

Eric D. Phillips, #318162

Ridgeland Correc. Inst.

P.O. Box 2039

Ridgeland, S.C. 29936

July 11, 2011

Honorable Daniel Shearouse
Clerk of the Supreme Court
Post Office Box 11330
Columbia, SC 29211

Re: NOTIFICATION OF DECISION REQUEST
Eric Phillips vs. State

Dear Mr. Shearouse:

I am writing to respectfully request that your office forward directly to me at the above address any decision rendered by the court in regard to my case.

I have made this request because, should the court render a decision adverse to my interests, I hope to file a petition for rehearing. In order to do that, I must have timely notice of the court's decision.

One final matter. Please note the above address is my correct address, which should supplant all other addresses which you may have for me.

Thank you for your kind attention to the above matters. In highest regards, I am

Sincerely,

Eric D. Phillips

RECEIVED
JUL 18 2011
S.C. SUPREME COURT

Ack'd 7/18/11.
w/ copy. JJ

The Supreme Court of South Carolina

Eric D. Phillips,

Respondent-Petitioner,

v.

State of South Carolina,

Petitioner-Respondent.

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No. 2007-CP-18-00202

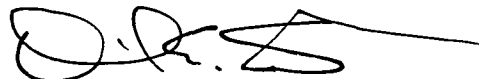
ORDER

For good cause shown, the request for an extension to serve and file the Return to Petition for a Writ of Certiorari on behalf of petitioner/respondent is granted and extended until July 18, 2011. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

June 20, 2011

cc: Assistant Attorney General Mary S. Williams
Appellate Defender LaNelle C. DuRant
Eric D. Phillips #318162



RECEIVED

JUN 17 2011

S.C. Supreme Court

ALAN WILSON
ATTORNEY GENERAL

June 17, 2011

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

Re: Eric D. Phillips, Jr. v. State of South Carolina
2007-CP-18-0202

Dear Mr. Shearouse:

The Return to Petition for Writ of Certiorari of the Petitioner/Respondent in the above appeal is due to be served and filed on today's date. However, this is to respectfully request a 30-day extension to serve and file this Return. By her signature below, LaNelle C. DuRant, indicates that she consents to this extension.

This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a workload.

Sincerely,

Mary S. Williams
Assistant Attorney General

MSW/lm

cc: LaNelle C. DuRant, Esquire

In compliance with:

In Re: Extensions in Criminal and Post-Conviction Relief Cases, (S.C. Sup. Ct. order dated March 18, 2009) (Davis Adv. Sh. No. 13 at 1).

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

LANELLE C. DURANT
Appellate Defender

The Supreme Court of South Carolina

Eric D. Phillips,

Respondent-Petitioner,

v.

State of South Carolina,

Petitioner-Respondent.

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No. 2007-CP-18-00202

ORDER

For good cause shown, the request for an extension until June 17, 2011 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

May 19, 2011

cc: Assistant Attorney General Mary S. Williams
Appellate Defender LaNelle C DuRant



ALAN WILSON
ATTORNEY GENERAL

May 18, 2011

RECEIVED

MAY 18 2011

S.C. Supreme Court

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

Re: Eric D. Phillips, Jr. v. State of South Carolina
2007-CP-18-0202

(2)

Dear Mr. Shearouse:

The Return to Petition for Writ of Certiorari of the Petitioner/Respondent in the above appeal is due to be served and filed on today's date. However, this is to respectfully request a 30-day extension to serve and file this Return.

This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a workload.

Sincerely,

Mary S. Williams
Assistant Attorney General

MSW/lm

cc: LaNelle C. DuRant, Esquire

The Supreme Court of South Carolina

Eric D. Phillips,

Respondent-Petitioner,

v.

State of South Carolina,

Petitioner-Respondent.

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No. 2007-CP-18-00202

ORDER

The request for an extension until May 18, 2011 to serve and file the Return to the Petition for Writ of Certiorari is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Dreda J. Shealy
Clerk

Columbia, South Carolina *Chief Deputy*

April 19, 2011

cc: Assistant Attorney General Mary S. Williams
Appellate Defender LaNelle C DuRant



ALAN WILSON
ATTORNEY GENERAL

April 18, 2011

RECEIVED

APR 18 2011

S.C. Supreme Court

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

Re: Eric D. Phillips, Jr. v. State of South Carolina
2007-CP-18-0202

Dear Mr. Shearouse:

The Return to Petition for Writ of Certiorari of the Petitioner/Respondent in the above appeal is due to be served and filed on today's date. However, this is to respectfully request a 30-day extension to serve and file this Return.

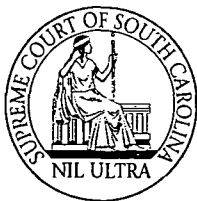
This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a workload.

Sincerely,

Mary S. Williams
Assistant Attorney General

MSW/lm

cc: LaNelle C. DuRant, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

March 3, 2011

Eric D. Phillips #318162
MacDougall Correctional Institution
1516 Old Gilliard Road
Ridgeville, SC 29472


Re: Phillips, Eric D. v. The STATE

Dear Mr. Phillips:

Regarding the White v. State review of your direct appeal issues [Rule 227 (g), SCACR], your attorney has submitted a brief indicating that there are no meritorious direct appeal issues. See Anders v. California, 386 U.S. 738 (1967). Our records reflect that your attorney sent you a copy of this brief on March 2, 2011.

You may, within forty-five (45) days of the date of this letter file with this Court a pro se response to the brief filed by your counsel. In this response, you may raise and argue any direct appeal issues which you believe the Court should consider. Upon receipt of your pro se response or the expiration of forty-five (45) days, the matter will be submitted to the Court for its consideration.

Very truly yours,



CLERK

DES/jj

cc: Assistant Attorney General Mary S. Williams
Appellate Defender LaNelle C DuRant

The Supreme Court of South Carolina

Eric D. Phillips,

Respondent-Petitioner,

v.

State of South Carolina,

Petitioner-Respondent.

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No. 2007-CP-18-00202

ORDER

For good cause shown, the request for an extension until March 2, 2011 to serve and file the Return to the Petition for Writ of Certiorari in this matter is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what measures are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Brenda J. Shealy
Clerk

Columbia, South Carolina

February 1, 2011

cc: Assistant Attorney General Mary S. Williams
Appellate Defender LaNelle C DuRant

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County

Diane Shaffer Goodstein, Circuit Court Judge

ERIC D. PHILLIPS,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE THE RETURN TO PETITION FOR
WRIT OF CERTIORARI

ORIGINAL

RECEIVED

JAN 31 2011

S.C. Supreme Court

(3)

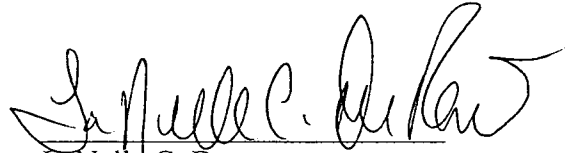
Counsel for Eric Phillips respectfully requests an extension of thirty (30) days in which to file the return to petition for writ of certiorari in this case. This motion is made pursuant to the Order of the South Carolina Supreme Court dated March 18, 2009. This is a second request for an extension. In support of this request, counsel shows:

1. The return to petition for writ of certiorari is due to be served and filed today, January 31, 2011.
2. Counsel for Mr. Phillips respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage her caseload, counsel hopes that no further extension requests will be required.

3. On January 27, 2011, counsel filed the return to petition for writ of certiorari in the case of Patrick Fuller v. State and the initial brief of appellant and designation of matter in the case of State v. James Curry. On January 18, 2011, counsel had an oral argument in the Court of Appeals in the case of State v. Randolph Frazier. On January 6, 2011, counsel filed the initial brief of appellant and designation of matter in the case of State v. Bennie Mitchell. On December 21, 2010, counsel filed the petition for writ of certiorari and appendix in the case of Kenneth Edwards v. State. On December 20, 2010, counsel filed the initial brief of appellant and designation of matter in the cases of State v. Donovan Roman and State v. Andre Massey. On December 17, 2010, counsel filed the petition for writ of certiorari to the Court of Appeals and appendix in the case of State v. Jeffery Evans and the brief of petitioner in the case of Christopher Commander v. State. On December 16, 2010, counsel filed the brief of appellant in the case of Demarcus Simuel v. State. On December 14, 2010, counsel filed the petition for writ of certiorari and appendix in the cases of Jeffrey Green v. State and Octavious Hollis v. State.
4. Counsel has not had time to complete the Return to Petition for Writ of Certiorari in this case. As a result, counsel respectfully asks this Court for an additional 30 day extension of time to file the return. Counsel understands that the Court has granted one previous extensions in this case. Counsel is striving to limit the number of extensions requested.
5. Counsel makes this request in good faith and not for purpose of delay.
6. Counsel for the Attorney General's office has been informed of this request.

