

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane S. Goodstein, Circuit Court Judge
Case No. 2007-CP-18-0202

ERIC PHILLIPS, JR.RESPONDENT,

v.

STATE OF SOUTH CAROLINA, PETITIONER.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Does evidence support the PCR court's finding that Counsel was ineffective in failing to present character evidence of the victims in the form of Phillips' testimony where (a) Counsel did elicit testimony from Phillips regarding his opinion of the victims and his state of mind before the jury and (b) Phillips' testimony at PCR hearing was cumulative to the testimony given before the jury.
- II. Does evidence support the PCR court's conclusion that Counsel was ineffective due to illness such that prejudice is presumed pursuant to U.S. v. Cronin, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657 (1984)?
- III. Does evidence support the PCR court's finding that Counsel's closing argument was "simply inadequate" where (a) Counsel's argument evinces a clear strategy and was clearly reasonable under professional norms and (b) prejudice such that the outcome of trial would have been different has not been shown?
- IV. Does evidence support the PCR court's finding that Counsel should have objected to the relevance of shell casings in excess of the number of shots which witnesses heard? Even if such an objection were tenable, is there evidence of prejudice?
- V. Does evidence support the PCR court's finding that Phillips was prejudiced by any Counsel's advice to reject plea offers where Phillips received a fair trial?

STATEMENT OF THE CASE

Eric Phillips (“Phillips”) was with two (2) counts of Assault and Battery with Intent to Kill (“ABWIK”) and one (1) count of Possession of a Weapon During Commission of a Violent Crime. (App. pp. 517-520; pp. 521-525; pp. 527-530.) He was represented by the late Gene Dukes, Esq. (“Counsel”) (App. pp. 487-488.) Phillips proceeded to a jury trial before the Honorable James C. Williams, Jr., on October 16, 2006. (App. pp. 1-353.) On October 18, 2006, the jury returned verdicts of guilty on each charge. Phillips was sentenced to fifteen (15) years on each count of ABWIK and to five (5) years for Possession of a Weapon During Commission of a Violent Crime. (App. p. 516; p. 521; p. 526.) All sentences were to be served concurrently. No direct appeal was filed.¹

Phillips filed his application for post-conviction relief (PCR) on February 6, 2007 (2007-CP-18-0202). (App. pp. 354-360.) The State made its Return on July 27, 2007. The case was called for hearing and the amended application was filed on June 10, 2009. (App. pp. 361-363; pp. 371-481.) In a written order dated January 25, 2010, and filed January 26, 2010, the Honorable Diane S. Goodstein granted the application and ordered a new trial. This Petition for Writ of Certiorari follows.

¹ The State consents to Phillips’ request for belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Phillips testified that he requested an appeal. As Counsel is deceased, there is no evidence to contradict this claim.

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 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, Id. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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.

SUMMARY OF FACTS ADDUCED AT TRIAL

The charges in this case arise from a shooting outside of a St. George Waffle House on December 14, 2003. John Griffin (“John”) sustained a gunshot wound in his upper right abdomen, the bullet passing through his liver and kidney, and required hospital care for approximately one week. (App. p. 121, line 17 – p. 123, line 7; pp. 184-186.) Gerald Griffin (“Gerald”) was shot in his right hand. (App. p. 101, lines 9-18.) John and Gerald had been at a local nightclub called “The Farm” on the evening in question celebrating John’s birthday. (App. p. 117, lines 8-9.) Phillips was also at The Farm. Due to another altercation he was having, Phillips bumped into John, and a verbal argument arose between John and Phillips, apparently over Phillips’ failure to provide support John and Gerald’s niece. (App. p. 97, line 6 – p. 98, line 6; p. 114, line 15 – p. 116, line 4; p. 132, lines 12-19.) It was alleged that Phillips was the father of the child. (App. p. 97, lines 10-12; p. 113, lines 13-16; p. 148, lines 2-11.) At The Farm, Phillips had been wearing a bright-colored Lakers jacket. (App. p. 98, lines 7-14; p. 119, lines 13-14.)

