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STATE OF SOUTH CAROLINA)
 COUNTY OF BEAUFORT)
)
 Mykel Johnson, SCDC #351916,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS SUPREME COURT FOR THE FOURTEENTH JUDICIAL CIRCUIT

Case No.: 2014-CP-07-01759

ORDER OF DISMISSAL

2023 SEP 14 PM 12:16
 JERRI ANN ROSENE, III
 BEAUFORT COUNTY, S.C.
 CLERK OF COURT

This matter is before this Court by way of an application for post-conviction relief filed by Applicant Mykel Johnson following a remand from the South Carolina Court of Appeals to address an enumerated issue—whether trial counsel was ineffective for failing to object to testimony from a law enforcement officer regarding Applicant’s invocation of his right to remain silent. See Mykel Johnson v. State, Unpub. Op. 2020-UP-033 (Ct. App. filed Feb. 5, 2020). Thereafter, Applicant, though retained counsel Tommy A. Thomas, Esquire, filed an amended application adding an additional issue—whether trial counsel was ineffective for failing to object to any mention of implied malice due to use of a firearm.¹

On August 9, 2021, an evidentiary hearing was convened before this Court at the Beaufort County Courthouse. Applicant was present alongside counsel Thomas. Respondent the State of South Carolina was represented by Assistant Attorney General Samantha J. Weidauer of the the

¹ Respondent objected to the presentation of this additional issue as beyond the scope of the remand from the Court of Appeals. Applicant conceded at the hearing that this issue was beyond the scope of the remand but still asked the Court to consider it. This Court agreed that this new issue was beyond the scope of the remand, and, accordingly, it has no authority to consider it. See State v. Conrad Slocumb, 412 S.C. 88, 770 S.E.2d 436 (Ct. App. 2015) (noting that the circuit court on remand only had the jurisdiction and authority mandated by the appellate court and affirming the circuit court’s decision not to exceed the scope of the remand by resentencing only for the conviction which was remanded for resentencing and declining to resentence for convictions not part of the remand).

South Carolina Attorney General's Office. Applicant and trial counsel Eric Erickson both testified at the evidentiary hearing. At the conclusion of the hearing, this Court took the matter under advisement.

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismissed this action with prejudice. Specific findings of fact and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 are set forth below:

PROCEDURAL HISTORY

The records before this Court² establish that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. On October 28, 2011, Applicant fired a weapon at a car occupied by Frank Babecki and Desiree Constantineau (who was pregnant), both of whom knew Applicant and identified him as the shooter following the shooting.

During the December 2011 term, the Beaufort County Grand Jury indicted Applicant for two counts of attempted murder (2012-GS-07-02269; -02270). Eric Erickson, Esquire, represented Applicant. On June 18, 2012, Applicant proceeded to a jury trial before the Honorable Carmen T. Mullen, circuit court judge. On June 20, 2012, the jury convicted Applicant as indicted. Judge

² The records before this Court include the Beaufort County Clerk of Court general sessions records from the underlying conviction, the trial transcript, the complete appellate record from Applicant's direct appeal (including the record on appeal, all pleadings before the South Carolina Court of Appeals and South Carolina Supreme Court), the Beaufort County Clerk of Court common pleas records from the matter before and after remand (including the application, return, amended application, and original order of dismissal), the complete appellate record from Applicant's post-conviction relief appeal, and Applicant's records from the South Carolina Department of Correction. This Court has reviewed the record in its entirety.

Mullen sentenced Applicant to concurrent fifteen-year sentences for each count of attempted murder.

Applicant filed a timely notice of appeal and was represented by Assistant Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense-Office of Appellate Defense, who filed a brief of appellant pursuant to Anders³ and a petition to be relieved as counsel for Applicant. On April 2, 2014, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences and granted appellate counsel's petition to be relieved. State v. Johnson, 2014-UP-134 (Filed on April 2, 2014). The Remittitur was issued on April 18, 2014.

Applicant then filed a timely application for post-conviction relief on July 21, 2014, asserting he was entitled to post-conviction relief based on a claims that his "lawyer didn't probably represent [him] at trial." Respondent made its return and requested an evidentiary hearing to resolve the claim of ineffective assistance of counsel.

