STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Spartanburg County
Honorable J. Mark Hayes, II, Circuit Court Judge

Opinion No. 2024-UP-077 (S.C. Ct. App. Filed March 13, 2024)

Lower Court Case No. 2018-CP-42-00711

BRITTANY C. FOSTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000774

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on April 12, 2024.

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in finding it was highly unlikely that suppressing Foster's confessions would have materially decreased the odds of an unfavorable trial outcome, since effective counsel would have recognized that while Foster did not have a viable self-defense claim she did have reasonable grounds for a jury to find her guilty of the lesser offense of voluntary manslaughter based on two different theories raised by the evidence in this case?

II. Whether the Court of Appeals erred in finding Foster's testimony regarding proceeding to trial was not credible, since that finding was wholly without support in the record and the PCR court only found her not credible on one of eight grounds raised during PCR?

III. Whether the Court of Appeals erred by not addressing Foster's PCR ground that counsel should have advised her she could move to suppress her confessions, where caselaw shows counsel was incorrect in his assessment that such attempts would be unsuccessful, and where counsel's deficient performance resulted in Foster's entry of pleas that were not knowingly, intelligently, and voluntarily tendered?

STATEMENT OF THE CASE

During the August 2016 term, a Spartanburg County Grand Jury indicted the petitioner, Brittany C. Foster, for murder, possession of a weapon during the commission of a violent crime, unlawful carrying of a pistol, and possession of methamphetamine. On April 27, 2017, Foster pleaded guilty as indicted before the Honorable Letitia Verdin. Barry Joe Barnette represented the State. Robert Hall represented Foster. Foster was sentenced to serve concurrent terms of

imprisonment of forty years for murder, five years for possession of a weapon during the commission of a violent crime, one year for unlawful carrying of a pistol, and three years for possession of methamphetamine. App. 307 – 312; App. 1; App. 27, ll. 16-19. Notice of intent to appeal the guilty pleas was timely filed and served and the Court of Appeals dismissed the appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR. The remittitur was issued August 3, 2017.

On February 27, 2018, Foster filed an application for post-conviction relief (PCR). On May 4, 2018, the State made its return and motion for a more definite statement. On June 7, 2018, Foster filed an amended PCR application. On November 8, 2018, a hearing was held on the matter before the Honorable J. Mark Hayes, II. Foster was represented by Susannah Ross. The State was represented by Jordan Cox. On January 24, 2020, the PCR court issued an order of dismissal. App. 29; App. 30; App. 31 – 37; App. 38 – 45; App. 46 – 48; App. 49; App. 293 – 306. Notice of intent to appeal the order of dismissal was timely filed and served on January 28, 2020.

Foster filed a petition for writ of certiorari. The State made its return. On January 15, 2021, this Court transferred the case to the Court of Appeals pursuant to Rule 243(l), SCACR. On August 19, 2022, the Court of Appeals granted certiorari. Foster filed her brief of petitioner. The State filed its brief of respondent. A three-judge panel of the Court of Appeals heard oral argument on February 6, 2024. The Court of Appeals affirmed in an unpublished opinion, *Foster v. State*, Op. No. 2024-UP-077 (S.C. Ct. App. filed March 13, 2024). Petitioner moved for rehearing. The Court of Appeals denied rehearing. This petition for writ of certiorari follows.

REASONS WHY CERTIORARI SHOULD BE GRANTED

This Court should grant certiorari because substantial constitutional issues are directly involved. This case involves the erroneous deprivation of the right to effective assistance of

counsel. Counsel was ineffective because he had an incorrect understanding of points of law critical to the case—suppression based on unconstitutional searches and seizures and involuntary confessions. U.S. Const. amend. IV; VI; XIV. *See* Rule 242(b)(4), SCACR.

STATEMENT OF FACTS

Brittany Foster's case stemmed from the 2016 death of the decedent, forty-five-year-old Anthony Biggerstaff. Foster was twenty-one years old with a ninth-grade education. She was in special education classes throughout school. She had brain damage, epileptic seizures, and learning disabilities. She was sexually abused by her own father at the age of eleven, and her mother was addicted to drugs. Foster had a significant history of cutting herself. She became addicted to drugs at the age of fifteen. She was raped at age eighteen. App. 311 – 312; App. 6, ll. 11-14; App. 218; App. 93, ll. 4-5; App. 88, ll. 7-10; App. 85, l. 17 – 86, l. 22; App. 219; App. 86, l. 23 – 87, l. 1; App. 89, ll. 5-15.

In May of 2016, Foster was living with her boyfriend, Keenen Hines (Hines). The two were roommates with the decedent. Decedent had been taking Foster's panties. One day, Foster woke up in "excruciating pain," bleeding from the vagina and rectum. She asked Hines if he had sex with her: Hines said he had not. Hines became angry with Foster and accused her of cheating on him with the decedent—the only other person in the house. However, Foster would later realize that Hines may have "sold" her to the decedent when she was "passed out." App. 11, l. 22 – 12, l. 1; App. 64, l. 24 – 65, l. 6; App. 65, l. 8 – 66, l. 8; App. 63, l. 25 – 66, l. 3; App. 22, ll. 4-6; State's Exhibit #5.

