STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal From Lexington County
Court of Common Pleas
Edgar W. Dickson, Circuit Court Judge

Case No: 2011-CP-32-0674

RODNEY C. BRYAN, #329517,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

MOTION TO DISMISS APPEAL

Respondent, State of South Carolina, moves to dismiss the above appeal, pursuant to Rule 240, SCACR, on the following grounds:

The above captioned matter is an appeal from a Lexington County post-conviction relief action. The Honorable Edgar W. Dickerson granted a belated appeal and denied all other claims in an Order filed February 2, 2018. (Attachment 1). The State filed a Rule 59 motion on February 12, 2018. (Attachment 2). That motion is still pending. However, Petitioner, who represented himself in PCR, served a notice of appeal. He also filed the notice with the Lexington County Clerk of Court. The notice and certificate of service filed in Lexington County is dated March 7, 2018. (Attachment 3). Petitioner asserts in the notice that he received his copy of the Order on February 8, 2018, which would make service of the notice of appeal timely. See Rule 203(b)(1), SCACR. If timely filed, then jurisdiction is no longer in the circuit court. Rule 205, SCACR

("Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal..."). However, the appeal is premature as a timely filed Rule 59 motion is still pending. Jurisdiction should be returned to the circuit court to allow Judge Dickson to rule on the timely filed Rule 59 motion.

WHEREFORE, based on the foregoing, Respondent, State of South Carolina, respectfully requests the Court dismiss the appeal as premature, and return jurisdiction to the circuit court so that the Rule 59 motion may be ruled upon.

Respectfully submitted,

ALAN WILSON
Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
S.C. Bar No: 14244

BY: _____
MELODY J. BROWN

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

July 30, 2018.

ATTACHMENT 1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
	)	
Rodney C. Bryan, S.C.D.C. No. 329517	)	**C.A. No. 2011-CP-32-0674**
Applicant,	)	
v.	)	**ORDER GRANTING BELATED APPEAL**
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on February 17, 2011. Respondent filed its Return on or about August 1, 2011. An evidentiary hearing into the matter was convened on August 15, 2013, at the Lexington County Courthouse. Applicant was present at the hearing and proceeded *pro se*. Respondent was represented by Walt Whitmire, Esquire, of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted at the October 2007 term of the Lexington County Grand Jury for criminal domestic violence of a high and aggravated nature (2007-GS-32-3034); violation of a court order of protection (2007-GS-32-3033); kidnapping (2007-GS-32-3042); and two counts of spousal sexual battery (2007-GS-32-3040; -3041). On July 14, 2008, Applicant proceeded to trial before the Honorable R. Knox McMahon and a jury. He was represented by Theo Williams, Esquire. The Jury convicted Applicant as charged. Judge McMahon sentenced Applicant on July 16, 2008 to twenty-five (25) years for kidnapping; ten (10) years for each count of spousal sexual battery; ten

(10) years for criminal domestic violence of a high and aggravated nature; and thirty (30) days for the violation of an order of protection.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Robert Pachak, Esquire, of the South Carolina Office of Appellate Defense, pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the appeal and relieved appellate counsel in an unpublished opinion filed February 22, 2010. State v. Brown, No. 2010-UP-136 (S.C. Ct. App. Feb. 22, 2010). Applicant thereafter filed a Petition for Writ of Certiorari seeking review by the South Carolina Supreme Court. Respondent submitted a letter waiving a formal response. The South Carolina Supreme Court issued an order dated May 26, 2010, dismissing the matter because it does not entertain petitions for writs of certiorari where the South Carolina Court of Appeals has dismissed an appeal after conducting an Anders review.[1] The Remittitur was issued by the South Carolina Court of Appeals on May 28, 2010.

On August 19, 2010, Applicant filed a Petition for Writ of Certiorari to the United States Supreme Court. That petition was denied on January 10, 2010.

ALLEGATIONS

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance counsel:
    a. Trial counsel failed to object to Dr. Ross testifying and bolstering the State's hypothesis;
    b. Trial counsel failed to object when the victim consistently refused to deny or accept facts;
    c. Trial counsel failed to object when the trial court denied Applicant's motion for a directed verdict;
    d. Trial counsel erred to concur with the trial judge when he opined to solicit a waiver on not having to notify Applicant his rights;

[1] See State v. Lyles, 381 S.C. 442, 673 S.E.2d 811 (2009).

e. Trial counsel failed to request the charge of false imprisonment;
f. Trial counsel failed to elaborate on Applicant's motion for trial judge to recuse himself;
g. Trial counsel failed to object to improper comments and interruptions made by the trial judge; and
h. Trial counsel failed to object to the State improperly amending indictments.

On August 19, 2013, Applicant amended his application to include the following allegations:

1. Ineffective assistance of appellate counsel for failing to brief issue of directed verdict on kidnapping indictment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony and evidence presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, the post-conviction relief transcript, and the legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2015), this Court makes the following findings of fact based upon all of the probative evidence presented.

