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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Spartanburg County

Letitia H. Verdin, Plea Judge

J. Mark Hayes, II, Post-Conviction Relief Judge

BRITTANY C. FOSTER,

PETITIONER

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000143

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

WILLIAM H. RAY
Assistant Attorney General
Bar No. 104476

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

INDEX

ISSUE PRESENTED

Petitioner's Statement of the Issue

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

Respondent's Statement of the Issue

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

STATEMENT OF THE CASE

Petitioner Brittany C. Foster is presently confined in the South Carolina Department of Corrections. Petitioner was indicted for possession of methamphetamine (2016-GS-42-4423), unlawful carrying of a pistol (2016-GS-42-4427), murder (2016-GS-42-4429), and possession of a firearm during the commission of a violent crime (2016-GS-42-4429) by the Spartanburg County grand jury during its August 2016 term. Robert B. Hall, Esquire, of the Seventh Circuit Public Defender's Office represented Petitioner and Seventh Circuit Solicitor Barry Barnette prosecuted the case.

Petitioner was examined by the South Carolina Department of Mental Health and found to be competent to stand trial. (App. 215-App. 225). The report stated that she presented a history depression, suicide ideations, epilepsy, prior physical and sexual abuse, a learning disability, and poor academic performance that ended in expulsion in the tenth grade due to fighting. (App. 215; App. 217 – App. 218). However, Petitioner was not taking seizure medication and reported being seizure free for several years. (App. 219). Petitioner also stated that she frequently consumed alcohol and methamphetamine, had an "addiction to marijuana", and had recently begun using heroin. *Id.* The report also noted that she had a history of self-mutilation and had previously cut herself bad enough to require hospitalization. (App. 219 – App. 220). While incarcerated she would often be observed crying, hitting the wall, and "talking to an unseen other", and "displaying a bizarre affect." (App. 220). She had reported seeing things and hearing voices, and at one point was observed screaming "he raped me. I paid him, his rent and they just watched" but had no recollection of the event when she received medical treatment. *Id.*

After an evaluation, Petitioner was found competent to stand trial, with the evaluator noting she accurately stated her charges and their severity, precisely when they occurred, the name of the

victim, the cause of death, the other persons involved, the differences between guilty and not guilty, and the potential sentence she faced. (App. 222 – App. 223). She acknowledged the waiver of a right to trial when agreeing to a plea bargain, as well as her ability to reject such an offer, and specifically stated that "she would have to plead 'not guilty' should she wish to proceed to trial." (App. 223). She identified her lawyer, stated that they had spoken, acknowledged his role as her advocate of whom she could ask questions, stated that he had told her she would get "30 years to life" if she was convicted, and stated that she would tell him if she was confused during courtroom proceedings or if the solicitor attempted to speak to her in his absence. (App. 222 – App. 224). Finally, Petitioner stated—should she plead not guilty and proceed to trial—that a neutral jury of twelve people must unanimously agree to a verdict based upon the evidence. (App. 223). Based upon this information, the evaluator determined Petitioner had sufficient mental capacity to understand the proceedings against her, assist in her defense, and reason logically about options related to her case. (App. 224).

On April 27, 2017, Petitioner entered a guilty plea as indicted before the Honorable Letitia H. Verdin in the Spartanburg County Court of General Sessions. Judge Verdin sentenced Petitioner to imprisonment for three years to the drug offense, one year for the unlawful carrying of a pistol, forty years for murder, and five years for unlawful possession of a weapon during the commission of a violent crime, to be served concurrently.

Petitioner filed a timely notice of appeal and the appeal was perfected by Robert B. Hall, Esquire. By order dated July 17, 2017, the South Carolina Court of Appeals dismissed Petitioner's appeal due to the failure to provide a sufficient explanation, as required by Rule 203(d)(a)(B)(iv) of the South Carolina Appellate Court Rules. *State v. Foster*, 2017-001114 (S.C. Ct. App. Order filed July 17, 2017). The Remittitur was issued on August 3, 2017.