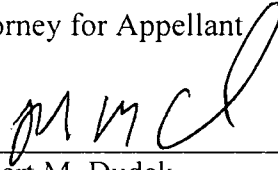
WHEREFORE, the undersigned counsel would respectfully request a thirty day extension until March 2, 2011, in which to file the return to petition for writ of certiorari in this case based upon the above exigent circumstances. Counsel requests that time limits for filing the return be held in abeyance pending a ruling on this motion.

Respectfully submitted,



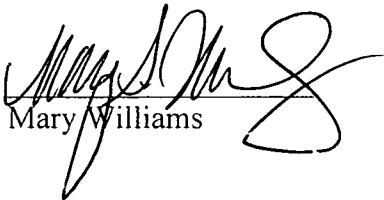
LaNelle C. Durant
Appellate Defender

Attorney for Appellant



Robert M. Dudek
Chief Appellate Defender

January 31st, 2011



Mary Williams

The Supreme Court of South Carolina

Eric D. Phillips,

Respondent-Petitioner,

v.

State of South Carolina,

Petitioner-Respondent.

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No. 2007-CP-18-00202

ORDER

For good cause shown, the request for an extension until January 31, 2011 to serve and file the Return to the Petition for Writ of Certiorari is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Dwenda J. Shealy*
Clerk

Columbia, South Carolina *Chief Deputy*

December 30, 2010

cc: Assistant Attorney General Mary S. Williams
Appellate Defender LaNelle C DuRant

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County
Diane Shaffer Goodstein, Circuit Court Judge

ERIC D. PHILLIPS,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE THE RETURN TO PETITION FOR
WRIT OF CERTIORARI

Counsel for Eric Phillips respectfully requests an extension of thirty (30) days in which to file the return to petition for writ of certiorari in this case. This motion is made pursuant to the Order of the South Carolina Supreme Court dated March 18, 2009. This is a second request for an extension. In support of this request, counsel shows:

- (1) The return to petition for writ of certiorari is due to be served and filed today, December 29, 2010.
- (2) Counsel for Mr. Phillips respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage her caseload, counsel hopes that no further extension requests will be required.

C. Phillips

RECEIVED

DEC 29 2010

S.C. Supreme Court

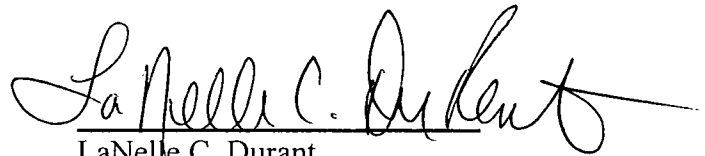
(2)

- (3) On December 21, 2010, counsel filed the petition for writ of certiorari and appendix in the case of Kenneth Edwards v. State. On December 20, 2010, counsel filed the initial brief of appellant and designation of matter in the cases of State v. Donovan Roman and State v. Andre Massey. On December 17, 2010, counsel filed the petition for writ of certiorari to the Court of Appeals and appendix in the case of State v. Jeffery Evans and the brief of petitioner in the case of Christopher Commander v. State. On December 16, 2010, counsel filed the brief of appellant in the case of Demarcus Simuel v. State. On December 14, 2010, counsel filed the petition for writ of certiorari and appendix in the cases of Jeffrey Green v. State and Octavious Hollis v. State. On December 9, 2010, counsel filed the initial brief of appellant and designation of matter in the cases of State v. Raymond Murray and State v. Michael Rose. On November 29, 2010, counsel filed the petition for writ of certiorari and appendix in the case of James Brisbane v. State and the initial brief of appellant and designation of matter in the case of State v. Leshan Bell.
- (4) Counsel has not had time to complete the Return to Petition for Writ of Certiorari in this case. As a result, counsel respectfully asks this Court for an additional 30 day extension of time to file the return. Counsel understands that the Court has granted one previous extensions in this case. Counsel is striving to limit the number of extensions requested.
- (5) Counsel makes this request in good faith and not for purpose of delay.
- (6) Counsel for the Attorney General's office has been informed of this request.

WHEREFORE, the undersigned counsel would respectfully request a thirty day extension until January 28, 2011, in which to file the return to petition for writ of

certiorari in this case based upon the above exigent circumstances. Counsel requests that time limits for filing the return be held in abeyance pending a ruling on this motion.

Respectfully submitted,

A handwritten signature in black ink, reading "LaNelle C. Durant". The signature is written in a cursive style with a long horizontal flourish extending to the right.

LaNelle C. Durant
Appellate Defender

Attorney for Respondent

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Diane Shaffer Goodstein, Circuit Court Judge

ERIC D. PHILLIPS,

RESPONDENT,

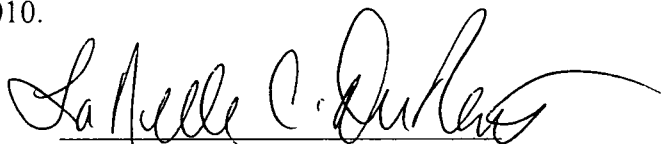
V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

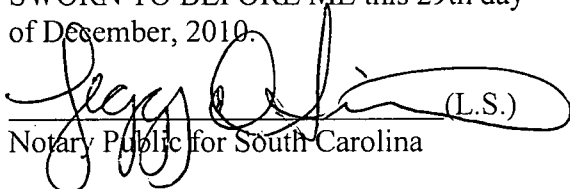
I certify that a true copy of the motion for an extension of time in which to file the return to petition for writ of certiorari in the above case has been served upon Mary S. Williams, this 29th day of December, 2010.



LaNelle C. Durant
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 29th day
of December, 2010.



(L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017.

The Supreme Court of South Carolina

Eric D. Phillips,

Respondent-Petitioner,

v.

State of South Carolina,

Petitioner-Respondent.

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No. 2007-CP-18-00202

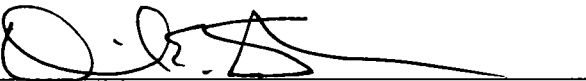
ORDER

The request for an extension until December 30, 2010 to serve and file the Return to the Petition for Writ of Certiorari is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY


Clerk

Columbia, South Carolina

November 30, 2010

cc: Assistant Attorney General Mary S. Williams
Appellate Defender LaNelle C DuRant



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Defender
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate

November 29, 2010

RECEIVED

NOV 29 2010

S.C. Supreme Court

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

Re: Eric D. Phillips v. The State

Dear Mr. Shearouse:

The return to petition for writ of certiorari and appendix in this case are due to be served and filed with the Court November 29, 2010. However, because of my heavy workload at this time, I am requesting an extension for 30 days until December 29, 2010, in which to serve and file the return.

By copy of this letter, I am informing Mary S. Williams, of the Attorney General's Office, of my request.

Sincerely,

LaNelle C. Durant
Appellate Defender

LCD/pds

cc: Mary S. Williams, Esquire



HENRY McMASTER
ATTORNEY GENERAL

October 11, 2010

RECEIVED

OCT 11 2010

S.C. SUPREME COURT

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

Re: Eric Phillips, Jr. v. State of South Carolina
2007-CP-18-0202

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the **Petition for Writ of Certiorari** and two (2) copies of the **Appendix** in the above mentioned case.

Sincerely,

Mary S. Williams
Assistant Attorney General

MSW/lm
Enclosures

cc: LaNelle C. DuRant, Esquire
Trisha Allen, Victim Services

The Supreme Court of South Carolina

Eric D. Phillips,

Respondent-Petitioner,

v.

State of South Carolina,

Petitioner-Respondent.

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No. 2007-CP-18-00202

ORDER

For good cause shown, the request for an extension until October 11, 2010 to serve and file the Petition for Writ of Certiorari and Appendix in this matter is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what measures are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

September 10, 2010

cc: Assistant Attorney General Mary S. Williams
Appellate Defense



HENRY McMASTER
ATTORNEY GENERAL

September 10, 2010

RECEIVED

SEP 10 2010

S.C. SUPREME COURT

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

(3)

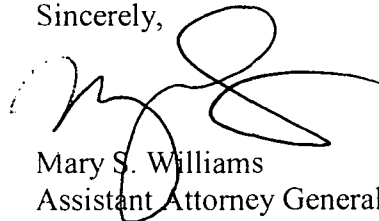
Re: Eric D. Phillips v. State of South Carolina
2007-CP-18-0202

Dear Mr. Shearouse:

The Petition for Writ of Certiorari in the above appeal is due to be served and filed on today's date. However, this is to respectfully request a 30-day extension to serve and file this Petition. By her signature below, LaNelle C. DuRant, indicates that she consents to this extension.

