STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Nov 21 2024

S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Spartanburg County
Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 6087 (S.C. Ct. App. Filed September 4, 2024)

Lower Court Case No. 2016-CP-42-04153

FRANCISCO R. RODRIGUEZ,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000882

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

KATHRINE H. HUDGINS
Senior Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

INDEX i

CERTIFICATE OF COUNSEL 1

QUESTION PRESENTED 2

STATEMENT OF THE CASE 3

STANDARD OF REVIEW 5

REASON WHY CERTIORARI SHOULD BE GRANTED 6

ARGUMENT

The Court of Appeals erred in affirming the PCR judge's finding that Petitioner suffered no prejudice from plea counsel's failure to advise that the Alford plea would result in mandatory deportation and a permanent ban on reentry into the United States. 7

CONCLUSION 22

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on October 22, 2024.

QUESTION PRESENTED

Did the Court of Appeals err in affirming the PCR judge's finding that Petitioner suffered no prejudice from plea counsel's failure to advise that the Alford plea would result in mandatory deportation and a permanent ban on reentry into the United States?

STATEMENT OF THE CASE

In August of 2015, the Spartanburg County Grand Jury indicted Petitioner, Francisco R. Rodriguez, for criminal sexual conduct with a minor first degree and criminal sexual conduct with a minor third degree, indictments #2015-GS-42-3396, 3397. On April 12, 2016, Petitioner appeared before the Honorable R. Keith Kelly and entered a plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to criminal sexual conduct with a minor third degree. The State dismissed the indictment for criminal sexual conduct with a minor first degree. An interpreter translated the proceedings. Joseph R. Baldwin represented Petitioner at the plea. Lindsey H. Overby represented the State. Judge Kelly sentenced Petitioner to fifteen (15) years in prison. (App. pp. 22-24). As a result of the plea, Petitioner will be required to register as a sex offender. Petitioner did not appeal the sentence or conviction.

On November 21, 2016, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 25-33). The State filed a return on July 3, 2017. (App. pp. 34-40). On October 10, 2019, an evidentiary hearing was held before the Honorable G. Thomas Cooper. Lydia Angelica Hernandez represented Petitioner at the PCR hearing. Jacob A. Isenberg represented the State. In a written order signed May 11, 2020, Judge Cooper denied relief and dismissed the application. (App. pp. 136-159). On June 16, 2020, a timely notice of intent to appeal was served. On December 3, 2020, the petition for writ of certiorari was filed with the South Carolina Supreme Court. In an order dated May 12, 2021, the South Carolina Supreme Court, pursuant to Rule 243(1), SCACR, transferred the case to the South Carolina Court of Appeals. On August 22, 2022, the Court of Appeals granted the petition for writ of certiorari. The brief of petitioner was filed on September 21, 2022. The brief of respondent was filed on December 21, 2022.

On May 8, 2024, a three judge panel of the Court of Appeals heard oral argument. On September 4, 2024, a majority of the Court affirmed the finding of the PCR judge that plea counsel was deficient but Petitioner failed to show prejudice. Rodriguez v. State, 444 S.C. 431, 907 S.E.2d 153 (Ct. App. 2024). The petition for rehearing was filed on September 19, 2024, and denied on October 22, 2024. This petition for writ of certiorari follows.

STANDARD OF REVIEW

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014))." Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018).

REASON WHY CERTIORARI SHOULD BE GRANTED

This Court should grant the petition for writ of certiorari to clarify that the ability to receive a reduced sentence as part of a plea deal does not preclude a finding of prejudice under Strickland when the record supports a finding that, but for counsel's deficient performance, Petitioner would not have entered the plea and instead would have insisted on going to trial.

ARGUMENT

The Court of Appeals erred in affirming the PCR judge's finding that Petitioner suffered no prejudice from plea counsel's failure to advise that the Alford plea would result in mandatory deportation and a permanent ban on reentry into the United States.