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). 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); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

a. Bolstering

This Court finds Applicant has not met his burden to prove counsel was ineffective for failing to object to purported bolstering by the State's expert witness, Dr. Catherine Ross. First, Dr. Ross's testimony did not impermissibly bolster the victim. Dr. Ross – an expert in the field of criminal domestic violence – testified about the effects of abusive relationships on victims *generally*. Tr., p. 346-352. She explained different types of abuse, and went over common misconceptions about domestic violence. Tr. p. 348-49.

Dr. Ross further testified that the victim's symptoms were consistent with those of a woman who had been a victim of domestic violence, Tr. p. 354-55, and that some of her actions were consistent with a "post-traumatic stress response." Tr. p. 356. Crucially, Dr. Ross did not

testify that she believed the victim, or that the victim had testified credibly. Because Dr. Ross did not improperly bolster the victim's testimony, this Court finds counsel's failure to object did not constitute deficient performance.

This Court further finds Applicant has failed to meet his burden to show prejudice. Counsel testified credibly at the PCR hearing that his strategy was, in part, "to indicate that [Applicant] had already been convicted" of a separate, unrelated criminal domestic violence offense, as a result of the very damaging video evidence against Applicant. PCR Tr. p. 68. Because this strategy involved admitting that Applicant had abused his wife in the past, this Court finds any improper vouching by Dr. Ross concerning that issue does not call into question the outcome of the proceeding in this case. This allegation is therefore denied and dismissed.

b. Removal from the Courtroom

Applicant's allegation that counsel was ineffective in failing to object to his removal from the courtroom while his children testified is also without merit. Circuit courts must treat sensitively witnesses who are very young by using closed or taped sessions when appropriate. S.C. Code § 16-3-1550(E). Accordingly, where specific findings are made and certain safeguards are taken, allowing a witness to testify outside the physical presence of a criminal defendant may not implicate the confrontation clause. See Starnes v. State, 307 S.C. 247, 414 S.E.2d 582 (1992) (criminal defendant's right to confrontation not violated when videotaped testimony of victim used, where trial judge had made specific factual finding that child was fearful of testifying in front of defendant and would be traumatized and intimidated if required to testify in her presence, and where defendant's trial attorney was present when child's testimony was taken by video tape, and defendant was able to view proceeding by way of closed one-way

circuit television monitor and was in constant contact with her attorney through use of headphones).

In the present case, the trial court carefully considered the testimony of an expert and made specific findings that the young children – who witnessed a large amount of the abuse – would be traumatized if required to face Applicant in the courtroom. Tr. p. 66. The trial court therefore determined that a special courtroom procedure was necessary to protect the welfare of the children pursuant to section 1550(E). Id. Counsel objected to this ruling on the record, and the issue was briefed on appeal. Accordingly, this Court finds Applicant has failed to show deficiency with regard to Applicant's performance.

Applicant has similarly failed to prove that he was prejudiced as a result of any alleged deficiency. While a defendant has a constitutional right to be present at every stage of the criminal proceeding against him, no presumption of prejudice arises from a defendant's exclusion. State v. Shuler, 344 S.C. 604, 625, 545 S.E.2d 805, 815 (2001). This Court notes that Applicant has failed to even *assert* any prejudice that resulted from his exclusion during the testimony of his children. See State v. Lopez, 306 S.C. 362, 365, 412 S.E.2d 390, 392 (1991). Moreover, an examination of the record reveals no prejudice from Applicant's exclusion during this portion of the trial. Applicant saw and heard the testimony of his children through the "media room" and with counsel. Tr. p. 120-21. Applicant's trial counsel was in the courtroom and was able to conduct cross-examination. Finally, the trial judge instructed the jury that they were not to take into account or even discuss during deliberations the fact that Applicant was not present for the testimony of either witness. Tr. p. 122; 154. See Foye v. State, 335 S.C. 586, 590 n. 1, 518 S.E.2d 265, 267 n. 1 (1999) (A jury is presumed to follow instructions). Accordingly,

this Court finds Applicant has failed to meet his burden with regard to this allegation. It is therefore denied.

c. Conceding Guilt and Prior Bad Act Evidence

Applicant has also failed to meet his burden to prove counsel was ineffective for "conceding guilt." Counsel did not concede guilt, but rather conceded that Applicant had previously pled guilty to a separate criminal domestic violence offense. Counsel testified that his trial strategy was to concede that Applicant had been convicted of criminal domestic violence

> "[n]ot the CDV that he was being tried for, but to indicate that he had already been convicted of the CDV. If they were going to use that video, and if they were going to say that that video [was] indicative of what happened, then, then what [the victim is] referring to is another CDV, not anything that was occurring then." PCR Tr. p. 68. The video, admitted over counsel's objection,[2] apparently portrayed evidence of domestic violence.

