VOLUME II of II

STATE OF SOUTH CAROLINA

In the Supreme Court

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Oct 25 2023

S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable Eugene C. Griffith, Jr.

Case No.: 2023-001525

State of South Carolina,

Respondent

vs.

Mykel Johnson #351916,

Appellant

APPENDIX

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THE COURT: That's fair enough because, I think as I understood it, the Belcher issue was a long stretch and it wasn't preserved, and so you said it was implicitly suggested there may be an issue there. I don't know that I can consider that.

ATTORNEY THOMAS: And I think that's the question, Your Honor in all candor. I think that there was a *Belcher* objection that could have been made in regards to implied malice because *Belcher* was good law at the time. It was not -- it would be a PCR issue, but my concern is that we're possibly beyond that point. I think the Court has to consider it as a full and complete remand which would entitle him to a completely new post-conviction relief hearing. And I'm not sure, in all honesty, that that's where we are.

THE COURT: Y'all both seem to be on the same page with that, so I think you protected it --

ATTORNEY THOMAS: Yes, sir.

THE COURT: -- and that issue won't be considered by me today --

ATTORNEY THOMAS: All right.

THE COURT: -- just because of the order of the court remanding it.

ATTORNEY THOMAS: All right. Your Honor, so if it please the Court, we would call Mr. Johnson to the stand.

THE COURT: Sure.

MYKEL D. JOHNSON,

having first been duly sworn, was examined and testified as follows:

CLERK OF COURT: And if you'll just state your name, and spell your last name for the court reporter.

THE WITNESS: Mykel Johnson, J-o-h-n-s-o-n.

DIRECT EXAMINATION

BY ATTORNEY THOMAS:

Q Mr. Johnson, you understand that you're here for post-conviction relief?

A Yes, sir.

Q And you understand what post-conviction relief is?

A Yes, sir.

Q That you're asking that your sentence be set aside?

A Yes, sir.

Q You understand that there are certain situations where you could have exposure in going forward with your post conviction?

A Yes, sir.

Q You could go back to trial and, as a result, you could potentially get more time?

A Yes, sir.

Q We discussed that, and you're willing and want to go forward today?

A Yes, sir, I do.

Q Okay. Now, Mr. Johnson, you're serving time for what?

A Two counts of attempted murder.
Q I'm sorry?
A Two counts of attempted murder.
Q Okay. And what type of sentence do you have?
A Fifteen, ran concurrent.
Q So you got a total sentence of fifteen?
A Yes, sir.
Q And what's your max-out date?
A September 2026.
Q Twenty-Six?
A Yes, sir.
Q Now, do you remember roughly when you were arrested?
A Yes, sir.
Q And who were you arrested by; do you remember?
A Detective Ardell [ph]. Erdel.
Q And what police department was he from?
A Beaufort County Department of U.S. Marshal.
Q Now, you were arrested on these charges?
A Yes, sir.
Q And when you were arrested did you make any comments to the police department, to the policeman?
A Yes, sir.
Q What did you say?
A I told the detective I would turn myself in once I had an attorney.

Q Okay. So what you said is that you wanted to turn -- did you know they had a warrant for your arrest?
A No. One of my family members told me that a police officer came looking for me. They said that I was in trouble for something, but I didn't know that this was the case, so I was waiting until I get an attorney to turn myself in.
Q So you were going to go down and voluntarily talk with them?
A Yes, sir.
Q And that comment was that you were going to come down and speak with them once you got a lawyer?
A Yes, sir.
Q Okay. So what happened then? They took you down to the police station?
A Yes, sir. They took me down to the police station. Asked me, did I want to make a voluntary statement, and I told them I invoke my rights to an attorney.
Q And were you Mirandized? Were you given your Miranda rights?
A Before I made that statement?
Q When you were arrested were you given your Miranda rights?
A Yes, sir.
Q And after you were given your Miranda rights, that's when you told them that you would like to have an attorney?
A Yes, sir.
ATTORNEY THOMAS: Your Honor, I have no further questions.

THE COURT: Ms. Weidauer.

ATTORNEY WEIDAUER: Beg the Court's indulgence for a moment.

THE COURT: Yes, ma'am.

ATTORNEY WEIDAUER: Nothing, Your Honor.

THE COURT: Mr. Johnson, you can step down.

THE WITNESS: Thank you.

ATTORNEY THOMAS: Your Honor, may I please -- the Court's indulgence just for a second.

THE COURT: Yes, sir.