After the verbal argument, John, Gerald, and some friends went to the Waffle House. (App. p. 98, line 15 – p. 99, line 4; p. 117, lines 14 - 24.) After about thirty minutes, Phillips, now clad in a dark “hoody” sweatshirt, arrived to the Waffle House in a car with Peter Willis (“Willis”). (App. p. 80, lines 15-23; p. 81, line 21 – p. 82, line 10; p. 99, line 5 – p. 100, line 7; p. 118, line 13 – p. 120, line 11; p. 171, lines 21-23.) Willis testified that he had not been at the Farm and encountered Phillips at a gas station. (App. p. 143, line 17 – p. 146, line 18.) The two proceeded to the Waffle House together. At the Waffle House, Willis had intervened in the verbal altercation between John and Phillips, pulling John a distance away from Phillips before the shots rang out. (App. p. 120, line 12 – p. 121, line 4; p. 146, line 19 – p. 154, line 10.) The State’s witnesses all agreed that words were exchanged, and Phillips pulled a pistol from the

pocket of his sweatshirt and fired the weapon. (App. p. 81, lines 2-13; p. 82, line 8 – p. 83, line 5; p. 83, lines 13-19; p. 100, line 8 – p. 101, line 2.; p. 120, line 15 – p. 121, line 9.) Everyone fled from the shots. (App. p. 83, lines 5-12; p. 101, lines 3-8; p. 121, lines 6-9.) The victims and State’s witnesses averred that no threats had been made by the victims, no physical altercation had taken place at any time, and that the victims were unarmed. (App. p. 81, lines 17-20; p. 84, lines 11-13; p. 116, lines 5-9; p. 121, lines 10-16; p. 125, lines 2-7; p. 129; p. 132, lines 20-23; p. 135, line 14 – p. 136, line 4; p. 154, line 23 – p. 155, line 18; p. 157, lines 13-23; p. 171, line 24 – p. 172, line 6.) Out of the group of several individuals outside, only John and Gerald were shot.

Willis fled to his car after the shots were fired. (App. p. 154, lines 14-17.) Phillips also got into the car. (App. p. 155, lines 19–25.) Willis drove Phillips back to his car at the gas station. (App. p. 156, lines 1-10.) On the drive to Phillips’ car, Phillips said he “was tired of people f___ing with him.” (App. p. 156, lines 16-22.) Willis turned himself in the following morning, arriving “before the police station opened.” (App. p. 157, lines 5-12.)

The defense presented a different version of events at trial. Phillips’ live-in girlfriend, Luvenia Lloyd (“Lloyd”), testified that she had witnessed the altercation between Phillips and John at The Farm. (App. p. 195, line 15 – p. 196, line 16.) According to Lloyd, John had instigated the confrontation, yelling curse words. Lloyd stated that she left with Phillips and his cousin and that John and Gerald followed them in their cars. (See for example App. p. 196, line 17 – p. 197, line 13.) Lloyd went home and went to bed, but Phillips changed clothes and went to the Waffle House for something to eat. (App. p. 197, lines 14-18; p. 206, line 21 – p. 207, line 2.)

Phillips also took the stand. Phillips testified that John had threatened him at The Farm and that John and Gerald had followed him when he left the club. (App. pp. 212-217.) Phillips said he met up with Willis on the way home. Leaving Lloyd at home, Phillips said he left his

home in the early morning hours to file a police report on John and Gerald. Phillips testified that while on the way to the police station, he decided to stop at the Waffle House to place an order, intending to pick up the food on his way back from the police station. (App. p. 217.) Willis denied that Phillips had mentioned going to law enforcement. (App. p. 165, lines 16-23.) According to Phillips, John and Gerald approached him in the Waffle House parking lot with several others and a scuffle broke out. (App. p. 217, line 12 – p. 219, line 1.) During the scuffle, Phillips claimed, a gun fell to the ground. (App. p. 219, lines 1-6.) Fearing for his life, he “picked the gun up to shoot the gun in the air.” (App. p. 219, lines 12-17.) Phillips told his mother he had shot someone, and later went to a neighboring police officer’s house to turn himself in. (App. p. 220, line 4 – p. 221, line 25.)