Counsel's credible testimony is dispositive to this issue – because he had a valid trial strategy, this Court finds no deficiency. See, e.g., Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (*citing* McLaughlin v. State, 352 S.C. 476, 483-84, 575 S.E.2d 841, 844-45 (2003)). Accordingly, this allegation is without merit and is dismissed.

Ineffective Assistance of Appellate Counsel

Failure to Brief Issue of Directed Verdict on Kidnapping Indictment

Applicant alleged at the evidentiary hearing that appellate counsel was ineffective for failing to draft a merits brief on trial counsel's motion for a directed verdict of not guilty on the indictment for kidnapping on the basis that the indictment alleges that the victim was prevented from leaving between the dates of September 14, 2007 and September 16, 2007. This Court finds this allegation is also without merit.

A defendant is constitutionally entitled to the effective assistance of appellate counsel.

[2] Tr. p. 298.

Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, 302 S.C. at 537, 397 S.E.2d at 526; Strickland, 466 U.S. at 687. When a claim of ineffective assistance of appellate 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). Generally, the presumption of effective assistance of appellate counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

This Court first finds Applicant has failed to meet his burden to show appellate counsel failed to present a "significant and obvious issue" with respect to directed verdict on the kidnapping indictment. In a motion for a directed verdict in a criminal case, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Burdette, 335 S.C. 34, 45, 515 S.E.2d 525, 531 (1999). If the State presents **any evidence** which reasonably tends to prove the defendant's guilt, or from which the defendant's guilt could be fairly and logically deduced, the case must go to the jury. State v. Poindexter, 314 S.C. 490, 431 S.E.2d 254 (1993) (emphasis added). On appeal from the denial of a motion for directed verdict,

reviewing courts must view the evidence in a light most favorable to the State. State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984).

In the present case, the State submitted evidence that could reasonably be said to prove Applicant's guilt of kidnapping. The victim testified that she as prevented from leaving by "[i]ntimidation" from Applicant. Tr. p. 323; PCR Tr. p. 24. Applicant's daughter further testified that he cut the phone lines to the house during the time period in question. Tr. p. 131. Applicant's son testified that he was unable to leave the house and get to the neighbor's house. Tr. p. 158-59. Clearly there was direct and circumstantial evidence that indicated Applicant was guilty of kidnapping, as the trial court ruled following counsel's motion. Tr. p. 368. As Applicant has failed to meet his burden, this allegation is dismissed.

Trial Judge Recusal

This Court further finds Applicant has failed to show any constitutional violation or deprivation as a result of the trial court's refusal to recuse himself. Initially, this allegation is a direct appeal issue, and is therefore not appropriate for consideration on post-conviction relief. Post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code Ann. § 17-27-20(b); *see, also, Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal."). Therefore, a post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal unless couched as claims of ineffective assistance of counsel. *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) (*citing, Hyman v. State*, 278 S.C. 501, 299 S.E.2d 330 (1983)). Applicant could have raised the issue of the trial judge's refusal to recuse himself on appeal. The failure to do so bars this allegation as a ground for relief.

Applicant simply cannot use post-conviction relief to bring this free standing claim of a constitutional violation.

In any event, Applicant's underlying claim is entirely without merit. A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. Canon 3(E)(2)(a) of Rule 501, SCACR. It is not enough for a party seeking disqualification to simply allege bias or prejudice. Roche v. Young Bros., Inc., of Florence, 332 S.C. 75, 5034 S.E.2d 311 (1998). The alleged bias or prejudice must stem from an extra-judicial source and result in a decision based on information other than what the judge learned from his or her participation in the case as a judge. Payne v. Holiday Towers, Inc., 283 S.C. 210, 321 S.E.2d 179 (Ct. App. 1984). If there is no evidence of judicial bias or prejudice, a judge's failure to disqualify himself will not be reversed. Ellis v. Procter & Gamble Distrib. Co., 315 S.C. 283, 433 S.E.2d 856 (1993).

During Applicant's trial, the judge disclosed on the record that his daughter was employed with the Lexington County Solicitor's Office. Neither the Solicitor nor Applicant objected to the trial judge continuing on the case. In addition, when asked by the Court during his PCR evidentiary hearing whether he wanted a mistrial "based on the fact that Judge McMahon's daughter worked for the Solicitor's Office," Applicant said "[a]bsolutely not, not on this basis." PCR Tr. p. 41. Applicant failed to object or indicate his objections to counsel when prompted by the trial judge. Applicant's contrary testimony – that counsel lied to the trial court when he said he had discussed the matter with Applicant for fifteen minutes – is not credible.