ATTORNEY THOMAS: Your Honor, if it please the Court. We would like to call Mr. Erickson to the stand.

ERIC J. ERICKSON,

having first been duly sworn, was examined and testified as follows:

CLERK OF COURT: Once you're seated, if you'll just state your name, and spell your last name for the court reporter.

THE WITNESS: My name is Eric Erickson.

ATTORNEY THOMAS: If it please the Court.

THE COURT: Yes, sir.

DIRECT EXAMINATION

BY ATTORNEY THOMAS:

Q Mr. Erickson, you had an opportunity to represent Mykel Johnson?

A Yes, sir.

Q All right. Were you appointed or retained?

A Retained.
Q And you went to trial with Mr. Johnson?
A Yes, sir.
Q And are you familiar with the appeal as to what's been going on with that?
A Yes, sir.
Q And you understand that this was a remand in regards to the issue of Mr. Johnson exercising his right to remain silent?
A I do.
Q And are you aware of the comment that was made at trial by the officer in regards to Mr. Johnson's wanting an attorney? And that is -- for the Court's information, as well, that's -- 103 of the transcript, as well as the record on appeal, Lines 13 through 16.
A Yes, I see that.
Q Okay. And this was testimony from the investigating officer?
A Yes, sir.
Q Okay. And what did he -- and this was in front of the jury?
A Yes, sir.
Q And do you mind just reading 13 through 16?
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.

Q So he did make a comment that he wanted to exercise his right to remain silent?
A Yes, sir.
Q Now, did you object to that?
A No, I did not.
Q And do you feel like that that had any prejudicial impact on the jury?
ATTORNEY WEIDAUER: Objection.
THE COURT: I'll allow it.
THE WITNESS: I'm trying to think what I said during the first PCR hearing, and I don't think I had that question.
BY ATTORNEY THOMAS:
Q Let me rephrase it then. Would you have rather that that response not go to the jury, that information go to the jury?
A Well, here's what I understand about the jury. As a lawyer, I have to make jury instructions.
Q Right.
A And I know there's a jury instruction that the right to remain silent cannot be used against you, cannot even talk about it. So that's what I understand about the jury instruction.
Q Okay. But in this instance, this was coming from the detective, and he said that, if you look at Lines 10 through 12, I think -- would you read that question?
A On page 103?
Q Yes, sir.

A 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?
Q And then 13 through 16 was the officer's response to that?
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.
Q Now, in this case, what was your theory of defense?
A My theory of the events?
Q No, defense. How were you going to defend Mr. Johnson?
A Well, that he had an alibi and he did not do the shooting.
Q And that testimony was presented?
A We had one alibi witness, Mr. Simmons, I believe, and he, Mr. Simmons, testified that around the time of the shooting Mykel Johnson was at somebody's house where they were making music.
Q Right. Now, do you remember -- there seems to be some concern about -- there were, I guess, two victims in this case, the gentleman and his wife?
A Yes, sir.
Q And the gentleman was allegedly purchasing drugs from Mr. Johnson?
A Yes, sir.
Q And I think you raised a second theory of defense in regards to there was some sort of disagreement between, or ill feelings

towards, Mr. Johnson by this individual because of a robbery of his cousin or some relation to him?

A Yes. I do remember that now.

Q Okay. And so you attempted to present that there was some sort of reason or, I guess, motive for him to claim that Mr. Johnson was involved in this altercation?

A Yes.

Q So there was a defense to this case?

A Yes.

Q And also, it appears in the transcript that there was some concern about the consistency of the statements given by the gentleman, this victim?

A Yes. There was two victims, a man and a woman. The man had seen what he thought was Mykel Johnson, and the woman did not see who fired the gun.

Q And I think that this gentleman's name was Bevecki [ph]; is that correct?

A Yes, sir.

ATTORNEY WEIDAUER: Objection.

THE COURT: Yes, ma'am? What for?

ATTORNEY WEIDAUER: Relevance. The only matter before the Court is Mr. Erickson's failure to object to Officer Dowling's testimony. I think we're getting a little away from that.

THE COURT: Mr. Thomas, are you going to tie this in for me?

ATTORNEY THOMAS: Yes. It all goes to the prejudicial

issue, Your Honor.

THE COURT: Okay. Go ahead.

ATTORNEY THOMAS: Your Honor, if I can beg the Court's indulgence just for a second.

THE COURT: Sure.

BY ATTORNEY THOMAS:

Q Counselor, can I draw your attention to page 146 of the transcript and record?

