

**RICHEY AND RICHEY** *A PROFESSIONAL ASSOCIATION*  
ATTORNEYS AT LAW

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November 10, 2016

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

**RECEIVED**

NOV 14 2016

S.C. SUPREME COURT

Re: Wallace Eugene Evatt, Jr. v. State of South Carolina  
Case No: 2016-CP-23-00479

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,

  
Rodney Richey

RWR/  
enclosures

cc: Patrick Lowell Schmeckpeper, Esquire

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

HONORABLE JOHN C. HAYES, III

2016-CP-23-00479

**RECEIVED**

NOV 14 2016

S.C. SUPREME COURT

WALLACE EUGENE EVATT, JR. SCDC# 102055

APPELLANT,

against

STATE OF SOUTH CAROLINA,

RESPONDENT.

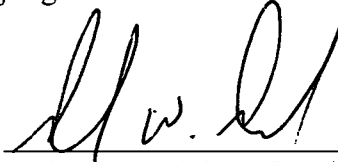
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**NOTICE OF APPEAL**

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Wallace Eugene Evatt, Jr. appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable, John C. Hayes, III, Circuit Judge on October 26, 2016 an Order issued on October 27, 2016 and filed on November 4, 2016.

The Appellant received notice of the judgment on November 10, 2016.



Rodney W. Richey, Esquire  
Attorney for the Appellant  
33 Market Point Drive  
Post Office Box 10916  
Greenville, South Carolina 29603  
(864) 467-0503  
Attorney for John C. Hayes, III

Other Counsel of Record:  
Patrick Lowell Schmeckpeper, Esquire  
Office of Attorney General State of SC  
Post Office Box 11549  
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

HONORABLE JOHN C. HAYES, III

2016-CP-23-00479

WALLACE EUGENE EVATT, JR. SCDC# 102055

APPELLANT,

against

STATE OF SOUTH CAROLINA,

RESPONDENT.

**RECEIVED**

NOV 14 2016

S.C. SUPREME COURT

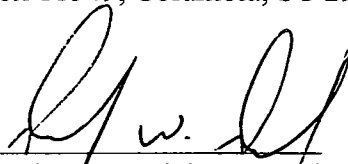
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**AFFIDAVIT OF SERVICE**

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I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on November 10, 2016, addressed to their attorney of record, Patrick Lowell Schmeckpeper, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: November 10, 2016



Rodney W. Richey, Esquire  
Attorney for the Appellant  
33 Market Point Drive  
Post Office Box 10916  
Greenville, South Carolina 29603  
(864) 467-0503  
Attorney for John C. Hayes, III

Other Counsel of Record:  
Patrick Lowell Schmeckpeper, Esquire  
Office of Attorney General State of SC  
Post Office Box 11549  
Columbia, SC 29211-1549

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

JUDGMENT IN A CIVIL CASE  
CASE NO: 2016CP2300479

Wallace Eugene Evatt Jr 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):**  
SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Rule 12(b), SCRPC;  Rule 41(a),  
 Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Other: \_\_\_\_\_  
 Rule 40(j) SCRPC;  Bankruptcy:
- 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:

Rodney Wade Richey PO Box 10916 Greenville,  
SC 29603-0916

\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

Patrick Lowell Schmeckpeper PO Box 11549  
Columbia, SC 29211

\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)

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

STATE OF SOUTH CAROLINA )

COUNTY OF GREENVILLE )

Wallace Eugene Evatt, Jr., )  
#102055, )

Applicant, )

vs. )

State of South Carolina, )

Respondent. )

IN THE COURT OF COMMON PLEAS  
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2016-CP-23-0479

ORDER

ENTERED COMPUTER

FILED IN COURT  
GREENVILLE CO. S.C.  
PAUL B. BARKER/SIMMER  
2016 NOV 4 PM 2 55

Applicant filed this Post-Conviction Relief Application on January 29, 2016. The matter was heard October 26, 2016. Applicant was represented by Rodney W. Richey, 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 Applicant was indicted by the December 2009 term of the Greenville County Grand Jury for Murder (2009-GS-23-09628). Dorothy Manigault, Esquire, represented Applicant. On July 16, 2012, the Applicant proceeded to a jury trial pursuant to which he was found guilty as indicted. The Honorable Victor C. Pyle, Jr. sentenced the Applicant to confinement for life.

