

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA                   :                   CIVIL ACTION  
  :                   :  
  :                   :  
  :                   :  
  :                   NO. 97-6475  
PETER A. PHILLIPS                         :                   (93-cr-513)

**FINDINGS OF FACT & CONCLUSIONS OF LAW**

**J.M. KELLY, J.**

**SEPTEMBER 27, 2000**

The United States Court of Appeals for the Third Circuit granted Petitioner, Peter A. Phillips ("Phillips"), a Certificate of Appealability solely as to the issue of whether Phillips's trial counsel, Joseph Capone, Esq., ("Capone"), failed to advise Phillips of his right to plead guilty without a plea agreement.<sup>1</sup> The Third Circuit remanded the matter to this Court, which held an evidentiary hearing in which Phillips and Capone both testified. Subsequently, Phillips filed a Motion to Expand the Record by which he seeks to enter an affidavit into the record of this case and present a new and unique explanation of the events preceding his arrest. This Memorandum constitutes the Court's Findings of Fact, Conclusions of Law and decision.

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<sup>1</sup>Phillips was convicted by a jury of the single count of an indictment charging him with importing a controlled substance in a secret compartment of his luggage.

### MOTION TO EXPAND THE RECORD

The government's opposition to Phillips's Motion to Expand the Record addresses the credibility of the proposed affidavit, rather than whether the Court should expand the record. Although the Court has grave reservations as to the credibility of the proffered affidavit, it will, however, expand the record to include his affidavit in the interest of allowing Phillips to fully present his position.

### EVIDENTIARY HEARING

The Court appointed counsel to represent Phillips at the evidentiary hearing. Not surprisingly, while Phillips testified that Capone never informed him that he could plead guilty without a plea agreement, Capone testified that he advised Phillips that he could plead guilty. Phillips now claims that he would have pleaded guilty to the open indictment if Capone had made him aware of that possibility.

In order to bolster his position that Capone failed to inform him that he could plead guilty, Phillips has presented an affidavit and testimony in order to show that he would have been able to effectively accept responsibility and plead guilty.

Throughout this case, Phillips has acted in a way that he believed, at the time, served his own best interest. Immediately after his initial arrest, Phillips agreed to cooperate and help apprehend the person to whom Phillips was supposed to deliver the luggage. When that effort failed, Phillips withdrew his cooperation and professed his innocence.

Throughout the trial in this matter, Phillips consistently maintained the position that he was innocent and had no knowledge that he was smuggling anything in his luggage. In his habeas corpus petition under 28 U.S.C. § 2255 (1994) and at the hearing held in this matter, despite arguing that Capone was ineffective for not advising him that he could plead guilty, Phillips never demonstrated that he could make an effective guilty plea.

Initially, the Court notes that Capone has much less reason to fabricate his testimony than Phillips. Phillips, who is currently incarcerated, now knows that the issue of whether Capone advised him that he could plead guilty without a plea agreement is the sole issue remaining by which he may reduce his current sentence. Also, Phillips's demeanor at the hearing demonstrated that he was laboring with his testimony and may well have been creating a story that best suited his attempt to secure a new trial. Through his new explanation of the events leading up to his arrest, Phillips continues to avoid any admission of guilt consistent with his argument on this issue. Instead, he now argues for the first time, he knew he was involved in someone else's illegal scheme because of a diminished mental state.

The Court is convinced that the testimony of Capone is more credible than the testimony of Phillips. In addition, the Court finds that Phillips failed in his attempt to demonstrate that he could have effectively pleaded guilty to the indictment. Accordingly, the Court finds that Capone did inform Phillips that he could plead guilty to the indictment.

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O R D E R

AND NOW, this 27th day of September, 2000, upon consideration of the Motion to Expand the Record of Petitioner, Peter A. Phillips ("Phillips"), the government's Response and Phillips's Reply thereto, and after an evidentiary hearing held in this matter upon Remand from the United States Court of Appeals for the Third Circuit, it is ORDERED:

1. The Motion to Expand the Record is GRANTED. that the Court finds as a fact that Joseph Capone, Esq., informed Petitioner, Peter A. Phillips, that he could plead guilty to the indictment.

BY THE COURT:

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JAMES MCGIRR KELLY, J.