STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

On Petition for Writ of Certiorari
to Richland County
Clifton Newman, Plea Judge
Jocelyn Newman, First PCR Judge
Roger E. Henderson, Second PCR Judge

Appellate Case No. 2021-001521

ARYEE HENDERSON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO AUSTIN PETITION FOR A WRIT OF CERTIORARI

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INDEX

QUESTION PRESENTED

Petitioner's Question

Whether the PCR court erred in finding plea counsel effective where counsel failed to object when the victim's family and the solicitor breached the pela agreement by recommending a specific term of years sentence when the plea agreement was without recommendation?

Respondent's Counterstatement of Question

Did the PCR court properly find Petitioner did not prove counsel was ineffective when (1) Petitioner failed to show the existence of a plea agreement related to sentencing, and thus there was no basis for plea counsel to object, and (2) Petitioner had numerous opportunities after the solicitor and the victim spoke to indicate he wished to proceed to trial but failed to do so, making it not reasonably likely he would have proceeded to trial if he had known the victim and the solicitor would recommend a sentence?

STATEMENT OF THE CASE

Procedural History

Petitioner Aryee Henderson is presently confined in the South Carolina Department of Corrections serving a twenty-five-year sentence. In November 2002, the Richland County Grand Jury indicted him for murder. On September 21, 2004, Petitioner proceeded to a jury trial before the Honorable Alison Renee Lee. At trial, Petitioner claimed self-defense. The jury convicted Petitioner of murder, and the trial court sentenced him to thirty years' imprisonment. Petitioner filed a direct appeal, which was dismissed by the Court of Appeals pursuant to Anders v. California, 386 U.S. 738 (1967). The remittitur was sent February 28, 2008.

On March 3, 2008, Petitioner filed an application for post-conviction relief (PCR). On August 12, 2009, an evidentiary hearing convened before the Honorable G. Thomas Cooper, Jr. On July 15, 2010, Judge Cooper granted Petitioner relief, vacated his prior conviction, and granted him a new trial. The State appealed, and the Court of Appeals affirmed. See Henderson v. State, 2014-UP-122 (Ct. App. Filed 3/19/2014). The State filed a Petition for Writ of Certiorari, which was granted. On October 28, 2015, the Supreme Court of South Carolina dismissed the writ of certiorari as improvidently granted. The remittitur was sent October 28, 2015.

On June 20, 2016, Applicant pled guilty to voluntary manslaughter. Assistant Public Defender Rhodes Bailey represented Petitioner and Assistant Solicitor Luck Campbell represented the State. The plea court sentenced Applicant to twenty-five years' imprisonment. On December 1, 2016, Petitioner filed a pro se Notice of Appeal. On January 6, 0217, the Court of Appeals dismissed the appeal. The remittitur was sent March 28, 2017.

On July 21, 2016, Petitioner filed an application for PCR. The State filed its Return on July 13, 2017. On January 24, 2018, an evidentiary hearing convened before the Honorable

Jocelyn Newman. Jonathan Waller, Esquire, represented Petitioner and Assistant Attorney General Jessica Kinard represented the State. On March 22, 2018, Judge Newman issued an order denying relief and dismissing the application. On June 22, 2018, Petitioner filed a pro se Notice of Appeal from that order. On June 29, 2018, the Supreme Court of South Carolina issued an order dismissing the appeal for failure to serve opposing counsel and failure to timely appeal. The remittitur was sent July 17, 2018.

On June 28, 2018, Petitioner filed a Motion to Set Aside the Judgment pursuant to Rule 60(b), SCRCP. In the motion, PCR counsel contended he overlooked an email from the Clerk of Court providing him notice of the Order of Dismissal, and his failure to file any post-trial motion or a Notice of Appeal was due to mistake, inadvertence, surprise, or excusable neglect. On July 31, 2018, the court issued an order denying Petitioner's motion. Petitioner appealed the denial of his Rule 60(b) motion but subsequently moved to dismiss his appeal. The remittitur was sent January 22, 2019.

On September 20, 2018, Petitioner filed this current PCR application seeking *inter alia* a belated review of the denial of his 2016 PCR application. An evidentiary hearing convened before the Honorable Roger E. Henderson. Arthur K. Aiken, Esquire, represented Applicant and Assistant Attorney General Lindsey A. McCallister represented the State. On November 16, 2021, Judge Henderson issued a Consent Order granting Petitioner a belated appeal of his 2016 PCR action pursuant to Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991).

