STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Charleston County

Honorable John C. Hayes, Circuit Court Judge

THERRON R. RICHARDSON,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2016-002309

RETURN TO PETITION FOR WRIT OF CERTIORARI

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT

INDEX

QUESTIONS PRESENTED

1.

Whether the state's argument that the post-conviction relief (PCR) court erred as a matter of law by granting Respondent a new trial when it applied an incorrect standard and granted relief despite failing to make the requisite finding that Respondent would have prevailed on appeal had the issue been preserved for appellate review is preserved when the state took a different position before the PCR court and consented to the standard applied by the court?

2.

Whether there is evidence to support the PCR court's finding that trial counsel was ineffective when she failed to preserve for appellate review Respondent's motion to suppress evidence seized from his residence pursuant to S.C. Code Ann. § 16-25-70(H) where counsel moved pretrial to suppress the evidence but failed to contemporaneously object when the evidence was admitted at trial, and that Respondent was prejudiced because if counsel had properly preserved the objection, the appellate court would have considered the merits of the argument on appeal?

STATEMENT OF THE CASE

At 11:09 am on October 17, 2010, the Charleston County Dispatch received a 911 call from a woman who claimed her boyfriend had choked her. She said she had locked herself in a bathroom and that her boyfriend was actively trying to get inside. App. 235, ll. 15-19. The call was then disconnected, meaning the caller hung up. App. 234, ll. 2-7. The call was characterized as "an active domestic violence" complaint. App. 258, ll. 8-11. The caller provided an address of 1956 Old Fort Avenue in Charleston County. Two deputies with the Charleston County Sheriff's Office, Jason Bowen and Julius Alexander, arrived at the residence at 11:24 am. Deputy Bowen approached the front door and began to knock "with increasing intensity." App. 16, l. 1 – 18, l. 9; App. 68, ll. 7-14. However, no one answered the door. App. 18, ll. 8-9; App. 68, ll. 15-16. After receiving no response at the front door, Deputy Alexander walked around the house to see if there were any windows or doors that were opened. He allegedly "discovered a sliding glass door in the rear that was partially open." App. 18, ll. 9-18; App. 68, l. 17 – 69, l. 14.

Deputies Bowen and Alexander entered the home through this rear sliding glass door.[1] They did not find anyone inside. App. 20, ll. 16-17. However, they allegedly observed a scale with a white powder residue on top of a bathroom counter, a safe on the floor of a bedroom closet with cash strewn about in front of it, and several firearms under a bed. App. 21, ll. 12-25.

After clearing the residence, law enforcement obtained a search warrant based on the evidence Deputies Bowen and Alexander observed in plain sight while they were searching for

---

[1] ADT security records show that home's alarm system was activated as the officers entered the house, which calls into doubt the deputies' testimony that the sliding glass door was partially opened. App. 47, l. 17 – 48, l. 1.

the 911 caller. App. 60, ll. 13-20. During the execution of the search warrant, officers found over two thousand grams of cocaine, twenty six thousand dollars in cash, and five firearms. App. 338, l. 12 – 370, l. 17; App. 457, l. 22 – 458, l. 19.

Deputy Bowen testified that even if the sliding glass door was not partially opened, the officers still would have entered the residence because of the nature of the 911 call, which was "an in-progress domestic, with somebody so afraid that they'd locked themselves in a room." He explained, "It is incumbent upon us to make sure that nobody has been harmed or is actively being harmed in that residence." App. 34, ll. 15-25. Bowen admitted that before entering the house, the officers did not hear any yelling or screaming or see any signs of a domestic disturbance. App. 28, ll. 10-24.

Law enforcement later learned that the 911 call did not originate from the address provided by the 911 caller: 1956 Old Fort Avenue. Instead, when the call was "triangulated," dispatch discovered the call originated from an apartment complex on North Romney Street in downtown Charleston, which was over twenty minutes away. App. 33, l. 23 – 34, l. 9.

Respondent was indicted by a Charleston County Grand Jury on April 4, 2011 for trafficking cocaine, four counts of unlawful possession of a firearm by a person convicted of a crime of violence, and possession of a weapon during the commission of a violent crime. App. 623-630. On May 9, 2012, a pretrial hearing was held on Respondent's motion to suppress pursuant to the Fourth Amendment to the United States Constitution and Article I, § 10 of the South Carolina Constitution before the Honorable R. Markley Dennis. App. 1. Assistant Solicitors Emmanuel Ferguson and Culver Kidd represented the state, and Alicia Penn and Mary Ford of the Ninth Circuit Public Defender Office represented Respondent. App. 1. Despite orally granting

Respondent's motion at the conclusion of this hearing, Judge Dennis ultimately denied the motion by written order dated June 20, 2012. App. 100, l. 22 – 101, l. 1.

