ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JAN 09 2018
S.C. SUPREME COURT

January 9, 2018

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

RE: **Daggart Bernard Frazier v. State of South Carolina**
2015-CP-02-1841

Dear Mr. Shearouse:

I am enclosing the original and one (1) copy of a Notice of Appeal in the above case.

Sincerely,

for Julie A. Coleman
Assistant Attorney General

JAC:ces
Enclosures

cc: Aimee J. Zmroczek, Esquire
Trisha Allen, Victim Services (letter only)

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JAN 09 2018

S.C. SUPREME COURT

Appeal from Aiken County
J. Mark Hayes, II, Circuit Court Judge

Case No. 2015-CP-02-01842

DAGGART BERNARD FRAZIER, #237617,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the order of the Honorable J. Mark Hayes, II, dated October 25, 2017 and filed November 6, 2017, granting post-conviction relief to Respondent. The State filed a motion to reconsider, which was denied by an Order dated December 19, 2017, and filed December 22, 2017. A copy of the order on appeal is attached to this notice.

[signature page to follow]

Respectfully submitted,

ALAN WILSON
Attorney General

JULIE A. COLEMAN
Assistant Attorney General
SC Bar #102214

Office of the Attorney General
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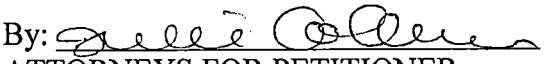
Columbia, SC 29211
(803)734-3737

By: 
ATTORNEYS FOR PETITIONER

Columbia, South Carolina
January 9, 2018

Other counsel of record:

Aimee J. Zmroczek, Esquire
A.J.Z. Law Firm, LLC
P.O. Box 11961
Columbia, SC 29211

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Aiken County
J. Mark Hayes, II, Circuit Court Judge

Case No. 2015-CP-02-01842

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S.C. SUPREME COURT

DAGGART BERNARD FRAZIER, #237617,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

PROOF OF SERVICE

I, Julie A. Coleman, Counsel for Petitioner, certify that I have today served the within notice of appeal upon Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

Aimee J. Zmroczek, Esquire
A.J.Z. Law Firm, LLC
P.O. Box 11961
Columbia, SC 29211

I further certify that all parties required by Rule 243 and Rule 203 to be served have been served this 9th day of January, 2018.

Julie A. Coleman
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P.O. Box 11549
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Attorney for Petitioner

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	IN THE SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN)	
)	C/A No.: 2015-CP-02-01842
)	
Daggart Bernard Frazier, #237617)	
)	
Applicant,)	ORDER GRANTING
-v-)	POST-CONVICTION RELIEF
)	
State of South Carolina,)	
)	
Respondent.)	
)	

This matter came before the Court pursuant to an application for post-conviction relief filed August 3, 2015 by Bernard D. Frazier. The State filed a return dated November 17, 2015. An Amended Application was filed by Applicant's counsel on May 16, 2016, no amended return was filed. An evidentiary hearing was convened at the Aiken County Judicial Center on September 18, 2017. The Applicant was present and represented by Aimee J. Zmroczek, Esquire. The State was represented by Julie Coleman, Assistant Attorney General.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to a conviction in Aiken County. The Applicant was true billed indicted March 2014 for burglary - first degree (2014-GS-02-00359), assault and battery – third degree (2014-GS-02-00360), and possession of a weapon during the commission of a violent crime (2014-GS-02-00358). He was represented at trial by Michael Routzoug, Esq. On May 19-21, 2014, the Applicant was tried and convicted of burglary - first degree and assault and battery – third degree; and acquitted of possession of a weapon during the commission of a violent crime following a jury trial before the Honorable Donald B. Hocker. Judge Hocker sentenced Applicant to a fifteen year

term of imprisonment for burglary - first degree and thirty days for assault and battery – third degree.

A timely notice of appeal was filed on Applicant's behalf and an Anders brief was submitted. Applicant filed a pro-se brief as well. The South Carolina Court of Appeals dismissed the appeal via an unpublished opinion. State v. Frazier, 2015-UP-319 (Ct. App. Filed July 1, 2015). The Remittitur was issued on July 23, 2015.

