

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Spartanburg County

J. Mark Hayes, II, Circuit Court Judge

BRITTANY C. FOSTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000143

PETITION FOR WRIT OF CERTIORARI

JOANNA K. DELANY
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

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ISSUE PRESENTED

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STATEMENT

During the August 2016 term, a Spartanburg County Grand Jury indicted the petitioner, Brittany Foster, for murder, possession of a weapon during the commission of a violent crime, unlawful carrying of a pistol, and possession of methamphetamine. App. 307 – 312. The charges stemmed from the death of Anthony Biggerstaff (the decedent) earlier that year. App. 311 – 312.

At the time of the decedent’s death, Foster was twenty-one years old with a ninth-grade education. App. 6, ll. 11-14. Foster had a history of epileptic seizures, brain damage, and learning disabilities. App. 93, ll. 4-5; App. 88, ll. 7-10. She was sexually abused by her father at the age of eleven, and her mother was addicted to drugs. App. 85, l. 17 – 86, l. 22. Foster herself became addicted to drugs at the age of fifteen. App. 86, l. 23 – 87, l. 1. Her lawyer would later say that “by the time [she] hit adolescence [she had been] thrown away by society.” App. 106, ll. 17-19. When Foster was raped by a friend’s father at the age of eighteen, the State declined to prosecute because the man “denied it was forced” and the prosecutor did not believe he could secure a conviction. 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. App. 11, l. 22 – 12, l. 1. Foster would later testify that prior to the decedent’s death, she woke up in “excruciating pain,” bleeding from the vagina and rectum. App. 64, l. 24 – 65, l. 6. She asked Hines if the two of them had sex, which he denied. Hines appeared to become angry with Foster and accused her of cheating on him with the decedent, who was the only other person in the house. App. 65, l. 8 – 66, l. 8. However, Foster would later discover that Hines likely “sold” her to the decedent when she was “passed out.” App. 63, l. 25 – 66, l. 3; App. 22, ll. 4-6.

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. App. 13, l. 15 – 14, l. 18; App. 255. After finding the decedent's car in the lake and a suicide note nearby, police began looking for Foster and Hines, since they were the decedent's roommates and had been seen with him that day. App. 11, l. 13 – 14, l. 1.

On May 30, 2016, after the decedent's car was found in the lake, Investigator Clark interviewed Foster and Hines at the hotel where they were staying. 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.

On June 2, 2016, Foster and Hines were passengers in car driven by Jessica Nesbitt (Nesbitt), that was pulled over because Officer Henderson could not read the date on the car's paper tag. Hines was seated in the front passenger seat and Foster sat in the rear. App. 196. Nesbitt did not immediately pull over but continued driving. App. 99, ll. 15-21; App. 196. After Nesbitt pulled over, Nesbitt looked through purses in the trunk for her driver's license, and at that time, the officer saw a bag of methamphetamine. App. 196. Nesbitt admitted the purse containing the methamphetamine was hers. App. 197. Officer Henderson asked Nesbitt about the presence of any weapons, and Nesbitt said that Hines had a gun. The officer searched the car and found a gun under the front passenger seat, where Hines had been seated. App. 99, l. 22 – 101, l. 25; App. 196; App. 200. Officers also found marijuana inside a bag within a bookbag in the car. App. 197.

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

After she was taken to the jail, Investigator Clark, who had wanted the opportunity to question Foster again, began to interrogate Foster, who was under the influence of drugs and alcohol, and she admitted shooting the decedent. App. 103, ll. 4-15; App. 57, ll. 15-18; App. 59, ll. 2-9; App. 166. Foster was read *Miranda*¹ warnings and officers took Foster out to look for the body for “a number of hours,” but were unsuccessful. App. 145; App. 166. Foster was taken to the Sheriff’s Department and again provided *Miranda* warnings. 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. 145; App. 166; App. 204; State’s Exhibit #4.

Although she initially denied that Hines was in any way responsible for 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.” App. 66, ll. 12-15; App. 14, ll. 3-6; App. 22, l. 4 – 23, l. 24.