Petitioner filed an application for post-conviction relief on February 27, 2018. In her application, Petitioner alleged that she was being held in custody unlawfully because she received ineffective assistance of counsel. Respondent filed its return and moved for a more definite statement on May 4, 2018. Petitioner filed an amended application on June 7, 2018, and raised the following allegations (verbatim):

> 1. Ineffective assistance of trial counsel for
>
> (a) failure to object to misstatement of facts during the guilty plea when the Solicitor states the car Applicant was a passenger in was pulled due to an expired tag when the car had an unexpired tag;
> (b) advising the Applicant to plea without explaining that she may not 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 applicant; and
> (d) failure to effectuate appeal.

An evidentiary hearing was held on the allegations in Petitioner's amended application on November 8, 2018 in the Spartanburg County Court of Common Pleas, before the Honorable J. Mark Hayes, II. Petitioner was represented by Susannah C. Ross, Esquire, and Assistant Attorney General Jordan A. Cox, Esquire, represented the State.

On January 24, 2020, the PCR court entered an order denying Petitioner's application for post-conviction relief. The court found that 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. Furthermore, the court found that plea counsel's failure to advise Petitioner of the possibility of suppressing the confession as fruit of the poisonous tree was not ineffective

because she 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. The PCR Court also found that Petitioner's plea counsel testified credibly at the evidentiary hearing. The application was dismissed with prejudice.

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. 11, 13-17). The vehicle, a silver 2015 Nissan Sentra, was recovered and a blood stained spiral notebook was found nearby. (App. 11, 18-22; App. 136; App. 140). There also appeared to be blood in the backseat and a bullet hole in the rear driver's side window. (App. 164). Two spent shell casings were found in the passenger side floor board, and a fired projectile was found in the backseat. *Id.* It was determined that the vehicle belonged to a relative of Anthony Biggerstaff, and was often driven by his former roommate, Keenen Hines. (App. 143; App. 164). Officers "sent a BOLO out" to find Hines and his girlfriend, Petitioner, who had previously lived with Biggerstaff but recently moved out. (App. 11, 23 – App. 12, 3).

Officers first made contact with Hines and Petitioner at the Roadway Inn, where they were staying after Biggerstaff had told them his landlord was requiring them to move out. (App. 164). After initially being hesitant to speak with police, Petitioner told officers that Biggerstaff had made sexual advances toward her, and Hines provided police with his contact information. *Id.* A search of Biggerstaff's residence revealed a receipt from a Food Lion in Columbus, North Carolina the previous day. (App. 164 – App. 165). After viewing the surveillance video at the Food Lion, officers contacted Dea O'Shields, who had been with Biggerstaff, Hines, and Petitioner previous

day. O'Shields stated that they were acting "very shady" and that Hines and Petitioner knew of a $10,000 inheritance Biggerstaff had received the previous month. (App. 164).

On June 2, 2016, Sergeant Henderson of the Spartanburg County Sheriff's Office stopped a vehicle on New Cut Road in Spartanburg due to an issue with the date on the vehicle's tags. (App. 12, 6-10). Sergeant Henderson's incident report stated that he could not read the expiration date on the vehicle's paper tags. (App. 125, 20-23). It was also noted that the driver of the vehicle did not stop immediately, but continued down New Cut Road, travelled over an overpass on I-85, and turned down a side street before coming to a stop. (App. 125, 24 – App. 126, 1; App. 196). The vehicle was being driven by Jessica Nesbitt, and Keenen Hines and Petitioner were riding as passengers. (App. 12, 12-16; App. 196). Upon approaching the vehicle, Sergeant Henderson noted that Hines was nervous and appeared to be putting something underneath his seat. (App. 116, 10-14; App. 196).

Nesbitt was unable to produce a driver's license, but stated that she believed it may have been in the trunk of the vehicle (App. 12, 17-19; App. 196). As Nesbitt was searching through the trunk, officers spotted a small baggy containing a crystal-like substance that tested positive for methamphetamine. (App. 12, 20 – App. 13, 1; App. 196). Nesbitt then told officers that Hines had a pistol in the vehicle and officers later recovered a loaded black revolver with a cocked hammer underneath the seat. (App. 13, 4-8; App. 196). All three passengers were arrested. (App. 13, 7-8). The pistol was checked via NCIC and returned as stolen. (App. 196).