Concerning Applicant's allegation that the trial judge should have recused himself "based on the totality of the circumstances," he has failed to show any substantive basis for recusal. PCR Tr. p. 39. Applicant has failed to show any actual evidence of judicial prejudice. This

Court also finds credible counsel's testimony that he did not believe there was a reason for a mistrial in this case, and that the judge did not "cross the line to where it appear[ed] he [was] favoring one side or the other." PCR Tr. P. 82-83. Accordingly, this allegation is denied and dismissed.

Right to Testify

The sole issue remaining is whether Applicant was denied the right to testify. A defendant's decision whether or not to testify must be made with the understanding of the consequences of either choice. Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). A defendant's waiver of his Fifth Amendment right must be made knowingly and voluntarily. Id.

Here the record is unclear as to whether Applicant knowingly and intelligently waived his right to testify. Defense Counsel merely stated to the trial judge that Applicant did not want to testify and that the trial judge did not need to interview him. Tr. P. 374. Applicant testified at his PCR hearing that defense counsel did not fully discuss the right to testify with him and that Applicant wanted to testify in his defense but defense counsel informed the trial judge otherwise. PCR Tr. P. 29-33. This issue was not addressed by appellate counsel in Applicant's original appeal. The State produced no evidence as to why the issue was not addressed. In Brown, the Supreme Court declined to state that failure to question the defendant on the record would automatically require a new trial but granted a new trial nonetheless due to the fact that neither the trial judge nor defense counsel apprised Brown of his Fifth Amendment rights. As a precautionary measure, an on the record colloquy between the trial judge and the defendant would ensure that the defendant was aware of his right to testify. The dissent by Judge Finney more aptly addressed that the violation of a constitutionally protected right should require a new trial. This Court is of the belief that the failure to address this issue on appeal without explanation to the court is ineffective

assistance of appellate counsel. Therefore, Applicant is entitled to a belated appeal on the sole issue as to whether he was properly apprised of and then waived his Fifth Amendment right to testify.

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, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

[*Signature follows*]

CONCLUSION

Accordingly, THEREFORE, Applicant is entitled to a new appeal as a result of appellate counsel's deficient performance regarding his right to testify. Applicant has not established any constitutional violations or deprivations beyond this sole issue. Counsel was not deficient in any other manner, nor was Applicant prejudiced by the remainder of counsel's representation.

Therefore, IT IS FURHER ORDERED that each of Applicant's other allegations must be denied and dismissed with prejudice

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief be denied and dismissed with prejudice;

2. Within thirty (30) days of service of this Order, Applicant must file a notice of appeal to secure the appropriate review of Applicant's conviction.

AND IT IS SO ORDERED!

Edgar W. Dickson
Presiding Judge, Eleventh Judicial Circuit

January 30, 2018
Orangeburg, South Carolina

ATTACHMENT 2

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF LEXINGTON	)	**ELEVENTH JUDICIAL CIRCUIT**
Rodney C. Bryan, **S.C.D.C. No. 329517**	)	**C.A. No. 2011-CP-32-0674**
Applicant,	)	
v.	)	**MOTION TO ALTER OR AMEND** **(Rule 59(e), SCRCP)**
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on February 17, 2011. An evidentiary hearing was held on August 15, 2013, with additional testimony taken on November 13, 2014. By Order dated January 30, 2018, filed February 2, 2018, the Honorable Edgar W. Dickson granted "a new appeal as a result of appellate counsel's deficient performance regarding [Applicant's] right to testify," but denied relief on all remaining claims. Pursuant to Rule 59(e), SCRCP, Respondent, the State of South Carolina, requests this Court reconsider its ruling, and alter and amend the Order to reverse the grant of relief.

Specifically, Respondent submits the Order should be altered and amended and relief denied as: 1) there was no claim of ineffective assistance of appellate counsel regarding the waiver issue before the court; 2) an on the record waiver is not the only method to show a sufficient waiver; and 3) the factual finding "the record is unclear as to whether Applicant knowingly and intelligently waived his right to testify," lacks support when the trial transcript reflects counsel confirmed to the trial judge that Applicant was advised and waived the right, without any dissent, objection, or request for further discussion by Applicant; trial counsel testified at the PCR hearing that he reviewed the right and the dangers of testifying with Applicant prior to affirming to the trial judge that Applicant waived the right; and Applicant's

PCR testimony conceding he discussed the right with counsel. Respectfully, Respondent asks the Court to reconsider this matter, and alter and amend its ruling. In support of its position, Respondent submits:

NO ALLEGATION THAT APPELLANT COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE AN ISSUE ON DIRECT APPEAL REGARDING THE ABSENCE OF A COLLOQUY BETWEEN THE JUDGE AND APPLICANT ON WAIVER OF THE RIGHT TO TESTIFY