Hines was questioned by police officers and told them he helped hide the body, but he said Foster killed the decedent because the decedent “was trying to get with her and she did not like that.” App. 145; App. 205 – 211; State’s Exhibit #5. Hines showed officers where the decedent’s body was and he was charged with accessory after the fact. App. 145; App. 155.

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

A pre-trial competency evaluation revealed Foster had depression and a personality disorder. App. 221 – 222. She was also diagnosed with alcohol use disorder and amphetamine use disorder. App. 222. The examiner noted that Foster had some “deficits” in her understanding of the legal system and opined that she might need education regarding the legal process. App. 224.

On April 27, 2017, Foster pleaded guilty as indicted before the Honorable Letitia Verdin. App. 1. Barry Joe Barnette represented the State. App. 1. Robert Hall (plea counsel) represented Foster. App. 1. No negotiations had been entered and no recommendations were made. App. 4, ll. 12-14. Petitioner 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. 27, ll. 16-19.

Of note, at the plea hearing, the solicitor misspoke and said that Nesbitt’s car had been pulled over for an expired tag and plea counsel did not correct this misstatement of fact. App. 12, ll. 6-12; App. 99, ll. 15-18. Nesbitt was pulled over because Officer Henderson said the expiration date on her temporary tag was not readable; the tag was not expired. App. 196; App. 99, ll. 15-18; App. 115, ll. 6-22.

Notice of intent to appeal the guilty pleas was timely filed and served but the Court of Appeals dismissed the appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR. App. 29. The remittitur was issued August 3, 2017. App. 30. On February 27, 2018, Foster filed an application for post-conviction relief (PCR). App. 31 – 37. On May 4, 2018, the State made its return and motion for a more definite statement. App. 38 – 45. On June 7, 2018, Foster filed an amended PCR application. App. 46 – 48. On November 8, 2018, a hearing was held on the matter before

the Honorable J. Mark Hayes, II. App. 49. Foster was represented by Susannah Ross. App. 49. The State was represented by Jordan Cox. App. 49.

Foster was the first witness at the PCR hearing. Foster testified that plea counsel never advised her that she could challenge the admissibility of her statements to the police if she went to trial. Foster said defense counsel never mentioned a *Jackson v. Denno*² hearing and never mentioned that a trial judge could, in some circumstances, keep a confession out of a trial. App. 60, l. 20 – 61, l. 2. “It was never stated that my – that my confessions could be suppressed, ever.” App. 69, ll. 18-19. Foster said that if she had known she could challenge her confessions at trial, she would have taken the case to trial. App. 69, ll. 22-25; App. 70, ll. 4-12.

Plea counsel³ 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 . . .”** App. 120, ll. 19-24 (emphasis added). 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 responded, “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 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. 121, l. 20 – 122, l. 5.

² *Jackson v. Denno*, 377 U.S. 368 (1964).

³ Plea counsel was appointed to represent Foster on the charges. App. 94, l. 19 – 95, l. 16. Troublingly, plea counsel did not explicitly deny Foster’s allegation that he told her if she did not plead guilty, she would be “hung” by the trial judge. Plea counsel said that he did not remember; that he would have advised something similar but he would likely have used the word “hanged.” App. 109, ll. 15-17; App. 113, ll. 3-16. Nevertheless, the PCR court found Foster’s testimony that she pleaded guilty based on this advice from counsel was not credible. App. 303.

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.⁴ App. 129 – 130; App. 131 – 283. After the hearing concluded, PCR counsel filed a post-hearing 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.” App. 286.

PCR counsel also noted that if Foster “lost her pre-trial suppression motion, she would have had a strong appellate issue if she had not pled guilty.” App. 289. PCR counsel argued that plea counsel provided deficient performance when he advised 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. 290. PCR counsel also noted that plea counsel did not dispute Foster’s “testimony that they had not discussed suppression issues or her chances to keep out the confession if she went to trial. Nor did [counsel] dispute [Foster’s] testimony that if she had known that she had a suppression issue, she would not have pled and instead insisted on going to trial.” App. 290.

On January 24, 2020, the PCR court issued an order of dismissal. App. 293 – 306. In the order of dismissal, the PCR court addressed, *inter alia*, 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 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.” App.