STANDARD OF REVIEW

In a post-conviction relief proceeding, the Applicant bears the burden of proving his allegations by a preponderance of the evidence. Caprood v. State, 338 S.C. 103, 109-110, 525 S.E.2d 514, 517 (2000); Rule 71.1(e). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Cronic v. United States, 446 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The correct measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, *supra.* "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case." Caprood, *supra.* At 109, 525 S.E.2d at 517 (citations omitted). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional

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norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. When an Applicant challenges his conviction after a trial, the proper consideration is whether there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt. Smith v. State, 375 S.C. 507, 515, 654 S.E.2d 523, 527-28 (2007) (citations omitted). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In order to receive relief, an applicant must prove both ineffective assistance and resulting prejudice. See, e.g., Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

A defendant is also constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (to be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair); Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999); Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990) (appellate counsel must provide effective assistance, but need not raise every non-frivolous issue presented by the record).

The burden of proof is upon petitioner to show counsel's performance was deficient as measured by the standard of reasonableness under prevailing professional norms. The petitioner must then prove that because of appellate counsel's deficient performance there is a reasonable probability that, but for appellate counsel's unprofessional errors, the result of the proceeding (appeal not trial) would have been different. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). When a claim of ineffective assistance of counsel is based upon failure to raise viable

issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986).

ALLEGATIONS

Mr. Frazier alleged in his applications and at the hearing that he is entitled to post-conviction relief for the following reasons:[1]

1. Trial counsel did not join in Appellant's motion to be relieved due to the complete breakdown in communication and Appellate counsel did not raise the issue on appeal.
2. Trial counsel did not investigate and prepare for trial including issuing subpoenas for telephone records and prepare for cross-examination of alleged victim.
3. Trial counsel did not make proper objections which allowed in improper testimony and could not be reviewed on appeal.
4. Trial counsel did not move for a new trial under the theory of inconsistent verdicts and could not be reviewed on appeal.
5. Trial counsel did not request a continuance or challenge the Solicitor's control of the trial docket in calling the case pursuant to Langford, and Appellate counsel did not raise the issue on appeal.

SUMMARY OF RELEVANT FACTS

On December 18, 2013, the applicant was arrested for burglary - first degree, assault and battery – third degree, and possession of a weapon during the commission of a violent crime following his longtime on again-off again girlfriend (Jacqueline Key) reported to police that Applicant broke into her home on the evening of December 16, 2013. Ms. Key claimed that

[1] Relief is denied on all other allegations raised by Applicant in his application and amended application filings.

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Applicant did not live there and that he broke in the door and assaulted a male guest with a gun. The day after the alleged break in and assault with a weapon, Ms. Key met with the Applicant at least once or twice subsequent to the alleged incident had several telephone conversations and claims that she called Aiken County Sheriff's Department but they never responded until two days later when Applicant was arrested. The solicitor received discovery and provided the same to trial counsel on January 30, 2014. Applicant was noticed for trial February 24, 2014 and filed a motion to relieve counsel on March 27, 2014.

PCR HEARING

The Applicant, his sister-in law, Kierra Martin, his brother, Daryl Frazier, Christopher Watkins of Watkins Digital Forensics and Investigations, and trial counsel testified at the hearing. The Applicant testified on direct examination that trial counsel met with him one time and a few times with the office of the public defender on the phone. He testified that he asked his attorney to gather records that would help show that he lived at the residence and that Ms. Key had been in contact with him after this alleged incident. Applicant testified that he received a letter from trial counsel advising him that his case was on the trial roster. He testified that nothing he requested was done and he filed a motion for substitution of attorney[2] laying out the reasons he was seeking a different attorney. Applicant claimed that specific defenses were never discussed nor did he have an opportunity to review all the discovery including listening to calls. Applicant not only filed a pro se motion, but argued his position on the record with the trial judge regarding his request for a new attorney and for a continuance. These issues will be discussed fully below.

The applicant repeated his trial testimony that he had told the trial judge there was such a breakdown in communication and he asked for a continuance which he was denied. He told the

[2] Applicant's Exhibit 1

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trial judge that he had asked trial counsel to request evidence to support his defense which trial counsel had not done. The applicant testified trial counsel never explained to him how the case would be defended. He testified he wanted trial counsel to call witnesses to testify as to the Applicants living situation and post incident interactions with Ms. Key.[3] Applicant testified that he never once spoke with anyone from appellate defense and after he received the Anders brief he tried to file one of his own briefs.

