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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
The Honorable Letitia H. Verdin, Trial Judge
The Honorable J. Mark Hayes, II, PCR Judge

Appellate Case No. 2024-000774

BRITTANY C. FOSTER, #372413,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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 a. Certiorari is not warranted to review the Court of Appeals' proper decision to affirm the denial of post-conviction relief where the court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by Petitioner because of the alleged deficiencies and if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed22

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PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI

- 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?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON CERTIORARI

- I. Whether the Court of Appeals properly determined it was highly unlikely that suppressing Petitioner's confessions would have materially decreased the odds of an unfavorable outcome had she proceeded to trial where, irrespective of Petitioner's confession, law enforcement had other evidence pointing to her as the shooter including a co-defendant's statement against her, and Petitioner was aware of that risk?
- II. Whether the Court of Appeals properly determined that the PCR court reasonably found Petitioner's testimony not credible, where the PCR court made its credibility findings clear in the order denying post-conviction relief?
- III. Whether the Court of Appeals properly refrained from directly addressing Petitioner's deficiency allegations against Plea Counsel where caselaw shows 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 and if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed?

STATEMENT OF THE CASE

Petitioner Brittany C. Foster 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 and possession of a firearm during the commission of a violent crime (2016-GS-42-04429). Seventh Circuit Assistant Public Defender Robert B. Hall, Esquire (hereafter "Plea Counsel").

On April 27, 2017, Petitioner pled guilty as indicted before the Honorable Letitia H. Verdin, then-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 years' imprisonment for unlawful carrying of a pistol.

Petitioner sought direct appellate review and was represented by Plea Counsel. By order dated July 17, 2017, the 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 returned to the lower court on August 3, 2017.

Petitioner then sought post-conviction relief by filing a *pro se* application on February 27, 2018, with the following allegations:

1. "Ineffective assistance of counsel, counsel not prepared for trial."
2. "Individual issues to be amended."
3. "Misrepresented, felt coerced to plead guilty."

On June 11, 2018, post-conviction relief counsel filed amendments to Petitioner's post-conviction relief application alleging the following:

1. Ineffective Assistance of Trial Counsel

- a. Failure to object to misstatement of facts during the guilty plea when the Solicitor states the car [Petitioner] was a passenger in was pulled due to expired tag which the car did not have an expired tag.
 - b. Advising [Petitioner] 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 knowingly and 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.
 - c. Failure to review discovery with [Petitioner].
 - d. Failure to effectuate an appeal.
2. Due process violations because the plea was not knowingly and voluntarily made.

On September 11, 2018, post-conviction relief counsel filed the second amendment to Petitioner's post-conviction relief application adding the following allegations:

1. Ineffective Assistance of Trial Counsel
 - a. Advising [Petitioner] to plead guilty or the Court would hang her after trial.
 - b. Advising [Petitioner] to plead guilty to murder when her history of mental health issues and sexual assault would mitigate her actions which she states were coerced by co-defendant, Keenen Hines.
2. Due process violations because the plea was not knowingly and voluntarily made and fundamental unfairness that co-defendant Keenen Hines received a sentence of twelve years.

An evidentiary hearing into the matter was convened on November 8, 2018, before the Honorable J. Mark Hayes, II, circuit court judge. Susannah C. Ross, Esquire, represented Petitioner. Petitioner testified on her own behalf and presented testimony from her aunt, Stephanie Gosnell. Respondent presented testimony from Plea Counsel. Petitioner proceeded forward on all allegations as set forth in her original and amended applications. The post-conviction relief court denied relief and dismissed the application with prejudice by order filed January 21, 2020. In the Order of Dismissal, the post-conviction relief court found Petitioner failed to meet her burden of proof regarding the allegation of ineffective assistance of counsel for failing to object to the Solicitor's summary of the facts during the plea hearing because Petitioner never informed her counsel of the misstatement, stated that she agreed with the facts as presented, admitted that she

was guilty, and had not asserted that she would have forgone the plea and pursued a jury trial but for her counsel's failure to object. Additionally, the court found that plea counsel's failure to advise Petitioner of the possibility of suppressing the confession as the fruit of the poisonous tree was not ineffective because Petitioner had been deemed to be competent to stand trial, she understood the consequences of her plea, there was no evidence corroborating her claims that she was under the influence of drugs at the time of her statement, and she informed the court of her guilt when presented with the confession at the plea hearing. Lastly, the post-conviction relief court found that Plea Counsel testified credibly at the evidentiary hearing. Petitioner filed a notice of appeal challenging the denial of relief.