A Okay.

Q Lines 18 through 24. And this is a cross-examination by you of George Erdel.

A Yes.

Q And who is George Erdel?

A I believe he worked for the Beaufort City Police at the time.

Q Okay. All right. And it appears -- tell me if this is true or not. It appears that you are talking about Mr. Bevecki's truthfulness?

A I suppose so.

Q Look at Line 15, 15 through 17. I think that's your question.

A Yes, I see that.

Q Okay. And you're saying, Did you feel he was being truthful? Was there times in that video where you feel that he was being untruthful? And that is, I guess, your question to

Mr. Erdel regarding --

A Yes. I was referring to credibility of the witness's testimony.

Q Okay. And what was his response?

A Line 18?

Q Yes, sir.

A I don't know. All I can say is that anything he said was overtly not true. I felt like maybe there would be something -- in other words, if he would say it would be a lie, I guess, of omission -- in other words, there were things that were not revealed. However, I can't think of anything where he said that was like, in and of itself, like a lie, not true.

Q But he is talking about, I guess, what you would have been searching for, is some inconsistencies in the victims' statements?

A Yes, sir.

Q And to the best of your recollection, there were inconsistencies?

A I believe there was.

Q Okay.

ATTORNEY THOMAS: Your Honor, I have no further questions.

THE COURT: Ms. Weidauer.

CROSS-EXAMINATION

BY ATTORNEY WEIDAUER:

Q Good morning, Mr. Erickson.

A Good morning.
Q So you stated, on page 103 -- the answer to the question from the State was: 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.
A Yes.
Q Was there a *Jackson v. Denno* hearing regarding statements applicant made when he was first taken into custody?
A Yes.
Q And were those statements made by Investigator Erdel?
A I'd have to review the testimony on that.
Q Do you remember if the judge denied your pretrial motion to have those statements excluded?
A Yes. It was denied.
Q Okay. And did the judge rule those statements were voluntary and admissible?
A I believe so.
Q All right. If you would turn to 144.
A 144.
ATTORNEY WEIDAUER: Beg the Court's indulgence, Your Honor.
THE COURT: Yes, ma'am.
BY ATTORNEY WEIDAUER:
Q 142. Excuse me. Can you read Lines 8 through 13?
A I believe he understood what his rights were. Yes. 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're wanted for? He said no.

I got allergies, so I'm going to obviously cough quite a bit now. I did take a Benadryl before I got in here, but ...

THE COURT: Need some water?

THE WITNESS: If you have a Benadryl.

THE COURT: I got one at home, but not here.

BY ATTORNEY WEIDAUER:

Q So that statement was admitted into evidence through Investigator Erdel's testimony?

A Yes, ma'am.

Q And Mr. Thomas asked you about Officer Dowling's testimony at trial. That's testimony on page 103 that you read before?

A Yes. Yes, he asked me about it.

Q Did you think about objecting to that testimony?

A No, I did not.

Q Did you think that there was any basis for objecting to that testimony or that statement?

A No, I did not.

Q Did you think if you would have objected this would have cured applicant's pre-Miranda statement?

A I don't understand the question.

Q Investigator Erdel testified to applicant's pre-Miranda

statement.
A Yes.
Q Do you think if you would have objected it would have cured this statement coming in anyway?
A I can't answer that. I don't remember what I was thinking back then. I was not asked that question.
Q There was a *Jackson v. Denno* hearing, though?
A Pardon me?
Q There was a *Jackson v. Denno* hearing regarding that specific statement, Investigator Erdel saying it --
A I'd have to look at what I said.
Q What you just said on 142 regarding Investigator Erdel.
A And the question again was? I'm sorry.
Q Investigator Erdel's testimony, Line 10 through 13, you want to reread that?
A What do you want from me now?
Q So in the *Jackson v. Denno* hearing, the judge found that statement would be admissible?
A Yes. We were denied.
Q So if you would have objected to Officer Dowling's statement on page 103, do you think it would have cured this statement coming in? The statement was always going to come in because the judge found, at the *Jackson v. Denno* hearing, the statement was admissible.
A No, ma'am. That's my answer. Would not have cured it.

Q Would not have cured it.

ATTORNEY WEIDAUER: Beg the Court's indulgence, Your Honor. Thank you.

THE COURT: All right. Anything else?

ATTORNEY THOMAS: If I may, just one or two.

REDIRECT EXAMINATION

THE COURT: Okay.

