

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

ORIGINAL

RECEIVED

JUL 24 2017

S.C. SUPREME COURT

\_\_\_\_\_  
Certiorari to Greenville County

Honorable John C. Hayes, Circuit Court Judge

\_\_\_\_\_  
WALLACE EUGENE EVATT, JR.,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-002281

\_\_\_\_\_  
PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

ROBERT M. DUDEK  
Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

**INDEX**

INDEX ..... i

ISSUE PRESENTED.....1

STATEMENT OF FACTS .....2

Direct Appeal .....8

Post-conviction relief.....8

Evidentiary hearing.....8

Order of dismissal.....9

ARGUMENT

The PCR court erred by finding trial counsel acted strategically reasonably in not calling two witnesses who confirmed to trial counsel that the decedent had made prior suicide attempts, where petitioner’s defense was that the decedent committed suicide, since the failure to present available corroborating witnesses because the decedent’s prior suicide attempts did not involve a gun was not objectively reasonable.....10

CONCLUSION.....15

**ISSUE PRESENTED**

Whether the PCR court erred by finding trial counsel acted strategically reasonably in not calling two witnesses who confirmed to trial counsel that the decedent had made prior suicide attempts, where petitioner's defense was that the decedent committed suicide, since the failure to present available corroborating witnesses because the decedent's prior suicide attempts did not involve a gun was not objectively reasonable?

## STATEMENT OF FACTS

Petitioner Wallace Evatt and the decedent, Karen Rojas, were living together and in a relationship on the day the decedent died from a gunshot wound. As will be seen infra, petitioner consistently told both lay and law enforcement witnesses that his girlfriend killed herself. App. 298, l. 23 – 299, l. 23.

Jerry Burgess was the owner of a business in Piedmont, South Carolina near the decedent's mobile home. Burgess was also the property manager. Burgess talked to Rojas almost every day. He often saw her grilling out at her trailer, and petitioner Evatt was there "about every other day." App. 65, l. 5 – 67, l. 16. Burgess said Rojas "seemed to be troubled" around the time of her death. App. 67, ll. 21-23.

Burgess remembered the Sunday afternoon when the incident happened. He was inside his shop, and he was told someone had heard a gunshot. The rescue squad arrived, and Burgess could not remember if he unlocked the door to the decedent's trailer so EMS could enter or whether the door was unlocked. "I don't know if it was locked or not, but I did put the key in and turned it." App. 68, l. 4 – 69, l. 22.

Roger Dobbs was one of the Greenville County EMS workers who responded to decedent Rojas' trailer that Sunday afternoon, May 17, 2009. Dobbs remembered they entered through the back door of the trailer. App. 87, l. 11 – 85, l. 25. Dobbs saw Rojas' body "and there was a handgun, pistol, laying near where she was." App. 86, ll. 3-7. The stereo or the television was on. App. 86, ll. 8-9.

Cynthia McNeely met the decedent, Karen Rojas, about six months before her death. Petitioner Evatt had introduced her to Rojas, and Cynthia said Rojas became friends. App. 75, l. 9 – 76, l. 7.

Cynthia remembered the Saturday before the decedent's death the next day. Rojas came and picked up petitioner Evatt from Cynthia's house. App. 76, ll. 5-15. Cynthia talked to Rojas about her son's wedding, and everything seemed fine to Cynthia. App. 76, ll. 15-24.

However, the next day, that Sunday afternoon at around noon "we was fixing to sit down and watch a race when petitioner came to her door." Cynthia testified that when something traumatic happened in petitioner's life -- such as when his mother got killed in a car accident -- petitioner would come to their house. App. 81, ll. 8-18. When petitioner came to the door, her husband said, "Gene, Gene, what's wrong, man; what's wrong, man, what's going on? And I heard him say, I can't believe it, man, she shot herself. And Ray said, did you call 911? Gene went, no, man, I come straight here." As will be seen infra, petitioner apparently did not have any time left on his prepaid cellphone, and there was no landline available in the mobile home. App. 77, ll. 20-24.

There would be evidence offered that petitioner suffered a severe mental disturbance as a result of Rojas' death. Petitioner was treated with five different kinds of medication to address his mental disturbance. App. 46, ll. 16-22. Petitioner was "in bad shape" and he was treated in the Greenville Memorial Hospital psychiatric ward. App. 47, ll. 4-19.