On May 29, 2016, Hines, Foster, and the decedent were together in the decedent's car. The night would end with the decedent dead in a creek and his car floating in Lake Bowen. After authorities found the decedent's car floating in the lake and what appeared to be a suicide note

nearby, police began looking for Foster and Hines, since they were the decedent's roommates. App. 13, l. 15 – 14, l. 18; App. 255; App. 11, l. 13 – 14, l. 1. On May 30, 2016, Investigator Clark interviewed Foster and Hines at a hotel. According to Clark, Foster and Hines said they were staying at the hotel because the decedent told them they had to move out. Clark said Foster "made the comment that [the decedent] had made several sexual comments and advances towards her," but that Foster and Hines "were hesitant to talk to me." Clark left after giving them his business card. App. 143; App. 150; App. 164.

Four days later, on June 2, 2016, Foster and Hines were passengers in car driven by Jessica Nesbitt (Nesbitt). The car was pulled over because Officer Henderson could not read the date on the car's paper tag. No traffic violations were observed. Nesbitt was in the driver's seat, Hines was in the passenger's seat, and Foster sat in the rear. Nesbitt continued driving briefly before she pulled over. When Nesbitt looked through purses in the trunk for her driver's license, Officer Henderson saw a bag of methamphetamine. Nesbitt admitted the methamphetamine was hers. Henderson asked Nesbitt about the presence of any weapons, and Nesbitt said that Hines had a gun. There was a gun under the front passenger seat where Hines had been seated. There was marijuana inside a bookbag on the passenger floorboard. App. 196; App. 99, ll. 15-21; App. 196 – 197; App. 99, l. 22 – 101, l. 25; App. 196; App. 200; App. 197.

Although nothing linked Foster to the gun under Hines' seat, the methamphetamine in Nesbitt's trunk, or the marijuana in the bookbag by Hines, Foster was arrested along with Nesbitt and Hines. All three—Nesbitt, Hines, and Foster—were charged with unlawful carrying of a pistol, possession of methamphetamine, and possession of marijuana. Nesbitt was charged with additional drug crimes for more drugs found on her person. App. 200; App. 102, l. 23 – 103, l. 2; R. 13, ll. 2-8; App. 197.

After Foster was taken to the jail, Investigator Clark, who wanted the opportunity to question her again, began to interrogate Foster. Foster, who was under the influence of drugs and alcohol, admitted shooting the decedent. Foster was read *Miranda*[1] warnings and officers took her out to look for the body, but this was unsuccessful. Foster was taken to the Sheriff's Department and again provided *Miranda*. Investigator Clark obtained a recorded confession from Foster in which she admitted that she had killed the decedent and said Hines helped her dispose of the body. App. 103, ll. 4-15; App. 57, ll. 15-18; App. 59, ll. 2-9; App. 166; App. 145; App. 166; App. 145; App. 166; App. 204; State's Exhibit #4. During the interrogation, Foster stated the day before the shooting, Decedent had set up her and Hines to get "jumped" behind Decedent's house. Foster said they were chased, and Hines was beaten with metal poles and bats. Foster's meager belongings were stolen. The day of the shooting, Foster stated Decedent was trying to get sex from her and was saying "nasty things" to her. Decedent had her stolen belongings. He was taunting Foster about having them jumped. Foster told law enforcement she was getting "angrier and angrier." Foster stated she finally shot Decedent. State's Exhibit #4.

Although she initially denied that Hines was involved in the murder, Foster would later say that Hines gave her the gun, asked her if she was going to let the decedent get away with raping her, and told her, "Do it." Foster stated when the shooting happened, Hines was asking her "if I was just going to let him do that to me." As seen, Foster had been raped while living with Hines and Decedent. Given her profound mental disabilities, Hines's remarks just prior to the shooting gave Foster the insight that the decedent was the person who had raped her the day she woke up bleeding. App. 66, ll. 12-15; App. 14, ll. 3-6; App. 22, l. 4 – 23, l. 24; App. 66, ll. 12-15; App. 63, l. 25 – 66, l. 15; App. 215 – 225.

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Hines was questioned and he admitted he helped hide the decedent's body, and he told law enforcement Foster shot Decedent because he was "touchy-feely" with her, "like a pedophile." Hines said Foster was angry with Decedent and called him a "sick bastard." According to Hines, Foster killed Decedent because Decedent "did grab her panties and stuff like that." Hines stated Decedent had said "perverted things" to Foster. Hines stated the shooting "wasn't planned," and Petitioner told him afterwards that the decedent deserved it. Hines showed officers where the decedent's body was located, and he was charged with accessory after the fact. App. 145; App. 205 – 211; State's Exhibit #5; App. 145; App. 155.

A pre-trial competency examiner noted Foster had "deficits" in her understanding of the legal system and opined that she might need education regarding the legal process. Foster's counsel advised that she plead guilty, straight up. On April 27, 2017, Foster did so. No negotiations had been entered and no recommendations were made. Foster was sentenced to serve concurrent terms of imprisonment of forty years for murder, five years for possession of a weapon during the commission of a violent crime, one year for unlawful carrying of a pistol, and three years for possession of methamphetamine.[2] App. 224; App. 109, ll. 15-21; App. 113, l. 17 – 114, l. 20; App. 121, l. 20 – 122, l. 1; App. 1; App. 4, ll. 12-14; App. 27, ll. 16-19.