Officers sought to question Petitioner, suspecting that she may have been involved in Biggerstaff's murder. (App. 166). Before they could even explain why she had been brought into the interview room, Petitioner started crying and repeatedly said she shot him. *Id.* Petitioner was

then given her Miranda warnings, provided a pre-interrogation waiver form, signed it, and again confessed to murdering Anthony Biggerstaff. (App. 13, 12-15).

While searching for the body, police stopped at a liquor store near the Roadway Inn where Petitioner and Hines had been staying and asked to review the surveillance footage. (App. 166). The footage showed Petitioner, Hines, and Biggerstaff leaving the store together in Biggerstaff's vehicle. *Id.* Police then provided Petitioner with food and questioned her a second time. *Id.* In her second statement, Petitioner stated that she shot Biggerstaff seven times with a .380 handgun that belonged to Hines's brother. (App. 14, 2-6). After shooting the victim, Hines and Foster drove his vehicle to Lake Bowen, cleaned out all of their items, ditched the vehicle in the lake and dumped the body in a creek in the northern part of Spartanburg County near Jordan Creek Road. (App. 14, 10-18; App. 145). Petitioner would later change her story multiple times when speaking to her plea counsel, claiming that she had shot Biggerstaff in self-defense and also claiming that she had shot him under the duress of Hines's threats to kill her. (App. 105, 11-18).

Hines corroborated the details of Petitioner's confession when questioned by police. (App. 166 – App. 167). He stated that he had gotten her the gun, that she had wanted to kill Biggerstaff in the past, that she had shot him while sitting in the passenger seat of the vehicle, and that they had dumped the body under a bridge before driving the car into Lake Bowen. *Id.* After disposing of the vehicle, Hines called his brother to come pick them up and take them back to the Roadway Inn. (App. 167). His brother was contacted, provided the gun, and was noted to drive a vehicle matching the description given by Hines. *Id.*

Petitioner, her Aunt, and her plea counsel Robert Hall, Esquire, testified at the PCR hearing. Petitioner testified she would not have pled guilty, and would have instead proceeded to trial, had she known that she was waiving all of her rights. (App. 56, 18-20). Her decision to plead

guilty was based upon her plea counsel's advice that if she went to trial she would "be hung in court." (App. 56, 23-25). She explained that "those confessions should have got suppressed considering that [she] was under the influence of drugs, alcohol, numerous drugs and a lot of alcohol." (App. 57, 15-18). She went on to state that "there was never any – any statements made or anything telling me, you know, that my statements could have been suppressed. Had I would have known that, I definitely would have took it to trial because I feel like . . . it would have been—made a huge difference." (App. 70, 7-14). Petitioner denied that her plea counsel told her that she was giving up all of her appellate rights to challenge evidence by entering a guilty plea.

Petitioner answered many questions at the PCR hearing about her arrest, despite allegedly being under the influence of drugs and alcohol at the time, including where she was sitting in the vehicle, if the police told her why they had been pulled over, whether the police asked her about her drug use, whether she covered for her boyfriend, and whether her attorney mentioned a *Jackson v. Denno* hearing. (App. 58, 5 – App. 60, 23). Nevertheless, Petitioner claimed that she "[did not] remember that day at all," that she "remember[ed] that day very, very vaguely," and that she "really didn't—[she did not] really remember anything." (App. 59, 17-20). She also claimed that she did not remember the judge at her plea hearing asking her if it was her decision to plead guilty, but that the judge "[m]aybe asked [her] if [she] wanted to plead guilty." (App. 73, 17 – App. 74, 19). When she was read a quote from the transcript of the judge's colloquy informing her of the waiver of her right to a jury trial she stated that she did in fact remember, but simply did not understand what was being said. (App. 76, 20 – App. 77, 7).

Petitioner went on to testify that she shot Biggerstaff because Keenen Hines was threatening her with a gun, making her feel an immediate threat for her life if she did not kill Biggerstaff. (App. 63, 5-24). Hines was angry with her because she had woken up that morning

"bleeding from both of [her] bottom parts" after Hines had allegedly sold her to Biggerstaff for drugs and rent. (App. 64, 8 – App. 65, 6). On cross-examination Petitioner revealed that she has a bad memory, even when not under the influence of drugs and alcohol. (App. 73, 1-9; App. 75, 8-10).