Dobbs administered a test to determine that there was no electro-activity in the decedent's heart, and he verified that she was deceased at 2:01 that Sunday afternoon. App. 87, l. 6 – 88, l. 8. Greenville County Sherriff's Deputy Dallas Gladson also recalled going to the mobile home that Sunday afternoon. He remembered that petitioner told him "his girlfriend had put a gun in her mouth and shot herself. Gladson maintained that petitioner told him he had his back to the decedent initially, and that he apparently turned around when Rojas killed herself. App. 108, ll. 5-21.

Deputy Shane Reece also responded to the scene at the trailer. Reece said petitioner told him that he and his girlfriend had been drinking during the course of the day. Reece testified:

“The defendant said that he and Ms. Rojas had been drinking during the course of the day. At the end of the day she took a shower. When she got out of the shower, she entered the living room, he had his back to her, and she stated that she needed to call her mother that she was going to kill herself. Mr. Evatt stated that he turned around and that Ms. Rojas had a pistol in her mouth, at which time she pulled the trigger and fell to the ground. Mr. Evatt said he had no minutes on his cell phone to call 911. So, he exited the house and went to the McNeely’s [house] and called 911 from there.”

App. 111, l. 17-23.

Deputy John White transported petitioner to the law enforcement center in the front seat of his patrol car. White said petitioner was not under arrest at the time. “During the ride, he was just going over the scenario, over and over and over until we go there, saying she walked out and bam, shot herself; just kept saying that over and over.” App. 115, l. 3 – 117, l. 9.

Greenville County Sherriff’s Investigator Tracy King read petitioner Wallace Evatt’s statement of what occurred to the jury.

“I have known Karen Rojas for the better part of thirty years. We had developed feelings for each other for this whole time. I have been married twice and divorced and she was still married, but she had left him. We lived together on and off for the last two years. We had problems like everyone else, but there was never anything physical and we would just argue. The last time was about three nights ago when Karen got home. She’d been drinking like she always does and then she got mad at me about something and she threw a bottle and broke a mirror.

‘Last night, my best friend, Raymond McNeely – I call him Bird because he has a lazy eye and we started calling him that back in grammar school – came and picked me up and we went to his house and watched the NASCAR race. Then Karen got off work’ – and there’s the correction – ‘at 11:00 p.m. She came over to Bird’s house and we all watched the end of the race together and just hung out and had a good time together.

‘We left Bird’s house around 2:00 a.m. and we went home. We just sat around and drank beer because that’s what Karen liked to do on her day off. We only get a couple of channels on television and I know we sat around and watched a couple of church programs on Channel 16. I don’t think we left the house all day, but if we did Karen would have drove to get a pack of cigarettes, but I don’t think we did.

‘I remember Karen cut my nails and even used her file on them because I was getting ready to take a bath and get cleaned up. Then Karen got up, said she was going to take a shower, and I don’t’ [sic] know if she took a shower or not. I just remember Karen coming back in the living room and I was sitting on the small couch, the right closest to the door. And she stated, I need to call my mother because I’m thinking about killing myself. Then she turned and faced me and put the handgun in her mouth almost to the cylinder and she just pulled the trigger right there in front of me.

‘I must have gone into shock for about thirty seconds because I saw her body go limp like a ragdoll and I knew she was dead. I didn’t even go over to her or nothing. I just ran out and got into her car and I drove to Bird’s house. I noticed there was people out at the lake fishing that had to have heard the shot and I remember making eye contact with the man that owned the pond and maybe another guy. And all I could think of was that I had to get to a phone and call 911.

‘We don’t have a phone, a home phone, and my cell phone doesn’t have any minutes. So I drove to Bird’s home as quick as I could and I know I got there probably quicker than I should have. But when I got there I was very upset and I don’t remember exactly what I said, but I remember telling Bird that she had killed herself. I know that call was the hardest call I had ever made. Then Bird drove me back over there and we got there about the same time that the police got there.

‘She really treated me like she loved me last night and this morning. This man is telling you I didn’t shoot that woman. I know that I am an alcoholic and Karen was an alcoholic, too. Karen would drink two 24 ounce beers on her way home from work, and then she would start into really drinking when she got home. Karen has a temper sometimes. And like I said, we’ve had our share of arguments, but she has never talked about suicide before and I didn’t have any clue that she would do anything like this. I don’t know what to say and I can’t get it out of my mind’”

App. 311, l. 19 – 313, l. 11.