The PCR judge and the Court of Appeals correctly found that trial counsel's failure to explicitly advise Petitioner that he would be deported if he entered the Alford plea to criminal sexual conduct with a minor third degree constituted deficient performance pursuant to Padilla v. Kentucky, 559 U.S. 356, 366, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). The PCR judge and the Court of Appeals, however, erred in refusing to find prejudice. Given Petitioner's familial connections to the United States, having two children who are United States citizens, his general confusion during the Alford plea, and the overall weakness in the State's case, there is a reasonable probability that absent counsel's error, Petitioner would have risked trial instead of entering the plea and facing certain deportation.

Alford Plea

Petitioner is from Veracruz, Mexico and speaks only Spanish. (App. p. 49, lines 5-8). Petitioner entered a plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to criminal sexual conduct with a minor third degree. Petitioner denied the allegations. (App. p. 99, lines 18-20). The minor who made the allegation was a girl who Petitioner's common law wife volunteered to watch so that the girl would not be left home alone. (App. p. 57, lines 17-19). While an interpreter was present to translate the proceedings of the plea, plea counsel did not use an interpreter when consulting with Petitioner. (App. p. 111, line 25 – p. 112, lines 1-25). Petitioner testified at the PCR hearing that counsel met with him three times. (App. p. 51, lines 12-15). Plea counsel testified that he communicated with Petitioner in Spanish because plea counsel's wife was from Mexico and he learned Spanish from her. (App. p. 112, lines 10-13).

Petitioner testified that plea counsel was not fluent in Spanish and Petitioner did not understand everything that plea counsel said. (App. p. 50, lines 9-17). While the plea judge advised that the plea would result in mandatory sex offender registry, (App. p. 6, lines 13-14), plea counsel admitted at the PCR hearing that he did not talk to Petitioner about the sex offender registry. (App. p. 124, lines 12-25).

The plea transcript reflects that Petitioner had to stop and consult with his attorney eight different times during the plea. During the PCR hearing plea counsel admitted that Petitioner seemed confused during the plea. (App. p. 103, lines 21-24). At the end of the plea hearing the prosecutor told the judge, "I would also let Your Honor know I did contact ICE regarding this defendant. And they did not tell me that he has, you know, regarding his immigration status. I'm not sure. I just know what they tell me is that deportation is not a real consequence unless this sentence is ninety days or more. Just that information I would just like to pass along to Your Honor." (App. p. 19, line 21 – p. 20, lines 1-2). The plea judge did not question Petitioner about any possible immigration consequences that would result from the plea.

Post-Conviction Relief

In the application for post-conviction relief [PCR] Petitioner alleged, "That the Applicant did not have an interpreter to explain the nature of the charge against him, his constitutional right to a jury trial, a defense, or of the exposure of time and consequences of the plea. If the Applicant had been advised in a manner that he could understand, he would have insisted on going to trial." (App. p. 26).

During the PCR hearing Petitioner testified, in regard to plea counsel's advice on immigration consequences, that "He, just told me that it would be possible for me to be deported." (App. p. 70, line 21 – p, 71, lines 1-4). Petitioner agreed on cross-examination that

plea counsel told him there was a possibility that he would be deported. (App. p. 85, lines 7-11). Petitioner agreed that plea counsel did not explain that a sexual crime against a child is considered a crime of moral turpitude. (App. p. 71, lines 10-16). Petitioner agreed that plea counsel did not advise him that by pleading to the charge of criminal sexual conduct with a minor third-degree Petitioner would be banned completely from ever reporting legal status in the United States. (App. p. 71, lines 17-20). Plea counsel knew that Petitioner had children and the children were United States citizens. (App. p. 71, lines 21-24). Petitioner agreed that plea counsel did not explain that if Petitioner was deported he would never be able to return to the United States to be with and raise his children. (App. p. 71, line 25 – p. 72, lines 1-4). Petitioner testified that his plea was not freely and intelligently made and but for counsel's advice to continue with the plea, Petitioner would have gone to trial instead. (App. p. 75, line 13 – p. 76, lines 1-8).

