

ORIGINAL

STATE OF SOUTH CAROLINA  
In The Supreme Court

CERTIORARI TO ANDERSON COUNTY  
Court of Common Pleas

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MAR - 3 2011

The Honorable J. Cordell Maddox, Jr., Circuit Court Judge  
Case No. 2008-CP-04-0073

S.C. Supreme Court

WAYMON HARBIN, JR., .....RESPONDENT,

v.

STATE OF SOUTH CAROLINA, ..... PETITIONER.

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**PETITION FOR WRIT OF CERTIORARI**

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**ATTORNEYS FOR PETITIONER**

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## **QUESTION PRESENTED**

1. Did the PCR Court err in finding that the Applicant was provided ineffective assistance of counsel due to the late hour of Counsel's appointment, resulting in a guilty plea that was not knowingly and voluntarily entered?

## STATEMENT OF THE CASE

Respondent Waymon Harbin was indicted at the January 1998 term of the Anderson County grand jury for murder (98-GS-04-94) and possession of a firearm during the commission of a violent crime (98-GS-04-93). He was represented by Richard Warder, Esquire. On April 21, 1998, Applicant pled guilty. He was sentenced by the Honorable Gerald C. Smoak, Sr., to confinement for periods of thirty (30) years and five (5) years concurrent. Applicant did not appeal his conviction or sentence.

Respondent filed this application for post-conviction relief (PCR) on January 9, 2008 (2008-CP-32-3812). It was his third PCR Application. A hearing was convened on March 26, 2009, before the Honorable Cordell Maddox. At that time, the State made its motion to dismiss. After hearing arguments from both Counselors, the Court denied the State's motion to dismiss and proceeded with an evidentiary hearing. In a written order dated August 26, 2009, and filed August 26, 2009, Judge Maddox granted relief. This Petition 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 PCR judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief action, the Applicant 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 Applicant 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, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant 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 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. With respect to guilty plea counsel, the Applicant 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, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

## ARGUMENT

**The PCR Court erred in finding that the Applicant was provided ineffective assistance of counsel due to the late hour of Counsel's appointment, resulting in a guilty plea that was not knowingly and voluntarily entered**

Petitioner submits that it was clear error on the part of the PCR Court to find that Counsel provided ineffective assistance of Counsel as a result of his late appointment, resulting in a guilty plea that was not knowingly and voluntarily entered. Petitioner further submits that there is no evidence on the record, other than Applicant's own unsupported testimony, that Counsel was unprepared in any way, or that his guilty plea was involuntary. However, both Counsel's testimony *and* the transcript of the guilty plea hearing reflect that Counsel was prepared, assisted the Applicant in entering a guilty plea that was to his benefit, and that the guilty plea was entered freely and voluntarily by the Applicant.

At the PCR Hearing, Counsel admitted to only being appointed shortly before he and the Applicant appeared for the entry of the guilty plea. (App. p. 58, lines 22-24). He stated that he obtained discovery in the case, and that he and his investigator met with the Applicant (App. p. 58, line 17 – p. 59, line 14), but added that it was a situation where the Applicant had told him that he committed the crime, which limited their possibilities for a defense. (App. p. 59, lines 3-21). He further testified that there was no evidence to support a defense of provocation. (App. p. 59, line 22 – p. 60, line3).

Counsel testified that he asked for a continuance, because he certainly would have liked to have had more time, but added that had the Applicant elected to proceed to trial he would have nonetheless been prepared to do so, in part because the public defender who had previously

represented the Applicant was willing to sit in on the trial with him. (App. p. 60, line 12 – p. 61, line 19).

However, Counsel further testified that he received a plea offer of thirty (30) years, taking the possibility of life off the table, and that the Applicant decided to accept it. (App. p. 61, lines 4-7). Counsel added that the facts were ‘bad in this case’ (App. p. 66, lines 10-19), and that Applicant pled guilty of his own free will. (App. p. 67, lines 17-21). Finally, Counsel testified that he never told the Applicant he would only serve twenty-five (25) years, or that he would get the Applicant back in court within a year and obtain a fifteen (15) year sentence for him. (App. p. 93, lines 11-24).

The transcript of the guilty plea hearing is also informative. At the Guilty Plea Hearing, the Applicant testified that no one had threatened him or pressured him into entering a guilty plea. (App. p. 28, lines 7-12). He also testified that he was pleading guilty of his own free will and accord, and that he was satisfied with his attorney’s representation (App. p. 28, lines 16-22).

Petitioner submits that the overwhelming weight of the evidence presented at the PCR Hearing supports the argument that the Applicant entered a plea that was to his benefit freely and voluntarily. Petitioner submits that it is apparent from Counsel’s testimony that he would have been prepared to go to trial, but that Applicant chose to plead. Petitioner submits that in the face of the evidence, the Applicant’s unsupported testimony should have been found to lack credibility and be of negligible evidentiary value. As such, Petitioner submits that this Court should overturn the lower court’s grant of post-conviction relief.

**CONCLUSION**

For the reasons stated above, this Court should grant Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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By:



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March 3, 2011

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In The Supreme Court

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APPEAL FROM ANDERSON COUNTY  
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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari has been served upon opposing counsel, Bruce Byrholdt, by mailing two (2) copies in an envelope properly addressed with postage prepaid this 3<sup>rd</sup> day of March, 2011.



Lena Pelishenko  
Legal Assistant for Petitioner

SWORN to before me this  
3<sup>rd</sup> day of March, 2011.

 (L.S.)

Notary Public for South Carolina.

My Commission Expires: 9/25/19