STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

RECEIVED
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S.C. SUPREME COURT

Appellate Case No. 2016-001914

CONNIE MURRAY DUMAS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUE PRESENTED

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II. Petitioner's assertions that Counsel was ineffective for failing to adequately advise Petitioner regarding the potential risk of taking the case to trial and that Counsel was ineffective for failing to object to the Solicitor's failure to honor an agreement regarding sentencing are not preserved for appellate review as they were not raised to and ruled upon by the PCR court. Even if these issues were preserved, these issues are without merit.

STATEMENT OF THE CASE

Underlying Facts and Trial

On August 9, 2010, Petitioner entered the One Stop convenience store in Rock Hill, South Carolina, armed with a pistol. App. 178. She approached the clerk, Marcella Talford, and demanded money while pointing a gun at the clerk. App. 180. Ms. Talford took the cash register drawer out and put in on the counter. App. 180. Petitioner took the cash from the drawer and demanded the extra cash from under the counter. App. 180-181. Petitioner took the cash and left the store in her vehicle. App. 187. The entire incident was recorded on the store's security cameras. App. 194. A witness in the parking lot saw Petitioner leave the store with cash and a gun and called the police to report the incident, while also giving a detailed description of Petitioner's car and the license plate number. App. 237-238, 307.

A short time later, Detective Jerry Waldrop responded to police dispatch and saw a car matching the exact description. App. 260. Petitioner and her daughter were taken out of the car and placed in separate police vehicles. App. 264. Petitioner was read her *Miranda* rights and initially told officers that her sister was at the One Stop driving Petitioner's car. App. 267-268. Petitioner then told officers that a gun fell out and the store clerk put the money on the counter even though Petitioner did not ask for it. App. 269. Officers searched Petitioner's car for money and found money folded up with a two dollar bill stamped "One Stop" that was planted in the cash by Ms. Talford. App. 187, 269.

Detective Waldrop transported Petitioner to the Rock Hill Law Center, Mirandized her again, and took a statement to from Petitioner. App. 277. Petitioner told law enforcement that she had a gun in her pants and went to the One Stop. App. 279. She said she put the gun on the counter and demanded money from the clerk, who pulled out the cash drawer and set it on the

counter. App. 279. Petitioner told officers she took the money and left the store, went to pick up her daughter, and was pulled over by police officers shortly thereafter. App. 279-280.

Ms. Talford later met with law enforcement, gave a written statement, and was presented with a photo lineup. She identified Petitioner in the lineup as the person who robbed her. App. 201-202.

Petitioner was indicted by the November 2010 term of the York County Grand Jury for armed robbery (2010-GS-46-3853) and possession of a weapon during the commission of a violent crime (2010-GS-46-3854). Michael Atwater, Esquire, represented her. On May 16-20, 2011, Petitioner proceeded to a jury trial pursuant to which she was found guilty as indicted.[1] The Honorable Paul M. Burch sentenced Petitioner to confinement for eighteen years for armed robbery and five years, concurrent, for the possession charge.

A notice of appeal was filed on Petitioner's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. *State v. Dumas*, 2013-UP-150 (filed April 10, 2013). Petitioner then filed a Petition for Writ of Certiorari in the South Carolina Supreme Court on January 23, 2014. On January 23, 2014, the Court denied the petition. The Remittitur was issued on February 25, 2014.

Post-Conviction Relief Application

On April 25, 2014, Petitioner filed an application for post-conviction relief alleging the following grounds:

1. "I was not in possession of a weapon."
    a. A search was performed without a warrant."
2. "My attorney was ineffective in securing witnesses.
    a. My daughter who was also arrested was never a witness for defense."

[1] Petitioner initially underwent a jury trial on these charges but it ended in a mistrial. The trial beginning on May 16, 2011 was a retrial.

