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).

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.

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.

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

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.

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.