STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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Appellate Case No. 2016-001819

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WILLIAM DAVID WOOTEN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**AMENDED PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

### I.

Did the lower court err in denying Petitioner's Application for Post-Conviction Relief where Petitioner met his burden of proof with regard to his claim that Plea Counsel was ineffective for failing to maintain copies of any and all plea agreements accepted and signed by the Petitioner after they were extended by the State?

**Second Amended Application, Allegation 4**

### II.

Did the lower court err in denying Petitioner's Application for Post-Conviction Relief where Petitioner met his burden of proof with regard to his claim that Plea Counsel was ineffective for failing to make adequate arrangements for someone to cover for him during a vacation out of South Carolina where said failure resulted in the Petitioner not receiving a plea offer from the State in a timely manner?

**Second Amended Application, Allegation 7**

### III.

Did the lower court err in denying Petitioner's Application for Post-Conviction Relief where Petitioner met his burden of proof with regard to his claim that Plea Counsel was ineffective for failing to move for specific enforcement of a plea offer from the State where said offer was made during a time period during which Plea Counsel was under an Order of Protection and the State was on notice of said order?

**Second Amended Application, Allegation 8**

### IV.

Did the lower court err in denying Petitioner's Application for Post-Conviction Relief where Petitioner met his burden of proof with regard to his claim that Plea Counsel was ineffective for failing to convey an advantageous plea offer to the Petitioner immediately upon receipt of said offer by Plea Counsel when he returned to South Carolina after the expiration of his Order of Protection?

**Second Amended Application, Allegation 9**

## STATEMENT OF THE CASE

The Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Pickens County Clerk of Court. The Pickens County Grand Jury indicted the Petitioner for two counts of lewd act upon a child (2011-GS-39-1763,-1765), first-degree criminal sexual conduct (CSC) with a minor (2012-GS-39-0492), and second-degree CSC with a minor (2012-GS-39-0493). He was represented by S. Paul Aaron, Esquire.

On February 27, 2012, the Petitioner pled guilty-pursuant to a negotiated sentence- to one count of lewd act upon a child[1] and first-degree CSC with a minor. The Honorable Brooks P. Goldsmith sentenced the Petitioner to concurrent terms of fifteen years for lewd act upon a child and twenty-five years for first-degree CSC with a minor. The Petitioner did not appeal.

This matter came before the Court by way of an Application for Post-Conviction Relief (hereafter PCR) filed August 17, 2012 and amended applications filed August 28, 2012 and April 17, 2015. The Respondent made its Return on February 12, 2013. In his original Post-Conviction Relief Application was filed on August 17, 2012, Petitioner has alleged generally that he received ineffective assistance of counsel prior to and during his trial 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. In support of that claim he has raised the following general allegations in that Application:

> 1. The Petitioner 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.
>
> 2. The Petitioner's plea of gulity were not voluntary and intelligently

[1] 2011-GS-39-1765

entered. The judgment and sentence against the Petitioner were entered in violation of his rights to due process of law and effective assistance of counsel.

3. Trial Counsel failed to provide the Petitioner effective assistance of counsel in that he failed to convey a plea offer from the State to the Petitioner in a timely manner thereby casuing the Petitioner to lose the benefit of that plea negotiation with the prosecution.

4. Counsel failed to provide client effective assistance of counsel prior to and during his guilty pleas proceeding. The Petitioner's pleas of guilt were coerced by counsel's failure to provide adequate representation.

App.pp. 20-26.

Petitioner filed an Amended Application for Post-Conviction Relief on August 28, 2012. The sole amendment reflected in that pleading was the addition of a charge that had not been listed in Petitioner's original Application; Lewd Act on a Minor under 16 years of age, Indictment No. 2011-GS-39-01765. App.pp. 27-33.

Petitioner subsequently filed a Second Amended Post-Conviction Relief Application on April 17, 2014, in which he raised the following additional allegations:

1. Plea Counsel was ineffective for allowing the State to force the Petitioner to make a decision about the plea offer extended to him on February 27, 2012, the date of his pleas, where the Petitioner was not indicted for two separate charges of First Degree Criminal Sexual Conduct and Second Degree Criminal Sexual Conduct with a minor relating to his daughter until February 21, 2012, and was not made aware of these charges until immediately prior to his plea proceeding.