3. "My attorney Michael Atwater was in possession of my primary bank account information and check stubs, along with receipts which contradict the State argument that I needed money for school clothes for my children. He never supplied the court with them."
    a. "My attorney never presented the evidence in court."
4. "My attorney did not make me aware of the fact that probation or time less than offered by the plea was not an option for the level of my charges."
    a. "He told me that he didn't agree with the plea deal offered. Lesser included charges could get me probation he said, but they were not offered when jury asked for them. State v. Campbell."
5. "Arguments between my attorney and the judge created a negative atmosphere in the court room."
    a. "Proof lies in the transcript. State v. Brinkley. My former attorney Michael Atwater has since been suspended form the practice of law. Told me in a letter from his former partner Eric Davis, PA of 528 12th Street, W. Columbia, SC 29169 (803) 939-1340."

The State filed its Return on or about October 2, 2014. An evidentiary hearing into the matter was convened on January 20, 2015, at the Moss Justice Center in York, South Carolina before the Honorable J. Derham Cole. Petitioner was present at the hearing and represented by Leah Moody, Esquire. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office represented the State. At the hearing, Petitioner testified on her own behalf. Petitioner's husband and daughter also testified. Petitioner's trial counsel, Michael Atwater, Esquire, (hereinafter "Counsel") testified. By Order of Dismissal signed August 23, 2016 and filed August 24, 2016, the PCR court denied and dismissed Petitioner's application with prejudice.

Petitioner filed a timely notice of appeal and filed her Petition for Writ of Certiorari on dated June 21, 2017. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review in a post-conviction relief action is whether "any evidence of probative value" exists to sustain the post-conviction relief court's findings. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's ruling. *Moore v. State*, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). This Court will reverse the post-conviction relief court's decision when it is controlled by an error of law. *Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing *Sheppard v. State*, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, at 441, 334 S.E.2d at 814.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, at 689. An applicant must overcome this presumption in order to receive relief. *Cherry*, at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief.

Strickland, at 687. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625, citing *Strickland*, at 688. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. Petitioner's assertion that Counsel was ineffective for failing to suppress the video evidence at trial is not preserved for appellate review as it was not raised to and ruled upon by the PCR court. Even if this issue was preserved, Counsel was not ineffective because he made a timely objection to suppress the video evidence during trial.

Petitioner argues the PCR court erred in failing to grant post-conviction relief on the basis that Counsel failed to move to suppress video evidence as a result of the State losing a crucial piece of video evidence. Respondent contends that this issue is not preserved for appellate review as it was never raised before the PCR court and not ruled upon in the PCR court's Order of Dismissal. Even if this Court were to find that the issue was preserved, Counsel was not ineffective for failing to suppress the video evidence because he made a timely objection to suppress the video evidence as it was being offered by the State at trial.

a. Petitioner's assertion that Counsel was ineffective for failing to suppress the video evidence at trial is not preserved for appellate review as it was not raised to and ruled upon by the PCR court.

The issue of whether Counsel was ineffective for failing to move to suppress the video evidence presented at trial is not preserved for appellate review.

Relevant Testimony

In her PCR Application, Petitioner raised the issue related to video evidence as follows:

1. "The State lost the original video surveillance necessary to corroborate my testimony."
    a. "Testified by the detective in court."
2. "My attorney did not investigate the lost evidence favorable to the defendant and state withheld audio from police cruiser. Lounds v. State 2008."
    a. "Detective Waldrup said in court that the video tape was 'lost' from evidence and the State said police cruiser tape was inaudible."

App. 646, 651-652.

During the PCR hearing, Petitioner testified the State lost the video surveillance evidence

from the One Stop convenience store. She testified the video shown at the first trial[2] was clear and showed Petitioner walking to the One Stop clerk, Marcella Talford, and receiving something from Ms. Talford. App. 672-673. She testified a second video was presented during her second trial that showed her at the One Stop store but from a different view. App. 674, ll. 19-22. Petitioner argued that when the State lost the first video, her attorney did not do anything to investigate why it was lost. App. 675, ll. 11-15. Petitioner's PCR counsel then asked her, "when you were in the trial, did you all discuss trying to suppress that video that was coming in for the second trial?" Petitioner replied, "He didn't discuss it with me, no." App. 675, ll. 16-19. Petitioner's PCR counsel then concluded her questioning on this issue by asking "So your issue with that is your attorney didn't investigate that particular video being lost?" Petitioner replied, "Exactly. Yes." App. 676, ll. 7-9. During Counsel's testimony, no questions were asked by Petitioner concerning whether Counsel moved to suppress the videos.

