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**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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On Petition for Writ of Certiorari to Spartanburg County  
Court of Common Pleas

The Honorable Letitia H. Verdin, Trial Judge  
The Honorable J. Mark Hayes, II, PCR Judge

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Appellate Case No. 2020-000143

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BRITTANY FOSTER. .... Petitioner,

v.

STATE OF SOUTH CAROLINA. .... Respondent.

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**BRIEF OF RESPONDENT**

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ALAN WILSON  
Attorney General

CHELSEY F. MARTO  
Assistant Attorney General  
S.C. Bar # 104191

Post Office Box 11549  
Columbia, S.C. 29211  
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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## **STATEMENTS OF ISSUE**

### **Petitioner's Statement of Issue**

Whether the PCR court erred where it found plea counsel provided effective representation where counsel advised Petitioner Foster to plead guilty but he did not advise Foster that she could challenge the admissibility of her confessions at trial, where Foster would have exercised her right to trial had she known she could challenge this critical evidence, and where there was a reasonable probability Foster would have succeeded in suppressing her confessions, since counsel's deficient performance resulted in Foster's entry of guilty pleas that were not knowingly, voluntarily, and intelligently tendered?

### **Respondent's Counterstatement of Issue**

Whether the PCR court properly found that Petitioner's plea counsel provided effective representation by advising Petitioner to plead guilty without reference to the admissibility of her confessions, where no credible evidence corroborates Petitioner's claim that she would have proceeded to trial had her plea counsel specifically advised her about the possibility of the confession being suppressed?

## STATEMENT OF THE CASE

Brittany Foster (hereafter “Petitioner”) is presently confined in the South Carolina Department of Corrections. During its August 2016 term, the Spartanburg County Grand Jury indicted Petitioner for possession of methamphetamine (2016-GS-42-04423), unlawful possession of a pistol (2016-GS-42-04427), and murder (count one) and possession of a firearm during the commission of a violent crime (count two) (2016-GS-42-04429). Petitioner was represented by Robert B. Hall, Esquire (hereafter “Counsel”). Solicitor Barry J. Barnette, Esquire, from the Seventh Circuit Solicitor’s Office, represented the State. On April 27, 2017, Petitioner pled guilty as indicted before the Honorable Letitia H. Verdin, circuit court judge. Judge Verdin sentenced Petitioner to forty years’ imprisonment for murder, five years’ imprisonment for unlawful possession of a weapon, three years’ imprisonment for possession of methamphetamine, and one year imprisonment for unlawful carrying of a pistol.

Petitioner filed a timely notice of appeal, and the appeal was perfected by Robert B. Hall, Esquire. By order dated July 17, 2017, the South Carolina Court of Appeals dismissed Petitioner’s appeal due to the failure to provide a sufficient explanation, as required by Rule 203(d)(a)(B)(iv), SCACR. The remittitur was issued on August 3, 2017.

Petitioner timely filed a PCR application on February 27, 2018. Respondent made its return on May 4, 2018. Petitioner amended her PCR application on June 7, 2018. The evidentiary hearing occurred on November 8, 2018, before the Honorable J. Mark Hayes, II, circuit court judge. Susannah C. Ross, Esquire was Petitioner’s attorney. Jordan A. Cox, Esquire of the South Carolina Attorney General’s Office represented Respondent. The Court issued an order of dismissal, denying Petitioner’s PCR application and remanding her to the custody of the South Carolina Department of Corrections on January 21, 2020.

Petitioner filed a petition for writ of certiorari. Respondent filed its return on December 29, 2020. The matter was transferred from the South Carolina Supreme Court to the South Carolina Court of Appeals. Certiorari was granted on August 19, 2022. Petitioner filed their brief of petitioner on September 28, 2022. This brief of respondent follows.

## STATEMENT OF FACTS

On May 30, 2016, Spartanburg County Sheriff's deputies responded to reports of a floating vehicle in Lake Bowen in Inman, South Carolina. (App. 11). The vehicle was recovered, and a blood-stained spiral notebook was found nearby. (App. 11, 136, 140). Blood was found in the backseat, and a bullet hole was found in the rear driver's side window. (App. 164). Two spent shell casings were found in the passenger side floorboard, and a fired projectile was found in the backseat. (App. 164). It was determined that the vehicle belonged to a relative of Anthony Biggerstaff, and was often driven by his former roommate, Keenen Hines. (App. 143, 164). Officers sent a BOLO out to find Hines and his girlfriend, Petitioner, who had previously lived with Biggerstaff but recently moved out. (App. 11-12).

