The Supreme Court of South Carolina

O R D E R

The attached certificate form is hereby approved for use with Rule 403, SCACR.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

August 22, 2001

The Supreme Court of South Carolina

C E R T I F I C A T E

This certificate is to be used to show completion of the trial experiences required by Rule 403 of the South Carolina Appellate Court Rules (SCACR). The text of this Rule is printed on the back of this form. This Certificate must be submitted in DUPLICATE (the original and one copy) to the Clerk of the South Carolina Supreme Court, P.O. Box 11330, Columbia, SC 29211.
Except for the signatures, all entries must be printed or typed.

COURT OF COMMON PLEAS or FEDERAL DISTRICT COURT FOR THE DISTRICT OF SC

1.Case Name:_____Date:_____ATTEST:_____
Court:_____Name of Judge:_____ Signature of Judge

2.Case Name:_____Date:_____ATTEST:_____
Court:_____Name of Judge:_____ Signature of Judge

3.Case Name:_____Date:_____ATTEST:_____
Court:_____Name of Judge:_____ Signature of Judge

COURT OF GENERAL SESSIONS or U.S. DISTRICT COURT FOR THE DISTRICT OF SC

1.Case Name:_____Date:_____ATTEST:_____
Court:_____Name of Judge:_____ Signature of Judge

2.Case Name:_____Date:_____ATTEST:_____
Court:_____Name of Judge:_____ Signature of Judge

3.Case Name:_____Date:_____ATTEST:_____
Court:_____Name of Judge:_____ Signature of Judge

EQUITY TRIAL

Case Name:_____Date:_____ATTEST:_____
Name of Judge and Title:_____ Signature of Judge

FAMILY COURT

1.Case Name:_____Date:_____ATTEST:_____
Name of Judge:_____ Signature of Judge

2.Case Name:_____Date:_____ATTEST:_____
Name of Judge:_____ Signature of Judge

ADMINISTRATIVE HEARING

Case Name:_____Date:_____ATTEST:_____
Name of Presiding Officer and Title:_____ Signature of Presiding Officer

I hereby certify that I completed one-half of the credit hours needed for law school graduation prior to participating in and/or observing the eleven trials indicated above. I further certify that I have observed or participated in the above trials in accordance with the provisions of Rule 403, SCACR.

Signed this _____ day _____, 20___. _____
SIGNATURE

Revised 8/22/2001

RULE 403
TRIAL EXPERIENCES

(a) **General Rule.** Although admitted to practice law in this State, an attorney shall not appear as counsel in any hearing, trial, or deposition in a case pending before a court of this State until the attorney's trial experiences required by this rule have been approved by the Supreme Court. An attorney whose trial experiences have not been approved may appear as counsel if the attorney is accompanied by an attorney whose trial experiences have been approved under this rule or who is exempt from this rule, and the other attorney is present throughout the hearing, trial, or deposition. Attorneys admitted to practice law in this State on or before March 1, 1979, are exempt from the requirements of this rule. Attorneys holding a limited certificate to practice law in this State need not comply with the requirements of this rule.

(b) **Trial Experiences Defined.** A trial experience is defined as the:

(1) actual participation in an entire contested testimonial-type trial or hearing if the attorney is accompanied by an attorney whose trial experiences have been approved under this rule or who is exempt from this rule, and the other attorney is present throughout the hearing or trial; or

(2) observation of an entire contested testimonial-type trial or hearing.

Should the trial or hearing conclude prior to a final decision by the trier of fact, it shall be sufficient if one party has completed the presentation of its case.

(c) **Trial Experiences Required.** An attorney must complete ten (10) trial experiences. The required trial experiences may be gained by any combination of (b)(1) or (b)(2) but must include the following:

(1) three (3) civil jury trials in a Court of Common Pleas, or two (2) civil jury trials in Common Pleas plus one (1) civil jury trial in the United States District Court for the District of South Carolina;

(2) three (3) criminal jury trials in General Sessions Court, or two (2) criminal jury trials in General Sessions plus one (1) criminal jury trial in the United States District Court for the District of South Carolina;

(3) one (1) trial in equity heard by a circuit judge, master-in-equity, or special referee in a case filed in the Court of Common Pleas;

(4) two (2) trials in the Family Court; and

(5) one (1) hearing before an Administrative Law Judge or administrative officer of this State or of the United States. The hearing must be governed by either the South Carolina Administrative Procedures Act or the Federal Administrative Procedure Act, and the hearing must take place within South Carolina.

(d) **When Trial Experiences May be Completed.** Trial experiences may be completed any time after the completion of one-half (½) of the credit hours needed for law school graduation.

(e) **Certificate to be Filed.** The attorney shall file with the Supreme Court a Certificate showing that the trial experiences have been completed. This Certificate, which shall be on a form approved by the Supreme Court, shall state the names of the cases, the dates and the tribunals involved and shall be attested to by the respective judge, master, referee or administrative officer.

(f) **Attorneys Admitted in Another State.** An attorney who has been admitted to practice law in another state, territory or the District of Columbia for three (3) years at the time the attorney is admitted to practice law in South Carolina may satisfy the requirements of this rule by providing proof of equivalent experience in the other jurisdiction for each category of cases specified in (c) above. This proof of equivalent experience shall be made in the form of an affidavit which shall be filed with the Supreme Court.

(g) **Circuit Court Law Clerks and Federal District Court Law Clerks.** A person employed full time for nine (9) months as a law clerk for a South Carolina circuit court judge or as a law clerk for a Federal District Court Judge in the District of South Carolina may be certified as having completed the requirements of this rule by participating in or observing two (2) family court trials which meet the requirements of (c)(4) above. A part-time law clerk may be certified in a similar manner if the law clerk has been employed as a law clerk for at least 1350 hours. The law clerk must submit a statement from a judge or other court official certifying that the law clerk has been employed as a law clerk for the period required by this rule. A Certificate (see [e] above) must be submitted for the family court trials.

(h) **Appellate Court Law Clerks and Staff Attorneys.** A person employed full time for eighteen (18) months as a law clerk or staff attorney for the Supreme Court of South Carolina or the South Carolina Court of Appeals may be certified as having completed the requirements of this rule by participating in or observing two (2) trials. Each trial must meet the requirements of (c)(1), (2) or (4) above, and only one (1) family court trial may be used. A part-time law clerk or staff attorney may be certified in a similar manner if the law clerk or staff attorney has been employed as a law clerk or staff attorney for at least 2700 hours. The law clerk or staff attorney must submit a statement from a judge, justice or other court official certifying that the law clerk has been employed as a law clerk or staff attorney for the period required by this rule. A Certificate (see [e] above) must be submitted for the trials.

(i) **Approval or Disapproval.** The Court will notify the attorney if the trial experiences submitted in the Certificate or affidavit have been approved or disapproved.

(j) **Confidentiality.** The confidentiality provisions of Rule 402(i), SCACR, shall apply to all files and records of the Clerk of the Supreme Court relating to the administration of this rule. The Clerk may, however, disclose whether an attorney's trial experiences have been approved and the date of that approval.

Notice of approval or disapproval of the trial experiences should be sent to:

NAME: _____

STREET OR P. O. BOX: _____

STATE and ZIP: _____

TELEPHONE NO. (H)_(_____)_____ (W)_(_____)_____

APPROVAL OF TRIAL EXPERIENCES

Pursuant to Rule 403, SCACR, the trial experiences of the above-named attorney are hereby approved. The attorney is now authorized to appear alone in cases pending before the courts of this State.

_____ , 20_____

_____
CLERK, SOUTH CAROLINA SUPREME COURT

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

August 27, 2001

ADVANCE SHEET NO. 31

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Felix Cheeseboro, Appellant.

Appeal From Richland County
Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 25347
Heard June 20, 2001 - Filed August 27, 2001

AFFIRMED

Senior Assistant Appellate Defender Wanda H. Haile, of S.C. Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters; and Solicitor Warren B. Giese, all of Columbia for

respondent.

_____

JUSTICE MOORE: Appellant was charged with the 1996 armed robbery and execution-style shooting of three victims at Kelly's Barbershop in Columbia. One victim survived the shooting and identified appellant as the perpetrator. The State sought the death penalty. The jury found appellant guilty of three counts of armed robbery, three counts of kidnaping, two counts of murder, and one count of assault and battery with intent to kill but did not recommend death. The trial judge sentenced appellant to consecutive terms of thirty years for each armed robbery, thirty years for the kidnaping of the surviving victim, life without parole for each murder, and twenty years for assault and battery with intent to kill. We affirm.

FACTS

Kendrick Davis worked as a barber at Kelly's. On the morning of March 14, 1996, he arrived at work around 6:10 a.m. Mr. Kelly was already cutting a customer's hair and another customer, Leon Poole, was waiting. After confirming that Mr. Poole did not need his services, Davis sat down with a cup of coffee to read the newspaper. As Mr. Kelly's first customer was walking out the door, Davis overheard someone ask for the time. A few minutes later, Davis lowered his newspaper and saw a black man wearing a toboggan cap standing in front of him with a gun. The man told him it was a holdup and instructed him to get up and go to the back room. At trial, Davis identified the man as appellant.

Davis tapped Mr. Kelly on the shoulder and told him they were being robbed. Mr. Kelly and Mr. Poole, who were both in their 70's, were slow-moving. Davis led them to the back room which was very small and narrow. When they reached the back room, appellant ordered them back to the front where he told them to get on their knees and throw their wallets out on the floor. At this point, appellant pulled his cap down over his face. Mr. Kelly

fumbled getting his wallet out and appellant ordered them to hurry up. Finally, appellant told them to get up and go back to the room at the back of the shop. Davis again led the way.

Appellant ordered the three men onto their knees with their hands behind their heads. Davis heard one shot, then another. The third shot struck him in the left thumb and the back of the neck. Davis lay on the floor and waited there several minutes. Mr. Poole, who weighed about 200 pounds, had fallen on top of him and they were all three lying in a pool of blood. Davis had some difficulty getting up but he was finally able to reach the telephone and dial 911.

Police arrived shortly thereafter and transported Davis to the hospital where he was interviewed almost immediately. Davis gave a description of the assailant as a black male in his mid-twenties, medium build, about 5'10". He gave a similar description later that day except he added that the perpetrator had a thin mustache. On March 15, Davis met with a forensic artist who developed a composite drawing based on Davis's description of the assailant.

Meanwhile, SLED analyzed three bullets from the barbershop crime scene and concluded they had been shot from the same gun that was used to kill a cab driver at a shopping mall in Richland County on February 19.

During this time, appellant was living with his sister, Glenda Love, in Eau Claire. He moved in with her after his release from prison on February 2, 1996. Appellant, who was an aspiring rap artist, had legally changed his name to "King Justice." He worked part-time for a janitorial service.

Appellant was not at home in the early morning hours of March 14. Love did not speak with him until early that evening when he asked if she had heard about the barbershop shooting. During the next few days, Love noticed a newspaper article about the killings in which someone had highlighted the words "execution style." She noticed that other articles had

been clipped from her newspapers.

Love saw the composite drawing of the suspect in the paper and thought it looked like appellant. She also thought the description of the hat and coat worn by the suspect matched appellant's. At some point, she found shoes wrapped up in a brown leather jacket. Finally, on March 27, she found a gun in a shopping bag in her house.

Love became alarmed and alerted police. The next day, March 28, police executed a search warrant at the Love residence but found nothing relevant except the newspaper clippings and a ski cap with two holes in it. Love testified she never saw the gun again.

Nothing further happened in the investigation of this case until October 1996. On October 3, officers executed a search warrant in an unrelated case at the residence of Lamont Hilliard on House Street in Columbia. They were looking for stolen goods reportedly at that location. During the search, police confiscated a .38 caliber Smith & Wesson handgun. SLED subsequently matched this gun to the bullets from the barbershop and cab driver murders.

As a result, Lamont Hilliard was interviewed by police. Hilliard told police he got the gun from Bernard Johnson in May 1996. Police then interviewed Bernard Johnson who stated he bought the gun on the street in November 1995 and gave it to appellant shortly after appellant got out of prison around the end of January 1996. Appellant returned the gun to Johnson in May or June 1996, and Johnson left it with Hilliard. Johnson told police appellant said he had used the gun to commit the barbershop murders.[1]

The same day Johnson was interviewed, police had appellant transported from Greenville where he was incarcerated on another charge. Appellant admitted receiving Johnson's .38 in February of 1996 but claimed

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[1]Johnson's statement also indicates appellant told him he killed the cab driver but Johnson denied this at trial.

not to remember how long he had possessed it.

