

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

MAY 11 2012

CERTIORARI TO ANDERSON COUNTY S.C. SUPREME COURT
Court of Common Pleas

WAYMON HARBIN, JR, #249126.....Respondent,

vs.

STATE OF SOUTH CAROLINA.....Petitioner.

BRIEF OF RESPONDENT

Bruce A. Byrholdt
CHAPMAN, BYRHOLDT & YON
Box 2506
Anderson, SC 29622

(864) 225-1411
(864) 231-9131 (fax)

ATTORNEYS FOR RESPONDENT

INDEX

	Page
Table of Cases.....	ii
Statement of Issues on Appeal.....	1
Statement of the Case.....	2
Standard of Review.....	3
Argument:	
The PCR Court did not err in finding the Applicant was denied the effective assistance of counsel due to the short time his attorney was retained and the lack of time counsel had to adequately prepare for a murder trial which involved more than 83 items of discovery and more than 350 pages of discovery; all of which rendered Applicant's guilty plea not freely, knowingly, voluntarily and intelligently entered.....	4
Conclusion.....	9
Certificate of Service.....	10

TABLE OF CASES

	Page
Federal Cases:	
Hill v. Lockhart, 447 U.S. 52, 106 S.Ct. 366 (1985).....	3, 6
Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).....	3, 6
State Cases:	
Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (SC 1985).....	3
Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (SC 1989).....	3, 6
Cobbs v. State, 305 S.C. 299, 408 S.E.2d 223 (SC 1191).....	7
Griffin v. Warden, 277 S.C. 288, 286 S.E.2d 145 (SC 1982).....	7
Stone v. State, 294 S.C. 286, 363 S.E.2d 903 (SC 1988).....	7

STATEMENT OF ISSUE ON APPEAL

1. Did the PCR Court err in finding that the Applicant was provided the 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 arrested on a murder charge on December 12, 1997. He was indicted for murder by the Anderson County Grand Jury on January 13, 1998. Attorney Richard Warder was retained by Mr. Harbin's family on or about April 15, 1998. Mr. Harbin's trial was set for April 21, 1998. Mr. Warder filed a motion for a continuance asserting to the trial court that he was not prepared for trial. The Honorable Gerald Smoak denied his motion for the continuance. Shortly after drawing the jury, Mr. Harbin entered his guilty plea. Judge Smoak sentenced Mr. Harbin to confinement for a period of thirty (30) years and five (5) years concurrent. Mr. Harbin did not file an appeal.

Mr. Harbin filed this application for post-conviction relief on January 29, 2008 (2008-CP-04-73). It was Mr. Harbin's third application. A hearing was convened on March 26, 2009, before the Honorable J. Cordell Maddox, Jr. The State moved to dismiss on the basis of successive applications and the statute of limitations. Respondent was present at the hearing and was represented by Bruce A. Byrholdt. Judge Maddox denied the States' motion because Mr. Harbin had never had an evidentiary hearing. At the evidentiary hearing Respondent testified, as did attorney Richard Warder and Respondent's father Waymon Harbin, Sr testified he provided information to Mr. Warder about his son, the respondent, having a gun being put in his mouth and threatened with having his head blown off and no one raised the issue of whether someone (decedent) had had a gun put in his mouth and threatened. (Appendix p. 91, lines 1 - 5, p. 92, lines 11-13). In a written order filed August 29, 2009, Judge Maddox granted Waymon Harbin a new trial. (Appendix p. 97-99). The State's applied for a Writ of Certiorari which was granted by the Supreme Court.

STANDARD OF REVIEW

The standard of review of a post-conviction evidentiary hearing is whether “any evidence” of ‘probative value’ exists to sustain the PCR judge’s findings. **Cherry vs. State, 300 S.C. 115, 199, 386 S.E.2d 624, 626 (SC 1989)**. In a post-conviction proceeding the applicant bears the burden of proving his/her allegations in the application. **Butler vs. State, 286 S.C. 441, 334 S.E.2d 813 (SC 1985)**. Where an application for post-conviction relief alleges the 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 vs. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed2d 674 (1984)**.