Officers first contacted Hines and Petitioner at the Roadway Inn, where they were staying, after Biggerstaff had told them his landlord required they move out. (App. 164). After initially hesitating to speak with police, Petitioner told officers that Biggerstaff had made sexual advances toward her, and Hines provided police with his contact information. (App. 164). A search of Biggerstaff's residence revealed a receipt from a Food Lion in Columbus, North Carolina, the previous day. (App. 164-65). After viewing the surveillance video at the Food Lion, officers contacted Dea O'Shields, who had been with Biggerstaff, Hines, and Petitioner the previous day. O'Shields stated that they were acting "very shady," and that Hines and Petitioner knew of a \$10,000 inheritance Biggerstaff had received the previous month. (App. 164).

On June 2, 2016, Sergeant Henderson of the Spartanburg County Sheriff's Office stopped a vehicle because he could not read the expiration date on the vehicle's paper tags. (App. 12, 125). The driver of the vehicle did not stop immediately, but continued down New Cut Road, traveled over an overpass on I-85, and turned down a side street before coming to a stop. (App.

125-26, 196). The vehicle was being driven by Jessica Nesbitt, and Keenen Hines and Petitioner were riding as passengers. (App. 12, 196). Upon approaching the vehicle, Sergeant Henderson noted that Hines was nervous and appeared to be putting something underneath his seat. (App. 116, 196).

Nesbitt was unable to produce a driver's license but stated that she believed it may have been in the trunk of the vehicle. (App. 12, 196). As Nesbitt was searching through the trunk, officers spotted a small baggy containing a substance later identified as methamphetamine. (App. 12-13, 196). Nesbitt told officers that Hines had a pistol in the vehicle, and officers later recovered a loaded black revolver with a cocked hammer underneath the seat. (App. 13, 196). All three passengers were arrested. (App. 13). The pistol was returned as stolen. (App. 196).

Officers sought to question Petitioner, suspecting that she was involved in Biggerstaff's murder. (App. 166). Petitioner immediately started crying and repeatedly said she shot him. (App. 166). Petitioner was informed of her *Miranda* warnings, provided a pre-interrogation waiver form, signed it, and again confessed to the murder. (App. 13).

While searching for the body, police stopped at a liquor store near the Roadway Inn where Petitioner and Hines were staying and asked to review the surveillance footage. (App. 166). The footage showed Petitioner, Hines, and Biggerstaff leaving the store together in Biggerstaff's vehicle. (App. 166). Police then provided Petitioner with food and questioned her a second time. (App. 166). In her second statement, Petitioner admitted that she shot Biggerstaff seven times with a .380 handgun that belonged to Hines's brother. (App. 14). After the shooting, Hines and Petitioner ditched the vehicle in the lake and dumped the body in a creek. (App. 14, 145). Petitioner later changed her story multiple times when speaking to Counsel, claiming that she shot Biggerstaff in self-defense and that she had shot him under the duress of Hines's threats

to kill her if she did not shoot Biggerstaff. (App. 105).

Hines corroborated the details of Petitioner's confession when questioned by police. (App. 166-67). He stated that he gave her the gun, that she wanted to kill Biggerstaff, that she shot him while in the passenger seat of the vehicle, and that they had dumped the body under a bridge before driving the car into the lake. (App. 166-67). After disposing of the vehicle, Hines called his brother to take them back to the Roadway Inn. (App. 167). His brother was contacted, provided the gun, and was matched to the vehicle described by Hines. (App. 167).

## STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts “give[] great deference to the PCR court’s findings of fact and conclusions of law”, *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the petitioner shouldering the burden of proof. Rule 71.1(e), SCRCPP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Further, a PCR court’s findings will be upheld if there is “any evidence of probative value sufficient to support them.” *Id.* Reversal of the lower court’s findings occurs only if no probative evidence to support the findings. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts only conduct a *de novo* review if evaluating questions of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

On appeal, Petitioner argues the PCR court erred in denying her relief because Counsel was ineffective for failure to discuss with her the possibility of suppressing her confession at trial. However, the PCR court properly rejected this argument, finding that Petitioner failed to establish she would have proceeded to trial but for Counsel's omission. Accordingly, Petitioner failed to establish prejudice. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should affirm the finding of the circuit court.

When a petitioner asserts ineffective assistance of counsel as a ground for relief, they must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the petitioner must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the petitioner must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRPC ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the petitioner so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant because of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

In the context of a guilty plea, the petitioner must show there is a reasonable probability that but for ineffective assistance of counsel, he or she would not have pled guilty but, instead, would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). *See also Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). "A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing 1) that counsel's representation fell below an objective standard of reasonableness and 2) that there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty but would

have insisted on going to trial.” *Wolfe v. State*, 326 S.C.158, 485 S.E.2d 367 (1997); accord *Hill v. Lockhart*, 474 U.S. 52 (1985); *Roscoe v. State*, 345 S.C. 16, 546 S.E.2d 417 (2001). Absent valid reasons why the petitioner is entitled to depart from previous judicial admissions made at the plea hearing, statements made during the original proceeding remain conclusive. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

To show prejudice, the petitioner is required to show that the deficiency would have affected counsel’s advice to accept the plea bargain or cause petitioner to decline accepting the bargain. See *Stalk v. State*, 383 S.C. 559, 681 S.E.2d 592 (2009) (quoting *Hill, supra* and discussing the prejudice prong). This requires more than the bare assertion that “but for” the deficiency, petitioner would not have pled guilty, but gone to trial instead. *Id.* at 563, 681 S.E.2d at 594-595.