Police then executed a search warrant at Glenda Love's residence where appellant had been living. They found the name "Virgil Howard" on some letters addressed to appellant and ascertained that Virgil Howard was an inmate. Prison officials then confiscated letters written by appellant from Howard's cell. Appellant stipulated he wrote these letters. The first letter reads as follows:

> Yo, Peace G, I got everything, even two letters from you. Things have been slow, but send them flicks because next time you write, my check will be cashed by then. I'm working with a janitorial service, so I can pay the payroll officers. Bust it. You know this shit ain't me. I got to have a backup when my licks don't go over. Read my last letter, you'll see where I told you about the Cee-Allah-Born. That didn't come out right because he tried to stag, so I sent him to the essence. You've heard about it. It was the one down by the mall last month. . . . Now that I got my God-U-Now back, I'm about to get busy tonight, March 1st. . . . I $300 (*sic*) for the demo tape, so someone's got to go.

Law enforcement officials familiar with a code used by inmates testified that "Cee-Allah-Born" means "cab," "God-U-Now" means "gun," "licks" means robbery, and "to stag" means "to resist." There was only one cab driver murder in the first three months of 1996 and it was the one matched to the .38.

The second letter reads as follows:

> Yo, Peace G, Yo, Black, I'm telling you, shit ain't so swift as I thought. The licks that I thought were going to put me on turn out to be locked down with Self-Allah-Father-Equality. So I just got small change. But I'm about to make a mad move Tuesday night 20th, that's going to put me on or put me away. Things are

> looking up for my music goals. I'm meeting with this kid that works in the music department for Black Newspaper. He gone to the Soul Train Music Awards, but he'll be back Monday. . . . I've got this bull-shitting job so I can buy some things for my capers on them devils Tuesday. The lyrics aren't all that sharp, but the beat is going to be the shit. I had to leave your stuff in my folder in the jail with this God Body because I was licking that night, but I'm sending for it now. Write Shabazz and tell him what's up but keep the caper between us, all right? Yo, Black, hang in there with me. I'm striving hard to get on and stay out at the same time. So I haven't forgot you, I've just been making a lot of moves. Write when you get this. Peace, King Justice.
>
> I got the stamps and envelopes from a lick I made. If I send one too many, just keep it for yourself.

Law enforcement translated "Self-Allah-Father-Equality" as meaning "safe." There was an unopened safe at the barbershop.

Finally, inmate Dan Temple testified that appellant told him while they were incarcerated together that he (appellant) was charged with the barbershop murders, that one of the victims had lived, and that he wished he had shot him again.

DISCUSSION

1. Destruction of gun

Appellant contends the murder weapon and any testimony regarding it should have been suppressed, or the indictments against him dismissed, because the gun was destroyed before the defense team could examine it. We disagree.

The State presented the following evidence at a pre-trial hearing.

Officer Conyers of the Columbia Police Department, who confiscated the gun from Hilliard's residence on October 3, 1996, checked over a four-day period for a report that it was stolen. When her check turned up no owner, she tagged the gun "destroy or sell" and placed it in the evidence room. All this was done pursuant to normal department procedures.

On October 16, the gun was transported to SLED for testing in an unrelated shooting case. The next day, Agent Paavel test-fired the gun and discovered that the markings on the test-fired bullets matched the markings on the bullets from the barbershop and cab driver killings. He took photographs of the gun, including the serial number, and reported his test results to the Columbia Police Department and the Richland County Sheriff's Office. Agent Paavel kept the bullets retrieved from the two murder scenes and the test-fired bullets but eventually returned the gun to the Columbia Police Department. He put the gun in an envelope, marked the envelope "do not destroy," and indicated it contained the barbershop murder weapon.

Officer Lewis of the Columbia Police Department testified she received the gun back from SLED on March 4, 1997. It still had the original Columbia Police Department tag indicating no owner. There was nothing indicating it was related to the barbershop murders. Following normal procedures, Officer Lewis advertised the gun in the newspaper as unclaimed property. Finally, on May 20, it was destroyed with a group of 140 weapons.

The trial judge denied appellant's motions for suppression or dismissal of the indictments ruling there was no bad faith in the destruction of the gun, the bullets were still available to the defense, and there was no prejudice to the defense because the gun was incriminating rather than exculpatory. The evidence regarding the care of the gun by police was introduced at trial and the jury was charged at the close of the case that the evidence was introduced "as to the issue of the degree of care exercised by the agents of Columbia Police Department charged with the custody and preservation of evidence."

We find no error in the trial judge's ruling. The State does not have an

absolute duty to preserve potentially useful evidence that might exonerate a defendant. Arizona v. Youngblood, 488 U.S. 51 (1988); State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991); State v. Jackson, 302 S.C. 313, 396 S.E.2d 101 (1990). To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means. State v. Mabe, *supra*; State v. Jackson, *supra*.

Appellant has failed to demonstrate any evidence of bad faith. The Columbia police officers testified they followed normal procedures in destroying the gun and there was no indication on the gun connecting it to the barbershop murders at the time of its destruction. While there is evidence of a lack of care, there is no evidence of an intentional destruction of relevant evidence in this case.

Further, appellant has not demonstrated in the alternative that the gun had exculpatory value that was apparent before it was destroyed. Appellant's expert testified the actual gun rather than the photographs of it should have been presented to the witnesses for identification. None of the witnesses, however, including appellant at the time he gave his statement, expressed any doubt that the gun in the photographs was the gun given to appellant. Further, Agent Paavel definitively identified the murder weapon as the gun in the photographs. There is no evidence of any apparent exculpatory value especially given the fact that the gun was recovered months after the crime and fingerprints were not an issue.

Finally, all of Agent Paavel's reports and the documentation of his microscopic comparison of the bullets from the murder scene with the test bullets fired from the gun, in addition to the bullets themselves, were available to the defense. Accordingly, comparable evidence was available from a source other than the gun.

The trial judge properly denied appellant's motions on this ground.

2. Kendrick Davis's identification of appellant

Appellant moved to suppress Kendrick Davis's identification on the grounds it was tainted by an unreliable hypnosis session and appellant was deprived of his right of confrontation. The trial judge denied the motion following a pre-trial hearing.

Kendrick Davis, the surviving victim of the barbershop shootings, gave a description of the perpetrator to police the day of the murders. The next day, March 15, 1996, Davis worked with a forensic artist who developed a composite drawing based on Davis's description. On April 5, Davis was shown a photographic line-up with six subjects approximating the description he had given. He failed to identify any of them as the perpetrator.

On May 14, Davis met with a hypnotist, Robert Sauer, who explained the procedure that would be used and introduced Davis to relaxation techniques. At a second session on May 21, Davis was accompanied by a police officer and a second forensic artist. Davis gave a description of the assailant and a second composite drawing was made. No pictures, other than the composite itself, or photographs were shown to Davis during the session.

Five months later, on October 22, Davis was shown a second photographic line-up in which he identified appellant as the perpetrator. Detective Mead, who was present, testified Davis became very emotional when he saw appellant's photo and exclaimed he would never forget appellant's face.

Appellant first contends Davis's identification was rendered unduly suggestive by the hypnosis session on May 21. An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. Manson v. Brathwaite, 432 U.S. 98 (1977); State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980). To determine the admissibility of an identification, the court must determine (1) whether the

identification process was unduly suggestive and (2) if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Neil v. Biggers, 409 U.S. 188 (1972); State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000).

In this case, under the first prong, there is no evidence the hypnosis session rendered the identification process unduly suggestive. The transcript of the session reveals nothing coercive in the dialogue between Davis and the hypnotist. Appellant complains there is a ten-minute gap in the tape of the session during which "suggestability violations," such as showing appellant's photograph, could have taken place. The hypnotist explained the ten-minute gap was caused by his inadvertent failure to turn on the volume at the beginning of the third tape while he was recording the session. Officer Mead, who accompanied Davis, testified that Davis was not shown any photographs and that the second composite was based entirely on Davis's description of the suspect. Finally, we have examined the composite drawing based on Davis's pre-hypnosis description and the one drawn during the hypnosis session and find them remarkably similar.

Moreover, even if the procedure used was unduly suggestive, there is no substantial likelihood of misidentification under the second prong of the Neil v. Biggers analysis. The following factors are to be considered in evaluating the totality of the circumstances to determine the likelihood of a misidentification: (1) the witness's opportunity to view the perpetrator at the time of the crime (2) the witness's degree of attention (3) the accuracy of the witness's prior description of the criminal (4) the level of certainty demonstrated by the witness at the confrontation and (5) the length of time between the crime and the confrontation. State v. Moore, *supra*.

Here, Davis saw the perpetrator face-to-face in a well-lit place for several minutes, Davis had a gun pointed at him at the time and was paying very close attention, his description consistently matched appellant, he expressed absolutely no doubt about his identification of appellant at the photographic line-up, and the time between the crime and the line-up was

about seven months. Under these circumstances, the trial judge did not abuse his discretion in refusing to suppress Davis's identification of appellant. *Id.* (decision to admit eyewitness identification is within trial judge's discretion); *accord* Harker v. Maryland, 800 F.2d 437 (4th Cir. 1986) (consistency of eyewitness's description before, during, and after hypnosis provided ample basis for witness to testify before jury).

Next, appellant contends the use of post-hypnotic evidence violated his Sixth Amendment right of confrontation under State v. Evans, 316 S.C. 303, 450 S.E.2d 47 (1994). To determine whether the admission of post-hypnotic testimony violates the Confrontation Clause, we must consider whether the hypnosis affected the witness's ability to testify and respond freely to cross-examination. *Id*. (*citing* McQueen v. Garrison, 814 F.2d 951, 958 (4th Cir.), cert. denied, 484 U.S. 944 (1987)). In determining whether post-hypnotic testimony is independent of the dangers associated with hypnosis, we will consider whether (1) the witness's trial testimony was generally consistent with pre-hypnotic statements (2) considerable circumstantial evidence corroborated the witness's post-hypnotic testimony and (3) the witness's responses to examination by counsel generally were not the automatic responses of a pre-conditioned mental process.

Davis's identification of appellant at trial was consistent with his pre-hypnotic description of the assailant. The identification was corroborated by evidence appellant was in possession of the murder weapon at the time of the barbershop murders and that he confessed to both Bernard Johnson and Dan Temple. Davis was cross-examined extensively about his identification and admitted there were some details he could not recall, such as whether the assailant was wearing gloves or what kind of shoes he had on. His responses to questioning give no indication of being pre-conditioned. Further, appellant presented expert testimony and fully argued the unreliability of Davis's post-hypnotic testimony to the jury.

In conclusion, under State v. Evans, there is no Confrontation Clause violation and the trial judge did not abuse his discretion in allowing Davis's

identification.

3. Kendrick Davis's impeachment with prior convictions

On direct examination, Kendrick Davis admitted he was convicted of murder in May 1977 and was on parole for life. He was further impeached on cross-examination with a 1968 conviction for safecracking and possession of safecracking tools, an administrative adjudication of embezzlement while he was in prison in 1981, and an admission that he did not pay income tax while he worked as a barber at Kelly's.

Appellant claims the trial judge erred in refusing to allow him to further impeach Davis with 1968 convictions for grand larceny and housebreaking, and a 1966 unlawful drug conviction. He argues this evidence is admissible under Rule 609, SCRE.

Rule 609(b) provides in pertinent part:

> (b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

(emphasis added).

We find the evidence of these convictions was properly excluded under Rule 609(b). First, narcotics offenses are generally not considered probative of truthfulness, State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), and appellant has failed to show why the ten-year limit should be overridden as to Davis's 1966 drug conviction. Second, the defense emphasized in closing that it was not challenging Davis's honesty but only the accuracy of his

memory. Davis's criminal record therefore has little or no probative value and the 1968 convictions for housebreaking and grand larceny were properly excluded under the ten-year rule.

The trial judge did not abuse his discretion in refusing to allow Davis's impeachment with these convictions.