2. Plea Counsel was ineffective for failing to adequately advise the Petitioner of measures which could be taken to ask the Court to sever the prosecution of his charges which involved two separate victim's neither of whom were witnesses to acts alleged to have been committed with the other.

3. Plea Counsel was ineffective for neglecting to fully advise the Petitioner concerning what use the defense could make of a recantation made by the Petitioner's daughter if his case had proceeded to trial by jury.

4. Plea Counsel was ineffective for failing to maintain copies of any and all plea agreements accepted and signed by the Petitioner after they were extended by the State.

5. Plea Counsel was ineffective for failing to fully discuss with the Petitioner what use the defense could make of the domestic history between the Petitioner and his daughter's mother, if the Petitioner exercised his right to trial by jury, where allegations of sexual battery were not made against the Petitioner until after he sought child support from his ex-wife sometime after he was awarded custody of their daughter.

6. Plea Counsel was ineffective for failing to consult with Attorney Nick Lavery concerning the fact that the Petitioner's daughter had made a statement in the presence of Attorney Lavery, recanting her allegations of sexual battery.

7. Plea Counsel was ineffective in that he failed to make adequate arrangements for someone to cover for him during a vacation out of South Carolina where said failure resulted in the Petitioner not receiving a plea offer from the State in a timely manner.

8. Plea Counsel was ineffective for failing to move for specific enforcement of a plea offer from the State where said offer was made during a time period during which Plea Counsel was under an Order of Protection and the State was on notice of said order.

9. Plea Counsel was ineffective for failing to convey an advantageous plea offer to the Petitioner immediately upon receipt of said offer by Plea Counsel when he returned to South Carolina after the expiration of his Order of Protection.

10. Plea Counsel failed to provide the Petitioner reasonable professional assistance of counsel in that he failed to adequately inform the Petitioner of the elements of the charges against him.

11. Plea Counsel was ineffective for failing to give the Petitioner accurate advise concerning his sentencing exposure if he proceeded to trial by jury.

12. Plea Counsel was ineffective for failing to object to the Petitioner's re-indictment for First Degree Criminal Sexual Conduct with a Minor and Second Degree Criminal Sexual Conduct with a Minor on charges of sexual battery upon his daughter where the second indictments broke the time period covered in a earlier single indictment into two separate offenses.

13. Plea Counsel was ineffective for neglecting to review all the discovery materials produced by the State with the Petitioner before he was required to make a decision regarding exercising his right to a jury trial.

14. Plea Counsel was ineffective for failing to consult with his daughter's guardian *ad litem*, Liz Young, where Ms. Young's testimony would have

helped develop a defense to the Petitioner's charges pertaining to his daughter.

15. Plea Counsel was ineffective for failing to advise the Petitioner concerning how the defense could us the testimony of a child interviewer who was the first to interview his daughter after the allegations concerning the daughter came to light.

16. Plea Counsel was ineffective for failing to object to a conflict of interest where the Plea Judge's daughter was close friends with the Prosecutor in the Petitioner's case.

App.pp.40-42.

An evidentiary hearing was held in this matter on August 25, 2014 before the Honorable James R. Barber, III, presiding circuit court judge. At the outset of that proceeding, Petitioner waived all his allegations of with the exception of those relevant to ineffective assistance of counsel concerning a plea offer made by the state. Following that hearing, Petitioner's PCR Counsel submitted a Memorandum in Support of PCR Application, which was filed on September 19, 2014. On September 23, 2014, Petitioner filed a Motion to Enlarge Record in which he noted that documentation relevant to his allegations had some to light which had not been provided to PCR Counsel in response to a duly served subpoena which clearly covered the records in question. App.pp. 167-200. Judge Barber subsequently filed a Form 4 Order returning Petitioner's case to Roster for a Trial *de novo*. App.p. 201.

The *de novo* hearing ordered by Judge Barber was held on April 20, 2015 at the Pickens County Courthouse, before the Honorable Edward W. Miller, presiding circuit judge. The Petitioner was present at this proceeding and was represented by undersigned counsel. Karen C. Ratigan, Assistant Attorney General, represented the Respondent. During this hearing, by agreement of both parties, a partial transcript of the August 25, 2014, evidentiary hearing was introduced into evidence as Plaintiff's Exhibit No. 6. App.p. 273, ll. 11-20. This transcript contained the previous PCR testimony of Plea Counsel, Paul Aaron, and Assistant Solicitor

Brandi Batson from the August 25, 2014 hearing.

