

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal From Florence County  
Thomas A. Russō, Circuit Court Judge

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**RECEIVED**

SEP 14 2012

**S.C. Supreme Court**

Me'Cenia A. Dials,

Petitioner,

vs.

State of South Carolina,

Respondent.

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**RETURN TO PETITION  
FOR WRIT OF CERTIORARI  
PURSUANT TO AUSTIN V STATE**

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ALAN WILSON  
Attorney General

DAVID SPENCER  
Assistant Deputy Attorney General  
Bar #: 68571

Post Office Box 11549  
Columbia, SC 29211  
Telephone: (803) 734-3737

ATTORNEYS FOR RESPONDENT

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## ISSUES PRESENTED

I. Probative evidence supports that trial counsel was not ineffective for failing to give notice to Petitioner that her case was on trial where Petitioner was aware that the case could be called during the term and where counsel tried to locate Petitioner the day before trial and objected to the case being tried in her absence.

II. Counsel was not ineffective for not obtaining a reduction in sentence for Petitioner's assistance to law enforcement where Petitioner did not provide any useful information to law enforcement.

III. Probative evidence supports that trial counsel was not ineffective for advising petitioner to go to trial where the State was offering no less than a twenty-five year sentence and Petitioner received exactly a twenty-five year sentence after being found guilty by a jury.

## STATEMENT OF THE CASE

Petitioner Dials was indicted during the March 1997 term of the Florence County Grand Jury for trafficking crack cocaine, possession with intent to distribute crack cocaine within proximity of a school, and possession of crack cocaine with intent to distribute. Dials failed to appear for trial and was found guilty as charged by the jury in her absence on September 26, 1997. The Honorable Hicks B. Harwell, Jr., sentenced Dials to twenty-five years imprisonment.

The conviction and sentence was affirmed by the South Carolina Court of Appeals. State v. Dials, 99-UP-243 (S.C. Ct.App., filed April 21, 1999).

Dials filed a PCR application on June 3, 1999. A hearing was held on June 5, 2002. Applicant was represented by Jerry Screen, Esquire. The Honorable James E. Brogdon, Jr. denied the application by order dated July 24, 2002. The order was not appealed.

Dials filed a petition for writ of habeas corpus in federal court on June 10, 2003. This case was dismissed when the Honorable Henry F. Floyd adopted the magistrate's recommendation and granted the State's motion for summary judgment by order dated June 15, 2004.

Dials filed her second PCR application in August 2007. However, the application was not received by the Attorney General's Office until September 2010. A hearing was held on February 7, 2011 before the Honorable Thomas A. Russo. Judge Russo found that Applicant did not freely and voluntarily waive his right to appeal the denial of the first PCR application by order dated May 2, 2011.

## ARGUMENT

### **I. Probative evidence supports that trial counsel was not ineffective for failing to give notice to Petitioner that her case was on trial where Petitioner was aware that the case could be called during the term and where counsel tried to locate Petitioner the day before trial and objected to the case being tried in her absence.**

Dials complains that she did not receive notice of the trial and that counsel was ineffective for not ensuring she received notice. However, evidence indicates Dials' deliberately avoided trial and she never explained her absence. Further, she was aware that her case might be called for trial. Counsel attempted to locate Dials without success.

Dials testified at the PCR hearing that she had appeared at several roll calls. The term the trial was called, she met with counsel, who advised her that he did not know whether they would call her case or not. She then left because "Nobody didn't tell me I had to stay." App. pp. 65-69 (direct quote: App. p. 69, line 17).

Counsel testified that he met with her two days before the case was called for trial. At that time, counsel did not know if the case would be called for trial. When it was called for trial, Judge Harwell allowed counsel the afternoon to locate Dials and sent deputies to Dials' address. App. p. 81. Counsel was unable to locate Dials and she was tried in her absence. App. pp. 125-127. Officers attempting to serve the bench warrant learned that she was seen packing a car with clothes from her apartment and when allowed in the apartment by the manager, noticed that it appeared "many of the Defendant's clothes had been taken from the apartment." App. pp. 130-132 (direct quote: App. p. 132, lines 112-13).

Dials missed several roll calls during the week . She missed the first roll call on September 22, but came in later and was excused for the afternoon roll call. She made the morning roll call on September 23. She did not respond to roll call on September 24 or the morning of trial on September 25. App. pp. 140-141.

Counsel moved for a continuance when it was called for trial. App. pp. 146-149.

Probative evidence supports the PCR court's ruling that counsel was not ineffective. Counsel attempted to locate Dials without success. Deputies were informed that Dials packed clothes in her car and when entering Dials' apartment, discovered that clothes appeared to be missing. The record establishes that Dials was familiar with the roster system and was aware her case could be called for trial. It appears that she fled. Counsel objected to the trial taking place in her absence.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996). The proper measure of attorney performance is reasonableness under professional norms. Id. In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result at trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id.

The record establishes that counsel did not render deficient performance. He attempted to attain her presence and protected her rights when she did not appear. Further, Dials was not prejudiced by any alleged deficiency of counsel, as the trial court properly determined that she had notice that the case could be called during the term and that, though her bond, was aware that she could be tried in her absence.

The record reflects that she intentionally avoided appearing at trial. The Sixth Amendment guarantees the right of the accused to be present at every stage of the defendant's trial. Ellis v. State, 267 S.C. 257, 260, 227 S.E.2d 304, 305 (1976). However, this right may be waived. Id. "The deliberate absence of a defendant who knows that he stands accused in a criminal case and that his trial will begin during a specific period of time indicates nothing less than an intention to obstruct the orderly process of justice." Id., 267 S.C. at 261, 227 S.E.2d at 306.