The Fourth Circuit has recognized that determining prejudice is an objective inquiry depending “on the likely outcome of a trial had the defendant not pleaded guilty.” *Meyer v. Banker*, 506 F.3d 358, 369 (4th Cir. 2007); see *Hooper v. Garraghty*, 845 F.2d 471, 475 (4th Cir. 1988) (noting despite focus on a subjective inquiry in *Lockhart*’s prejudice standard, the answer to the prejudice inquiry “must be reached through an objective analysis.”).

To show prejudice in the context of a guilty plea, a PCR applicant must show that he would not have pled guilty but for counsel’s errors and “must convince the court that such a decision would have been rational under the circumstances.” *United States v. Fugit*, 703 F.3d 248, 260 (4th Cir. 2012) (internal quotation marks omitted) *cert denied*, 134 S.Ct. 999 (2014) citing *Padilla v. Kentucky*, 559 U.S. 356, 372 (2009). “The challenger’s subjective preferences,

therefore, are not dispositive; what matters is whether proceeding to trial would have been objectively reasonable in light of all of the facts.” *Fugit*, at 260.

The plea transcript reflects that Petitioner pled freely, knowingly, intelligently, and voluntarily. Petitioner admitted she discussed her charges with Counsel, that she had sufficient time to talk to him, and that her decision to plead was not coerced. (App. 5). She acknowledged she was not promised anything to plead. (App. 5). She waived her rights to a jury trial, to remain silent, and to call and confront witnesses. (App. 5-6). Petitioner admitted she had a history of mental health issues and that she was evaluated and found competent to stand trial. (App. 6-8). She admitted that she did not have any complaints against Counsel, the State, or law enforcement in the handling of her case. (App. 8). After the State recited the facts of the case, Petitioner pled guilty on all three counts. (App. 9-15). Counsel submitted to the Court that he thought Petitioner understood their conversations, understood the State’s theory of the case if the matter proceeded to trial, and agreed with her decision to plead. (App. 16).

At the PCR hearing, Petitioner admitted she pled because she was afraid of a harsher sentence at trial. (App. 56-57). Petitioner also admitted that, though their conversation about the confession was brief, Counsel informed her that it was sufficient evidence to convict. (App. 57). Counsel reviewed the discovery with Petitioner, including the police statement. (App. 95, 103-04). Counsel testified that he gave Petitioner a generalized warning that if she pled, she would waive “any rights to challenge any of the evidence, statements, or anything.” (App. 121-22). After reviewing the statement, Counsel informed Petitioner she would likely lose at trial and be more likely to receive a life sentence at trial than she would by pleading. (App. 109, 113-14). Counsel testified that, in his professional judgment, any challenge to the police statement would not have been successful. (App. 113).

Petitioner has failed to establish any prejudice from the alleged failure to communicate with Petitioner the prospects of suppressing the statement. Specifically, she has failed to substantiate the claim that she would have proceeded to trial but for Counsel's alleged failure. Petitioner acknowledged that she pled because she was afraid of a harsher sentence at trial. Counsel corroborated this. Counsel also acknowledged that the confession likely would not have been suppressed and did not alter his advice or opinion that pleading was in Petitioner's best interest. Petitioner failed to show how the motion would have been successful. She has also failed to support her prejudice argument with any corroborating evidence. Thus, any assertion of prejudice is not objectively reasonable. *See Fugit*, 703 F.3d at 260 (4th Cir. 2012) (internal quotation marks omitted) *cert denied*, 134 S.Ct. 999 (2014) citing *Padilla v. Kentucky*, 559 U.S. 356, 372 (2009). ("The challenger's subjective preferences, therefore, are not dispositive; what matters is whether proceeding to trial would have been objectively reasonable in light of all of the facts." *Fugit*, at 260). Petitioner has failed to establish her burden of proof regarding prejudice and relief should be denied accordingly.

**CONCLUSION**

For the reasons stated above, this Court should affirm the PCR Court's findings.

Respectfully submitted,

ALAN WILSON  
Attorney General

CHELSEY F. MARTO  
Assistant Attorney General

BY: /s Chelsey F. Marto  
Chelsey F. Marto

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-0386

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