The PCR court ruled that Petitioner's allegations concerning the lost videotape did not allege ineffective assistance of counsel. The PCR court found that Counsel brought the issue of the lost videotape to the jury's attention during his closing argument to highlight the police officer's errors, and found that Counsel's performance did not rise to the level of deficient performance. App. 753.

Analysis

An issue must be raised to and ruled upon by the trial court to be preserved for appellate review. *See State v. Moore,* 357 S.C. 458, 593 S.E.2d 608 (2004). This Court has made it abundantly clear that, where a PCR court fails to set forth findings and the reasons for those findings, the issue is not preserved for appellate review if the petitioner fails to make a Rule 59(e) motion requesting the PCR court make specific findings of fact and conclusions of law on

[2] Petitioner's first trial on these same charges ended in a mistrial.

the allegations. *Marlar v. State,* 375 S.C. 407, 408–10, 653 S.E.2d 266, 266–67 (2007).

Here, it is clear from the PCR application, Petitioner's testimony, and Petitioner's examination of Counsel during the PCR hearing that Petitioner's allegation of the videotape evidence concerned the State losing the videotape and whether Counsel properly investigated the lost videotape. The only time a suppression motion was mentioned was in one question during Petitioner's PCR hearing. *See* App. 675, ll. 16-19 (PCR Counsel: "[w]hen you were in the trial, did you all discuss trying to suppress that video that was coming in for the second trial?" Petitioner: "He didn't discuss it with me, no.") This sentence only mentions whether Petitioner and Counsel discussed moving to suppress the video evidence and does not ever allege that Counsel was deficient for failing to do so. The Order of Dismissal did not address Counsel's failure to move to suppress the evidence and Petitioner did not file a Rule 59(e) motion to address the issue. This Court should find based on the PCR application and testimony from the PCR hearing that the issue of whether Counsel should have suppressed the videotape evidence is not preserved for appellate review. *See also Mangal v. State*, Op. No. 27726 (S.C.Sup.Ct. refiled October 4, 2017) (Shearouse Adv.Sh. No. 38 at 12) (finding an issue was not preserved for appellate review where the issue was not mentioned in Mangal's written application, PCR counsel did not make an oral amendment at the evidentiary hearing to add the issue as a claim, and he did not specifically make the claim at the hearing even when brief testimony on the issue came up).

b. Counsel was not ineffective for failing to move to suppress the video evidence from Petitioner's trial as he did make a timely objection when the videotape was being offered into evidence.

Even if this Court were to find that the issue was preserved for appellate review, Counsel was not ineffective for failing to move to suppress the video evidence.

Relevant Testimony

One piece of evidence presented by the State during Petitioner's trial was video evidence of the incident taken from the One Stop's surveillance cameras. The store's operations manager, Judy Ashdown, testified the One Stop at issue is equipped with video surveillance cameras. App. 143, ll. 3-18. She testified the store has nine cameras showing different parts of the store and only three of the cameras showed the robbery. App. 146, ll. 14-18; 159-163. Ms. Ashdown testified she gave law enforcement a copy of the video surveillance showing the robbery, but a month later she received a call saying law enforcement misplaced the video and needed another copy. App. 146, 19-24. She testified that when she went to make another copy, only two of the three camera angles were saved. App. 147, l. 23 – 148, l. 2. Ms. Ashdown further testified that she was able to find the video depicting the third angle and she submitted all three to law enforcement. App. 148, ll. 3-5. Ms. Ashdown testified that she did not include the six other camera angles because they did not show the robbery. App. 165-166.

The victim, Ms. Talford, testified that she viewed the video tape evidence showing the incident from three angles from inside the store. App. 196, ll. 14-22. Ms. Talford testified that the video tape only showed a partial portrayal of what happened in the store that day because it only showed three of the camera angles. App. 196, l. 23 – 197, l. 1.