There is a two-prong test in evaluating the 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 attorneys performance by its “reasonableness under professional norms.” **Cherry at 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 at 300 S.C. at 117 118, 386 S.E.2d at 625, 626**. 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 plead guilty and would have insisted on going to trial. **Hill vs. Lockhart, 447 U.S. 52, 106 S.Ct. 366, 88 L.Ed2d 203 (1985)**.

ARGUMENT

The PCR Court did not err in finding the Applicant was denied the effective assistance of counsel due to the short time his attorney was retained and the lack of time counsel had to adequately prepare for a murder trial which involved more than 83 items of discovery and more than 350 pages of documents ; all of which rendered Applicants guilty plea not freely, knowingly, voluntarily and intelligently entered.

I find it incredible that the State would assert that Harbin, who's attorney had less than five (5) days to prepare for trial or a guilty plea on a murder case, had the effective assistance of competent counsel required under our system of criminal justice.

Richard Warder asked the trial court for a continuance because he needed more time to prepare. Yet during the PCR hearing, Mr. Warder testified under oath that he was prepared for trial. This testimony was not believed by the PCR court and is not worthy of belief. To most all of Mr. Harbin's questions during the PCR hearing, Mr. Warder's responses were worthless. "Can you tell me how many times you met with Mr. Harbin? I can't tell you that." (Appendix page 58, l. 17-19). "How may witnesses did you interview in preparation for this murder trial? Well, once again I can't tell you. I had my investigator meet with my client." (Appendix p. 59, l. 11-14). "Did you ever look into any defenses such as provocation, which would have had a possibility of reducing it from murder to manslaughter? You didn't did you. There was no evidence of heat of passion that I was able to arrive, provocation I don't think would necessarily take it from." (Appendix p. 59, l. 22-p. 60. l. 3). "But my question is if you were prepared, why would you ask for a continuance? I asked for a continuance at the time - - at the very time we took the case. I would have liked to have had more time. If I had to go to trial, I would have been prepared." (App. p. 61, l. 20-25). The motion for continuance was denied on April 21,

1998 and Mr. Harbin entered his plea of guilty.

The State is wrong when it states that trial counsel (Richard Warder) was appointed shortly before trial, he was **retained**. (Petition for Cert page 5, App. p. 58, l. 22-24). Mr. Warder did admit that he did not believe he could adequately prepare for a murder case in a week. (App. p. 62, l. 20-23). Mr. Warder was asked if Mr. Harbin told him the victim in the case has put a gun into Mr. Harbin's mouth and threatened to blow his head off and Mr. Warder answered that he had no recollection either way. (App. p. 69, l. 13-19). Mr. Harbin testified he only saw Mr. Warder or his investigator once or twice. (App. p. 71. l. 22- p. 72. l. 2). Mr. Harbin testified that Warder told him: "Look Mr. Harbin, you take this plea, within a year we'll be back in court and I'll get you 15, you'll be home is seven." (App. p. 77, l. 9-110. During Mr. Harbin's plea, the trial judge asked him, "Have you talked with your lawyer for as often and as long as you feel necessary for him to properly represent you? I can't answer that question." (App. p. 28, l. 23 - p. 29, l. 1). Mr. Harbin's father testified during sentencing that the victim had threatened Waymon Harbin on numerous occasions. (App. p. 32, l. 13 - p. 33, l. 2). Mr. Harbin's father also testified at the PCR that he provided information to Mr. Warder about his son, the respondent, having a gun being put in his mouth and threatened with having his head blown off and no one raised the issue of whether someone (decedent) had had a gun put in his mouth and threatened. (Appendix p. 91, lines 1 - 5, p. 92, lines 11-13). The State argues Waymon Harbin's plea should stand because he answered the judge's questions properly. A defendant in entering a guilty plea answers the questions because he is told he must answer the questions to have the court accept the plea. Here, Mr. Warder's representation of Waymon Harbin falls below the standard of effective representation called for by the Sixth and Fourteenth Amendments to the Constitution of the United States and implied in

Art. I, Sec. 14 of the Constitution of the State of South Carolina and **Strickland vs.**