Respondent's case was called to trial on November 13, 2012 before the Honorable Stephanie P. McDonald, and a jury. App. 146. Assistant Solicitors Emmanuel Ferguson and Culver Kidd represented the state, and Donna K. Taylor and D. Lynn Bowley of the private bar represented Respondent. App. 146.

Respondent moved pretrial to suppress the evidence seized from his residence pursuant to S.C. Code Ann. § 16-25-70(H). App. 154, l. 1 – 156, l. 14. This subsection states in relevant part that evidence discovered as a result of a warrantless search administered pursuant to a criminal domestic violence complaint is only admissible in a court of law if the evidence is found in plain view in a room in which an officer is "interviewing, detaining, or pursuing a suspect." Trial counsel argued that it was undisputed that no one was found inside the house and that the officers were not "interviewing, detaining, or pursuing a suspect." Consequently, she concluded, given that the plain language of the statute is unambiguous, the evidence found in Respondent's residence as a result of the warrantless search should be suppressed. App. 154, l. 21 – 156, l. 14; App. 158, l. 2 – 159, l. 22.

Trial counsel later argued:

> [W]hat triggers the permission and the right of the government to enter [Respondent's] home [without a warrant] is this statute . . . because they refer to it both in the 911 dispatch, the police reports, the police officers both refer to it when they talk in the [pretrial] transcript, pages 15, 17, 34. It's a domestic call. It's a criminal domestic dispute between boyfriend and girlfriend. It's in the CAD reports. It's in the search warrant that they later get based on probable cause of what they saw [in plain view]. Everybody is referring to it as a criminal domestic violence call.
>
> Had they gotten in that house and it had been boyfriend trying to get to his girlfriend, he would have been charged with criminal domestic violence in all likelihood. But we don't ever get that far.

> But again, as unusual as it is for there to be extra protections in a criminal case for a defendant, it's real hard to look at that statute and not see what it says. They could have said any number of things. They could have said nothing and it just would have gone to exigent circumstances. But they [the legislature] create an exclusion and specifically say for any purpose in any other court. Now, why would they do it if they wanted evidence to be brought in against those facts?

App. 161, l. 6 – 162, l. 8.

The trial judge ultimately denied the motion to suppress blatantly ignoring the plain language of § 16-25-70. She found the officers did not enter Respondent's residence pursuant to the authorization of the statute. Instead, she maintained they entered pursuant to exigent circumstances. App. 169, l. 6 – 170, l. 10.

At the conclusion of the state's presentation of evidence, trial counsel renewed Respondent's motion to suppress pursuant to S.C. Code Ann. § 16-25-70. App. 441, ll. 13-24. In continuing to deny the motion, Judge McDonald stated, "[I]t is still my opinion, and I may be wrong, but it's just my interpretation that they entered the house pursuant to an exigent circumstance. *It may have been pursuant to the statute as well.*" App. 442, ll. 5-9 (emphasis added).

The jury ultimately convicted Respondent as indicted. App. 493, l. 1 – 494, l. 4. Judge McDonald sentenced him to thirty years for trafficking cocaine, five years consecutive for possession of a weapon during the commission of a violent crime, and five years concurrent for each count of unlawful possession of a firearm by a person convicted of a crime of violence. App. 498, l. 14 – 499, l. 10. The aggregate sentence was thirty five years imprisonment.

On direct appeal, Respondent challenged Judge McDonald's ruling denying his motion to suppress the evidence seized from his residence pursuant to S.C. Code Ann. § 16-25-70. Specifically, Respondent argued, "The trial court erred in denying defense counsel's motion to

suppress evidence seized from appellant's [Respondent's] residence in response to a criminal domestic violence call by the police, when the evidence was not found in plain view in a room in which the police were 'interviewing, detaining, or pursuing a suspect' under S.C. Code § 16-25-70(H)(1)(a) and where the evidence found was inadmissible in a court of law as the statute mandates." App. 508.

However, the Court of Appeals found the issue was unpreserved for appellate review. In its opinion affirming Respondent's convictions, the Court of Appeals asserted, "Richardson [Respondent] did not object to a single piece of evidence offered by the State during trial. Every time the State offered any evidence seized from Richardson's home, he responded, 'No objection' or 'No, your Honor' when asked if he had any objection. On one occasion Richardson said nothing, and the trial court stated, 'Without objection, [the evidence] is admitted.'" State v. Richardson, Op. No. 2014-UP-471 (S.C. Ct. App. filed December 17, 2014); App. 534-535 (alternation in original). Because the Court of Appeals held the issue was unpreserved, it refused to consider the merits of Respondent's argument. Id.