This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a workload.

Sincerely,



Mary S. Williams
Assistant Attorney General

MSW/lm


cc: Office of Appellate Defense

In compliance with:

In Re: Extensions in Criminal and Post-Conviction Relief Cases, (S.C. Sup. Ct. order dated March 18, 2009) (Davis Adv. Sh. No. 13 at 1).



SALLEY W. ELLIOTT
Assistant Deputy Attorney General



LANELLE C. DURANT
Appellate Defender

The Supreme Court of South Carolina

Eric D. Phillips,

Respondent-Petitioner,

v.

State of South Carolina,

Petitioner-Respondent.

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No. 2007-CP-18-00202

ORDER

For good cause shown, the request for an extension until September 10, 2010 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Brenda L. Shealy*
Clerk

Columbia, South Carolina *Chief Deputy*

August ¹²~~11~~, 2010

cc: Assistant Attorney General Mary S. Williams
Appellate Defense



HENRY MCMASTER
ATTORNEY GENERAL

August 11, 2010

RECEIVED
AUG 11 2010
S.C. SUPREME COURT

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

Re: Eric D. Phillips v. State of South Carolina
2007-CP-18-0202

(2)

Dear Mr. Shearouse:

The Petition for Writ of Certiorari and Appendix in the above appeal is due to be served and filed on Wednesday, August 11, 2010. However, this is to respectfully request a 30-day extension to serve and file this Petition.

This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a workload.

Sincerely,

Mary S. Williams
Assistant Attorney General

MSW/lm

cc: Appellate Defense

The Supreme Court of South Carolina

Eric D. Phillips,

Respondent-Petitioner,

v.

State of South Carolina,

Petitioner-Respondent.

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No. 2007-CP-18-00202

ORDER

The request for an extension until August 11, 2010 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Shenda J. Shealy*
Clerk

Columbia, South Carolina *Chief Deputy*

July 13, 2010

cc: Assistant Attorney General Mary S. Williams
Appellate Defense



HENRY McMASTER
ATTORNEY GENERAL

July 12, 2010

RECEIVED

JUL 12 2010

S.C. SUPREME COURT

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


Re: Eric D. Phillips v. State of South Carolina
2007-CP-18-0202

Dear Mr. Shearouse:

The Petition for Writ of Certiorari in the above appeal is due to be served and filed on today's date. However, this is to respectfully request a 30-day extension to serve and file this Petition.

This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a workload.

Sincerely,


Mary S. Williams *for*
Assistant Attorney General

MSW/aekr

cc: Office of Appellate Defense



HENRY McMASTER
ATTORNEY GENERAL

RECEIVED
MAY 13 2010
S.C. SUPREME COURT

May 13, 2010

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

RE: **Eric Phillips v. State of South Carolina**
2007-CP-18-0202

Dear Mr. Shearouse:

We are in receipt of the Post-Conviction Relief hearing transcript in the above captioned matter. We have calendared the State's Petition for Writ of Certiorari to be due 60 days from the date of receipt, May 11, 2010. If this date, July 12, 2010, is incorrect or inconsistent with your records, please contact this office.

If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,

Mary S. Williams
Assistant Attorney General

MSW/aekr

cc: Office of Appellate Defense



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

March 18, 2010

RECEIVED

MAR 18 2010

S.C. SUPREME COURT

Jeremy A. Thompson, Esquire
Law Office of Tara Dawn Shurling
3614 Landmark Dr., Ste. D
Columbia, SC 29206

Re: Eric D. Phillips v. State of South Carolina

Dear Mr. Thompson:

The Chief Appellate Defender has reviewed the Affidavit of Indigency for the above case and has approved for this Office to perfect the appeal for Mr. Phillips.

Please contact me if you should have any questions concerning this matter.

Sincerely,

Sharon A. Graham
Administrative Coordinator

cc: S.C. Supreme Court



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

February 25, 2010

Assistant Attorney General Mary S. Williams
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Jeremy Adam Thompson, Esquire
Law Office of Tara D. Shurling
3614 Landmark Dr., Ste. D
Columbia, SC 29204

Re: Phillips, Eric D. v. The STATE

Dear Counsel:

We have received a Notice of Appeal from each of you in the above entitled matter. Unless notified by you to the contrary, these appeals will be consolidated for consideration by the Court under the South Carolina Appellate Court Rules, and we anticipate receiving only one appendix.

When appeals are consolidated, the party filing the first Notice of Appeal, State of South Carolina, has been designated as the Petitioner/Respondent and the party filing the second Notice of Appeal, Eric D. Phillips, has been designated as the Respondent/Petitioner.

Please notify this Court upon receipt of the trial transcript from the Court Reporter. Each party is allowed to serve and file a Petition for Writ of Certiorari and Return as provided for in Rule 227 of the South Carolina Appellate Court Rules.

Very truly yours,

A handwritten signature in black ink, appearing to be 'DES', with a long horizontal flourish extending to the right.

CLERK

DES/jj

cc: Appellate Defense

LAW OFFICE OF



TARA DAWN SHURLING, PA

Attorneys and Counselors at Law

3614 Landmark Drive

Suite D

Columbia, South Carolina 29204

(803) 738-8622

Fax (803) 738-1600

E-Mail: jthompson@shurlinglaw.com

Jeremy A. Thompson

Associate Attorney

February 23, 2010

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211-1330

RE: Eric D. Phillips, #318162 v. State of South Carolina; 07-CP-18-202

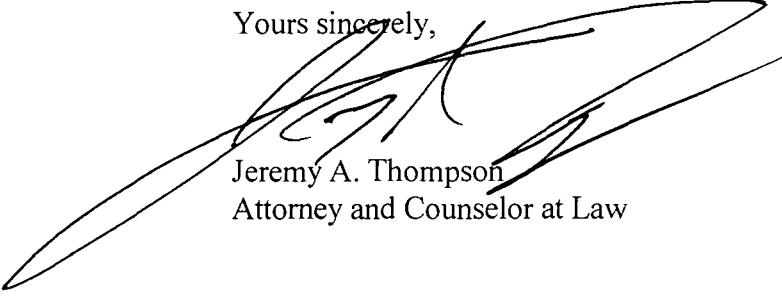
Dear Mr. Shearouse:

Enclosed please find the original and two (2) copies of my Notice of Appeal in the above-captioned action. I would appreciate your filing the original, clocking the copies, and returning the two (2) clocked copies to me in the envelope provided. I would note that Judge Goodstein issued a written Order on this case granting, in part, my client's Application for Post-Conviction Relief which was filed with the Dorchester County Clerk of Court's Office on January 26, 2010. That Order is also enclosed. It is my understanding that the State has already filed a Notice of Appeal in this matter. With my thanks for your assistance in this matter and my best regards, I am,

Yours sincerely,

RECEIVED

FEB. 24 2010


Jeremy A. Thompson
Attorney and Counselor at Law

JAT/ **S.C. SUPREME COURT**

Enclosures

cc: Mary S. Williams, Assistant Attorney General (w/ Notice of Appeal)
Eric D. Phillips, #318162 (w/ Notice of Appeal)
Louvenia Lloyd (w/ Notice of Appeal)

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Presiding Judge

07-CP-18-202

ERIC D. PHILLIPS, #318162,

Respondent/Petitioner,

v.

STATE OF SOUTH CAROLINA,

Petitioner/Respondent.

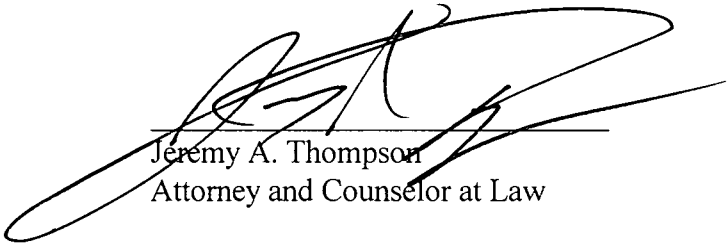
NOTICE OF APPEAL

Eric D. Phillips, #318162, appeals the Order granting his Application for Post-Conviction Relief filed January 26, 2010, and received by counsel on January 28, 2010, issued by the Honorable Diane S. Goodstein, presiding judge. Counsel was served with the State's Notice of Appeal on February 22, 2010, and received the State's Notice of Appeal on February 23, 2010.

RECEIVED

FEB. 24 2010

S.C. SUPREME COURT



Jeremy A. Thompson
Attorney and Counselor at Law

3614 Landmark Drive, Suite D
Columbia, South Carolina 29204
(803)738-8622
(803)738-1600 FAX

ATTORNEY FOR RESPONDENT/PETITIONER

This 23rd day of February, 2010.