An evidentiary hearing was convened on May 17, 2016, at the Beaufort County Courthouse before the Honorable Brooks P. Goldsmith, circuit court judge. James K. Falk, Esquire, represented Applicant. Assistant Attorney General J. Rutledge Johnson of the South Carolina Attorney General's Office represented Respondent. Although no formal amendments were filed, Applicant proceeded forward on claims that counsel was ineffective for failing to object to hearsay testimony from Officer Dowling and failing to object to testimony from Officer Dowling pertaining to Applicant's right to remain silent.

Thereafter, Judge Goldsmith denied the application and dismissed the action with prejudice by written order signed on June 20, 2016. Applicant filed a motion to alter or amend pursuant to Rule 59(e), SCRPC, arguing Judge Goldsmith applied the incorrect standard to reject Applicant's

³ Anders v. California, 386 U.S. 738 (1967).



claim as to whether counsel was ineffective for failing to object to Officer Dowling's testimony regarding his right to remain silent. Respondent filed a return, and thereafter, Judge Goldsmith summarily denied the motion.

Applicant filed a timely notice of appeal. Pursuant to Rule 243, SCACR, Appellate Defender Susan B. Hackett South Carolina Commission on Indigent Defense-Office of Appellate Defense perfected Applicant's appeal by filing a petition for writ of certiorari with the South Carolina Supreme Court, raising the following issues:

- I. Did the PCR court err in concluding as a matter of law that [Applicant's] claim that trial counsel rendered ineffective assistance by failing to object to an officer's improper comment on his silence was procedurally barred pursuant to Section 17-27-20(B) of the South Carolina Code because the unpreserved issue regarding the officer's improper comment was raised in a brief pursuant to Anders v. California, 386 U.S. 738 (1967), on direct appeal?
- II. Did trial counsel render ineffective assistance in abrogation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to object to a police officer's testimony that [Applicant] invoked his Fifth Amendment rights to silence and counsel subsequent to his arrest and the advisement of rights?

In its return, Respondent conceded error in the post-conviction relief court's rejection of the first issue. Thereafter, the case was transferred to the South Carolina Court of Appeals pursuant to Rule 243(l), SCACR, who granted certiorari. Following briefing and oral argument, the Court of Appeals issued an order reversing and remanded the matter back to the circuit court. Our Court of Appeals found the post-conviction relief court erred in denying Applicant's allegation on procedural grounds. Respondent filed a petition for rehearing on February 20, 2020, seeking clarification on the scope of the remand, and Applicant, pursuant to an order from the Court and through counsel, filed a return. An Order denying Respondent's petition for rehearing was filed April 23, 2020. The case was remitted back to the circuit court on June 24, 2020.

CURRENT APPLICATION

In his original 2014 PCR application, Applicant alleges he is being held unlawfully for



the following reasons:

1. "My lawyer didn't probably (sic) represent me at trial."

Applicant, through Counsel, filed an amended application on July 29, 2021. In the amended application, Applicant re-alleges his allegations contained in his original application and moves to include and allege the following:

1. Ineffective assistance of trial counsel for
 - a. "Failure to object to Officer Dowling's testimony regarding Applicant's decision to exercise his right to remain silent" and
 - b. "Failure to object to any mention of implied malice due to use of a firearm, including Belcher implied malice charge".

Regarding relief sought, Applicant requested: "conviction to be overturned on ground of illegal search and seizure and Miranda rights violation or vacated on the grounds of ineffective assistance of counsel."

At the start of the evidentiary hearing, Respondent moved to limit testimony and argument to the Applicant's allegation alleging counsel was ineffective for failing to object to Officer Dowling's testimony regarding Applicant's decision to exercise his right to remain silent, noting that because the matter was remanded for this limited issue, the circuit court did not have the authority to hear and rule upon any new issues beyond the limited scope of the remand. PCR counsel conceded this was beyond the scope of the remand but nevertheless asked this Court to consider the issue.