The jury charge included charges on self-defense and the lesser-included offense of Assault and Battery of a High and Aggravated Nature (“ABHAN”).

ARGUMENTS

- I. **The PCR court’s finding that Counsel was ineffective in failing to present character evidence of the victims in the form of Phillips’ testimony is without evidentiary support. Counsel did elicit testimony from Phillips regarding his opinion of the victims and his state of mind before the jury. Phillips’ testimony at PCR hearing was cumulative to the testimony given before the jury.**

The PCR court found that Counsel was ineffective in failing to elicit testimony from Phillips about his opinion of the victims. (App. pp. 500-502.) This was error.

During his trial testimony, Phillips repeatedly testified that he was afraid of John on the night in question because of John’s threats at The Farm (e.g. “I’ll kill you and whoever is in your car ... you and your old lady.”), because of John’s actions in following him, and because he was outnumbered by John’s group. (See for example App. p. 213, lines 16 –19; p. 214, line 15 – p. 215, line 18; p. 216, lines 5-21; p. 217, lines 15-19; p. 218, line 2 – p. 219, line 22; p. 220, line 20 – 23; p. 221, lines 7-8; p. 222, line 6 – p. 223, line 24; p. 224, lines 10-17; p. 225, line 19 – p.

226, line 18; p. 231, line 3 – 15.) Phillips testified further that he feared the Victims “because, you know, I heard about things they had did.” (App. p. 226, lines 17-18.)¹ The solicitor objected, and the jury was excused. (App. p. 226, line 16 – p. 227, line 5.) A proffer of the testimony was made outside of the jury’s presence. In the proffer, Phillips stated that he had heard that the victims were involved in a shooting at an apartment complex. (App. p. 228, lines 7-18; p. 229, lines 4-19.) The trial judge took a moment to review case law as to whether the defendant could introduce this type of evidence of a victim’s character. (App. p. 229, line 20 – p. 230, line 2.) The trial judge then overruled the solicitor’s objection but stated that no further testimony would be allowed on the matter. (App. p. 230, lines 3-6.) At PCR hearing, Phillips stated simply he believed that John was dangerous and aggressive based on his personal experience that evening and based on what he heard, an echo of the very testimony given prior to the solicitor’s objection. (App. p. 410, line 25 – p. 411, line 9; p. 420, line 21 – p. 421, line 11.)

Because Counsel did elicit this testimony, the Court’s finding is without evidentiary support. Moreover, the “additional” testimony which Phillips would have Counsel elicit is cumulative to what was given. It is abundantly clear in the trial testimony that Phillips believed John was dangerous and aggressive based on his personal experiences that evening and based on what he had “heard about things they did.”² Therefore, there is no evidence that Phillips suffered prejudice in this regard.

¹ Phillips also said that Gerald was not a threat during the course of events. (See for example App. p. 213, line 25 – p. 214, line 3; p. 251, lines 18-21.) The State argued the theory of transferred intent. (See App. p. 263, line 17 – p. 264, line 14.)

² Phillips concedes, and the PCR court found, that the proffered testimony was not admissible. The State takes no exception to that finding. (App. p. 501.)

II. The PCR court's conclusion that Counsel was ineffective due to illness such that prejudice is presumed pursuant to U.S. v. Cronic, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657 (1984) is unsupported by the record.