When asked at the PCR hearing if he discussed deportation consequences with Petitioner, plea counsel testified, "I, I told – well, I told him that immigration was probably gonna come and get him when his sentence was over no matter when it ended. You know, whether it was, you know, at – and that they would use this conviction against him as a reason to deport him." (App. p. 102, lines 8-14). When asked on cross-examination about whether he explained immigration consequences that would result from the plea, plea counsel testified, "Yes, I'm sure I did. I told him it would be used against him in a deportation proceeding if there was one." (App. p. 126, lines 2-7). Plea counsel admitted that the plea would make Petitioner inadmissible. (App. p. 126, lines 8-11). When asked if he explained that as a result of the plea Petitioner would never be able to return to the United States to raise his children, plea counsel testified:

> Well, if I – I think I had asked him if there were any – if there was anything about the children that was exceptional or unusual in any regard. And I don't think

> there was, but I don't know if I ever told him he'd never be able to come to the United States. I may not have gone over that with him, but he was very much aware that the immigration court would – you know, this would be used against him and he would probably be deported.

(App. p. 126, line 18 – p. 127, line 1).

In summation PCR counsel stated that if Petitioner had understood everything, he would not have entered the plea. (App. p. 130, lines 1-7).

In the order of dismissal the PCR judge wrote:

> Here, because Counsel failed to explicitly state Applicant would be deported if he pled, Counsel acted deficiently. However, there is no indication Applicant was prejudiced by this deficiency. Applicant made clear the determinative factor in taking the plea was the shortened sentence, not any potential deportation consequences. (PCR Tr. 62). Applicant never testified that if Counsel told him deportation was mandatory in his case he would have proceeded to trial. Applicant never stated he would not have plead but for this deficiency. Thus, Applicant has not met his burden of proof in showing he was prejudiced by any lack of information given to him regarding immigration consequences. *See Taylor v. State*, 404 S.C. 350, 362, 745 S.E.2d 97, 103 (2013) (stating that to show prejudice, the applicant must show that but for Counsel's error Applicant would have proceeded to trial).
>
> Thus, this Court finds, based on the entirety of Counsel's testimony, Applicant still would have taken the plea if Counsel provided a more concrete answer regarding immigration consequences of the plea. Thus, Applicant has not met his burden of proof as to prejudice, and consequently, is not entitled to relief.

(App. pp. 155-156). While the PCR judge correctly found that plea counsel was ineffective for failing to advise Petitioner that the Alford plea would result in mandatory deportation and a permanent ban on reentry into the United States, the PCR judge erred in refusing to find prejudice. Contrary to the finding in the order of dismissal, Applicant did not make clear the determinative factor in taking the plea was the shortened sentence. The reference in the order to page 62 of the PCR hearing is based on plea counsel's testimony, not Petitioner's testimony, that Petitioner did not want to face a mandatory minimum twenty-five-year sentence. (App. p. 102,

lines 1-7). The reduced exposure is just one factor to consider in addition to the mandatory deportation and permanent ban on reentry.

Deficient Performance

Pursuant to Padilla v. Kentucky, 559 U.S. 356, 366, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), the PCR judge correctly found that plea counsel was deficient in failing to explicitly advise Petitioner that he would be deported if he entered the Alford plea to criminal sexual conduct with a minor third degree. In the 2018 case of Taylor v. State, 422 S.C. 222, 225, 810 S.E.2d 862, 863 (2018), the South Carolina Supreme Court wrote:

> "[A]dvice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel." Padilla v. Kentucky, 559 U.S. 356, 366, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). If the deportation consequences of a particular plea are unclear or uncertain, "a criminal defense attorney need do no more than advise a non-citizen client that pending criminal charges may carry a risk of adverse immigration consequences." Id. at 369, 130 S.Ct. 1473. However, where the terms of the relevant immigration statute are "succinct, clear, and explicit" in defining the removal consequence, counsel has an "equally clear" duty to give correct advice. Id. at 368–69, 130 S.Ct. 1473.