This Court premised its relief on a claim of ineffective assistance of appellate counsel: "This Court is of the belief that the failure to address this issue on appeal without explanation to the court is ineffective assistance of appellate counsel." (Order Granting Belated Appeal, pp. 11-12). The Court found Petitioner carried his burden of proof in that: "This issue was not addressed by appellate counsel in Applicant's original appeal" and "[t]he State produced no evidence as to why the issue was not addressed." (Order Granting Belated Appeal, p. 11). However, no such claim was made in the PCR application or the amendment of August 19, 2013. (See Order Granting Belated Appeal, pp. 2-3). The State had no notice of an appellate counsel claim as to the right to testify; thus, while correct the State elicited no information on why appellate counsel would not have raised the issue in a merits brief, no notice was given that such testimony would be relevant and admissible. The claim raised and argued at the evidentiary hearings remained consistently a claim of ineffective assistance of trial counsel resulting "structural error," *i.e.*, failure to secure an on the record waiver. (See August 15, 2013 PCR Tr. p. 33).[1]

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[1] Apparently, Applicant attempts to avoid his burden of showing prejudice by claiming a "structural error." However, the United States Supreme Court has rejected that argument when the purported error is raised through a claim of ineffective assistance of counsel. *Weaver v. Massachusetts*, ___ U.S. ___, 137 S. Ct. 1899, 1913 (2017) ("When a structural error is raised in the context of an ineffective-assistance claim ... petitioner must show prejudice in order to obtain a new trial.").

In fact, Applicant did not contest the trial record showed his counsel affirmed to the trial judge that Applicant waived his right; rather, Applicant alleged at the PCR hearings that counsel's affirmance was not true. (August 15, 2013 PCR Tr. p. 32). Applicant testified at the PCR hearing that he wanted to testify at trial. (See August 15, 2013 PCR Tr. pp. 331-33). In particular, he focused not on discussions with counsel, which he admitted, (see August 15, 2013 PCR Tr. p. 29), but the lack of a defendant/court exchange: "It's that the record does not reflect that I knowing [sic], voluntarily waived that right." (August 15, 2013 PCR Tr. p. 30).

Respondent submits the records and transcripts before the Court do not support that a claim of ineffective assistance of appellate counsel was raised in the PCR action. Thus, relief on such a claim is not warranted. However, even if such a claim had been raised, the claim does not warrant relief.

NO MERIT TO THE CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILURE TO PRESENT A MERITS BRIEF ISSUE ON THE ABSENCE OF AN ON THE RECORD COLLOQUY

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Robert Pachak, Esquire, of the South Carolina Office of Appellate Defense, pursuant to *Anders v. California,* 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the appeal and relieved appellate counsel in an unpublished opinion filed February 22, 2010. *State v. Brown,* No. 2010-UP-136 (S.C. Ct. App. Feb. 22, 2010). In an *Anders* review, an appellant is allowed the right to submit a *pro se* pleading. Appellant filed a *pro se* pleading but did not raise any issue regarding the waiver of his right to testify. (See PCR Return, p. 2 and attachments). Thus, it is difficult to fault counsel when Applicant did not consider the issue worthy of briefing.

Further, it cannot be disputed that there is no objection to counsel's advising the trial judge of the waiver – the record shows none. (See Trial Tr. p. 374). In the absence of an

objection, there is nothing preserved to review on direct appeal. See, *e.g., State v. Hoffman,* 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review.") (citing *State v. Torrence,*305 S.C. 45, 406 S.E.2d 315 (1991)). The requirement of a contemporaneous objection to preserve an issue for direct appeal review applies to the waiver of the right to testify. *Brown v. State (Willie),* 317 S.C. 270, 453 S.E.2d 251 (1994). "[A]ppellate counsel is not ineffective for failing to raise on appeal an issue that was not preserved for review." *Gilchrist v. State,* 364 S.C. 173, 178, 612 S.E.2d 702, 705 (2005). Thus, appellate counsel would not be ineffective in failing to raise the unpreserved issue. Moreover, had the issue been raised, it would have been without merit, and, again, does not support the grant of relief.

Respondent agrees that a waiver of the right to testify should be knowing and voluntary. However, *Brown v. State (Adrien),* 340 S.C. 590, 533 S.E.2d 308 (2000), the case cited by the Court in support of error, (see Order Granting Belated Appeal, p. 11), does not support that an on the record colloquy is required. To the contrary, in *Brown,* the Court confirmed, "... we decline to require an on-the-record waiver of a defendant's right against compelled testimony...." *Brown,* 340 S.C. at 595, 533 S.E.2d at 310. See also *Brown v. State (Willie),* 317 S.C. at 272, 453 S.E.2d at 252 ("An on-the-record waiver of a constitutional or statutory right is but one method of determining whether the defendant knowingly and intelligently waived that right."); *State v. Davis,* 309 S.C. 326, 346, 422 S.E.2d 133, 145–46 (1992), *overruled on other grounds by Brightman v. State,* 336 S.C. 348, 520 S.E.2d 614 (1999) ("...a full record must be developed to demonstrate that a defendant has waived his right to testify. This requirement may be satisfied by a colloquy on the record between the trial judge and trial counsel.") (citations omitted). At trial, counsel made the following representation:

> THE COURT: All right. Mr. Williams, do -- do I need to interview Mr. Bryan with regard to his right to testify or not to testify?
>
> (Sotto voce discussion between Mr. Williams and the defendant.)
>
> MR. WILLIAMS: Your Honor, you do not need to interview Mr. Bryan. I have talked to Mr. Bryan about him testifying and not testifying, and he is not testifying.
>
> THE COURT: All right. With that being said then, and your advising the Court I do not need to interview him, I - - I will not do so. Again, I am sure you've explained it to him fully and completely, and if you need any more time to discuss that with him, you certainly may have that, Mr. Williams.
>
> MR. WILLIAMS: Your Honor, I think we're okay on this.

(Trial Tr. pp. 373-374).

Thus, the "requirement ... [was] ... satisfied by a colloquy on the record between the trial judge and trial counsel." *Davis, supra.* Consequently, even if the lack of preservation could be avoided in some form or fashion (and Respondent submits there is no such method available), the claim itself lacked merit; thus, Applicant cannot carry his burden of proof for relief in PCR. *Anderson v. State,* 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) ("To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal."). Lastly, even if Applicant's claim is considered as ineffective assistance of trial counsel, the claims lacks merit based on the full record before this Court.

FACTUAL FINDING THAT THE RECORD IS UNCLEAR AS TO WAIVER LACKS SUPPORT

As noted above, Applicant did not contest the trial record showed his counsel affirmed to the trial judge that Applicant waived his right, but alleged that counsel's affirmance was not true. (August 15, 2013 PCR Tr. p. 32). Applicant testified at the PCR hearing that he wanted to testify. (See August 15, 2013 PCR Tr. pp. 331-33). In particular, he focused not on discussions

with counsel, which he admitted, (August 15, 2013PCR Tr. p. 29), but the lack of a defendant/court exchange: "It's that the record does not reflect that I knowing [sic], voluntarily waived that right." (August 15, 2013 PCR Tr. p. 30).

In the PCR testimony, trial counsel amplified the exact discussions, describing, upon questioning by the State, the type of discussions referenced in his representation to the trial court:

> A. Well, my advice is that obviously that the client had the right to make the call whether or not he's going to testify or not testify, but with Mr. Bryan I didn't think that was necessarily a good idea that he do that but he made the call.
>
> Q. Can you elaborate a little bit further on why it wouldn't have been a good idea?
>
> A. Mr. Bryan is a very intelligent man, very articulate. They had enough information where, I don't know if you recall, I think part of it had to do with the recording where it basically had the wife and he was asking what do you want me to do an it may have just come back to bite him on that particular issue. I didn't think it would be helpful if he testified because I think, I thought he would get himself into trouble in regards to how he would respond to questions, but that was up to him and I let him make that call.

(November 13, 2014 PCR Tr. pp. 4-5).[2]

Counsel further testified that while Applicant had "something on his record ... that wasn't the major consideration" in counsel's advice on testifying. (November 13, 2014 PCR Tr. p. 5). Counsel also confirmed they spoke about whether to testify "during the course of the trial ... prior to the State resting its case[.]" (November 13, 2014 PCR Tr. p. 5). Further still, counsel confirmed that had his client wanted to testify, he "[a]bsolutely [would] have allowed him" to do so. (November 13, 2014 PCR Tr. p. 5).

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[2] The "recording" refers to the "video from a cell phone in which Mr. Bryan is holding it, and essentially he's videotaping his wife. And he is asking her, 'What do you want me to do?' And she says, 'I want you to stop hitting me.'" (August 15, 2013 PCR Tr. p. 66). The instant convictions are for criminal domestic violence of a high and aggravated nature; violation of a court order of protection; kidnapping; and, two counts of spousal sexual battery. (Return, p. 1).

On cross-examination by Applicant (who was *pro se*), counsel responded, "... I know that I spoke to you about whether or not you wanted to testify or not and not only during the trial but prior to the trial and that we decided that you did not need to testify." (November 13, 2014 PCR Tr. p. 23; see also p. 24, "You decided. You decided. I did not disagree with you."). Counsel agreed that a "better practice" may be to have the waiver on the record upon questioning by the court: "That way it would resolve issues that are currently gong on like what we have right here." (November 13, 2014 PCR Tr. p. 24). However, he also testified: "It was my opinion that it did have the expressed waiver by the defendant. It was not my opinion that you were coerced, threatened in any way to make that decision not to testify. Now, why it was not on the record is something which would be left up to the judge's handling of the trial." (November 13, 2014 PCR Tr. p. 24; see also p. 26, "I informed the Court what you let me know and that is that you did not want to testify.").