Guilty Plea

Applicant was indicted for murder but pled guilty to the lesser-included offense of voluntary manslaughter. (App. 4). At the beginning of the plea hearing, the State relayed, "[H]e's **pleading straight up** to a—one count of voluntary manslaughter, **with each side asking for**

whatever time we feel is appropriate." (App. 4, emphasis added). The plea court asked Petitioner whether he understood he faced to two to thirty years' imprisonment; Petitioner indicated he did. (App. 5). The plea court asked Petitioner if he wanted to plead guilty to voluntary manslaughter, and he replied, "Yes, sir." (App. 6). The plea court then apprised Petitioner of the constitutional rights he was waiving, including the right to a jury trial, the right to remain silent, and the right to challenge evidence and present a defense. (App. 6). Petitioner stated he understood. (App. 6). The plea court again asked Petitioner if he wanted to plead guilty, and he replied, "Yes, sir." (App. 7).

According to the State's recitation of the facts, Petitioner went to the victims' home around 6:15 a.m., although it was unclear whether Petitioner was planning to steal drugs or rob the victim. (App. 7). A confrontation ensued and three shots were fired; the victim died of a gunshot wound. (App. 8). An eyewitness identified Petitioner as the person who was at the victim's home. (App. 8). At his first trial, Petitioner asserted he was acting in self-defense. (App. 8).

When the plea court asked Petitioner if he agreed with the facts, Petitioner disputed that he was robbing the victim. (App. 8-9). The plea court again asked Petitioner if he wanted to plead guilty or go to trial, and Petitioner responded, "Plead guilty, sir." (App. 9).

Plea counsel addressed the court and indicated Petitioner had wanted to plead guilty from the time plea counsel began representing him. (App. 10). He relayed that every time he spoke to Petitioner, Petitioner said, "I want to go forward, I want to get this behind me, I want to plead guilty." (App. 12).

The victim's mother addressed the court and stated, "He need[s] to be punished for his crime. The same amount of time that they gave him before, this is what he needs to get."[1] (App.

[1] Petitioner was sentenced to thirty years after his first trial.

19). She reiterated, "[T]he sentence that they gave him before, this is what he needs to keep." (App. 20). The State asked the court to "take the victim's request." (App. 23).

Plea counsel advocated for a fifteen-year sentence, noting the State had offered a plea to fifteen years prior to Petitioner's first conviction. (App. 24). Plea counsel then averred that Petitioner would like an opportunity to address the court. (App. 33).

The plea court asked Petitioner, "What do you want to say here today?" (App. 33). Petitioner responded, "I'm guilty, your honor. I'm wrong for what I did. I apologize that somebody died in this case. I feel remorse that her son had passed away. And I can't bring him back, nobody can bring him back." (App. 33). Petitioner then began to recount his version of the facts, including that the gun belonged to the victim and they were struggling over the gun when the victim was shot. (App. 34-35). The court asked, "Do you really want to plead guilty?" (App. 37). Petitioner replied, "I'm telling you the truth now, Your Honor, sir. I'm pleading guilty because the incident happened a long time ago." (App. 37). The court asked, "What are you trying to do here today?" (App. 38). Petitioner again responded, "Plead guilty, sir." (App. 38). Petitioner stated, "I'm afraid to go through [a trial] again because if I get found guilty again, then, you know, I may not get a second chance. And number two, I take responsibility because a man died." (App. 40). The court replied, "You're taking responsibility, but then you're not taking responsibility." (App. 40). The court then relayed,

> I have a hard time sentencing . . . innocent people to prison, so that's why if people tell me they're not guilty, then I'm like, hey, we got to have a trial. . . . **[B]ut if you're guilty, then I'm listening to the mother here, the grieving mother, who has lost her son** . . . .
> . . . .
>
> **So I need to know which way we're going with this**. It can't be half over here and half over there. I mean, if you want to plead guilty, you have to convince me that you're guilty, not convince me that you're not guilty. I want to sentence guilty people, not innocent

people. **This is a straight-up plea.**

(App. 41-42, emphasis added). After further conversation, the plea court again asked Petitioner, "Understanding everything we've talked about, you want to plead guilty or not?" (App. 49). Petitioner responded, "Plead guilty, sir." (App. 49). After hearing from plea counsel and the State again, the plea court sentenced Petitioner to twenty-five years' imprisonment. (App. 58).