The decedent has a blood-alcohol content of .18, and she had cocaine in her system. App. 364, ll. 14-25. Investigator Whaley offered that he thought petitioner Evatt was inconsistent in what he said to road deputies about how he was not facing the decedent in the beginning, and what Whaley thought was inconsistent about petitioner being seated on the couch. “The bullet was found by Sergeant Shaw in the top of the mobile home around the trim in the ceiling tile.” App. 334, ll. 1-12.

The prosecution presented forensic evidence that petitioner had Rojas’ DNA on his shirt and gunshot residue on his shirt also. However, petitioner “had *no gunshot residue on his right palm, right back; left palm, left back, no gunshot residue. So, a negative.*” App. 250, ll. 3-4. Two particle lifts found gunshot residue on petitioner’s shirt. App. 250, ll. 3-10; App. 280, ll. 1-9.

The pathologist, Dr. Michael Ward, testified: “In my opinion the weapon was not discharged outside of Ms. Rojas’ lips. The muzzle of the gun was inside her oral cavity . . . [O]n the outside of her lips and on the outside of her face, there was no gunshot residue, which we would expect to see if the weapon was discharged close to her oral cavity but not inside her mouth.” App. 352, ll. 7-13. However, Dr. Ward opined as a state’s witness that other factors led him to believe the cause of death was a “homicide.” App. 352, l. 15 – 360, l. 25.

In her closing argument, defense counsel Manigault also argued that the **decedent** “on her right back [hand] [had a] quantity of metal was found are consistent with gunshot residue. . . . On the GSR kit for Mr. Wallace Evatt, right palm, no gunshot residue found.” App. 382, ll. 1-10. Manigault also argued that the particles of DNA found on petitioner’s shirt were insignificant, since they can float in the air and this was a small area of the trailer where the shot

occurred. Manigault reminded the jury that “Karen Rojas owned the gun.” The decedent had a blood alcohol level of .82 (sic) mixed with cocaine, and counsel added “So, to think that Wallace Evatt all of the sudden just went berserk, grabbed Karen and shot her in the mouth, that’s odd. That’s odd.” App. 383, l. 20 – 384, l. 8.

Manigault told the jury “There is no question that the death of Karen Rojas is regrettable. There is no question that there is a loss in her family. That is not in question. But we submit to you that Wallace Evatt did not take her life. We submit to you that strange things happen in people’s minds. Who can tell why a person commits suicide? You can only guess afterwards what happened when they try to piece things together. So, we submit to you that Wallace Evatt did not shoot Karen Rojas.” App. 384, ll. 9-16.

The jury began deliberating at 10:27 a.m. on July 19, 2012. At 11:43 a.m., the jury returned wanting to hear the tapes of the 911 calls, it wanted the coroner’s report, and the interviews with the officer. The judge told the jury that the coroner’s report was not in evidence so they could not consider it. The judge then had the two 911 calls and the interview with Officer Whaley and petitioner replayed for the jury. App. 392, l. 5 – 393, l. 7. The jury resumed deliberations at 12:49 p.m. At 3:14 p.m. petitioner was found guilty by the jury. App. 392, l. 4 – 393, l. 24.

At sentencing, defense counsel Manigault told the judge that petitioner was fifty-two years old, he had been married twice, and he had four children. He did body work most of his life. His mother and father and his mother’s pastor had been in court every day.” Judge Pyle sentenced petitioner to life imprisonment. App. 396, l. 22 – 397, l. 6.

## **Direct Appeal**

Petitioner's murder conviction was affirmed on appeal after the submission of an Anders brief<sup>1</sup> raising the issue of petitioner's inability to make a knowing, intelligent, and voluntary waiver of his rights due to his psychological condition, his psychological impairment and his medication to treat his mental disorder. See, State v. Wallace Eugene Evatt, Jr., 2015-UP, 159 (Decided March 18, 2015).

## **Post-conviction relief**

Petitioner thereafter filed an application for post-conviction relief on January 29, 2016. App. 399 – 408. The state filed a return to this application dated July 1, 2016, asking for an evidentiary hearing to be convened. App. 409 – 412.

PCR Counsel Rodney Richey filed an amended PCR application dated October 13, 2016. App. 413 – 416.

## **Evidentiary hearing**

An evidentiary hearing was convened on October 26, 2016 before the Honorable John C. Hayes, III. Rodney Richey represented petitioner. Patrick Schmeckpeper represented the state. App. 417.