A notice of appeal was filed on Applicant's behalf and an appeal perfected pursuant to *Anders v. California*, 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal. *State v. Evatt*, Op. No. 2015-UP-159 (filed on March 18, 2015). The Remittitur was issued on April 10, 2015.

*JEH #1*

In his application for Post-Conviction Relief the Applicant alleges that he is being held in custody unlawfully for ineffective assistance of counsel and presented testimony as to the specifics of this general allegation.

When ineffective assistance of counsel is alleged as a ground for relief, 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." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). 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. 2066. 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, Applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." *Cherry v. State*, 300 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 the 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)).

QcA#<sup>2</sup>

Applicant testified trial counsel was ineffective for not calling a forensic expert to testify at trial. Applicant testifies that, in spite of trial counsel obtaining funding to call an expert in the analysis of gunshot residue evidence, she did not call one to testify at trial.<sup>1</sup>

Trial counsel testified she obtained funding for a gunshot residue expert and hired one. Trial counsel also testified that she met with the expert and had him present in the courthouse on the day of Applicant's trial. Further, trial counsel testified that the expert's opinion was of no help to Applicant. Trial counsel testified that this was the case since there was no gunshot residue on Applicant's hand nor on the victim, that gunshot "particles" were present on Applicant's shirt, and that Applicant (who sped away from the scene) had time to wash his hands and stood at the rain at the scene when he returned to the scene.

Trial counsel further testified that she explained to Applicant why she chose not to call the gunshot residue expert and that this decision was not based on reserving final closing argument. Where trial counsel articulates a valid reason for employing a certain strategy, such choice will not be deemed ineffective assistance of counsel. *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992).

Applicant testified he wanted to testify based on trial counsel wanting to preserve her right to final closing argument. However, Applicant agreed with trial counsel that it was the best trial strategy for him to not testify to preserve final closing argument.

Trial counsel testified she did discuss the strategy of preserving final closing argument with applicant, but that final closing argument "was not the point." Trial counsel testified Applicant made, on his own, the decision not to testify. Trial counsel testified the decision was

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<sup>1</sup> Trial counsel received funding also for a DNA expert, and retained one. Trial counsel testified that DNA expert's testimony would be of no help to Applicant and informed him of this.

Je tt #3

ultimately his, not hers. Trial counsel further testified that her discussion with Applicant also included the impeachment he would face based on his prior criminal record and his flight from the scene.

I find that based on proper communication by trial counsel, Applicant's decision to not testify was his own and that, had he wished, he would have been "allowed" to testify. Additionally, the record reflects that Applicant was aware of his right to testify, the prior record the State would use to impeach him, and his right to remain silent (Trial Transcript p. 367, l. 19 through p. 369, l. 20).

Applicant also claims he was not aware of the maximum penalty he could receive for the charges he was facing. Trial counsel's testimony, which I find credible, establishes that she advised Applicant thoroughly as to the sentence the court could impose. On cross examination, Applicant testified, after testifying that he did not know he was facing a life sentence, that he "probably" did know but was "not sure."

Applicant raised at his hearing an issue which would fall under the umbrella of "failure to investigate." This had to do with his claim that trial counsel had not talked with witnesses who could testify as to victim's prior suicide attempts.<sup>2</sup> 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 under the rubric of *Stokes*, 308 S.C. 546, 419 S.E.2d 778.

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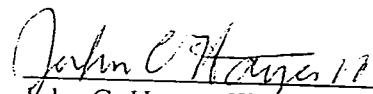
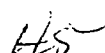
<sup>2</sup> Applicant's defense was that the victim had committed suicide.

Wherefore, I find that Applicant has failed to prove by a preponderance of the evidence that he is entitled to relief on the grounds of ineffective assistance of counsel. Therefore, Applicant's request for Post-Conviction Relief is denied and dismissed with prejudice.

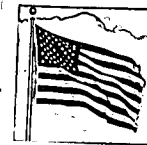
This Court hereby advises Applicant that he must file and serve a Petition for Writ of Certiorari within thirty (30) days of the service of this Order to secure appellate review. *See* Rules 203 and 243, South Carolina Appellate Court Rules (SCACR). The Applicant's attention is directed to Rule 243,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

IT IS SO ORDERED.

October 27<sup>th</sup>, 2016  
Greenville, South Carolina

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

RICHEY AND RICHEY, P.A.  
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The Honorable Daniel E. Shearouse  
Clerk of Court  
The Supreme Court of South Carolina  
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