PCR Testimony

At the PCR hearing, Petitioner recalled being transferred from the South Carolina Department of Corrections to Alvin S. Glenn Detention Center after his first PCR application was granted. (App. 97). He filed a pro se motion for a speedy trial and appeared before Judge Newman. (App. 97). Petitioner acknowledged telling Judge Newman that he wanted to plead guilty; rather than accept a plea that day, Judge Newman appointed him a public defender. (App. 98).

Petitioner stated that when he first met with plea counsel on January 20, 2016, plea counsel indicated the solicitor had offered a voluntary manslaughter plea with no recommendation, but plea counsel had rejected it without discussing it with Petitioner. (App. 99-100). Petitioner testified plea counsel encouraged him to plead guilty, but Petitioner was adamant about proceeding to trial. (App. 102, 104). However, he acknowledged he initially told plea counsel he wanted to plead guilty. (App. 102, 104).

Petitioner testified he decided to plead guilty after being told (1) he "couldn't talk at the trial" and (2) the solicitor "ain't got nothin' better to do than to send black men to prison." (App. 112). He testified it was an open plea to "voluntary manslaughter, no recommendation," and he understood "no recommendation" to mean nobody would say anything about the sentence. (App. 113). Petitioner stated counsel never told him the victim could speak, and he would not have pled guilty if he had known the victim would make an impact statement. (App. 113).

On cross-examination, Petitioner admitted he told plea counsel he wanted the fifteen-year offer he received prior to his first trial, but counsel told him that offer "was off the table." (App. 127, 141). He asserted the solicitor breached the plea agreement by bringing up his prison disciplinary record. (App. 137).

Plea counsel testified he was appointed to representant Petitioner in January 2016 and first met with him on January 20, 2016. (App. 161). He stated every time he met with Petitioner, Petitioner asked, "When are you gonna get me in court to plead?" (App. 145-46, 148). Plea counsel denied rejecting an offer from the State prior to meeting with Petitioner and explained he would not have done so without first relaying the offer to Petitioner. (App. 148).

Plea counsel reviewed his notes and recounted the meetings when Petitioner asked to plead guilty. At their first meeting in January 2016, Petitioner stated, "Well, if I don't get the 15 at trial, I'm fine with the straight up plea." (App. 149). In March 2016, Petitioner did not "seem to care if [the solicitor] won't go with the 15. He was ready to just get in there and . . . try his chances." (App. 149). In May 2016, Petitioner "want[ed] to plead guilty in front of Judge Newman ASAP. He [did] not care about whether it's straight up and doesn't want me to wait for a specific number as to time. Says to get him in court as soon as he has the offer and as soon as its reasonably possible." (App. 150). Plea counsel stated Petitioner was not interested in discussing a trial; at every meeting, Petitioner said he wanted to plead guilty. (App. 150-51). However, he stated he would have prepared for trial if Petitioner had decided not to plea and noted there was not a pending trial date at the time of the plea. (App. 182).

Plea counsel testified the solicitor first offered a voluntary manslaughter plea in June 2016, and they set the plea hearing for June 20, 2016. (App. 148-49). Plea counsel stated he advised Petitioner to wait and see if the State would agree to fifteen years, but Petitioner "had more faith

in his ability to get in there and . . . get a better sentence rather than wait." (App. 152, 176). He stated as soon as Petitioner was sentenced, Petitioner said, "I should've gone to trial." (App. 158).

Plea counsel stated he typically does not know whether victims will attend a plea hearing until the time of the hearing. (App. 165-67). Although he did not recall whether he advised Petitioner that the victims could speak, he stated it was his general practice to explain to clients that victims could speak during sentencing. (App. 165-66, 180). He testified Petitioner understood what a straight-up plea was. (App. 176).

In denying relief, the PCR court first found Petitioner did not prove his plea was involuntary. (App. 209-10). As part of that analysis, the Court found credible the testimony that Petitioner "always wanted to plead guilty and repeatedly requested a plea offer." (App. 210). The PCR court further found Petitioner did not prove the solicitor promised not to comment on the plea, and even if that promise was made, there was no real breach of that agreement. (App. 211-12). The PCR court reasoned the victim's mother made a recommendation, and although the solicitor repeated that recommendation, she also said, "'Whatever sentence you feel like would be appropriate, Your Honor," which the PCR court found was not a sentencing recommendation. (App. 211-12). The PCR court further found this discussion occurred before the plea court accepted the plea, and Petitioner had numerous opportunities to withdraw his plea after that discussion. (App. 212).