BY ATTORNEY THOMAS:

Q Counselor, it appears from the information that we now have, the wisdom that we have now from the Court of Appeals, is that the judge was wrong in the *Jackson v. Denno?*

A Yes.

Q So it was an impermissible comment on his right to remain silent?

A Yes.

Q When you were testifying -- and I looked at -- let's go back to 142. In looking at that, does that just compound the error? I mean, he says: He told me that he was going to turn himself in when he got a lawyer.

If we look at -- and I know this wasn't addressed by the Court of Appeals, but if you look at 103, 13 through 16, where he says that he, you know, exercised his right to remain silent, I mean, didn't he also, in some way, exercise his right to remain silent on 142, that statement?

A It appears so.

Q So if you take that line of thought, 142 doesn't help the State; I think it hurts the State in that it compounds the error that was made in the testimony of the detective?
A I can't answer that question. I don't know if it did or did not compound the problem.
Q But that goes to the jury twice, that he wanted a lawyer?
A Yes. That's right.
ATTORNEY THOMAS: Your Honor, I have no further question.
THE COURT: Any recross?
ATTORNEY WEIDAUER: No, Your Honor.
THE COURT: All right. You may step you down. You still need him or not? Are we good?
ATTORNEY THOMAS: We have no objection, Your Honor.
THE COURT: Okay. He's excused.
ATTORNEY THOMAS: Your Honor, if I beg the Court's indulgence just for a second.
THE COURT: Certainly.
ATTORNEY THOMAS: Your Honor, if it please the Court, that's the applicant's case. If the Court would allow, I would certainly be glad to make a closing argument on it.
THE COURT: I think I'd like to hear that.
ATTORNEY THOMAS: Yes, sir. Your Honor --
THE COURT: Since you presented, I want to hear you right now.
ATTORNEY THOMAS: Okay. Your Honor, if it please the Court.

I think the thing that jumps out at me is, When can any attention being brought to someone exercising their right to remain silent, when can that not be prejudicial? I mean, you've got a jury sitting there, and actually it comes out in this case twice that he wanted a lawyer. And then in the statement on 103 goes, really, even, beyond that to say, No, I didn't get anymore information because he wouldn't talk to me. I think, just in human nature and looking at it in my mind, a simpleton approach, that's just -- the jury is just going to wonder about that. Well, you know, he didn't get any more statements coming from him because he wouldn't tell him. Well, why wouldn't he tell him? Because he committed a crime or he had some involvement in the crime.

I disagree with the Court's opinion a little bit in that I think it's almost prejudicial on its face. You know, clearly the courts have said, you know, you can't make a comment -- you just can't make a comment on someone's right to remain silent. It's a due process issue.

And so in this instance, I think we're beyond all that. We're to the point now where the Court of Appeals has said it was an impermissible comment. We're back in front of the post-conviction relief court to make a record in regards to this, and the only issue that is undecided is the prejudicial nature of it.

Now, I went through and looked at the Court's -- what was

presented to the Court, both from the State and from Mr. Johnson, and it's interesting in that I think it takes us, it fast-forwards us, all the way to *Strickland*, and maybe beyond *Strickland*. *Strickland* starts setting the basis for it. You know, counsel's performance was deficient. We already know the answer to that. The Court of Appeals has said yes.

So, was it prejudicial? And, you know, we don't have -- what we have to show is that -- what the court basically sets out is that there are four factors that we can look at to determine whether or not it's harmless error or not. And there's a single reference, that's true, and it did not tie it to an exculpatory story. I think that's true.

But 3 and 4, I think, are important in this situation in that, Was the exculpatory story totally implausible? And I don't think so. I think that counsel testified that there were two bases, two defenses, two issues that could have been raised as a defense that this was not basically a defenseless case in which he was just presenting because he had to or the client wanted to go to trial. There were two issues that the jury could have found him not guilty of.

And in the transcript, you know, there was the alibi witness; there was the police; you know, there was concern with the victim's testimony, Mr. Bevecki. You know, he was -- his thing was that he was there basically saying that he was trying to buy marijuana, and, you know, his story was all over the place

because he certainly, I would assume, didn't want to say, you know, Well, I smoke a lot of marijuana and I was trying to buy all these drugs and all this stuff. So, there are all these inconsistencies in his story.

And then he had a relative who was allegedly robbed by Mr. Johnson -- Mr. Johnson was not convicted of that -- that gave, I would say, some concern about, you know, what his feelings towards Mr. Johnson were.