An applicable federal code section, 8 U.S.C.A. § 1227 (a)(2)(A)(i,ii), provides that, "Any alien who— is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable." Another part of the federal code provides that, "Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable." 8 U.S.C.A. § 1227 (a)(2)(E)(i). The terms of the removal statute are succinct, clear, and explicit.

Counsel had a duty to give correct advice. As the Court wrote in Taylor, "Pursuant to Padilla, counsel must do more than 'discuss immigration' or advise Petitioner he *might* face adverse immigration consequences." 422 S.C. at 227, 810 S.E.2d at 864. Plea counsel's advice that Petitioner *might* be deported was deficient. The PCR judge correctly found deficient performance.

The prosecutor's brief reference to deportation at the end of the plea did not cure trial counsel's failure to advise that the plea would result in mandatory deportation and a permanent ban on reentry. In Taylor v. State, 422 S.C. 222, 229, 810 S.E.2d 862, 865 (2018), the Court wrote:

> We turn now to the State's (and the PCR court's) reliance on the plea colloquy to remedy the deficiency. During the plea hearing, before accepting Petitioner's guilty plea, the plea court stated that a guilty plea could "subject [Petitioner] to being removed from this country" and "could affect [Petitioner's] right to remain here." Here, the colloquy was generic in that Petitioner was merely informed that his plea *could affect* his immigration status. In light of Padilla and its progeny, we are constrained to conclude that the plea court's general warning failed to cure counsel's deficient representation. We acknowledge that in many circumstances a plea court's standard colloquy will cover a multitude of deficiencies by counsel. Pittman v. State, 337 S.C. 597, 600, 524 S.E.2d 623, 625 (1999) ("A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' ") (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171 (1993)). But under Padilla, special requirements have been added to counsel in the plea bargaining process when a non-citizen is involved. The meaning of Padilla would be negated if we allowed general comments from the plea court to satisfy the specific requirements imposed on counsel under the Sixth Amendment. The generic statement by the plea court was no better than counsel's general deportation advice, especially where Petitioner had made it crystal clear that his decision to plead guilty turned on the prospects of deportation.

In Petitioner's case the plea judge did not make any statements about Petitioner's immigration status. The prosecutor's comment to the judge about contacting ICE does not cure the deficiency. Plea counsel was deficient.

Prejudice

The PCR judge erred in finding that Petitioner failed to meet his burden to demonstrate prejudice. The judge's finding that the determinative factor in Petitioner's decision to enter an Alford plea was the shortened sentence is not supported by the record. There is a reasonable probability that if Petitioner had been advised that the Alford plea would result in mandatory deportation and permanent ban on reentry, Petitioner would have rejected the plea and insisted on going to trial. The order of dismissal cites to page 62 of the PCR transcript where plea counsel testified that Petitioner did not want a trial because he did not want to risk the possibility of a twenty-five (25) year minimum sentence. (App. p. 102, lines 1-7). This decision was based, however, on the erroneous advice that deportation was merely a possibility. As noted by the dissent:

> I agree with the majority that the terms of the applicable removal statutes are succinct, clear, and explicit in mandating Petitioner was deportable if convicted. But the problem here is that plea counsel himself did not appear to understand this consequence, and he admittedly did not adequately explain it to Petitioner. As the majority recognizes, the only reference to immigration consequences before the plea court was the prosecutor's brief reference to deportation at the end of the proceeding. Notably, when the State mentioned "deportation is not a real consequence unless this sentence is ninety days or more," the plea court made no inquiry as to whether Petitioner understood that *his* plea would result in mandatory deportation. Cf. United States v. Akinsade, 686 F.3d 248, 255 (4th Cir. 2012) (explaining that in order for a plea court's "admonishment to be curative, it should address the particular issue underlying the affirmative misadvice"). Thus, the conduct of the plea proceeding itself did not ameliorate the prejudice to Petitioner resulting from plea counsel's deficiency.