On January 15, 2015, Respondent filed an application for post-conviction relief (PCR) alleging his trial counsel was ineffective for failing to preserve the motion to suppress pursuant to S.C. Code Ann. § 16-25-70(H) for appellate review. App. 537-544. The state filed a return to this application dated July 29, 2015. App. 545-549. An evidentiary hearing was convened on August 3, 2016 before the Honorable John C. Hayes. App. 550. Assistant Attorney General J. Rutledge Johnson represented the state, and Rodney Davis represented Respondent. App. 550.

Donna Taylor, Respondent's trial counsel, admitted at the evidentiary hearing that she did not contemporaneously object to any of the evidence that was seized from Respondent's residence when it was admitted into evidence at trial. App. 561, l. 15 – 562, l. 7. However, it

was her belief at the time, based on a misunderstanding of South Carolina law, that she had preserved the objection for appellate review. Taylor explained that, at the time of Respondent's trial, she mostly practiced in federal court, where counsel is not permitted to make contemporaneous objections. She erroneously believed the same was true in state court. App. 570, ll. 7-18. Taylor asserted that if she would have known contemporaneous objections were required in order to preserve an issue for appellate review, she would have objected when each item seized from Respondent's residence was admitted into evidence. App. 571, ll. 11-22.

At the conclusion of the hearing, PCR counsel argued that the evidence seized from Respondent's residence was "the crux of the State's case." App. 581, l. 16 – 582, l. 4. He emphasized that trial counsel challenged the admission of that evidence pretrial pursuant to S.C. Code Ann. § 16-25-70(H) in both a written motion and oral argument on the record, but failed to preserve the issue for appellate review by not contemporaneously objecting. PCR counsel concluded that this constituted deficient performance. App. 582, l. 13 – 584, l. 1.

As to prejudice, counsel argued that if the Court of Appeals had considered the argument on appeal it "would have resulted in a reversal." App. 584, l. 2 – 585, l. 12. He asserted that based on the "plain reading" of S.C. Code Ann. § 16-25-70(H) and this Court's opinion in State v. Cannon, 336 S.C. 335, 520 S.E.2d 317 (1999), the evidence seized from Respondent's residence and admitted into evidence against him at trial should have been suppressed. App. 584, l. 18 – 585, l. 12. Consequently, PCR counsel concluded that Respondent had met "the two prongs of [his] burden" under Strickland v. Washington, 466 U.S. 668, 686 (1984) and respectfully requested the judge grant him relief, vacate his convictions and sentence, and remand for a new trial. App. 585, ll. 13-18.

The assistant attorney general argued in response that there was "no rational basis to [contemporaneously] object" to the admission of the evidence seized from Respondent's residence after the trial judge had denied the pretrial motion to suppress because "[a]ll you are going to do it draw attention to the jury that Mr. Richardson [Respondent], those are his drugs, that is his money, that's all his property. That then would be ineffective to draw that attention." App. 586, l. 14 – 587, l. 1. However, if the PCR judge found trial counsel was ineffective, *the attorney general asserted Respondent could not prove prejudice because there was "overwhelming evidence of guilt."* App. 587, l. 11 – 588, l. 1 (emphasis added). Notably, this argument completely ignores the fact that there would have been no case against Respondent at all if the evidence seized from the residence had been suppressed.

As to Respondent's argument that the Court of Appeals would have reversed the ruling of the trial judge if the claim had been properly preserved for appellate review, the assistant attorney general argued that such a determination "would be complete speculation." The PCR judge interrupted counsel and stated, "I can't make a finding there. . . I don't think it's my job to determine on the merits of the appeal. That's up to an appellate court." *The assistant attorney general agreed.* He stated, "*Yes, sir. And that will be my argument.* That would be complete speculation." App. 588, ll. 2-13 (emphasis added). The attorney general concluded, "*[T]here is no prejudice because there's overwhelming evidence in this case*, Your Honor." App. 588, ll. 13-17 (emphasis added).