Foster filed an application for post-conviction relief (PCR). A hearing was held on the matter. Foster testified that plea counsel did not advise her that she could challenge the admissibility of her statements if she went to trial. Foster stated defense counsel did not mention

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[2] At the plea hearing, the solicitor misspoke and said that Nesbitt's car had been pulled over for an expired tag. Plea counsel did not correct this misstatement of fact. Nesbitt was actually pulled over because Officer Henderson said he could not see the expiration date on her temporary tag—the tag was not expired. App. 12, ll. 6-12; App. 99, ll. 15-18; App. 196; App. 99, ll. 15-18; App. 115, ll. 6-22.

a *Jackson v. Denno*[3] hearing and did not tell her that a trial judge could, in some circumstances, keep a confession out of a trial. "It was never stated that my – that my confessions could be suppressed, ever." Foster said that if she had known she could challenge her confessions at trial, she would have taken the case to trial. App. 31 – 37; App. 60, l. 20 – 61, l. 2; App. 69, ll. 18-19; App. 69, ll. 22-25; App. 70, ll. 4-12.

Plea counsel testified that when he first met with Foster she stated she had shot Decedent in self-defense because he was "touching [her] in a sexual manner as [they were] riding down the road." Plea counsel advised Foster that was not self-defense. Plea counsel testified that he believed, based on a conversation with jailers, that Foster was "covering" for Hines, so counsel demanded Foster tell him what really happened. Plea counsel stated Foster tried to "stick with" her original story, but after attempting to persuade her during additional meetings, Foster eventually stated she shot Decedent but it was only because Hines threatened her at gunpoint. App. 98, ll. 20-24; App. 104, l. 24 – 105, l. 18.

Plea counsel[4] was asked if he had explained to Foster that she might have a "suppression issue that she could only argue if she went to trial?" and he said, "I don't know if we had that discussion . . ." PCR counsel asked plea counsel a second time if he specifically recalled discussing with Foster that she waived her right to challenge her confessions if she pleaded guilty rather than going to trial, and he replied, "Well, first of all, I didn't think we had a good suppression issue. But I did say you're – and I tell all my clients you're going to be giving up

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[3] *Jackson v. Denno*, 377 U.S. 368 (1964).

[4] Foster alleged plea counsel told her if she did not plead guilty, she would be "hung" by the trial judge. Plea counsel said he would have advised something similar but he would likely have used the word "hanged." However, plea counsel said he did not think he said that—he would have told her she would get life. App. 109, ll. 15-17; App. 113, ll. 3-16.

any rights to challenge any of the evidence, statements, or anything. And I think the judge – every judge goes through that very well in this State." App. 120, l. 19 – 122, l. 5.

Notably, what Foster told law enforcement (that she shot Decedent because he had them attacked the day before, and he was in possession of her stolen belongings and was taunting her about the attack), and what she told plea counsel (that she shot decedent because he was sexually touching her in the car, and she realized he had previously raped her) were alternate theories which both could have supported a conviction for voluntary manslaughter rather than murder. However, plea counsel advised Foster to plead guilty straight up to murder. He did not advise her she might be able to suppress her confessions to law enforcement if she went to trial.

The PCR court took the matter under advisement and issued an order wherein the fifteen exhibits that were entered by the State at Foster's plea hearing were made part of the record of the PCR hearing.[5] PCR counsel filed a brief in which she argued that the exhibits showed Foster "had a strong search and seizure argument which could likely have resulted in the suppression of her confession as fruit of the poisonous tree," or as involuntarily made. PCR counsel argued that plea counsel provided deficient performance by advising Foster she should plead guilty based on his opinion that she would be convicted at trial, since his opinion was "based on a mistake of law." App. 129 – 130; App. 131 – 283; App. 286; App. 289 – 290.

On January 24, 2020, the PCR court issued an order of dismissal. Under the general heading: "findings of fact and conclusions of law," the order stated that the court had observed the witnesses and weighed their testimony and credibility. "These credibility findings have been applied to the Court's findings and conclusions as set forth below." The order thereafter

[5] Copies of the paper and photographic exhibits, as well as footage and audio recordings of both Hines's and Foster's interviews with law enforcement are all either included in the Appendix or on file with this Court.

addressed eight distinct claims raised during PCR. The order only made one adverse credibility finding against Foster, when addressing one particular claim—her claim that counsel told her the court would hang her if she went to trial. The PCR court found Foster's testimony that she pleaded guilty based on a statement from counsel that she would be hung at trial was not credible. App. 293 – 306; App. 298; App. 300 – 305; App. 303.

The order addressed Foster's allegation that counsel was ineffective for "[a]dvising the Applicant to plea without explaining that she may have been able to get her confession suppressed as fruit of the poisonous tree or because it was not voluntarily made due to the fact her statement was given when she was incompetent because of her mental health issues and the fact that she was actively under the influence of drugs." The order stated that the traffic stop "in which the applicant was a passenger that resulted in the applicant being taken into custody would not have been successful if challenged at a trial." It also concluded that "her confession to the murder was not a fruit of the search." App. 301. As to whether counsel should have advised Foster she could challenge the voluntariness of her confessions, the order of dismissal concluded that Foster had not met her burden of proof as to establishing *Strickland* prejudice since she "presented no evidence, other than her own statement that she was 'extremely high' at the time of her arrest, to support a finding of incompetency." App. 301 – 302. (Importantly, however, the PCR court did not make an adverse credibility finding on this allegation.)