The Petitioner testified on his own behalf at the second PCR hearing. Also testifying were: Lisa Spangler, Assistant Solicitor Brandi Batson Hinton, Jean Keown, Richard Douglas Wooten, III, and the Petitioner's plea counsel, S. Paul Aaron, Esquire. The lower court has before it a copy of the guilty plea transcript, the Pickens County Clerk of Court records, the South Carolina Department of Corrections record, the PCR application, the Return, and the Petitioner's Exhibits 1-6 from the April 20, 2015 hearing. On May 4, 2015 Petitioner filed his Memorandum in Support of his Application for PCR. App.pp. 297-303. Respondent's Post-Trial Memo was submitted to Judge Miller on May 4, 2015. App.pp. 304-305. Petitioner filed a Reply to Respondent's Memorandum on May 11, 2015. App.pp. 306-310.

An Order of Dismissal was filed by Judge Miller on October 6, 2015. App.pp. 311- 324. Petitioner subsequently filed a Motion to Alter or Amend, pursuant to Rule 59(e), SCRCP, on October 26, 2015 after having been timely served on Respondent on October 22, 2015. App.pp. 325-366. The lower court's Order denying Petitioner's 59(e) Motion was not filed until July 25, 2016. App.p. 367. Petitioner's Notice of Appeal, filed September 6, 2016, expressly gave notice of his appeal from the Order of Dismissal filed October 6, 2015 and the Order Denying Motion to Alter or Amend filed July 25, 2016. App.pp. 368-369. This appeal follows.

## ARGUMENT

### Questions I through IV

Plea Counsel was ineffective for failing to maintain copies of any and all plea agreements accepted and signed by the Petitioner after they were extended by the State.

**Second Amended Application, Allegation 4**

Plea Counsel was ineffective in that he failed to make adequate arrangements for someone to cover for him during a vacation out of South Carolina where said failure resulted in the Petitioner not receiving a plea offer from the State in a timely manner.

**Second Amended Application, Allegation 7**

Plea Counsel was ineffective for failing to move for specific enforcement of a plea offer from the State where said offer was made during a time period during which Plea Counsel was under an Order of Protection and the State was on notice of said order.

**Second Amended Application, Allegation 8**

Plea Counsel was ineffective for failing to convey an advantageous plea offer to the Petitioner immediately upon receipt of said offer by Plea Counsel when he returned to South Carolina after the expiration of his Order of Protection.

**Second Amended Application, Allegation 9**

**These questions are presented as a single argument due to the fact that the questions are all interrelated and address the same factual considerations.**

## RELEVANT TESTIMONY

The testimony before the lower court reveals the following with regard to Petitioner's claims.

At the August 25, 2014 hearing, Assistant Solicitor Brandi Batson Hinton, hereafter Sol. Hinton, testified that she believed her plea offer for Petitioner to plead to two

counts of Lewd Act for a sentence of 15 years was conveyed to Defense Counsel in an offer letter. App.p. 101, ll. 7-18. In her August PCR testimony Sol. Hinton admitted that at the time that offer was sent out she *was aware* that Defense Counsel was under an Order of Protection. She explained that the reason the letter offering a deal to 15 years for pleas to two counts of Lewd Act was because it ***"was just a further negotiation of the letter that had already been extended. Our first initial conversation in October of 2011 and was that Mr. Wooten was not interested in pleading."*** App. p. 103, ll. 4-14. *See*, Plaintiff's Exhibit No. 1, April 20, 2015 hearing. She repeated this acknowledgement, stating, ***"Yes. I was aware of that."*** App.p. 104, ll. 2-7. She subsequently backtracked and claimed she believed she had sent it to Plea Counsel before he went out of town. App.p. 104, ll. 14-25. In Sol. Hinton's August PCR testimony she further acknowledged that she had discussed the plea negotiations with the victims and ***"they were in agreement with the fifteen years, so I sent some sort of communication to Mr. Aaron that they were willing to go as low as fifteen."*** App.p. 103, ll. 20-25.

