STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Greenville County
Court of Common Pleas
The Honorable John C. Hayes, III, Circuit Court Judge

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S.C. SUPREME COURT

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Appellate Case No. 2016-002281

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WALLACE EUGENE EVATT, JR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## RESPONDENT'S QUESTIONS PRESENTED

Is there evidence of probative value in the record to support the PCR judge's finding trial counsel employed proper trial strategy in not calling two witnesses to testify concerning the victim's previous suicide attempts?

## STATEMENT OF THE CASE

Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court of Greenville County. During its December 2009 term, the Greenville County Grand Jury indicted Petitioner for murder (2009-GS-23-09628). Dorothy A, Manigault, Esquire represented Petitioner. On July 12, 2012, Petitioner proceeded to trial before the Honorable Victor C. Pyle, Jr. and a jury. The jury convicted Petitioner of murder. Judge Pyle sentenced Petitioner to life imprisonment.

A notice of appeal was filed on Petitioner's behalf and an appeal perfected pursuant to Anders v. California, 378 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Petitioner's appeal. State v. Evatt. Op. No. 2015-UP-159 (filed March 18, 2015). The Remittitur was issued on April 10. 2015.

On January 29, 2016, Petitioner filed an application for post-conviction relief. Respondent made its return on July 1, 2016 requesting an evidentiary hearing be convened. An evidentiary hearing was held on October 26, 2016, at the Greenville Courthouse before the Honorable John C. Hayes III. Petitioner was present at the hearing and was represented by Rodney W. Richey, Esquire. Respondent was represented by Patrick L. Schmeckpeper, Esquire, of the South Carolina Attorney General's Office. Petitioner testified at the hearing. Additionally, trial counsel Dorothy A. Manigault, Esquire testified at the hearing. Thereafter, Judge Hayes denied Petitioner's PCR application by written order filed October 27, 2016.

Petitioner filed a timely notice of appeal. Thereafter, Petitioner filed his Petition for Writ of Certiorari and Appendix. This Return to Petition for Writ of Certiorari follows.

## STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief decision is whether "**any** evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). However, appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624. Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or

omission of counsel was unreasonable. Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

## ARGUMENT

**I. There is evidence of probative value in the record to support the PCR judge's finding trial counsel employed proper trial strategy in not calling two witnesses to testify concerning the victim's previous suicide attempts.**

Petitioner asserts the PCR judge erred by finding trial counsel acted strategically reasonable 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. This argument is without merit.

During the evidentiary hearing, the PCR judge heard testimony from Petitioner and his trial counsel. (App.p.425). Petitioner testified he asked trial counsel to talk to the victim's husband, mother and father about her previous suicide attempts. (App.p.425). He testified as far as he knew his trial counsel never talked to any of those people. (App.p.426).

However, trial counsel testified she investigated and talked to several people regarding the decedent's prior history with suicidal thoughts and actions including a co-worker and a family member. (App.p.439). She testified the two individuals expressed the victims had prior suicide attempts. (App.p.440). She further testified she did not believe their testimony would have been helpful because the two potential witnesses said the victim's previous suicide attempts did not involve a gun. (App.p.440).

The PCR court found Petitioner had failed to prove trial counsel was ineffective with regard to this allegation. (App.p.450). The PCR court found trial counsel did investigate the suicide attempts and talked to two witnesses. (App.p.449). The PCR court also found trial counsel testified that the witnesses confirmed the victim had made prior suicide attempts, but not by a self-inflicted gunshot. (App.p.449). The PCR court noted therefore trial counsel, after

proper investigation determined the witnesses would not be of any benefit to Petitioner and decided not to call them. (App.p.449). The PCR court concluded trial counsel employed proper trial strategy under the rubric of Stokes v. State of South Carolina, 308 S.C. 546 (1992).

There is evidence of probative value to support the PCR court's finding trial counsel did not render ineffective assistance of counsel by not calling two witnesses who told trial counsel the victim had made prior suicide attempts. Petitioner argues his case is different than this Court's holding in Stokes v. State, in which the present PCR court rested its ruling on. In Stokes, this Court held trial counsel's failure to call certain witnesses was not ineffective assistance of counsel. 308 S.C. 546, 419 S.E. 2d 778 (1992). In Stokes, the petitioner had been found guilty of killing her husband. At the PCR hearing trial counsel testified that he was aware of witnesses who were available to testify that petitioner's husband had engaged in two prior acts of suicidal gunplay. Id. at 548, 419 S.E.2d at 779. Trial counsel went on to testify that he chose not to use these witnesses because, in his judgment at the time, their testimony would not have been of value to petitioner's case, stating that the witnesses vacillated when offering their recollections to him and presented no evidence that the husband actually committed suicide. Id. at 548, 419 S.E.2d at 779.

