STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Lexington County
Court of Common Pleas
Robert E. Hood, Circuit Court Judge

Appellate Case No. 2017-001742
Lower Court Case No. 2015-CP-32-1885

Juan Arroyo, #354538,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTION PRESENTED

Whether the PCR court erred in concluding that defense counsel was not ineffective for failing to properly advise Petitioner of all plea offers conveyed by the State?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the State Grand Jury Clerk of Court. Petitioner was indicted at the September 2010 term of the State Grand Jury on seven counts including trafficking heroin, possession with intent to distribute heroin, and conspiracy. (2010-GS-47-4707). Petitioner initially proceeded to trial on November 15, 2011, before the Honorable William P. Keesley. A mistrial was declared after the State solicited testimony from an agent concerning other crimes unrelated to the charge being tried. Judge Keesley ruled that, although unintentional and inadvertent, the State violated an agreement with defense counsel that they would not mention controlled narcotics buys from other parts of the investigation. Petitioner was then retried on March 4th-5th, 2013, where he was convicted. Judge Keesley sentenced Petitioner to the mandatory minimum sentence of twenty-five (25) years' imprisonment.

A Notice of Appeal was filed on Petitioner's behalf on March 14, 2013. Benjamin John Tripp, Esquire, represented Petitioner on appeal, and submitted a final brief and petition to be relieved as counsel pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the appeal. State v. Arroyo, Op. No. 2014-UP-338 (S.C. Ct. App. filed September 24, 2014). The remittitur was also sent on September 24, 2014.

Petitioner subsequently filed an application for post-conviction relief on May 22, 2015. On April 18, 2017, an evidentiary hearing was held before the Honorable Robert E. Hood. Petitioner testified on his own behalf. Counsel Debra R. Chapman and Bradley M. Kirkland also testified. On June 2, 2017, Judge Hood issued an Order of Dismissal, denying relief. Petitioner

served and filed a notice of appeal to the South Carolina Supreme Court. A Petition for Writ of Certiorari was filed on March 22, 2018. This Return follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

Counsel properly conveyed all plea offers made by the State to Petitioner. Regardless, Petitioner would not have accepted the alleged plea offer of a recommended sentencing range of 14 to 18 years.

Petition argues the PCR court erred in failing to find Counsel failed to convey a plea offer of a recommended sentencing range of 14 to 18 years imprisonment. The State only made an offer of a negotiated, *not* recommended, sentencing range of 14 to 18 years, so the alleged offer did not exist and was never presented to Counsel. Furthermore, Petitioner did not meet his burden in proving that he would have accepted the alleged offer if it had been made.

A. Relevant Law

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

B. Discussion

1. Counsel Chapman and Kirkland conveyed all plea offers made by the State to Petitioner.

There is probative evidence to support the PCR court's findings that Counsel fully conveyed all plea offers to Petitioner. First, the premise of Petitioner's argument is faulty.

Petitioner argues that Counsel were ineffective for failing to advise him that Petitioner could require the State and the Court to accept a recommended sentencing range of 14 to 18 years. The State is generally not bound by any plea offers until they are accepted, that is when a defendant pleads guilty. "Both the South Carolina Constitution and South Carolina case law place the unfettered discretion to prosecute solely in the prosecutor's hands." Ex parte Harrell v. Attorney Gen. of State, 409 S.C. 60, 69, 760 S.E.2d 808, 812 (2014). "The Judicial Branch is not empowered to infringe on the exercise of this prosecutorial discretion; however, on occasion, it is necessary to review and interpret the results of the prosecutor's actions." Id. It is ultimately in the State's discretion of whether to make any plea offers. Id. Plea agreements rest upon contract principles. State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994). The plea agreement exists only as an "offer" until the defendant accepts by entering into a court-approved guilty plea; until which point neither the State, the defendant, nor the court are bound by the plea agreement. Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999) (citations omitted). Here, the court could not have required the State to allow Petitioner to plead guilty to a recommended sentencing range of 14 to 18 years. See Custodio v. State, 373 S.C. 4, 10, 644 S.E.2d 36, 39 (2007) (Absent an actual plea of guilty, a defendant may enforce an oral plea agreement upon a showing of detrimental reliance on a prosecutorial promise in plea bargaining. The State may withdraw a plea offer at any time prior to the court accepting the defendant's plea.). Petitioner did not present any evidence that the State would have agreed to a recommended, rather than negotiated range.

