STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Beaufort County

Brooks P. Goldsmith, Circuit Court Judge

MYKEL JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001684

BRIEF OF PETITIONER

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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I. Did the PCR court err in concluding as a matter of law that Petitioner'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 Petitioner invoked his Fifth Amendment rights to silence and counsel subsequent to his arrest and the advisement of rights?

STATEMENT

Petitioner lived in the same apartment complex as Frank Babecki[1] and his wife, Desiree Constantineau. App. 170, ll. 12-23; App. 201, ll. 10-11. At various times, Babecki would contact Petitioner to purchase marijuana. App. 177, ll. 12-15; App. 181, ll. 2-7. On October 27, 2011, Babecki sent a text message to Petitioner asking "could you spot me a 10 and I'll have it for you by two o'clock. I need a smoke bad. I got like two bucks. Just until my depsit [sic] goes through and I give you an extra 10 for fronting me homey." App. 176, ll. 14-25; App. 181, ll. 11-19; App. 182, ll. 18-25. At trial, Babecki explained "a 10" meant $10 worth of marijuana, but he could not recall if he sent the text message to request marijuana for himself or for a friend. App. 176, ll. 12-13; App. 177, ll. 2-7; App. 181, ll. 20-25.

Also on October 27, 2011, Babecki's friend, Mike, or Mike's brother, was robbed during a "drug deal gone bad." App. 151, ll. 7-25; App. 178, ll. 1-17; App. 184, ll. 6-8; App. 191, ll. 21-25; App. 207, ll. 14-18. Babecki suspected Petitioner had committed the robbery against his friend. App. 151, ll. 7-12. While the robbery did not involve guns or violence, it did involve a promise to sell a quantity of marijuana between $250 and $375 with no marijuana being provided despite the exchange of funds. App. 151, ll. 17-25; App. 178, ll. 1-17; App. 192, l. 24 – App. 193, l. 2; App. 193, ll. 17-19.

On October 28, 2011, Babecki and Constantineau were leaving the apartment complex in a rental car. App. 171, ll. 14-19; App. 172, ll. 6-8; App. 203, ll. 4-6. Along the way, Babecki claimed he saw Petitioner walking along the sidewalk within the complex. App. 172, ll. 11-14; App. 173, ll. 5-6; App. 203, ll. 6-7; App. 203, ll. 11-14. Babecki yelled out the window and

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[1] At the time of Petitioner's trial, Frank Babecki had pending criminal charges for financial transaction card fraud. App. 179, ll. 11-13. His charges were "scheduled to go into [the solicitor's] Pre-trial Diversion program." App. 179, ll. 21-23.

asked what happened last night in reference to the alleged robbery during the drug deal. App. 172, ll. 14-23; App. 174, ll. 14-15; App. 183, l. 20 – App. 184, l. 3; App. 189, l. 20 – App. 190, l. 1; App. 202, ll. 7-8. When Petitioner did not answer, Babecki and his wife started driving away. App. 202, ll. 8-9; App. 203, ll. 11-20. According to Babecki, Petitioner shot twice at the rear of his car while the car was driving away. App. 174, ll. 20-24; App. 194, ll. 11-15; App. 202, ll. 9-10.

Thereafter, Babecki and his wife drove to the parking lot of a nearby restaurant, where they called 911. App. 87, ll. 5-7; App. 157, ll. 11-15; App. 204, ll. 6-8; App. 204, ll. 23-25. The police arrived shortly thereafter. App. 175, ll. 14-15. Oddly, Babecki's friend, Mike, also arrived at the scene shortly after the shooting. App. 191, l. 24 - App. 192, l. 3. According to Babecki, Mike was walking and "was at the scene when the cops were there." App. 192, ll. 1-3.

Babecki and his wife gave video recorded statements to police, in which they claimed the shooter was "Hot Boy." App. 100, ll. 14-23; App. 138, ll. 4-25; App. 205, ll. 1-6. Investigator George Erdel described Babecki's interview as containing lies of omission. App. 146, ll. 2-24. While Erdel did not know if "anything [Babecki] said was overtly not true," he "felt like maybe there would be something - - in other words, if you would say it would be a lie, I guess, of omission, in other words, there were things that were not revealed." App. 146, ll. 18-22. Erdel qualified his answer by saying he could not "think of anything where he said that was like in and of itself like a lie, not true." App. 146, ll. 22-24. The police searched a "database" of "street names" and determined Petitioner's nickname was "Hot Boy." App. 100, ll. 20-25; App. 131, ll. 6-21. This database search also revealed Petitioner lived in the same apartment complex as Babecki and his wife. App. 100, l. 25 – App. 101, l. 1; App. 131, l. 22 – App. 132, l. 2. The

police arrested Petitioner, charging him with two counts of attempted murder. App. 102, ll. 13-23; App. 139, l. 7 – App. 140, l. 23.