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STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court properly found Petitioner did not prove counsel was ineffective when (1) Petitioner failed to show the existence of a plea agreement related to sentencing, and thus there was no basis for plea counsel to object, and (2) Petitioner had numerous opportunities after the solicitor and the victim spoke to indicate he wished to proceed to trial but failed to do so, making it not reasonably likely he would have proceeded to trial if he had known the victim and the solicitor would recommend a sentence.

Petitioner asserts plea counsel was ineffective for not objecting when the solicitor breached a plea agreement by recommending a sentence. He contends plea counsel knew the plea agreement was without recommendation, and counsel was deficient for allowing "the solicitor to misstate the plea agreement" and not objecting when the victim's family and the solicitor recommended the maximum sentence. Petitioner contends the facts here are akin to Jordan[2] and Thompson,[3] where the court found counsel ineffective for not objecting when the State breached a plea agreement. He further contends the PCR court applied the wrong standard for prejudice when it found Petitioner failed to show any detrimental reliance on the plea agreement rather than analyzing whether Petitioner would have proceeded to trial but for counsel's deficient performance.

However, plea counsel was not deficient because, as the PCR court found, Petitioner did not prove the existence of a plea agreement related to sentencing—and thus there was no reason to object. Further—and critically—any argument that Petitioner would have proceeded to trial had he known the victim and the solicitor would recommend a sentence is refuted by the plea transcript, which shows Petitioner had *numerous* opportunities to withdraw his plea or tell the court he wished to proceed to trial *after* the solicitor and the victim recommended a sentence.

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[2] Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988) (finding counsel ineffective for failing to object when the solicitor breached a plea agreement that it would not oppose probation).

[3] Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000) (finding counsel ineffective for failing to object when the solicitor breached a plea agreement that it would not make a specific sentence recommendation).

"There is a strong presumption trial counsel provided adequate assistance." Green v. State, 351 S.C. 184, 192, 569 S.E.2d 318, 322 (2002). To prove ineffective assistance of counsel, an applicant must show counsel was deficient, and that deficiency prejudiced the applicant. Strickland v. Washington, 466 U.S. 668, 687 (1984). In other words, "the applicant must show trial counsel's performance fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different." Green, 351 S.C. at 192, 569 S.E.2d at 322. "A reasonable probability is one sufficient to undermine confidence in the trial's outcome." Id.

In Jordan, our supreme court found counsel was ineffective for not objecting when the solicitor opposed probation at a plea hearing, notwithstanding evidence that the solicitor had agreed not to oppose probation. 297 S.C. at 54-55, 374 S.E.2d at 684-85. Likewise, in Thompson, our supreme court found counsel was ineffective for not objecting when the solicitor requested the maximum sentence at a guilty plea, notwithstanding evidence plea counsel had informed the petitioner that the solicitor "was not going to make a specific sentence recommendation." 340 S.C. at 114, 117, 531 S.E.2d at 295, 297. In each case, our supreme court applied the prejudice prong of Strickland and evaluated whether the petitioner would have proceeded to trial if he had known the solicitor would comment on sentencing in a way contrary to what the petitioner believed the solicitor would do. See Jordan, 297 S.C. at 54–55, 374 S.E.2d at 685 ("Considering the original vehemence of Jordan in pursuing his right to trial by jury, we further hold that there is a reasonable probability that but for the fact that Jordan's attorney failed to object to the continuation of the guilty plea proceeding once the solicitor reneged on the plea bargaining agreement, that Jordan would not have pleaded guilty, but would have insisted on going to trial."); Thompson, 340 S.C. at 117, 531 S.E.2d at 297 ("We find there is enough evidence to demonstrate that there was a

reasonable probability Thompson would not have pled guilty if he had known the solicitor was going to make a sentencing recommendation.").

A. Petitioner failed to show the existence of a plea agreement as to sentencing and thus failed to prove counsel was deficient for not objecting when the victim and the solicitor requested the maximum sentence.

Viewed as a whole, the evidence does not establish the existence of a plea agreement as to sentencing. Contrary to Petitioner's assertion, plea counsel did *not* testify the plea was without recommendation. (Pet. 10). Rather, plea counsel consistently described the plea as a straight-up plea. (App. 149-50, 176, 180). Plea counsel testified the solicitor agreed to a voluntary manslaughter plea, and plea counsel wanted a better offer but Petitioner did not want to wait any longer. (App. 177-78). Plea counsel did not testify to any other offers or promises made by the solicitor other than a straight-up plea to voluntary manslaughter.