Phillips argued that Counsel's failure to make a motion to be relieved as counsel due to his illness constitutes ineffective assistance of counsel, and Phillips argued that Counsel's illness so impaired him that he failed to subject the State's case to meaningful adversarial testing pursuant to U.S. v. Cronic, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657 (1984). Cronic recognized that there are certain "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Id. at 658, 104 S.Ct. 2046. Such circumstances where prejudice is presumed, thereby rendering an individualized inquiry unnecessary, are very limited. In Cronic, the court noted that the complete denial of counsel at a critical stage of the process is one such circumstance. Second, "[w]here circumstances surrounding a criminal trial indicate a lack of meaningful adversarial testing, prejudice is presumed and it is unnecessary to inquire into counsel's actual performance." Frett v. State, 298 S.C. 54, 56, 378 S.E.2d 249, 250 (1989)(citing U.S. v. Cronic, supra). Third, Cronic recognized that there may be cases where "surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness [could be] properly presumed without inquiry into actual performance at trial." U.S. v. Cronic, 466 U.S. at 661, 104 S.Ct. at 2048. Phillips asserts that his case falls into the second category, the class of "cases where counsel fails to 'function in any meaningful sense as the Government's adversary.'" Nance v. Ozmint, 367 S.C. 547, 552, 626 S.E.2d 878, 881 (2006) (citing Florida v. Nixon, 543 U.S. 175, 190, 125 S.Ct. 551, 562, 160 L.Ed.2d 565 (2004)).

Counsel was retained by Phillips. Counsel, an experienced trial lawyer, former legislator, and active in his community, passed away in August 2007. (App. pp. 487-488.) Counsel's file in Phillips' case contained discovery documents (e.g. statements, police reports, photographs of the

scene, rap sheet), letters from the solicitor ranging from April 2005 to early October 2006, the jury list (with handwritten notes), jury charges, handwritten trial notes taken by Counsel, and a document indicating that \$500 of \$2500 in fees had been paid.

Phillips testified that his case was pending for around three years before trial. Phillips believed that Counsel was in ill health from the time he retained him. (App. p. 388, lines 8-13.) Phillips stated that Counsel was “out of it.” Though testifying that they met “three or four times at the most,” Phillips testified that Counsel often forgot things they talked about and related many occasions when they talked. (App. p. 388, lines 10-13; p. 393, lines 7-8.) Phillips, his mother, and Lloyd testified at PCR hearing that Counsel was experiencing an unspecified illness; they had no specific information on the nature of the illness or any treatment other than a catheter bag visible at trial. (App. p. 392, line 25 – p. 393, line 4; p. 436, lines 1-3.)

Russell Hilton, Esquire, (“Hilton”) of the First Circuit Solicitor’s Office, was one of two solicitors prosecuting the case. (App. p. 439, lines 18-22.) Since beginning his role in prosecution in 2005, Hilton had approximately ten cases with Counsel. (App. p. 440, lines 1-5.) Hilton recalled seeing Counsel in and out of court around the time of Phillips’ trial. Hilton testified that while Counsel was undoubtedly ailing physically, he seemed mentally sharp at the time of trial and lucid throughout. (App. p. 442, line 13 – p. 443, line 4.)

Phillips pointed to, and the PCR court found, certain verbal slips to be indicators of all-consuming illness rendering a prejudice inquiry unnecessary pursuant to Cronic, supra. For example, Phillips pointed to a misstatement at App. p. 40, line 24 – p. 41, line 2. Counsel immediately corrected his misstatement. (App. p. 41, lines 6-8.) If misspeaking is to be the standard for a presumption of prejudice, a great many attorneys may be presumed ineffective. Phillips further lays blame for his own manner of speaking in his trial testimony on Counsel’s illness. (App. p. 513.) However, as should be most important to this analysis, when reviewed as a

whole, the trial transcript reflects that Counsel retained the requisite awareness and ability and functioned as an adversary.

The present case stands in contrast to Nance v. Ozmint, *supra*, in important regards. First, while Counsel was apparently in ill physical health, there is no evidence that Counsel was under the influence of debilitating prescription drugs. Counsel presented a coherent defense of self-defense through the testimony of Phillips and Lloyd at trial. Counsel's conduct in the present case falls far short of the misconduct described in Nance wherein the defense attorney failed to present a coherent defense theory and ultimately bolstered the State's case. For these reasons, the PCR court erred in finding that Counsel's illness so affected his performance such that a prejudice inquiry was unnecessary.