On December 15, 2011, a Beaufort County grand jury indicted Petitioner for two counts of attempted murder (2011-GS-07-2269; -2270). App. 415-416; App. 418-419. On June 18, 2012, the state, represented by Jeffrey S. Stephens, called the case to trial before the Honorable Carmen T. Mullen and a jury. App. 1. Eric Erickson represented Petitioner. App. 1.

Relevant trial facts

The second witness called in the state's case-in-chief was Investigator Joshua Dowling, the lead investigator in the case. When the prosecutor questioned Dowling about his interrogation of Petitioner, Dowling told the jury that Petitioner refused to cooperate with the police investigation. App. 102, l. 24 – App. 103, l. 16.

> Q. And did you subsequently interview him or take any other investigative steps?
>
> A. Yes, when he was taken into custody, he was brought back to the Beaufort City Police Department. We always want to get everybody's side of the story to give them a chance to - -
>
> Q. Investigator Erdel [sic], let me just ask, uh, did Mr. - - were there any other evidence that was obtained in this case after Mr. Johnson was taken into custody?
>
> A. As it pertains to?
>
> Q. 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?
>
> 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.**

App. 102, l. 24 – App. 103, l. 16 (emphasis added). Trial counsel did not object.

In light of the prosecutor's desire to introduce statements allegedly made to George Erdel, a police officer, by Petitioner upon his arrest, the trial judge presided over a hearing in accordance with Jackson v. Denno, 378 U.S. 368 (1964). During the hearing, Erdel claimed that when Petitioner was arrested, he said "he wanted to turn himself in and he was going to do so once he had an attorney," and he asked how the police had found him. App. 23, ll. 12-16. Petitioner also told Erdel there was something on his phone that he wanted Erdel to see, but Erdel did not "understand exactly what he was saying." App. 23, ll. 16-19. As Erdel had not yet advised Petitioner of his rights, he did not pose any questions to Petitioner. App. 23, ll. 20-25.

Shortly thereafter, Petitioner was transported to the local police department. App. 24, ll. 3-5. According to Erdel, when Petitioner was questioned at the police station, he was advised of his rights and "he invoked his rights." App. 24, ll. 5-14. At the conclusion of the hearing, the parties argued regarding the admissibility of the statements allegedly made to Erdel just after his arrest. App. 27, l. 24 – App. 28, l. 23. The judge found the statements were voluntary, not elicited by police interrogation, and were "spontaneous utterances." App. 28, l. 24 – App. 29, l. 2. Thus, the trial judge held the statements were admissible.[2]

Erdel's testimony during the pre-trial hearing established that Petitioner's invocation of his rights to silence and counsel occurred *after* he was advised of his rights. This testimony also placed trial counsel on notice that Petitioner had invoked his rights to silence and counsel *and* that the state intended to elicit such testimony during the trial. However, trial counsel did not move to exclude the testimony or request any preliminary ruling on the admissibility of the

[2] When Erdel testified before the jury, the solicitor elicited these two statements during his direct examination. App. 140, l. 24 – App. 142, l. 2. Trial counsel did *not* object or renew his pre-trial objections.

testimony. As previously noted, trial counsel did not object and move to strike when Dowling testified improperly regarding Petitioner's invocation of his rights during the trial.

Dowling arrived to the scene shortly after the 911 call. App. 90, ll. 14-15; App. 90, l. 22 – App. 91, l. 13. Dowling recovered a single bullet from the car. App. 97, ll. 14-22. The police collected no other evidence from the car. App. 98, ll. 9-19. The police collected no evidence from the scene, and no cartridge cases were found near where the shooting allegedly occurred. App. 99, ll. 2-14. Although the police recovered the bullet from the car, the police were unable to provide the caliber of the bullet with any certainty. App. 107, ll. 12-21. Dowling guessed it was either a .40 caliber or .45 caliber based on the size. App. 107, ll. 18-21. He explained the bullet was not examined forensically because a gun was not recovered in order to conduct any comparison testing. App. 107, l. 22 – App. 108, l. 10. In his opinion, there was "no need to have a ballistic[s] analysis done." App. 108, ll. 9-10. In light of Petitioner being arrested outside the "four-hour window" established by police protocol in order to test a suspect for gunshot residue, the police did not collect any swabs from Petitioner's hands. App. 100, ll. 9-13.