In affirming the denial of PCR, the Court of Appeals did not address deficiency and instead focused on prejudice. The Court of Appeals found that, "Regardless of whether plea counsel was deficient, we agree with the PCR court that Foster failed to satisfy the prejudice prong of her ineffective assistance claim." *Foster v. State*, Op. No. 2024-UP-077 (S.C. Ct. App. filed March 13, 2024). "Foster relies on her testimony at the PCR hearing to prove prejudice . . .

However, the PCR court found Foster's testimony not credible, and we must give great deference to the court's findings on credibility." *Id.* (footnote omitted). In a footnote, the Court of Appeals stated: "Foster notes that the PCR court did not explicitly find her testimony regarding proceeding to trial not credible. Though the court made its credibility finding under a separate allegation in the order denying PCR, it is clear throughout the entirety of the order that the court did not think Foster was credible." *Id.*

The Court of Appeals further concluded that the PCR court found Foster's testimony that she would have proceeded to trial was not sincere and that a plea was the only rational action for her to take." *Id.* The Court of Appeals cited *Padilla v. Kentucky*, and found that a decision to go to trial on these facts would have been irrational. "*See Padilla v. Kentucky*, 559 U.S. 356, 371-72 (2010) (concluding, to meet '*Strickland*'s high bar,' the 'petitioner must convince the court that a decision to [proceed to trial] would have been rational under the circumstances')[.]" (brackets in original). *Id.* The Court of Appeals concluded that it "seems highly unlikely that suppressing Foster's confession would have materially decreased the odds of an unfavorable trial outcome. Irrespective of Foster's confession, law enforcement had other evidence pointing to Foster as the shooter, including a codefendant's statement against her." *Id.*

ARGUMENT

I. The Court of Appeals erred in finding it was highly unlikely that suppressing Foster's confessions would have materially decreased the odds of an unfavorable trial outcome, since effective counsel would have recognized that while Foster did not have a viable self-defense claim she did have reasonable grounds for a jury to find her guilty of the lesser offense of voluntary manslaughter based on two different theories raised by the evidence in this case.

The conclusion by the Court of Appeals that Foster would likely have been found guilty at trial regardless of whether her confessions were suppressed misses the fact that Foster had a reasonable probability of being found guilty of the lesser offense of voluntary manslaughter at trial—but she pled guilty to murder. "A person convicted of manslaughter, or the unlawful killing of another without malice, express or implied, must be imprisoned not more than thirty years or less than two years." S.C. Code Ann. § 16-3-50. "Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." *Cook v. State*, 415 S.C. 551, 556, 784 S.E.2d 665, 668 (2015) (citation omitted). *See,* e.g., *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001) (citing *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000)) (same). "To warrant a court's eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." *State v. Cole*, 338 S.C. at 101, 525 S.E.2d at 513. "In determining whether the evidence requires a charge on voluntary manslaughter, this Court must view the facts in the light most favorable to the defendant." *Id.* at 101, 525 S.E.2d at 512–13.

As seen, Foster told law enforcement the day before the shooting, Decedent had set up her and Hines to get "jumped" behind the decedent's house. Hines was beaten; Foster was chased, and what little personal belongings she owned were stolen. The day of the shooting, Foster stated Decedent was trying to get sex from her and was saying "nasty things" to her. Decedent had her stolen belongings in his possession, and he was taunting her about getting jumped. Foster told law enforcement she was getting "angrier and angrier." Foster stated she finally shot Decedent. State's Exhibit #4.

Foster told plea counsel she shot Decedent in self-defense because he was touching her sexually as they were riding down the road. After being repeatedly pressed by plea counsel, Foster eventually stated that Hines gave her the gun, asked her if she was going to let the decedent get away with raping her, and told her, "Do it." Hines was asking Foster "if I was just going to let him do that to me." Given her brain damage and drug abuse, Hines's taunting just prior to the shooting gave Foster the insight that the decedent was the person who had raped her the day she woke up bleeding. App. 66, ll. 12-15; App. 14, ll. 3-6; App. 22, l. 4 – 23, l. 24; App. 66, ll. 12-15; App. 63, l. 25 – 66, l. 15; App. 215 – 225; App. 98, ll. 20-24; App. 104, l. 24 – 105, l. 18. Foster's statements to both law enforcement and to plea counsel provided alternate bases to support a verdict of voluntary manslaughter. Yet Foster pleaded guilty to murder with no recommendations or negotiations and received forty years.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). The decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). "In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case." *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008) (citing *Strickland*, 466 U.S. at 687). "[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill*, 474 U.S. at 58.