Washington, supra. because he had insufficient time to prepare to defend a murder case over a period of time of less than five (5) days from being retained to trial or plea. Mr. Warder was further ineffective for failing to properly investigate the case and interview witnesses especially regarding the assertion the decedent had repeatedly threatened Respondent's life and had put a gun in Respondent's mouth and threatened to blow his head off. Had the information about the threats to Harbin's life been developed the case would have proceeded to trial and the result most probably would have been a verdict of not guilty of murder or a verdict of manslaughter or a plea to some charge less than murder. Respondent was prejudiced by trial counsel's failure to prepare his defense and the failure to be prepared for trial or to have conducted an investigation which could have provided plea negotiations to a charge of less than murder. Harbin has established that the representation of his trial counsel was ineffective and that he was prejudiced by counsel's representation, but for trial counsel's unreasonably short period of representation, trial counsel's request for continuance based upon lack of preparation, and trial counsel's failure to investigate threats of bodily harm/death made by the decedent against Harbin, Waymon Harbin, Jr. had already drawn a jury and would have proceeded to trial with sufficient evidence to assert a defense of provocation or probably could have negotiated a more beneficial result. **Strickland vs. Washington, supra. ; Cherry at 300 S.C. at 117 118, 386 S.E.2d at 625, 626; Hill vs. Lockhart, 447 U.S. 52, 106 S.Ct. 366, 88 L.Ed2d 203 (1985).**

Our system of justice is premised on the foundation that both the State and a defendant shall have a fair trial with a defendant represented by an effective advocate. It strains all common sense for the State to argue that Mr. Harbin had the effective assistance of counsel when he was facing a murder charge with retained counsel who had been on the case less than five (5)

days. In reviewing post- conviction relief matters, this Court is limited to determining if there is any evidence in the record to support the PCR judge's findings of fact. **Stone vs. State, 294 SC 286, 363 S.E.2d 903 (SC 1988)**. If any evidence exists on the record the judge's finding should be upheld. **Griffin vs. Warden, 277 SC 288, 286 S.E.2d 145 (SC 1982)**. Here, there is evidence in the record that trial counsel had less than five (5) days to investigate, prepare a defense and prepare for a murder trial. Trial counsel requested a continuance from the trial judge stating he was not prepared to go forward, yet he testified at the evidentiary hearing that he was prepared. Trial counsel's testimony lacked belief. Trial counsel failed to investigate the defense that Harbin had been threatened on prior occasions and had previously had a gun put in his mouth by the alleged victim. Harbin was not afforded the effective assistance of counsel who had been on the case less than five (5) days. **Cobbs vs. State, 305 SC 299, 408 S.E.2d 223 (SC 1991)**.

The voluntariness and knowing aspects of Mr. Harbin's guilty plea must be questioned in light of Mr. Harbin's colloquy with the trial judge, the inadequate time counsel devoted to this case, the failure to investigate and offer evidence of the history of threats to Mr. Harbin by the victim. This was exacerbated by Mr. Warder being retained only five (5) days before pleading Mr. Harbin guilty to a sentence of thirty (30) years. It was impossible for Waymon Harbin to have had the effective assistance of counsel called for under our system of justice when trial counsel only had five (5) days involvement to prepare for defending a murder case and did no investigation into the history of threats and violence between the Respondent and decedent. Had a proper investigation been conducted by Richard Warder the case either would have proceeded to trial with a not guilty verdict or a verdict of manslaughter or the Respondent would have been able to negotiate a plea to a charge less than murder.

While it is true that Waymon Harbin, Jr. responded to the trial judge's questions during the guilty plea that he was satisfied with Mr. Warder's representation and has spent enough time with him. In order for our criminal justice system to be fair and just we must not accept the plea colloquy with a blind eye. Everyone involved in the criminal justice system is also aware that a defendant is required to answer the question propounded in such a manner in order to have the plea accepted. In this case, Judge Smoak questioned Mr. Harbin as follows:

The Court:	All right. Have you talked with your lawyer for an often and as long as you feel necessary for him to properly represent you.
The Defendant:	I can't answer that question.
The Court:	Well, sir, then I can't accept your plea unless you can answer these questions. And I've got to know that the plea is free and voluntary, sir.
The Defendant:	Yes, sir.
The Court:	All right. Do you need more time to talk to your lawyer?
The Defendant:	No sir (Appendix p. 28, l. 23 to p. 29, l. 8).