Rodriguez v. State, 444 S.C. 431, 439–40, 907 S.E.2d 153, 157 (Ct. App. 2024).

In the application for post-conviction relief [PCR] Petitioner alleged, "That the Applicant did not have an interpreter to explain the nature of the charge against him, his constitutional right to a jury trial, a defense, or of the exposure of time and consequences of the plea. If the

Applicant had been advised in a manner that he could understand, he would have insisted on going to trial." (App. p. 26). Petitioner testified that the plea was not made freely and intelligently and if plea counsel had not told him to continue through eight interruptions, he would have proceeded to trial. (App. p. 75, line 13 – p. 76, lines 1-8). PCR counsel argued that if Petitioner had been made aware of all of the consequences of the plea, he would have insisted on going to trial. (App. p. 129, line 17 – p. 130, lines 1-7).

The language barrier and the eight times Petitioner had to stop and consult with plea counsel reflect that Petitioner was confused by the proceedings. Plea counsel admitted that Petitioner seemed confused during the plea. (App. p. 103, lines 21-24; p. 104, line 9). Plea counsel admitted, "But, you know, looking back, maybe I should have just taken a lot more time with him to make sure he understood that it wasn't a trial." (App. p. 105, lines 8-11).

Given Petitioner's familial connections to the United States, having two children who are United States citizens, there is a reasonable probability that absent counsel's error, Petitioner would have risked trial instead of entering the plea and facing certain deportation. In United States v. Swaby, 855 F.3d 233, 243 (4th Cir. 2017), the Court addressing prejudice in the context of Padilla deficient performnce wrote:

> Swaby alternatively can demonstrate prejudice by showing a reasonable likelihood that, absent his counsel's error, he would have gone to trial instead. To determine Swaby's reasonable likelihood of going to trial, we must look to the strength of the state's case "inasmuch as a reasonable defendant would surely take it into account." Ostrander v. Green, 46 F.3d 347, 356 (4th Cir. 1995), *overruled on other grounds by* O'Dell v. Netherland, 95 F.3d 1214 (4th Cir. 1996). But likelihood of acquittal at trial is not the only factor a defendant considers, especially when the offered plea carries considerable collateral consequences. For example, this Court has found prejudice when the defendant "had significant familial ties to the United States and thus would reasonably risk going to trial instead of pleading guilty and facing certain deportation." Akinsade, 686 F.3d at 255.

In the present case, as in Swaby, it is not only reasonable, it is unsurprising that if Petitioner had known the true consequences of the plea, he would have taken any chance to avoid deportation by going to trial rather than accepting mandatory deportation and permanent ban on reentry making it impossible to visit his children or help to raise them in the United States.

The Court in Klaiber v. United States, 471 F. Supp. 3d 696, 711 (D. Md. 2020), wrote:

> The Supreme Court has now repeatedly held that non-citizen defendants must be apprised of the immigration consequences of their conviction, given that for many, deportation is more severe a penalty than imprisonment. See Padilla, 559 U.S. at 365, 130 S.Ct. 1473; Lee, 137 S. Ct. at 1967. As the Court explained in Lee, even when the chances of success at trial are slim, the failure to warn a defendant of these consequences can be prejudicial. Id. at 1966–67. This is because for someone facing deportation, "the smallest chance of success at trial may look attractive." Id. at 1966.

The failure to warn Petitioner of the consequences of the plea in the present case was prejudicial.