As the State moved to enter the videotape into evidence, and prior to it being published to the jury, Counsel made an objection, stating:

> Your Honor, we'd object that the video is not accurately portray a fair portrayal of the incidents that occurred in the store that day, in that it has been controlled and redacted in a manner to which it does not — it only shows limited views that have been chosen to be produced and it doesn't show all the views that were available.

App. 197, ll. 2-9. The court overruled his objection and the video tape was entered in evidence and published. App. 197.

At the PCR hearing, Counsel clarified his issue with the videotape evidence, stating that the One Stop store had nine video cameras inside, but the State's discovery only included snippets from three of the cameras. App. 722. He clarified that the "missing video" evidence at issue in this case was the video from the six other cameras that Ms. Ashdown did not copy and save for law enforcement. App. 723, ll. 13-17.

Analysis

Counsel was not ineffective for failing to make a motion to suppress the videotape evidence. It is clear from the record that although Counsel did not make a pre-trial motion to suppress the videotape evidence, he did make a timely objection. During Ms. Talford's direct examination the State moved to enter the videotape into evidence and Counsel asked several questions of Ms. Talford concerning the authentication of the videotape. App. 195-196. After his questioning, and before the State continued its direct examination, Counsel made a timely objection to the videotape which was overruled by the trial judge. App. 197. Petitioner has failed to provide any evidence to show Counsel was deficient for failing to make a motion to suppress. It was not unreasonable for Counsel to wait until hearing testimony about the video evidence to make a timely objection to suppress the evidence and preserve the issue for appellate review.

Furthermore, Petitioner was not prejudiced by Counsel's actions. Counsel's objection had the exact same effect as a motion to suppress, as the evidence would have been suppressed had the judge sustained Counsel's objection. Clearly there is no prejudice for Counsel's failure to make a pretrial motion to suppress because the judge made a ruling on the evidence by overruling the objection. Thus, Counsel was not ineffective for failing to move to suppress the video evidence.

II. Petitioner's assertions that Counsel was ineffective for failing to adequately advise Petitioner regarding the potential risk of taking the case to trial and that Counsel was ineffective for failing to object to the Solicitor's failure to honor an agreement regarding sentencing are not preserved for appellate review as they were not raised to and ruled upon by the PCR court. Even if these issues were preserved, these issues are without merit.

Petitioner argues the PCR court erred in failing to grant post-conviction relief on the basis Counsel failed to adequately advise Petitioner regarding the potential risk of taking the case to trial. Petitioner further asserts that the PCR court erred in failing to grant post-conviction relief on the ground that Counsel did not object to the Solicitor's failure to honor an agreement regarding sentencing. Respondent contends that these issues are not preserved for appellate review as they were never raised before the PCR court and not ruled upon in the PCR court's Order of Dismissal. Even if this Court were to find that the issues were preserved, Counsel was not ineffective for failing to advise Petitioner regarding the risk of going to trial and for failing to object to the solicitor's failure to honor a sentencing agreement.

a. Petitioner's issues of whether Counsel was ineffective for failing to adequately advise Petitioner regarding the potential risk of taking the case to trial and whether Counsel was ineffective for failing to object to the Solicitor's failure to honor an agreement regarding sentencing are not preserved for appellate review.

The issues of whether Counsel was ineffective for failing to adequately advise Petitioner regarding the potential risk of taking the case to trial and whether Counsel was ineffective for failing to object to the Solicitor's failure to honor an agreement regarding sentencing are not preserved for appellate review.

Relevant Testimony

In her PCR Application, Petitioner did not raise either of these two issues. In her Petition

to this Court, she stated that she alleged "That the Petitioner was offered a plea of ten (10) and six (6) years. Defense Counsel persuaded her not to accept the plea and failed to adequately advise her of the exposure of trial verses acceptance of the plea." Petitioner's Petition for Writ of Certiorari. This issue was never raised to the PCR court. The only issue raised that can be construed as related to advice about going to trial reads as follows:

1. "My attorney did not make me aware of the fact that probation or time less than offered by the plea was not an option for the level of my charges."
    a. "He told me that he didn't agree with the plea deal offered. Lesser included charges could get me probation he said, but they were not offered when jury asked for them. State v. Campbell."