On September 14, 2020, Petitioner filed a petition for writ of certiorari. The matter was transferred from the Supreme Court to the Court of Appeals. On August 19, 2022, certiorari was granted. Petitioner filed their brief of petitioner on September 28, 2022, raising the following:

The PCR court erred where it found plea counsel provided effective representation where plea 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 been successful 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.

On February 6, 2024, the Court of Appeals held oral arguments. On March 13, 2024, the Court of Appeals affirmed the post-conviction relief court's findings by unpublished opinion. Brittany C. Foster v. State, Op. No. 2024-UP-077 (Ct. App. filed March 13, 2024). Petitioner moved for a rehearing. On April 12, 2024, Petitioner's motion for a rehearing was denied. On June 3, 2023, Petitioner filed their petition for writ of certiorari with the Supreme Court.

STATEMENT OF THE 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. p. 11, ll. 13-18). The vehicle was recovered, and a blood-stained spiral notebook was found nearby. (App. p. 11, ll. 18-23; p. 136; p. 140). Blood was found in the backseat, and a bullet hole was found in the rear driver's side window. (App. p. 164). Two spent shell casings were found in the passenger-side floorboard, and a fired projectile was found in the backseat. (App. p. 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. p. 143; p. 164). Officers sent a BOLO out to find Hines and his girlfriend, Petitioner, who had previously lived with Biggerstaff but recently moved out. (App. pp. 11, l. 18 – 12, l. 3).

Officers first contacted Hines and Petitioner at the Roadway Inn, where they were staying, after Biggerstaff had told them that Biggerstaff required they move out. (App. p. 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. p. 164). A search of Biggerstaff's residence revealed a receipt from a Food Lion in Columbus, North Carolina, the previous day. (App. pp. 164-165). 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 they were acting "very shady," and that Hines and Petitioner knew of a \$10,000 inheritance Biggerstaff had received the previous month. (App. p. 164).

On June 2, 2016, Petitioner and Hines were passengers in a vehicle driven by Jessica Nesbitt, when it was stopped by Sergeant Henderson of the Spartanburg County Sheriff's Office.¹ (App. p. 12, ll. 3-15; p. 125, ll. 20-25). 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. pp. 125, l. 24 - 126, l. 2; p. 196). Upon approaching the vehicle, Sergeant Henderson noted that Hines was nervous and appeared to be putting something underneath his seat. (App. p. 116, ll. 8-14; p. 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. p. 12, ll. 12-19; p. 196). As Nesbitt was searching through the trunk, officers spotted a small bag containing a substance later identified as methamphetamine. (App. pp. 12, l. 20 - 13, l. 4; p. 196). Nesbitt told officers that Hines had a pistol in the vehicle, officers immediately searched the car and recovered a loaded black revolver with a cocked hammer underneath the front passenger seat where Hines had been seated.² (App. p. 13, ll. 1-8; p. 196; p. 200). The pistol was checked via NCIC, which categorized the weapon as stolen. (App. p. 196). Officers recovered a blue bankers bag containing approximately 3.9 grams of marijuana from a black bookbag found in the floor board of front passenger seat where Hines had been seated. (App p. 197). All three passengers were arrested and transported to Spartanburg County Jail. (App. p. 13, ll. 7-8; p. 197).

Officer Tom Clark and Sergeant Brandon Letterman were informed by Sergeant Henderson that Petitioner and Hines had been arrested in a traffic stop on June 2, 2016. Offer Clark then

¹ Sergeant Henderson indicated that he initiated blue lights because he could not see the expiration date on the vehicle's paper tags, but further pursued the contact with the driver based upon her failure to stop when signaled to do so. (App. p. 196; p. 201).

² The gun was later identified as a Rossi .38 cal. revolver. (App p. 165).

proceeded to SCDC to speak with Petitioner regarding her involvement in Biggerstaff's death. (App. p. 166). Petitioner immediately started crying and repeatedly said she shot him. (App. p. 166). Petitioner was informed of her Miranda warnings, provided a pre-interrogation waiver form, signed it, and again confessed to the murder. (App. p. 13, ll. 8-14). Petitioner stated that she had been the one to shoot Biggerstaff and contended that he "deserved it." (App. p. 166). Petitioner further informed officers that she and Hines had driven Biggerstaff's car into Lake Bowen and dumped Biggerstaff's body under a bridge. (App. p. 166). Petitioner agreed to take officers to Biggerstaff's body. (App. p. 166).