The Court of Appeals concluded that it "seems highly unlikely that suppressing Foster's confession would have materially decreased the odds of an unfavorable trial outcome. Irrespective of Foster's confession, law enforcement had other evidence pointing to Foster as the shooter, including a co-defendant's statement against her." As seen, Foster could have been convicted of a lesser offense—voluntary manslaughter—at trial. App. 63, l. 25 – 66, l. 15; App. 215 – 225. Moreover, the admissibility of her codefendant Hines' statement is speculative. Hines was Foster's boyfriend—he might have refused to testify against her come trial, and if he did not testify, she could have excluded his confession as to her pursuant to *Bruton v. United States*, 391 U.S. 123 (1968). *See State v. McDonald*, 412 S.C. 133, 139, 771 S.E.2d 840, 843 (2015) ("In *Bruton v. United States*, the United States Supreme Court held that a defendant's Confrontation Clause rights are violated when a nontestifying codefendant's confession that implicates the defendant is admitted during a joint trial.").

The Court of Appeals found "[t]he PCR court had good ground to doubt the genuineness of Foster's assertion that she would have chosen a trial if she had known she could move to have her confession suppressed. The record demonstrates that Foster understood the high probability of an unfavorable trial outcome—thus making it very unlikely she would have gone to trial." *Foster v. State*, Op. No. 2024-UP-077 (S.C. Ct. App. filed March 13, 2024). There was no benefit to Foster pleading guilty in this case—her guilty pleas were without negotiation or recommendation. Although Foster disputes that the chances of an unfavorable outcome were high at trial, it is undeniable the chances of an unfavorable outcome were guaranteed at a straight-up plea (convictions on all charges and a minimum sentence of thirty years for murder).

The Court of Appeals cited the following in its opinion: "[A] plea was the only rational action for her to take. Under these facts, we agree. *See Padilla v. Kentucky*, 559 U.S. 356, 371-72

(2010) (concluding, to meet '*Strickland*'s high bar,' the 'petitioner must convince the court that a decision to [proceed to trial] would have been rational under the circumstances')[.]" However, *Padilla* stated: "a petitioner must convince the court that a decision *to reject the plea bargain* would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. at 372 (emphasis added). There was no plea bargain in this case. Proceeding to trial would have been objectively reasonable. The trial court may not impose a "trial tax" on a criminal defendant and punish her for exercising her constitutional rights. *See Castro v. State*, 417 S.C. 77, 83, 789 S.E.2d 44, 47 (2016) ("When a trial judge considers the fact that the defendant exercised his or her constitutional right to a jury trial as a factor in sentencing the defendant, it is an abuse of discretion."); *Davis v. State*, 336 S.C. 329, 333, 520 S.E.2d 801, 803 (1999) ("[T]he trial judge, in sentencing petitioner, improperly considered petitioner's decision to proceed with a jury trial."); *State v. Hazel*, 317 S.C. 368, 370, 453 S.E.2d 879, 880 (1995) (The "trial judge abused his discretion by considering the fact that appellant exercised his right to a jury trial."). Foster received the same sentences at the plea that she could have received if convicted of murder at trial, and pleading guilty meant she passed up her chance at the lesser offense of voluntary manslaughter.

II. The Court of Appeals erred in finding Foster's testimony regarding proceeding to trial was not credible, since that finding was wholly without support in the record and the PCR court only found her not credible on one of eight grounds raised during PCR.

To establish prejudice when challenging a guilty plea, a PCR applicant must prove "there is a reasonable probability that, but for, counsel's errors, the defendant would not have pled guilty, but would have gone to trial." *Harden v. State*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). "The crux of the inquiry is whether counsel's ineffective performance affected the

outcome of the plea process, not whether the defendant would have been successful had he gone to trial." *Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018). A PCR applicant shows prejudice where but for counsel's deficient performance, he would not have pleaded guilty "and would have insisted on going to trial to challenge charges grounded on his allegedly involuntary statements." *Shirley v. State*, 306 S.C. at 244, 411 S.E.2d at 216.

"An appellate court must give deference to the PCR court's factual findings, and must uphold them if there is any evidence of probative value to support them." *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018). "Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings. Ordinarily, the appellate court is not free to make its own factual findings." *Id.* *See also Simmons v. State*, 416 S.C. 584, 593, 788 S.E.2d 220, 225 (2016) ("We sit today in an appellate capacity and making findings of fact de novo would be contrary to this appellate setting."). *Cf. Smalls v. State*, 422 S.C. 174, 194–96, 810 S.E.2d 836, 847 (2018) (under unique circumstances the appellate court may make the findings itself).

Foster testified that plea counsel did not discuss the possibility of suppressing her confessions and that she would have gone to trial had she known of this possibility. App. 69, l. 22 – 70, l. 12. When it addressed this allegation of ineffective assistance in the order of dismissal, the PCR judge did not find her testimony as to this matter to lack credibility. Nor was Foster's testimony about the lack of a discussion regarding suppressing her confessions disputed by plea counsel. Plea counsel was asked twice about it, and said he could not recall having such a discussion with Foster. App. 120, l. 19 – 122, l. 5.

In its order of dismissal, the PCR court stated its "credibility findings have been applied to the Court's findings and conclusions set forth below." App. 298. Shortly thereafter, the order

of dismissal again stated, "Below are the findings in regards to *each specific allegation* of ineffective assistance of counsel raised by Applicant[.]" App. 300 (emphasis added). Set forth below in the PCR court's order were findings and conclusions as to eight separate and specific allegations of ineffective assistance of counsel. The PCR court only found Foster's testimony was not credible as to one of the eight allegations—the fourth allegation. This allegation was the second. App. 300 – 305. The PCR court did not find Foster was not credible with regard to her claim that her plea was not knowingly, voluntarily, and intelligently made due to counsel's deficient performance in failing to advise her she could challenge her confessions at trial.

