

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO SUMTER COUNTY  
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

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Appellate Case No.: 2016-001132  
Lower Court Case No. 2015-CP-43-2810

RECEIVED

FEB 21 2017

S.C. SUPREME COURT

DEVAN DWYER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**PETITIONER'S QUESTION PRESENTED**

- I. Whether the PCR court erred in concluding that defense counsel was not ineffective for failing to take any corrective action due to a prior assistant solicitor's promise to dismiss the charges against the Petitioner?

## STATEMENT OF THE CASE

Petitioner (Devan Dwyer) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. Petitioner was indicted during the February 2009 term of the Sumter County Grand Jury under indictment 2006-GS-43-00553 for the following counts: (1) Burglary - 1st degree; (2) armed robbery; (3) assault and battery with intent to kill, (4) assault and battery with intent to kill; and (5) possession of firearm/knife during the commission of a violent crime. Lauren Stevens, Esquire, represented him. Petitioner proceeded to trial on April 13 and 14, 2009. On April 14, 2009, Petitioner was found guilty on all counts. The Honorable R. Ferrell Cothran, Jr., sentenced Petitioner to thirty years' imprisonment for burglary, twenty-five years' imprisonment for armed robbery, twenty years' imprisonment for one count of assault and battery with intent to kill; fifteen years' imprisonment for the second count of assault and battery with intent to kill, and five years' imprisonment for possession of a firearm. All sentences were to run concurrently.

A timely notice of appeal was filed. The South Carolina Court of Appeals affirmed the lower court's conviction. State v. Dwyer, Op. No. 2011-UP-010 (S.C. Ct. App. Filed January 24, 2011. The Remittitur was sent on February 10, 2011.

Petitioner filed an application for post-conviction relief on January 30, 2012. An evidentiary hearing was held on December 17, 2014, at the Sumter County Courthouse before the Honorable J. Cordell Maddox, Jr. Petitioner was present at the hearing and was represented by Willie H. Brunson, Esquire. By Order filed May 15, 2015, Judge Maddox denied and dismissed Petitioner's post-conviction relief action. Petitioner appealed the denial of his

application for post-conviction relief. However, his appeal was dismissed for failing to provide proof of service of the notice of appeal. The Remittitur was issued October 16, 2015.

Petitioner filed a second application for post-conviction relief on December 22, 2015, alleging ineffective assistance of PCR counsel for failing to properly perfect an appeal. On February 2, 2016, Respondent filed its Return and Motion to Dismiss all claims beyond review pursuant to Austin v. State, 305 S.C. 453 (1991). An evidentiary hearing was held on March 17, 2016, at the Sumter County Courthouse before the Honorable Brooks P. Goldsmith. Petitioner was present and represented by Jeremy A. Thompson, Esquire. At the hearing, Respondent consented to Petitioner's request for a belated PCR appeal. By Order filed April 21, 2016, Judge Goldsmith granted Petitioner's request for a belated appeal of his first PCR application pursuant to Austin v. State.

On October 20, 2016, Petitioner filed his Petition for Writ of Certiorari Pursuant to Austin v. State. This Return to the Petition for Writ of Certiorari follows.

## STANDARD OF REVIEW

The proper standard for reviewing a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a PCR proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

## ARGUMENT

### I. Probative evidence supports the PCR Court's finding that Trial Counsel was not ineffective for failing to take corrective action on a prior assistant solicitor's promise to dismiss the charges against Petitioner.

Petitioner's argument that the PCR Court erred in finding that trial counsel was not ineffective for failing to "take corrective action" on a prior solicitor's promise to dismiss the charges against Petitioner is without merit.

In a PCR 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 the 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, supra.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, supra. Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland, 80 L.E.2d 674). Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

First, it should be recognized that the PCR Court found Trial Counsel's testimony to be very credible, as opposed to Petitioner's testimony which was found to be not credible. (App. 437-438). The PCR judge was in the best position to determine credibility and, as such, his findings must be given great deference. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993).

At the evidentiary hearing, Trial Counsel testified that the former Assistant Solicitor, Hugh Ryan, told her that the charges would be dropped because the victim had a significant record and was not worthy of prosecuting the case over. App. 407. She stated that, unfortunately, she did not have anything in writing to confirm Solicitor Ryan's promise to drop the charges, she only took him at his word. App. 407. She testified that Solicitor Ryan had some personal problems and had to leave his position with the Solicitor's Office, but before he left she "begged him, I said please, before you leave do not forget that you promised me that you were going to [*nolle prosequere*] this case, this case, this case, and this case, and he did not." App. 408. The case was then transferred to Solicitor Catherine Fant, who took the case to trial.

The PCR Court relied on this testimony in making its finding that Trial Counsel's actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. App. 442. Trial Counsel followed up with former Solicitor Ryan and attempted to have him follow through on his promise to drop the charges. Trial Counsel did not have any promise in writing to enforce, but she did all that she could do within reasonable norms.

Solicitors have a wide range of ability in choosing how and when to prosecute their cases. "The solicitor has broad discretion in choosing the offenses with which a defendant will be charged and in plea negotiations leading up to trial." State v. Johnson, 287 S.C. 171, 172, 337 S.E.2d 204, 205 (1985) (citing State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978));

Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975)). The fact that the new Solicitor prosecuting the case chose, within her discretion, not to drop the charges was outside of Trial Counsel's control. There was no further action Trial Counsel could have taken to have these charges dropped. Therefore, Trial Counsel cannot be ineffective for failing to act in any other manner.

Furthermore, the PCR Court properly found that Petitioner can show no prejudice from Trial Counsel's actions. Even if Trial Counsel had made a formal objection or pressed the matter further to the Solicitor's Office or to the trial court, it would not have been successful. Solicitor Fant wanted to take the case to trial, and did. This decision was within her discretion. Trial Counsel properly and fully prepared Petitioner's case for trial and represented him to the best of her ability. Clearly, Trial Counsel was prepared for trial, even if she originally believed the charges were going to be dropped. The testimony on Trial Counsel's preparation for trial and meetings with Petitioner over their strategy formed the basis for the PCR Court's ruling that Petitioner was not prejudiced.

The PCR Court's finding that Trial Counsel's actions were reasonable in the circumstances and not prejudicial was well-supported by the factual record as well as by the testimony of the parties and the case law. Therefore, because the PCR Court's findings were supported by probative evidence, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's denial of post-conviction relief.

**CONCLUSION**

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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February 21, 2017

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Sumter County

The Honorable Brooks P. Goldsmith, Circuit Court Judge

DEVAN DWYER, #302693

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

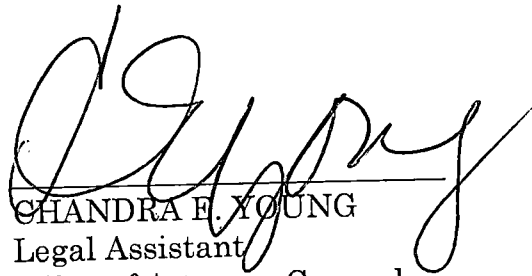
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**PROOF OF SERVICE**  
\_\_\_\_\_

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Jeremy A. Thompson, Esquire  
Post Office Box 12891  
Columbia, SC 29211

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

This 21<sup>ST</sup> day of February 2017.



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