4. Kendrick Davis's impeachment with racial slur

As impeachment evidence, appellant proffered the testimony of Kendrick Davis's co-worker, Stanley Davis, who would have testified that Kendrick Davis stated after identifying appellant in the photo line-up: "Yes, I picked out the individual, but you know how it is, all these niggers look alike." The trial judge ruled he would not allow the witness to use the word "niggers" but permitted him to answer affirmatively defense counsel's question whether Kendrick Davis had said "all blacks look alike." Kendrick Davis was asked during cross-examination whether he had made this statement and he denied it.

Appellant contends the trial judge's refusal to allow him to cross-examine Kendrick Davis with the statement using the word "niggers" violated appellant's confrontation rights. We disagree.

The right to meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accuser. State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994); State v. Graham, 314 S.C. 383, 444 S.E.2d 525 (1994). The trial judge retains wide latitude, however, to impose reasonable limits on cross-examination that is only marginally relevant. State v. Aleksey, *supra*; State v. Smith, 315 S.C. at 552, 446 S.E.2d at 411 (*quoting* Delaware v. VanArsdall, 475 U.S. 673, 679 (1986)).

In this case, the defense emphasized in closing argument that it was not challenging Kendrick Davis's honesty but only the accuracy of his memory.

Appellant was permitted to challenge the accuracy of Davis's memory by impeaching him with the statement "all blacks look alike." Nothing would have been added by allowing the use of the inflammatory word "niggers." Since this evidence was irrelevant to impeach Davis's memory, there was no Confrontation Clause violation in its exclusion.

5. Impeachment of defense witness Stanley Davis

The solicitor was permitted to impeach defense witness Stanley Davis, who testified regarding Kendrick Davis's identification, with a prior conviction for impersonating an officer and his statement to investigators that he knew nothing about appellant's case. Appellant claims this impeachment evidence was improperly allowed.

First, appellant contends that impersonating an officer is not a crime of dishonesty and, since it is not punishable by a term in excess of one year, it was not admissible under Rule 609, SCRE.[2]

Evidence of a conviction of a crime involving dishonesty is admissible for impeachment regardless of the punishment. Rule 609(a)(2), SCRE. Federal courts applying this rule under the Federal Rules of Evidence have held criminal impersonation is a crime involving dishonesty and therefore admissible. United States v. Moore, 459 F.2d 1360 (D.C. Cir. 1972); Brundridge v. City of Buffalo, 79 F.Supp.2d 219 (W.D.N.Y. 1999). We agree with the approach taken by the federal courts and hold, since impersonating an officer involves a misrepresentation, it is a crime involving dishonesty and therefore admissible under Rule 609(a)(2) regardless of the punishment it carries.

Second, the solicitor sought to impeach Stanley Davis with evidence that Davis told the solicitor's investigator he knew nothing about the case.

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[2]Under S.C. Code Ann. § 16-17-720 (1985), impersonating a law enforcement officer is punishable by a term of not more than one year.

When asked on cross-examination, Davis simply replied that he did not recall making such a statement. On appeal, appellant mischaracterizes this cross-examination by stating the solicitor was allowed to impeach Davis with his "failure to recall an event." Davis's failure to recall was never made an issue.

The trial judge did not abuse his discretion in allowing this cross-examination of Stanley Davis. *See* State v. Aleksey, *supra* (scope of cross-examination within trial judge's discretion).

6. Admission of cab driver murder

Captain Williams of the Richland County Sheriff's Office testified that between 10:30 and 10:45 p.m. on February 19, 1996, he arrived at the scene of a shooting and found the victim, Elvis McDonald, standing next to his cab. McDonald said he had been shot by a light-skinned, black male about 5'8" and 130 pounds. Shortly thereafter, McDonald died of his wounds. SLED subsequently matched the bullets from this crime to those recovered from the barbershop crime scene. Evidence of McDonald's murder was admitted as evidence of motive, common scheme or plan, and identity.[3] Appellant contends this was error on several grounds.

a. Clear and convincing proof

Appellant contends there is not clear and convincing evidence he committed the cab driver murder. *See* State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000) (bad act must be proved by clear and convincing evidence to be admissible). As we recently stated, the trial judge's ruling admitting bad act evidence will be upheld on appeal if it is supported by any evidence.

[3]Evidence of other crimes or bad acts, although generally inadmissible to prove the defendant's bad character, is admissible when it tends to establish motive, identity, a common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b), SCRE; *see also* State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). This Court does not conduct a *de novo* review to determine if the evidence is clear and convincing. *Id*.

Here, there is evidence appellant was in possession of the murder weapon at the time of the cab driver shooting and the cab driver gave a description generally matching appellant. Further, in his letter, appellant told inmate Virgil Howard about his "licks" involving a cab "down by the mall last month" (*i.e.* February) and sending someone "to the essence." McDonald was the only cab driver murdered between January and March of 1996. This evidence is sufficient to uphold the trial judge's ruling.

b. Insufficient similarity between barbershop and cab driver killings

Appellant claims there is insufficient similarity between the barbershop shootings and the McDonald shooting because they happened in different settings and the number of victims was different. We disagree.

A close degree of similarity or connection between the prior bad act and the crime for which the defendant is on trial is required to support admissibility under the common scheme or plan exception. State v. Cutro, 332 S.C. 100, 504 S.E.2d 324 (1998); State v. Parker, 315 S.C. 230, 433 S.E.2d 831 (1993). In this case, there is forensic evidence that the same gun was used in both the barbershop and cab driver shootings. This fact establishes a substantial connection between the two crimes that supports the admission of evidence regarding the cab driver murder.

Further, where the defendant's own actions link two crimes together, evidence of one crime is admissible as proof of the other under the common scheme or plan exception. State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990). Here, appellant himself linked the barbershop and cab driver murders in his letters to Virgil Howard.

c. Evidence of motive or identity

Appellant contends evidence of the cab driver murder was improperly admitted to show identity and motive. We disagree.

The fact that the same weapon was used in both the barbershop and cab driver murders goes to show appellant's identity as the barbershop killer. Further, both crimes involved robbery, a motive matching appellant's expressed need for money. *See* State v. Bell, *supra* (evidence of motive is admissible as relevant and need not be necessary to the State's case). Accordingly, evidence of the cab driver murder establishes identity and motive.

d. Unfair prejudice

Appellant complains the probative value of the evidence of the cab driver murder is outweighed by its unfair prejudice because a layperson would not recognize the "legal" differences between the two crimes and circumstantial evidence would lead the jury to conclude appellant committed both. *See* State v. Beck, *supra* (trial judge must exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice); Rule 403, SCRE.

We find the probative value of the evidence regarding the cab driver murder was great. In light of the evidence both crimes were committed with the same gun, the evidence appellant committed the cab driver murder makes it more likely he committed the barbershop murders. Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one. State v. Wilson, *supra*; State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). There is no such improper basis suggested by this evidence.

In conclusion, the trial judge did not err in admitting evidence of the

cab driver murder.

7. Admissibility of letters to Virgil Howard

Over appellant's objection, the trial judge admitted appellant's letters to Virgil Howard ruling they were probative on the issues of identity and motive and their probative value outweighed any unfair prejudicial effect. Appellant contends this was error.

Under Rule 401, SCRE, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. The first letter makes more probable appellant's identity as the barbershop murderer since the cab driver murder to which the letter refers was committed with the same gun. This letter also goes to show motive in its reference to appellant's need for money. The second letter refers to appellant's robbery of a place with a safe, a detail that fits the barbershop crime and makes more probable appellant's identity as the perpetrator. This letter also goes to the issue of motive.

Appellant complains the reference to the safe is unfairly prejudicial because there is no evidence establishing that the safe referred to is the one located in the barbershop. This second letter, although undated, refers to the Soul Train Music Awards which the prosecution established occurred on March 29, 1996. Accordingly, the safe incident referred to in appellant's letter must have occurred sometime between February 2, when he was released from jail, and the end of March 1996, putting it within the time frame of the barbershop killings.

We find these letters relevant to establish appellant's motive and identity as the barbershop killer. Further, despite their violent and boastful tone, the probative value of these letters outweighs any unfair prejudice in light of the details matching both crimes.

8. Excluded evidence explaining reference to a safe

Appellant proffered testimony by an investigator with the Richland County Public Defender's office who, after speaking with appellant several days before trial, investigated a reported break-in at Andrews Travel Agency that occurred in February 1996. Appellant also proffered the testimony of the travel agent who stated that his office was broken into on the night of February 5th and his safe was moved but not broken into. Some stamps and petty cash were stolen. Appellant never proffered any declaration that he actually committed the travel agency break-in.

Appellant argued the evidence regarding the travel agency was relevant to explain the reference to the safe in his letter to Virgil Howard, thereby contradicting his connection to the barbershop murders. The State objected on hearsay grounds and the trial judge refused to allow the admission of this evidence.

Without appellant's admission that he committed the travel agency break-in,[4] evidence regarding this unrelated crime, which may or may not have been committed by appellant, is irrelevant and therefore inadmissible. We find no error in its exclusion.

9. Admission of "Ruckus" lyrics.

While appellant was incarcerated awaiting trial, prison officials seized from his cell a rap song entitled "The Ruckus." Appellant stipulated he is the author. The lyrics read as follows:

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[4]Initially, it appears such an admission (through the investigator) would be permitted as an exception to the hearsay rule under Rule 804(b)(3), SCRE, which allows for the admission of a statement against the declarant's penal interest. This exception applies, however, only if the declarant is unavailable. Rule 804(b), SCRE. A defendant who invokes his fifth amendment privilege against self-incrimination is not "unavailable" for purposes of this rule. State v. Terry, 339 S.C. 352, 529 S.E.2d 274 (2000). Accordingly, evidence of such an admission would be inadmissible hearsay.

The Ruckus, Part I

> Ruckus, I believe you're a perpetrator, gold and platinum hater, cause me and J.D. is a force like Dark Vador. Who do you despise a strong enterprise? Do the greed in your eyes lead you to tell lies? Victimize me and Jermain Dupri, don't let me see or else there'll be death in this industry. Want let go, set it fo' sho', I get hype like Mike put yo' blood on the dance flo'. Blow fo' blow, toe to toe, with that no mo'. Like the 4th of July, I spray fire in the sky. If I hear your voice, better run like horses or like metamorphis, turn all y'all to corpses. No fingerprints or evidence at your residence. Fools leave clues, all I leave is a blood pool. Ten murder cases, why the sad faces? Cause when I skipped town, I left a trail [of] bodies on the ground. Your whole click ain't nothing but tricks, bitch pulling sticks, grown men sucking dicks. No one bring ruckus like King Justice, but toughest the So So Def most corruptest.

The defense objected to the admission of this document as improper character evidence. After the trial judge ruled it admissible, appellant put up evidence that violent lyrics are common to rap music and suggested an innocuous explanation of the words having to do with appellant's role in the music industry. Further, appellant introduced the lyrics to two other songs he had written entitled "I Love My Babies" and "Mama, Mama" about family-related matters.

Appellant contends he was unfairly prejudiced by the admission of the Ruckus document. While we agree this evidence should not have been admitted, we find no reversible error.

The trial judge admitted these lyrics as an admission against interest under Rule 801(d)(2), SCRE, based on the song's reference to leaving no prints and bodies left in a pool of blood. We find these references too vague in context to support the admission of this evidence. The minimal probative

value of this document is far outweighed by its unfair prejudicial impact as evidence of appellant's bad character, *i.e.* his propensity for violence in general. Unlike the letters to Virgil Howard which contain identifying details of the crimes committed, these lyrics contain only general references glorifying violence. Accordingly, the Ruckus song should have been excluded. *See* Rule 403, SCRE (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice).

Where there is other properly admitted evidence of conduct demonstrating the particular character trait in question, however, there is no reversible error. State v. Brown, 344 S.C. 70, 543 S.E.2d 552 (2001). The two letters to Virgil Howard, which have the same tone, were properly admitted and demonstrate appellant's violent disposition. We find any error in the admission of the Ruckus document harmless.