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. p. 166). The footage showed Petitioner, Hines, and Biggerstaff leaving the store together in Biggerstaff's vehicle. (App. p. 166). Police then provided Petitioner with food and questioned her a second time. (App. p. 166). In her second statement, Petitioner admitted that she shot Biggerstaff seven times with a .380 handgun that belonged to Hines's brother. (App. p. 14, ll. 2-10). After the shooting, Hines and Petitioner ditched the vehicle in the lake and dumped the body in a creek. (App. 14, ll. 10-20 p. 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 in duress after Hines threatened to kill her if she did not shoot Biggerstaff. (App. 105, ll. 16-24).

Hines corroborated the details of Petitioner's confession when questioned by police. (App. pp. 166-167). 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 his body under a bridge before driving the car into the lake. (App. pp. 166-167). After disposing of the vehicle, Hines called his brother to take them back to the Roadway Inn. (App. p. 167). His brother was contacted by

officers, provided the gun to police, and was matched to the vehicle described by Hines. (App. p. 167).

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the post-conviction relief court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

- I. **Certiorari is not warranted to review the Court of Appeals' proper decision to affirm the denial of post-conviction relief because Petitioner failed to meet his burden of establishing suppression of Petitioner's confessions would have materially decreased the odds of an unfavorable outcome had she proceeded to trial where the record contained ample evidence of Petitioner's guilt and Petitioner was aware of that risk, and, accordingly, there was not a reasonable likelihood that Petitioner would have forgone her guilty plea and proceeded to trial**

On appeal, Petitioner asserts that the Court of Appeals erred in finding that it was highly unlikely that suppressing her confessions would have materially decreased the odds of an unfavorable trial outcome. Petitioner's belief is based on her contention that effective counsel would have recognized that she had "reasonable grounds for a jury to find her guilty of the lesser offense of voluntary manslaughter."³ Petitioner contends that the holding of the Court of Appeals is therefore erroneous, for failure to address her PCR allegations where she contends she suffered prejudice in the form of her plea being rendered not knowingly, intelligently, and voluntarily tendered.

Applicable Law on Ineffective Assistance of Counsel Claims Following a Guilty Plea

The Sixth and Fourteenth Amendments to the United States Constitution guarantee all criminal defendants the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Strickland v. Washington, 466 U.S. 668, 685(1984). In post-conviction relief actions, the reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so ineffective as to require reversal" of

³ Petitioner argues for the first time before this court that Plea Counsel acted deficiently in allowing Petitioner to enter her guilty plea where she contends her statements evidence the possibility that she could have been convicted of the lesser included offence of voluntary manslaughter. This argument was never made before the Court of Appeals and is consequently unpreserved for review. See Rule 242(d)(1), SCACR.

the applicant's conviction. Id. at 687. To obtain relief, a post-conviction relief applicant must prove (1) counsel's performance fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (citing Strickland, 466 U.S. 668). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The applicant bears the heavy burden of establishing both prongs of the Strickland standard. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRCP. To prove deficient performance, the applicant must establish that, in light of all the circumstances, the acts or omissions complained of "fell below an objective standard of reasonableness" as measured by "prevailing professional norms." Strickland, 466 U.S. at 688. Reviewing courts should be deferential in this inquiry, and apply "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689.

With respect to prejudice, the applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" Id. at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Id. Significantly, "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.

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 they 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) (emphasis added), *cert denied*, 134 S.Ct. 999 (2014) citing Padilla v. Kentucky, 559 U.S. 356, 372 (2009) (emphasis added). "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.

Argument and Law

Here, Petitioner argues the Court of Appeals erred in finding that suppression of Petitioner's statement would likely not have changed the outcome of her trial, as the jury could have potentially convicted her of the lesser-included offense of voluntary manslaughter. Therefore, Petitioner contends that the holding of the Court of Appeals is erroneous, for failure to address her PCR allegations where she asserts, she suffered prejudice in the form of her plea being rendered not knowingly, intelligently, and voluntarily tendered.