*After the first PCR hearing*, despite an earlier subpoena for all records pertaining to plea negotiations, PCR Counsel was provided with copies of two offer letters; one dated December 20, 2011 and the other dated the same date the offer was to expire, January 3, 2012. ***See***, Plaintiff's Exhibits No. 2 and 3, April 20, 2015 hearing. The text of both offer letters was identical with the exception of the dates. In her April, 2015 PCR testimony she offered no real explanation for why the two letters not disclosed to PCR Counsel in response to subpoena has not been provided. Nor, did she ever explain why even Counsel for Respondent was only provided the version of the letter dated December 20, 2011 and not the version dated January 3, 2012, the date it expired. App.p. 41, l. 24 – 244, l. 3; Days before the *de novo* hearing held in this matter on April 20, 2015, Sol. Hinton produced copies of two

sentencing sheets from her file. App.p.244, ll. 4-21. These sheets, entered at the April 20, 2015 hearing as Plaintiff's Exhibit No. 4, were signed and dated by Defense Counsel on January 17, 2012. They were also signed by Assistant Solicitor Hinton and Petitioner. App.pp. 287-288. An email from Sol. Hinton (then Sol. Batson prior to her marriage) dated January 17, 2012 confirms that the plea to the offer which expired January 3, 2012 did not go through on that date because the victims were no willing to allow Petitioner to plead to an offer which had expired. App.p. 294. She admitted, however, that she had signed plea sheets on that date for Petitioner to plead to two counts of lewd act for a negotiated sentence of fifteen (15) years. App.p. 245, l. 21- p. 246, l. 18.

Despite her earlier testimony during the August hearing, at the April 20, 2015 hearing, Sol. Hinton testified that she did not know Defense Counsel was under an Order of Protection at the time this offer was extended and she believed she had not found out about that fact until after he returned. App.p. 247, l. 5- p. 248, l. 14. In her April, 2015 testimony, Sol. Hinton admitted that the plea had not gone through on January 17, 2012 because the victims changed their minds and would not agree to the fifteen year deal once they were told Petitioner had not accepted the deal before the January 3, 2012 expiration date. She significantly admitted however, that she never told the victims that Petitioner did not respond to the offer by that date because his lawyer had been under an Order of Protection, was out of State when the offer was made and that Petitioner's lawyer had not received the offer and conveyed it to Petitioner until after the expiration date. App.p. 245, l. 11- p. 249, l. 18. This prosecutor went so far as to claim that at the time the victim's declined to agree to Petitioner pleading under the deal that expired January 3, 2013, she could not have explained to them that the reason the offer had expired before it was accepted by Petitioner was because, "I was not aware of that at the time, so I would not have had that conversation with them." App.p.

247, ll. 5-14. Interesting insight into why the Assistant Solicitor handled this plea offer the way she did is found when she was asked point blank why she did not tell the family that the offer had not expired because Petitioner just did not take the offer, but rather because his lawyer had not been in town to offer it to him. In response to this specific question, Sol. Hinson stated that she did not really think the 15 year deal to two counts of Lewd Act was an appropriate offer to begin with, but had extended that offer because she ***"had discussed it with the family , and at that time, that's what they wanted to do."*** App.p. 250, ll. Interestingly, while this prosecutor claimed that she did not feel the offer was appropriate and that she extended the offer because it was what the family wanted to do, she later testified that the opinion of victims is ***"never definitive"*** on the question of whether a plea offer should be made. App.p. 251, ll. 12–18.

Sol. Hinton testified at the April, 2015 hearing that she could not have extended the time for accepting this offer without approval from her boss. She admitted, however, that she never even requested permission to extend the deadline in light of the circumstances that had resulted in Defense Counsel not conveying the offer to Petitioner in time. It is clear that even when Plea Counsel took this issue to Sol. Hinson's boss, she still did not weigh in and acknowledge the circumstances under which the pleas had been offered and why it had expired without being accepted. App.p. 250, l. 19 – p. 252, l. 21. Petitioner would submit that her failure to do so, no doubt put her supervisor in the position of "*backing her up*" as opposed to being reception to Plea Counsel urging that the plea offer be extended.