Turning to the appropriate prejudice analysis, Phillips failed to demonstrate how counsel's physical impairment affected the ultimate outcome of the trial. Phillips failed to demonstrate any additional investigation which could have been conducted or any misstep at trial so grievous that doubt can be cast upon the verdict.

III. There is no evidence to support the PCR court's finding that Counsel's closing argument was "simply inadequate." The PCR court further erred in finding a reasonable likelihood that some unspecified better argument would have changed the outcome of the proceeding.

Phillips broadly asserted, and the PCR court equally broadly found, that Counsel's closing argument failed to sufficiently address Phillips' claim of self-defense and that Counsel failed to adequately argue to the jury that Phillips could be convicted of the lesser-included offense of ABHAN. The PCR court found that some unspecified better argument on these topics would have changed the outcome of trial.

Upon review of Counsel's closing argument as a whole, it is clear that no omissions by Counsel rise to the level of deficient performance. (App. p. 272, line 19 – p. 284, line 20.) While

the right to effective assistance of counsel extends to closing arguments, counsel has wide latitude in presenting such argument. “When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect.” Yarborough v. Gentry, 540 U.S. 1, 8, 124 S.Ct. 1, 5 (2003).

The PCR court erred in assigning error to Counsel’s emphasis of self-defense and lack of argument on the lesser offense of ABHAN. In the present case, Counsel’s strategy was not to garner a conviction of ABHAN but rather to urge an acquittal. While Counsel cannot testify as to his strategy, Solicitor Hilton remarked that he believed Counsel was taking something of an “all or broke” approach, noting “that’s not uncommon for a defense attorney to ... not ask for a lesser included offense.” (App. p. 447, line 21 – p. 448, line 4.) The transcript further evinces this inference. During the discussion of jury charges, Counsel informed the court that he did not wish a charge on the lesser-included offense of ABHAN. (App. p. 258, lines 5-16.) The jury charge on ABHAN was ultimately given following conference with the trial judge. (App. p. 447, lines 16-20.) Based on this evidence, the court’s finding that defense counsel’s emphasis on self-defense was unreasonable is without support.

Moreover, as further noted in Yarborough, “even if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” Id. at 1, 124 S.Ct. 6. With regard to the Counsel’s summation of facts and theory of self-defense, Counsel set forth a succinct version of the facts, ultimately focusing in on Phillips’ testimony that he acted in self-defense. While Phillips may have preferred a more extensive argument, Counsel’s argument is unreasonable under professional norms. Further, there is no evidence that additional commentary in closing argument may have influenced the ultimate outcome of the case.

IV. The PCR court's finding that Counsel should have objected to the relevance of shell casings in excess of the number of shots which witnesses heard on the basis of relevance is without support. Further, Phillips failed to show prejudice.

The PCR court found that Counsel erred in failing to object to the admission of eight shell casings found at the scene of the shooting when witnesses testifying later in the trial only recalled hearing three to four shots. (See for example Tr. p. 83, lines 5-8; p. 101, lines 3-6; p. 121, lines 5-9; p. 133, lines 12-16; p. 153, lines 3-7) Eight .45 caliber casings and a slug were found outside the Waffle House. (App p. 60, line 7 – p. 63, line 9.) These items were entered into evidence through the police officer who collected them from the scene without objection. In contrast to Phillips' assertion and the PCR court's finding that the officer attributed all eight shots to Phillips, the officer testified simply that the eight casings indicated that eight shots were fired – the officer does not attribute the shots to anyone. (App. p. 66, lines 3-5.) The PCR court determined that “defense counsel committed error by failing to object to the extra shell casings.” (App. p. 499.) The PCR court assigned prejudice because the State could then argue that Phillips fired eight times and that the eight shell casings undermined Phillips' testimony that he only fired a few times.