⁴ Copies of the paper exhibits, including the incident reports, are included in the appendix. Copies of the photographic exhibits are included in the appendix and are also on file with this Court. The recorded exhibits, including Foster’s interview with police officers and Hines’ interview with police officers, are also on file with this Court.

301. The order of dismissal 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.” App. 301. “Also, her confession to the murder is unrelated to the stop.” App. 301.

As to whether counsel should have advised Foster she could challenge the voluntariness of her confessions, the order of dismissal improperly conflated the standard for competency to stand trial with the standard for establishing prejudice in a PCR action in the guilty plea context, stating that Foster had not met her burden of proof as to “establishing *Strickland* prejudice in the context of plea counsel’s failure to request a mental competency evaluation, [since] the applicant need only show a reasonable probability that he was incompetent at the time of the plea.” App. 301 – 302. “Applicant 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. 302.

This petition for writ of certiorari follows.

ARGUMENT

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.

Counsel provided ineffective assistance when he advised Petitioner Foster that she should plead guilty based on counsel's erroneous conclusion that her confessions could not be suppressed, and where counsel did not advise Foster of the possibility that they could be suppressed, where the confessions were the State's key evidence of guilt.

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.

Deficiency

Foster’s allegation of deficient performance by plea counsel is twofold. In order to provide reasonably effective assistance under prevailing professional norms, in this case: (1) plea counsel was obligated to inform but failed to inform Foster that she had constitutional rights to challenge the admissibility of her confessions at trial, and that when she pleaded guilty she gave up those rights; and (2) plea counsel was required to have a correct understanding of the law before advising Foster to plead guilty but counsel did not, since he did not know that there was a reasonable probability Foster’s confessions could be suppressed under these circumstances.

First, plea counsel was deficient when he did not advise Foster that she could challenge the admissibility of her confessions at trial. As seen, Foster testified plea counsel never mentioned that a trial judge could keep a confession out of a trial under certain circumstances. App. 60, l. 20 – 61, l. 2. “It was never stated that my – that my confessions could be suppressed, ever.” App. 69, ll. 18-19. Plea counsel did not dispute Foster’s testimony; he was asked if he 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 . . .**” App. 120, ll. 19-24 (emphasis added).

PCR counsel was asked again whether 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 only said that he would have told Foster what he generally tells all of his clients, that “you’re going to be giving up any rights to challenge any of the evidence, statements, or anything.” Plea counsel also said he considered colloquies by judges sufficient to inform

defendants of their rights. App. 121, l. 20 – 122, l. 5. Notably, the plea judge here did not mention anything about suppression or challenging a confession in her colloquy with Foster. App. 5, l. 2 – 6, l. 25; App. 15, l. 5 – 16, l. 18.

Plea counsel's performance was deficient, since his advice left Foster without an understanding of the fact that the trial judge could suppress her confessions (or that if the trial judge did not, she could potentially prevail on direct appeal) if she went to trial. *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.”)

In *Shirley v. State*, 306 S.C. 241, 244, 411 S.E.2d 215, 216 (1991), the PCR applicant alleged ineffective assistance of counsel based on counsel's failure to inform him “prior to his guilty plea that his statements may have been made involuntarily, and, if so, would be inadmissible at trial.” This Court agreed, observing that statements are inadmissible at trial when they are made involuntarily, and found Shirley had proven prejudice since but for plea counsel's deficient performance, he would not have pled guilty, and would have gone to trial. *Id.* Here, Foster testified that plea counsel did not discuss the possibility of suppression and that she would have gone to trial had she known of this possibility.

The evidence against Foster 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. Thus, Foster's confessions were the chief piece of incriminating evidence against her, and plea counsel's advice left her with the mistaken understanding that the confessions were automatically admissible at trial. Plea counsel's deficient performance thus left Foster without a “voluntary and intelligent

choice among the alternative courses of action open to the defendant,” since she did not know she could challenge the most critical evidence against her at trial. *Hill v. Lockhart*, 474 U.S. at 56. Foster did not have an “understanding of the law in relation to the facts.” *McCarthy v. United States*, 394 U.S. at 466. Therefore, her pleas of guilty were not knowingly, voluntarily, and intelligently entered.