Ms. Martin and Mr. Daryl Frazier both testified at the hearing as to the nature of the relationship between the parties as well as knowing Applicant lived with Ms. Key and they saw her the next day consuming alcohol and attempting to get money and alcohol from the Applicant. Neither witness were ever interviewed by trial counsel prior to trial and only one, Ms. Martin, was called as a witness in front of the jury.

Mr. Chris Watkins testified that he has been a licensed SLED investigator since 2005. He frequently is hired by criminal defense attorneys to assist in investigating cases. Mr. Watkins testified that he contacted Aiken County Sheriff's Department and could find no record of any calls Ms. Key claims she made to law enforcement after the incident[4]. Additionally, Mr. Watkins testified that he attempted to get telephone records from both the Applicant's and Ms. Key's telephones but since so much time had passed, the companies no longer retained the records.

Trial counsel seemingly agreed during cross-examination that he may have only met face to face with the Applicant one time but he does recall speaking with him "several times" over the telephone. Trial counsel testified that his strategy was to try the case as a "he said she said" defense. He testified that he thought he had attempted to subpoena the telephone and had no

[3] Trial counsel did call one of these witnesses but did not interview or prepare her before trial and did not ask the questions pertinent to Applicant's defense. This witness did testify at the hearing along with another witness who corroborated the Applicant's position.

[4] This could have been used for impeachment.

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explanation as to why he never followed up. Trial counsel agreed the timeline was accurate that 43 days had passed from the time Applicant was arrested until the assistant solicitor received discovery. It was 68 days from the day the Applicant was arrested until the solicitor issued the trial notice. Trial counsel admitted that 25 days had passed from when he received the discovery until the trial notice and that there was a total of 109 days from receiving the discovery and starting the trial date. Trial counsel was aware that burglary – first degree is a most serious violent strike for which the Applicant could have been sentenced to life.

When cross-examined about the objections, trial counsel admitted he "missed" some and "should have" made some objections but was focused on the he-said/she-said defense. He indicated that he did not discuss self-defense with the Applicant. With regard to Applicant's pro se motion, it was heard in open court and after the trial judge took a break for counsel and applicant to discuss the issue of his representation, counsel informed the judge that "the great issue right now has been kind of a complete breakdown in communication. I think could affect his cooperation and his, outcome of this trial." He testified he was not familiar with the rules of ethics associated with representation and in hindsight, he should have explored that. Lastly, trial counsel said he did not ever consider filing a post-trial motion

Set forth below are the relevant findings of fact and conclusions of law, as required by S.C. Code Ann. § 17-27-80 (2003):

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In considering the Applicant's case, this court had before it the Applicant's PCR file, including all pleadings filed, the records of the Aiken County Clerk of Court regarding the conviction, the Applicant's submissions at the hearing, the trial transcript, and the testimony at the evidentiary hearing. The court's findings are as follows.

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1. Trial counsel did not join in Appellant's motion to be relieved due to the complete breakdown in communication and Appellate counsel did not raise the issue on appeal.

Applicant filed a motion for substitution of attorney[5] with the Aiken County Clerk of Court dated March 25, 2014, and filed March 27, 2014. There is a handwritten note from the clerk indicating that a copy of the motion would be forwarded to the solicitor's office, Judge Early, the resident Judge, and Michael Routzoug, Appellant's attorney. Prior to the trial, but after jury selection, Appellant was sworn in and the motion was heard. (Trial Tr. p.31 lines 3-11). While under oath Appellant described to the trial judge how trial counsel had only been to the "jailhouse" to see him one time which was consistent with what Applicant asserted at trial. Appellant stated "[s]o conversation have been broken down, you know what I'm saying. So I just hoping y'all appoint me another attorney." emphasis added (Trial Tr. p.31 lines 22-25). Applicant went on to state, as he did at the hearing, that trial counsel had not devoted enough time to his case. (Trial Tr. p.32 lines 21-24). Trial counsel confirmed on the record that he had only been to see Applicant one time but spoke with him several times over the phone. (Trial Tr. p.33 lines 14-18). After further inquiry, Applicant tells the trial judge that he has asked trial counsel to subpoena phone records and public safety records. (Trial Tr. p.37 lines 6-8).