Briefly in response to this colloquy, Respondent's counsel argued, "[R]espectfully, Your Honor, I think *you must consider . . . what [an] appellate court does.* Because the second prong of Strickland is the obligation to suggest to you and convince you by the evidence that the outcome would have been different." Counsel further asserted that if the issue had been preserved and the

Court of Appeals had considered the merits, "*we would have been successful [on appeal].* That's the second prong. *I respectfully think the Court has to make a judgment call* . . . in place of the . . . appellate court." App. 589, l. 8 – 590, l. 7 (emphasis added).

After taking the case under advisement, the PCR judge ultimately found trial counsel was ineffective for failing to contemporaneously object when the evidence seized from Respondent's residence was admitted into evidence at trial. The judge found counsel's strategy for not objecting was unreasonable since it was based on her erroneous belief that she could not make a contemporaneous objection to evidence which had been ruled admissible by the court prior to trial. App. 608-609. The judge found counsel's failure to object failed to preserve the pretrial motion to suppress for appellate review. App. 609.

The PCR judge further found Respondent was prejudiced by counsel's deficient performance. Specifically, the judge stated, "There is no question trial counsel's failure to protect the record for appeal prejudiced [Respondent]. The failure to preserve the issue of the seizure extinguished [Respondent's] opportunity to have a *very viable* constitutional claim reviewed by an appellate court. *The result in the proceeding, i.e. trial and appeal, would have been different if the record had been protected.* The undersigned does not find that [Respondent] would have prevailed on appeal, but must, and *does find the proceedings would have been different.* Simply put, [Respondent] would have had the search and seizure issue addressed by an appellate court." App. 609 (emphasis added). The judge also emphasized that the only evidence against Respondent was the evidence seized from his residence and subject to suppression. App. 609.

Despite arguing on appeal that the PCR judge applied an incorrect standard and erroneously granted Respondent relief without making the requisite finding that Respondent

would have prevailed on appeal had the issue been properly preserved, the state never filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, informing the PCR judge that the state believed he applied an incorrect standard and requesting the judge address whether Respondent would have prevailed on appeal if the issue had been properly preserved. See Petition at 11.

The state ultimately filed a notice of appeal. On June 23, 2017, the state filed a petition for writ of certiorari requesting this Court reverse the order of the PCR judge granting Respondent a new trial.

This return to the petition for writ of certiorari follows.

ARGUMENT

1.

The state's argument that the PCR court erred as a matter of law by granting Respondent a new trial when it applied an incorrect standard and granted relief despite failing to make the requisite finding that Respondent would have prevailed on appeal had the issue been preserved for appellate review is not preserved when the state took a different position before the PCR court and consented to the standard applied by the court.

During oral arguments at the conclusion of the evidentiary hearing, the following colloquy took place between the PCR judge and the assistant attorney general:

> [Assistant AG]: Your Honor, and then the last argument I have is that Mr. Davis [Respondent's counsel] makes this argument that [the] Court of Appeals, if [it] would have had this issue preserved, would have, by [the plain] reading of the statute [S.C. Code Ann. § 16-25-70(H)], would have overturned [reversed] that case [the ruling of the trial judge].
>
> The Court: I can't make a finding there.
>
> [Assistant AG]: **Exactly. That's speculation**.
>
> The Court: . . . I don't think it's my job to determine the merits of the appeal. That's up to an appellate court.
>
> [Assistant AG]: **Yes, sir. And that will be my argument. That would be complete speculation**. And in that regard, even if there is ineffective assistance, if there is some type of ineffective counsel, **there is no prejudice because there's overwhelming evidence [of guilt] in this case**, Your Honor. We ask you to deny and dismiss this application.

App. 588, ll. 2-17 (emphasis added).

Not only did the state fail to object to the standard applied by the PCR judge, the assistant attorney general agreed the judge was applying the correct standard. App. 588, ll. 2-17. The state cannot now complain on appeal that the PCR judge applied an incorrect standard. See State v.

Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) ("[A] party cannot complain of an error which his own conduct has induced.").

In State v. Carlson, 363 S.C. 586, 611 S.E.2d 283, 287 (Ct. App. 2005), Carlson argued on appeal that the trial judge failed to conduct a proper hearing on the admissibility of the victim's out of court identification pursuant to Neil v. Biggers, 409 U.S. 188 (1972) and State v. Ramsey, 345 S.C. 607, 550 S.E.2d 294 (2001). The Court of Appeals emphasized that generally a trial court must hold an *in camera* hearing when the state offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in court identification as being tainted by a previous, illegal identification or confrontation. However, the court found Carlson consented to the trial judge's suggestion that the court merely view the pictures contained in the photographic lineup viewed by the victim rather than require testimony. Id. at 594-595, 611 S.E.2d at 287 (internal citations omitted). In holding that Carlson failed to preserve the argument for appellate review, the court asserted:

> An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review. **A party cannot complain of an error which his own conduct has induced.** Where an objection and the ground therefore is not stated in the record, there is no basis for appellate review. A contemporaneous objection is required to preserve issues for direct appellate review. **Not only did Carlson fail to object, but *he consented to the procedure proposed by the trial judge.* Consequently, Carlson failed to preserve this issue.**

Carlson, 363 S.C. at 595, 611 S.E.2d at 287 (internal citations and quotation marks omitted) (emphasis added).

