen year recommendation was not credible. See Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) ("The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty."). The charge for which the January 8, 2013 trial was set, was the case in which Keith allegedly had made an incriminating statement. App. 7, l. 18 – 8, l. 5. There is no basis to support the proposition that an incriminating statement made by a defendant necessitates a plea. It is common for defendants to seek suppression of their prior statements, and if unsuccessful, to explain or disavow their prior statements at trial. Further, neither Keith's allegedly incriminating statement nor any other evidence against him changes the presumption of innocence and requirement that the State prove him guilty beyond a reasonable doubt. Further, there may have been other deficiencies in the State's case against him, such as missing witnesses or evidence, which would have led to Keith's success at trial. The evidence does not support the PCR court's findings that Keith was not prejudiced by plea counsel's deficient performance simply because of the purported weight of some of the evidence.

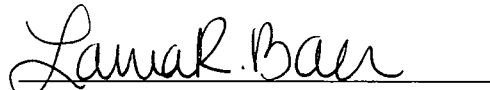
In summary, Culbertson was deficient in failing to communicate Keith's acceptance of the plea offer in September 2012 to the solicitor. Despite the lack of evidence that Keith ever

communicated a change of mind regarding acceptance of the plea, to the extent that were the case, plea counsel was deficient in advising Keith that the fifteen year offer was still available on January 7, 2013. Keith would have unquestionably timely accepted the plea offer for fifteen years, and in fact, thought that he had done so. His intention to do so is confirmed by plea counsel's own notes regarding their September 22, 2012 meeting, which is uncontradicted by any probative evidence. Keith was prejudiced because he instead pled guilty with no recommendation and received a sentence three years more than the negotiation.

CONCLUSION

For the reasons set forth herein, Petitioner Kevin Lee Keith respectfully requests this Court grant certiorari and 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 18th day of May, 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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KEVIN LEE KEITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

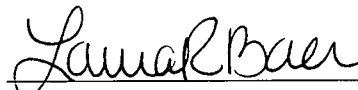
APPELLATE CASE NO. 2014-001952

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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 the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Kevin Lee Keith, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 18th day of May, 2015.



Laura R. Baer

Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day  
of May, 2015.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.