Counsel's PCR testimony is supported not only by the responses on record, but also by the fact the defense immediately advised the trial judge after confirmation of the waiver, that they would not present any evidence and were prepared for argument. (See Trial Tr. p. 374). Additionally, the trial transcript shows the trial judge invited counsel and Applicant to take additional time if needed to consider the waiver. No indication is on the record that was necessary. To the contrary, as noted, counsel advised they were ready for argument. Applicant wholly failed to offer any reason in his PCR action as to why he did not object or challenge the representation of discussion and waiver at any time during the trial (or, for that matter, in his own *pro se* filings in the *Anders* appeal). See, for example, *State v. Rivera*, 402 S.C. 225, 243, 741 S.E.2d 694, 703 (2013) ("...Appellant disagreed with counsel's recommendation not to testify, unambiguously indicated to the trial court that he wished to take the stand..."). It is

especially difficult to understand reticence on this waiver issue, when on the potential trial judge conflict waiver issue,[3] Applicant actively and openly had counsel re-address the issue before the judge. (Tr. p. 293-294).[4]

---

[3] This Court denied relief as non-cognizable, and, in the alternative, on the merits, on Applicant's allegation the trial judge should have recused himself due the judge's daughter working in the solicitor's office at the time of trial. (Order Granting Belated Appeal, pp. 9-11). At trial, the judge disclosed this fact and Applicant waived any potential conflict. (See Trial Tr. p. 285-286, (when asked if any objection to the judge presiding, defense counsel responded: "No, Your Honor, I don't. And we spent at least 15 minutes discussing that issue along in the back where he was located. And he has decided he wishes the trial to go forward, and - - and is satisfied with you trying the case....").

[4] The relevant passages read:

> MR. WILLIAMS: You probably noted that my client became somewhat agitated during the in-camera hearing. Maybe – maybe you didn't know he was becoming agitated. He became excited and - -something he wanted to tell me, and that's why we took the break.
>
> I took him back in the back area, and he now tells me that he does not want to proceed with this trial; that he does not waive his conflict. ...
>
> ...
>
> ... He does not waive the potential for there being a conflict. I don't know that there is a conflict, I'm just saying he does not.
>
> As further example of that, Your Honor - - and you know, in kind of a different area - - he wrote down on a piece of paper, while sitting here, "I don't know if I made the right decision."
>
> And you know, this has been going on for, like, two minutes. I don't know if he, you know, jumped too quick, or if he wasn't firmly convinced in his mind. I can only tell the Court that he actually wrote down - - if the Court needs to see this document, I can show it to them...
>
> ...
>
> ... There are actually two lines on there. One references the decision he made in reference to waiving the conflict or not waiving the conflict. The other sentence is just a denial in regards to an occurrence.

(Trial Tr. pp. 293-294).

This Court's Order Granting a Belated Appeal does not acknowledge these very telling passages of testimony. Further, when the all of these critical facts are consider in context, the *Brown* case which the Court relied upon, is still instructive, but indicates relief is not warranted.

The problem in *Brown* was not just the absence of an on the record colloquy, but, there was no on the record colloquy **and** counsel failed to inform Petitioner of his right:

> ...we nonetheless find defense counsel was ineffective. The PCR court found as a fact respondent's trial counsel failed to inform respondent of his Fifth Amendment privilege and the consequences of waiving that privilege. Failure to inform a client of his Fifth Amendment rights and the consequences of exercise and waiver of those rights falls below an objective standard of reasonable representation.

Brown, 340 S.C. at 595, 533 S.E.2d at 310.

The Supreme Court ultimately determined relief was not warranted – and reversed the grant of relief by the PCR judge – based upon a lack of prejudice shown. *Id.*, 340 S.C. at 595-96, 533 S.E.2d at 311. Chief Justice Finney disagreed "with the majority's analysis of the prejudice" because "[t]he evidence is uncontroverted that respondent was never informed" of his right. *Id.*, 340 S.C. at 596-97, 533 S.E.2d at 311. Respondent submits this Court misapprehended facts and logic of *Brown* in the majority, and in the dissent, when finding:

> In Brown, the Supreme Court declined to state that failure to question the defendant on the record would automatically require a new trial but granted a new trial nonetheless due to the fact that neither the trial judge nor defense counsel apprised Brown of his Fifth Amendment rights. As a precautionary measure, an on the record colloquy between the trial judge and the defendant would ensure that the defendant was aware of his right to testify. The dissent by Judge Finney more aptly addressed that the violation of a constitutionally protected right should require a new trial. This Court is of the belief that the failure to address this issue on appeal without explanation to the court is ineffective assistance of appellate counsel. Therefore Applicant is entitled to a belated appeal on the sole issue as to whether he was properly apprised of and then waived his Fifth Amendment right to testify.