Other Counsel of Record:
Mary S. Williams, Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
Attorney for Petitioner/Respondent
(803) 734-3737

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Presiding Judge

07-CP-18-202

ERIC D. PHILLIPS, #318162,

Respondent/Petitioner,

v.

STATE OF SOUTH CAROLINA,

Petitioner/Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Respondent/Petitioner's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Mary S. Williams, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 23rd day of February, 2010.



Jeremy A. Thompson
Attorney and Counselor at Law

SWORN TO BEFORE me this 23rd day
of February, 2010.

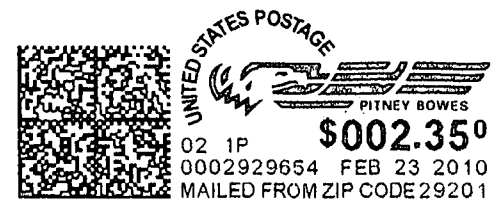
Sharon H. McCollister (L.S.)

Notary Public for South Carolina

My Commission Expires: Jan. 16, 2017

*Eric D.
Phillips*

FIRST-CLASS



Law Offices of
TARA DAWN SHURLING, PA
3614 Landmark Drive, Suite D
Columbia, South Carolina 29204

TO:

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211-1330



HENRY McMASTER
ATTORNEY GENERAL

February 22, 2010

Bonnie H. Kelly
Post Office Box 50614
Columbia, SC 29250

**RE: Eric Phillips v. State of South Carolina
2007-CP-18-0202**

Dear Ms. Kelly:

Please prepare a transcript of the post conviction hearing of the above named individual taken on June 10, 2009, before the Honorable Diane S. Goodstein, for the term of the Court of Common Pleas for Dorchester County.

Please note that the amended Rule 227(e) (3), SCACR, now requires as detailed an index for PCR hearings as for trial transcripts filed in the Supreme Court. The index should include all exhibits. If exhibits were not introduced, then please note that no exhibits were submitted at the hearing.

If you will prepare this transcript and forward it to me along with your statement, I will arrange for payment. Please note that all statements are to be signed.

Very truly yours,

Mary S. Williams, Assistant Attorney General

MSW/

cc: The Honorable Daniel Shearouse, Clerk of the Supreme Court of South Carolina
Court Administration
Jeremy Thompson, Esquire
Appellate Defense

PCR



HENRY MCMASTER
ATTORNEY GENERAL

February 22, 2010

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

**RE: Eric Phillips v. State of South Carolina
2007-CP-18-0202**

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. Proof of service of the notice of appeal on the respondent.
2. A copy of the order which is to be challenged on appeal.

RECEIVED

FEB 22 2010

S.C. SUPREME COURT

With highest regards,

Mary S. Williams

Mary S. Williams
Assistant Attorney General

MSW/
Enclosures

cc: Jeremy Thompson, Esquire
 The Honorable Cheryl L. Graham, Clerk of Court of Dorchester County
 The Honorable David M. Pascoe, First Circuit Solicitor
 Appellate Defense (via interagency mail)
 David Tatarsky, SCDC
 Trisha Allen, Victims Services (via interagency mail)

THE 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,

Respondent,


v.

State of South Carolina,

Petitioner.

NOTICE OF APPEAL

The State of South Carolina hereby appeals from the **Order Granting Post-Conviction Relief** of the Honorable Diane S. Goodstein, Presiding Judge for the First Judicial Circuit, dated January 25, 2010, and filed January 26, 2010, and received by the State on January 27, 2010, in the matter of Eric Phillips vs. State of South Carolina, Case No. 2007-CP-18-0202.


Mary S. Williams, Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

Feb. 22, 20 10.

OTHER COUNSEL OF RECORD: Jeremy Thompson, Esquire

RECEIVED

FEB 26 2010

S.C. SUPREME COURT

THE 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,

Respondent,

v.


State of South Carolina,

Petitioner.

PROOF OF SERVICE

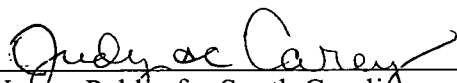
I hereby certify that I have served the **Notice of Appeal** in the above-referenced matter upon Respondent by depositing a copy of it in the United States Mail, postage prepaid, on February 22, 2010, to his attorney of record, at the addresses listed below:

**Jeremy Thompson, Esquire
Law Office of Tara D. Shurling
3614 Landmark Dr., Suite D
Columbia, SC 29204**



MARY S. WILLIAMS
Assistant Attorney General
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

SWORN to before me this 22nd day of February, 2010.



Notary Public for South Carolina.

My Commission Expires: 5/11/2014

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2007CP1800202

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Eric Deron jr Phillips vs. South carolina state of

CHECK ONE:


- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other:
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy:
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Dated at St. George, South Carolina, this 26th day of January, 2010.

Court Reporter:


- Cheryl Graham, Clerk of Court, By: Carolyn Ayer, Deputy

This judgment was entered on the 26th day of January, 2010, and a copy mailed first class this 26th day of January, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

Tara Shurling Law Offices of Tara Dawn
Shurling, PA 3614 Landmark Dr., Ste. D
Columbia, SC 29204
Jeremy Thompson Tara Shurling, P.A. 3614
Landmark Drive, Suite D Columbia, SC 29204

Mary S Williams Assistant Attorney General P
O Box 11549 Columbia, SC 292111549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)
)
ERIC D. PHILLIPS, #318162,)
)
 Applicant.)
)
 v.)
)
 STATE OF SOUTH CAROLINA.)
)
 Respondent.)
)
 _____)

IN THE COURT OF COMMON PLEAS
 FIRST JUDICIAL CIRCUIT

CASE NO.: 07-CP-18-2025

ORDER

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 Clerk of Court
 Dorchester County

THIS MATTER comes before the Court by way of an Application for Post-Conviction Relief filed on February 6, 2007, which was amended on June 10, 2009. The State made its Return on July 27, 2007. An evidentiary hearing was convened in this case on June 10, 2009. The Applicant was present and was represented by Jeremy A. Thompson, Esquire. The State was represented by Mary Williams, Assistant Attorney General.

**I.
 PROCEDURAL HISTORY**

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Dorchester County Clerk of Court's orders of commitment. The Dorchester County Grand Jury indicted the Applicant at the March 15, 2004, term of General Sessions for Possession of a Weapon during the Commission of a Violent Crime (04-GS-18-224), and at the May 17, 2004, term of General Sessions for two counts of Assault and Battery with Intent to Kill ("ABWIK") (04-GS-18-225; 226). On October 16-18, 2006, the Applicant proceeded to trial by jury, and was represented by Gene Dukes, Esquire. He was found guilty as charged. The Honorable James C. Williams, Jr., presiding circuit judge, sentenced the Applicant to fifteen years imprisonment on each ABWIK charge and five years imprisonment for the weapon charge.

with the sentences to run concurrently. The Applicant did not appeal his convictions or sentences.

II. ALLEGATIONS RAISED

In his Application for Post-Conviction Relief, the Applicant alleged that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel; and
2. Ineffective assistance of appellate counsel.

He alleged generally that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, were violated prior to, during, and after his trial.

In an Amended Application for Post-Conviction Relief filed June 10, 2009, the Applicant more narrowly defined his allegations in support of his claim that he received ineffective assistance of counsel. In that Application, he alleged:

1. Defense counsel was ineffective for failing to file a Notice of Appeal for the Applicant following his convictions;
2. Defense counsel was ineffective for failing to completely convey all plea offers to the Applicant;
3. Defense counsel was ineffective for failing to present character evidence of the victim;
4. Defense counsel was ineffective for failing to object to burden-shifting portions of the self-defense charge;
5. Defense counsel was ineffective for failing to request a specific intent to harm charge;
6. Defense counsel was ineffective for failing to object to portions of the charge to the jury which amounted to comments on the facts;
7. Defense counsel was ineffective for failing to request a jury charge that stated that if the State had not disproven self-defense beyond a reasonable doubt, then they must find the Applicant not guilty;

8. Defense counsel was ineffective for failing to object to portions of each solicitor's closing arguments in which they argued that the jury could not find that the Applicant was guilty of assault and battery of a high and aggravated nature if they found that malice was present;
9. Defense counsel was ineffective for failing to object to portions of the jury charge wherein the jury was instructed that the difference between assault and battery with intent to kill and assault and battery of a high and aggravated nature was the presence of malice;
10. Defense counsel was ineffective for failing to request a jury charge that all doubts must be resolved in favor of the defendant;
11. Defense counsel was ineffective for failing to sufficiently argue that the Applicant was not guilty by reason of self-defense during his closing argument;
12. Defense counsel was ineffective for failing to argue that the Applicant could be found guilty of assault and battery of a high and aggravated nature;
13. Defense counsel was ineffective for failing to make a motion to be relieved as counsel due to his illness;
14. Defense counsel was ineffective for failing to object to the admission of eight shell casings into evidence when no evidence was presented that more than three or four shots were fired;
15. Defense counsel was ineffective for failing to object to a portion of the solicitor's closing argument wherein the solicitor alleged that the Applicant should have gotten with key witnesses to change their stories if he wanted to be found not guilty;
16. Defense counsel, due to his illness, so completely failed to challenge the State's case that he was *per se* ineffective pursuant to United States v. Cronie, 466 U.S. 648 (1984).