An objection on this basis would not have been sustained under the Rules of Evidence. Rule 403, SCACR. Evidence is not irrelevant just because it differs from a witness' testimony or allows the State to argue a certain theory. Such matters are factual determinations for the jury. Therefore, Counsel's failure to put forth an objection that only some of the casings could be admitted is not unreasonable; the PCR court's finding that Counsel should have made such an objection is unsupported. In terms of prejudice, the casings could just as well lead to inferences that would be beneficial to Phillips. For example, the jury could infer that another individual must have been shooting as well. Counsel also noted that a gun that had been fired eight times

would have an odor and would be hot to discredit Willis' testimony that Phillips had gotten in the car and placed the gun out of sight. (Tr. p. 282, lines 10-20.)

V. Evidence does not support the PCR court's finding that Phillips was prejudiced by any failure to communicate a plea offer where Phillips received a fair trial.

Phillips testified that he was not told of any plea offers prior to trial. (App. p. 396, lines 9-12.) Phillips stated that during trial Counsel approached him with plea offers from the state, "but he just gave me notes. He never gave me what it was." (App. p. 399, lines 21-24.) Phillips then testified that he was told during trial that the State was offering a twenty (20) year plea and that he had inquired as to what it was for, but his attorney advised him not to take it. (App. p. 400, lines 1-8.) Phillips testified that on the second day of trial he was told of a ten (10) year plea offer, but he did not know what the offense was. (App. p. 400, lines 9-13.) Phillips testified that he would have taken a plea to ABHAN. (App. p. 400, lines 14-22.) Phillips testified that he was not interested in pleading guilty to ABWIK and would not have wanted to enter a plea to ABWIK.

Solicitor Hilton testified that a written plea offer was made in February 2006. The February offer was to one count of ABWIK and one count of ABHAN, with a recommendation that the sentences be served concurrently. (App. pp. 483-484; p. 441, lines 6-10.) Under the February plea offer, the charge of Possession of a Weapon During the Commission of Certain Crimes would be *nolle prossed*. Phillips testified that he would not have accepted the February 2006 plea offer as he would not have accepted a plea offer to ABWIK under any circumstances. (App. p. 399, lines 2-20; p. 400, lines 19-22; p. 426, lines 4-7.)

Hilton recalled that a second, unwritten plea offer made several weeks before trial. (App. p. 441, lines 11-p. 442, line 7; p. 446, lines 1-4.) Under the second plea offer, both charges would have been reduced from ABWIK to ABHAN. Hilton did not testify as to any offers being made

immediately before or during trial. Hilton was not privy to any conversations or communication between Phillips and Counsel regarding the plea offers. (App. p. 444, line 18 – p. 445, line 8.)

Because Counsel is deceased, there is no additional testimony addressing the discrepancy between the solicitor's account of the plea offers made and Phillips' recollection of the plea offers communicated. From Phillips' testimony, it is clear that he was not completely unaware that plea offers had been made. Under Phillips' version of events, the plea offers were not discussed in detail, and Counsel advised him against accepting the offers. The question then, is one of whether Counsel adequately advised Phillips of plea offers and whether advice not to plead guilty, rendered during trial, should be scrutinized by a standard of length of sentence.

In the recent case of Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009), our Supreme Court addressed for the first time the issue of whether failure to communicate a plea offer constitutes ineffective assistance of counsel. In Davie, it was found that the attorney's failure to notify the applicant of a plea offer constituted deficient performance.³ In ascertaining prejudice, however, our courts will continue to employ a case-by-case analysis.

Phillips testified that he would have accepted a ten (10) year plea offer to charges of ABHAN, "Once [he] discussed it with [Counsel]." (App. p. 416, lines 29-32.) In retrospect, the ten (10) year sentence to the lesser charge is undoubtedly appealing to him. However, Phillips also testified that with regard to his other PCR allegations he was seeking a new trial. (App. p. 426, line 22 – p. 427, line 6. The State asserts that Phillips in fact received a fair trial. He was