This Court agreed that this new issue was beyond the scope of the remand, and, accordingly, it has no authority to consider it. See State v. Conrad Slocumb, 412 S.C. 88, 770 S.E.2d 436 (Ct. App. 2015) (noting that the circuit court on remand only had the jurisdiction and authority mandated by the appellate court and affirming the circuit court's decision not to exceed the scope of the remand by resentencing only for the conviction which was remanded for



resentencing and declining to resentence for convictions not part of the remand). Therefore, this order will only address the limited issue on remand from the Court of Appeals – whether counsel was ineffective for failing to object to Officer Dowling’s testimony regarding Applicant’s decision to exercise his right to remain silent.

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

Applicant testified first. On direct examination, Applicant testified he understood the post-conviction relief process as well as the risks associated with proceeding forward and affirmed he still wished to proceed forward. (PCR Tr. 10-11). He testified he is serving an aggregate fifteen year sentence as a result of his conviction for two counts of attempted murder and his current max-out date is September of 2026. (PCR Tr. 10-11).

Applicant testified he was arrested by Detective Erdel and that he told Detective Erdel he would turn himself in once he had an attorney. (PCR Tr. 11). Applicant testified he was unaware at the time that there was a warrant for his arrest but that he had been informed by a family member that law enforcement was looking for him. (PCR Tr. 11-12). Applicant testified he planned to voluntarily turn himself in after learning this but was waiting for an attorney. (PCR Tr. 11-12). Applicant testified he was asked by law enforcement if he wished to make a statement and was provide with a warning of his rights pursuant to Miranda. (PCR Tr. 12). He testified he invoked his right to an attorney. (PCR Tr. 12).

Trial Counsel Eric Erickson testified next. Counsel testified he was retained to represent Applicant. (PCR Tr. 14). He testified he was aware of Applicant’s appellate issues and understands this case has been remanded for a hearing on the issue concerning Applicant’s right to remain silent. (PCR Tr. 14). Counsel testified he was aware of the comment made by the investigating



officer in front of the jury at trial concerning Applicant requesting an attorney.⁴ (PCR Tr. 14). Counsel then read aloud the testimony of the investigating officer from the trial transcript (PCR Tr. 14). Counsel testified that this was a comment on Applicant's right to remain silent. (PCR Tr. 15).

In response to questioning as to why he did not object to this testimony, Counsel testified he relied on fact he could propose a jury instruction that the right to remain silent cannot be used against a defendant. (PCR Tr. 15). PCR Counsel then asked Counsel to read the question of the prosecutor aloud⁵, and again read aloud the Investigating Officer's response (PCR Tr. 15-16). Counsel testified the defense at trial was an alibi based on the testimony of Mr. Simmons, who testified he was making music with Applicant at the time of the crimes. (PCR Tr. 16). Counsel testified he recalled he presented a second defense theory that the victim had ill-feelings toward Applicant from a drug-deal that created a motive for framing Applicant for the crime. (PCR Tr. 16-17). Counsel also testified regarding inconsistencies in the testimony from the two victims and how the issue arose at trial. (PCR Tr. 17-19).

⁴ In response to the prosecutor's question if there was any additional evidence the lead investigator was able to obtain after Applicant was taken into custody:

A. Mr. Johnson did not want to talk. He wanted the representation of an attorney when we asked him for his side of the story. From the defendant's side, we did not develop any information.

Trial Tr. 103, lines 13-16.

⁵ The prosecutor's question, read aloud at the hearing by Counsel:

Q. Is there any other additional evidence that you as a lead investigator in the case were able to obtain after Mr. Johnson was taken into custody?

Trial Tr. 103, lines 10-12.



On cross-examination, Counsel testified there was a pre-trial Jackson v. Denno⁶ hearing to determine the admissibility of Applicant's statements when he was first taken into custody. (PCR Tr. 20). Trial Counsel could not recall if the officer made the statements at the pre-trial hearing, but testified the trial court ruled the statements were voluntary and admissible at trial. (PCR Tr. 20). He further testified that he did not believe he had any basis to object to

Respondent then directed Counsel to page 142, lines 8 through 13, which Counsel read aloud. (PCR Tr. 20-21).⁷ The statement was then admitted into evidence through Erdel's testimony at Applicant's trial. (PCR Tr. 21). Counsel testified he did not think of objecting to Officer Dowling's statements on page 103 and did not think there was any basis for an objection. (PCR Tr. 21). Trial Counsel testified even if he did object, the statement would still likely have come in as the admissibility of the statement was already decided at the pre-trial Jackson v. Denno hearing. (PCR Tr. 22-23).