Petitioner defended against the charges by arguing that Babecki wanted revenge against him for the "drug deal gone bad." App. 285, ll. 3-13. Babecki concocted the elaborate ruse of a shooting to mete out his revenge. App. 285, ll. 3-13. Additionally, Petitioner called his friend, Kendalle Simmons, as a witness to establish an alibi. Simmons told the jurors that on October 28, 2011, he and Petitioner were visiting with Malcolm Moore. App. 249, ll. 1-21. Simmons arrived at Moore's home around 3 p.m., and Petitioner was already there. App. 249, ll. 1-3; App. 249, ll. 10-11; App. 252, ll. 7-16. When Simmons left between 6:45 p.m. and 7 p.m., Petitioner was still there. App. 249, ll. 17-21; App. 254, ll. 2-7.

The jury found Petitioner guilty as charged. App. 312, ll. 8-17. Judge Mullen sentenced sixteen-year old Petitioner to fifteen years' imprisonment on each count and ordered the sentences to be served concurrently. App. 317, ll. 11-20; App. 417; App. 420.

Direct appeal

Petitioner filed a notice of appeal, which was perfected by Kathrine Haggard Hudgins by way of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 320-331. The issue raised on appeal was whether the trial judge erred in failing to strike testimony by the investigator that Petitioner "did not want to talk and wanted the representation of any attorney because the testimony constituted an improper comment on [his] constitutional right to remain silent and right to an attorney." App. 320-331.

In the brief, appellate counsel quoted Dowling's testimony regarding Petitioner's invocation and argued the judge erred in failing to strike the testimony. App. 325-326. At no point in the brief did appellate counsel state or argue that trial counsel objected to the testimony. App. 325-326. Certainly, appellate counsel could make no such statement or argument because trial counsel had *not* objected to the testimony. In fact, appellate counsel filed the brief pursuant to Anders, supra, signaling to the Court of Appeals that counsel found no *preserved* issue that would warrant reversal.

Thereafter, the Court of Appeals reviewed the entire record for any preserved issues with potential merit. See McHam v. State, 404 S.C. 465, 474, 746 S.E.2d 41, 46 (2013)(explaining that "[u]nder the Anders procedure, an appellate court is required to review the entire record, including the complete trial transcript, for any *preserved* issues with potential merit"); State v. Lawrence, 349 S.C. 129, 130, 561 S.E.2d 633, 634 (Ct. App. 2002)(noting that after its review in accordance with Anders, the "only preserved issue at trial" was the directed verdict motion).

Finding no *preserved* issues with potential merit, the Court of Appeals dismissed the appeal and relieved appellate counsel on April 2, 2014. App. 332-333; State v. Johnson, 2014-UP-134 (S.C. Ct. App. filed April 2, 2014). Remittitur was issued on April 18, 2014. App. 334.

Post-conviction relief

On July 21, 2014, Petitioner filed an application for post-conviction relief (PCR). App. 335-341.[3] On May 17, 2016, the matter proceeded to an evidentiary hearing before the Honorable Brooks P. Goldsmith. App. 347. James K. Falk represented Petitioner, and J. Rutledge Johnson represented the state. App. 348.

PCR hearing

At the PCR hearing, trial counsel[4] acknowledged Dowling testified about Petitioner's post-arrest silence and trial counsel posed no objection to the testimony. App. 371, l. 20 – App. 373, l. 2. In fact, trial counsel did not even consider objecting to the testimony. App. 373, l. 2. Trial counsel stated frankly, "I didn't think there was anything wrong with that." App. 373, l. 7.

When PCR counsel began questioning trial counsel regarding the long line of cases excluding such testimony, the state posed an objection, stating the issue was "improper for a PCR forum." App. 373, ll. 10-16. According to the state, this was "the exact issue raised at the Court of Appeals through an Anders versus California brief. The Court of Appeals affirmed his conviction. That was dealt with on direct appeal." App. 373, ll. 10-16. PCR counsel countered that the issue was "not preserved" for appeal, and thus, appellate counsel had filed an Anders

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[3] During the PCR hearing, the state agreed that PCR counsel had amended the application to include an allegation "that counsel was ineffective for not objecting to Mr. Dowling making some type of reference, which the state disputes, on Mr. Johnson's right to remain silent." App. 365, ll. 16-20.

