

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Sumter County  
Court of Common Pleas  
The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

RECEIVED

APR 22 2015

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2012-CP-43-0100  
Appellate Case No. 2014-001764

S.C. Supreme Court

DIANE ELIZABETH BROWN,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

\_\_\_\_\_  
**RETURN TO PETITION FOR WRIT OF CERTIORARI**  
\_\_\_\_\_

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## **ISSUES PRESENTED**

- I. Whether Petitioner's Plea Counsel was ineffective for failing to present the sentencing judge with exhibits he planned to introduce in mitigation of sentence in a timely manner thereby depriving Petitioner of the opportunity to have the sentencing judge fully review these exhibits and take them into consideration in determining the appropriate penalty to impose in Petitioner's case.
  
- II. Whether Petitioner's Plea Counsel was ineffective for neglecting to research and present readily available information concerning the sentences imposed in other felony DUI cases where said statistical data would have clearly been beneficial to the sentencing judge in determining what penalty to impose on the particular facts and circumstances of Petitioner's case?

## STATEMENT OF THE CASE

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. The Applicant was indicted at the October 2009 term of the Sumter County Grand Jury for two counts of Felony DUI (2009-GS-43-0208). She was represented by Marvin McMillan, Esquire. On January 20, 2011, the Applicant pled guilty before the Honorable George C. James, Jr. She was sentenced as indicted, without negotiations or recommendations to twelve years imprisonment and a \$20,000.00 fine for Felony DUI, death results, and twelve years imprisonment and a \$5,100 for Felony DUI, great bodily injury results. All sentences were to be served concurrently.

Petitioner filed a timely application for post-conviction relief on January 20, 2012. Respondent made its return August 6, 2012. An evidentiary hearing into the matter was convened on December 17, 2013, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Tara Shurling, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office. By order dated February 5, 2014 and filed February 14, 2014, the Honorable R. Ferrell Cothran, Jr., denied and dismissed the application with prejudice. Petitioner filed a Rule 59(e) motion to alter or amend on March 10, 2014. By order filed April 14, 2014, Judge Cothran denied and dismissed the motion.

Subsequently, Petitioner filed a timely Notice of Appeal on August 13, 2014. Petitioner submitted her Petition for Writ of Certiorari on March 23, 2015. This Return follows.

## STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “‘any evidence’ of probative value” exists to sustain the post-conviction relief court’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the Petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an application alleges ineffective assistance of counsel as a ground for relief, the Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether Petitioner’s attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668, 104 S.Ct. 2052, 2064. The Petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney’s performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Petitioner 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. With respect to

guilty plea counsel, the Petitioner must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial.

Hill v. Lockhart, 474 U.S. 52 (1985).

## ARGUMENT

**I. Probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective for failing to present mitigation evidence, where Plea Counsel gathered and presented the mitigation evidence hours prior to Petitioner's guilty plea and Petitioner received a lawful sentence.**

Petitioner argues that the PCR Court erred in finding the Plea Counsel was not ineffective in regards to his presentation of mitigation evidence to the plea court. However this argument is meritless as there is ample probative evidence to support the PCR Court's finding that Plea Counsel was not ineffective.

Petitioner argues Plea Counsel failed to present the various documents gathered in mitigation in a timely fashion for the plea court to adequately consider them prior to sentencing. Petitioner speculates "it would have been impossible for the plea judge to give these important materials...a thorough review and the thoughtful consideration they warranted." (Pt. p. 8). To the contrary, Plea Counsel stated that he compiled all the letters of support, letters or recommendation, and emails into an appendix. (App p. 160 lines 12-16). Plea Counsel stated the appendix covered Petitioner's background, career in the military, and work with General Electric. (App p. 160 line 24—p. 161 line 9). Additionally, there were various documents from psychiatrist, therapist, psychologist, neurologist, and her family health care doctor. (App p. line 162 line 3—p. 163 line 8).