It is clear from the record, Petitioner's case is very similar to Stokes. Trial counsel testified that she talked to a co-worker and a family member of the victim. (App.p.439). She testified the two individuals expressed the victims had prior suicide attempts. (App.p.440). She further testified she did not believe their testimony would have been helpful because the two potential witnesses said the victim's previous suicide attempts did not involve a gun. (App.p.440). Here, trial counsel articulated a valid trial strategy by not calling these witnesses. Trial counsel must be given leeway to make reasonable strategic decisions. Strickland v.

Washington, 466 U.S. 668, 688-689 (1984). No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland, 466 U.S. at 688-689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

Additionally, Petitioner's argument centers on this Court's holding in Dove v. State, 337 S.C. 298, 523 S.E. 2d 459 (2000). In Dove, this Court held the petitioner met his burden of showing that trial counsel was ineffective for failing to subpoena victim's medical records and use them at trial. Id. at 302, 523 S.E.2d at 461. More specifically in Dove, the victim had been previously admitted to a mental psychiatric facility and there were medical records which contained numerous threats to commit suicide. Id. at 301, 523 S.E.2d at 460. However, trial counsel did not subpoena those records after petitioner had told him the victim had been previously committed to a mental health facility. Id. at 301, 523 S.E.2d at 460. In this case, there was never any testimony or admissions about the victim being treated at a medical facility or medical records that could be subpoenaed. Accordingly, Petitioner failed to prove the first prong

of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms.

Notwithstanding Petitioner failing to prove the first prong of the Strickland test, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's alleged deficient performance. At the PCR hearing, Petitioner did not call any witnesses to testify concerning the victim's attempts at suicide. This Court has held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Glover v. State, 318 S.C. at 498-99, 458 S.E.2d at 540. Petitioner cites to Pauling v. State, 331 S.C. 606, 503 S.E. 2d 468 (1998), to support his argument that trial counsel's testimony concerning her conversations with the witnesses about the victim's previous suicide attempts satisfies his burden. In Pauling, at the PCR hearing a triage nurse's notes from a sexual assault were entered into evidence but the triage nurse did not testify at the hearing. Id.at 609, 503 S.E. 2d at 470. This Court held petitioner presented evidence as to the nature of the nurse's testimony by introducing her triage notes. Id.at 611, 503 S.E. 2d at 471. Here, Petitioner never called any witnesses at the PCR hearing to testify concerning the victim's suicide attempts and argues he produced evidence at the hearing through the testimony of trial counsel. This argument is without merit as trial counsel would not have been eligible to testimony on Petitioner's behalf at his trial. Additionally, the forensic pathologist testified the manner of death was homicide not suicide.

(App.p.360). Accordingly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's alleged deficient performance.

## CONCLUSION

For the foregoing reasons, the petition should be denied. Should this Court grant the petition for writ of certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General
SC Bar No. 101813

By:
ATTORNEYS FOR PETITIONER

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January 8, 2018

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Court of Common Pleas
The Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2016-002281

Wallace Eugene Evatt, Jr., ........................................................................................ Petitioner,

v.

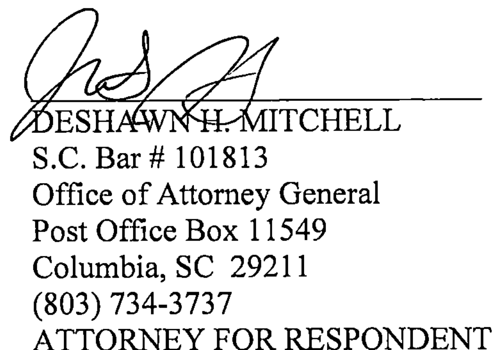
State of South Carolina, ........................................................................................ Respondent.

## CERTIFICATE OF SERVICE

I, DeShawn H. Mitchell, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in inter-agency mail and addressed to:

**Robert M. Dudek, Esquire**
**SC Commission on Indigent Defense**
**Division of Appellate Defense**
**Post Office Box 11589**
**Columbia SC 29211-1589**

I further certify that all parties required by Rule to be served have been served. This 8th day of January, 2018.



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January 8, 2018

RECEIVED
JAN 08 2018
S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
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*Re:* **Wallace Eugene Evatt, Jr. v. State of South Carolina**
**Appellate Case No. 2016-002281**
**Lower Court Case No. 2016-CP-23-0479**

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

for DeShawn H. Mitchell
Assistant Attorney General
SC Bar #101813

DHM/jacc
Enclosures

cc: Robert M. Dudek, Esquire
Trisha Allen, Director - Victim Advocacy Division (without enclosure)