As noted by the South Carolina Supreme Court in the 2018 Taylor case, in Lee v. United States, 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017), the United States Supreme Court adopted the Hill v. Lockhart analysis for prejudice resulting from plea counsel's failure to properly advise about immigration consequences resulting from a guilty plea. In Lee the Court found that, although Lee had no viable defense at trial, there was a reasonable probability that if Lee had been advised that his guilty plea would result in mandatory deportation, he would have rejected the plea and insisted on going to trial.

In contrast to the case against Lee, the State's case against Petitioner was based solely on the testimony of the minor. During the Alford plea counsel told the judge that there was no physical evidence against Petitioner and the State's evidence was based solely on the word of the minor. (App. p. 14, line 12 – p. 15, lines 1-2). Plea counsel also told the judge, "I would point out to the Court that I believe that the parents of the victim might have some type of ulterior

motive to make allegations in that they're not legally in the country and they might be looking for a new visa." (App. p. 15, lines 3-6).

During the PCR hearing plea counsel testified, "And I remember telling him that in my opinion he could win the case, but there was more than – you know, that there was sufficient evidence that he could -- that there was probably even better than a 50 percent chance that he, that he would lose the case, and if he did, the lewd act on a child wouldn't be the one he went to trial on. It would be the criminal sexual conduct in the first degree, which would carry a minimum of 25 years." (App. p. 118, lines 11-19). The fact that plea counsel believed that there was a possibility that the jury would find Petitioner not guilty combined with the language barrier and the fact that Petitioner was confused during the plea hearing as well as the fact that Petitioner did not admit guilt and instead entered a plea pursuant to Alford all support that there is a reasonable probability that if Petitioner had been advised that the plea would result in mandatory deportation and a permanent ban on reentry, Petitioner would have rejected the plea and insisted on trial. This is especially true in light of the fact that Petitioner's children are United States citizens and he will not be able to visit them or help to raise them in the United States.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under

this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' " Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "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.' " Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

In Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018), the South Carolina Supreme Court wrote:

> To establish a claim of ineffective assistance of counsel, the defendant has the burden of proving "(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). In order to establish prejudice when challenging a guilty plea, a defendant 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. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991). As the United States Supreme Court stated in Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), "[I]n order to satisfy the 'prejudice' requirement, the defendant must show there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial."

Petitioner did not have a full understanding of the consequences of the plea. Petitioner established that plea counsel failed to render reasonably effective assistance of counsel under prevailing norms by not advising Petitioner that as a result of the Alford plea he faced mandatory deportation and a permanent ban on reentry. Additionally, Petitioner established prejudice by showing that there is a reasonable probability that if counsel had advised Petitioner that as a result of the plea Petitioner faced mandatory deportation and a permanent ban on reentry, Petitioner would not have pled guilty and would have insisted on going to trial. Petitioner is entitled to a new trial.

In affirming the PCR judge the majority of the Court of Appeals wrote:

> Although the PCR court's order states Petitioner "made clear the determinative factor in taking the plea was the shortened sentence, not any potential deportation consequences" and this finding is based on plea counsel's testimony rather than Petitioner's, we find evidence to support the PCR court's finding. See Lee v. United States, 582 U.S. 357, 369, 137 S.Ct. 1958, 198 L.Ed.2d 476 (2017) ("Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences."); Smalls, 422 S.C. at 180, 810 S.E.2d at 839

> ("We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them.").

Rodriguez v. State, 444 S.C. 431, 436, 907 S.E.2d 153, 155 (Ct. App. 2024). The showing of prejudice in the present case is not based solely on a *post hoc* assertion from the Petitioner. Instead, the evidence in the record including Petitioner's familial connections to the United States, having two children who are United States citizens, his general confusion during the Alford plea, and the overall weakness in the State's case all support a finding of prejudice. This Court should find, as the United States Supreme Court found in Lee v. United States, 582 U.S. 357 (2017), the case cited in the majority opinion, that Petitioner showed prejudice.