Nevertheless, the Court of Appeals concluded: "Foster relies on her testimony at the PCR hearing to prove prejudice . . . However, the PCR court found Foster's testimony not credible, and we must give great deference to the court's findings on credibility." *Foster v. State*, Op. No. 2024-UP-077 (S.C. Ct. App. filed March 13, 2024) (footnote omitted). In a footnote, the Court of Appeals stated: "Foster notes that the PCR court did not explicitly find her testimony regarding proceeding to trial not credible. Though the court made its credibility finding under a separate allegation in the order denying PCR, it is clear throughout the entirety of the order that the court did not think Foster was credible." *Id.* The Court of Appeals' conclusion that the PCR court found Foster was not credible as to this allegation was wholly without support in the record—that factual finding was not made by the PCR court, but was instead (improperly) made by the Court of Appeals. *E.g.*, *Buckson v. State*, 423 S.C. at 320, 815 S.E.2d at 440. Foster's pleas were not a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*, 474 U.S. at 56. Foster showed prejudice per *Hill*, *Frierson* and *Harden*, and per *Shirley*, *supra*.

III. The Court of Appeals erred by not addressing Foster's PCR ground that counsel should have advised her she could move to suppress her confessions, since caselaw shows counsel was incorrect in his assessment that such attempts would be unsuccessful, and where counsel's deficient performance resulted in Foster's entry of pleas that were not knowingly, intelligently, and voluntarily tendered.

Counsel should have advised Foster there was a reasonable probability her confessions would be suppressed as fruit of the poisonous tree or as involuntarily made if she proceeded to trial. The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). The decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). "In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case." *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008) (citing *Strickland*, 466 U.S. at 687). "[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill*, 474 U.S. at 58.

Defense counsel provides ineffective assistance where counsel fails to inform the defendant "prior to his guilty plea that his statements may have been made involuntarily, and, if so, would be inadmissible at trial." *Shirley v. State*, 306 S.C. 241, 244, 411 S.E.2d 215, 216 (1991). *See McCarthy v. United States*, 394 U.S. 459, 466 (1969) ("because a guilty plea is an

admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts"). Foster testified plea counsel never advised her a trial judge could keep a confession out of a trial under certain circumstances. App. 60, l. 20 – 61, l. 2; App. 69, ll. 18-19. Plea counsel did not dispute Foster's testimony; he was twice asked if he explained to Foster that she might have a suppression issue that she could only argue if she went to trial, and counsel did not remember any such discussion. App. 120, ll. 19-24; App. 121, l. 20 – 122, l. 5. The plea judge did not mention suppression in her colloquy with Foster. App. 5, l. 2 – 6, l. 25; App. 15, l. 5 – 16, l. 18.

In order for Foster to knowingly and intelligently plead guilty and waive her rights to challenge the evidence against her she needed to understand that her confessions might not be heard by the jury if she went to trial. Notably, the psychologist who evaluated Foster for competency to stand trial concluded that Foster had deficits in her understanding of the legal system and might need "education" regarding "some aspects of the legal system." App. 224. The evidence implicating Foster primarily consisted of her confessions, her codefendant Hines' statement against her, and evidence that she was with Hines and the decedent the day of his death. *See* App. 143 – 168; App. 194 – 211; State's Exhibit #4; State's Exhibit #5. Plea counsel's advice left her with the mistaken understanding that the confessions would be admitted at trial as a matter of course. Foster did not have a "voluntary and intelligent choice among the alternative courses of action open to the defendant," or an "understanding of the law in relation to the facts," since she did not know she could challenge critical evidence against her at trial. *Hill v. Lockhart*, 474 U.S. at 56; *McCarthy v. United States*, 394 U.S. at 466. This affected her plea calculus.

Plea counsel's incorrect opinion that Foster's confessions were unlikely to be suppressed was ineffective representation. App. 109, ll. 15-21; App. 113, l. 17 – 114, l. 20; App. 121, l. 20 –

122, l. 1. "Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948). The exhibits before the PCR court show there was a reasonable probability that Foster's confessions could be suppressed. App. 9, l. 3 – 11, l. 12; App. 131 – 283; State's Exhibits #4 – 5; State's Exhibits #7 – 10. Grounds for suppressing Foster's confessions were the unlawful stop, the unlawful arrest, fruit of the poisonous tree, and involuntariness.