The trial court followed the dictates of Rule 16, SCRCRP by making a finding that Dials received notice of her right to be present and was warned that the trial would proceed in his absence if he failed to attend court. State v. Castineira, 341 S.C. 619, 623, 535 S.E.2d 449, 451 (Ct. App. 2000) (affirming conviction from trial in absence where the trial court followed the requirements of Rule 16, SCRCrP). Accordingly, Dials was not prejudiced.

The Court sustains the PCR court's factual findings and conclusions of law drawn as long as "any evidence of probative value" exists in the record. Burnett v. State, 352 S.C. 589, 576 S.E.2d 144 (2003); Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002); Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001). In the instant case, the only explanation for the inability of counsel and the deputies being unable to locate Dials for trial was that her

absence was deliberate. She packed her belongings and left. Further, she was aware of the roll call system, but missed several roll calls the week of trial, including roll call the day of trial. Counsel did his best to find Dials, so he did not render deficient performance. Accordingly, the PCR court's findings are supported by probative evidence.

**II. Counsel was not ineffective for not obtaining a reduction in sentence for Petitioner's assistance to law enforcement where Petitioner did not provide any useful information to law enforcement.**

Dials alleges that counsel was ineffective for failing to follow up on obtaining a favorable plea bargain in exchange for her assistance to law enforcement. It appears from Dials' testimony at the PCR hearing that she provided law enforcement with some information that they did not see fit to utilize, while she was unable or unwilling to provide information on other individuals and turned down offers to participate in potential sting operations. App. pp. 74-76. Counsel testified that the information she provided did not help her. App. p. 85. The solicitor was only willing to offer concurrent sentences, including the minimum twenty-five years imprisonment for trafficking, and was not willing to make a better offer. Counsel advised Dials that she was better off going to trial than taking the offer. App. pp. 82-85.

The PCR court did not err in denying relief. First, Dials failed to show that any further pursuit of a reward for information would have been fruitful. The speculative nature of this claim and absence of prejudice supports the PCR court's denial of relief. Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (finding allegation was only supported by speculation as to the result and therefore, the grant of relief was not supported

by probative evidence); Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (finding applicant failed to show he was prejudiced by counsel's lack of preparation where no showing was made of what benefits would have accrued from further preparation).

Further, counsel's performance was not deficient in this regard. The record indicates that Dials provided some information, but did not assist law enforcement as fully as law enforcement wanted. The record does not reflect that this information was at all useful to law enforcement and accordingly, trial counsel's performance did not fall below professional norms by not pursuing the matter further. Strickland, *supra*.

Further, this issue was not ruled upon by the PCR court and therefore, is not preserved for review. Marlar v. State, 375 S.C. 407, 408, 653 S.E.2d 266 (2007) (failure to attain a ruling on issues raised at a PCR hearing precludes review on appeal).

**III. Probative evidence supports that trial counsel was not ineffective for advising petitioner to go to trial where the State was offering no less than a twenty-five year sentence and Petitioner received exactly a twenty-five year sentence after being found guilty by a jury.**

Dials alleges counsel was ineffective for advising her to go to trial instead of pleading guilty. Counsel testified that the State would not offer anything better than the minimum sentence of twenty-five years imprisonment for trafficking cocaine, more than 200 grams, and that the remaining charges would be dismissed. Counsel felt that Dials was unlikely to receive a more severe sentence if she was tried and convicted. He felt it was advantageous to go to trial. For instance, he felt there was some chance of winning the suppression motion. He recommended she go to trial. App pp. 82-84.

Dials received a twenty-five year sentence after being convicted at trial, the exact sentence she would have received if she pled guilty with the solicitor's recommendation.

An attorney may render deficient performance in advising a client to reject a plea offer. Lafler v. Cooper, 132 S.Ct. 1376 (2012). However, in the instant case, counsel's advice was reasonable. Further, an applicant is still required to prove prejudice pursuant to Strickland. In order to prove prejudice, an applicant must show he would have accepted the plea offer and the prosecution would not have withdrawn the offer, that the trial court would accept the terms of the plea agreement, and that "under the offer's terms would have been less severe than the judgment and sentence that in fact were imposed." Lafler, at 1385.

Counsel's advice was reasonable, if not prophetic. The prosecution was not going to offer a more favorable bargain, and Dials received exactly the same sentence she would have if she pled guilty to the State's recommendation. Counsel was reasonable in advising to go to trial and see if the jury might be swayed to acquit or whether a potentially reversible error might occur. Counsel's performance did not fall below professional norms and Dials was not prejudiced as she would have been no better off pleading guilty. Strickland; Lafler. Accordingly, probative evidence supports the PCR court's findings. Burnett.

CONCLUSION

For the above stated reasons, the petition should be denied. If this Court sees fit to grant this petition for writ of certiorari, respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

ALAN WILSON  
Attorney General

DAVID SPENCER  
Assistant Attorney General  
Bar # 68571

BY: 

\_\_\_\_\_  
ATTORNEYS FOR RESPONDENT

Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211

Columbia, South Carolina  
September 14, 2012

STATE OF SOUTH CAROLINA  
SUPREME COURT

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Certiorari to Florence County  
The Honorable Thomas A. Russo, Circuit Court Judge  
Case No. 2007-CP-21-1379  
Appellate Case No. 2011-193113

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**S.C. Supreme Court**

ME'CENIA A. DIALS,

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**PROOF OF SERVICE**

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I, Lauren Meara, certify that I have served the within **Return to Petition for Writ of Certiorari Pursuant to Austin v. State** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tommy Thomas, Esquire  
Post Office Box 88  
Irmo, SC 29063

I further certify that all parties required by Rule to be served have been served.

This 14<sup>th</sup> day of September, 2012.

  
LAUREN MEARA  
Legal Assistant

Office of Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3737