App. 646, 651-652.

During the PCR hearing, the only testimony from Petitioner regarding any allegations related to Counsel's advice about her plea offer or trial risk reads as follows:

> Q: Now as far as you decided to go to the trial versus accepting a plea offer from the State, what, if anything, did you discuss with your attorney about a plea?
>
> A: Over the phone, he just said that they offered a plea, but I don't think you want to take it. And he said it was — I remember something about 10 years, but he said well, why would you take that when you can leave with no time. So it was my understanding that the option was, like, zero to something — if found guilty, there was a possibility there would be no prison time. At the worst case scenario, if I were to be found guilty, I didn't know the charges — the level and severity of the charges, that wasn't even possible.
>
> Q: So your — when you got the offer, you didn't fully go through — or as far as you know, you don't know whether or not you fully exhausted your understanding of what the plea offer meant?
>
> A: Correct. I didn't understand.

App. 677, ll. 7-24.

No testimony was elicited from Petitioner that alleged Counsel was ineffective for failing to object to the solicitor's failure to honor a plea agreement. *See* App. 661-690.

The PCR court dismissed Petitioner's application, finding that Petitioner rejected all plea offers and that she failed to prove any prejudice in this regard because she did not show that she would have accepted the plea offer rather than proceed to trial. App. 754. As the issue was not raised, the PCR court did not make any findings regarding Counsel's failure to adequately advise Petitioner regarding the risk of going to trial. Similarly, the PCR court did not make any findings regarding Counsel's failure to object to the solicitor's failure to honor an agreement regarding sentencing.

Analysis

An issue must be raised to and ruled upon by the trial court to be preserved for appellate review. *See Moore,* 357 S.C. 458, 593 S.E.2d 608. This Court has made it abundantly clear that, where a PCR court fails to set forth findings and the reasons for those findings, the issue is not preserved for appellate review if the petitioner fails to make a Rule 59(e) motion requesting the PCR court make specific findings of fact and conclusions of law on the allegations. *Marlar,* 375 S.C. at 408–10, 653 S.E.2d at 266–67.

Here, it is clear from the PCR application and Petitioner's testimony at the PCR hearing that her allegation listed above concerned the State's plea offer and the amount of time that the charge carried. Nowhere prior to this appeal, did Petitioner allege that Counsel did not advise her of the risk of taking the case to trial. Additionally, Petitioner never made an allegation or provided testimony that would allege that Counsel was ineffective for failing to honor an agreement regarding sentencing. The Order of Dismissal did not address these two issues and Petitioner did not file a Rule 59(e) motion to address the issue. This Court should find based on the PCR application and testimony from the PCR hearing that the issues of whether Counsel was ineffective for failing to adequately advise Petitioner regarding the potential risk of taking the

case to trial and whether Counsel was ineffective for failing to object to the Solicitor's failure to honor an agreement regarding sentencing are not preserved for appellate review. *See also Mangal*, Op. No. 27726 (S.C.Sup.Ct. refiled October 4, 2017) (Shearouse Adv.Sh. No. 38 at 12) (finding an issue was not preserved for appellate review where the issue was not mentioned in Mangal's written application, PCR counsel did not make an oral amendment at the evidentiary hearing to add the issue as a claim, and he did not specifically make the claim at the hearing even when brief testimony on the issue came up).

b. Even if this Court were to examine Petitioner's issue whether Counsel was ineffective for failing to adequately advise Petitioner regarding the potential risk of taking the case to trial, it is without merit.

Even if this Court were to find that this issue was preserved for appellate review, no evidence exists to support Petitioner's claim.