The record fails to support a finding that the determinative factor in Petitioner accepting the Alford plea was the shortened sentence. The ability to receive a reduced sentence was just one factor for Petitioner to consider when deciding to enter the Alford plea. The resulting mandatory deportation and permanent ban on reentry was another factor Petitioner should have been able to consider when deciding to enter the Alford plea but was prevented by counsel's deficient performance. The ability to receive a reduced sentence as part of a plea deal does not preclude a finding of prejudice under Strickland when the record supports a finding that, but for counsel's deficient performance, Petitioner would not have entered the plea and instead would have insisted on going to trial. Petitioner was prejudiced by counsel's error.

As noted by the dissent:

> The PCR court found the determinative factor in Petitioner's decision to enter the *Alford* plea was a lesser sentence. I agree with the majority that this finding is likely supported by plea counsel's testimony. Still, in light of Petitioner's clear confusion during the plea proceeding itself, there is at least a reasonable probability that Petitioner would have rejected the plea and insisted on going to trial had he been properly advised that his plea would result in mandatory deportation and a permanent ban on reentry. See, *e.g.*, United States v. Swaby, 855 F.3d 233, 243 (4th Cir. 2017) (addressing prejudice in the context of Padilla

> deficient performance and finding the "likelihood of acquittal at trial is not the only factor a defendant considers, especially when the offered plea carries considerable collateral consequences. For example [the Fourth Circuit] has found prejudice when the defendant has 'significant familial ties to the United States and thus would reasonably risk going to trial instead of pleading guilty and facing certain deportation.' " (quoting Akinsade, 686 F.3d at 255)).

Rodriguez v. State, 444 S.C. 431, 440–41, 907 S.E.2d 153, 157–58 (Ct. App. 2024) (note #5, #6, #7 omitted).

The majority of the Court of Appeals found, "Although Petitioner's testimony supports the PCR court's finding that counsel's representation was deficient, Petitioner never testified that if counsel told him deportation was mandatory in his case he would have proceeded to trial." Rodriguez v. State, 444 S.C. 431, 437, 907 S.E.2d 153, 156 (Ct. App. 2024). While those specific words were not said by Petitioner through the translator used during the PCR hearing, the record supports that Petitioner showed a reasonable probability that, but for counsel's deficient performance, Petitioner would not have entered the Alford plea and instead would have insisted on going to trial.

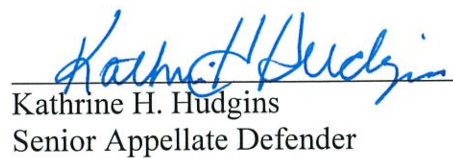
Petitioner asserted in the PCR application that if he had been advised of the consequences of the plea in a manner that he could understand, he would have insisted on going to trial. (App. p. 26). During the PCR hearing Petitioner testified that the plea was not entered freely and intelligently and he would have gone to trial if it had not been for plea counsel's advice to continue with the plea after confusion and eight interruptions. (App. p. 75, line 13 – p. 76, lines 1-8). In closing PCR counsel argued that if Petitioner understood the consequences of the plea, he would not have entered the plea. (App. p. 129, line 17 – p. 130, lines 1-7). Additionally, the fact that Petitioner denied the allegations, the overall weakness in the State's case, the language barrier, the lack of an interpreter during the three times plea counsel met with

Petitioner, Petitioner's confusion during the Alford plea, including the eight times during the plea when Petitioner had to stop and consult with his attorney, and Petitioner's familial connections to the United States all support that there is a reasonable probability that if Petitioner had been warned that the plea would result in mandatory deportation and a permanent ban on reentry, Petitioner would not have entered a plea and instead would have insisted on going to trial. The Court of Appeals erred in affirming the PCR judge's finding that Petitioner suffered no prejudice from plea counsel's failure to advise that the Alford plea would result in mandatory deportation and a permanent ban on reentry into the United States.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully Submitted,



Kathrine H. Hudgins
Senior Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of November, 2024.