III. EVIDENCE BEFORE THE COURT

At the Post-Conviction Relief hearing held in this case on June 10, 2009, the Applicant presented his own testimony, as well as testimony from his mother Linda Phillips and his wife Louvenia Lloyd. The Respondent presented testimony from Assistant Solicitor Russell D. Hilton.¹ In addition to this testimony, this Court has before it a transcript of the trial, a copy of the records of the Dorchester County Clerk of Court regarding the subject convictions, a copy of

¹ Gene Dukes, who was the Applicant's trial attorney, died in 2007.

the Applicant's records with the South Carolina Department of Corrections, along with the exhibits submitted by the parties in this case. What follows below are the findings of fact and rulings of law made by this Court in accordance with the Uniform Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 *et seq.* (1985).

As a threshold matter, this Court would note that the Applicant was represented by an experienced trial attorney who was generally regarded for his competence. On the facts of this case, however, this Court finds that the combined effect of his errors and omissions was such that the Applicant was deprived of a fair trial. Specifically, this Court finds a reasonable probability that but for counsel's errors and omissions, the outcome of this trial would have been different. For that reason, this Court finds that trial counsel failed to provide the Applicant reasonable, professional assistance of counsel.

IV. RELEVANT FACTS

For the purpose of evaluating this action, this Court would note the following relevant facts. In the early morning hours of December 14, 2003, the Applicant and the two victims—John and Gerald Griffin—were at a club called “The Farm.” The Applicant and John Griffin got into a brief altercation at the club. After the altercation, everyone left.

Later on that night, the victims were at a local Waffle House when the Applicant, by all accounts, coincidentally arrived. The State presented evidence that the Applicant spotted the victims, who were there with several other individuals, and renewed the earlier argument with John Griffin. The Applicant then opened fire, hitting Gerald Griffin in the hand and John Griffin in the stomach. The Applicant then fled the scene.

Contrarily, the Applicant testified that he did not have a gun that night. He further testified that when he got to the Waffle House another argument did ensue. The Griffins and

their friends surrounded him. Applicant testified during this altercation, a gun fell out of someone's pocket and the Applicant picked it up. He fell backward, accidentally firing a shot. He then got to his feet and fired a couple of additional times into the air. He stated he then left the scene. The Applicant turned himself into the police the next day.

At the time of the trial, defense counsel was very ill. All of the witnesses who testified before this Court stated that defense counsel was wearing a bag around his leg that was attached to a catheter. The Applicant's witnesses testified that this bag would have been very visible to the jury. Unfortunately, defense counsel passed away after the trial.²

V. STANDARD OF REVIEW

This Application for Post-Conviction Relief generally raises numerous specific allegations of ineffective assistance of counsel. The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRPC. In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that trial counsel 1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and 2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668 (1984). In other words, the Applicant must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.; Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine

² The Supreme Court's Order appointing Bruce A. Berlinsky, Esquire, to assume responsibility for defense counsel's files and accounts was filed August 31, 2007, approximately ten months after the Applicant's trial.

confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

On the one hand, where trial counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). On the other hand, counsel may not explain away errors and omissions which acted to prejudice his client's ability to receive a fair trial simply by labeling them matters of trial strategy or tactics. In the case of Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002), the South Carolina Supreme Court found that

Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

(Emphasis in original) (internal citations omitted).

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Applicant raises several allegations of ineffective assistance of counsel. These allegations can be broken down into several general categories: (1) defense counsel's failure to convey all plea offers; (2) defense counsel's failure with regard to evidentiary matters at trial; (3) defense counsel's failure to object to the solicitors' closing arguments; (4) defense counsel's failure to sufficiently argue defenses during his closing argument; (5) defense counsel's failure to object to the sufficiency of the jury charge; (6) defense counsel's failure to file an appeal for the Applicant following his convictions; and (7) defense counsel's *per se* ineffectiveness due to his illness. This Court shall address each allegation in turn.

A. Defense Counsel's Failure to Convey All Plea Offers

The Applicant alleges that defense counsel was ineffective for failing to convey all plea offers made by the State to him. The Applicant contends that had defense counsel conveyed all available plea offers to him, he would have pleaded guilty and would not have exercised his right to trial. Accordingly, the Applicant argues that he is entitled to a new trial. This Court agrees.

A defense attorney's failure to convey a plea offer to his client constitutes deficient performance. Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009). In order to obtain relief when a defense attorney has failed to convey a plea offer, a PCR applicant must demonstrate that "but for counsel's deficient performance [he] would have accepted the State's proposed plea bargain and that he would have benefited from the offer." Id. at 613, 675 S.E.2d at 422. When a PCR applicant has been harmed by his defense attorney's deficient performance, this Court may craft a remedy specifically tailored to correct the harm done. Rolen v. State, Op. No. 26678 (S.C. Sup. Ct. filed June 29, 2009) (Davis Adv. Sh. No. 29 at 32).

At the evidentiary hearing convened in this case, one of the assistant solicitors who prosecuted the Applicant—Russell D. Hilton—testified that, approximately a month prior to trial, he had made a "straight up" plea offer to assault and battery of a high and aggravated nature ("ABHIAN") to the Applicant's attorney. Assistant Solicitor Hilton testified that the Applicant was not present when this offer was made. The Applicant testified that defense counsel did not convey this offer to him. The Applicant further testified that while he would not have taken a plea to ABWIK, he would have taken the plea offer made by the State had he known about it.

There was no evidence in writing or otherwise in trial counsel's file showing the plea offer was communicated to the Applicant. Based on all the circumstances, this Court finds that the Applicant's testimony is credible on this issue. Accordingly, this Court finds that defense

counsel's performance was deficient due to his failure to convey the plea offer to the Applicant. See Davie, supra. Furthermore, this Court finds that the Applicant was prejudiced by defense counsel's failure. The Applicant was facing twenty years on each count of ABWIK if convicted at trial, as well as five years on the gun charge, for a total of forty-five years imprisonment. Had the Applicant taken the plea to ABHAN, he would have been facing ten years imprisonment. Additionally, ABWIK is classified as a felony while ABHAN is classified as a misdemeanor. Consequently, this Court finds that the Applicant has demonstrated that he was prejudiced by defense counsel's failure to convey the State's plea offer to ABHAN.

Having found defense counsel's performance deficient and prejudicial to the Applicant, this Court must fashion the appropriate remedy to correct the harm done to the Applicant. See Rolen, supra. While other courts which have addressed this issue have found that the appropriate remedy is to require that the State be bound by its plea offer that was never conveyed to the defendant,³ this Court is constrained to find that it cannot bind the State to the earlier plea offer. See Davie, supra. at 615-616, 576 S.E.2d at 424 ("given Petitioner was never apprised of the plea offer, we do not believe that specific performance would be the appropriate remedy in that Petitioner did not detrimentally rely on the offer"). Furthermore, this Court cannot vacate the Applicant's sentences and remand for a new sentencing proceeding, as was done in Davie, since the Applicant was convicted of ABWIK and not ABHAN and the ABWIK convictions would remain in place. To do so would not in any way correct the harm done to the Applicant.

Therefore, this Court finds that it must grant the Applicant a new trial. Accordingly, relief is granted to the Applicant as to this issue.

³ See generally Williams v. Jones, 571 F.3d 1086, 1092 (10th Cir. 2009); United States v. Blaylock, 20 F.3d 1458, 1468 (9th Cir. 1994).

B. Defense Counsel's Failure to Adequately Handle Evidentiary Matters

The Applicant alleges that defense counsel was ineffective for failing to adequately address two evidentiary matters that arose during trial: (1) failing to object to the admission of all of the shell casings that were found at the scene; and (2) failing to present character evidence of the victim. Each allegation will be addressed in turn.