10. Exclusion of letter denying cab driver murder

At the same time the Ruckus song was seized from appellant's cell, a letter he wrote was also seized. The letter as proffered reads:

> Yes, they do have a letter that I write in mathematics to a fraud not God admitting to doing the cab driver. But word is bond to the Father Allah, I didn't do the crime nor was I at any of the crime scenes. You see, when I was pulling a lid in '94, I was on lockup for my last two years before making my sentence of six years. This brother used to look out for me with food, radio and writing material. We got tight like cousins within them two years. So when I got out, I wanted to look out for him. But things were rough out there on my own. I didn't want to lose his trust in me. So when that cab shit came up and I read they didn't know who did it, I lied to him so he would think I was trying to come up. See, we used to talk about how we were going to do capers and shit, but I saw things different when I was in the

> county jail. I saw brothers getting out and coming right back, so I decided I was going to get two jobs and work on my music career. I used to tell the officers to tell him I would look out when I got straight, but I felt I was – he was giving up on me, so I used the cab thing to keep his trust.

The trial judge excluded this letter as self-serving hearsay. Appellant argues it was admissible under Rule 106, SCRE, to explain the Ruckus song.

Rule 106 provides:

> When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Evidence that is otherwise inadmissible is not admissible under Rule 106. State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001). Appellant's exculpatory letter contains inadmissible hearsay since it is offered for the truth of the matter asserted, *i.e.* that appellant did not commit the cab driver murder which linked him to the barbershop murders. *See* Rules 801(c) and 802, SCRE. Further, it falls under no exception to the hearsay rule. Moreover, given that it was written while appellant was awaiting trial on this matter, its trustworthiness is highly suspect.

The trial judge did not abuse his discretion in excluding this letter. *See* State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) (trial judge's decision to admit or exclude evidence is reviewed on appeal under abuse of discretion standard).

11. Cross-examination of Sgt. Wilkerson regarding other suspects

Appellant contends his Sixth Amendment rights were violated by the

trial judge's refusal to allow him to cross-examine Sgt. Wilkerson of the Columbia Police Department regarding other suspects who falsely confessed to these murders. At trial, appellant argued this evidence was "probative to show the jury that some people boast or puff about crimes they did not do." He claimed this evidence would explain his admission to the crimes in his letters to Virgil Howard.

The right to meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accuser. State v. Smith, *supra*; State v. Graham, *supra*. Trial judges retain wide latitude, however, to impose reasonable limits on cross-examination including questions regarding matters that are only marginally relevant. State v. Aleksey, *supra*; State v. Smith, 315 S.C. at 552, 446 S.E.2d at 411 (*quoting* Delaware v. VanArsdall, 475 U.S. 673, 679 (1986)). The fact that other people may confess to crimes they did not commit has little or no relevance to appellant's guilt in this case.

The trial judge did not abuse his discretion in refusing to allow this line of questioning.

12. Failure to disclose information regarding Bernard Johnson

Bernard Johnson gave Columbia police a statement indicating that he was the owner of the .38, that he gave the gun to appellant, and that appellant said he used the gun in the barbershop shootings. At the time he was interviewed by police, Johnson was in jail on unrelated drug charges.

At trial, the defense requested that the State be required to disclose the identity of the confidential informant who led police to arrest Johnson on these drug charges and the audio tapes of Johnson's drug transactions claiming, "[W]e need to know all the relevant evidence about any testifying snitch in this case." Appellant contends the trial judge's refusal to require disclosure of this information violated his due process rights, especially in light of the fact that Johnson eventually pled guilty to the pending drug

charges and received an eight-year sentence.

Due process requires the prosecution to disclose evidence that is favorable to the accused and material to guilt or punishment. United States v. Bagley, 473 U.S. 667 (1985); Brady v. Maryland, 373 U.S. 83 (1963). Evidence is material only if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. State v. Cain, 297 S.C. 497, 503, 377 S.E.2d 556, 559 (1988) (*quoting* United States v. Bagley, 473 U.S. at 682). In determining the materiality of nondisclosed evidence, the reviewing court's function is to determine whether the appellant's right to a fair trial has been impaired. Kyles v. Whitley, 514 U.S. 419 (1995); State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998).

We find the nondisclosure of the requested information did not deprive appellant of a fair trial. Narcotics offenses are generally not considered probative of truthfulness. State v. Aleksey, *supra*. Accordingly, the requested drug-related information regarding Johnson would have little, if any, impeachment value. Further, appellant does not argue he was deprived of information regarding any deal Johnson may have had with prosecutors.[5]

In any event, Johnson was thoroughly impeached with nine drug charges pending from August 1996 for which he was released on bond in exchange for his testimony in this case, five additional drug charges pending from October 1996, and prior convictions for possession of an unlawful weapon, assault and battery with intent to kill, and possession and distribution of crack cocaine. Where there is an abundance of evidence detailing the witness's unabashed disrespect for the law, the nondisclosure of other impeaching evidence does not deprive the defendant of a fair trial.

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[5]The record of Johnson's guilty plea indicates the prosecutors involved in appellant's case were removed from any involvement in Johnson's plea which was negotiated by a different solicitor.

State v. Gunn, 313 S.C. 124, 137, 437 S.E.2d 75, 82 (1993). This issue is without merit.

CONCLUSION

Appellant's remaining issues are without merit and we dispose of them pursuant to Rule 220(b), SCACR. *See* Issue 6: Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997) (prejudicial effect of question regarding post-arrest silence may be nullified by curative instruction if the jury is specifically told to disregard the evidence and not consider it for any purpose); Issues 11 & 12: State v. Harris, 340 S.C. 59, 530 S.E.2d 626 (2000) (mistrial should be granted only when absolutely necessary and defendant must show error and resulting prejudice); Issue 17: State v. Burton, 302 S.C. 494, 397 S.E.2d 90 (1990) (no error where charge given adequately covered substance of requested charge); Issue 18: State v. Darby, 324 S.C. 114, 477 S.E.2d 710 (1996) (noting Manning charge is not mandatory and upholding Victor v. Nebraska charge using the "firmly convinced" language). The judgment of the circuit court is

AFFIRMED.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James P. Hughes, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Williamsburg County
Thomas W. Cooper, Jr., Post-Conviction Judge
M. Duane Shuler, Trial Judge

Opinion No. 25348
Submitted June 20, 2001 - Filed August 27, 2001

AFFIRMED

Assistant Appellate Defender Aileen P. Clare, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Allen Bullard, and Assistant Attorney General Douglas E. Leadbitter, all of Columbia, for

respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the denial of Post-Conviction Relief (PCR) to Petitioner, James P. Hughes (Hughes). We affirm.

FACTS

Hughes was indicted for assault and battery with intent to kill (ABIK), possession of a weapon during a violent crime, and pointing a firearm in connection with events which occurred in Kingstree on September 1, 1994.[1] Both the ABIK victim, Marone Nesmith (Nesmith), and Hughes' co-defendant, Larone Shaw (Shaw)(the pointing a firearm victim), testified Hughes walked up to Shaw, held a gun to his throat, and threatened to kill Shaw if he didn't pay Hughes money he owed. Nesmith, witnessing the events, crossed the street to avoid the confrontation. As Hughes began walking away from Shaw, Shaw pulled a gun and shot at Hughes; the bullet missed Hughes and hit Nesmith, permanently paralyzing him.

Shaw and Hughes were jointly tried on April 4-5, 1995.[2] At the close of the state's case, the state *nol prossed* the charges of ABIK and possession of a weapon during a violent crime against Hughes, leaving Hughes to be tried solely on the charge of pointing a firearm, with Shaw remaining as his co-defendant. The trial judge indicated that since the cases had already been tried together to that point, he saw no reason to sever. The jury convicted Hughes of pointing

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[1] Although Hughes was initially indicted only for pointing a firearm, the indictment was amended before the grand jury when "evidence came forward, both [he and his co-defendant] were shooting."

[2] Shaw was indicted for ABIK and possession of a weapon during a violent crime.

a firearm, and he was sentenced to five years.[3]

Hughes sought PCR, alleging counsel was ineffective in failing to investigate the evidence against him (on the charges of ABIK and possession of a weapon during a violent crime), and failing to move to sever his trial from Shaw's. The PCR court denied relief. We affirm.

ISSUE

Did the trial court err in ruling counsel was not ineffective in failing to move for a severance?

DISCUSSION

"To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability that the result at trial would have been different. . . . 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, 80 L.Ed.2d 674 (1984)). Thus, a PCR applicant must show both error and prejudice to win relief. Scott v. State, 334 S.C. 248, 513 S.E.2d 100 (1999). The burden is on the PCR applicant to prove the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). An appellate court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Criminal defendants who are jointly tried are not entitled to separate trials as a matter of right. State v. Dennis, 337 S.C. 275, 281, 523 S.E.2d 173, 176

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[3] Shaw was convicted of ABIK and possession of a weapon during commission of a violent crime and sentenced to 15 years, and five years, respectively.

(1999). A defendant who alleges he was improperly tried jointly must show prejudice before this Court will reverse his conviction. Id. The general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood he and a co-defendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime. Id. A severance should be granted only when there is a serious **risk that a joint trial would compromise a specific trial right of a co-defendant** or prevent the jury from making a reliable judgment about a co-defendant's guilt. Id. (Emphasis supplied). A proper cautionary instruction may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial. State v. Holland, 261 S.C. 488, 494, 201 S.E.2d 118, 121(1973). An appellate court should not reverse a conviction achieved at a joint trial in the absence of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial. People v. Greenberger, 68 Cal.Rptr.2d 61, 86 (Cal. App. 1997).

Here, the thrust of Hughes' argument is that he should not have been tried with his co-defendant Shaw because evidence concerning the ABIK and possession of a weapon during a violent crime was irrelevant to the sole crime with which he was charged, i.e. pointing a firearm. Hughes asserts he would have been found not guilty of pointing a firearm if the trials had been severed. We disagree. There is simply not a reasonable probability that, had the charges been severed, the jury would have found Hughes not guilty of pointing a firearm.[4]

As noted previously, the charges of ABIK and possession of a weapon during a violent crime were *nol prossed* by the solicitor at the close of the state's

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[4] We assume, *arguendo*, counsel's representation fell below an objective standard of reasonableness in failing to move for a severance since, had he learned that neither Shaw nor Nesmith would inculpate Hughes of the ABIK charges, a severance could likely have been obtained prior to trial. The issue remains, however, whether Hughes was in any way prejudiced by the lack of a severance.

case. At this point, the court instructed the jury that those counts no longer existed with regard to Hughes.[5] Both the victim and Shaw testified Hughes walked up to Shaw, held a gun to his throat and threatened to kill Shaw if he didn't give him money. Further, both Shaw and Nesmith testified Shaw was the only shooter. Hughes did not testify and the sole witness he presented was a cab driver who testified he'd given Hughes a ride to Thorne Avenue, where the incident occurred, and picked him up again about 10 minutes later, but that he did not see Hughes carrying a pistol either time. The cabdriver testified that when he picked him up the second time, Hughes was acting strange. He took Hughes to the back of the courthouse where Hughes' car was parked. In closing argument, Hughes' sole defense was that Shaw had simply invented a "self-defense" story in an attempt to exculpate himself of liability for shooting Nesmith.

We ascertain no evidence presented at the joint trial which would not have been presented at an independent trial of Hughes. Given that the only two eyewitnesses testified Hughes walked up, pointed a gun at Shaw's throat, and threatened to kill him, it is patent this evidence would have come out at an independent trial. Therefore, the only evidence of which Hughes really complains is evidence that Shaw shot at Hughes, missing him and accidentally hitting Nesmith (i.e., the ABIK). However, as both Shaw and Nesmith testified Hughes was in no way involved in the ABIK, we fail to see how this evidence was in any way prejudicial to Hughes. Moreover, since Hughes' sole defense to the charge of pointing a firearm was that it was a fabrication by Shaw to exculpate himself of liability for the ABIK, it is likewise patent evidence of the ABIK would have been presented at a separate trial.[6] Accordingly, Hughes has

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[5] In its final charge, the court reiterated that Shaw was charged with ABIK and possession of a weapon during a violent crime, and Hughes was charged with pointing a firearm. The court also advised that each of the cases was to be considered separately and distinctly, and thoroughly went over the verdict forms applicable to each defendant.

[6] Hughes makes no claim that an alternate defense would have been presented at an independent trial.

not demonstrated in what way he was prejudiced by the joint trial, nor has he shown a reasonable probability that the outcome would have been different had he been separately tried. Finally, Hughes has failed to demonstrate any specific trial right which was compromised, or that the joint trial somehow prevented the jury from making a reliable determination of his guilt. Dennis, supra.