Second, Petitioner failed to present persuasive evidence that a valid and enforceable plea offer of a recommended sentencing range of 14 to 18 years ever existed. This is fatal to Petitioner's argument as he has failed to meet his burden of production. The PCR court properly

found that the final and most favorable plea offer from the State was the negotiated 14 to 18 year range. This finding is supported by both Counsel Chapman and Kirkland's credible testimony that the plea offer was for a negotiated sentencing range of 14 to 18 years, *not* a recommended range. (App. p. 633; 714). Petitioner points to the written plea agreement which states, "The parties have negotiated the sentence of Defendant, Juan Rodolpho Arroyo, for a recommended sentencing range of fourteen (14) to eighteen (18) years." (App. p. 739). Petitioner argues that this handwritten addendum should have controlled the outcome of the case. Counsel Chapman explained that the offer was never for a recommended range and that the prosecutor on the case would not allow Petitioner to plead to a recommended range. (App. p. 630-31; 633-34).

Further, the proposed sentencing sheet that accompanied the plea agreement had "Negotiated 14-18" written on it and had the "Negotiated Sentence" box checked which further shows the offer was a negotiated range, not a recommended range. (App. p. 656-67; 633-34). This was considered by the PCR court as Judge Hood was the one who pointed this out and elicited the response from Counsel Chapman at the hearing. (App. p. 656-58). Finally, Counsel Chapman testified that she reviewed all plea offers with Petitioner and that he was not willing to accept them. (App. p. 632; 648). In conclusion, while the plea agreement used the word "recommended," it is clear after examining Counsels' testimony and the sentencing sheet that the State's offer was for a negotiated range of 14 to 18 years.

2. Petitioner failed to prove that he would have accepted an offer for a recommended range of 14 to 18 years' imprisonment.

"Counsel's failure to convey a plea offer constitutes deficient performance." Davie v. State, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009). However, prejudice is determined on a case-by-case approach in order to determine whether

"[B]ut for counsel's deficient performance a defendant would have accepted the

> State's proposed plea bargain and that he would have benefitted from the offer. Because presumed prejudice is reserved to very limited situations . . . a defendant must show actual prejudice. However, it is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a defendant's self-serving statements may be sufficient to establish actual prejudice." Davie, 381 S.C. at 613, 675 S.E.2d at 422 (citations omitted).

Even assuming this offer was not conveyed, the PCR court found that Petitioner failed to meet his burden of proof to show that he would have accepted the offer. Petitioner's testimony at the PCR hearing that he would have accepted a recommended range was inconsistent with his written letters to Counsel. (App. p. 745-48) (Petitioner writing to Counsel Chapman that his "final decision" would be to go to trial unless he is offered a "time served plea."). It was also inconsistent with what he told Counsel while plea negotiations were on-going. (App. p. 629-30; 648; 682; 699-702). Still, Petitioner's testimony regarding the alleged plea offer was varying and found not credible by the PCR court. "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." Solomon v. State, 313 S.C. 526, 443 S.E.2d 540, 542 (1994). Petitioner asks this Court to reject the factual and credibility findings made by the PCR court. Those findings are clearly supported by the record. Petitioner's letter and Counsels' testimony is consistent with the fact that Petitioner was not happy with the plea offer, decided to go to trial, and wanted to put his fate in "God's hand." (App. p. 648; 684; 702; 711-12; 727-28). Despite Counsels' extensive efforts to convince Petitioner to accept the plea offer, he rejected it and decided to go to trial. (App. p. 628; 630-32; 711-14).

As noted above, Petitioner also failed to show that there was a "reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms, and that the conviction and sentence under the offer's terms would have been less severe

than under the actual judgment and sentencing imposed." Lafler v. Cooper, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012). In sum, even assuming that the alleged plea offer existed, Petitioner failed to prove he would have accepted a recommended sentencing range of 14 to 18 years. Certiorari is not warranted to address this issue.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling as there is ample evidence of probative value to support the PCR Court's denial of Petitioner's application. Should this Court grant Certiorari, Respondent requests permission under the rules to fully brief the issue discussed above.

Respectfully submitted,

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BY:

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JUAN ARROYO, #354538,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

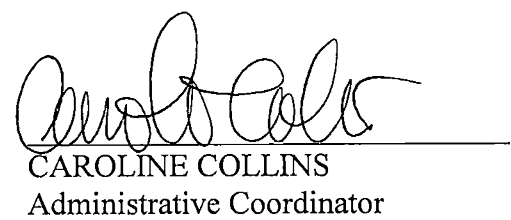
Respondent.

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:

Jeremy A. Thompson, Esquire
Law Ofc. of Jeremy A. Thompson, LLC
Post Office Box 1834
Irmo, South Carolina 29063

This 23rd day of July, 2018



CAROLINE COLLINS
Administrative Coordinator

ALAN WILSON
ATTORNEY GENERAL

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S.C. SUPREME COURT

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

Re: **Juan Arroyo, #354538 v. State of South Carolina**
Appellate Case No. 2017-001742
Lower Court Case No. 2015-CP-32-1885

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,

J. Clayton Mitchell
Assistant Attorney General
SC Bar No. 101443

JCM/cc
Enclosures

cc: Jeremy A. Thompson, Esquire (2 copies)