1. Failure to Object to Shell Casings

At trial, all of the witnesses, both for the State and for the Applicant, who were at the scene of the shooting testified that the Applicant fired three or four gunshots. See Tr. p. 101, lines 3-6 (Gerald Griffin); p. 133, lines 12-16 (Cheri Darden); p. 153, lines 3-7 (Peter Willis); p. 219, lines 13-15 (the Applicant). However, eight shell casings were recovered at the scene. See Tr. p. 61, lines 8-14. These casings were admitted into evidence without objection, at the outset of the trial prior to any witness' testimony. See Tr. p. 30, lines 3-4. No witness testified that eight shots were fired from the same weapon or different weapons during the altercation.

During the State's opening statement, they used the eight shell casings to argue that the Applicant fired eight shots at the scene. See Tr. p. 36, lines 24-25. Officer John R. Poole, III, testified that because eight shell casings were found at the scene, eight shots were fired. See Tr. p. 66, lines 3-5. Finally, during defense counsel's closing argument, he argued to the jury that the Applicant fired eight shots. See Tr. p. 282, lines 14-16.

The Applicant argues that defense counsel was ineffective for failing to object to the admission of the shell casings without some evidence as to how many shots the Applicant fired or some evidence that all eight shell casings were fired from the same gun. The Applicant further argues that defense counsel was ineffective for failing to object to the solicitor's statement that the Applicant fired eight times. The Applicant also argues that defense counsel

was ineffective for arguing to the jury that the Applicant fired eight shots. The Applicant contends that had defense counsel taken any of these actions, there is a reasonable likelihood that the result at his trial would have been different. Accordingly, the Applicant contends that he is entitled to a new trial. This Court agrees.

“Relevant evidence” is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. All relevant evidence is admissible, while irrelevant evidence is inadmissible. Rule 402, SCRE. Even if evidence is relevant, it may be excluded if the probative value of the evidence is substantially outweighed by the prejudicial nature of the evidence. Rule 403, SCRE.

Simply put, the evidence adduced at trial revealed that the Applicant fired a maximum of four shots. The fact that eight shell casings were found at the scene does not prove that the Applicant fired eight times. While, it may be inferred that some of these shell casings were fired from the gun that the Applicant fired, no forensic test was performed that demonstrated that *all* of the casings were fired by the same gun. Consequently, at least four shell casings were simply not relevant to the jury’s consideration of this case.

Furthermore, even if the extra shell casings were relevant, they were unduly prejudicial to the Applicant. As noted above, the State used the extra casings to argue that the Applicant fired eight shots the night of the incident. This was simply not the state of the evidence admitted at trial. Accordingly, defense counsel committed error by failing to object to the extra shell casings.

There can be no question that the Applicant was prejudiced by defense counsel’s failure to object to the shell casings. The Applicant’s entire defense was predicated on the jury’s belief

of his testimony over that of the State's witnesses. However, the Applicant testified that he only fired a few shots the night of the incident. The presence of eight shell casings at the scene, which a witness for the State testified were all fired by the Applicant since they found them at the scene, completely obliterated the Applicant's testimony and eliminated the possibility of an acquittal. Had the extra shell casings been properly excluded, the state of the forensic evidence found at the scene would have comported with the Applicant's testimony. Given these facts, the Applicant was undeniably prejudiced by defense counsel's failure to object to the extra shell casings.

Finally, even if the Applicant was not prejudiced by defense counsel's failure to object to the shell casings, the Applicant was certainly prejudiced by his attorney's argument to the jury that the Applicant fired eight shots the night of the incident. See Lounds v. State, 380 S.C. 454, 465, 670 S.E.2d 646, 652 (2008) ("petitioner's own counsel damaged the defense case because [counsel's] closing argument did not support petitioner's account of what had happened"). Consequently, the Applicant is entitled to a new trial on this ground.

2. Failure to Present Character Evidence of the Victim

During the Applicant's testimony, the Applicant began to testify that he was afraid of the victims because he had "heard about things they had did." Tr. p. 226, lines 17-18. The State objected and the Applicant testified *in camera* that he had heard that the victims were involved in a shooting prior to this incident. See Tr. p. 228, lines 3-18. The trial court overruled the objection but stated that "Mr. Dukes won't go any further into that matter." Tr. p. 230, lines 3-5. The jury was then brought back to the courtroom and the Applicant's testimony continued without any additional evidence being admitted about the victims' prior actions.

At the evidentiary hearing convened in this case, the Applicant testified that his opinion of the victims was that they were dangerous people and that they had a reputation for violence in the community. The Applicant alleged that defense counsel was ineffective for failing to present this testimony at trial. This Court agrees.

Generally speaking, evidence of a person's character is not admissible for proving action in conformity therewith on a particular occasion. Rule 404(a), SCRE. However, evidence "of a pertinent trait of character of the victim of the crime offered by an accused" is admissible at a criminal trial. Rule 404(a)(2), SCRE. When character evidence is admissible, it may be shown by reputation or opinion testimony. Rule 405(a), SCRE. However, specific instances of an individual's character may not be admitted unless that individual's character is an essential element of a charge or defense. Rule 405(b), SCRE. Reputation testimony is not barred by the hearsay rules. Rule 803(22), SCRE.

While the Applicant's proffered testimony may not have been admissible because it was evidence of the victims' specific instances of conduct, defense counsel did not proffer opinion or reputation evidence of the victims' character. Clearly, such testimony would have been admissible. See Rule 404(a)(2), SCRE. Furthermore, the testimony would have been highly relevant. Consequently, defense counsel committed error by failing to attempt to admit the Applicant's testimony as to his opinion of the victims' character and their reputation in the community for violence.

Additionally, the Applicant was prejudiced by defense counsel's failure to do admit this evidence. The crucial issue at trial was whether the jury believed that John Griffin was the aggressor or that the Applicant was the aggressor. Testimony that the victims were violent individuals likely would have shifted the scales in the Applicant's favor as to which version of

the events the jury believed. Consequently, defense counsel was ineffective for failing to present this clearly admissible evidence, and the Applicant is entitled to a new trial on this ground.

C. Defense Counsel's Failure to Object to the Solicitors' Closing Arguments

"[W]hile [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88 (1935). The standard of review is "whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)).

The Applicant alleges that defense counsel was ineffective for failing to object to improper arguments made by the solicitors prosecuting the Applicant in the following respects: (1) failure to object to portions of the argument wherein the State argued that the primary difference between ABHAN and ABWIK was malice; and (2) failure to object to portions of the argument wherein the State argued that the Applicant should have conspired with key witnesses to change their testimony if he wanted to be found not guilty. This Court shall address each argument in turn.

1. Failure to Object to the Differences Between ABHAN and ABWIK

Applicant asserts that trial Counsel's failure to object to various portions of the solicitor's closing argument constitutes ineffective assistance of counsel.

Applicant first asserts that Counsel's failure to object to a portion of the solicitor's closing argument wherein the solicitor defined ABHAN. Applicant specifically takes issue with that portion of the solicitor's argument discussing malice in the context of ABHAN:

...Even though he's not charged in the indictment with this, this is a lesser included charge. And if you find that the facts don't fit the malice, express or implied, malice aforethought, then you can find that he was guilty of [ABHAN]. Now what is that? It's an unlawful act of a violent nature to the person of another accompanied by circumstances of aggravation. ...

(Tr. p. 268, lines 1-9.) Later, another solicitor made the following statements in closing argument:

Now, the judge is also going to charge you with a lesser crime, assault and battery of a high and aggravated nature, two counts of that, one dealing with John Griffin and one dealing with Gerald Griffin. But very simply, the difference, ladies and gentlemen, is the lack of malice. And I submit to you, ladies and gentlemen, when you take a loaded forty-five caliber pistol out of your pocket and start shooting, intending on hitting somebody, it doesn't get any more malicious, and it doesn't get any more violent than that, it just doesn't get any. I submit to you, if either one of them had died that night he'd be over there sitting, charged with murder, the most serious crime in our state.

(Tr. p. 305, line 15 – p. 406, line 3.)

The trial judge repeatedly informed the jury that the arguments of the attorneys were not evidence. (Tr. p. 261, lines 19-20.) Counsel reminded the jurors that the attorneys' remarks were not evidence. (Tr. p. 273, lines 3-13.) Counsel admonished the jury that the judge's charge on the law should be the law applied. (Tr. p. 283, lines 19-24; p. 284, lines 13-15.) In its jury charge, the court again reminded the jurors that they were to determine the facts and must accept the law as given by the court. (Tr. p. 312, lines 8-18.)

The trial judge defined ABWIK as "an unlawful [act] of a violent nature to the person of another, with malice aforethought, either express or inferred." (Tr. p. 314, lines 14-16.) The court added:

Well, malice is an essential element of the crime of [ABWIK]. Malice is a term of art, a technical term importing wickedness and

excluding just cause or legal excuse. Malice in any form, whether it arises from hatred, ill will, or otherwise, is still malice.