As shown by the colloquy above, at the conclusion of the evidentiary hearing, the state agreed with the PCR judge that the judge could not make a finding regarding whether Respondent would have prevailed on appeal if trial counsel had contemporaneously objected to the admission of the evidence seized from Respondent's residence and properly preserved the

pretrial motion to suppress for appellate review. The PCR judge asserted, "I don't think it's my job to determine the merits of the appeal. That's up to an appellate court." The assistant attorney general responded, "*Yes, sir. And that would be my argument.* That would be complete speculation." App. 588, ll. 6-13 (emphasis added). He went on to advocate an incorrect standard. He asserted: "[T]here is no prejudice because there's overwhelming evidence in this case." App. 588, ll. 13-17.

Moreover, pursuant to judicial estoppel, the state cannot take one position during the proceedings before the PCR court and a different position on appeal. In Cothran v. Brown, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004), this Court explained that "[j]udicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." See State v. Blakney, 410 S.C. 244, 254-255, 763 S.E.2d 622, 628 (Ct. App. 2014) (Few, C.J. dissenting) (explaining that under judicial estoppel "the State may not argue to a sentencing court that the court has the power to suspend a sentence, and after the court accepts the State's argument and suspends the sentence, turn around and argue, as it has done in this appeal, the sentence may not be suspended" as these two positions are "precisely the opposite" of each other).

Additionally, the state never filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, informing the PCR judge that the state believed he applied an incorrect standard and requesting the judge address whether Respondent would have prevailed on appeal if the issue had been properly preserved. See Petition at 11. A "Rule 59(e) motion must be filed if issues are not adequately addressed in order to preserve the issues for appellate review." Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007).

In Burgess v. State, 402 S.C. 92, 738 S.E.2d 264 (Ct. App. 2013), the Court of Appeals held the state's argument that the PCR court erred in failing to determine whether Burgess was prejudiced by his counsel's failure to request a jury charge regarding Burgess's absence from his criminal trial was not preserved for appellate review because the state failed to file a Rule 59(e), SCRCP, motion asking the PCR court to specifically determine whether Burgess suffered prejudice as a result of his counsel's deficient performance. Id. at 94-95, 738 S.E.2d at 265.

This Court should likewise hold the state's argument that the PCR judge applied an incorrect standard is not preserved since the state failed to file a Rule 59(e) motion informing the PCR judge that the state believed he applied an incorrect standard and requesting the judge address whether Respondent would have prevailed on appeal if the issue had been properly preserved, particularly given the fact that the state consented to the standard applied by the judge on the record at the evidentiary hearing. See App. 588, ll. 2-17.

Respondent respectfully requests this Court hold the state's argument is not preserved for appellate review.

2.

There is evidence to support the PCR court's finding that trial counsel was ineffective when she failed to preserve for appellate review Respondent's motion to suppress evidence seized from his residence pursuant to S.C. Code Ann. § 16-25-70(H) where counsel moved pretrial to suppress the evidence but failed to contemporaneously object when the evidence was admitted at trial, and that Respondent was prejudiced because if counsel had properly preserved the objection, the appellate court would have considered the merits of the argument on appeal.

"On certiorari in PCR cases, the Court applies an 'any evidence' standard of review." McHam v. State, 404 S.C. 465, 472, 746 S.E.2d 41, 45 (2013) (citing Terry v. State, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011)). "This Court will uphold the findings of the PCR judge when there is *any* evidence of probative value to support them, and it will reverse the PCR judge's decision when it is controlled by an error of law." Id. at 473, 746 S.E.2d at 45 (quoting Suber v. State, 371 S.C. 554, 558-559, 640 S.E.2d 884, 886 (2007)) (internal quotation marks omitted) (emphasis added). "This Court gives great deference to the PCR judge's findings of fact and conclusions of law." Id. (citing Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005)).