After the judge took a break for counsel and applicant to discuss the issue of his representation, counsel informed the judge that "the great issue right now has been kind of a complete breakdown in communication. I think could affect his cooperation and his, outcome of this trial." emphasis added (Trial Tr. p.38 lines 12-17). Trial counsel goes even further to state, "I would characterize it as a substantial breakdown in communication." emphasis added (Trial Tr. p.38 lines 22-23). Even with that assertion from trial counsel, the trial judge goes on to state that there is no reason to continue or excuse trial counsel. There could also be concerns addressed

[5] Applicant's Exhibit 1

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under Rule 407, SCACR, Rules of Prof. Conduct, Rule 1.4 RULE 407 as well as Rule 8.5. The trial judge goes on to address the ethical responsibilities of trial counsel to clients while the record reflects that Applicant is shaking his head in opposition. (Trial Tr. p.39). The trial judge then continues without addressing the issue further that day but does the following day clarifying again Applicant's position on the record. (Trial Tr. p.48-50). The manner in which this matter was handled created significant Sixth Amendment right to counsel issues in refusing to allow him to substitute counsel and continue his case.

Whether discharge during trial of ineffective assistance of counsel due to alleged lack of attorney-client communication warrants immediate evidentiary hearing is matter concerning course and conduct of trial left largely to discretion of trial judge, and Supreme Court will not interfere unless it clearly appears rights of complaining party were prejudiced. State v. Allen (S.C. 1977) 269 S.C. 233, 237 S.E.2d 64. "A defendant's right to have a lawyer of his or her own choosing is an essential element of the Sixth Amendment right to assistance of counsel." United States v. Mullen, 32 F.3d 891, 895 (4th Cir. 1994). The individual's right to have counsel of his choosing, however, is not an absolute right. See id. Rather, the right is circumscribed by the need for the orderly administration of justice. The exercise of the right to counsel of choice may neither "obstruct orderly judicial procedure" nor "deprive courts of the exercise of their inherent power to control the administration of justice." United States v. Gallop, 838 F.2d 105, 108 (4th Cir. 1988). The denial of a motion to substitute counsel is reviewed under an abuse of discretion standard. See id. To determine whether the trial court abused its discretion three factors are considered: (1) the timeliness of the motion, (2) the adequacy of the court's inquiry into the defendant's complaint, and (3) whether a total breakdown in attorney/client communication had developed such that it prevented the attorney from putting forth an adequate defense. See Mullen, 32 F.3d at 895.

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Based upon our review of the record, consideration of these factors demonstrates that trial counsel fell below professional standards and failing to join in the motion to be relieved. See S.C. Code Ann. § 17-23-60. The question of whether court appointed counsel should be discharged is a matter addressed to the discretion of the trial judge. Only in a case of abuse of discretion will this Court interfere. State v. Marshall, 273 S.C. 552, 257 S.E.2d 740 (1979); State v. Hyman, 276 S.C. 559, 281 S.E.2d 209 (1981). In evaluating whether the trial judge abused his discretion in denying Sims' motion for substitution of counsel, the Court may consider several factors: timeliness of the motion, adequacy of the trial judge's inquiry into the defendant's complaint, and whether the attorney-client conflict was so great that it resulted in a total lack of communication, thereby preventing an adequate defense. State v. Sims, 304 S.C. 409, 414, 405 S.E.2d 377, 380 (1991) (citing U.S. v. Gallop, 838 F.2d 105 (4th Cir. 1988)).

