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April 14, 2017

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APR 18 2017

S.C. SUPREME COURT

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

RE: Michael E. Hyatt, #358395 v. State of South Carolina  
2015-CP-29-1103

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal along with the accompanying Order for the above-referenced matter. By way of this letter I am copying the Office of Appellate of Defense, as I was appointed to represent Mr. Hyatt.

Best regards,

Ashley A. McMahan  
Attorney at Law

ndt:AAM

cc: Michael E. Hyatt  
Justin J. Hunter, Asst. Attorney General  
Lancaster County Clerk of Court  
Office of Appellate Offense

STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM LANCASTER COUNTY  
Court of Common Pleas

The Honorable W. Jeffrey Young, Circuit Court Judge

Case No. 2015-CP-29-1103

RECEIVED  
APR 18 2017  
S.C. SUPREME COURT

Michael E, Hyatt, #358395, ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

NOTICE OF APPEAL

Applicant, Michael E. Hyatt, appeals the order of the Honorable W. Jeffrey Young, dated March 28, 2017, and filed April 5, 2017.

Apr 14th, 2017

*Ashley A. McMahan*  
ASHLEY A. McMAHAN, ESQUIRE  
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ashley@macvance.com  
SC Bar No. 71676  
ATTORNEY FOR APPLICANT

Opposing Counsel:  
Justin J. Hunter, Asst, Attorney General  
S.C. Attorney General's Office  
PO Box 11549  
Columbia, SC 29211-1549

STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM LANCASTER COUNTY  
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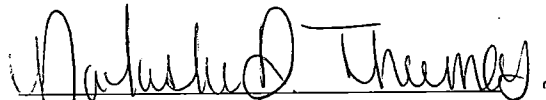
**PROOF OF SERVICE**

I, Natasha D. Thomas, certify that I have served the within Notice of Appeal on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Justin J. Hunter, Asst, Attorney General  
S.C. Attorney General's Office  
PO Box 11549  
Columbia, SC 29211-1549

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

April 14, 2017



NATASHA D, THOMAS  
PARALEGAL INTERN  
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RECEIVED  
APR 18 2017  
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF LANCASTER

) SIXTH JUDICIAL CIRCUIT

Michael E. Hyatt,  
S.C.D.C. No. 358395

) C.A. No. 2015-CP-29-1103

) Applicant,

) v.

) **ORDER OF DISMISSAL**  
) **(with prejudice)**

) State of South Carolina,

) Respondent.

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on August 6, 2015. Respondent filed its Return on or about March 1, 2016. An evidentiary hearing into the matter was convened on January 9, 2017, at the Lancaster County Courthouse. The Applicant was present and testified in his defense. Steve Garris also testified, as did the Applicant's plea counsel, Mark H. Grier, Jr. The Applicant was represented by Ashlee A. McMahan, Esquire. Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office.

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LANCASTER, SC

**PROCEDURAL HISTORY**

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Lancaster County Clerk of Court's orders of commitment. Applicant was indicted at the December 2010 term of the Lancaster County Grand Jury for attempted murder (2010-GS-29-1590). Applicant was represented by Mark Grier, Esquire. On January 6, 2014, Applicant proceeded to trial where he was convicted by a jury of the lesser included offense of assault and battery of a high and aggravated nature. The Honorable Brian M. Gibbons sentenced Applicant to nine (9) years imprisonment.

Applicant filed a timely notice of appeal. An appeal was perfected by Susan B. Hackett, Esquire, of the South Carolina Office of Appellate Defense. The South Carolina Court of Appeals affirmed Applicant's conviction on March 1, 2015. State v. Hyatt, Op. No. 2015-UP-326 (S.C. Ct. App. filed July 1, 2015). The Remittitur was returned on July 22, 2015.