Second, in addition to not informing Foster she could challenge the admissibility of her confessions, plea counsel was ineffective for advising Foster she should plead guilty based on his erroneous understanding that Foster’s confessions were unlikely to be suppressed. “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). Here, the solicitor’s recitation of the facts was brief at the plea hearing, but he entered fifteen exhibits, including what appears to be the entirety of law enforcement’s incident reports about the case. App. 9, l. 3 – 11, l. 12; App. 131 – 283; State’s Exhibits #4 – 5; State’s Exhibits #7 – 10. These exhibits were also made part of the record at the PCR hearing and show that there was a reasonable probability that Foster’s confessions could be suppressed—based on the Fourth Amendment (unreasonable search and search and seizure; fruit of the poisonous tree) or, alternatively, the Fourteenth Amendment (voluntariness of the confession).

Foster’s confessions were the product of an unlawful seizure, since police officers lacked probable cause to arrest her for drugs or weapons based on the evidence found in the car, but Investigator Clark wanted to question her again about the decedent’s death. Probable cause must be more than mere suspicion; it must be a fair probability determined by the totality of the

circumstances. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Arrests cannot be made without probable cause. *Michigan v. Summers*, 452 U.S. 692, 700 (1981).

Although police had probable cause to arrest Nesbitt and Hines, they did not have probable cause to arrest Foster. When Nesbitt looked through the trunk of her car for her driver's license, the officer spotted methamphetamine in a purse that Nesbitt admitted was her own. App. 196. Nesbitt told Officer Henderson that Hines had a pistol in the car, and officers found the pistol under Hines' seat. Officers also found marijuana inside a bookbag on the floor. App. 196 – 197. These facts did not provide probable cause to arrest and question Foster, where it was undisputed the methamphetamine was located in in Nesbitt's purse inside the trunk, where the gun was located under Hines's seat after Nesbitt told police that Hines had a gun, and where the marijuana was located inside a bookbag that was not tied to Foster, and the marijuana was not in plain view. Foster's arrest was unlawful. *Michigan v. Summers*, 452 U.S. at 700; *see also Dunaway v. New York*, 442 U.S. 200, 216 (1979).

Foster's arrest led to her interrogation and confession, which was made in two parts. First, a statement that she shot the decedent made prior to *Miranda*, when police initiated questioning; and second, Foster's more detailed averment that she shot the decedent after police provided her with *Miranda* warnings. However, the provision of *Miranda* did not attenuate the taint of Foster's 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.* In other

words, just because Foster was given *Miranda* warnings does not make her subsequent confession admissible, since it was obtained by pursuant to her unconstitutional seizure.

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). The 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. In *Taylor v. Alabama*, 457 U.S. at 691, the United States Supreme Court held that intervening circumstances were not sufficient to break the causal connection between an arrest and confession where six hours had elapsed between the arrest and the confession, *Miranda* warnings were given, and the accused was allowed to visit with his girlfriend.

Here, as in *Taylor*, Foster’s confessions were obtained by exploitation of her arrest. The temporal proximity of her statements was close to the time of her arrest, and there were no intervening circumstances sufficient to attenuate Foster’s unlawful arrest from her confessions. She was in police custody throughout and she never spoke with a lawyer. The purpose of the questioning was an investigatory expedition undertaken via an unconstitutional arrest.

The PCR court erred in finding Foster’s confessions were unrelated to the stop. Foster had already been questioned by Investigator Clark about the decedent’s death two days before and she did not incriminate herself. It was not until she was arrested pursuant to the traffic stop that Foster confessed. Foster’s confessions were therefore evidence derived from her unreasonable seizure since police did not have probable cause to arrest her, and the confessions

would likely have been suppressed at trial as fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 484-86 (1963).

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). Here, Foster's confessions derived from her unlawful arrest and should have been suppressed, had counsel challenged their admissibility at trial. Plea counsel was ineffective for failing to recognize the strength of the suppression issue in this case based on Foster's unlawful arrest.

Alternatively, Foster could have successfully suppressed her confessions based on the unlawful stop of Nesbitt's car. These facts did not provide reasonable suspicion to stop Nesbitt's car. A traffic stop is a seizure under the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809-10 (1996). As a passenger, Foster had standing to challenge the traffic stop, her own seizure, and evidence derived from that seizure. *Brendlin v. California*, 551 U.S. 249, 257 (2007). 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 and Henderson never claimed there was anything wrong with how the tag was displayed, and the tag was not expired.