And then there was the alibi witness. The alibi he brought, he said that he wasn't there, he was in some other location. If the Court -- if the jury is going to consider that, then it fits in with the fact that there was some reason as to why he would want to make Mr. Johnson the perpetrator of this crime.

So in factors 3 and 4, The exculpatory story was totally implausible. No, it was not totally implausible. There was plausibility to it. And, Was the evidence overwhelming?, is the fourth factor. No, it was not overwhelming.

This was a defensible case. He had two theories of defense which could have worked. It could have -- it's something that the jury could have made a determination on that he was not guilty and not the perpetrator of this crime but for the statement that, No, he didn't want to talk to me; I tried to ask him questions; I tried to give him more information so I could help him with his case, but he wouldn't talk to me because he wanted his lawyer.

So I think if we look at the Court of Appeals' opinion, you know, we cycle through these four factors to determine whether or not it's prejudicial but, to me, I think it even goes beyonds that. It appears to me that it's prejudicial on its face.

And when I asked counsel, which I'm not sure that he did answer that question, if I had asked -- if somebody had asked me would I have rather that information not come in, my answer would have been yes. I would not have had to think about it because I would not want the jury to know that, one, he said he was going to turn himself in after he got a lawyer, or that he didn't want to talk to me. He wanted an attorney.

So I think if the Court would please look at the information, look at those briefs, I think that especially appellant's brief sets it out very well, with all the case law, I think the Court would make the determination that this is a prejudicial situation and that the post conviction -- in the interest of justice, the post conviction should be granted.

THE COURT: All right. Thank you, sir. I'll hear from you now.

ATTORNEY WEIDAUER: May it please the Court.

THE COURT: Yes, ma'am.

ATTORNEY WEIDAUER: I would say Mr. Thomas has incorrectly asserted that the Court of Appeals found the statement was impermissible. The Court of Appeals reversed and remanded on this very issue.

Mr. Thomas also asserted that it did not -- it compounded the error, both of these statements, on page 142 and 103. I'd like to go over the second statement on page 142. That statement, there was a *Jackson v. Denno* hearing over that statement, and the judge found that statement was voluntary and admissible. That statement was always going to be allowed in. So that was pre-Miranda. That statement was always going to come in.

The State, on 103, the statement of Officer Dowling, the State would assert that that was not elicited in the State's questioning, and that the State did not solicit that, and it was not responsive to the question on page 103 from the State.

THE COURT: That's the statement, that he didn't want to talk to us, and we want to get his side of the story, and we did not develop any other information and he asked for a lawyer, that statement?

ATTORNEY WEIDAUER: Yes, but it was not responsive to --

THE COURT: What was the question he asked, just so I know?

ATTORNEY WEIDAUER: Yes. On page 103, Line 10: Is there any additional evidence that you, as the lead investigator in the case, were able to obtain after Mr. Johnson was taken into custody?

THE COURT: And the proffered answer, We did not develop any other information?

ATTORNEY WEIDAUER: Right.

THE COURT: Without all the preliminary comments would have been the best answer?

ATTORNEY WEIDAUER: The State would assert that applicant was not prejudiced because the pre-Miranda statement was going to come in. So because that statement came in, the State's potential prejudice is divested.

I'd like to also go over the four Doyle factors that Mr. Thomas touched upon. He conceded that there was a single reference, which further proves my point that we are only talking about the statement made on page 103.

As to the second prong, the solicitor did not tie the defendant's silence directly to his exculpatory story. Appellant counsel conceded that in her brief of petitioner, which I believe you have before you, and the solicitor did not, in any way, untie applicant's silence to his exculpatory story.

Doyle factor no. 4, the exculpatory story was totally implausible. Applicant's alibi was shaky and incomplete at best, and lacking credibility.

As per the fourth prong, the evidence of guilt was overwhelming. There were eyewitnesses that testified they were the witnesses that were shot at. They knew the applicant personally and were able to pick him out of a photo lineup pretty immediately. They called him by name and were able to assist officers in tracking his real name down, as they only knew his street name. So we would say that evidence that he was the

shooter and was there at the scene was overwhelming at that point. Thank you, Your Honor.

THE COURT: All right.

ATTORNEY THOMAS: Your Honor, may I just respond briefly?

THE COURT: Sure. Briefly.

ATTORNEY THOMAS: You Honor, I just wanted to point out, because it was a little confusing to me, if you on 103, it says at the top, Joshua Dowling, cross-examination by Mr. Erickson, Mr. Erickson's cross doesn't start until Line 23. So this question is by, actually, Mr. Stephens, who is the attorney. He's from the solicitor's office. And he does set it up. It says: Is there any other additional evidence? That's beginning on Line 10. And that's when the comment comes in from the officer.