In asserting that plea counsel testified the plea was without recommendation, Petitioner appears to be taking plea counsel's response to two questions out of context. When asked, "Did you discuss with [Petitioner] the meaning of a straight-up plea with no recommendation?", plea counsel responded, "[H]e knows what a straight—I mean, yes, we talked about it." (App. 176). Notably, plea counsel reiterated throughout his answer to that question that Petitioner understood what a straight-up plea was, but nothing in his lengthy response indicated the solicitor promised not to make a recommendation. (App. 176-77). The fact that PCR counsel asked whether plea counsel discussed with Petitioner the meaning of a plea with no recommendation, without more, does not prove the existence of an agreement that the solicitor would not make a recommendation—especially when plea counsel never actually testified the solicitor agreed not to make a recommendation.

Likewise, the following question and answer cannot be construed as testimony by plea

counsel that the solicitor promised not to make a recommendation:

> Q: Do you think it was improper that any of the attorneys or victims mentioned a definite term or years or asked for the max or asked for leniency in a plea that doesn't have a recommendation?"
>
> A: Yeah. I wish they wouldn't. If I don't have—I've looked at the transcript. I don't remember—the solicitor asked [sic] taking a position on sentencing, but I think she conveyed that the—I mean, we—we know that frequently the victims are gonna ask for what the victims are gonna ask for, and we can't—and we—we can't control that.

(App. 177). Initially, it is unclear which of the questions posed in this compound question plea counsel was agreeing to when he said "Yeah." Further, this question and response should not be read in isolation but should be read in context of plea counsel's entire testimony, wherein counsel repeatedly indicated this was a straight-up plea, Petitioner understood what a straight-up plea meant, and Petitioner was ok with a straight up plea. Viewed in context, plea counsel's response to this question is not tantamount to testimony that the solicitor promised not to make a recommendation.

In support of his contention that the solicitor promised not to make any recommendations, Petitioner offered only his self-serving testimony that the plea was without recommendation. (App. 112). However, the PCR court—which was in the position to evaluate the credibility of Petitioner's testimony—implicitly chose not to believe this testimony when it found that Petitioner failed to prove the existence of a plea agreement as to sentencing. (App. 211). Because this issue primarily hinges on Petitioner's credibility, this Court should defer to the PCR court's finding on this issue. See Solomon v. State, 313 S.C. 526, 529, 443 S.E.2d 540, 542 (1994) ("We give great deference to a judge's findings when matters of credibility are involved since we lack the opportunity to directly observe the witnesses."), overruled on other grounds by State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013).

Further, Contrary to Petitioner's assertion, the facts here are *not* "on all fours" with Jordan and Thompson. (Pet. 10). Jordan and Thompson are distinguishable because both petitioners established the existence of a plea agreement that was clearly breached. Jordan, 297 S.C. at 54, 374 S.E.2d at 684-85; Thompson, 340 S.C. at 114, 531 S.E.2d at 295. Jordan is further distinguishable because the petitioner always wanted to proceed to trial and only decided to plead guilty after being promised the solicitor would not oppose probation. 297 S.C. at 54, 374 S.E.2d at 684-85. Likewise, Thompson is distinguishable because the petitioner initially wanted a trial and "went back and forth about whether he was going to plead." 340 S.C. at 114, 531 S.E.2d at 295. Here, unlike Thompson and Jordan, the testimony did not establish that the solicitor promised not to recommend a sentence. Further, as discussed in the next section, the evidence established Petitioner always wanted to plead guilty. Thus, Thompson and Jordan are distinguishable.

Viewed as a whole, plea counsel did *not* testify the solicitor agreed not to make a recommendation. Although Petitioner testified he believed the plea was without recommendation, the PCR judge, which was in the position to weigh the credibility of Petitioner's testimony, ultimately determined Petitioner did not prove the existence of a plea agreement. (App. 112). Because this is primarily an issue of credibility, this Court should defer to the PCR court's finding on this issue. Without a plea agreement—other than a straight-up plea to voluntary manslaughter—there was simply no basis for plea counsel to object when the victim and the solicitor recommended the a sentence. Thus, Petitioner failed to prove deficiency.