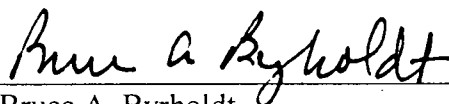
The trial judge was put on notice that Harbin could not truthfully answer the question about whether he had sufficient time with his lawyer for the lawyer to properly represent him. Harbin's plea was not freely, voluntarily and intelligently entered and he did not receive the effective assistance of counsel required by our criminal justice system.

Conclusion

Waymon Harbin, by and through his undersigned counsel, would respectfully request the Court affirm the decision of the Honorable J. Cordell Maddox, Jr. and remand this case for a new trial.

Respondent Waymon Harbin, Jr. would respectfully request this case be set for oral argument.

Respectfully submitted,



Bruce A. Byrholdt
CHAPMAN, BYRHOLDT & YON
Box 2506
Anderson, SC 29622
(864) 225-1411
(864) 231-9131 (fax)

May 10, 2012

ATTORNEYS FOR RESPONDENT HARBIN

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

MAY 11 2012

APPEAL FROM ANDERSON COUNTY
In the Court of Common Pleas

S.C. SUPREME COURT

The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

Case: 2008-CP-04-0073

WAYMON HARBIN, JR.,

Respondent,

V.

STATE OF SOUTH CAROLINA,

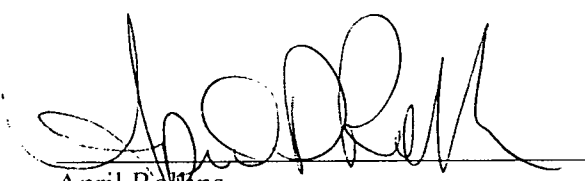
Petitioner.

CERTIFICATE OF SERVICE

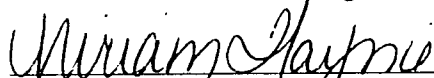
The undersigned hereby certifies that the Original Unbound Copy of Brief of Respondent along with fifteen (15) copies of same have been served upon Hon. Daniel E. Shearouse, Clerk of the Supreme Court of South Carolina, and two copies upon opposing counsel, Kaelon E. May, by US mail, addressed as follows this 10 day of May, 2012.

Hon. Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Kaelon E. May
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-1549


April Rollins
Legal Assistant to Bruce Byrholdt

Sworn to before me this 10 day of May, 2012.



Notary Public for South Carolina. My commission expires: 8/5/2015

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
In the Court of Common Pleas

The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

Case: 2008-CP-04-0073

WAYMON HARBIN, JR.,

Respondent,

v.

STATE OF SOUTH CAROLINA,

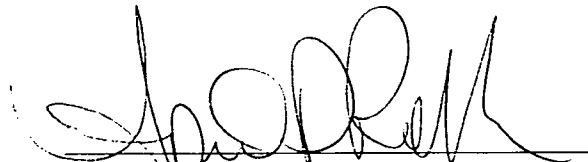
Petitioner.

CERTIFICATE OF SERVICE

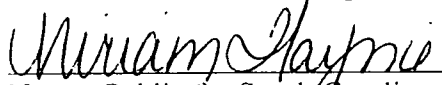
The undersigned hereby certifies that the Original Unbound Copy of Brief of Respondent along with fifteen (15) copies of same have been served upon Hon. Daniel E. Shearouse, Clerk of the Supreme Court of South Carolina, and two copies upon opposing counsel, Kaelon E. May, by US mail, addressed as follows this 10 day of May, 2012.

Hon. Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Kaelon E. May
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-1549


April Robbins
Legal Assistant to Bruce Byrholdt

Sworn to before me this 10 day of May, 2012.


Notary Public for South Carolina. My commission expires: 3/5/2015