Petitioner Evatt testified he was in the Department of Corrections because “my girlfriend killed herself.” App. 421, ll. 13-14. Petitioner said he discussed with his attorney, Dorothy Manigault, the decedent's prior suicide attempts. Petitioner responded that he had talked to the decedent's husband and her mother and father, but he did not believe Manigault had ever followed through on talking to those witnesses. Petitioner repeated that his girlfriend, the decedent, had killed herself, and he demonstrated how the shooting occurred during the suicide.

---

<sup>1</sup> Anders v. California, 386 U.S. 738 (1967).

App. 425, l. 20 – 427, l. 6. Petitioner said he did not think defense counsel had adequately argued his total defense that the decedent had committed suicide, and therefore that he was innocent. App. 426, l. 12 – 427, l. 16.

Defense counsel Manigault testified that she *was able to confirm* the decedent's prior suicide attempts with a family member and a coworker at a "pizza place." Manigault said she did not think the witnesses would be helpful to petitioner's defense because the prior suicide attempts did not include a gun being used. App. 439, l. 9 – 440, l. 10; App. 442, ll. 4-12.

### **Order of dismissal**

An order of dismissal dated October 21, 2016, was issued. App. 446 – 450. The PCR court found that "trial counsel did, in fact, investigate the suicide attempts and talked to two witnesses to whom Applicant had directed her. *Trial counsel testified that the witnesses confirmed the victim had made prior suicide attempts, but not by self-inflicted gunshots.* Therefore trial counsel, after proper investigation, determined the witnesses would not be of any benefit to Applicant and decided not to call them. This is again, is proper trial strategy of the rubric of Stokes." <sup>2</sup> App. 449.

---

<sup>2</sup> Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992)

## ARGUMENT

The PCR court erred by finding trial counsel acted strategically reasonably in not calling two witnesses who confirmed to trial counsel that the decedent had made prior suicide attempts, where petitioner's defense was that the decedent committed suicide, since the failure to present available corroborating witnesses because the decedent's prior suicide attempts did not involve a gun was not objectively reasonable

In Dove v. State, 337 S.C. 298, 523 S.E.2d 459 (2000), this Court held that Dove met his burden of showing that trial counsel was ineffective for failing to subpoena the victim's medical records and then use them at trial. This Court therefore reversed the PCR judge's denial of relief.

In Dove, the defendant was convicted of murdering his estranged wife. Dove testified that he first told the police after they took him to jail that he believed the victim had committed suicide. Dove knew the victim had been involuntarily admitted to a mental hospital for drug abuse problems. The medical records showed that three months before her death, the victim was twice admitted to a psychiatric facility. She was diagnosed with depression and substance abuse problems. The records contained numerous references to her repeated threats to commit suicide. The victim's mother swore on an affidavit for emergency admission that the victim repeatedly had expressed suicidal thoughts.

On cross-examination at trial, Dove testified he did not know exactly how the shooting occurred, but the victim "could have been playing around and shot herself." Dove v. State, 327 S.C. 298, 300-301, 523 S.E.2d 459, 460 (2000).

The victim's mother in Dove testified the victim had never threatened to commit suicide. The prosecutor tried to nullify any evidence of suicide by emphasizing the victim had a regular

job at the time and exhibited no signs of depression. The prosecutor told jurors that family and friends believed the victim was neither depressed nor suicidal, and explained how she believed the evidence would show it was not suicide.

Trial counsel testified that he did not investigate the victim's medical background. As stated above the medical records showed the decedent was twice admitted to a psychiatric facility, she diagnosed with depression and substance abuse problems, and she made repeated threats to commit suicide. This Court in Dove found that no probative evidence supported the PCR court's finding that defense counsel was not ineffective, where petitioner maintained his wife had committed suicide, and these records corroborated that defense. This Court held that petitioner's trial attorney erred in failing to subpoena the medical records, and in failing to use them at trial. This Court found the petitioner was prejudiced because he was unable to present relevant and important evidence supporting his assertion that his wife committed suicide.

In Dove, this Court found that the case was easily distinguishable from Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). This case is likewise distinguishable from Stokes where defense counsel did not call witnesses he did not think were credible, and other of the potential witnesses vacillated when offering their recollections, and presented no evidence the defendant's husband actually committed suicide. Here, as in Dove, Petitioner Evatt's suicide defense was not implausible. While Dr. Ward ultimately opined the decedent's death was a homicide, some of his medical findings on the gun being in the decedent's mouth, and that gunshot residue should have likely been found if the gunshot came from outside the decedent's mouth was helpful to petitioner's defense.