³ The South Carolina precedent of Judge v. State may also be noted: "We agree with the reasoning of the district court in Turner and thus hold that the Sixth Amendment protects criminal defendants against ineffective assistance of counsel during the plea bargaining process, even if the plea offered ultimately is rejected." Judge v. State, 321 S.C. 554, 560, 471 S.E.2d 146, 149 (1996). While respectful of our State Supreme Court's ruling in Judge, it is noted that Turner was vacated, and other courts have refused to follow the logic of Turner v. State, 664 F.Supp 1113, 56 USLW 2055 (M.D.Tenn. Jun 12, 1987) (NO. 3-87-0152). State v. Greuber, 165 P.3d 1185, 581 Utah Adv. Rep. 34, 2007 UT 50 (Utah Jul 03, 2007) (NO. 20060009); In re Alvernaz, 282 Cal.Rptr. 601, 60 USLW 2106 (Cal.App. 4 Dist. Jun 25, 1991) (NO. D012971), rehearing denied (Jul 02, 1991); People v. Jordan, 184 Ill.App.3d 1090, 540 N.E.2d 941, 133 Ill.Dec. 75 (Ill.App. 3 Dist. Jun 16, 1989) (NO. 3-88-0505, 3-88-0518). In Judge, the advice to reject the plea bargain was found to be unreasonable based on counsel's failure to review Brady material. In the present case, Phillips has made no showing of any such shortcoming.

allowed to present evidence and to confront and cross-examine the witnesses against him. Pursuant to Strickland v. Washington, *supra*, 466 U.S. at 694, the proper analysis of prejudice not whether a lesser sentence could have been secured but rather whether counsel's error renders a conviction unreliable. In Hill v. Lockhart, 474 U.S. 52 (1985), the Supreme Court found that an attorney's deficiency results in prejudice where a defendant is induced to forego his right to a jury trial and accept a guilty plea. In contrast, where a defendant is not deprived of substantive or procedural rights, the result of the proceeding is not unreliable. See for example Lockhart v. Fretwell, 506 U.S. 364 (1993); See also Williams v. Jones, 571 F.3d 1086, 1104 (10th Cir. 2009) (dissent: "Absent a loss of a legal entitlement, the defendant can claim no prejudice.") Some states have adopted this view. State v. Greuber, 165 P.3d 1185, 581 Utah Adv. Rep. 34, 2007 UT 50 (Utah Jul 03, 2007); Bryan v. State, 134 S.W.3d 795 (Mo. App. 2004) (Sixth Amendment guarantee of effective assistance of counsel not usually implicated unless conduct rendered trial process unreliable; "...the complaint that he was deprived of an opportunity to plead guilty tends to support the jury's determination that he was guilty of the offenses charged."); Louisiana v. Monroe, 757 So.2d 895, 898 (La. Ct. App. 2000). Because a defendant is not entitled to a beneficial plea bargain, Phillips suffered no loss. Whether Phillips pled guilty or was found guilty by a jury following a fair trial, the result of the proceeding was reliable.

A similar argument to the one now advanced by the State is currently being presented to the United States Supreme Court through a Petition for Writ of Certiorari filed August 9, 2010, from the decision in Cooper v. Lafler, 376 Fed.Appx. 563, 2010 WL 1851348 (6th Cir. 2010). As framed in the Petition for Writ of Certiorari the issue is:

Is a state habeas petitioner entitled to relief where his counsel deficiently advises him to reject a favorable plea bargain but the defendant is later convicted and sentenced pursuant to a fair trial?

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari. If this Court grants certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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October 11, 2010

STATE OF SOUTH CAROLINA

SUPREME COURT

—————
Certiorari to Dorchester County

The Honorable Diane S. Goodstein, Circuit Court Judge
Case No. 2007-CP-18-0202

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ERIC PHILLIPS, JR.,

RESPONDENT,

vs.

THE STATE,

PETITIONER.


—————
PROOF OF SERVICE
—————

I, Lauren Meara, certify that I have served the within Petition for Writ of Certiorari on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Lanelle Durant, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

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

This 11 day of October, 20 16.



Lauren Meara
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727