We have consistently held that an applicant seeking relief on PCR must demonstrate not only error, but also prejudice. See Humbert v. State, Op. No. 25314 (S.C. Sup. Ct. filed June 25, 2001)(Shearouse Adv. Sh. No. 23 at 64) (Court will not presume prejudice where defendant was tried wearing prison garb and shackles); Brown v. State, 340 S.C. 590, 533 S.E.2d 308 (2000) (defendant who was not advised of right not to testify must demonstrate prejudice on PCR); Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (declining to presume prejudice where trial counsel did not conduct an investigation of the charges against his client and admitted he was unprepared for trial). We adhere to this precedent and decline to presume prejudice under the limited facts of this case.

We do not, by our opinion, imply that a defendant jointly tried with a co-defendant/victim would never be entitled to PCR. On the contrary, if a defendant is able to demonstrate prejudice from such a joint trial,[7] PCR would be warranted. However, this is simply not the situation in the present case and Hughes has demonstrated no prejudice resultant from the joint trial with Shaw.

The ruling of the PCR judge is

AFFIRMED.

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[7] If, for example, Shaw had given a statement inculpating Hughes and then refused to testify, there could have been Confrontation Clause problems with a joint trial. Since, however, Shaw testified and was subject to cross-examination, no such right was compromised in this case.

BURNETT, J., concurs. PLEICONES, J., concurring in a separate opinion. MOORE, J., dissenting in a separate opinion in which TOAL, C.J., concurs.

JUSTICE PLEICONES (concurring separately): I agree with the result reached by the majority. I write separately to express my concern about the potential for abuse in the joint prosecution of defendants similarly situated to these.

The absence of evidence that Hughes committed Assault and Battery with Intent to Kill (ABIK)[8] supports an inference that the prosecution's decision to try Hughes and Shaw jointly was a stratagem used only to prejudice Hughes by presenting evidence of Nesmith's injuries before the jury. Such evidence was irrelevant to the issue of Hughes's guilt on the pointing and presenting a firearm charge, and would not have been admitted had Hughes been tried separately on that charge. I would strongly discourage the employment of such ploys by the prosecution.

Notwithstanding the above, Hughes has failed to meet his burden of showing a reasonable probability that the outcome of the proceeding would have been different had separate trials been conducted, and therefore, is not entitled to post-conviction relief.[9]

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[8]Whether this was apparent to the prosecution prior to trial or whether it only became apparent at the close of the state's case is unclear. Given the total lack of evidence of ABIK against Hughes, the circumstances are strongly suspect.

[9]I am less convinced that trial counsel was not ineffective in failing to request that the **charges** against Hughes be severed and separate trials had on the ABIK and pointing and presenting a firearm charges. Since that issue is not before the Court, it need not be addressed.

JUSTICE MOORE (dissenting): I respectfully dissent from the majority's opinion. Under the particular facts of this case, the act of trying Hughes with Shaw, who was the victim of Hughes's crime of pointing a firearm, as his co-defendant was inherently prejudicial.

While it is true criminal defendants who are jointly tried are not entitled to separate trials as a matter of right,[10] a criminal defendant is entitled to a trial free from bias and confusion. As the majority states, a severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt. State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999) (emphasis added). Allowing Hughes to be tried with his victim as his co-defendant seriously hampered the jury's ability to make a reliable judgment about Hughes's guilt for the charge of pointing a firearm. Accordingly, I would hold the PCR court erred by finding counsel was not ineffective for failing to investigate the charges against Hughes and for failing to make a motion to sever Hughes's trial from his victim/co-defendant's trial.

TOAL, C.J., concurs.

[10] State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of James A. Cheek, Respondent.

Opinion No. 25349
Submitted August 7, 2001 - Filed August 27, 2001

DEFINITE SUSPENSION

Henry B. Richardson, Jr., and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Frank L. Eppes, of Eppes & Plumblee, of Greenville, for respondent.

PER CURIAM: Respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a ninety days suspension from the practice of law. We accept the agreement and impose a ninety day suspension retroactive to July 5, 2001, the date respondent was placed on interim suspension. The facts as admitted in the agreement are as follows.

Facts

Respondent was indicted on four counts of willful failure to file a South Carolina Income Tax Return in violation of S.C. Code Ann. § 12-54-40(b)(6)(c) (Supp. 1994), and ten counts of failing to account for and pay over employee withholding taxes in violation of S.C. Code Ann. § 12-54-40(b)(6)(b) (Supp. 1994). Pursuant to a plea agreement with the Attorney General's Office, respondent pled guilty to one count of willful failure to file a South Carolina Income Tax Return in exchange for the dismissal of the remaining counts. He was sentenced to one year imprisonment and payment of a $5,000 fine, suspended upon payment of $500 and the service of three years' probation. He was also ordered to pay $12,105 restitution.

Law

As a result of his conduct, respondent has violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4 (violating the Rules of Professional Conduct). In addition, respondent has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct); Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or bring the legal profession into disrepute); and Rule 7(a)(6) (violating the oath of office taken upon admission to practice law in this state).

Conclusion

We find a ninety day suspension is the appropriate sanction for respondent's misconduct. Accordingly, we accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for ninety days, retroactive to the date of his interim suspension.

DEFINITE SUSPENSION.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Darrell Lester Diggs, Respondent.

Opinion No. 25350
Submitted August 7, 2001 - Filed August 27, 2001

DISBARRED

Henry Richardson, Jr., and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

D. Lester Diggs, Pro Se.

PER CURIAM: In this attorney disciplinary matter, respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to an indefinite suspension or disbarment from the practice of law in this state. We accept the agreement and disbar respondent, retroactive to the date respondent was placed on

interim suspension.[1] The facts as admitted in the agreement are as follows.

Facts

I. Family Court Matter

Respondent was involved in marital litigation with his wife. He was held in contempt by the family court, which could be purged by bringing current the mortgage on the marital home. Respondent issued checks to the mortgage company from a closed account. The family court found that respondent knew the account was closed when he wrote the checks, and again held him in contempt.

II. Client A Matter

Client A hired respondent to represent her after she was involved in an automobile accident. Respondent settled the claim and issued a check to Client A from a bank account that was not a trust account. Respondent has not operated a trust account since early 1999. The check was returned to Client A for insufficient funds. Respondent paid Client A's claim using cash and a cashier's check. Respondent's checks to Client A's medical providers were also returned for insufficient funds.

III. Client B Matter

Client B retained respondent to represent her in a foreclosure action. Respondent received checks totaling $61,460 from the insurance company. He instructed Client B to endorse the checks and return them to respondent. Respondent told Client B that the money was going to be held in an escrow account. Respondent did not have a trust or escrow account at that

[1]Respondent was placed on interim suspension by order of this Court dated December 14, 2000. In the Matter of Diggs, 343 S.C. 294, 540 S.E.2d 839 (2000).

time. He gave Client B a check for $3,000 from his personal account. Respondent misappropriated the remainder of Client B's funds.

IV. Settlement of Client C's Estate

Respondent was retained to settle Client C's estate. Respondent made disbursements to three beneficiaries of the estate. None of the checks were issued from a trust account. Two of the checks were returned for insufficient funds. On learning of this, the third beneficiary did not attempt to negotiate her check.

The Office of Disciplinary Counsel issued a subpoena for respondent's bank records and files from Client C's estate. The client file was not delivered at the date and time promised, and respondent did not turn over all of the requested bank records. A review of respondent's bank records indicate at least 69 negative balances, 40 overdraft fees, and 42 NSF fees over a course of ten months.

In the "Proposal for Distribution" filed with the probate court, respondent stated that various distributions had been made from Client C's estate. In particular, respondent represented to the probate court that he had made payments to the State of Michigan and to Bankers Life and Casualty of Chicago. Neither of these parties received disbursements from Client C's estate.

After respondent issued checks to the beneficiaries of Client C's estate that were returned for insufficient funds, the Aiken County Department of Public Safety began an investigation. Respondent was subsequently arrested for breach of trust with fraudulent intent.

V. Contempt of South Carolina Supreme Court

Pursuant to an investigation under Rule 413, SCACR, the Office of Disciplinary Counsel issued a subpoena for respondent's client files and

bank records. Respondent failed to comply with the subpoena, and was found to be in civil contempt by this Court on March 26, 2001.

VI. Failure to Cooperate with Attorney to Protect

After respondent was placed on interim suspension, Todd J. Johnson was appointed as the attorney to protect clients' interests pursuant to Rule 413, SCACR. Respondent failed to turn over client files to Johnson. After repeated requests from both Johnson and respondent's clients, many of these files still have not been turned over to Johnson. The failure to cooperate with Johnson was cited as one of the reasons that respondent was held in contempt by this Court.

VII. Failure to Cooperate with Investigation

The Office of Disciplinary Counsel sent a Notice to Appear to respondent. He was directed to appear and bring all records regarding his family court matter, Client A, Client B, and the settlement of Client C's estate. Respondent neither attended the Notice to Appear nor did he provide the subpoenaed documents for that appearance.

Law

By his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); Rule 1.15 (a lawyer shall hold and safeguard property of clients or third persons separate from the lawyer's own business or personal property); Rule 4.1 (in the course of representing a client, a lawyer shall not knowingly make a false statement

of material fact or law to a third person or fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited); Rule 8.1 (failure to respond to a lawful demand for information from disciplinary authority); Rule 8.4(a) (violating the Rules of Professional Conduct); Rule 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer); Rule 8.4(c) (engage in conduct involving moral turpitude); Rule 8.4(d) (engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (engage in conduct prejudicial to the administration of justice).

Respondent has also violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct); Rule 7(a)(3) (willful failure to respond to a lawful demand from a disciplinary authority); Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law); Rule 7(a)(6) (violating the oath of office taken upon admission to practice law in this state).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state. Reinstatement shall be conditioned upon full restitution to all injured parties. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of W. Jeffrey McGurk, Respondent.

Opinion No. 25351
Submitted August 7, 2001 - Filed August 27, 2001

PUBLIC REPRIMAND

Henry B. Richardson, Jr., and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

W. Jeffrey McGurk, of Spartanburg, Pro Se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a public reprimand. We accept the agreement. The facts as set forth in the agreement are as follows.

Facts

Respondent represented a client in a property dispute involving a home that was owned jointly by the client and the client's ex-girlfriend. The ex-girlfriend entered into a relationship with a St. George police officer who was involved in a pending divorce and child custody matter. After learning that the officer and the ex-girlfriend had rendezvoused on the property at the center of the dispute between the client and the ex-girlfriend, respondent sent a letter warning the officer not to enter that property. The letter stated that the officer's "failure to abide by this no trespass notice will result in the immediate procurement of a warrant for your arrest for trespass after notice." The letter also suggested that the officer threatened physical harm to the client. Respondent sent copies of this letter to the St. George, Seneca, and Clemson University Police Departments, as well as the attorneys and the guardian ad litem in the divorce matter.

Law

Respondent admits that his conduct violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 3.1 (asserting a frivolous claim or contention); Rule 4.1 (making a false statement of material fact or law to a third person); Rule 4.4 (using means that have no purpose other than to embarrass, delay, or burden); Rule 4.5 (threatening to present criminal charges solely to obtain an advantage in a civil matter); Rule 8.4(a) (violating the Rules of Professional Conduct); and Rule 8.4(e) (engaging in conduct that is prejudicial to the administration of justice).

Respondent also admits that he violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct); Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or tending to bring the legal profession into disrepute); and Rule 7(a)(6) (violating the oath of office taken upon admission to practice law in South Carolina).

Conclusion

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and hereby reprimand respondent.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of George Turner Perrow, Respondent.

Opinion No. 25352
Submitted July 10, 2001 - Filed August 27, 2001

INDEFINITE SUSPENSION

Henry B. Richardson, Jr., of Columbia, for the Office of Disciplinary Counsel.

G. Wells Dickson, Jr. and Lionel S. Lofton, of Lionel S. Lofton Law Offices, both of Charleston, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and Disciplinary Counsel have entered into an agreement pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a definite suspension of no more than two years or an indefinite suspension. We accept the agreement and find an indefinite suspension, retroactive to the date respondent was placed on interim suspension, is appropriate under the circumstances.[1]

[1]Respondent was placed on interim suspension on August 2, 2000. In the Matter of Perrow, 342 S.C. 45, 535 S.E.2d 648 (2000).