Malice must be aforethought. The law does not require that malice should exist for any particular time before the commission of the act, but malice must exist in the mind of the accused just before and at the time of the commission of the act. There must be a combination of the previous evil intent and the act producing the result.

Malice aforethought might be either expressed or inferred...

(Tr. p. 314, line 19 – p. 317, line 17.) The judge continued:

Now, what we mean by [ABHIAN] it is defined as the unlawful and intentional infliction of a violent injury on the person of another accompanied by circumstances of aggravation. The definition of assault and battery of a high and aggravated nature are very similar. Both of them start out, the unlawful and intentional infliction of violent injury upon the person of another. ABWIK, assault and battery with intent to kill, adds with malice aforethought. ABHAN, assault and battery of a high and aggravated, adds, accompanied by circumstances of aggravation. That is the difference in the two. ...

It is committed with a spirit of wantonness or with a reckless disregard for the rights and safety of others. ...

(Tr. p. 317, line 18 – p. 318, line 22.) The court then provided examples of circumstances of aggravation.

The current Circuit Court Benchbook provides the following suggested language when charging ABHIAN as a lesser-included offense of ABWIK:

Included within the offense of assault with intent to kill is the lesser offense of assault of a high and aggravated nature. Assault of a high and aggravated nature contains all of the elements of assault with intent to kill except malice aforethought. In addition, the State must prove beyond a reasonable doubt a circumstance of aggravation.

Indeed, ABHIAN is not predicated on the absence of malice. As discussed in State v. Fennell, 340 S.C. 266, 274-275, 531 S.E.2d 512, 517 (2000) (internal citations omitted):

The State does not, however, have to prove the defendant acted with malice to obtain an ABHAN conviction because the circumstances that give rise to ABHAN may also give rise to an inference of malice. Thus, a defendant may be convicted of ABHAN regardless of whether malice is present. ... The required mental state for ABIK, like murder, is malice aforethought.

Applicant asserts that this charge and the solicitor's arguments are objectionable pursuant to State v. Tyler, 348 S.C. 526, 560 S.E.2d 888 (2002). In Tyler, the court re-emphasized that ABHAN should not be analogized to voluntary manslaughter.

The trial court's charge was a correct statement of the law. Malice is a required element of ABWIK. As stated, the arguments and charge are emphasizing that malice is necessary for a finding of ABWIK. Even assuming, *arguendo*, that the solicitors' comments could have been misinterpreted, the correct charge given by the court would correct any misgivings. For these reasons, I do not find Counsel's failure to object unreasonable beyond professional norms. Nor do I find prejudice such that the outcome of the trial would have been different.

2. Failure to Object to the Solicitor's Allegation that the Applicant Should Have Conspired with Witnesses to Present False Testimony

During Deputy Solicitor Sorenson's closing argument, he stated:

Now, the last person I want to talk to you about is who I feel is probably the most important witness in this whole case. And if you noticed, he's the person that Mr. Dukes probably spent the least time talking about, because he doesn't want to talk about him, because they don't know what to do with him, because they can't explain him, and he absolutely kills their defense. And that's Peter Willis. Peter Willis, his cousin, his friend, his co-defendant, and the person that he got into trouble and got charged as an accessory for driving him away from the scene of the shooting, I submit to you, ladies and gentlemen, if Mr. Willis had observed everything that Eric Phillips testified to you about, if he had observed this mob attacking him, threatening to kill him, heard the gun fall like Mr. Phillips said there was no doubt everybody out there heard, and then saw the fact that Mr. Phillips was defending himself, don't you think that that's what he would have told you? I mean,

it's his cousin. I mean, that's going to serve him better. I mean if he's not guilty then Mr. Phillips, I mean, Mr. Willis is obviously not guilty of aiding him in getting away from that scene. But that's not what he did, ladies and gentlemen. I submit to you, he told you the truth, he told you the truth. *As I said, you know, he was his biggest mistake was back in December of two thousand and three, that morning, he didn't have a chance to get with Peter Willis and get him with the program, get him with the program.*

Tr. p. 297, line 21-p. 298, line 24 (emphasis added).

The Applicant alleges that defense counsel was ineffective for failing to object to this portion of the State's closing argument. The Applicant argues that he was prejudiced by defense counsel's failure to do so.

"A solicitor has the right to state his version of the testimony and to comment on the weight to be given such testimony." State v. Caldwell, 300 S.C. 494, 504, 388 S.E.2d 816, 822 (1990). In view of the evidence in the record, the solicitor's comments were not improper because they addressed Applicant's credibility, a central issue in the case. State's witness Willis, who had given Applicant a ride to and from the Waffle House and had been with Applicant at the time of the shooting, related a different version of events than did Applicant. The solicitor's comment was made in context of noting that Applicant and his girlfriend, Lloyd, gave similar testimony while Willis' version of events was consistent with testimony of the State's witnesses. In this context, the failure of counsel to not object to the solicitor's statement may rise to the level of ineffective assistance of counsel, but this Court does not find this failure prejudiced the Applicant such that the outcome of the trial would have been different.

D. Defense Counsel's Failure to Sufficiently Argue the Applicant's Defenses to the Jury

The Applicant alleges that defense counsel was ineffective for failing to sufficiently argue the Applicant's defenses—self-defense and ABHAN—to the jury during his closing

argument. The Applicant contends that had defense counsel done so, there is a reasonable likelihood that the result at his trial would have been different. Accordingly, the Applicant argues that he is entitled to a new trial. This Court agrees.

A comprehensive review of defense counsel's closing argument reveals that defense counsel's entire closing argument was devoted to recapping each witness' testimony at trial. The following is the *only* portion of defense counsel's closing argument devoted to actually arguing that the Applicant was not guilty:

[The Applicant] did what he thought he had to do. That's what we call self-defense. And I'm sure you are all familiar with that term, it means that you have a right to defend yourself. And I'm sure that the judge's charge and all will go much more into that, and if I mis-state anything to you that's contrary to the law that the judge charges you, please don't accept what I say, but listen to what the judge says and to what his instructions will be.

...

So that pretty well sums up my ideas about this case and about the facts therein. And what I would ask each of you to do is, when you go to that jury room and begin your deliberations, to search through these facts, search through these facts. That's all we ask you to do, and take the law as the judge will charge you and apply it to these facts. And we feel that if you do, under these circumstances, with the lack of evidence and what evidence is there, that the right verdict in this case would be self-defense, and that he is not guilty of any crime.

Tr. p. 283, line 16-p. 284, line 20.

Defense counsel's performance was simply inadequate.⁴ It is clear from his closing argument to the jury that defense counsel did not argue that the Applicant was not guilty in any meaningful way, and did not argue that the Applicant could be found guilty of ABHIAN in any way whatsoever. Instead, defense counsel simply told the jury that the case was one of self-

⁴ The Applicant testified to this Court that after defense counsel concluded his closing argument, he came back to counsel table and told the Applicant that he could not argue this case like he wanted to due to his illness. This issue will be addressed in more detail below.

defense. This argument was insufficient, especially given the serious nature of the crimes that the Applicant was facing.

Furthermore, the Applicant was prejudiced by defense counsel's failures. The jury had the benefit of two solicitors' closing arguments demonstrating exactly why the Applicant was guilty of ABWIK and how he was not guilty of ABHIAN or entitled to self-defense. Defense counsel's closing argument did not in any meaningful way counter these arguments. Without a defense argument, the jury was left with ABWIK as their only available option. Had the jury had the benefit of a well-reasoned defense argument, there is a reasonable likelihood that they would have found the Applicant either guilty of ABHIAN or not guilty. Consequently, the Applicant is entitled to a new trial on this ground.

E. Defense Counsel's Failure to Adequately Address the Jury Charge

1. Failure to Request Jury Charges

Applicant asserts that Counsel should have requested additional jury charges.⁵ Applicant first argues that Counsel should have requested a jury charge on specific intent. The trial judge charged the jury that a specific intent to kill need not be shown to convict for ABWIK and general intent was sufficient. (Tr. p. 316, line 17 – p. 317, line 7.) It is well-settled in our law that a showing of general intent is sufficient and "trial judges should give a standard 'intent' charge, but need not advise the jury that the defendant must have a **specific** intent to kill before he may be convicted of ABIK." State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996)

⁵ Counsel's file contained jury charges, but there was no evidence at hearing that any of the charges were submitted to the court.

(emphasis in original).⁶ I therefore find that Counsel's failure to request such a charge does not constitute deficient performance.