(Order Granting a Belated Appeal, pp. 11-12).

Respectfully, the misapprehension of the *Brown* precedent has created an error of law in the basis for relief. *Brown* does not support a grant of relief. Moreover, given the totality of the testimony, Petitioner's claim of ineffective assistance of trial counsel lacks merit. Respondent urges the Court to consider, and reject, the claim raised. Respondent submits that trial counsel's testimony is credible and consistent with the representations made at trial.

CONCLUSION

Because the Order relies on several misapprehensions of law and fact as set out above, Respondent respectfully requests the Court reconsider its findings and conclusion, amend the Order, and deny the application in its entirety, including on the issue raised – ineffective assistance of trial counsel in failing to secure an on the record colloquy.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

By: _____
MELODY J. BROWN
SC Bar No. 14244

ATTORNEYS FOR RESPONDENT

February 9, 2018.
Columbia, South Carolina.

ORIGINAL

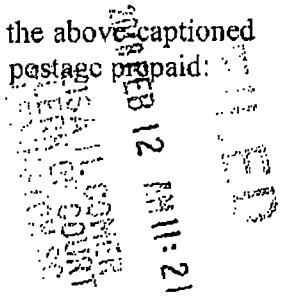
STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	IN THE ELEVENTH JUDICIAL CIRCUIT
	)	
	)	2011-CP-32-0674
	)	
RODNEY C. BRYAN, #329517,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

1. I am counsel for Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Motion to Alter or Amend**, in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Rodney C. Bryan, #329517
Lee Correctional Institution
990 Wisacky Highway
Bishopville, South Carolina 29010



DATED this 9th day of February, 2018.

And also provided a copy to the PCR judge, the Honorable Edgar W. Dickson, via United States mail this same day.

Melody J. Brown
Senior Assistant Deputy Attorney General

ORIGINAL

ATTACHMENT 3

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
COURT OF COMMON PLEAS

Edgar W. Dickson, Circuit Court Judge

Case No. 2011-CP-32-0674

THE STATE OF SOUTH CAROLINA, Respondent,

V.

RODNEY C. BRYAN, pro se
S.C.D.C. No. 329517 Appellant.

NOTICE OF APPEAL, RULE 201, SCRCP

Rodney C. Bryan appeals the judgment to "applicants other allegations" of the Honorable Edgar W. Dickson dated January 30, 2018. Appellant recieved written notice of entry of this judgment on Febuary 8, 2018.

March 7, 2018

Rodney C. Bryan #329517 pro se
Lee CI/F-5/235-D
990 Wisacky Highway
Bishopville, SC 29070

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
IN THE ELEVENTH JUDICIAL CIRCUIT

2011-CP-32-0674

RODNEY C. BRYAN, #329517

Applicant

vs.

STATE OF SOUTH CAROLINA

Respondent.

AFFIDAVIT OF SERVICE

U.S. POSTAL MAIL

FILED
2018 MAR 13 AM 10:21
LISA M. COMER
CLERK OF COURT
LEXINGTON SC

I Rodney C Bryan #329517 pro se and hereby attest that the above captioned matter was served on this same day to:

1. OFFICE OF ATTORNEY GENERAL
STATE OF SOUTH CAROLINA
P.O. BOX 11549
COLUMBIA SC 29211

2. Edgar W Dickson, Judge
P.O. BOX 1949
ORANGEBURG, SC 29116

MARCH 7, 2018

Rodney C Bryan #329517
Lee CI / F-5 / 235-D
990 Wisacky Hwy
Bishopville SC 29070

RECEIVED

AUG 02 2018

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Lexington County
Court of Common Pleas
Edgar W. Dickson, Circuit Court Judge

Case No: 2011-CP-32-0674

RODNEY C. BRYAN, #329517,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

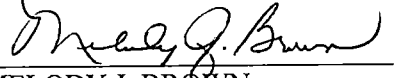
PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the Motion to Dismiss Appeal on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to :

Rodney C. Bryan, # 329517
Lee Correctional Inst.
990 Wisacky Highway
Bishopville, South Carolina 29010

I further certify that all parties required by Rule to be served have been served.

This 30th day of July, 2018.



MELODY J. BROWN

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
AUG 02 2018
S.C. SUPREME COURT

July 30, 2018

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

Re: Rodney C. Bryan, #329517 v. State of South Carolina
2011-CP-32-0674; Post-Conviction Relief Action

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Motion to Dismiss Appeal along with proof of service in the above-referenced case.

Sincerely,

Melody J. Brown
Senior Assistant Deputy Attorney General
S.C. Bar No: 14244

MJB/ab
Enclosures

cc: The Honorable Edgar W. Dickson
The Honorable Lisa M. Comer, Lexington County Clerk of Court
Rodney C. Bryan, #329571
Victim Advocacy Division