In order to show ineffective assistance of counsel as a ground for relief, an applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. An applicant must prove "that counsel's performance was deficient" and fell below reasonable

professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

"This Court has previously held that an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a PCR claim alleging ineffective assistance of counsel." McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003) and Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). In McHam, this Court found McHam's counsel's failure to renew his Fourth Amendment objection constituted deficient performance that satisfied the first prong of the Strickland analysis. Id. at 474, 746 S.E.2d at 46.

Here, it is clear from the record that trial counsel did not contemporaneously object when the evidence that was seized from Respondent's residence was admitted into evidence during trial. App. 252, ll. 4-12. Consequently, she failed to preserve the motion to suppress for appellate review. See State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001) ("[M]aking a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party must make a contemporaneous objection when the evidence is introduced.") Because counsel failed to contemporaneously object, the Court of Appeals found the motion to suppress pursuant to S.C. Code Ann. § 16-25-70, which was raised by Respondent on direct appeal, was not preserved for appellate review and refused to consider the merits. State v. Richardson, Op. No. 2014-UP-471 (S.C. Ct. App. filed December 17, 2014); App. 534-535. Counsel's failure to renew the objection

constituted deficient performance. Consequently, there is ample evidence to support the PCR court's finding that counsel was ineffective. See App. 609.

"Since the [suppression] issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong." McHam, 404 S.C. at 475, 746 S.E.2d at 47; See Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, *[the] defendant must show that such claim is meritorious* and that the verdict would have been different absent the evidence that should have been excluded.) (emphasis added).

The PCR court correctly found Respondent was prejudiced by trial counsel's failure to preserve the motion to suppress because it "extinguished [Respondent's] opportunity to have a *very viable* claim reviewed by an appellate court." App. 609. Implicit in this finding is the PCR court's belief that the motion to suppress was a meritorious claim. The court further emphasized that the sole evidence against Respondent at trial was the evidence subject to suppression. App. 609. Consequently, the outcome of Respondent's trial would have been different if this evidence had been excluded. App. 609. Pursuant to this Court's holdings in McHam and Sikes, this finding is sufficient to satisfy the prejudice prong in Strickland.

S.C. Code Ann. § 16-25-70 states in relevant part:

> (A) A law enforcement officer may arrest, with or without a warrant, a person at the person's place of residence or elsewhere if the officer has probable cause to believe that the person is committing or has freshly committed a misdemeanor or felony pursuant to the provisions of Section 16-25-20, 16-25-65, or 16-25-125, even if the act did not take place in the presence of the officer . . .
>
> (C) *In effecting a warrantless arrest* under this section, *a law enforcement officer may enter the residence of the person to be arrested in order to effect the arrest where the officer has probable cause to believe that the action is*

reasonably necessary to prevent physical harm or danger to a family member or household member.

(H) Evidence discovered as a result of a warrantless search administered pursuant to a complaint filed under this article is admissible in a court of law:

(1) if it is found:

(a) in plain view of a law enforcement officer *in a room in which the officer is interviewing, detaining, or pursuing a suspect*; or

(b) pursuant to a search incident to a lawful arrest for a violation of this article or for a violation of Chapter 3, Title 16; or

(2) if it is evidence of a violation of this article.

An officer may arrest and file criminal charges against a suspect for any offense that arises from evidence discovered pursuant to this section.

Unless otherwise provided for in this section, *no evidence of a crime found as a result of a warrantless search administered pursuant to a complaint under this article is admissible in any court of law.*

S.C. Code Ann. § 16-25-70 (emphasis added)

This statute provides officers responding to a criminal domestic violence complaint with an exception to the warrant requirement in certain limited, clearly defined circumstances. In the absence of these specific circumstances, no evidence of a crime the officers may have seen is admissible in any court of law.

One of the first and only times this Court has addressed and analyzed this statute is in State v. Cannon, 336 S.C. 335, 520 S.E.2d 317 (1999). In Cannon, an officer with the City of York Police Department responded to Cannon's home in response to a criminal domestic violence complaint. Id. at 337, 520 S.E.2d at 318. When the officer arrived, Cannon's mother, who also resided in the home, invited the officer into the house. Id. at 337, 520 S.E.2d at 318. She told the officer that Cannon had a knife. Id. When the officer spoke with Cannon, he stated

he was playing a videogame when his mother became upset, came at him with a vacuum cleaner, and he grabbed a knife. Id. The officer arrested Cannon for criminal domestic violence. Id. After escorting Cannon outside, the officer conducted a search incident to arrest and located a pill bottle in Cannon's pocket, which was found to contain crack cocaine. Id. The officer claimed that if he had not been invited into the home, he would not have entered because he "didn't hear any screams or anything like that." Id. Cannon was ultimately indicted for possession of crack cocaine with intent to distribute. Id. at 336, 520 S.E.2d at 317.