Petitioner bases her belief that that there exist reasonable grounds for a jury to find her guilty of this lesser included offense on the statements she alleged she had made to both law enforcement⁴ and Plea Counsel during her PCR evidentiary hearing. Yet, the PCR court found

⁴ Petitioner cites the statements made to police officers as being derived from State's Exhibit #4, which depicts is the very confession whose suppression she submits would have allowed her to

Petitioner's testimony at her PCR evidentiary hearing not credible.⁵ Further, The Court of Appeals supported that finding, noting that the record demonstrates that Petitioner "understood the high probability of an unfavorable trial outcome-thus making it very unlikely she would have gone to trial."⁶

The record reflects that Petitioner gave Plea Counsel multiple versions of the events in question. Specifically, Plea Counsel testified that he had been given six different versions of the events leading up to the crime being committed. (App. p. 98, ll. 17-19). During the PCR evidentiary hearing, Plea Counsel testified that he was informed by a female deputy that she believed Petitioner to be covering for her co-defendant, during one of his first visits with Petitioner. (App. p. 96, ll. 5-9). Plea Counsel testified that he attempted to investigate the possibility of this being the case with Petitioner, but she did not corroborate that story until much later after discovering that she would not be able to get probation for her murder charges. (App. pp. 96, l. 25-97, l. 10; pp. 104, l. 24 – 106, l. 3). Plea Counsel testified that he first met with Petitioner on the fifth of July and she did not become more consistent in her statements to him that her then boyfriend, Mr. Hines, had been involved in the crime until approximately December of that same year. (App. p. 105, ll.19-24).

Petitioner did not consistently give one story implicating her co-defendant, but even after she began to state a version of events in line with Petitioner's current arguments, Plea Counsel testified that he approached the Solicitor's office in an attempt to obtain a deal for her based on

establish reasonable grounds for a jury to find her guilty of voluntary manslaughter as opposed to murder.

⁵ Petitioner asserts that the Court of Appeals erred in finding Foster's testimony not credible, However, it is implicitly clear from the order that the PCR Court made a credibility finding regarding Petitioner's testimony and found her testimony at the evidentiary hearing to lack credibility.

⁶ Brittany C. Foster v. State of South Carolina, Op. No. 2024-UP-077 (S.C. Ct. App. filed March 13, 2024).

her cooperation with them. (App. pp. 105, l. 19- 106, l. 3). However, Plea Counsel testified that by the time Petitioner started to give a somewhat consistent version of events, Solicitor Barnette was not interested and indicated that he was pursuing the State's case against her. Plea Counsel testified that he had reviewed all of the discovery provided to him with Petitioner during the course of his representation. (App. pp. 103, l. 19-104, l. 20).

Further, Plea Counsel testified during Petitioner's PCR evidentiary hearing, and the PCR court found credible his testimony,⁷ that:

PCR Counsel: And prior to asking for a plea did you explain to her that she may have some arguments for manslaughter and suppression issues that she could only argue if she went to trial?

Plea Counsel: When she made her final decision, I don't know if we had that discussion, but I know we talked about what -- from the very start the lesser included offenses. And I know early on it was very hard to get her off the idea of self-defense. But we did discuss those lesser included and that a jury and a trial could find those, but I didn't think the probability of that happening were very great.

PCR Counsel: Okay. And so do you recall specifically discussing manslaughter with her, whether that could be a potential?

Plea Counsel: No. Like I said, I think on the first -- my first meeting with her we talked about those issues.

PCR Counsel: So you did talk about lesser included, - - those options?

Plea Counsel: Yes. I have -- I don't remember seeing the note where I had manslaughter, 30, and all that -- I know that that's generally what I do. Anybody that's charged with murder I'm going to go over those things with them and try to explain the best I can, particularly when, you know, when you don't have many facts.

⁷ "Counsel testified credibly at the evidentiary hearing." (App. p. 302; p. 303).

It's kind of hard to say how a particular case may fit into those, but we did I know we did talk about those things at different times.

(App. pp. 120, l. 19 – 121, l. 19).

Accordingly, the record reflects that Petitioner was informed of the possibility that she may be convicted of the lesser included offense of voluntary manslaughter should she decide to proceed to trial, advised of Plea Counsel's opinion that the chance of her being convicted of the lesser included offense was unlikely, and having that knowledge decided to enter her guilty plea.