### **Allegations**

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

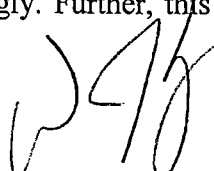
1. "Applicant's sentence and conviction were procured in violation of the sixth and Fourteenth Amendments"
  - a. Ineffective assistance of counsel, in that:
    - i. Trial counsel failed to object to Trial Court's charge of assault and battery
    - ii. Trial counsel failed to object to the solicitor's closing argument

On or about December 29, 2016, the Applicant filed an amended application raising the following issues:

1. Ineffective assistance of counsel
  - a. Mr. Grier failed to call witnesses on behalf of Mr. Hyatt who would have testified that the victim's intent was to in fact injure Mr. Hyatt.
  - b. Mr. Grier did not convey any plea offers from the Solicitor to Mr. Hyatt in violation of Davie v. State, 381 S.C. 601 (2009) & Missouri v. Frye, 132 S.Ct. 1399 (2011).
  - c. Mr. Grier did not cross-examine Officer Lilly on the fact that MR. Hyatt had called the sheriff earlier that day regarding Kamil Nassrah and his threats to Mr. Hyatt.
  - d. Mr. Grier did not sufficiently cross-examine Mr. Nassrah on the differences in his statement to the police and the testimony he gave in court.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject



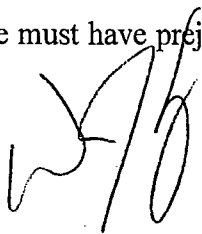
conviction, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and the legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2015), this Court has made the following findings of fact and conclusions of law based upon all of the probative evidence presented.

### **Ineffective Assistance of Counsel**

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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 upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that,



but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

#### **Failure to Convey Plea Offer**

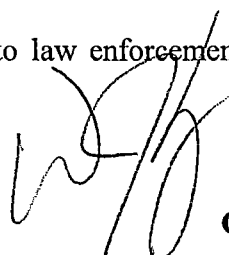
The Applicant testified that he was never informed of any plea offers. He testified that if he had been told of any plea offers, he probably would have pled guilty. The Applicant specifically testified that he was never offered the opportunity to plead to assault and battery of a high and aggravated nature, but that he was not sure he would have taken such an offer.

Counsel testified that the only offer ever made by the solicitor's office in this case was to assault and battery of a high and aggravated nature. Counsel was unable to specifically remember conveying the plea offer to the Applicant. However, he testified credibly that his standard practice is to convey plea offers to his clients. This Court also takes into account that counsel had been practicing for roughly twenty-five years at the time of the Applicant's trial. There is nothing in the record that realistically suggests counsel failed to convey the plea offer to the Applicant.

The Applicant's contrary self-serving testimony is not credible. Particularly compelling to this determination is counsel's credible testimony that the Applicant considered himself the victim throughout the course of the proceedings. In any event, even taking everything he says as true, the Applicant was unable to definitively say that he would have accepted the offer had it been conveyed by counsel. See Hill v. Lockhart, supra. Because he has failed to meet his burden to show deficiency or prejudice, this allegation is denied and dismissed.

#### **Failure to Adequately Impeach the Victim on Cross-Examination**

Applicant testified that counsel failed to question or adequately impeach the victim on his statement to law enforcement. He said the victim's prior statement to law enforcement was



different than his testimony at trial. Having reviewed the record, this Court notes that counsel did, in fact, cross-examine the victim on his prior statement to law enforcement. Tr. p. 210-16.<sup>1</sup> Inasmuch as the Applicant disagrees with the extent or method, this Court finds he has failed to meet his burden to show counsel's performance was objectively unreasonable. The Applicant has also failed to meet his burden to show that but for counsel's purported deficiency, the outcome of the proceeding would have been different. This allegation is therefore denied and dismissed.

#### **Failure to Introduce Missing Portions of Video**

The Applicant testified that the video introduced at trial of the immediate aftermath of the incident was incomplete, and that certain parts were missing. However, the Applicant did not produce the video or any of the alleged missing portions at the evidentiary hearing. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (allegation of ineffective assistance may not be supported by mere speculation as to the result). Lacking either, this Court cannot find the Applicant has met his burden. This allegation is therefore denied and dismissed.

#### **Failure to Call Witnesses**

##### *Steve Garris*

The Applicant further alleged counsel was ineffective for failing to call witnesses Steve Garris and Terry Bowers. Steve Garris testified at the evidentiary hearing, apparently to present statements he heard from Terry Bowers that were attributed to the victim. Any such statements from Ms. Garris would have clearly been inadmissible at trial. See, Rule 801, SCRE. Moreover, this Court finds counsel was not deficient in failing to call Mr. Garris as a witness because the Applicant failed to provide him with the appropriate contact information in sufficient time to be

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<sup>1</sup> The victim explained that he had trouble remembering his statement to law enforcement because he was barely conscious from being struck in the head by the Applicant. Tr. p. 211-12.