On re-direct, Trial Counsel testified that based on his review of the decision of the Court of Appeals, he now believes that the pre-trial ruling on the admissibility of Applicant's statement was in error and Officer Dowling's testimony was an impermissible comment on Applicant's right to remain silent. (PCR Tr. 23).

⁶ Jackson v. Denno, 378 U.S. 368 (1964).

⁷ Testimony of Mr. Erdel read aloud by Trial Counsel at evidentiary hearing:

A. I believe he understood what his rights were, yes.

Q. Now, when you, uh, when he came out and he asked you or said that he was going to turn himself in when he got a lawyer and asked you how you found him, did he ask you any questions about what you wanted him for?



FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged ineffective assistance of trial counsel and asserts that as a result of counsel's purported error, he is entitled to have his conviction reversed and proceed back to the court of general sessions for a new disposition of his case.

Standard of Review

Under the Uniform Post-Conviction Procedures Act, an applicant may seek post-conviction relief upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRPC.

The three grounds for relief upon which Applicant proceeded at the evidentiary hearing pertain to ineffective assistance of counsel. The Sixth and Fourteenth Amendments to the United



States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, post-conviction relief allegations are centered upon an allegation that the applicant did not receive effective assistance of counsel guaranteed by the Sixth Amendment. See generally S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in post-conviction relief actions). The allegation of denial of such representation sets forth a prima facie violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland to determine whether counsel’s conduct “was so ineffective as to require reversal” of the applicant’s conviction or sentence. 466 U.S. at 687. First, the applicant must show that counsel’s performance was deficient; and second, that the deficient performance prejudiced the applicant. Id. at 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is “necessarily linked to the practice and expectations of the legal community.” Padilla v. Kentucky, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel’s representation fell below an objective standard of “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland, however, “does not guarantee perfect representation[—]only a ‘reasonably competent attorney.’” Harrington v. Richter, 562 U.S. 86, 110 (2011) (quoting Strickland, 466 U.S. at 687). Representation is constitutionally ineffective only if counsel’s conduct “so undermined the proper functioning of the adversarial process” that the defendant was denied a fair proceeding. Strickland, 466 U.S. at 686. Just as there is “no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.” Harrington, 562 U.S. at 110.

Accordingly, “[j]udicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Strickland, 466 U.S. at 689; see also Yarborough v. Gentry, 540 U.S. 1, 6 (2003) (“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”). Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690).

Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Id. Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a “strong

presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Butler, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Reviewing courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct." Strickland, 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

The Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; see also Harrington, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Harrington, 562 U.S. at 105. Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," **not** whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690) (emphasis added).

The second, or "prejudice" prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Id. at 691–92. In order to prove prejudice, an applicant

must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." Id. at 687 (emphasis added).

The performance and prejudice standards, however, "do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Id. at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. Id.

Applicant has alleged trial counsel was ineffective for failing to object to testimony comment on his right to remain silent and asserts that as a result of counsel's purported errors, he is entitled to a new trial. This Court finds has failed to meet his requisite burden of proof and denies relief.

In this case, Applicant made statements to law enforcement after his arrest. (Trial Tr. 23). A Denno⁸ hearing was held to determine the admissibility of Applicant's statements to Officer

⁸ Jackson v. Denno. 378 U.S. 368 (1964)

George Erdel by Applicant after his arrest. The trial judge found Applicant's pre-Miranda statements were admissible as spontaneous utterances. (Trial Tr. 24).

After his arrest and before he was read his Miranda rights, Applicant requested an attorney and made statements to law enforcement. (Trial Tr. 141). These statements were admitted into evidence, through the testimony of Erdel, after a Denno hearing on the statement's admissibility. (Trial Tr. 29, 141):

Q: You said he asked you questions. Do you recall what he said to you?