Further, Respondent submits the Court of Appeals was correct in its finding that it appears "highly unlikely that suppressing [Petitioner]'s confessions would have materially decreased the odds of an unfavorable trial outcome" where "[i]rrespective of [Petitioner]'s confession, law enforcement had other evidence pointing to [her] as the shooter, including a co-defendant's statement against her."⁸ Specifically noting the court's citation to Pilla v. United States,⁹ in their holding "finding that proceeding to trial would have been irrational where defendant "faced overwhelming evidence of her guilt" and "had no rational defense, would have been convicted[,] and would have faced a longer term of incarceration."

Petitioner avers that the admissibility of her codefendant Hines' statement is speculative, as "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)." (PWC p. 13). Petitioner cites to the Court's holding in State v. McDonald, in her allegation:

In *Bruton v. United States*, the United States Supreme Court held that a defendant's Confrontation Clause rights are violated when a

⁸ Brittany C. Foster v. State of South Carolina, Op. No. 2024-UP-077 (S.C. Ct. App. filed March 13, 2024).

⁹ 668 F.3d 368, 373 (6th Cir. 2012).

nontestifying codefendant's confession that implicates the defendant is admitted during a joint trial.

412 S.C. 133, 139, 771 S.E.2d 840, 843 (2015).

Petitioner's contentions that 1) Petitioner and Mr. Hines would have been tried jointly, and 2) Mr. Hines may have refused to testify against her are purely speculative and not supported by the record. The record reflects that Mr. Hines immediately cooperated with officers and even led them to the location of Victim's body following the couples' arrest. Mr. Hines explicitly informed officers that Petitioner was the shooter in this case. Hines further established that he felt he was a victim of Petitioner as well, as he only assisted her in the commission of this crime because he feared retaliation on her part if he did not. (App. pp. 205-211).

Additionally, Petitioner failed to call Mr. Hines as a witness during her PCR evidentiary hearing or present any evidence as to what he would or would not have said in the event that she chose to proceed to a jury trial. See Dalton v. State, 376 S.C. 130, 654 S.E.2d 870 (Ct. App. 2007) (Mere speculation of what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR); Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) (a PCR applicant cannot show prejudice from counsel's failure to call a favorable witness to testify at trial if the witness does not testify at the PCR hearing or otherwise offer testimony within the rules of evidence).

Thus, the Court of Appeals correctly concluded that it would not have been reasonable for Petitioner to proceed to trial under the circumstances, where the record supports the Court of Appeal's finding that "there was a strong chance [Petitioner] would have been convicted had she proceeded to trial, and it appears [Petitioner] was aware of that risk."¹⁰ Petitioner's awareness of

¹⁰ Brittany C. Foster v. State of South Carolina, Op. No. 2024-UP-077 (S.C. Ct. App. filed March 13, 2024).

the risk she faced is further evidenced by her statement during the PCR evidentiary hearing that she pled because she was afraid of receiving a harsher sentence at trial. (App. pp. 56, l. 21 - 57, l. 4). Therefore, Petitioner's allegation that the court erroneously found that Petitioner pled freely, knowingly, intelligently, and voluntarily is without merit, as the Court's finding is supported entirely by the record. Thus, This Court should deny certiorari.

"[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). Accordingly, because a criminal defendant waives several constitutional rights by pleading guilty the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently. Boykin v. Alabama, 395 U.S. 238 (1969); Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999).

"The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Gustine v. State, 325 S.C. 123, 127, 480 S.E.2d 444, 446 (1997) (citing Hill v. Lockhart, 474 U.S. 52, 56 (1985) (citations omitted)). However, courts have consistently refused to "hold that 'a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.'" Gustine, 325 S.C. at 128, 480 S.E.2d at 446 (quoting Brady v. United States, 397 U.S. 742, 751 (1970)).

To be intelligent, a plea must be made by a mentally competent defendant who understands both the charges against him or her and the consequences of his or her plea. Brady, 397 U.S. at 748. To be voluntary, a plea must be free of threats or other coercion that would impermissibly

distort the defendant's choice. Id. at 755; see also United States v. Smith, 440 F.2d 521, 528–529 (7th Cir. 1971) (Stevens, J., dissenting) (explaining voluntariness relates to the trustworthiness of the admission of guilt and binding character of the waiver of the constitutional protections which would be available to the accused if he elected to stand trial).

Before a court can accept a guilty plea, the defendant must be advised of the constitutional rights he or she is waiving; the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination. Boykin, 395 U.S. at 243. Additionally, to knowingly and voluntarily plead guilty, the defendant must have a full understanding of the consequences of the plea, including the nature and crucial elements of the offense(s); the maximum and any mandatory minimum penalty; and the nature of the constitutional rights being waived. Pittman, 337 S.C. at 599, 524 S.E.2d at 624.