Plea Counsel stated that he could not specifically recall whether he presented the material to the plea judge the day prior to the plea or the morning of the plea. (App. p. 179 lines 6-10). However, Plea Counsel recalled asking both the Solicitor's office and plea judge if he could provide the court with the mitigation material prior the plea. (App. p. 186 lines 14-20). Plea Counsel stated that he typically provides mitigation material during a guilty plea. (App p. p 186

lines 16-17). Plea Counsel stated that the material was presented in a timely fashion and the plea judge was able to review it. (App p. 186 lines 18-20). Plea Counsel stated this was an afternoon plea and the plea judge would have missed a lunch in order to review the material if necessary. (App p. 188 line 24—p.189 line 3).

Plea Counsel stated that he would not have presented the material to the plea court a week in advance because the court is only going to look at the material for a certain amount of time. (App. p. 187 line 11—p. 188 line 5). Plea Counsel opined that the plea judge would have delayed the proceedings if he had not had time to review the material. (App p. 187 lines 22-25). Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003).

During the guilty plea proceeding, the plea judge noted that both Plea Counsel and the Solicitor were aware that Plea Counsel had provided mitigation material prior to the plea. (App p. 31 lines 10-19). Notably, Plea Counsel referenced the packet of materials during his mitigation proceeding and the plea court responded that he had reviewed the material. (App. p. 70 line 16—p.70 line 7). The plea court reiterated at the end of the mitigation presentation that he had read all the material. (App p. 100 line 99—p. 100 line 4).

Respondent submits the PCR Court did not err in finding that Plea Counsel was not ineffective when he presented the mitigation material to the plea judge in advance of the guilty plea proceeding. Notably, the plea judge remarked *twice* that he had reviewed all the material prior to sentencing. (App. p. 70 line 16—p.70 line 7; p. 100 line 99—p. 100 line 4). In addition to the mitigation packet, Plea Counsel presented a compelling, detailed, and organized

presentation of Petitioner's background. It is clear from the record that there is ample probative evidence to support the PCR Court's finding that Plea Counsel's actions did not fall below professional norms. Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing Strickland*.

Furthermore, Petitioner can show no prejudice as a result of Plea Counsel's alleged deficiencies. Petitioner received a lawful sentence of twelve years. Petitioner's argument is solely based on pure speculation that had Plea Counsel provided the mitigation material further in advance of the guilty plea hearing then it would have persuaded the plea court to sentence Petitioner to less than the twelve year concurrent sentence. To the contrary, Petitioner was fully advised of the potential forty years she was facing during the guilty plea proceeding. (App. p. p. 33 lines 9-22). Petitioner, with full knowledge of the possible sentencing range, admitted her guilt and informed the plea judge that she wanted to plead guilty. (App. p. 44 line 21—p. 45 line 22). Wishful thinking on the part of Petitioner does not amount to an involuntary guilty plea. Cf. Holden v. State. 713 S.E.2d 611, 617, 393 S.C. 565, 575-76 (2011) (*citing Roddy v. State*, 339 S.C. 29, 36, 528 S.E.2d 418, 422 (2000)) ("Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made."). Based off of the forgoing, there is ample probative evidence to support the PCR Court's finding that Petitioner was not prejudiced by Plea Counsel's alleged deficiencies.

**II. Probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective in failing to gather and present material regarding the past sentences given for felony DUI cases, where Plea Counsel stated it was not his practice to present the information and Plea Counsel opined that the information would have hurt more than helped Petitioner.**

Petitioner argues the PCR Court erred in finding that Plea Counsel was not ineffective for failing to gather and present evidence of past sentences for felony DUIs. To the contrary, ample probative evidence supports the PCR Court's finding that Plea Counsel was not ineffective.

Petitioner argues that Plea Counsel's reasons for not providing the sentencing information to the plea court were not valid strategic reasons. However, where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). In the instant case, Plea Counsel stated that it is not his practice to present sentencing information to a circuit court judge. Plea Counsel reasoned that circuit court judges know what type of sentences are given for certain crimes. (App p. 180 lines 9-23). Plea Counsel stated that he is well aware that judges have the list-service, email each other, and talk to each other about sentencing. (App p. 180 lines 19-23). Plea Counsel opined that giving a judge examples or statistics of sentences is essentially telling the judge what sentence he should impose. (App. p. 180 lines 6-15). Plea Counsel reasoned that it is simply not a good strategy to tell a judge what length of sentence he should impose. (App. p. 180 lines 6-15).