At the first PCR hearing Plea Counsel testified that he was under an Order of Protection when the plea offer in dispute was sent to him. He testified that he was out of State under an Order of Protection from ***"I think December 15th through January 8th or 9th, somewhere in that area."*** App. p. 65, l. 24- p. 66, l. 9. He testified that he did not have a copy of his Order

of Protection, but that during that time period he typically took four weeks off that time of the year to visit his children. He could not recall the exact dates, but believed he was protected from ***"December 15th through the first week in January."*** App.p.67, l. 20- p. 69 l. 16. At one point, however he recalled that his Order of Protection expired January 3rd. App.p. 69, ll. 15-18. Although Plea Counsel could not recall the exact date, his August PCR testimony reflected that he was certain he did not become aware of the plea offer in question until he returned from vacation sometime between January 7-9, 2012. App. p. 69, l. 12- p. 70, l. 3. January 3, 2012 was a Tuesday and January 9, 2012 was a Monday. The email chain between Sol. Hinson and Pleas Counsel in this matter indicates that their first communication concerning this matter in 2012 took place on January 12, 2012. App.p. 289-p.293.

In Plea Counsel's testimony at the April hearing he testified that his best recollection was that he was under Order of Protection from December 20, 2011 through January 5, 2012. In the emails between Plea Counsel and Sol. Hinton, introduced as part of Plaintiff's Exhibit No. 5, April 20, 2015 hearing, there is an email from Defense Counsel dated January 12, 2012, at 1:31 pm, which acknowledges a December oral offer of 15 years for 2 lewd act charges, *and harassment* (which he says was the most recent warrant). In that same email, Plea Counsel expressly states that he was under an Order of Protection from the last day of the December term "*through January second.*" App.p. 184.

Plea Counsel's testimony at the April, 2015 PCR hearing admits that while he vented his displeasure over the fact that Ms. Hinton would not extend the deadline for this deal with her boss, he did not file any sort of motion with the Court requesting specific enforcement of the plea deal in dispute. He indicated that he believed he said something about it during the guilty plea proceeding on February 27, 2012, at which Petitioner pleaded

to one count Criminal Sexual Conduct with a Minor, First Degree and one count, Lewd Act on a Minor, for an aggregate sentence of 25 years. App.p. 223, l. 12– p. 225, l. 7; App.p. 237, l. 17-p. 238, l. 4. The transcript of that plea proceeding does not reflect that there was any discussion of this issue during that hearing.

Plea Counsel admitted that he made no arrangements for another attorney to cover for him in his absence. He did not check in with his staff on a regular basis while out of State nor could he be reached consistently by his staff while away from his practice.

Defense Counsel acknowledged that he did not provide his clients any notice that he was going to be away from his practice and unavailable for approximately four weeks. App.p. 226, l. 21 –p.229, l. 1; App.p.240, l. 3-7.

Petitioner's PCR testimony reflects that he was never advised that his lawyer was leaving the State and would be under an Order of Protection. He testified that he never knew about the offer in dispute until it had expired and would have accepted it earlier had he known of it sooner. When he did sign sentencing sheets for the fifteen year negotiated sentence to two counts of Lewd Act on January 17, 2012, he did not know that the offer was contingent upon the victims agreeing to extend the time for the offer. His testimony very clearly indicated that he was fully committed to entering pleas to two counts of Lewd Act for a fifteen (15) year negotiated sentence. App.p. 259, l. 16- p.264, l. 13.

## STANDARD OF REVIEW

This Application for Post-Conviction Relief generally raises numerous specific allegations of ineffective assistance of counsel. The standard of review in a Post-Conviction Relief appeal is whether "any evidence of probative value" exists to support the Post-Conviction Relief court's findings. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). The burden of proof is on the Petitioner in a Post-Conviction Relief proceeding to prove the allegations raised

in his Application for Relief and at his Post-Conviction Relief hearing. *Thompson v. State*, 340 S.C. 112, 531 S.E.2d 294 (2000); Rule 71.1(e), SCRCP. In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that trial counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984). In other words, the Petitioner must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. *Id.*; *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. *Ard v. Catoe*, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

On the one hand, where trial counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). On the other hand, counsel may not explain away errors and omissions which acted to prejudice his client's ability to receive a fair trial simply by labeling them matters of trial strategy or tactics. In the case of *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002), the Supreme Court of South Carolina found that

> Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

(Emphasis in original) (internal citations omitted).