Applicant met the burden to show satisfactory cause for removal. The trial court conducted a thorough investigation into the basis of Applicant's complaints against his trial counsel. Applicant certainly specifically expressed disagreement with his trial counsel's strategies and prospective defenses to the crime, and his objections prevented him from communicating with his attorney or precluded trial counsel from preparing a zealous defense for him. In considering the several factors set out in Sims. First, Applicant's motion was clearly timely. the motion was filed in March and although not heard until the morning of trial, it was clearly not a delay tactic. The case was only 109 days old. The Applicant was facing a possible life sentence and had only met with counsel one time face to face and did not have the documents he alerted trial counsel could assist in his defense. This information also goes to showing the adequacy of the circuit court's inquiry into the defendant's complaint. Secondly, the judge adequately inquired into Applicant's complaints regarding his trial counsel. At the beginning of the hearing, the judge permitted

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Applicant to explain the rationale behind his motion and confirmed those reasons the following day. Even trial counsel agreed with the facts and stated he did not have the information Applicant was requesting and that he had only met with him face to face one time but had spoken with him on the telephone. Finally, the record does reveal that there existed any conflict between Applicant and his trial counsel so great that it resulted in a total lack of communication thereby preventing an adequate defense, was confirmed by both the Applicant and trial counsel. An appellate review of this would have found the trial judge abused his discretion in not substituting counsel and granting the continuance.

Appellate counsel was ineffective for raising meritorious issue of removal of trial counsel in a conclusory fashion in appellate brief and for failing to state the issue with particularity in the petition for rehearing. Patrick v. State, 349 S.C. 203. 562 S.E.2d 609 (2002) (finding PCR applicant was prejudiced by appellate counsel's failure to adequately argue issue to the Court of Appeals because the Court of Appeals would have ruled in applicant's favor). In Frazer v. South Carolina, the court discusses when confronted with a claim that counsel rendered ineffective assistance in failing to consult with the defendant regarding an appeal, a court must conduct a three-step inquiry. 430 F.3d 696 (4th Cir. 2005). The threshold consideration is whether the defendant had independently decided whether to appeal and communicated that decision to counsel. If the defendant has affirmatively requested an appeal, counsel's assistance to the defendant in making that decision is obviously unnecessary. Indeed, long before Strickland, the Supreme Court held that the "fundamental decision" of whether to appeal rests with the defendant. Where, as here, the defendant has not specifically requested an appeal, counsel is under a professional obligation to "consult" with the defendant regarding that fundamental decision, and unless the circumstances demonstrate that consultation is unnecessary. See Roe v. Flores-Ortega,

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528 U.S. 470, 479 (2000). If counsel fails to consult, the defendant may demonstrate prejudice by showing that a rational defendant would want to appeal. Defendant may do this by demonstrating either that a) there were non-frivolous issues for appeal, or b) he had adequately indicated his interest in appealing. The mere presence of non-frivolous issues to appeal is generally sufficient to satisfy the defendant's burden to show prejudice. Attempting to demonstrate prejudice based on a reasonably obvious interest in pursuing an appeal, necessitates an additional showing that, had the defendant received reasonable advice from counsel about the appeal, he would have instructed his counsel to file an appeal which was established during the PCR evidentiary hearing.

For the foregoing reasons, I conclude trial counsel's failure to join in Applicant's motion for substitution of counsel and a continuance fell below accepted professional norms. Had this motion been granted, the outcome would have resulted in different counsel properly preparing and gathering the documents needed to defend the case which prejudiced the client as described further below. As for the second prong of the test, trial counsel's deficient performance prejudiced Applicant such that there is a reasonable certainty that, but for this error, the result of the proceeding would have been different. Had defense counsel joined in the motion, then that issue would have been more clearly preserved for appeal. Appellate counsel did not raise the issue. Had the issue been presented for review during appeal, a review of the record, consideration of the factors would have demonstrated that the trial court did abuse its discretion when it denied Applicant's motion to for substitution of counsel and a continuance and the case would have been overturned on appeal. These failures clearly prejudiced the Applicant.

2. Trial counsel did not investigate and prepare for trial including issuing subpoenas for telephone records and prepare for cross-examination of alleged victim.