Furthermore, Plea Counsel stated that he was aware of the prior sentences for felony DUI. (App. p. 180 line 24—p. 181 line 2). Specifically, Counsel referred to a recent defendant receiving twenty five years for felony DUI. (App. p. 180 lines 6-8). Plea Counsel further stated

that he represented a defendant who received one year house arrest. (App. p. 183 lines 3-7). Plea Counsel distinguished the case by noting that the victims did not want the defendant to receive jail time. (App. p. 183 lines 3-7). However, the victims in Petitioner's case wanted Petitioner to receive the maximum sentence. (App. p.175 line 24—p. 176 line 7). Plea Counsel further referenced the fact that the plea judge recently gave a defendant twenty years for felony DUI. (App. p. 183 lines 11-14). Plea Counsel opined that the sentencing information would be more detrimental than beneficial for Petitioner. (App. p. 180 lines 15-18; p. 182 line 22—p.183 line 23). Based off of the foregoing, there is ample probative evidence to support the PCR Court's finding that Plea Counsel was not ineffective for failing to present the plea judge with sentencing statistics.

Furthermore, Petitioner can show no prejudice as a result of Plea Counsel's alleged deficiencies. Petitioner received a lawful sentence of twelve years. Petitioner's argument is solely based on pure speculation that had Plea Counsel provided the sentencing statistics to the plea judge it would have somehow persuaded the plea court to sentence Petitioner to something less than the twelve year concurrent sentence. To the contrary, Petitioner was fully advised of the potential forty years she was facing during the guilty plea proceeding. (App. p. p. 33 lines 9-22). Petitioner, with full knowledge of the possible sentencing range, admitted her guilt and informed the plea judge that she wanted to plead guilty. (App. p. 44 line 21—p. 45 line 22). Wishful thinking on the part of Petitioner does not amount to an involuntary guilty plea. Cf. Holden v. State, 713 S.E.2d 611, 617, 393 S.C. 565, 575-76 (2011) (citing Roddy v. State, 339 S.C. 29, 36, 528 S.E.2d 418, 422 (2000)) ("Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have

been made.”). Based off of the forgoing, there is ample probative evidence to support the PCR Court’s finding that Petitioner was not prejudiced by Plea Counsel’s alleged deficiencies.

**CONCLUSION**

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON  
Attorney General

DANIEL GOURLEY  
Assistant Attorney General  
Bar No. 100934

By:   
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April 22, 2015

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S.C. Supreme Court

DIANE ELIZABETH BROWN,

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v.

THE STATE OF SOUTH CAROLINA,

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**CERTIFICATE OF SERVICE**

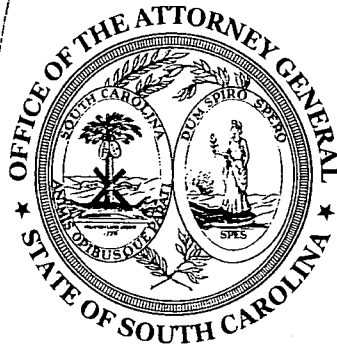
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The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Tara Dawn Shurling, Esquire  
Law Office of Tara Dawn Shurling, PA  
3614 Landmark Drive, Suite A  
Columbia, SC 29204**

This 22<sup>nd</sup> day of April, 2015

  
\_\_\_\_\_  
CAROLINE COLLINS  
LEGAL ASSISTANT



ALAN WILSON  
ATTORNEY GENERAL

April 22, 2015

RECEIVED

APR 22 2015

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

S.C. Supreme Court

**RE: Diane Elizabeth Brown v. State of South Carolina**  
**Lower Court Case No.: 2012-CP-43-0100**  
**Appellate Case No.: 2014-001764**

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Daniel Gourley  
Assistant Attorney General  
SC Bar No. 100934

DG/cc  
Enclosures

cc: Tara Dawn Shurling, Esquire (2 copies)