**DISCUSSION**

Clearly Petitioner has demonstrated a violation of his Sixth Amendment right to effective assistance of counsel. Records of the email communications between Plea Counsel and the State

confirm that his Order of Protection only protected him through Monday, January 2, 2012. Had he conveyed this offer to Petitioner on January 3, 2012, Petitioner would have pleaded under the terms of a vastly more favorable deal. As result of Plea Counsel's failure to ensure that his staff had a way to communicate urgent matters to him while on vacation, he did not become aware of this offer until he returned to the office. Even then, he did not immediately seize upon the urgency of the situation and bring this offer to Petitioner on January 3, 2012, in time to accept it before it expired. In *Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2008)* our Supreme Court adopted the rule that failure to convey a plea offer constitutes deficient performance. In so ruling, the Court expressly found that even if they concluded the failure of Defense Counsel constituted excusable neglect, such neglect would not negate the deficient performance. *Id, 381 S.C. at 610, 675 S.E.2d at 421.*

Petitioner has demonstrated prejudice by proving that when he finally became aware of the offer on January 17, 2012, he not only agreed to accept it, but actually committed to the deal by signing sentencing sheets for the plea. Furthermore, testimony from the prosecutor in this case, as well as the documents introduced in evidence, establish that the victims only withdrew their agreement to this plea offer after they learned Petitioner had not taken the deal before it expired January 3, 2012. In *Davie, supra*, this Honorable Court found the appropriate remedy was a resentencing proceeding. Indeed, on the facts of that case, *Davie* could in theory be made whole by that remedy. Here, Petitioner can not.

As this Court has consistently recognized, the remedy for ineffective assistance of counsel, ***"should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests."*** *Davie, 381 S.C. at 614, 675 S.E.2d at 423.* (citations to authorities omitted). Likewise, the Court recognized in *Davie* that an Petitioner may not be subjected to a greater punishment for exercising the right upon which he prevailed in a

collateral attack. *Id, 381 S.C. 601, 615, 675 S.E.2d at 424.* Petitioner therefore submits that the appropriate remedy in this case would be a remand for specific enforcement of the plea offer not timely conveyed to Petitioner. This, Petitioner argues, is particularly true where the State does not have entirely clean hands in this matter. It is apparent the offer in dispute was conveyed when the prosecutor either knew, or according to her own testimony should have known, Plea Counsel was under protection. When Plea Counsel made the prosecutor aware of why he had not conveyed this offer to Petitioner before the offer expired, she did not explain the situation to the victims, but rather allowed them to believe that Petitioner had simply failed to accept this offer, which they no doubt viewed as generous, in a timely manner. Further, the prosecutor, once reminded that Plea Counsel had been under an Order of Protection, did not request approval from her supervisor to extend the deadline for the offer.

Petitioner is mindful that under the terms of this plea agreement he was to receive a negotiated sentence of fifteen years. It was within the discretion of the State to reduce the original charges, however, the lower court may have, in its discretion, rejected the penalty of fifteen (15) years. Petitioner therefore submits that the appropriate remedy is remand for specific enforcement of the plea offer. On remand, if the Court accepts the deal as negotiated, it would sentence Petitioner to an aggregate term of fifteen years on two counts of Lewd Act. Petitioner submits that this Court's Order should provide, however, that if the Court declines to follow the *negotiated sentence* of fifteen (15) years, the Court could impose an aggregate sentence of no more than Petitioner's original sentence of twenty-five (25) years for the two counts of Lewd Act the State agreed to accept pleas to in lieu of the original charges.

Petitioner would note that this case presents a prime opportunity for this Court to clarify exactly what duties and responsibilities a lawyer is *"protected"* from while under an order of protection. Further, this case presents an opportunity to clarify for the prosecutors of this state

what their obligations are with regard to dealings with a lawyer under an Order of Protection. For example, in this case, the prosecutor alternately admitted knowing Petitioner's lawyer was under Order of Protection and then denied that knowledge. Interestingly, however, she clearly expressed the view that an Order of Protection would not prohibit her from communicating with an attorney ***"while they're out of town or on protection. I cannot rule them into court, but I'm not aware of my inability to communicate with them."*** App.p. 250, ll. 8-11. The manner in which the parties handled this case, clearly punctuates the need for more definitive guidelines on this crucial issue.