Relevant Testimony

Petitioner presented no testimony at the PCR hearing to suggest that Counsel was ineffective for failing to adequately advise her regarding the potential risk of taking the case to trial. The only tangentially related testimony presented concerned the amount of time that Petitioner would be facing, where she testified "So it was my understanding that the option was, like, zero to something — if found guilty, there was a possibility there would be no prison time. At the worst case scenario, if I were to be found guilty. I didn't know the charges — the level and severity of the charges, that wasn't even possible." App. 677, ll. 14-19. Petitioner's testimony was in response to her PCR counsel's question about whether or not she understood the plea offers.

Counsel testified at the PCR hearing that he met with Petitioner and explained the nature of the charges, defenses available, and the minimum and maximum penalties Petitioner would be

facing "well before the first trial." App. 709, ll. 8-11. Counsel testified that he relayed the State's plea offers but Petitioner rejected every offer because she said she was not guilty and had no desire to take any plea. App. 714, ll. 13-25. He testified that the initial offer was for ten years, then after the mistrial the State offered six years to a lesser included offense. App. 728, ll. 7-20. Counsel testified on cross-examination that he and Petitioner "discussed all of the possibilities of pleading, being found guilty, not being found guilty, the possibility of an acquittal and everything in between." App. 729, ll. 23-25.

Analysis

It is clear from the testimony at the PCR hearing that Petitioner provided no evidence to support an allegation that Counsel failed to advise her of the risk of going to trial. Since this allegation was not alleged, there is very little related testimony from the PCR hearing regarding this issue. Counsel provided credible evidence that he explained the charges and the possible punishments, as well as defenses available and Petitioner's version of the facts. Respondent would also point out that Petitioner attended and testified at two trials, with the first ending in a mistrial. By experiencing the trial process previously, Respondent would argue that Petitioner was familiar with the process and the risks of going to trial during her **second** trial. *Strickland* holds "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Petitioner has provided no evidence to rebut this presumption. Thus, the evidence shows that Counsel's conduct fell below the reasonableness standard and his actions were not deficient.

Petitioner has failed to show that she was prejudiced by Counsel's alleged failure to adequately advise her of the potential risk of going to trial. She has failed to provide any evidence to show that the outcome of her trial would have been different had she known the

risks. Respondent would again point out that this was Petitioner's second trial on these charges. To the extent that Petitioner alleges that Counsel failed to convey the plea offers, Petitioner has provided no proof that she was prejudice as she has provided no evidence that she would have taken the plea offers. All evidence made it clear that she rejected every offer. This Court should find that even if Petitioner's issue that Counsel failed to adequately advise her of the potential risk of going to trial is preserved for appellate review, it should be dismissed.

c. Even if this Court were to examine Petitioner's issue whether Counsel was ineffective for failing to object to the solicitor's failure to honor an agreement regarding sentencing, the allegation is without merit.

Even if this Court were to find that this issue was preserved for appellate review, no evidence exists to support Petitioner's claim.

Relevant Testimony

After Petitioner was found guilty, the solicitor put on the record that prior to trial, he and Counsel met with the trial judge to discuss what the plea offers had been. The solicitor informed the court:

> And I told the Court that I was considering making a recommendation if we got to this point. I'll say now after hearing all the testimony in the trial I have no recommendation to make. I'll leave it in the Court's good judgment.

App. 625, l. 22 – 626, l. 1.

No testimony was given from Petitioner at the PCR hearing regarding this issue or alleging Counsel was ineffective for failing to object to the solicitor's statement. The only testimony related to this issue was given from Counsel in response to the State's plea offers. He testified he, the solicitor, and the trial judge met in chambers prior to the trial to talk about the plea offers. Counsel testified that the solicitor "said he would make a recommendation at the end of the trial for that six years. At the end of the trial, he didn't keep his word." App. 728, l. 25 –

729, l. 2. Counsel was then asked how a six year recommendation could be given after a guilty verdict since armed robbery carries at least ten years, and Counsel replied he did not know. App. 729, ll. 3-6.

Analysis

It is clear from the testimony at the PCR hearing that Petitioner provided no evidence to support an allegation that Counsel failed to object to the solicitor's failure to honor a sentencing agreement. Since this allegation was not alleged or raised in any way, there is very little related testimony from the PCR hearing regarding this issue and the issue is only briefly mentioned in one sentence from Counsel when he testified about plea offers. There is no evidence to support a claim that Counsel was ineffective for failing to object during trial.