A: I do recall what he said to me. He asked me, I do not recall the exact order, but the gist of it was, uh, he did say that he was going to turn himself in once he hired a lawyer. There was – he didn't specify and I didn't ask. He said there was something in his phone that would tell the story. Then he asked how did y'all find me.

(Trial Tr. 141).

Applicant was then taken to the local law enforcement facility. (Trial Tr. 24). At that facility, Investigator Joshua Dowling read Applicant his Miranda rights. (Trial Tr. 24). Applicant then requested an attorney and refused to speak to law enforcement. (Trial Tr. 103). In response to the question:

Q: Is there any additional evidence that you as a lead investigator in the case were able to obtain after Mr. Johnson was taken into custody?

A: Mr. Johnson did not want to talk. He wanted the representation of an attorney when we asked him for his side of the story. From the defendant's side, we did not develop any information.

(Trial Tr. 103).

Under the both the United States and South Carolina Constitutions, criminal defendants have a constitutional right not to be compelled to incriminate themselves during trial. See U.S. Const. amend. V (prohibiting a criminal defendant from being "compelled in any criminal case to be a witness against himself[.]"); S.C. Const. art. I, § 12 ("[N]or shall any person be compelled in

any criminal case to be a witness against himself.”). Pursuant to that right, both comments by the prosecution on a defendant’s silence and instructions by the trial judge indicating a defendant’s silence constitutes evidence of guilt are prohibited. Griffin v. California, 380 U.S. 609, 615 (1965); see Doyle v. Ohio, 426 U.S. 610, 618 (1976) (“[W]hile it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.”).

“In particular, the State may neither comment upon nor present evidence at trial of a defendant’s decision to exercise his right to remain silent[.]” Edmond v. State, 341 S.C. 340, 346, 534 S.E.2d 682, 685 (2000); see McFadden v. State, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000) (“Specifically, the solicitor must not comment, either directly or indirectly, on a defendant’s silence, failure to testify, or failure to present a defense.”); State v. Weaver, 361 S.C. 73, 88-89, 602 S.E.2d 786, 794 (Ct. App. 2004) (“As a corollary of this right, a prosecutorial comment, whether direct or indirect, upon a defendant’s failure to testify at trial is constitutionally impermissible.”). “The obvious purpose [of that prohibition] is to try to prevent jurors from improperly inferring the accused is guilty simply because he exercised rights guaranteed him by the state and federal constitutions.” Edmond, 341 S.C. at 346, 534 S.E.2d at 685; see Wainwright v. Greenfield, 474 U.S. 284, 292 (1986) (“The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony.”).

However, the mere mention of a defendant’s decision to exercise his right to remain silent during trial does not automatically constitute reversible error. See State v. Truesdale, 285 S.C. 13,

17, 328 S.E.2d 53, 56 (1984) (“When such a violation occurs, the question remains, however, whether it is cause for reversal or is harmless error beyond a reasonable doubt.”), rev’d on other grounds by Truesdale v. Aiken, 480 U.S. 527 (1989). Instead, such testimony only requires reversal where its admission results in prejudice to the defendant. Gill v. State, 346 S.C. 209, 221, 552 S.E.2d 26, 33 (2001); see State v. Johnson, 306 S.C. 119, 129, 410 S.E.2d 547, 553 (1991) (declining to reverse Johnson’s conviction as a result of the introduction of testimony establishing Johnson invoked his right to counsel after determining the admission of that testimony was not prejudicial to Johnson’s case). Significantly, the burden rests upon the defendant to establish the admission of the testimony deprived him of a fair trial. Gill, 346 S.C. at 221, 552 S.E.2d at 33; see also Weaver, 361 S.C. at 89, 602 S.E.2d at 794 (“[A]lthough it is improper for the solicitor to indirectly comment on a defendant’s failure to testify, such comments do not necessarily mandate reversal of a conviction. Indeed, a criminal defendant is entitled to a fair trial, not a perfect one.”). In the context of post-conviction relief, it is not sufficient for Applicant to merely show deficiency—Applicant must show resulting prejudice from counsel’s deficiency. “When a Doyle violation has occurred, the prejudice prong of the PCR analysis runs parallel to the harmless error analysis applied in a direct appeal.” McFadden, 342 S.C. at 641, 539 S.E.2d at 393. Thus, in determining whether an applicant was prejudiced by the admission of testimony concerning his post-arrest silence, any error resulting from the admission of that testimony will not result in reversal if a review of the entire record establishes the error was harmless beyond a reasonable doubt. State v. Arther, 290 S.C. 291, 296, 350 S.E.2d 187, 190 (1986); see United States v. Hastings, 461 U.S. 499, 509 (1983) (“[T]he [United States Supreme] Court has consistently made clear it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations[.]”).