[4] At the PCR hearing, trial counsel explained he was retained by Petitioner's mother to represent Petitioner on the criminal charges while Petitioner was in jail awaiting trial. App. 351, ll. 12-18.

brief, not a merits brief. App. 373, ll. 17-20. The appellate court would not consider the issue "because trial counsel failed to preserve the objection that [Petitioner]'s Fifth Amendment right to remain silent had been impeded or whatever, had been jeopardized, because the Court was able - - because the jury was able to hear that." App. 373, l. 20 – App. 374, l. 1. The jury was permitted "to draw their own negative conclusions." App. 374, ll. 1-3. PCR counsel was emphatic, "It did not go up on appeal. It was an Anders brief; not a merits brief; and the reason why is because the issue was not preserved. You got to preserve these issues in order for it to go up. There is no clear error doctrine." App. 374, ll. 3-7.

The state responded that "if an issue is unpreserved the Court of Appeals is very quick to tell appellate counsel." App. 374, ll. 9-10. Further, the state argued,

> [A]n Anders brief is not just when you just think it's not preserved. An Anders brief, the whole point is that, in good conscience and through the duty that appellate counsel has to argue merit issues, if they feel that there is no merit issues to raise, they're allowed to file an Anders versus California brief. The Court then reviews the entire record for any *preserved* errors and makes a decision.

App. 374, ll. 11-18 (emphasis added). According to the state, the Court of Appeals "affirmed" and made "no mention concerning the fact that this issue was not preserved." App. 374, ll. 19-22. In the state's view, "the Court of Appeals dealt with this issue." App. 374, ll. 22-23. "[T]he fact that this issue was briefed on direct appeal" was proof, according to the state, "that this [issue was] not proper for PCR forum" as the issue had "already been addressed because an Anders brief [was filed] ... [and] the Court is presumed to have reviewed the entire record and ma[d]e an opinion - - or issued an opinion based on they reviewed the entire record." App. 378, ll. 12-18. Thus, the issue was procedurally barred as "not proper ... for the PCR forum." App. 374, ll. 24-25.

PCR counsel countered that the Court of Appeals "didn't say anything other than affirm," and that no conclusion could be drawn from the opinion to suggest that the Court of Appeals entertained and rejected an unpreserved issue. App. 375, ll. 5-8. PCR counsel explained trial counsel failed to preserve the issue for appeal by failing to object to the comment on Petitioner's exercise of his constitutional right to silence was reversible error in light of controlling case law. App. 375, ll. 9-19. According to PCR counsel, the issue being raised at the PCR hearing was not an issue that could have been raised on direct appeal because it was not preserved. App. 379, ll. 6-9. PCR counsel continued, "I mean, that's the whole issue here is that these are issues that were not preserved." App. 379, ll. 9-11. The Court of Appeals did not review, and could not have reviewed, the error because it was not preserved, and South Carolina's "very rigorous error preservation rules" would prohibit such review. App. 379, ll. 16-19.

Order denying relief

By an order dated June 20, 2016, Judge Goldsmith denied Petitioner relief. App. 397-403. The PCR judge found Petitioner's allegation that trial counsel "was ineffective for failing to [object to Officer] Dowling's testimony that when [Petitioner] was arrested, he invoked his right to remain silent" was "without merit." App. 402. According to the PCR judge, the issue raised a "direct appeal issue that [was] procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003)." App. 402. Although the PCR court correctly noted that "[p]ost-conviction relief is not a substitute for a direct appeal" and that "[a] post-conviction relief application cannot assert any issues that could have been raised ... on direct appeal," the PCR court erred in holding that because this issue was raised on direct appeal, the issue was "not proper for the PCR forum." See App. 402.