The PCR court erred where it found the confessions would not have been suppressed even if admissibility was challenged at trial, and it erred where it found the confessions were not a fruit of the traffic stop. Foster could have successfully suppressed her confessions based on the unlawful stop of Nesbitt's car since there was no reasonable suspicion to stop the car. *See Whren v. United States*, 517 U.S. 806, 809-10 (1996) (traffic stop is a seizure under the Fourth Amendment); *Brendlin v. California*, 551 U.S. 249, 257 (2007) (passenger has standing to challenge the traffic stop, seizure, and evidence derived from that seizure). The Fourth Amendment prohibits an officer from stopping a car because it has a temporary tag unless he has an objective, particularized and articulable suspicion to believe the tag is expired or the occupants of the car are involved in criminal activity. *State v. Butler*, 343 S.C. 198, 539 S.E.2d 414 (Ct. App. 2000). *Butler* considered whether "the mere presence of a 'temporary tag' on a car is reasonable suspicion that the car is either unregistered, uninsured, or is otherwise involved in criminal activity." *Butler*, 343 S.C. at 202–03, 539 S.E.2d at 416. *Butler* held that the mere presence of a temporary tag on the back of a car, without more, is insufficient to provide a reasonable suspicion that the driver is violating registration or insurance laws or that the driver is otherwise involved in criminal activity." *Id.*

The Fourth Circuit Court of Appeals has addressed a traffic stop identical to the stop in this case. In *United States v. Wilson*, 205 F.3d 720, 722 (4th Cir. 2000), a police officer pulled over a car because he could not read the expiration date on a temporary tag, although the officer had not seen anything illegal about the tag or the operation of the car, and there was no evidence that the tag was improperly displayed. The Fourth Circuit cited *Delaware v. Prouse*, 440 U.S. 648, 663 (1978), and noted, "An objective assessment of the facts and circumstances of this stop compels the conclusion that the officer lacked any articulable, reasonable suspicion that a violation had occurred. Simply put, he saw nothing wrong, and he suspected nothing." *Wilson*, 205 F.3d at 724. "Upholding a stop on these facts would permit the police to make a random, suspicionless stop of any car with a temporary tag. The Fourth Amendment does not afford the police such unbridled discretion." *Id.* The contraband discovered in the defendant's car pursuant to the stop should have been excluded from trial. *Id.*

Officer Henderson's incident report stated that he pulled over Nesbitt's car because, "I could not see the expiration date on the tag." App. 196. However, no traffic violation was reported, Henderson never claimed there was anything wrong with how the tag was displayed, and the tag was not expired. The date on a temporary tag will often be unreadable due to its size unless the officer is extremely close to the car. Here, as in *Wilson*, the officer lacked a reasonable, articulable suspicion to pull the car over. As in *Butler*, this was simply a temporary tag. Foster's detention and subsequent interrogation pursuant to the stop were unlawful. *Wilson*, 205 F.3d at 723; *Prouse,* 440 U.S. at 663; *Butler*, 343 S.C. at 202–03, 539 S.E.2d at 416. Foster's confessions were evidence derived from the unreasonable stop and would have been suppressed as fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 484-86 (1963); U.S. Const. amend. IV; U.S. Const. amend. XIV.

Foster's confessions were also the product of an unlawful seizure since police officers lacked probable cause to arrest her for the drugs or weapon found in Nesbitt's car. See *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (probable cause must be more than mere suspicion; it must be a fair probability determined by the totality of the circumstances); *Michigan v. Summers*, 452 U.S. 692, 700 (1981) (arrests cannot be made without probable cause). Although police had probable cause to arrest Nesbitt and Hines, they did not have probable cause to arrest Foster. Nesbitt admitted the methamphetamine belonged to her. Nesbitt told Officer Henderson that Hines had a pistol in the car, and officers found the pistol under Hines' seat. Officers also found marijuana in a bookbag on the floor of the passenger's compartment, where Hines was sitting. App. 196 – 197. These facts did not provide probable cause to arrest and question Foster. U.S. Const. amend. IV; U.S. Const. amend. XIV; *Michigan v. Summers*, 452 U.S. at 700.

The remedy for an unlawful arrest is the suppression of evidence seized as a result of the arrest, along with any leads or evidence derived from the arrest. *Whiteley v. Warden*, 401 U.S. 560, 568-69 (1971). *See Dunaway v. New York*, 442 U.S. 200, 216-19 (1979) (officers violated Fourth and Fourteenth Amendments when they seized defendant without probable cause and took him to the police station; defendant's confession, which was obtained absent significant intervening events, should have been suppressed). *See also Florida v. Royer*, 460 U.S. 491, 501 (1983) ("statements given during a period of illegal detention are inadmissible even though voluntarily given if they are the product of the illegal detention and not the result of an independent act of free will").

Foster's arrest led to her interrogation and confessions. State's Exhibit #4; App. 145; App. 166. Although Foster was given *Miranda* warnings, the provision of *Miranda* did not attenuate the taint of the unconstitutional arrest. "[T]he fact that the confession may be

'voluntary' for purposes of the Fifth Amendment, in the sense that *Miranda* warnings were given and understood, is not by itself sufficient to purge the taint of the illegal arrest." *Taylor v. Alabama*, 457 U.S. 687, 690 (1982). "In this situation, a finding of 'voluntariness' for purposes of the Fifth Amendment is merely a threshold requirement for Fourth Amendment analysis." *Id.* When determining whether *Miranda* warnings assure that a confession was of sufficient free will so as to purge the primary taint of an unlawful arrest, the court must determine whether the confession was "obtained by exploitation of the illegality of [the accused's] arrest." *Brown v. Illinois*, 422 U.S. 590, 600 (1975). Factors to be considered include the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. *Id.* at 603-04. Foster's confessions were obtained by exploitation of her arrest. The statements were close in time to the arrest, and there were no intervening circumstances sufficient to attenuate the unlawful arrest from the confessions. Foster was in police custody throughout and never spoke with a lawyer. App. 145; App. 166; App. 103, ll. 4-15. Foster had already been questioned by Investigator Clark about the decedent's death two days before and she did not incriminate herself. App. 164. It was not until she was arrested that she confessed. Foster's confessions were evidence derived from her unreasonable stop and seizure since police did not have reasonable suspicion to pull the car over, did not have probable cause to arrest her, and the confessions would have been suppressed at trial as fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 484-86 (1963).