When a Doyle violation has occurred, as alleged here, we will consider the following factors in determining prejudice on PCR:

- 1) whether the reference to the accused's exercise of his constitutional right was a single reference;
- 2) whether the State tied the exercise of this right directly to the accused's exculpatory account;
- 3) whether the accused's exculpatory account was totally implausible; and
- 4) whether the evidence of guilt was overwhelming.

Gantt v. State, 354 S.C. 183, 188, 580 S.E.2d 133, 136 (2003) (citations omitted). See Edmond, 341 S.C. at 348, 534 S.E.2d at 686-687 (finding that when reviewing the record to determine whether an error was harmless, the following factors should be considered: (1) whether the reference to defendant's right to remain silent was a single reference; (2) whether the reference was repeated or alluded to at another point during trial; (3) whether the prosecutor tied the defendant's exercise of his right directly to his exculpatory story; (4) whether the exculpatory story was totally implausible; and (5) whether the evidence of guilt was overwhelming.); Truesdale, 285 S.C. at 18-19, 328 S.E.2d at 56 (identifying the factors relied upon in the opinion of the Fifth Circuit Court of Appeals in Chapman v. United States, 547 F.2d 1240 (5th Cir. 1977), as relevant factors to be considered in determining if a Doyle violation is harmless). The four factors listed in Doyle are not rigid rules, but factors to be weighed in determining whether Petitioner was prejudiced under Strickland.

However, none of those factors is alone dispositive, and the specific circumstances of each case should be considered individually on a case-by-case basis to determine whether the error was harmless beyond a reasonable doubt. Truesdale, 285 S.C. at 19, 328 S.E.2d at 56; see Alderman v. Austin, 695 F.2d 124, 126, n. 7 (5th Cir. 1983) (instructing that the factors for determining whether a Doyle violation is harmless identified in Chapman, are not to be treated as rigid rules or

applied strictly to all cases); see also United States v. Shaw, 701 F.2d 367, 382 (5th Cir. 1983) (“Subsequent cases have illustrated, however, that factual situations are not always amenable to description with the rigid Chapman types. Consequently, we have held Chapman inapplicable and the error to be harmless even though the defendant’s story is ‘not totally implausible,’ but the evidence of guilt is ‘substantial.’” (citations omitted)); see, e.g., State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) (“No definite rule of law governs this finding [of harmlessness]; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.”).

Here, the record shows that all four Doyle factors weigh in favor of the State and the violation was, therefore, harmless and lacking in prejudice.

First, the reference to Applicant’s silence was a single reference. Applicant concedes this factor. The only mention of Applicant’s post-Miranda silence is Dowling’s statement: “Mr. Johnson did not want to talk. He wanted the representation of an attorney when we asked him for his side of the story. From the defendant’s side, we did not develop any information.” (Trial Tr. 103). The State did not reference this statement in its closing argument or ask further questions, and the statement was never repeated or alluded to again. Thus, as the reference was only singular, this factor is in the State’s favor.

Second, the State did not tie the exercise of Applicant’s right to an exculpatory account, which Applicant also concedes. The State itself did not reference Applicant’s post-Miranda silence at all, and it certainly did not tie that silence to an exculpatory account. The State’s closing argument tied Applicant’s pre-Miranda request for an attorney to his fleeing from law enforcement and guilty conscience. “You can consider that he said not why do you want me, what’s this all about or even can I call my mom. No, he said I was going to turn myself in when I got a lawyer.”

