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January 09, 2017

**RECEIVED**

**JAN 12 2017**

**S.C. SUPREME COURT**

**Via US Mail**

Daniel Shearouse  
Clerk of Court  
South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

***Re: Notice of Intent to Appeal from State of SC v. Joseph C. Walker***  
***C.A. No.: 2015-CP-23-4239***

Dear Mr. Shearouse:

I was Court Appointed in the above referenced matter, and I expect that appellate defense will handle the appeal and petition for certiorari. On behalf of my client, enclosed for filing please find the Notice of Appeal and proof of service. I've enclosed a copy of the Honorable John C. Hayes, III's Order of Dismissal to be challenged on appeal. By copy of this letter, I am also serving my client, counsel for the State of South Carolina, the South Carolina Commission of Indigent Defense - Appellate Defense Division and the Greenville County Clerk's Office.

Thank you for your assistance in this matter and if you have any questions, please feel free to contact me.

Sincerely,  
LAW OFFICE OF R. MILLS ARIAIL, JR.  
Attorney at Law

  
R. Mills Ariail, Jr.

RMAjr/dl  
Enclosures (as stated)

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2015-CP-23-4239

**RECEIVED**

JAN 12 2017

S.C. SUPREME COURT

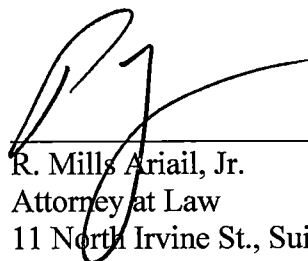
Joseph Walker,..... Appellant,

v.

State of South Carolina ..... Respondent.

**NOTICE OF APPEAL**

Appellant appeals the Honorable John C. Hayes, III's Order of Dismissal dismissing Appellant's application for post-conviction relief. On December 20, 2016, the Honorable John C. Hayes, III signed an order dismissing Appellant's application for post-conviction relief with prejudice. Appellant, through counsel, received written notice of entry of this order on January 9, 2017. A copy of the Honorable John C. Hayes, III's Order of Dismissal is attached.



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Telephone (864) 232-9390  
Facsimile (864) 232-9392  
Attorney for Joseph Walker

Greenville, South Carolina  
January 09, 2017

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

JUDGMENT IN A CIVIL CASE

CASE NO: 2015CP2304239

FILED-CLERK OF COURT  
GREENVILLE, S.C.  
PAUL B. WICKENSIMER  
2017 JAN 5 PM 4 22

Joseph Walker 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):**  
SCRCP (Vol. Nonsuit);  Rule 12(b), SCRCP;  Rule 41(a),  
 Rule 43(k), SCRCP (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRCP;  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 Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE - John C Hayes III

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

R. Mills Ariail Jr. 11 North Irvine Street, Suite 11  
Greenville, SC 29601

*Patrick Schmeck Paper*  
~~Karen Christine Ratigan~~ PO Box 12487 Columbia,  
SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court  
- Clerk of Court

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Joseph C. Walker, )  
 S.C.D.C. No. 285497, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2015-CP-23-4239

FILED-CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL B. SICKENBENDER  
 2017 JUN 5 PM 1 22

ORDER

ENTERED COMPUTER

Applicant filed this Post-Conviction Relief Application on July 1, 2015.<sup>1</sup> The matter was heard December 9, 2016. Applicant was represented by R. Mills Ariail, Jr., Esq. The State was represented by Patrick Schmeckpeper, Esq.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the December 2011 term of General Sessions for attempted murder (2011-GS-23-8458). C. Lance Sheek, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On April 2, 2013, the Honorable C. Victor Pyle, Jr., sentenced the Applicant to life imprisonment without parole.

A Notice of Appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal in the form of an Anders<sup>2</sup> brief. The Court of Appeals dismissed the

<sup>1</sup> Applicant filed a Motion to Amend the Application and an "Amendment to the Original PCR Application." The amendment was more of a brief than an application. This Order addresses all issues raised by either the Application filed July 1, 2015, and the amendment.

<sup>2</sup> Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

*Just H*

appeal. State v. Walker, Op. No. 2015-UP-230 (S.C. Ct. App. Filed May 6, 2015). The Remittitur was sent on May 26, 2015.

In his application for post-conviction relief, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel:
  - a. Failed to obtain a “forensic expert examination of the path of the bullets that could have provided the jury with evidence to support witnesses testimonies.”
  - b. Failed to “renew the motion for a directed verdict after the presentation of all the evidence.”
  - c. Counsel “represented conflicting interests.”

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing norms.” Cherry v. State, 300

*JCH#2*

S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E. 2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

This case has a somewhat interesting twist as during the time Mr. Sheek represented Applicant, he was also being represented on another charge (intimidation of a witness) by Cassandra Gorton.<sup>3</sup> The claim here is that Cassandra Gorton was advising him as to the charges on which he was represented by Mr. Sheek. Both Mr. Sheek and Ms. Gorton testified that this was not correct. Ms. Gorton, who testified by phone, stated she did act as a relay for transmission of requests by Applicant to Mr. Sheek. Ms. Gorton emphatically stated, and I find such to be credible, that she never discussed the charges being handled by Mr. Sheek with Applicant. An e-mail was placed in evidence dated after Applicant's conviction which in no way supports his claim. However the latter claim may be couched, it is without merit.