Even if this Court were to examine this claim, Counsel was not deficient for failing to object to the solicitor's statement at the end of the trial that he would make no recommendation. First, the solicitor's actions were not objectionable as he has no duty to make a sentencing "offer" or recommendation at the end of a trial. The solicitor was certainly not bound by his statement to the trial judge and Counsel prior to the trial and prior to hearing any testimony that he would make a sentencing recommendation.

Petitioner addresses this issue using the logic of the law governing plea offers, however a trial presents a different situation. Our Supreme Court has recognized a plea agreement rests on contractual premises. *State v. Gates*, 299 S.C. 92, 94-95, 382 S.E.2d 886-87 (1989). Parties are free to withdraw offers until performance occurs. *Reed v. Becka*, 333 S.C. 676, 687, 511 S.E.2d 396, 402 (Ct. App. 1999). A plea agreement is only an "offer" until the defendant enters a court-approved guilty plea. *Id.* at 668, 511 S.E.2d at 403. Until formal acceptance has occurred, the plea is not binding on the defendant, the State, or the court. *Id.* This general rule is subject to a

detrimental reliance exception. *Custodio v. State*, 373 S.C. 4, 11, 644 S.E.2d 36, 39 (2007); *Reed*, 333 S.C. at 688, 511 S.E.2d at 403. Absent a plea of guilt, a defendant may enforce an oral plea agreement upon a showing of detrimental reliance. *State v. Miller*, 375 S.C. 370, 389, 652 S.E.2d 44, 454 (2007). State prosecutors are obligated to fulfill the promises they make to defendants when those promises serve as inducements to defendants to plead guilty. *Santobello v. New York*, 404 U.S. 257, 262 (1971). However, a defendant may not attempt to create a firm commitment out of plea negotiations. *State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683 (1996).

After examining the law on plea offers, it is clear that such principles do not work in a trial context. In a plea, the defendant accepts the State's offer of a particular sentence by giving up consideration in the form of a pleading guilty and giving up his freedom. In a trial's context, any recommendation the State may predictively "offer" cannot be accepted because the defendant cannot give up any consideration. The defendant is not giving up his freedom by proceeding to a trial and she is not detrimentally relying on the possibility of the State making a certain recommendation in proceeding to trial because she is presumed innocent until a jury finds her guilty. Given these principles, this Court should conclude that the solicitor's statement that he may make a sentencing recommendation did not constitute an "agreement" or any sort of binding "offer." Because the solicitor's statement was not objectionable, Counsel was not deficient for failing to object.

Furthermore, Petitioner has not provided any evidence to show that she was prejudiced by Counsel's failure to object because she has failed to show that an objection would be sustained. It is clear that an objection would not be sustained because the solicitor's possible recommendation following a guilty verdict did not constitute a binding offer and would have no mandatory effect on the judge's decision. The trial judge had the authority to impose Petitioner's

sentence and sentenced Petitioner within the statutorily prescribed range. Petitioner has failed to show that the outcome of her trial would have been different had Counsel objected to the solicitor's statement during sentencing. This Court should find that even if Petitioner's issue that Counsel failed to object to the solicitor's statement is preserved for appellate review, it should be dismissed.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issue discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

JUSTIN J. HUNTER
Assistant Attorney General
S.C. Bar # 101254

By: _____
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November 16, 2017

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2016-001914

CONNIE MURRAY DUMAS,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Tommy A. Thomas, Esquire
Post Office Box 88
Irmo, South Carolina 29063

This 16th day of November, 2017

CAROLINE COLLINS
Administrative Coordinator

ALAN WILSON
ATTORNEY GENERAL

November 16, 2017

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Connie Murray Dumas v. State of South Carolina**
Appellate Case No. 2016-001914
Lower Court Case No. 2014-CP-46-1332

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Justin J. Hunter
Assistant Attorney General
SC Bar No. 101254

JJH/cc
Enclosures

cc: Tommy A. Thomas, Esquire