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). In *Butler*, the South Carolina Court of Appeals addressed the State's argument that "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. The Court of Appeals found it did not and “h[e]ld 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 case at hand—due to an officer being unable to read a temporary tag—and found the search and seizure there to be unreasonable. 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 Court of Appeals cited *Delaware v. Prouse*, 440 U.S. 648, 663 (1978), noting that “the Fourth Amendment does not allow a random, discretionary automobile stop that is unsupported by articulable, reasonable suspicion of a violation.” *Wilson*, 205 F.3d at 723.

The Fourth Circuit continued, “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.” *Id.* 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 Court therefore found the contraband discovered in the defendant’s car pursuant to the stop should have been excluded from trial. *Id.*

Here, as in *Wilson*, there was no evidence of anything amiss—Officer Henderson only stopped the car because he could not read the expiry date on the temporary tag. Officer Henderson therefore lacked a reasonable, articulable suspicion to pull the car over. 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. *See also Florida v. Royer*, 460 U.S. 491, 498-500 (1983). Foster’s confessions were evidence derived from the unreasonable stop and would likely have been suppressed as fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. at 484-86.

Moreover, Foster had an additional alternative ground for suppression—that her confessions were involuntary—since she was heavily under the influence of drugs and alcohol at the time they were made, she was uneducated, she had a history of mental illness, and she suffered from brain damage caused by epileptic seizures. A defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, and she has the right to object to the use of the confession and have a fair hearing on the issue of voluntariness. *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. A totality of the circumstances inquiry may include consideration of the accused’s intelligence and education. *Fare v. Michael C.*, 442 U.S. 707, 725 (1979). Here, Foster did not complete high school, had a history of mental illness, and had brain damage. In addition, she was intoxicated from ingesting both drugs and alcohol. Proof that an accused was intoxicated at the time she made a confession renders the statement inadmissible as a matter of law, where the accused’s intoxication is such

that she did not realize what she was saying. *State v. Saxon*, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973).

Moreover, the unconstitutional stop and arrest of Foster was coercive. *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986). 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). Here, Foster's myriad vulnerabilities, weighed against her coercive unlawful arrest, support suppression.

Plea counsel provided deficient representation when he advised Foster to plead guilty without any negotiations or recommendations based on his incorrect opinion that attempts at suppressing Foster's confessions would be unsuccessful, since there was a reasonable probability that suppression attempts would succeed.

Prejudice

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). Foster said that if she had known she could have challenged her confessions at trial, she would have taken the case to trial. App. 69, ll. 22-25; App. 70, ll. 4-12. 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. Therefore, Foster showed she was prejudiced, per *Frierson* and *Harden*, by counsel's erroneous advice. See also *Shirley v. State*, 306 S.C. at 244, 411 S.E.2d at 216. As seen, the PCR court did find Foster's testimony to lack credibility as to her allegation that she would not have pleaded guilty but for counsel's advice that she would be "hung" if she went to trial, but that was the only allegation upon which the court made an adverse credibility finding. App. 302. Moreover, Foster's testimony about the lack of a discussion regarding suppressing her confessions was not disputed by plea counsel. Plea counsel was asked twice about it, and said he could not recall having such a discussion with Foster but he advises clients they are waiving their rights and he expects that plea colloquies with the court adequately cover these matters.

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). Petitioner Foster submits that she has shown prejudice per *Frierson* and *Harden*—through her testimony that if her attorney had advised her she could challenge her confessions at trial, she would have gone to trial. Nevertheless, even under *Rollison*, Foster has shown prejudice, since, as discussed in the deficiency section *supra*, there was a reasonable probability her confessions would have been suppressed: based on her unlawful arrest; based on the improper stop; and based on the involuntariness of her confessions. *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.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. Foster did not receive effective assistance here and this Court should grant certiorari. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. at 686.

CONCLUSION

Based on the foregoing argument, Petitioner Foster respectfully requests this Court grant the petition for certiorari to allow full briefing on this issue.

s/ Joanna K. Delany
Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of September, 2020.