Stephanie Gosnell testified at length about Petitioner's upbringing, prior history of sexual abuse, mental health, drug abuse, and relationship with Hines. (App. 85, 7 – App. 90, 19). On cross-examination, she stated that she had spoken with Petitioner's plea counsel in private, but was not present at the plea hearing. (App. 90, 24 – App. 93, 20).

Petitioner's plea counsel, Robert Hall, Esquire, testified regarding his representation of Petitioner. He stated that he had 32 years of experience practicing criminal law, and had handled six murder cases. (App. 94, 24 – App. 95, 9). He testified that Petitioner claimed she had not made a statement when she first spoke with an investigator from his office, but upon his arrival at the jail, a female deputy at the jail told him that she in fact had and was "covering for somebody". (App. 96, 1-9). When he was able to meet with Petitioner he told her that he needed to know if she was covering somebody so he could do everything he could for her, and that she was facing "30 years without parole, day-to-day." (App. 97, 1-10). Over the course of his representation of Petitioner, plea counsel was told various stories about what happened, with Petitioner's claims ranging from self-defense to duress, and others. (App. 98, 13 – App. 99, 6). He also stated that he did not believe he told Petitioner that she would be "hung in the courtroom if she went to trial." (App. 113, 3-5). Instead, he said that he would have said something similar, such as "if you go to trial and get convicted, you're going to get life." (App. 113, 5-7).

On the issue of whether he advised Petitioner that her confession could be suppressed, plea counsel stated that "had we gone to trial, we definitely would have attempted that." (App. 113, 22-

23) But, he also stated that he was of the opinion that such a motion would ultimately be unsuccessful because "according to [the officer's report] and the way he spoke about it, he did probably what he needed to do at that point, he got somebody else in there to make sure they go through the witness, and reading of the rights, and the initial and signing everything. And then she just kept saying she shot him." (App. 114, 3-8). On cross-examination, he explained that he "didn't think we had a good suppression issue. But I did say you're . . . going to be giving up any rights to challenge any of the evidence, statements, or anything. And I think . . . every judge goes through that very well in this State." (App. 121, 25 – App. 122, 5).

STANDARD OF REVIEW

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

ARGUMENT

The Court should reject Petitioner's argument that counsel was ineffective for failing advise her of the possibility of suppressing her confession at trial

because Petitioner has failed to present sufficient credible evidence of her desire to go to trial, and therefore has failed to meet her burden of showing that she was prejudiced by plea counsel's advice.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Petitioner, like all other defendants, the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive effective assistance of counsel guaranteed by the Sixth Amendment. *See* generally S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such representation sets forth a prima facie violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). 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 the applicant's conviction or sentence. 466 U.S. at 687. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. *Id.* at 668; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." *Cherry v. State*, 300

S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

The second, or "prejudice" prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id.* at 691-92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." *Id.* at 687 (emphasis added).

Strickland, "does not guarantee perfect representation . . . only a 'reasonably competent attorney.'" *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (quoting *Strickland*, 466 U.S. 687). Representation is constitutionally ineffective only if counsel's conduct so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Harrington*, 562 U.S. at 110.

Accordingly "[j]udicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved

unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689; see also *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Id.* (quoting *Strickland*, 466 U.S. at 690).

Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspectives at the time. *Id.* Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Reviewing courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct." *Strickland*, 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

The *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve.

466 U.S. at 689-90; see also *Harrington*, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under *de novo* review, the standard for judging counsel's representation is a most deferential one.

The performance and prejudice standards, however, "do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696. Moreover, "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." *Id.* at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52 (1985). The "prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial." *Stalk v. State,* 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009). "A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." *Dalton v. State,* 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Blackledge v. Allison*, 431 U.S. 63, 74 (1977)). "Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea." *Garren v. State,* 423

S.C. 1, 12, 813 S.E.2d 704, 712 (2018); See *Jamison v. State*, 410 S.C. 456, 469-71, 765 S.E.2d 123, 129-30 (2014) (observing that "guilty plea[s] must be treated as final in the vast majority of cases" and instructing that caution must be exercised so as not to "undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea").