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Applicant testified about the specific records and investigation he requested of trial counsel not only during his aforementioned motion to substitute[6] but also during the evidentiary hearing. Upon inquiry by the trial judge, trial counsel asserts "...I think this case comes down to his testimony versus her testimony. It's not a lot of other collateral witnesses or testimony - - that are going to be particularly helpful. The jury believes him, that's fine. We can bring all of this out on cross-examination and direct." (Trial Tr. p. 33-34 lines 21-24, 1-3) After the court broke to allow Applicant and trial counsel to confer specifically about the failure to subpoena records, trial counsel stated "I really don't see his point. Maybe there is a point..." (Trial Tr. p. 38 lines 7-14) Trial counsel's belief that the case was going to be a swearing match was his strategy and given that the ex-girlfriend/wife went to visit him the day after the incident (maybe while she was intoxicated), the cell phone records may have shown other communications between them and should have been subpoenaed. There was evidence presented that trial counsel may have even attempted to subpoena some records from Comcast but for no reason stated, did not follow up on that request.[7] The testimony of investigator Watkins hired by PCR counsel suggests that these records were not available for the PCR hearing because of the retention policies of the cell phone companies. If these records had been obtained they could have substantiated the long relationship between the applicant and his ex-girlfriend/wife to support the defense of defense of others.

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). One component of that duty is to investigate records and witnesses identified by a defendant, and the

[6] See specific transcript references above.
[7] Applicant believes this was an exhibit entered at the evidentiary hearing, or at least presented to trial counsel who identified the documents.

failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable. Id. In Stalk v. State, the court stated that for PCR applicant to show he was prejudiced by counsel's failure to investigate, he must present favorable evidence that counsel could have found upon investigation. 383 S.C. 559, 681 S.E.2d 592 (2009). To establish counsel failed to adequately prepare for trial, applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) (failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (relief denied where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). Trial counsel was also ineffective for failing to interview and call all alleged corroboration witnesses and these witnesses did testify at PCR hearing. The two witnesses who testified did establish supporting testimony for Applicant's defense. Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) (a PCR applicant cannot show prejudice from counsel's failure to call a favorable witness to testify at trial if the witness does not testify at the PCR hearing or otherwise offer testimony within the rules of evidence). Counsel ineffective for failing to obtain records showing that alleged victim's testimony was false on the stand (regarding calling the police) and for failing to request/preserve telephone records that could have been used not only in the

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affirmative defense but for cross-examination as well. Dove v. State, 337 S.C. 298, 523 S.E.2d 459 (1999).

For the foregoing reasons, I conclude trial counsel's failure to realize, explore, present documentary evidence, direct testimony, and argue to the jury the Applicant's version of events fell below accepted professional norms. I find Applicant establishes the prejudiced prong because of trial counsel's failure, that evidence is no longer available to Applicant. There is a reasonable certainty that, but for this error, the result of the proceeding would have been different given trial counsel's trial strategy.

3. Trial counsel did not make proper objections which allowed in improper testimony and could not be reviewed on appeal.

Several objections were not made during the trial that clearly should have been made by trial counsel. When the State was cross examining witnesses about jail phone calls and letters written by the applicant that have been produced through discovery an objection should have been made by counsel. (jail calls-Trial Tr. p. 158-159 lines 11-4, letters-Trial Tr.165-166 lines 8-16) Arguments made by the solicitor as to the character of the young 911 caller (Trial Tr. p. 203 lines 6-11); the statements attributable to the landlord (Trial Tr. p. 202 lines 1-19); and about golden rule (Trial Tr. p 205 lines 20-24) should have been objected to by counsel. Also the in court identification of the defendant by the assault victim was objectionable (Trial Tr. p. 121 lines 14-25) but not as prejudicial as the others aforementioned.

In Ingle v. State, trial counsel was ineffective for permitting two instances of hearsay testimony that identified petitioner as CSC victim's assailant. Counsel's explanation that he elicited one witness's testimony because the victim only offered an allegation was not a valid strategy since all hearsay testimony identifying an assailant could be characterized as an allegation. 348 S.C. 467, 560 S.E.2d 401 (2002). Improper corroboration testimony, such as Brown's, that is cumulative to

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the victim's testimony is prejudicial since "it is precisely this cumulative effect which enhances the devastating impact of improper corroboration. Especially since the solicitor's closing arguments did not reflect what was testified to during trial. Id. Trial counsel was ineffective for failing to object to solicitor's closing argument that Applicant had damaged the house where there was no evidence of his presence at the scene the night in question presented at trial. Mincey v. State, 314 S.C. 355, 444 S.E.2d 510 (1994). A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. Id. "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). However, "[s]olicitors are bound to rules of fairness in their closing arguments," as the Supreme Court has explained:

> While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based on this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice. State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (quoting State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)).