Facts

The facts as stated in the agreement are as follows.

I. Estate Matter

Respondent was named personal representative of an estate. As personal representative, he had signatory authority on the estate's checking account. Respondent computed his statutory commission for serving as personal representative to be $5,000 and issued a check payable to himself in that amount dated January 31, 2000. However, when he entered the check in the estate's check register, he indicated it was written to a beneficiary of the estate in the amount of $500.

As personal representative, respondent also undertook to be the unofficial guardian of the aforementioned beneficiary. Rather than make a lump sum disbursement to the beneficiary for a bequest made to him by the deceased, respondent regularly wrote checks to the beneficiary on the estate's account. On or about June 16, 2000, respondent withdrew $4,113.79 from the estate's bank account, the remaining balance in the account, and retained the funds for his personal use. Respondent maintained the funds were to pay the statutory commission he was due as personal representative of the estate and that he had forgotten he had previously paid himself that commission. Following inquiries from the Office of Disciplinary Counsel, respondent reimbursed the estate the sum of $4,113.79 and corrected the entries on the estate's check register.

Respondent also issued a check on the estate's account to himself in the amount of $1,303 for legal services he provided to the estate. Respondent acknowledges that, in retrospect, it was improper for him, in his capacity as personal representative, to engage himself to do legal work for the estate for fees over and above the statutory commission he was due for

serving as personal representative. Finally, Disciplinary Counsel contends, and respondent agrees, that when respondent undertook to provide legal services to the estate, it became incumbent upon him to maintain the funds of the estate in accordance with the requirements of Rule 417, SCACR, which respondent acknowledges he failed to do.

II. Personal Injury/Child Support Matter

Respondent represented a client in a personal injury matter and a child support matter. The written fee agreement in the personal injury matter provided for a one-third contingency fee. When the personal injury matter was settled for $5,500, respondent deposited the settlement check into his general operating account, out of which respondent issued a check to the client for $2,000 and a check to himself for $3,500. Respondent maintains the excess of $1,666.67 over and above the one-third fee set forth in the fee agreement was additional fees due him for representation of the client in the child support matter. Respondent has no correspondence, bills, records, time sheets, or other documentation to support the additional fee; however his files indicate he represented the client in the child support matter. Respondent cannot provide any written documentation indicating the client was aware of or approved the additional payment, and respondent failed to prepare a disbursement sheet in connection with the disbursement of the proceeds from the settlement of the personal injury matter.

Finally, in the personal injury matter, three medical providers were paid a total of $2,712.75 out of respondent's escrow account notwithstanding the fact that no deposit had ever been made on behalf of the client into the escrow account. Moreover, when the payments were made to the medical providers, there were no funds in the escrow account due respondent for fees and costs in those amounts. Accordingly, funds from other clients were used to make the payments.

III. Home Repair Matter

Respondent used client funds in his escrow account to pay for repairs to his personal residence. Respondent has since repaid the monies.

IV. Workers' Compensation Matters

Respondent represented a client in a workers' compensation matter. Although there was no written fee agreement, respondent was to be paid a contingency fee. The matter was settled and the Workers' Compensation Commission (Commission) approved certain disbursements of the proceeds. Instead of disbursing to himself the amount approved by the Commission, respondent disbursed to himself $3,848.26 more than the amount approved by the Commission. Respondent maintains the additional amount was for legal fees respondent felt he was due in connection with other matters he was handling for the client. However, in addition to having no written fee agreement, respondent has no time sheets, no statements or bills nor any correspondence to or from the client to support this representation or to indicate the client knew of or approved of the additional payment. Respondent does have files indicating he performed substantial work for the client on the other matters.

After inquiries by the Office of Disciplinary Counsel, respondent reimbursed the client $3,848.26. Moreover, when the Office of Disciplinary Counsel spoke to the client, the client indicated he had verbally approved respondent retaining the additional fee, but he was under the impression the additional fee was to constitute full payment for the conclusion of long-term disability and social security matters respondent was handling for him. The client indicated the matters were not fully resolved to his satisfaction by respondent and, with the assistance of his daughter, he finally resolved them himself.

On two other occasions, respondent represented the client in workers' compensation matters. On both occasions, respondent was to be

paid a contingency fee, but there was no written fee agreement. Both matters were settled. In one of the matters, fees were disbursed as approved by the Commission. However, in the other matter, after the settlement proceeds were deposited in respondent's escrow account, respondent disbursed a portion of the funds to another client. In addition, he disbursed fees to himself in excess of that approved by the Commission. As a result, a portion of the disbursements made from the escrow account to the client were made using the funds of other clients inasmuch as the proceeds of the settlement had been exhausted. Respondent maintains he felt he was entitled to the excess fee for work he performed for the client on additional social security and long-term disability matters. However, there are no written fee agreements, bills, statements, ledger cards, disbursement schedules, correspondence or other documentation in respondent's records authorizing the excess fee.

In addition, prior to inquiries by the Office of Disciplinary Counsel, the client had not received his full disbursement from the settlement proceeds although more than a year had passed since the matter was settled. Respondent has since used personal funds to pay the client the remaining balance of the disbursement approved by the Commission as well as the excess fee.

V. Probate Matter

Respondent undertook, on a contingency fee basis, representation of four beneficiaries in a contested probate matter. Subsequently, one of the clients was appointed personal representative of the estate. The client then engaged respondent to represent him in his official capacity as personal representative. Respondent undertook the representation despite the fact that he had previously represented the other beneficiaries and without following procedures set forth in Rule 407, SCACR, for dealing with such conflicts of interest.

In addition, respondent was given custody of certain funds of the

estate, but failed to maintain accurate records concerning the funds and failed to comply with the recordkeeping and accounting requirements set forth in Rule 417, SCACR. As a result of errors in recordkeeping, a negative balance developed in the estate funds. A subsequent disbursement made by respondent was therefore taken from funds belonging to other clients. Following inquiries from the Office of Disciplinary Counsel, respondent used personal funds to reimburse the estate as well the personal representative for monies owed.

VI. Secretarial Matter

Respondent acknowledges that reports that his misconduct was related to errors or shortcomings on the part of his secretarial staff were incorrect and he accepts full and sole responsibility for the circumstances leading to his suspension.

Law

Respondent admits that by his actions he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (diligent representation); Rule 1.4(a) (communication with clients); Rule 1.5 (fees); Rule 1.7 (conflict of interest); Rule 1.15 (safekeeping of client funds); Rule 3.3 (candor toward tribunal); Rule 8.4(a) (violation of the Rules of Professional Conduct); Rule 8.4(d) (conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (conduct prejudicial to the administration of justice). Respondent also violated Rule 7 of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, by violating the Rules of Professional Conduct, engaging in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute, violating the oath of office, and willfully violating a valid court order. Finally, respondent failed to comply with the recordkeeping requirements of Rule 417, SCACR.

Conclusion

Although respondent has reconciled his escrow account and has reimbursed all clients or transferred sufficient funds to the attorney to protect clients' interests appointed in this matter so that he may reimburse clients, we find the facts set forth in the agreement warrant an indefinite suspension from the practice of law, retroactive to August 2, 2000, the date of respondent's interim suspension. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

INDEFINITE SUSPENSION.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ellis Franklin, Respondent/Petitioner,

v.

William D. Catoe,
Director, South Carolina
Department of
Corrections, Petitioner/Respondent.

ON WRIT OF CERTIORARI

Appeal From Williamsburg County
M. Duane Shuler, Trial Judge
Thomas W. Cooper, Jr., Post-Conviction Judge

Opinion No. 25353
Heard November 14, 2000 - Filed August 27, 2001

REVERSED IN PART

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, for petitioner/respondent.

Kenneth M. Suggs, of Suggs & Kelly, P.A., of Columbia, and David P. Voisin, of Center for Capital Litigation, of Columbia, for respondent/petitioner.

CHIEF JUSTICE TOAL: The State appeals the post conviction relief ("PCR") court's order granting Ellis Franklin ("Franklin") a new trial on his capital murder charge. Franklin cross appeals the PCR court's ruling that he was not entitled to a new trial on his non-murder charges. We reverse.

FACTUAL/ PROCEDURAL BACKGROUND

In January of 1993, Franklin was found guilty of murder, burglary in the first degree, grand larceny, and criminal sexual conduct in the first degree. In the penalty phase, the jury found four statutory aggravating circumstances and recommended a death sentence. The trial judge sentenced Franklin to death for murder, to ten years for grand larceny, to thirty years for criminal sexual conduct, and to life imprisonment for burglary. This Court affirmed these convictions on direct appeal. *State v. Franklin*, 318 S.C. 47, 456 S.E.2d 357 (1995). Franklin's petition for writ of certiorari to the United States Supreme Court was denied. *Franklin v. South Carolina*, 516 U.S. 856, 116 S. Ct. 160, 133 L. E. 2d 103 (1995).

Franklin then filed for PCR on March 14, 1996. An evidentiary hearing was held on January 27, 1998. The evidentiary hearing was limited to the following allegations in Franklin's petition for relief:

> 1. Applicant did not knowingly or intelligently waive his right to address the jury at the conclusion of the guilt phase of his capital trial as guaranteed by S.C. Code Ann. § 16-3-28 (Supp. 2000) and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.
>
> 2. Applicant was denied his right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States

> Constitution and South Carolina law by the following acts and omissions of trial counsel:
>
> Counsel failed to explain to applicant that he had the right to address the jury at the conclusion of the guilt/innocence phase. *See* S.C. Code Ann. § 16-3-28.

On October 2, 1998, the PCR judge entered an order granting Franklin post conviction relief and requiring a new trial on all the charges. The State then moved to alter or amend the judgment asserting the non-murder charges of burglary, grand larceny, and criminal sexual conduct charges should not be affected by the alleged error and should be reinstated. On February 12, 1999, the PCR judge granted the State's request to limit relief to Franklin's murder conviction. Both parties appealed. This Court granted certiorari as to the State's Questions I and II and Franklin's Question II, and the following issues are before this Court:

> I. Did the PCR court err by finding Franklin did not waive his statutory right to make a personal closing statement in the guilt phase of his trial?
>
> II. Assuming there was no waiver of Franklin's statutory right to make a closing statement in the guilt phase, did the PCR court err by granting a new trial because Franklin did not show he was prejudiced under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 88 L. E. 2d 908 (1984) or Rule 61, SCRCP, by the lack of waiver?
>
> III. Did the PCR court err by denying relief on Franklin's non-capital convictions after finding he had not knowingly and intelligently waived his right to address the jury during the guilt phase of his trial and after finding that counsel was ineffective for not advising him of that right?

LAW/ ANALYSIS

I. Waiver

The State argues the PCR court erred in holding Franklin did not knowingly and intelligently waive his statutory right under S.C. Code Ann. § 16-3-28 to make a personal closing statement during the guilt phase of his capital murder trial. We disagree.

On October 2, 1998, the PCR court granted Franklin post conviction relief on the ground he did not knowingly and intelligently waive his statutory right to make an argument in the guilt phase of his trial.[1] In reviewing a grant of post conviction relief, we are "concerned only with whether there is any evidence of probative value to support the PCR judge's decision." *Palacio v. State*, 333 S.C. 506, 512, 511 S.E.2d 62, 65 (1999); *Skeen v. State*, 325 S.C. 210, 481 S.E.2d 129 (1997). Therefore, the PCR court's findings should be affirmed if there is "any probative evidence" to support the court's findings. *Palacio, supra.*

Section 16-3-28 provides: "Notwithstanding any other provision of law, in any criminal trial where the maximum penalty is death or in a separate sentencing proceeding following such trial, the defendant and his counsel shall have the right to make the last argument." Before the abolition of *in favorem vitae* review, we held in *State v. Orr*, 304 S.C. 185, 403 S.E.2d 623 (1991), a capital defendant was entitled to reversal of his conviction where the trial judge failed to obtain an on-the-record waiver of the defendant's statutory right under section 16-3-28. *See also State v. Cooper*, 312 S.C. 90, 439 S.E.2d 276 (1994); *State v. Reed*, 293 S.C. 515, 362 S.E.2d 13 (1987), *overruled in part by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

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[1]The trial court did obtain an on-the-record waiver during the penalty phase of the trial.