However, it is “well established that a guilty plea is not rendered invalid because it represents a compromise by defendant, thrusts a difficult judgment upon him, or is motivated by fear of greater punishment.” United States v. Cox, 464 F.2d 937, 942 (6th Cir. 1972) (citing Brady, 397 U.S. 742). The standard for determining the validity of a guilty plea is “whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” Id. at 31.

A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and “may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both.” State v. Ray, 437, 427 S.E.2d 171, 174 (1993); see also Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997) (guilty plea not involuntary where the colloquy demonstrated the trial judge asked defendant twice whether he understood there were no promises and that no sentencing recommendations were binding on the

judge). To ensure the defendant understands the consequences of his or her guilty or the trial judge “usually questions the defendant about the facts surrounding the crime and punishment that could be imposed.” Dover v. State, 304 S.C. 433, 434–35, 405 S.E.2d 391, 392 (1991). However, the trial judge “does not have to direct the defendant’s attention to every consequence of his plea provided the record reveals affirmative awareness of the consequences of a guilty plea.” Carter v. State, 329 S.C. 355, 362, 495 S.E.2d 773, 776 (1998).

The voluntariness of a guilty plea, however, “is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing.” Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984). In evaluating an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. Wolfe, 326 S.C. at 165, 485 S.E.2d at 370; cf. Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994) (finding that, where the transcript of the guilty plea proceeding refuted applicant’s claim that he did not understand the terms of a plea bargain, granting PCR was inappropriate notwithstanding applicant’s claim his lawyer misadvised him).

An applicant who enters a plea on the advice of counsel may “only attack voluntary, knowing and intelligent character of the plea by showing that plea counsel’s representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s errors, the [Applicant] would not have pled guilty, but would have insisted on going to trial.” Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). As with all post-conviction relief actions, it is the applicant who bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of involuntariness of a plea or ineffectiveness of counsel is not

sufficient to warrant granting relief. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Here, Petitioner did not and could not meet her burden of proof and, accordingly, the Court of Appeals properly rejected this claim.

Petitioner alleges she received no benefit by pleading guilty in this case, as her guilty pleas were without negotiation or recommendation. However, as Petitioner was charged with murder, she was facing a sentencing range starting with the mandatory minimum of thirty years' imprisonment that must be served day-for-day up to a sentence of imprisonment for her natural life without the possibility of parole. Petitioner was sentenced to a total of forty years' imprisonment on all charges. Further, Judge Verdin informed Petitioner of the specific benefit that she received by entering her guilty plea during the sentencing phase of her plea hearing as follows:

I will say that your decision to plead guilty and decision to, um, to have some level of cooperation, uh, is going to give you at least an opportunity one day to have some sort of a life...

(App. p. 30, ll. 9-12).

The benefit Petitioner received for her plea is clear, and supports the finding that the Court of Appeals properly determined it was highly unlikely that suppressing Petitioner's confessions would have materially decreased the odds of an unfavorable outcome had she decided to proceed to a jury trial, based upon the hypothetical and slim possibility that she may have been found guilty of the lesser included charge of voluntary manslaughter. See Harrington v. Richter, 562 U.S. 86, 112 (2011) (“[t]he likelihood of a different result must be *substantial*, not just conceivable.”).

- a. Certiorari is not warranted to review the Court of Appeals' proper decision to affirm the denial of post-conviction relief where the court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by Petitioner because of the alleged deficiencies and if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed*

Here, Petitioner did not and could not meet her burden of proof and, accordingly, the court properly rejected this claim. Petitioner has failed to establish any prejudice from the alleged failure to communicate with her 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.

Accordingly, the Court of Appeals correctly determined that Petitioner failed to meet her burden of establishing that counsel's alleged failure to inform Petitioner of the possibility that her confessions may have been suppressed had she wished to proceed to trial resulted in the requisite prejudice necessary to reverse his conviction. In light of its holding, the Court of Appeals correctly stated that there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland v. Washington, 466 U.S. 668, 700 (1984).

Thus, as the Court had correctly determined that Petitioner failed to establish the requisite prejudice, they properly dismissed her claim without examining her PCR allegation, as is required by the governing law. Therefore, this Court should deny certiorari.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the post-conviction relief court's denial of relief. Should this Court grant certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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