Cannon moved pretrial to suppress the crack cocaine. He argued S.C. Code Ann. § 16-25-70(H) prohibits the admission of evidence of crimes, other than criminal domestic violence, seized through a warrantless search conducted as a result of a criminal domestic violence complaint. Id. at 337, 520 S.E.2d at 317. Finding the police entered Cannon's home with the consent of his mother, not based on the statutory authority of § 16-25-70, the trial judge denied Cannon's motion to suppress. Id.

In its opinion, this Court explained that the General Assembly enacted the Criminal Domestic Violence Act in 1984, which defined the statutory offense of criminal domestic violence and set forth the penalties for a conviction. Id. at 338, 520 S.E.2d at 318 (citing 1984 S.C. Acts 484, § 1). The Court emphasized that the act also "provided the circumstances under which a law enforcement officer may effect an arrest for criminal domestic violence either with or without a warrant, specifically permitting a warrantless arrest even if the violence did not take place in the presence of an officer, and permitting an officer to enter a person's home without a warrant to effect the arrest." Id. The act further provided that "no evidence other than evidence of violations of this article found as a result of a warrantless search shall be admissible in any court of law." Id.

This Court further explained that, while the substance of the original act remains the same, § 16-25-70 has been expanded and designated into subsections. Id. After citing the relevant portions of the statute outlined in subsections (C) and (H), this Court held § 16-25-70 was inapplicable in Cannon because the officer did not enter Cannon's home under the authority of § 16-25-70(C), but rather upon the invitation of Cannon's mother, who also resided in the home. Id. at 339, 520 S.E.2d at 319. The Court asserted that once the officer arrested Cannon for criminal domestic violence, he was entitled to search Cannon incident to the arrest. Id. (citing United States v. Robinson, 414 U.S. 218 (1973)). Therefore, this Court concluded that because "the officer did not enter [Cannon's] home under the authority of § 16-25-70(C), § 16-25-70(H) does not apply and the evidence seized as a result of the valid search incident to arrest was properly admitted in [Cannon's] trial for possession of crack cocaine with intent to distribute." Id.

In a footnote at the conclusion of the opinion, this Court asserted:

> We are concerned about the effect of § 16-25-70(H). **The plain meaning of the statute precludes the admission of evidence of crimes, other than criminal domestic violence, seized as a result of a warrantless search conducted pursuant to § 16-25-70(C).** In the case before us today, if the officer had entered respondent's home under the authority of § 16-25-70(C), the crack cocaine found in respondent's pocket would have arguably been inadmissible pursuant to § 16-25-70(H). Similarly, as noted by the amicus curiae [the Solicitors' Association of South Carolina and the South Carolina Sheriff's Association], **if the police make a warrantless entry into a home under the authority of § 16-25-70(C) and observe in plain view a weapon which is recognized as the weapon in an unrelated murder, the weapon could be inadmissible under § 16-25-70(H) since the murder is not a violation of the Act** [the Criminal Domestic Violence Act].

Id. at 339 n. 4, 520 S.E2d at 319 n. 4 (emphasis added).

Significantly, in the eighteen years since this Court decided Cannon and expressed its concern regarding the effect of § 16-25-70(H), the legislature has not seen fit to change the statute.

Subsequent to Cannon, in State v. Roberts, 340 S.C. 238, 530 S.E.2d 899 (Ct. App. 2000), the Court of Appeals also recognized the plain meaning effect of § 16-25-70(H). In Roberts, an officer with the Beaufort City Police Department responded to a reported disturbance at an apartment. Id. at 239, 530 S.E.2d at 900. The officer found two people standing outside and Roberts lying on his back two to three feet from the sidewalk. Id. The officer noticed Roberts was intoxicated and helped him to his feet. Id. The other people present informed the officer that Roberts was not supposed to be there, refused to leave, and was causing a disturbance. Id. The officer placed Roberts in his patrol car intending to charge him with public drunkenness and disorderly conduct. Id. He then began talking with the two other people, who claimed they were Roberts's relatives and that he had assaulted one of them. Id. The officer ultimately arrested Roberts for public drunkenness, disorderly conduct, and criminal domestic violence. Id. A corrections officer conducted an inventory search of Roberts and found crack cocaine in his pocket. Id.