Motion to alter or amend

Petitioner filed a motion to alter or amend on July 7, 2016, including a copy of his proposed order granting relief. App. 404-413. In his motion to alter or amend, PCR counsel took issue with the court's failure to consider whether trial counsel failed to properly preserve the issue of the officer commenting on Petitioner's silence for appeal. App. 404-413. In other words, as PCR counsel explained, trial counsel failed to object to the officer's testimony, and as a result, the issue was not preserved for review. App. 404-413. Error preservation rules in South Carolina do not permit an issue to be raised for the first time on appeal; rather, the issue must have been raised to and ruled upon by the trial judge to be preserved for appellate review. App. 404-413 (citing State v. Nichols, 325 S.C. 111, 120-121, 481 S.E.2d 118, 123 (1997)). In light of the fact that trial counsel failed to object, which would have been necessary to preserve the issue for appellate review, any review pursuant to Anders by the appellate court would necessarily have excluded consideration of this issue. App. 404-413. Thus, the issue presented for PCR was *not* a direct appeal issue because it was not preserved for appellate review. App. 404-413. The question properly before the PCR court was whether the failure to object amounted to ineffective assistance of counsel in derogation of the Sixth and Fourteenth Amendments to the Constitution. App. 404-413. This question went unanswered as the PCR court improperly applied a procedural bar.

In his motion, PCR counsel quoted the specific objectionable testimony and explained the transcript "reflect[ed] no contemporaneous objection" from trial counsel. App. 404-413. PCR counsel also explained that trial counsel testified at the PCR hearing that "he did not see any grounds upon which to object to Officer Dowling's testimony" and "that his failure to object was neither purposeful nor was it part of his trial strategy." App. 404-413. Thus, PCR counsel

argued, trial counsel's performance was deficient due to his failure to object to the testimony. App. 404-413. PCR counsel further argued trial counsel's deficient performance was prejudicial citing United States v. Hale, 422 U.S. 171 (1975). App. 404-413. As PCR counsel explained, the United States Supreme Court cautioned against permitting witnesses comment on a defendant's invocation of his right to silence because jurors likely assign "much more weight" to a defendant's invocation and silence than warranted. App. 404-413 (citing Hale, 422 U.S. at 180). Informing the jury of a defendant's invocation of his constitutional right offered little probative value, but presented "an intolerably prejudicial impact." App. 404-413 (citing Hale, 422 U.S. at 180). PCR counsel concluded that Dowling's testimony regarding Petitioner's invocation of his Fifth Amendment rights was "equally prejudicial." App. 404-413.

Order denying motion to alter or amend

On July 31, 2016, providing no elaboration, Judge Goldsmith denied the motion to alter or amend. App. 414. The order provided simply that the judge found "no reason to alter or amend the prior [o]rder." App. 414.

Appeal

Petitioner filed and served a notice of appeal on August 10, 2016. Subsequently, Petitioner filed a petition for writ of certiorari. On October 30, 2017, the South Carolina Supreme Court transferred Petitioner's case to this Court pursuant to Rule 243(l), SCACR. On November 1, 2018, this Court granted the petition and ordered briefing. This brief of petitioner follows.

STANDARD OF REVIEW

Recently, this Court clarified the standard of review an appellate court reviewing a PCR action must use when analyzing claims of ineffective assistance of counsel pursuant to Strickland v. Washington, 466 U.S. 668, 688 (1984). Smalls v. State, 422 S.C. 174, 180-181, 810 S.E.2d 836, 839-840 (2018). This Court explained the "standard of review in PCR cases depends on the specific issue" raised on appeal. Id. at 180, 810 S.E.2d at 839. The reviewing court will "defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." Id. at 180, 810 S.E.2d at 839. However, the appellate court will "will review questions of law de novo, with no deference to trial courts." Id. at 180-181, 810 S.E.2d at 839. In another recent case, this Court explained the appellate courts give "great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them." Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). "Questions of law are reviewed de novo," and the reviewing court must "reverse the PCR court's decision when it is controlled by an error of law." Id. See also Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013).

ARGUMENT

I. The PCR court erred in concluding as a matter of law that Petitioner'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.

Concession of error

In its return, the state candidly admitted the PCR court erred in finding Petitioner's claim that trial counsel provided ineffective assistance by failing to object to an officer's improper comment on his silence was procedurally barred because the issue was raised in a brief pursuant to Anders. Ret. at 6-8. The state requested this Court reverse the PCR court's dismissal of Petitioner's allegation. Ret. at 8. Petitioner respectfully joins in this request.