Further, her, as seen above, a witness testified that around the time of the decedent's death, she seemed "troubled." Even though petitioner never wavered in stating that his girlfriend

committed suicide to both lay witnesses, and law enforcement officials, an Investigator rather arbitrarily maintained that he came to believe the shooting was murder and not a suicide. This was because petitioner allegedly did not give the exact description of the decedent shooting herself to a “road deputy.”

In this case, as seen above, defense counsel admitted that she spoke with two witnesses who both confirmed that the decedent had attempted suicide in the past. Counsel said she did not call these two witnesses to corroborate petitioner’s defense of suicide because the prior suicide attempts did not involve use of a gun. That was not objectively reasonable. This case is not like Stokes. The articulated reason for trial counsel not calling these suicide corroboration witness was simply not reasonable. Defense counsel is entitled to due deference but not all deference.

Defense counsel in her closing argument urged that the shooting was a suicide, yet petitioner was allowed to drift in the wind with his consistent statements that the decedent’s death was a suicide where there were available witnesses to corroborate petitioner’s statements that the decedent said she was thinking about committing suicide before she actually did commit suicide. As in Dove v. State, trial counsel’s failure to offer available corroborating evidence of prior suicide attempts cannot be justified where petitioner’s defense was the decedent committed suicide, and where corroborating witnesses of the decedent’s prior suicide attempts were available. The state made much of petitioner’s alleged inconsistency in stating at one time he was facing the decedent when she shot herself, and allegedly telling a “road officer” that he was sitting on the couch. As in Dove, the state’s battling of the suicide defense made the corroborating evidence of it all the more important.

Moreover, in Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998), this Court held defense counsel was ineffective for failing to call as a defense witness a triage nurse whose notes

indicated that the victim stated her vagina had not been penetrated. In Pauling, the defendant was convicted of first degree criminal sexual conduct and first degree burglary.

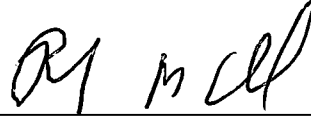
The victim in Pauling claimed she had been raped. The triage nurse testified she found no lesions, cuts, or tears while performing a pelvic examination on the victim. Although the PCR attorney failed to call the triage nurse as a PCR witness and did not even allege ineffective assistance of counsel for failure to introduce the triage nurse's notes at trial, this Court rejected the state's argument that Pauling had failed to meet his burden of proof at PCR because the triage nurse did not testify at the PCR hearing. This Court held that Pauling presented evidence as to the nature of the nurse's testimony by introducing the triage notes themselves. Thus, this Court found that the findings of the PCR judge were not supported by any evidence in the record.

Here, similarly, defense counsel admitted under oath that she was aware of the two witnesses who would have corroborated petitioner's testimony that the decedent was suicidal. Defense counsel admitted interviewing these witnesses, and she admitted that they would have testified the decedent had attempted suicide in the past. Her reason for not calling these witnesses was that the prior suicide attempts did not involve a gun. Again, defense counsel's *reason* for not calling these witnesses – that the prior suicide attempts did not involve a gun -- was not an acceptable -- indeed it was an irrational reason -- not to call the available corroborating suicide defense witnesses. The petitioner in this case carried his burden of proof in showing his attorney was ineffective in handling his suicide defense by not calling available corroborating witnesses of his suicide defense. This Court should respectfully grant certiorari, and grant petitioner a new trial. Cf. Davenport v. State, 301 S.C. 39, 389 S.E.2d 649 (1990) (Defense counsel was unreasonable and ineffective in advising Davenport to plead "guilty but

mentally ill” to the charge of murder despite being aware the state’s own psychiatrist had diagnosed Davenport as being legally insane at the time of the trial).

**CONCLUSION**

By reason of the foregoing arguments, a writ of certiorari should be issued to allow a full briefing on this issue.



---

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of July, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Greenville County

Honorable John C. Hayes, Circuit Court Judge

\_\_\_\_\_  
WALLACE EUGENE EVATT, JR.,

PETITIONER

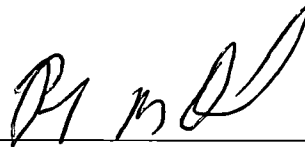
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon DeShawn Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Wallace E. Evatt, #102055, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 24th day of July, 2017.



\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 24th day of July, 2017.

Courtney Powers (L.S)  
Notary Public for South Carolina  
My Commission Expires: May 2, 2027.