Applicant further asserts that Counsel erred in failing to request a jury charge that stated that if the State had not disproven self-defense beyond a reasonable doubt then they must find the Applicant not guilty. The court instructed the jury:

The State has the burden of disproving self-defense by proof
beyond a reasonable doubt.

(Tr. p. 319, lines 19-21.) Because the charge was given, I find that any failure by counsel to request the charge was harmless.

Finally, Applicant argues that Counsel should have requested a jury charge that all doubts must be resolved in favor of the defendant. The trial court gave correct instructions on reasonable doubt. (Tr. p. 307, line 16 – p. 308, line 25.) In various terms, the court repeatedly admonished the jury that if they believed that there was a real possibility that Applicant was not guilty, they should give him the benefit of that reasonable doubt and find him not guilty. (See Tr. p. 308, lines 21-25.) The correct standard is not that all doubts be resolved in favor of the defendant; rather the State must prove guilt beyond a reasonable doubt. I find that the charge as given correctly articulates the standard to be applied and even substantially comports with the proposed request. Therefore, assuming, *arguendo*, that Counsel had a duty to request such a charge, I find no prejudice from any failure to request this specific charge.

⁶ A footnote to this line reads: "To the extent the cases may be read as requiring a specific intent to kill, they are overruled."

2. Failure to Object to Jury Instructions

Applicant takes exception to several jury charges. Applicant argues that portions of the jury charge on self-defense improperly shift the burden onto the Applicant and were therefore objectionable. Applicant takes exception to the following portion of the jury charge:

Self-defense is a complete defense. And if it is established by evidence in this case then you must find the defendant not guilty.

(Tr. p. 319, lines 17-19.) However, in the next sentence, the court instructs:

The State has the burden of disproving self-defense by proof beyond a reasonable doubt.

(Tr. p. 319, lines 19-21.) Read as a whole, the charge properly conveys the State's burden to disprove self-defense. State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998). I therefore find no deficiency in Counsel's failure to object to this charge.

Applicant next argues that portions of the court's charge amounted to impermissible charges on the facts of the case. Applicant specifically points to the following portions of the trial court's charge:

...the charge of assault and battery with intent to kill carries within it a lesser charge of assault and battery of a high and aggravated nature. Now, under some circumstances it would carry even a third, or a second lesser charge, which would be a third charge, simple assault and battery. ...

(Tr. p. 312, line 25 – p. 313, line 2.) Applicant also takes exception to the following portion of the charge:

Now, if there are no circumstances of aggravation, no injury, or anything of that nature, we would call that a simple assault and battery.

(Tr. p. 314, lines 7-9.) Indeed, a trial judge may instruct the jury on the law but not on the facts of a case; the disputed facts are the province of the jury. See S.C. Const. art. V, § 21. The above-

referenced portions of the trial judge's charge do not constitute a charge on the facts of the case. The charges are explanations of the offenses and carry no implication regarding the facts in dispute in the case. Therefore, I find that an objection on these grounds would have been improperly made. Counsel's failure to make such an objection does not constitute deficient performance.

F. Defense Counsel's Failure to File a Direct Appeal for the Applicant

Applicant further asserts that he was denied his right to a direct appeal. Trial counsel must ensure that a criminal defendant is made fully aware of his appeal rights. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure required by Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). White, Id. Where the post-conviction relief court determines that the applicant did not freely and voluntarily waive his appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White v. State. See Rule 243, SCACR; Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986). If a criminal defendant is found guilty after a trial, defense counsel *must* file a Notice of Appeal for him. See In re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E.2d 483 (1991).

The Applicant testified that after he was convicted, he asked defense counsel about filing an appeal for him. Defense counsel informed him that he did not do appeals. After the Applicant was transferred to the Department of Corrections' custody, he attempted to file an appeal on his own. However, his appeal was untimely. The record before this Court reveals that the Applicant did not have a direct appeal. The Applicant alleges that defense counsel was ineffective for failing to file an appeal for him, and that he is entitled to a belated direct appeal.

There was no evidence in writing in trial counsel's file informing the Applicant of when his appeal would be due or that the Applicant did not wish to appeal his guilty verdict. In reviewing all the circumstances, this Court finds that the Applicant's testimony is credible on this issue.

Based on the evidence available to this court, this Court affirmatively finds that the Applicant did not knowingly and voluntarily waive his right to a direct appeal. The Court concludes that the Applicant is entitled to a belated review of his conviction(s). A petition for belated review pursuant to White v. State can remedy the Applicant's lack of a direct appeal.

G. Defense Counsel's *Per Se* Ineffectiveness

Ordinarily, in order for a PCR applicant to demonstrate that defense counsel was ineffective, a PCR applicant must demonstrate that he was prejudiced by defense counsel's errors and omissions. See Strickland v. Washington, *supra*. However, there are three situations where prejudice is presumed. See United States v. Cronie, 466 U.S. 648 (1984).

In Cronie, the [United States Supreme] Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." Cronie, 466 U.S. at 659. Second, per-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing," thus making "the adversary process itself presumptively unreliable." Id. Third, the Court identified certain instances "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Id.

Nance v. Ozmint, 367 S.C. 547, 551-552, 626 S.E.2d 878, 880 (2006) (additional internal citations omitted). Demonstrating *per se* prejudice is “an extremely high showing for a criminal defendant to make.” Id. at 552 (quoting Brown v. French, 147 F.3d 307, 313 (4th Cir. 1998)).

The Applicant alleges that defense counsel’s performance at trial was so deficient that he has met the high burden of proof required by Cronic and that prejudice to him should be presumed. Accordingly, the Applicant argues that he is entitled to a new trial. This Court agrees.

Initially, this Court would note that defense counsel was an extremely talented lawyer who more than sufficiently represented clients in South Carolina for decades. However, his representation of the Applicant came at both the close of his career and, unfortunately, the close of his life. It is evident from the facts presented to this Court that defense counsel’s sickness simply prevented him from representing the Applicant in the typically excellent manner that he had represented clients in the past.

All of the Applicant’s witnesses testified that defense counsel had been sick for some time prior to the trial and that he was visibly seriously ill at trial. The Applicant testified that defense counsel told him that he could not argue the case like he wanted due to his illness. A comprehensive review of defense counsel’s file in this case, which was admitted as an exhibit by the Applicant, reveals that defense counsel had little or no preparation work for the trial in his file. On numerous occasions during the trial, defense counsel misstated evidence, generally in a way harmful to the Applicant and contrary to his testimony at trial. See Tr. p. 40, line 24-p. 41, line 2; p. 282, lines 14-16. When the Applicant testified at trial, defense counsel essentially allowed the Applicant to testify in a rambling narrative. See Tr. p. 212, line 1-p. 231, line 15.

With the number of deficiencies for this particular lawyer and the number of different instances of ineffective assistance of counsel, and these instances were uncharacteristic for defense counsel, so, while there was no evidence of illness, it is consistent with someone having severe life threatening problems. Given all of these factors, which this Court believes were due primarily to defense counsel's illness,⁷ defense counsel simply should not have been representing the Applicant at this trial, and he "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." Cronic, *supra*, at 659. Accordingly, this Court finds that defense counsel was ineffective, and that prejudice to the Applicant is presumed. Therefore, this Court finds that the Applicant is entitled to a new trial.⁸

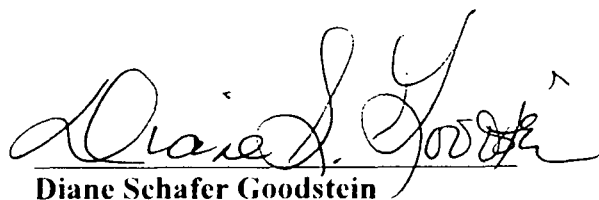
⁷ This Court would note that the South Carolina Supreme Court has held that an attorney who was too sick to adequately represent a criminal defendant at trial was ineffective pursuant to Cronic. See Nance v. Ozmint, *supra*.

⁸ The Applicant has also alleged that defense counsel should have moved to be relieved as counsel due to his illness. For the same reasons as set forth above, this Court finds that defense counsel should have made such a motion.

**VII.
CONCLUSION**

This Application for Post-Conviction Relief is hereby granted. The Applicant's convictions and sentences are vacated, and the Applicant's case is remanded to the Dorchester County Clerk of Court for a new trial. In the event that the Respondent seeks to appeal this Order, this Court finds that the Applicant did not knowingly and voluntarily waive his right to a direct appeal, and that he is entitled to seek a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). The Applicant is directed to the provisions of Rule 243, SCACR, in the event that the Respondent files an appeal from this Order, for the applicable provisions regarding White v. State review.

IT IS SO ORDERED.



Diane Schafer Goodstein
Presiding Circuit Judge
First Judicial Circuit

This 15 day of January, 2009.


South Carolina.