"On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." Simmons, 331 S.C. at 338, 503 S.E.2d at 166. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's

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comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.; see State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997)("A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice."). None of these issues were raised by appellate counsel likely because they were not objected to. For the foregoing reasons, Applicant has met both prongs of the Strickland test. Vasquez v. State, 388 S.C. 447, 698 S.C. 561 (2010).

4. Trial counsel did not move for a new trial under the theory of inconsistent verdicts and could not be reviewed on appeal.

The lack of a post-trial motion due to an inconsistent verdict (not guilty if the weapons charge) should have been made by counsel. But the prejudice of this error is speculative since the jury was not asked and the nighttime element of burglary first is not contested. However, given the Applicant's and witnesses testimony that Applicant did live at the residence and therefore could not have committed burglary by entering his residence during the nighttime would render the fact that the jury found him not guilty of possession of a weapon during the commission of a violent crime inconsistent. This is addressed somewhat in the jury charges. (Trial Tr. pgs. 217-219) Assault and battery third degree is not statutorily considered a violent crime.

Trial counsel did not object and move immediately for the inconsistent verdicts to be resubmitted to the jury to be reconciled. The other is to allow the jury to be dismissed and ask the court to order a new trial on the basis of the inconsistency, usually through a post-trial motion.

Failing to object to an inconsistent jury verdict (and moving simultaneously for the case to be resubmitted to jury) results in a waiver of the ability to challenge the verdict. See, e.g., Kosmynka v. Polaris Indus., Inc., 462 F.3d 74, 83 (2d Cir. 2006); Pearson v. Welborn, 471 F.3d 732, 739 (7th Cir. 2006) ("[I]t does not appear from the record that Kwasniewski made a contemporaneous objection to the alleged inconsistency of the verdict at the time it was rendered. In many circuits,

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such a failure amounts to waiver of the argument."). Thus, even if there was an actual inconsistency in the jury verdict—and one that would otherwise justify a new trial—a party that waits until post-trial briefing to raise the issue risks waiver.

Even if a party does not waive the objection, there are advantages to having the jury, and not the court, resolve the discrepancy. If the verdict is colorably inconsistent, then a court can easily send the case back to the jury. Scott-Harris v. City of Fall River, 134 F.3d 427, 435 (1st Cir. 1997) ("When a verdict appears to be internally inconsistent, the safest courses . . . is to defer its acceptance, consult with counsel, give the jury supplemental instructions, and recommit the matter for further consideration."), rev'd sub nom. on other grounds, Bogan v. Scott-Harris, 523 U.S. 44 (1998). Waiting to challenge the verdict until after the jury is dismissed eliminates the Court's ability to do so, and the verdict is given a presumption of correctness that is difficult to overcome. See, e.g., Julien J. Studley, Inc. v. Gulf Oil Corp., 407 F.2d 521, 527 (2d Cir. 1969) ("The record may reveal a plausible, or even highly probable, ground for reasoning that the jury's findings on specific issues leave no logical basis for the general verdict. Even so, if it is discoverable that the jury 'might' nevertheless have found consistent grounds for its ultimate decision—if the findings, therefore, are not necessarily in conflict the general verdict must be sustained.").

5. Trial counsel did not request a continuance or challenge the Solicitor's control of the trial docket in calling the case pursuant to Langford, and Appellate counsel did not raise the issue on appeal.

Langford abolished solicitor docket control. As of the date of this order, Langford has not been implemented, and Solicitors retain control of General Sessions Court dockets. As our Supreme Court recognized, dockets controlled by the State "leaves room for abuses which can deny a defendant due process." Id., 400 S.C. at 439, 735 S.E.2d at 480. In the case at bar, the State appears to have received an advantage by limiting time to gather evidence needed to prepare