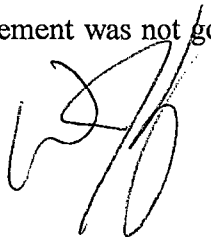
ready for trial. Counsel's credible testimony further indicates that the Applicant requested a speedy trial, further compounding problems with his failure to turn over witness contact information. Given the reasonableness of counsel's failure to call Mr. Garris, as well as the lack of admissible evidence Mr. Garris's testimony would have produced, this Court finds the Applicant has failed to show deficiency or prejudice with respect to this allegation. It is therefore denied and dismissed.

*Terry Bowers*

Concerning counsel's failure to call Terry Bowers as a witness, the Applicant failed to produce Mr. Bowers at the evidentiary hearing or any admissible evidence as to what he would have said at trial. He has therefore failed to show any prejudice resulting from this purported deficiency. Moorehead, supra. The Applicant's failure to provide contact information in a timely manner, as with Mr. Garris, also precludes a finding of deficiency. Having failed to meet his burden to prove ineffective assistance, this allegation is denied and dismissed.

**Failure to Adequately Cross-Examine Law Enforcement**

The Applicant further alleges counsel was ineffective for failing to adequately cross-examine law enforcement officers about a prior call concerning the victim. Again, the Applicant has failed to present testimony of the law enforcement officers, or any records of previous calls to police, to support his allegation. The Applicant has not presented any prior statements – inconsistent or otherwise – which would have corroborated his testimony or weakened the state's case. Compare Rutland v. State, 415 S.C. 570, 785 S.E.2d 350 (2016). This Court will not fill in the gaps of the Applicant's burden to prove prejudice with rampant speculation. In any event, counsel testified that he was aware that, in part, because of the victim's stature in the community, law enforcement was not going to be particularly helpful to his client on the witness stand, and



approached them accordingly on cross-examination. See Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). As the Applicant has failed to show deficiency or prejudice, this allegation is denied and dismissed.

#### **ALL OTHER ALLEGATIONS**

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

## CONCLUSION

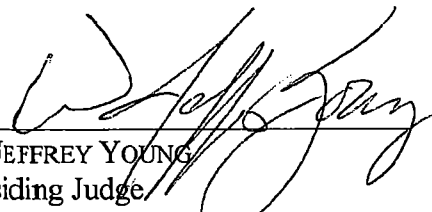
Based on the foregoing, this Court finds that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRPC; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

### IT IS THEREFORE ORDERED

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 28 day of March, 2017.

  
W. JEFFREY YOUNG  
Presiding Judge  
Sixth Judicial Circuit

Sumter, South Carolina

# Lancaster County

Jeff Hammond  
Clerk of Court

Clerk of Court of Lancaster County  
Post Office Box 1809  
Lancaster, S.C. 29721

Phone (803) 285-1581  
Fax (803) 416-9388

STATE OF SOUTH CAROLINA  
COUNTY OF LANCASTER

IN THE COURT OF COMMON PLEAS  
6<sup>TH</sup> JUDICIAL CIRCUIT

Michael E Hyatt

Applicant

## CERTIFICATE OF SERVICE

CASE# 2015-CP-29-01103

VS

State of South Carolina

Respondent

I certify that, on April 5, 2017, I served a copy of the Order of Dismissal by mailing to him at his last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Michael E Hyatt #358395  
HB-181-T Ker CI  
4848 Goldmine Hwy  
Kershaw, SC 29067

Ashley McMahan  
PO Box 5501  
West Columbia, SC 29169

Judy Carey/Legal Assistant  
Post- Conviction Relief  
6<sup>th</sup> and 13<sup>th</sup> Judicial Circuit  
Post Office Box 11549  
Columbia, SC 29211-1549

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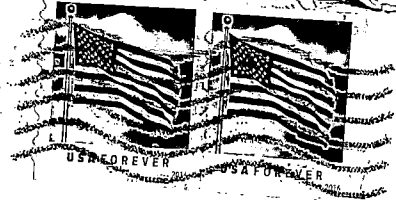
4-5-2017  
Date

Jeff Hammond  
Signature



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The Honorable Daniel E. Shearouse  
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