Foster had yet another alternative ground for suppression—that her confessions were involuntarily made—since she was under the influence of drugs and alcohol, uneducated, had a history of mental illness, and had brain damage. App. 6, ll. 11-14; App. 88, l. 7 – 93, l. 5; App. 57, l. 15 – 59, l. 9. Due process prohibits a conviction founded upon an involuntary confession.

Jackson v. Denno, 378 U.S. 368, 376–77 (1964). The use of a defendant's confession offends due process if his will has been overborne and his capacity for self-determination critically impaired. *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973). "In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Id.* at 226. This inquiry may include consideration of the accused's intelligence and education. *Fare v. Michael C.*, 442 U.S. 707, 725 (1979). *See State v. Saxon*, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973) (accused's intoxication considered when determining admissibility of confession). The PCR court erroneously conflated competency with voluntariness in its order of dismissal. App. 301 – 302. However, while Foster's mental illness and brain damage did not render her incompetent, it did weigh in favor of involuntariness.

The unconstitutional stop and arrest of Foster was coercive. *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (coercive police activity is necessary predicate to finding confession is not voluntary within the meaning of the Due Process Clause). Courts weigh the degree of coercion against an accused's degree of vulnerability. *See, e.g.*, *Payne v. Arkansas*, 356 U.S. 560, 567 (accused described as "mentally dull"); *Blackburn v. Alabama*, 361 U.S. 199, 200-201 (1960) (defendant with history of severe mental illness); *Columbe v. Connecticut*, 367 U.S. 568, 620 (1961) (illiterate defendant with mental age of a nine-year-old). Foster's myriad vulnerabilities were exploited by her coercive unlawful arrest and her confessions would likely have been suppressed as involuntary. *Denno*, 378 U.S. at 376-77.

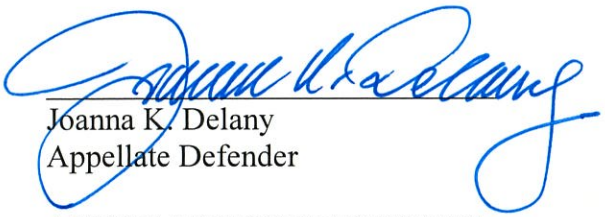
Plea counsel was ineffective for failing to recognize Foster's confessions could be suppressed based on the improper traffic stop, Foster's unlawful arrest, the and involuntariness of her statements. Foster's pleas were not a voluntary and intelligent choice among the

alternative courses of action open to the defendant due to ineffective assistance of counsel. *Hill v. Lockhart*, 474 U.S. at 56; U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. at 686.[6]

CONCLUSION

Petitioner Foster respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented.

Respectfully Submitted,



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of June, 2024.

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6 In addition to the prejudice discussion in Issue II, which Petitioner hereby incorporates, where a PCR applicant claims ineffective assistance of counsel based on counsel's failure to challenge a search and seizure where the applicant pleaded guilty, and where the solicitor's rendition of facts at the plea show no constitutional error, this Court has held that the applicant must show that "had his trial attorney challenged the frisk, there is a reasonable probability that she would have prevailed in a suppression hearing." *Rollison v. State*, 346 S.C. 506, 509-10, 552 S.E.2d 290, 292 (2001). Assuming *arguendo* that *Rollison* applies, because counsel did not correct the solicitor's incorrect statement at the plea hearing that the car was stopped for an expired tag, even under *Rollison*, Foster has shown prejudice. *See* App. 12, ll. 6-21; App. 99, ll. 15-18. There was a reasonable probability her confessions would have been suppressed. *Michigan v. Summers*, 452 U.S. at 700; *Delaware v. Prouse*, 440 U.S. at 663; *Jackson v. Denno*, 378 U.S. at 376–77.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Spartanburg County
Honorable J. Mark Hayes, II, Circuit Court Judge

Opinion No. 2024-UP-077 (S.C. Ct. App. Filed March 13, 2024)

Lower Court Case No. 2018-CP-42-00711

BRITTANY C. FOSTER,

PETITIONER

V.

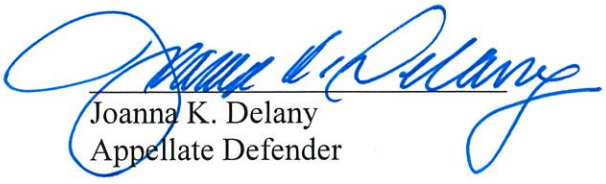
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000774

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the petition for writ of certiorari to the Court of Appeals in the above-referenced case has been served upon Shayla Joan Flores, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and the South Carolina Court of Appeals; and on Brittany C. Foster, #372413, at Camille Griffin Graham Correctional Center, 4450 Broad River Road, Columbia, SC 29210, this 3rd day of June, 2024.



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