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a defense when the motion to substitute counsel and to continue the case was not granted. As noted previously, Applicant was arrested on December 18, 2013. The solicitor received discovery and provided the same to trial counsel on January 30, 2014, merely 43 days had passed from the time Applicant was arrested until the assistant solicitor received discovery. Applicant was noticed for trial February 24, 2014, 68 days from the day the Applicant was arrested until the solicitor issued the trial notice. Trial counsel admitted that 25 days had passed from when he received the discovery until the trial notice and that there was a total of 109 days from receiving the discovery and starting the trial date. Trial counsel agreed on the record during the pre-trial hearing (Trial Tr. pg. 33 lines 11-20) during cross-examination that he may have only met face to face with the Applicant one time but he does recall speaking with him "several times" over the telephone. Trial counsel stated on the record that "[w]e've discussed the basic issues about the case. There are things that tend to come out the more he (talks)." (Trial Tr. p.33 lines 14-20) Applicant clearly did not feel trial counsel was adequately prepared to go forward and trial counsel should have at least asked for the case to be continued to address the evidentiary concerns raised in the motion to substitute counsel and request a continuance addressed above. See Stalk v. State, *supra.*

To establish counsel failed to adequately prepare for trial, applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) (failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (relief denied where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 481 S.E.2d

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129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). Therefore, failure to raise an objection regarding State v. Langford by both trial and appellate counsel was error.

Trial counsel's performance fell below professional norms in not requesting a continuance. Most of the issues alleged above could have been resolved had trial counsel spent time preparing the case for trial. Applicant was prejudiced because of the aforementioned conclusions.

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

In conclusion, based upon the entire record, this court finds that the applicant has met his burden of proof under ." Strickland v. Washington, 466 U.S. 668 (1984); Cronic v. United States, 446 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); and Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The Court finds and concludes that the Applicant has established constitutional violations or deprivations that would require this Court to grant his application for the reasons enumerated above. All other allegations are denied and dismissed with prejudice.

Counsel's attention is directed to Marlar v. State , 375 S.C. 407, 653 S.E.2d 266 (2007), and Rule 59(e), SCRCP, regarding the filing of a Motion to Alter or Amend should counsel believe this Order fails to adequately address all issues raised as required by S.C. Code Ann. § 17-17-80 (2003). This Court further advises that if either party desires to secure appellate review of this

order, a notice of appeal must be filed **within thirty (30) days** of the service of this order. See Rule 203, 206, and 243 SCACR. Pursuant to Austin v. State, 305 S.C. 452 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf.

IT IS THEREFORE ORDERED, that the application for Post-Conviction Relief is GRANTED and Applicant's conviction be vacated.

IT IS FURTHER ORDERED, that the matter is remanded to the Aiken County Court of General Sessions for a new trial.

AND IT IS SO ORDERED this 25 day of October, 2017.

J. MARK HAYES, II
Presiding Judge

Aiken, South Carolina

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STATE OF SOUTH CAROLINA COUNTY OF AIKEN	)	IN THE COURT OF COMMON PLEAS FOR THE SECOND JUDICIAL CIRCUIT
Daggart Bernard Frazier, #237617, Applicant, v. State of South Carolina, Respondent.	)	C/A No.: 2015-CP-02-01842 **ORDER DENYING MOTION TO RECONSIDER**

This matter came before this Court by way of Respondent's Motion to Reconsider and Order from this Court granting Applicant's application in part for post-conviction relief (PCR). The application for PCR was filed on August 3, 2015, and an Order Granting the application in part was filed and served November 6, 2017. Respondent emailed a Motion to Reconsider on November 16, 2017, which was filed with the clerk on November 20, 2017. Applicant filed a response on November 21, 2017. The motion to reconsider, the petitioner's reply, prior order, notes and transcript were reviewed. The Court does not believe additional arguments are needed. The prior order will not be amended, except to the extent that the section dealing with inconsistent verdicts should be altered to reflect inconsistent legal theories. Other than the previous modification, the remainder of this motion is denied for the reasons stated herein:

Respondent's Motion to Reconsider failed to raise any new issues or reasons supporting alteration or amendment of the Order Granting Petitioner's Application other than the section addressing the inconsistent verdicts is altered to reflect inconsistent legal theories. Respondent has not presented any valid reasons for the Court to alter its Order Granting PCR Application.

Therefore, the Respondent's Motion to Reconsider is Denied.

IT IS SO ORDERED.

This the 19th day of December, 2017

J. MARK HAYES, II
Presiding Judge

Aiken, South Carolina.

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