So I first looked at this, and I was confused because I thought that this was in response to cross-examination, and it's not. It's actually in response to a question by the solicitor.

And, Your Honor, if it please the Court, we would just ask the Court to look at all the information and everything, and that the post conviction should be granted.

THE COURT: I'll be glad to look at everything.

ATTORNEY THOMAS: Yes, sir.

THE COURT: And the record transcript of the trial, do I get it online?

ATTORNEY WEIDAUER: We sent it to the archive [ph] works. I

do have it printed, if you'd like it, but it is single-sided.

THE COURT: Okay. Did you bring that for me?

ATTORNEY WEIDAUER: Yes.

THE COURT: I'll take that. I'm going to give my new law clerk something to look at here.

ATTORNEY THOMAS: It's not a bad thing, Your Honor.

THE COURT: I'll take it that way. I just downloaded access permission this morning, so I'm well-prepared.

ATTORNEY THOMAS: If you're like me, Your Honor, I've got to have it in my hand.

THE COURT: I like to get it on paper. I'll take it under advisement, and I'll let y'all know as promptly as we get something decided.

ATTORNEY WEIDAUER: Thank you, Your Honor.

ATTORNEY THOMAS: Thank you.

(End of Transcript of Record.)

CERTIFICATE OF REPORTER

I, Cathy J. Provost, Official Court Reporter for the Fourteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial/proceedings of the captioned case in the Court of Common Pleas for Beaufort County, South Carolina, on the 9th day of August, 2021.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Date: February 20, 2023

\s\ Cathy J. Provost
Cathy J. Provost, RMR
Official Circuit Reporter

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT
Mykel Johnson, SCDC #351916, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2014-CP-07-01759 **ORDER OF DISMISSAL**

This matter is before this Court by way of an application for post-conviction relief filed by Applicant Mykel Johnson folllowing a remand from the South Carolina Court of Appeals to address an enumerated issue—whether trial counsel was ienffective for failing to object to testimony from a law enforcment 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 retianed cojnsel 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 Court[2] 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 Anders[3] 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), SCRCP, 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 mater 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 aloud[5], 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).

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[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. Denno[6] 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).

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[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?

Trial Tr. 142, lines 8-13.

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), SCRCP.

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 Denno[8] 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

ALAN WILSON
ATTORNEY GENERAL

September 12, 2023

The Honorable Jerri Ann Roseneau
Beaufort County Clerk of Court
Post Office Box 1128
Beaufort, South Carolina 29901-1128

Re: **Mykel D. Johnson, #351916 v. State of South Carolina**
Case No.: 2014-CP-07-01759

Dear Ms. Roseneau:

Enclosed please find the original Order of Dismissal signed by the Honorable Eugene C. Griffith, Jr., in the above-captioned case, for filing in your office. In addition, please forward a time-stamped copy back to our office for our file.

Sincerely,

Danielle Dixon
Assistant Attorney General

DD/vh

cc: Tommy A. Thomas, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Post Conviction Relief

EUGENE C. GRIFFITH, JR., Circuit Court Judge

Lower Court Case No.: 2014-CP-07-01759

Mykel Johnson #351916,..... Petitioner

vs.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

The Appellant, Mykel Johnson #351916, appeals the Order of Dismissal signed by the Honorable Eugene C. Griffith, Jr. on September 6, 2023 and filed on September 14, 2023. Appellant received written notice of entry of this order on September 25, 2023.

Respectfully submitted.

Tommy A. Thomas
S.C. Bar 5536
Attorney for Applicant
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

September 25, 2023

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Post Conviction Relief

EUGENE C. GRIFFITH, JR., Circuit Court Judge

Lower Court Case No.: 2014-CP-07-01759

Mykel Johnson #351916,..... Petitioner

vs.

State of South Carolina, ...Respondent.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, Paralegal to Tommy A. Thomas, P.C., hereby certify that I placed in the United States Mail, a copy of the Notice of Appeal, with postage prepaid and the return address clearly shown on said envelope to Danielle Dixon, Esq. with the Attorney General's Office, at:

Office of the Attorney General
ATTN: Danielle Dixon, Esq.
P.O. Box 11549
Columbia, SC 29211-1549

Jacquelyn E. Miller, Paralegal
Tommy A. Thomas, P.C.
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September 25, 2023