After *in favorem vitae* review was abolished, we stated the appropriate forum for addressing this issue was a post conviction relief proceeding "where the facts surrounding the trial can be fully explored." *State v. Rocheville*, 310 S.C. 20, 25, 425 S.E.2d 32, 35 (1993); *Cartrette v. State*, 323 S.C. 15, 448 S.E.2d 553 (1994); *State v. Torrence*, *supra*. We found "[t]he post conviction relief process is specifically designed to allow for an inquiry into the relevant facts surrounding the adequacy of a defendant's information and/or waiver of rights . . ." *Cartrette*, 323 S.C. at 18, 448 S.E.2d at 555. Therefore, under the current law, a petitioner for post conviction relief may no longer rely solely on the trial record to demonstrate the lack of waiver. The PCR court should analyze all the facts surrounding the trial to determine if a petitioner knowingly and intelligently waived his rights under section 16-3-28.

The trial record, PCR transcript, affidavits, and depositions support the PCR court's finding that Franklin did not knowingly and intelligently waive his right. There was no *on-the-record* waiver of Franklin's statutory right to personally address the jury at the end of the guilt phase. At the conclusion of the guilt phase, the trial court merely stated the order of closing arguments, but did not mention a defendant's right to address the jury. After reviewing the record, we cannot find any reference to Franklin's rights under section 16-3-28 until the penalty phase of the trial.[2]

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[2]During the *penalty* phase of the trial the following colloquy between the defense and the court occurred:

> THE COURT: [W]hile we're doing it I want him to understand that he also has the right – *as he did at the last phase* – he has the right to make an argument along with you or Mr. Carraway, whoever makes the argument. He has the right to speak to the jury as well and I need to know whether or not he, you know desires to do that.
>
> I want to make him aware of it, know he's aware of it – *was aware before* but I want to make sure he was aware of it *again* at this stage . . . I want to know – be sure that he

Testimony at the PCR hearing further supports Franklin's argument that

> understands that he has a right to do both [testify and argue]. . . (emphasis added).
>
> THE COURT: All right, sir, and the same is true of your closing argument. Mr. Barr or Mr. Carraway will make the last argument. The state has to argue first in this portion of the trial, and your lawyers or lawyer has the right to argue last just like he did in the last portion of the trial *and you have the same right*. You've got the right – *just like you did before* – you've got the right to stand before the jury at this time – at the end of this phase of the trial – and tell them anything you want to tell them about yourself or about anything about the facts of the case or anything that you want to say you've got the right to do it.
>
> And I just want to make you aware of that fact and would like to know before – before– we make final arguments I would like for you all to come and let me know what his intention is just before you make the argument. I don't want to pin him down now. I'll let him think about it but I'm going to – I need to know whether he's waiving his right or whether he wants to do it before it happens. That's the thing I've got to get on the record. (emphasis added).

After these remarks by the court, neither defense counsel made any comment or took any action which would indicate they were receiving this knowledge for the first time. The State argues this inaction by Franklin's attorneys speaks volumes about their actual knowledge at that time. The State further contends this penalty phase inquiry was sufficient to appraise and to verify the preexisting knowledge of Franklin and his counsel of the right as it existed in the guilt phase. We find this passing reference in the *penalty* phase does not imply Franklin waived his right during the *guilt* phase. The judge's comments were too little and too late.

no waiver occurred. Two defense attorneys represented Franklin in his initial trial. Although it was not their first murder trial, it was the first capital case tried by either attorney. One of Franklin's attorneys testified he did not know at the time of trial a defendant had the right to make a closing argument in the guilt phase and did not advise Franklin he had such a right. He stated if he had known of the right, he "would have advised [Franklin] that was his right and certainly would have left it up to him to make a decision regarding what he wished to do." Co-counsel testified similarly. He stated at the time of the trial he was not aware of the guilt phase statutory right. He further stated he personally did not advise Franklin of this right, and, to his knowledge, his co-counsel had not either. Former solicitor Wade Kolb, the prosecutor in Franklin's case, also testified at the PCR hearing. He stated he did not specifically hear the trial court discuss a defendant's rights under section 16-3-28 with either defense counsel or Franklin. Finally, Franklin testified before the PCR judge. He stated neither of his counsel ever informed him of a statutory right to make a closing argument in the guilt phase.

Therefore, there is ample probative evidence to support the PCR court's finding that Franklin did not waive his right to make a personal argument during the guilt phase of the trial. The PCR court was correct in finding Franklin did not knowingly and intelligently waive his right under section 16-3-28.

II. Prejudice

The State argues the PCR court erred in granting Franklin a new trial because Franklin did not show he was prejudiced under *Strickland* by the lack of waiver. We agree and hold Franklin should have been required to show prejudice under *Strickland*.

In order to prevail in a PCR action, an applicant has to satisfy a two prong test.[3] First, he must show his counsel's performance fell below an objective

[3]Franklin asserts two separate grounds for relief: (1) ineffective assistance of counsel; and (2) denial of his right under section 16-3-28. We analyze under the *Strickland* prejudice standard, however, the same result would be reached

standard of reasonableness. Secondly, he is required to prove he suffered prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 88 L. E. 2d 908 (1984); *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). To prove prejudice, an applicant must show there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* Franklin has met his burden as to the first prong of the test by showing his counsel did not apprise him of his rights under section 16-3-28 and did not object to the trial court's failure to obtain a waiver. The State contends Franklin must also prove prejudice in this case, while Franklin argues South Carolina case law provides he is not required to show prejudice in this instance. We find Franklin is required to prove prejudice.

Franklin is correct in observing that prior South Carolina cases have not undertaken a prejudice analysis when holding the defendant was entitled to a

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under the harmless error standard. An error is harmless where it could not reasonably have affected the result of the trial. *State v. Reeves*, 301 S.C. 191, 391 S.E.2d 241 (1990). Although the *Strickland* prejudice standard arguably places a greater burden on the defendant than the showing required to obtain reversal on direct appeal, the overwhelming evidence of guilt, as discussed below, negates any claim that the denial of Franklin's right under section 16-3-28 could have "reasonably affected the result" of his trial.

The dissent argues a violation of a statutory right, in this case of section 16-3-28, should be analyzed under a different standard than other PCR claims. This Court has never made such a distinction. In analyzing a PCR claim, this Court applies a *Strickland* prejudice standard. As discussed below, this Court in *Torrence, supra*, abolished *in favorem vitae* review in part because of its faith in the PCR system. The Court held that where counsel fails to object to an error committed during trial, PCR would be the proper and effective forum for a defendant to bring his claims. In a PCR proceeding, the applicant has always had the burden of demonstrating prejudice. This Court has never made a distinction between failure to object to a statutory violation and failure to object to any other type of error.

new trial on the ground the court failed to obtain a waiver of allocution rights under section 16-3-28. However, this is the first case which addresses this issue on post conviction relief.[4] In *State v. Reed*, 293 S.C. 515, 362 S.E.2d 13 (1987), we reversed defendant's murder conviction on the ground he did not knowingly and intelligently waive his right to make a personal closing statement. This Court stated, "Speculation as to whether appellant was prejudiced by being denied his right to final argument is inappropriate in this situation." *Id.* at 518. Additionally, in *State v. Orr*, 304 S.C. 185, 403 S.E.2d 623 (1991), *State v. Charping*, 313 S.C. 147, 437 S.E.2d 88 (1993), and *State v. Cooper*, 312 S.C. 90, 439 S.E.2d 276 (1994), we held that failure to obtain a knowing and voluntary waiver of the statutory rights under section 16-3-28 was alone ground for reversal. In none of these cases did the Court undertake a prejudice analysis.[5]

However, all of these cases were decided before our decision in *Torrence, supra*, where this Court abolished *in favorem vitae* review of death penalty cases. As discussed in detail in *Torrence*, the reasons and basis for the Court's adoption of *in favorem vitae* review no longer exist. When *in favorem vitae* review was established, the appellate review system did not include a post conviction relief system. Presently, with such a system in place, the Court reasoned, "In situations where an objection is not made due to alleged ineffective assistance of defense counsel, we hold the more preferable method of exploring this issue is via the avenue of an application for post conviction relief." *Torrence*, 305 S.C. at 66, 406 S.E.2d at 326. In the instant case, Franklin's counsel failed to make an objection, and the proper review of this alleged error is in an application for post conviction relief. In a post conviction proceeding, the applicant's burden has always been to demonstrate prejudice.

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[4]Although it could be argued that a harmless error analysis is also appropriate on direct appeal, note that in *Cartrette* and *Rocheville*, this Court stated a PCR proceeding was the appropriate forum for addressing the issue of voluntary waiver under section 16-3-28, therefore in the future, the issue is unlikely to be addressed on a direct appeal.

[5]The PCR court's order relied on these cases when holding Franklin did not have to show prejudice in order to be entitled to relief.

Strickland, supra.

The facts of the instant case are a clear illustration why due process is not offended by, and public policy supports, the application of a prejudice analysis to this type of statutory error. First, we note the harmless error rule and a prejudice analysis are no strangers to cases involving the death penalty. For example, the United States Supreme Court has approved the application of a harmless error analysis in death penalty cases even when a defendant's constitutional rights have been violated. *See Yates v. Evatt*, 500 U.S. 391, 111 S. Ct. 1884, 114 L. E. 2d 432 (1991) (jury charge on malice unconstitutionally shifted the burden of proof from the State to the defendant, nonetheless the constitutional violation was subject to harmless error analysis); *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. E. 2d 302 (1991) (admission of an involuntary confession subject to a harmless error analysis); *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. E. 2d 705 (1967) (harmless error analysis used where state prosecutor's argument and trial judge's instruction continuously and repeatedly impressed to the jury that since defendant refused to testify, all the inferences from facts in evidence had to be drawn in state's favor). Our Court has also acknowledged the appropriateness of a harmless error analysis even when a defendant's constitutional rights have been violated. *See Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992), *cert. denied*, 507 U.S. 927, 113 S.Ct. 1302, 122 L.Ed. 2d 691 (1993) (in this death penalty case, the malice instruction was found to be in violation of *Sandstrom v. Montana*, 422 U.S. 510, 99 S. Ct. 2450, 61 L. E. 2d. (1979), thus unconstitutional, but subject to harmless error standard).

Second, we note this error occurred during the guilt phase, where the jury is confined to determining whether Franklin committed the crime, not whether he deserved the death penalty. Had Franklin been apprised of his right to address the jury during closing, and had he chosen to do so,[6] he would have

[6]Even if Franklin was aware of his right to argue, it is unlikely he would have chosen to do so. Franklin's attorneys testified they did not think Franklin should personally address the jury during the penalty phase since he did not make a good impression on the jury during his guilt phase testimony.

been arguing for his innocence, not pleading for his life. However, the jury had already heard Franklin argue for his innocence when he testified in his own defense. Franklin testified he had consensual sexual intercourse with the victim on the date of the murder, but he denied killing the victim. Therefore, the jury had the opportunity to hear and consider Franklin's side of the story. The fact that Franklin did appear before the jury during the guilt phase, even if his appearance was not during the closing, demonstrates due process and fundamental fairness were not offended by the error.

Third, it is important to note the policy behind a harmless error and prejudice analysis. These rules are rooted in the fundamental goal of the criminal justice system - that no citizen forfeit his life or liberty unless found guilty beyond a reasonable doubt. As discussed below, it is clear beyond a reasonable doubt the correct man was found guilty of this crime. Based on a review of the evidence presented, we can find no evidence whatsoever the jury would have rendered a different verdict had the error not been made.