Applicant testified he did not feel comfortable talking with Ms. Gorton and was confused. The confusion, Applicant claims, was based on conflicting advice being received from Ms. Gorton and Mr. Sheek. As set forth above, I find the two attorneys were not giving him conflicting advice. In fact, I find Ms. Gorton was not giving Applicant any advice as to the instant charges.

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<sup>3</sup> Ms. Gorton had represented Applicant on all of these charges, but Mr. Sheek was substituted as counsel based on Applicant's concern as to Ms. Gorton's husband playing in a hockey league with the solicitor.

Applicant testified that he would have taken a twenty year plea offer from the State. This offer was apparently made on June 7, 2012. Applicant testified he was never told about this plea offer. Applicant also testified he was never told he was facing life without parole (LWOP).

Applicant testified very inconsistently on this issue. While he maintained he was not served with Notice of LWOP, he testified the Notice (he did not receive) said he "may" be sentenced to life without parole. He also testified that he asked trial counsel at sentencing to argue for a sentence less than life without parole. Trial counsel told the trial judge that Applicant asked him to present mitigation evidence and acknowledged the sentence was not discretionary (See TR, p. 246, L9 through p. 247, L1).<sup>4</sup>

Applicant's trial counsel testified he did discuss the State's plea offer both before and after Applicant was noticed as to his facing LWOP. Trial counsel testified that the offer excluded any offer as to a murder charge pending against Applicant while the instant charges were pending. Additionally, trial counsel testified he advised Applicant that if he was convicted, the judge would have to sentence him to life without parole.

I find that trial counsel was not ineffective in his transmitting and discussing with Applicant the sentences he was facing and the State's trial offers.

Applicant claims trial counsel was ineffective in his investigation of the State's case against Applicant. This relates to a bullet hole in an automobile wheel well. Applicant called no witnesses on this issue and therefore he has failed to carry his burden of proof.

Trial counsel testified he got the State's discovery and Ms. Gorton's notes taken while she represented Applicant. Trial counsel testified he went over the discovery with Applicant prior to trial.

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<sup>4</sup> The copy of the Transcript in the Court's packet is missing pages 244 and 245, which would contain the reading of the jury verdicts and, apparently, discussion of the LWOP Notice. (See TR p. 246, LL 2-22 and Exhibit; TR p. 4).

It appears from the testimony that a Ms. Amanda Ray may have been the catalyst for the incident for which Applicant was tried and convicted. Ms. Ray testified for the State at trial. Applicant testified he had a letter from Ms. Ray concerning the victim (Tyler Mattress) and that Applicant wanted trial counsel to use the letter to impeach Ms. Ray at trial. Mr. Sheek testified that he had, at Applicant's request, talked with Ms. Ray prior to trial. This letter was not introduced into evidence at Applicant's hearing so the Court cannot assess what, if any, value it would have had as to Ms. Ray's testimony.<sup>5</sup> Trial Counsel testified that Applicant wanted him to talk with the victim, Tyler Mattress. Trial counsel testified Mr. Mattress would not talk with him and he had no way to compel Mr. Mattress to talk with him. Mr. Mattress did not testify at Applicant's hearing.

Applicant testified to numerous instances of ineffective counsel, which the Court finds do not rise to the level of ineffectiveness nor do these instances indicate counsel's alleged failure created prejudice to the Applicant. These concerns are, issues regarding voir dire questions, obtaining witness statement (none produced at the hearing), failure to interview Beverly Henderson (did not testify at hearing); failure to object to Solicitor's testimony (TR pages 45-48, 69 and 70); failure to object to single photo line-up (victim knew Applicant (TR p. 33, L 19 through p. 34, L 22)); failure to object to Solicitor's appeal to the jury's passion and prejudice (TR p. 58); failure to contradict Mr. Mattress' testimony about the gun (TR p. 58); failure to object to character witnesses; vouching for victim (TR p. 215, LL 18-20); failure to object to Solicitor's reference to murder (TR p. 228, LL 17-25); failure to argue mutual combat (TR p. 230); failure to argue self-defense; allowing Solicitor to get into the jurors' minds (TR p. 230, LL 1-3); allowing Solicitor to appeal to the jury (TR p. 235, LL 1-6); failure to object to evidence

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<sup>5</sup> Trial counsel did use a statement of Ms. Ray's at trial to impeach her testimony (TR p. 101, L 17 through p. 102, L 1).

outside the record (TR p. 236, LL 1-4); allowing the judge in his charge to shift the burden to Applicant as to criminal intent (TR p. 238, L 3 through p. 239, L 6); and failure to request a jury charge on intent.