B. The overwhelming evidence refutes Petitioner's contention that he would have proceeded to trial if he had known the victim and the solicitor would recommend the maximum sentence.

Petitioner correctly contends that the proper lens for prejudice is whether he would have proceeded to trial had he known the solicitor would breach the alleged plea agreement. See Jordan,

297 S.C. at 54–55, 374 S.E.2d at 685 ("To establish prejudice, the proper analysis is to determine whether there was a reasonable probability that, but for counsel's unprofessional errors, the defendant would not have pled guilty and would have insisted on going to trial."). In the context of whether Petitioner's plea was voluntary, the PCR court found, "[T]he credible testimony in this case is that [Petitioner] always wanted to plead guilty and repeatedly requested a plea offer." (App. 210). In the context of whether Petitioner proved counsel was ineffective for failing to object when the solicitor allegedly breached the plea agreement, the PCR court found, "It is clear that, subsequent to those comments, [Petitioner] had a number of opportunities to withdraw his guilty plea. In fact, the court asked several times wither [Petitioner] wised to plead guilty; and each time, [Petitioner] said he did." (App. 212). The foregoing establishes that the PCR court *did* find Petitioner did not prove he would have proceeded to trial had he known the solicitor and the victim would recommend a sentence, and ample evidence supports that finding.[4]

Notably, the plea transcript itself disputes Petitioner's PCR testimony that he would have proceeded to trial had he known the solicitor and the victim would recommend the maximum sentence. (App. 113). At the beginning of the plea, the solicitor stated, "[H]e's pleading **straight up** to a—one count of voluntary manslaughter, **with each side asking for whatever time we feel is appropriate.**" (App. 4, emphasis added). Thereafter, the plea court asked Petitioner **five** times whether he wished to plead guilty and whether he was sure he wanted to plead guilty; each time Petitioner indicated he wished to plead guilty. (App. 6, 7, 9, 37, 49). Additionally, the plea court asked Petitioner **twice** after the solicitor made that comment what Petitioner wished to do that day; each time, Petitioner responded he was pleading guilty. (App. 33, 38). Thus, Petitioner had **seven**

[4] Even if the PCR court did not make a finding as to this precise issue, this Court can affirm for any reason appearing in the appendix. See Rule 220(c), SCACR.

opportunities after the solicitor relayed that each side could request whatever sentence it felt appropriate to tell the court he wanted to proceed to trial. Although Petitioner disputed the State's version of the facts, he never told the plea court that the solicitor had promised not to make a recommendation, and he never indicated he wished to proceed to trial rather than plead guilty.

Additionally, after the victim's mother requested that Petitioner receive sentenced the same sentence he had before and the State asked the court to "take the victim's request," the court asked Petitioner **twice** whether he wanted to plead guilty; each time Petitioner indicated he wished to plead guilty. (App. 23, 37, 49). The court also asked Petitioner **twice** after the victim's mother spoke what he wished to do that day; each time he responded he was pleading guilty. (App .33, 38). Thus, Petitioner had **four** opportunities after the victim requested the same thirty-year sentence to tell the court he wished to proceed to trial, but each time he indicated he wanted to plead guilty.

Further, the plea court advised Petitioner, "[I]f you're guilty, then I'm listening to the mother here . . . ." (App. 41-42). Thereafter, the plea court asked, "Understanding everything we've talked about, you want to plead guilty or not?" (App. 49). Petitioner replied, "Plead guilty, sir." (App. 49). Thus, Petitioner had an opportunity to tell the court he wished to proceed to trial after being told the court would listen to the victim's mother, but each time he indicated he wanted to plead guilty.

It strains credibility to suggest that Petitioner would have proceeded to trial had he known the solicitor and the victim would recommend the maximum sentence when Petitioner had the opportunity to inform the court he wished to proceed to trial **seven** times after the solicitor indicated "each side [could] ask[] for whatever time we feel is appropriate," **four** times after the victim requested he receive the thirty-year sentence he had from the first trial, and **once** after the

plea court indicated it would listen to the mother if Petitioner pled guilty. Finally, plea counsel's testimony both at the plea hearing and at the PCR hearing indicate Petitioner wanted to plead guilty and was not interested in proceeding to trial. (App. 10, 12, 145-46, 148-51). Based on the foregoing, the evidence does not support a finding that Petitioner would have proceeded to trial had he known the solicitor and the victim would recommend a sentence.

CONCLUSION

Based on the foregoing, this Court should deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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This 14th day of September, 2022