Petitioner most respectfully submits that the lower court erred in denying this application for Post-Conviction Relief and he submits that the Order of Dismissal erroneously denied relief in the following particulars. The Order of Dismissal makes inaccurate findings of fact not supported by the records before this Court. The Order states that Petitioner has failed to demonstrate prejudice inasmuch as he failed to present evidence, ***"other than his own self-serving testimony"*** that he would have accepted the fifteen (15) year deal had it been presented to him in time for him to accept it. App.p. 319, Order of Dismissal, p. 9, para. 2. This finding is simply inaccurate. The records before this Court, *other than Petitioner's own testimony*, confirm the following.

- The exhibits before this Court show that Petitioner signed plea sheets for two counts of lewd act on a minor on January 17, 2012. These plea sheets specifically reflect that they are for a negotiated sentence. They were signed by Petitioner, defense Counsel and the Assistant Solicitor. PCR II, Plaintiff's Exhibit 4.

- The testimony of the Assistant Solicitor in this case confirms that the negotiated sentence in that deal was for a fifteen (15) sentence. PCR II, p. 53, ll. 22-25. This fact is confirmed in the plea offer letter entered into evidence as Petitioner's Exhibits No. 2 and 3.

- Defense Counsel expressly testified that Petitioner accepted the fifteen (15) year deal when he conveyed it to him at the detention center. PCR II

p. 32, l. 18- p. 33, l.10.

- Not only did the evidence before this Court establish that Petitioner accepted this offer the first time it was presented to him, it further established that the plea sheets Petitioner signed were returned to the State. In an email from the Assistant Solicitor to Defense Counsel, she thanked him for getting the sheets back to her and then, in that same email, advised him that the victims would not agree for Petitioner to plead under the offer as it had expired. PCR II, Petitioner's Exhibit 5.

In addition, the Order of Dismissal states that it finds credible the Assistant Solicitor's claim that at the time she sent Defense Counsel her written plea offer to the fifteen (15) year deal she was unaware that Defense Counsel was under Order of Protection. It is true that this Assistant Solicitor vehemently denied knowing that Defense Counsel was under Order of Protection at the time the written offer was extended at the second PCR hearing held on April 15, 2015. In her previous testimony at the first PCR hearing held on August 25, 2014, she expressly acknowledged that she knew Defense Counsel was gone and under Order of Protection when the offer was extended in writing. PCR I p. 44, l. 4 – p. 45, l. 7. [2] The testimony of Defense Counsel and the Assistant Solicitor from the first PCR hearing was admitted into evidence during the second PCR hearing by agreement of the parties. PCR II, p. 72, ll. 11-21; Petitioner's Exhibit 6.

In addition, the lower court found that Petitioner had not demonstrated prejudice where he could not prove that the presiding Judge would have agreed to allow Petitioner to plead under the terms of the negotiated deal at issue herein. Petitioner would assert that this Honorable Court's decision in *Davie v. State*, 381 S.C.601, 675 S.E.2d 416

[2] In his testimony at the second PCR hearing, Plea Counsel recalled standing in the hall at the courthouse and having a discussion with the Assistant Solicitor during which she told him she was going to send him an offer for fifteen years in this case. He testified that he then reminded her that the day of this conversation was his "last day of availability until into January." App. p. 233, ll. 8-17 (1st PCR Hearing). During the first PCR hearing, this Assistant Solicitor testified that she "believed" she extended this offer before Plea Counsel left town, but she could not produce the letter in which the offer was extended. App. p. 103-105, ll 1-4 (1st PCR Hearing). The letter, produced before the *de novo* proceeded, was dated December 20, 2011. Petitioner's Exhibit 2, App. p. 283 (2nd PCR Hearing). That was what Plea Counsel recalled to be the first day covered by his Order of Protection. App. p. 212, ll. 15-20, (2nd PCR Hearing).

(2009), indicates that the PCR Court has the authority to tailor a remedy consistent with the harm to the Petitioner caused by the ineffective assistance of counsel proven by a Petitioner for Post-Conviction Relief. Clearly the Sixth Amendment right to effective assistance of Counsel has been extended to the plea negotiation process in this State. The only remedy that could have made Petitioner whole was for the lower court to set aside his judgments and sentences and remand his case to the circuit court for a new plea proceeding for specific performance of the State's agreement to allow him to plea to the two counts of Lewd Act on a Minor charged in Indictments No. 2011-GS-39-01763 and 01765. The decision of the prosecution dismiss the charge of First degree Criminal Sexual Conduct with a Minor found in Indictment 2012-GS-39-492, as part of this plea agreement, did not require judicial approval. It would then have been up to the presiding judge to determine whether he would accept the negotiated sentence agreed upon as part of this negotiated plea bargain not timely conveyed to Petitioner. [3]