Trial counsel testified he did not object to some possibly objectionable portion of the Solicitor's closing argument based on trial strategy as he did not think any of the Solicitor's arguments rose to level of being objectionable. (See Stokes, Whitehead, and Ingles, infra).

As to mutual combat,<sup>6</sup> trial counsel testified that as Applicant's theory was that he did not "do it." A mutual combat instruction would have been inconsistent with Applicant's position.

Applicant offered some testimony which the Court takes as a claim of ineffective assistance of counsel relating to Applicant's decision to remain silent and not testify. This issue is disposed of adverse to Applicant based on the Transcript of his trial. At trial, Applicant acknowledges he had a right to testify after a full colloquy regarding this right between Applicant and the trial judge (See TR p. 192, L 6 through p. 194, L 14).

Trial counsel testified that his strategy at trial was to attack the credibility of the victim.<sup>7</sup> Trial counsel brought out on cross-examination the fact that Mr. Mattress was still, even on the night before trial, continuing a relationship with Ms. Ray, the catalyst for the event at issue. Trial counsel brought out the fact that Mr. Mattress had an ongoing confrontational relationship with Applicant. Trial counsel brought out the fact that at the time the charged event occurred, Mr. Mattress was armed and looking to fight Applicant; and trial counsel questioned the victim as to his prior record and a pending perjury charge.

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<sup>6</sup> Applicant also mentioned self-defense. The theory as to mutual combat applies equally to self-defense.

<sup>7</sup> Specific Transcript page and lines are not included. Trial counsel's cross-examination is in the Transcript at pages 49-71 and 76-80.

In addition to the cross-examination of Mr. Mattress, counsel attacked Mr. Mattress's credibility in his closing argument (TR pp. 197-221).

Trial counsel's strategy for presenting an arguable defense for Applicant by way of impeachment was an appropriate trial strategy. Where counsel articulates valid reasons for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992); Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Where counsel articulates a strategy, it is measured under an objective standard of reasonableness. Ingle v. State, 348 S.C. 467, 506 S.E.2d 401 (2002).


As set forth earlier, the Court need not address all of the Applicant's litany of complaints categorized above. However, the Court notes that trial counsel testified Applicant did not ask trial counsel to ask the trial judge to ask any questions at voir dire; that he was concerned that Applicant would not be a good witness, as earlier addressed, due to the hostility between Applicant and victim; that nothing in the trial warranted a mistrial; that Applicant never brought up any issue regarding a ballistics expert and since Applicant claimed he did not shoot at anyone, it would have not have helped to call a ballistics expert; and, that in addition to attacking Mr. Mattress' credibility, he attacked the credibility of the State's witnesses.

Applying the Strickland and Cherry test, the Court finds Applicant has not carried his burden of proof and has not proven trial counsel was ineffective in any regard. Trial counsel's representation of Applicant was well within the range of competency required in criminal cases and was reasonable under prevailing professional norms.

Wherefore, Applicant's Application for Post-Conviction Relief is denied and dismissed with prejudice.

This Court hereby advises Applicant that he must file and serve a Petition for Writ of Certiorari within thirty (30) days of the service of this Order to secure appellate review. See Rules 203 and 243, South Carolina Appellate Court Rules (SCACR). The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the Petition.

IT IS SO ORDERED.

  
\_\_\_\_\_  
John C. Hayes, III  
Presiding Judge

HS

December 20<sup>th</sup>, 2016  
York, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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JAN 12 2017

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

John C. Hayes, III, Circuit Court Judge

Case No.2015-CP-23-4239

Joseph Walker,..... Appellant,

v.

State of South Carolina ..... Respondent.

**CERTIFICATE OF SERVICE**

I, Denise Tanner LaBeck, paralegal to R. Mills Ariail, Jr., do hereby certify that on this January 09, 2017, I served upon the below named Respondents copies of the **NOTICE OF APPEAL** by depositing copies of the same via U.S. Mail, postage prepaid, Registered Mail in an envelope addressed as set forth herein below:

**Patrick Schmeckpeper, Esq.**  
**Assistant Attorney General**  
**PO Box 11549**  
**Columbia, SC 29211**  
**Attorney for the State of South Carolina**

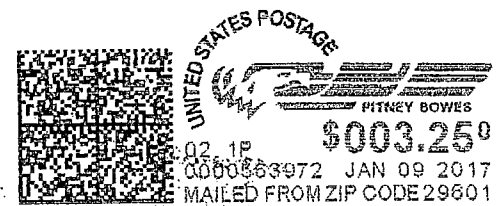
**Greenville County Clerk's Office**  
**Greenville County Courthouse**  
**305 East North Street**  
**Greenville, SC 29601**

**Joseph Walker SCDC# 285497**  
**Perry Correctional Institution**  
**430 Oaklawn Road**  
**Pelzer, South Carolina 29669**

**SC Commission of Indigent Defense**  
**Division of Appellate Defense**  
**PO Box 11433**  
**Columbia, SC 29211-1433**

*Denise Tanner LaBeck*  
Denise Tanner LaBeck

January 09, 2017



██████████  
AIL, JR.

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