Roberts was indicted for possession of cocaine with intent to distribute. Id. He moved to suppress the drugs pursuant to S.C. Code Ann. § 16-25-70 because they were obtained during a warrantless search incident to an arrest for criminal domestic violence. Id. He argued that statutory and case law barred the admissibility of evidence of crimes other than criminal domestic violence offenses where the evidence was obtained during an arrest for criminal domestic violence. Id. at 239-240, 530 S.E.2d at 900. The trial court agreed and suppressed the cocaine found on Roberts. Id. at 240, 530 S.E.2d at 900.

The Court of Appeals reversed. The appellate court found law enforcement did not rely on the authority of § 16-25-70 to arrest Roberts because the officer had already decided to charge Roberts with public drunkenness and disorderly conduct before the officer was even advised that a CDV had occurred. Id. at 241, 530 S.E.2d at 901. The court concluded the discovery of the crack cocaine was the result of a lawful search incident to an arrest for disorderly conduct and public drunkenness, in addition to a charge for CDV. Id. Accordingly, because the officer did not rely upon § 16-25-70(A) in making his initial arrest of Roberts, the court held § 16-25-70(H) did not apply and that suppression was not warranted. Id.

Here, it is clear that the officers were responding to a criminal domestic violence complaint and that they entered Respondent's home without a warrant as a result of this complaint. The above statute provides for officers responding to a criminal domestic violence complaint with an exception to the warrant requirement in certain limited, clearly defined circumstances. In the absence of those specific circumstances, no evidence of a crime the officers may have seen in plain view is admissible in any court of law. The statute clearly states that evidence discovered in a warrantless search pursuant to a CDV complaint is admissible in a court of law only if it "is in plain view of a law enforcement officer in a room in which the officer is *interviewing, detaining, or pursuing a suspect.*" § 16-25-270(H) (emphasis added). Certainly there was no "interviewing, detaining, or pursuing a suspect" in this case because no one was in or around the residence. The officers admittedly entered the residence only to ensure the safety of the 911 caller.

"In interpreting statutes, the Court looks to the plain meaning of the statute and the intent of the Legislature." Gay v. Ariail, 381 S.C. 341, 344–45, 673 S.E.2d 418, 420 (2009) (citing State v. Dingle, 376 S.C. 643, 659 S.E.2d 101 (2008). "All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in

the language used. Id. (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007), *cert. denied* 552 U.S. 1314 (2008). "A statute's language must be construed in light of the intended purpose of the statute." Id. "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning." Id. (citing State v. Gains, 380 S.C. 23, 667 S.E.2d 728 (2008)).

The trial judge violated the rules of statutory construction by forcing a different interpretation than what the statute explicitly states. She cited to § 16-25-70(C), which deals with effecting a warrantless arrest, which the officers admittedly were not doing in this case. She then reasoned that the officers did *not* enter the residence pursuant to the authorization of the CDV statute. Earlier on, the trial judge stated that it was hard for her to believe that the legislature meant to give greater protections then were provided by the Fourth Amendment. But the legislature did precisely that when it enacted S.C. Code Ann. § 17-13-140 and the South Carolina Supreme Court held that the legislature was free to do so in State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987).

Based on the foregoing, it is clear that if trial counsel would have properly renewed her objection to the evidence seized from Respondent's residence when it was admitted at trial, the appellate court would have considered the objection and held the trial judge erred by denying Respondent's motion to suppress pursuant to S.C. Code Ann. § 16-25-70(H). Consequently, Respondent has established that not only was trial counsel ineffective for failing to preserve the issue for appellate review, but that he was prejudiced by counsel's deficient performance.

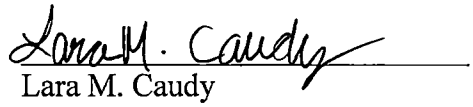
There is ample evidence to support the PCR court's finding that counsel rendered ineffective assistance and that Respondent was prejudiced as a result since her failure to preserve the motion to suppress extinguished Respondent's opportunity to have the "very viable" claim

reviewed by the appellate court. Moreover, the sole evidence against Respondent at trial was the evidence subject to suppression. Respectfully, this Court should deny certiorari or, in the alternative, affirm the ruling of the PCR court.

CONCLUSION

Based on the foregoing argument, Respondent respectfully requests this Court deny the petition for writ of certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the questions presented above. In the alternative, Respondent respectfully requests this Court affirm the ruling of the PCR court.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of November, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Honorable John C. Hayes, Circuit Court Judge

THERRON R. RICHARDSON,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Therron R. Richardson, #191713, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 6th day of November, 2017.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 6th day of November, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.