It is clear, on the facts of this case, that Plea Counsel did not take adequate measures to insure that the plea offer extended by the State was conveyed to Petitioner in a timely manner. Petitioner's acceptance of that deal on January 17, 2012 confirms that he was ready and willing to accept the deal. Furthermore, the prosecutor has admitted that this plea offer was what the victims wanted to do in this case until they were told Petitioner had allowed the offer to expire without accepting it. It certainly appears that the problem was at least exacerbated by a prosecutor who saw nothing wrong with extending a plea offer while a defendant's lawyer was Under Order of Protection. Likewise, Plea Counsel was ineffective for taking proper measure to insure that he had someone to cover for him in his absence from the state under Order of

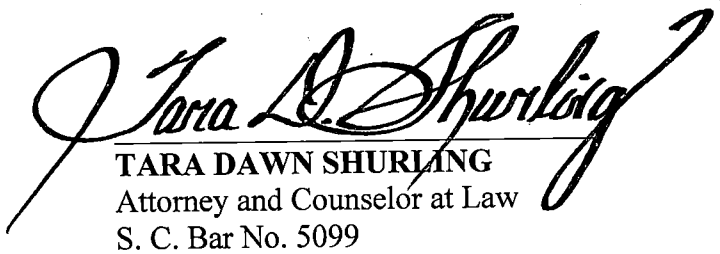
[3] The plea/sentencing sheets introduced in this PCR action as Petitioner's Exhibit No. 4 confirm that the two counts of Lewd Act on a Minor Petitioner was to be allowed to plead to under the terms of the fifteen (15) year deal that was extended by the State, approved by the family of the victims and valid through January 3, 2012, were those found in these two indictments; 2011-GS-39-01763 and 01765. Pursuant to S.C. Code Ann. §16-15-140, each of these counts would carry a maximum term of imprisonment of fifteen (15) years.

Protection. Had someone been covering his mail, and made note of the plea offer extended to Petitioner being set to expire on January 3, 2012, that person could have contacted the Solicitor's Office, reminded Sol. Hinson that Plea Counsel was out of state and asked her to extend the expiration date to a date after Plea Counsel's scheduled return to his office. Barring her agreement to do so, that person could have asked her supervisor to intervene. The record before the Court is less than clear as to what the effective dates of the Order of Protection were. Plea Counsel had no record of the Order in question and was forced to rely on his memory and the scope of his customary annual Order of Protection for this time period. Likewise, on the facts of this case, Plea Counsel was ineffective for failing to file a formal Motion for Specific Enforcement of the plea offer in question. Given the fact that the terms of the deal were admittedly consistent with the wishes of the victims, there exists a high degree of probability that the negotiated deal would have been accepted by the circuit court. Has a Motion for Specific Performance been properly filed and argued, Pleas Counsel would have had the opportunity to insure that the victims understood the circumstances under which the offer had originally expired without being accepted. The bottom line is that a plea agreement that the victims were in favor of, the state had agreed to and Petitioner wanted to accept was never put before the Court because Petitioner never knew about the offer in time to accept it. Petitioner respectfully submits that he has met his burden of proof with regard to these allegations and he asks for this Court's Order remanding his case for specific enforcement of the plea deal in question.

## CONCLUSION

For the reasons stated, remand his case for specific enforcement of the plea offer. On remand, if the Court accepts the deal as negotiated, it would sentence Petitioner to an aggregate term of fifteen years on two counts of Lewd Act as provided in the terms of the plea offer extended on December 20, 2011 and repeated, January 3, 2012. Petitioner Prays that this Court's provide, however, that if the Circuit Court declines to follow the *negotiated sentence* of fifteen (15) years, the Circuit Court be instructed that it could impose an aggregate sentence of no more than Petitioner's original sentence of twenty-five (25) years for the two counts of Lewd Act the State agreed to accept pleas to in lieu of the original charges. Alternatively, Petitioner asks that the writ be granted and that he be allowed full briefing of the issues summarized herein.

Respectfully submitted,



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This 1st day of March, 2017