Petitioner argues her plea counsel was deficient for failing to inform her about the possibility that her confession could be suppressed at trial. This failure allegedly rendered her guilty plea involuntary because she did not possess an understanding of the law in relation to the facts of her case. Petitioner also asserts that plea counsel was deficient for advising her to plead guilty based upon his judgment that the confessions were unlikely to be suppressed. Petitioner cites both the Fourth Amendment's prohibition against unreasonable search and seizure and its corollary fruit of the poisonous tree doctrine, and the Fourteenth Amendment's requirement of voluntariness of a confession as possible grounds for suppression of her statements. Petitioner further asserts that these alleged failures by plea counsel were prejudicial because she would have proceeded to trial if she had been advised of the possibility that her statements could have been suppressed at trial, regardless of whether a motion to suppress would have been successful.

Thus, the proper question before this Court is not whether her confession would have actually been suppressed had it been challenged, but rather, it is whether Petitioner has proven her assertion that she would not have pled guilty but for counsel's failure to inform her about the suppression issue, and instead would have insisted on going to trial.[1] Respondent asserts that the

[1] To the extent it is relevant, Respondent asserts that Petitioner would have been unsuccessful in suppressing the confession as the poisoned fruit of a Fourth or Fourteenth Amendment violation. The arresting officer in this case could have provided the vehicle's illegible tag, the prior BOLO dispatch for the two persons in the vehicle, the vehicle's failure to promptly stop for the officer's blue light, Hines's nervous behavior, and the driver's voluntary, incriminating statements as supporting reasonable suspicion sufficient to justify an investigatory stop. *See United States v. Cortez*, 449 U.S. 411, 417-18 (1981); *United States v. Mendoza*, 691 F.3d 954 (8th Cir. 2012);

record is devoid of such evidence beyond her mere assertion. However, there is evidence in the record supporting the PCR Court's dismissal of her claims. Therefore, Petitioner has failed to meet her burden of proof, and this Court should deny certiorari.

Here, Petitioner's plea counsel ordered a competency evaluation, and she was found competent to stand trial, based upon her mental and physical health, as well as her understandings of the proceedings. (App. 106, 25 – App. 107, 11). Petitioner was advised by the Court at her plea hearing that her guilty plea would forfeit her right to a jury trial where her attorney could call witnesses for her and cross-examine witnesses against her. (App. 6, 4-10). Her plea counsel stated at the PCR hearing that would have challenged the admissibility of the confession, had Petitioner insisted on going to trial, but she made the decision to plead guilty in order to get a more lenient sentence. (App. 113, 17 – App. 115, 1). He also testified that he advised her about potential defenses available to her, and that she would be giving up her right to challenge the evidence against her if she entered a guilty plea. (App. 120, 4-8)

Petitioner's claims are supported only by her testimony at the PCR hearing. Her asserted desire to proceed to trial but for her plea counsel's advice regarding suppression is contradicted by her counsel's testimony at the PCR hearing, the colloquy with the Court at her plea hearing, and the assessment made of her at her competency evaluation. Petitioner has therefore failed to meet her burden of proof, given that *Strickland*'s prejudice prong "ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial." *Stalk* 383 S.C. at 563, 681 S.E.2d at 595. This evidence was determined

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but see also *United States v. Wilson*, 205 F.3d 720 (4th Cir. 2000). Given these factors it is permissible for possession of the narcotics and firearm found inside the vehicle to be imputed to Petitioner, justifying her subsequent detention, *Mirandized* interrogation, and admission of her confession into evidence to be used against her. *Maryland v. Pringle*, 540 U.S. 366, 372 (2003).

to be insufficient by the PCR Court when it dismissed her claims. Because evidence of probative value exists in the record supporting the PCR Court's dismissal, this Court should deny certiorari.

CONCLUSION

For the reasons stated above, this Court should deny certiorari and affirm the PCR Court's findings that Petitioner received effective assistance of counsel. However, if this Court decides to grant the petition of writ of certiorari, Respondent respectfully requests permission to more fully brief the issues herein.

/s/ William H. Ray
William H. Ray
Assistant Attorney General

ATTORNEY FOR RESPONDENT

December 29, 2020