(Trial Tr. 273). This is certainly allowed. “Doyle is only applicable after Miranda warnings have been given.” Brown, 375 S.C. at 479, 652 S.E.2d at 773. The State did not tie Applicant’s exculpatory account, in the form of an alibi, to his post-Miranda invocation of his constitutional rights. Thus, this factor is in the State’s favor and shows a lack of prejudice from Dowling’s statement.

Third, Applicant’s account was totally implausible. Applicant asserted an alibi defense through a single witness, Kendalle Simmons. Simmons, who was a friend of Applicant’s, testified he was with Applicant from 3:00 pm until 7:00 pm the day the incident occurred. (Trial Tr. 248-249). The State noted this was not an actual alibi as the victim stated the incident took place sometime between 12:00 pm and 2:00 pm. (Trial Tr. 275). The State pointed out several inconsistencies in Simmons’ statements. Simmons testified he saw Applicant on dates in which the State had established Petitioner was no longer in town. (Trial Tr. 254). Simmons also testified that Applicant did not own a firearm or ammunition. (Trial Tr. 258). The State established through text messages with his mother and a search warrant of his room that he did. (Trial Tr. 109; 129).

Further, two witnesses placed Applicant directly on the scene, with the handgun, as the person who was firing the shots. (Trial Tr. 46; 203). This was further corroborated by Applicant’s actions after the incident. Immediately following the shooting, Babecki accused Applicant by text of shooting at himself and his pregnant wife. (Trial Tr. 198). Applicant did not respond to that accusation. (Trial Tr. 199). This pre-Miranda silence was permissively referenced as indicative of guilt by the State along with Applicant’s flight and hiding from law enforcement. (Trial Tr. 274). See Brecht v. Abrahamson, 507 U.S. 619, 628 (1993) (recognizing silence can be probative while noting “if the shooting was an accident, petitioner had every reason—including to clear his name and preserve evidence supporting his version of the events—to offer his account immediately



following the shooting”); Jenkins v. Anderson, 447 U.S. 231, 239 (1980) (“Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted.”); see also Raffel v. United States, 271 U.S. 494, 497 (1926) (“[A criminal defendant’s] failure to deny or explain evidence of incriminating circumstances of which he may have knowledge may be the basis of adverse inference [regarding credibility.]”); cf. State v. Nathari, 303 S.C. 188, 195, 399 S.E.2d 597, 602 (Ct. App. 1990) (explaining a witness’s failure to come forward earlier with exculpatory information was a proper subject of cross-examination because that fact bore on the witness’s credibility).

Fourth, the evidence of Applicant’s guilt was overwhelming. The State provided overwhelming evidence in the form of direct evidence and supporting circumstantial evidence of Applicant’s guilt. The two victims saw and knew Applicant. (Trial Tr. 46, 202). They named him as the shooter and called 911 immediately after the incident. (Trial Tr. 46, 202). Following the incident, Applicant consistently acted with a guilty conscience. He left his mother’s home, where he lived. (Trial Tr. 101). When law enforcement found him, his first words were to ask how they found him, which indicates he knew law enforcement was looking for him and he was attempting to hide from them. (Trial Tr. 141). Applicant’s only alibi witness was a friend of his who made statements that were shown to be patently false on behalf of Applicant and was completely unreliable and unbelievable. Further, Applicant’s witness did not present an actual alibi since he did not account for Applicant’s whereabouts during the actual time of the shooting. Therefore, the State had overwhelming evidence of guilt and this factor is also in the State’s favor.

Based on this, this Court finds that Applicant cannot establish the requisite prejudice necessary for a grant of post-conviction relief. While Counsel failed to object to comments made



on Applicant's right to remain silent, Applicant cannot establish that the result of his proceeding would have been different but for this failure, and, accordingly, this claim is **DENIED** and **DIMISSED** with prejudice.

CONCLUSION

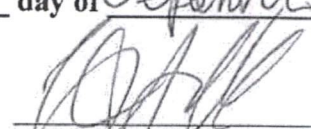
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant remains remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 6th day of September, 2023.



EUGENE C. GRIFFITH, JR.
Presiding Judge
Fourteenth Judicial Circuit

York _____, South Carolina