Finally, the evidence of guilt in this case is overwhelming. The facts in brief are as follows. Victim Jennifer Martin and family members attended a cousin's wedding earlier in the day. Thereafter, Jennifer visited her grandmother, then drove to her mother's house about 11:00 p.m. to use the telephone. Her mother left the house shortly before Jennifer arrived. Jennifer had a ten minute conversation with her fiancé, beginning at 11:13 p.m. Shortly after midnight, less than 45 minutes after the victim had spoken with her fiancé, police found Jennifer's car abandoned across town with the engine running and the lights on. Police determined ownership, proceeded to the mother's house, and discovered Jennifer's badly battered, partially nude body. She had been raped, violently beaten, and sexually assaulted with a broomstick. The post mortem examination demonstrated that Jennifer suffered many pre-mortem injuries. The photographs introduced at trial showed extensive pre-mortem injuries, and these injuries led the jury to find the aggravating circumstance of physical torture. Franklin's own testimony placed him at the scene of the crime. It is impossible to believe a reasonable juror could find the violent brutality of this murder to be the result of consensual sex, as Franklin claimed. Furthermore, Franklin's bloody palm print was left on the fan that crushed the victim's head. DNA analysis confirmed the semen found on the victim's body

belonged to Franklin. Necklaces belonging to the victim were found in Franklin's possession. Blood on Franklin's pants matched the blood found on the fan and victim. Considering the evidence of guilt and malice outlined above,[7] Franklin's testimony in front of the jury, and his attorney's closing argument, there is no reasonable possibility Franklin's failure to make a personal closing argument to the jury during the guilt phase of his trial contributed in any way to his convictions.

In conclusion, we find a prejudice analysis is appropriate for the error committed in this case.[8] To the extent *State v. Orr*, *State v. Cooper*, *State v. Charping*, and *State v. Reed* hold differently, they are overruled. Since there is no reasonable probability that but for counsel's deficient performance, the result

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[7]For a more detailed discussion of the evidence of guilt and malice displayed by Franklin at the crime scene see *State v. Franklin*, 318 S.C. 47, 456 S.E.2d 357 (1995).

[8]The dissent argues imposing a prejudice analysis places a "virtually insurmountable obstacle" in the way of a convicted capital defendant. While there may be some instances where prejudice may be presumed because of the nature and circumstances surrounding the error, this is not one of those rare instances. The error in this case occurred during the guilt phase of Franklin's trial. Had he exercised his statutory right under section 16-3-28 during the guilt phase, he would have argued for the jury to believe his side of the story. As discussed previously, Franklin exercised his opportunity to testify and tell the jury his side of the story. The jury received all the overwhelming evidence, including Franklin's own testimony, and rendered a verdict of guilty. Nothing in the facts or circumstances surrounding this guilt phase error makes a prejudice analysis inappropriate or a "virtually insurmountable obstacle."

Furthermore, as discussed previously, both the Unites States Supreme Court and this Court have held a harmless error analysis is appropriate where a capital defendant has suffered a deprivation of a *constitutional right*. It is hard to reason why a statutory right, enacted by our state legislature, should be given a higher importance than rights guaranteed by the Constitution of the United States.

of Franklin's trial would have been different, we find Franklin suffered no prejudice. We reverse the PCR court's order granting Franklin a new trial.[9]

III. Non-Murder Convictions

Franklin argues the PCR court erred in denying him relief on his non-murder convictions of burglary, grand larceny, and criminal sexual conduct after finding he had not knowingly and intelligently waived his right to address the jury at the close of the guilt phase. In light of our holding above, reinstating Franklin's murder conviction, it is not necessary to reach the merits of Franklin's argument.

CONCLUSION

For the foregoing reasons, we **REVERSE** in part the findings of the PCR court and reinstate Franklin's murder conviction.

MOORE, WALLER and BURNETT, JJ., concur. PLEICONES, J. dissenting in a separate opinion.

[9]For further policy arguments concerning the appropriateness of a prejudice analysis in this case see *Charping*, *supra* (Goolsby, AAJ, joined by Justice Toal, concurring in part and dissenting in part).

JUSTICE PLEICONES: We granted cross-petitions for certiorari to review a post-conviction relief (PCR) order granting respondent-petitioner (Franklin) a new trial on his capital murder charge but denying him relief on the other three convictions[10] arising out of his death penalty trial. The majority reverses the order granting Franklin relief and therefore does not reach the remedy issue he raises. I would grant Franklin a new trial on the murder charge only, and therefore respectfully dissent.

A. State's Petition

The PCR judge found, and the majority agrees, that Franklin was never informed of his statutory right to argue to the jury during the guilt phase of his trial. See S.C. Code Ann. § 16-3-28 (Supp. 2000). Based on this finding, the judge granted relief on two grounds:

> (1) Franklin's trial counsel's performance was ineffective in violation of the sixth amendment;[11] and
>
> (2) Franklin's conviction was obtained "in violation of the . . . laws of this State .. .."[12]

As explained below, I agree that Franklin cannot prevail on his ineffective assistance claim. I would hold, however, that the violation of state law which occurred here compels us to grant a new trial.

i. Ineffective Assistance

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[10]Franklin was convicted of murder, first degree burglary, first degree criminal sexual conduct, and grand larceny. See State v. Franklin, 318 S.C. 47, 456 S.E.2d 357 (1995).

[11]U.S. Const. amend. VI.

[12]See S.C. Code Ann. § 17-27-20(a)(1)(1985).

In order to obtain relief on an ineffective assistance of counsel claim, a PCR applicant must establish both that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by counsel's deficient performance. Strickland v. Washington, 466 U.S. 668 (1984); Brown v. State, 340 S.C. 590, 533 S.E.2d 308 (2000). In this case, there is no question but that Franklin's trial attorneys performed below professional norms. Their admitted failure to review the applicable statutes when they undertook to represent this individual charged with capital murder should undermine our confidence in the integrity of our judicial system. No defendant, most especially one facing the death penalty, should be afforded such perfunctory representation.

Franklin's sixth amendment claim also requires that he demonstrate prejudice, that is, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. at 694. Even where, as here, counsels' performance has deprived the defendant of a substantive or procedural right to which the law entitled him, he must establish Strickland prejudice in order to prevail. Williams v. Taylor, 592 U.S. 362 (2000); see Brown v. State, supra. Whether there is a reasonable probability that, but for the error the result would have been different, is a fact-intensive inquiry. Strickland v. Washington, 466 U.S. at 695-96. I agree with the majority that, given the overwhelming evidence of Franklin's guilt, there is no reasonable probability that a jury would have returned a not guilty verdict had Franklin been informed of, and chosen to exercise, his statutory right to argue to the jury.

I therefore concur in the majority's opinion insofar as it reverses the grant of PCR because of a sixth amendment violation.

B. Violation of State Law

We are free to decide the statutory violation issue under the standard we deem appropriate. I would hold that when a capital defendant is denied the opportunity to exercise a statutory right afforded him by our death penalty

statutes,[13] we must reverse.

In my opinion, we must honor the General Assembly's prerogative to establish the procedural safeguards which it deems necessary to the fair administration of the death penalty. Where the legislature has prescribed a departure from the procedures observed in "ordinary" criminal trials, those deviations should be scrupulously honored. I would thus not engage in a prejudice analysis where the undisputed facts do not demonstrate a conscious waiver or strategic decision to forego one of the special protections mandated by the capital statutes. When a capital defendant is deprived of the opportunity to exercise one of these statutory rights, whether through ignorance or design, I would hold that justice requires we grant a new trial.

Even if we were to require a showing of prejudice, Franklin has met that burden here. In four prior decisions, we have granted relief to capital defendants who suffered this same delict. See State v. Cooper, 312 S.C. 90, 439 S.E.2d 276 (1996); State v. Charping, 313 S.C. 147, 437 S.E.2d 88 (1993); State v. Orr, 304 S.C. 185, 403 S.E.2d 623 (1991); State v. Reed, 293 S.C. 515, 362 S.E.2d 13 (1987). In all four cases, the reversals resulted from this Court's *in favorem vitae* review. By definition, the error was found to be inherently prejudicial. See e.g., Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 519 (1993)("*In favorem vitae* review requires us to painstakingly inspect capital cases to determine whether prejudicial error has been committed in a trial . . . ."). We subsequently abandoned our rule of automatic reversal where no waiver of this right to address the jury appeared on the record, recognizing that a collateral inquiry may reveal a knowing, intelligent, and voluntary waiver. See e.g., State v. Rocheville, 310 S.C. 20, 425 S.E.2d 32 (1993) (where trial record is silent on waiver of right to address jury in guilt phase, issue may be fully explored at PCR to determine whether defendant was adequately informed of right but chose to waive it for strategic reasons); see also Cartrette v. State, 323 S.C. 15, 448 S.E.2d 553 (1994).

In State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), this Court

[13]S.C. Code Ann. §§ 16-3-20 through -28 (Supp. 2000).

agreed to abolish the doctrine of *in favorem vitae* because, among other things, the adoption of the Uniform Post Conviction Relief Act[14] in 1969 and the revitalization of the great writ of habeas corpus in 1990[15] assured that "[O]ther mechanisms of protection and of relief have now been created for the [capital] defendant which safeguard [him] and render the protections afforded by *in favorem vitae* surplusage." Id. at 61, 406 S.E.2d at 324.[16]

In my opinion, if we are to safeguard the rights of the capital defendant and follow our precedents, then the only issue before this Court is whether there is any evidence of probative value in the record to support the PCR judge's finding that Franklin did not waive his statutory right to address the jury at the close of the guilt phase of his trial. Humbert v. State , Op. No. 25314 (S.C. Sup. Ct. filed June 25, 2001)(Shearouse Adv. Sh. No. 23 at p. 64); State v. Rocheville, supra. I disagree with the majority's decision applying the Strickland prejudice standard to our analysis of this state law issue. The effect of imposing this requirement is to place a virtually insurmountable obstacle in the way of a convicted capital defendant who has been deprived of one of these statutory rights.[17]

B. Franklin's Petition

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[14]S.C. Code Ann. §§ 17-27-10 through -160 (1988 and Supp. 2000).

[15]See Butler v. State, 302 S.C. 466, 397 S.E.2d 87 (1990).

[16]Among the other grounds advanced for the abolition of the doctrine was "the advances in the quality of legal representation." Id. at 60, 406 S.E.2d at 324. As this case demonstrates, we must not assume that capital defendants will necessarily be afforded competent representation.

[17]Since the ultimate sanction is reserved for the "worst of the worst," it will be a rare death row inmate who can demonstrate a "reasonable probability" of a different outcome where, for example, the statutory waiting period required between the guilty verdict and the commencement of the penalty phase is not observed, or even where separate sentencing and penalty hearings are not held.

Franklin contends the PCR court erroneously limited relief to the murder charge alone. I disagree. See State v. Cooper, supra; State v. Charping, supra (both reversing only the murder conviction for lack of a waiver of the right to closing argument in the guilt phase).

Conclusion

For the reasons given above, I would affirm the issues raised in the State's petition and the issue raised in Franklin's petition. Accordingly, I would affirm the PCR order granting a new trial on the murder charge only.

The Supreme Court of South Carolina

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, the following amendments are made to Rule 403, SCACR.

(1) The phrase "eleven (11) trial experiences" in the first sentence of section (c) is replaced by the phrase "ten (10) trial experiences."

(2) The phrase "three (3) trials" in section (c)(4) is replaced with the phrase "two (2) trials."

(3) Sections (g) and (h) are renumbered as sections (i) and (j).

(4) The following are added as sections (g) and (h):

> **(g) Circuit Court Law Clerks and Federal District Court Law Clerks.** A person employed full time for nine (9) months as a law clerk for a South Carolina circuit court judge or as a law clerk for a Federal District Court Judge in the District of South Carolina may be certified as having completed the requirements of this rule by participating in or observing two (2) family court trials which meet the requirements of (c)(4) above. A part-time law clerk may be certified in a similar manner if the law clerk has been employed as a law clerk for at least 1350 hours. The law clerk must submit a statement from a judge or other court official certifying that the law clerk has been employed as a

law clerk for the period required by this rule. A Certificate (see [e] above) must be submitted for the family court trials.

(h) Appellate Court Law Clerks and Staff Attorneys. A person employed full time for eighteen (18) months as a law clerk or staff attorney for the Supreme Court of South Carolina or the South Carolina Court of Appeals may be certified as having completed the requirements of this rule by participating in or observing two (2) trials. Each trial must meet the requirements of (c)(1), (2) or (4) above, and only one (1) family court trial may be used. A part-time law clerk or staff attorney may be certified in a similar manner if the law clerk or staff attorney has been employed as a law clerk or staff attorney for at least 2700 hours. The law clerk or staff attorney must submit a statement from a judge, justice or other court official certifying that the law clerk has been employed as a law clerk or staff attorney for the period required by this rule. A Certificate (see [e] above) must be submitted for the trials.

These changes shall be effective immediately.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
August 22, 2001