Proper forum

PCR is the proper forum for Petitioner's claim for relief – trial counsel's ineffective assistance in failing to object to the officer's improper testimony – because the issue was not decided, and could not have been decided on direct appeal. The Uniform Post-Conviction Relief Procedures Act provides that post-conviction relief is "not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code Ann. § 17-27-20(B). "Under the doctrine enunciated in Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975), errors which can be reviewed on direct appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings." Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 519 (1993). "Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective

assistance of counsel." Id. at 9, 430 S.E.2d at 520. Neither the Act nor case law precludes review in PCR of Petitioner's issue as it could not have been decided on direct appeal due to trial counsel's failure to object.

Petitioner's case presents striking similarities to McHam v. State, 404 S.C. 465, 746 S.E.2d 41 (2013). On appeal, McHam's counsel filed a brief pursuant to Anders, supra, arguing the trial court erred in refusing to suppress evidence seized as a result of the unlawful search of McHam's car. McHam, 404 S.C. at 471, 746 S.E.2d at 45. The Court of Appeals dismissed McHam's direct appeal after review. Id.

Subsequently, McHam filed a PCR application alleging trial counsel was ineffective for failing to object contemporaneously to the admission of the drug evidence based on the illegal search and seizure. Id. Trial counsel had argued the suppression motion during the pre-trial proceedings, but he had failed to object contemporaneously, which was necessary to preserve the matter for appeal. Id. at 471-472, 746 S.E.2d at 45. At the PCR hearing, trial counsel conceded he did not preserve the issue by objecting contemporaneously and stated that the suppression motion was the "most critical part of McHam's trial." Id. at 472, 746 S.E.2d at 45.

The state argued the issue was improper for PCR. Id. According to the state, "the opinion of the Court of Appeals did not appear to dismiss the Anders appeal on a procedural basis as it did not employ that language." Id. Incredulously, the state maintained the issue "was dismissed on the merits and, as a result, formed no basis for a PCR claim." Id.

The PCR judge denied McHam relief, finding counsel's representation on the suppression motion exceeded the standard of reasonableness and that he was not ineffective for failing to prevail on the motion. Id. Further, the PCR court determined the Court of Appeals had reviewed the suppression issue presented on direct appeal and the dismissal of the appeal was on the merits, not a

procedural ground. Id. According to the PCR court, the Court of Appeals determined the search and seizure issue lacked merit, and, therefore, any error by trial counsel was harmless. Id. It was the PCR court's conclusion that "McHam had not demonstrated that his attorney failed to properly argue the motion to suppress or that the lack of an objection had led to the dismissal of his direct appeal." Id.

In rendering an opinion in McHam, this Court first explained the Anders procedure. "Under the Anders procedure, an appellate court is required to review the entire record, including the complete trial transcript, for any *preserved* issues with potential merit." Id. at 475, 746 S.E.2d at 46 (emphasis in original). Additionally, this Court re-iterated its previous holding "that an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a PCR claim alleging ineffective assistance of counsel." Id. at 475, 746 S.E.2d at 47. This Court found it "clear the Court of Appeals did not consider the merits of the Fourth Amendment issue because it was not preserved by trial counsel." Id. Thus, this Court held the PCR court was in error to hold otherwise. Id.

Similarly, State v. Lyles, 381 S.C. 442, 444-445, 673 S.E.2d 811, 813 (2009) provided that "a decision of the Court of Appeals dismissing an appeal after conducting a review pursuant to Anders is not a decision on the merits of the appeal, but simply reflects that the appellate court was unable to ascertain a non-frivolous issue which would require counsel to file a merits brief."

Thus, the question presented in the instant matter was whether the Court of Appeals reviewed the improper testimony of Dowling as part of the Anders procedure. That answer turned on whether the issue was preserved for appellate review because the Court of Appeals reviewed the record for *preserved* errors only.

"The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal." State v. Porter, 389 S.C. 27, 37, 698 S.E.2d 237, 242 (Ct. App. 2010) (citing State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003)). "A contemporaneous objection is required to preserve issues for direct appellate review." Id. at 38, 698 S.E.2d at 242 (citing State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005)). "Issues not raised and ruled upon in the trial court will not be considered on appeal." Id. at 38, 698 S.E.2d at 243 (citing Humbert v. State, 345 S.C. 332, 338, 548 S.E.2d 862, 866 (2001)).

Trial counsel failed to object to Dowling's testimony. The trial transcript showed no objection to the testimony, and trial counsel candidly admitted during the PCR hearing that he had not objected to the testimony, had not even considered an objection, and saw nothing wrong with the testimony. There was simply no argument to support the PCR judge's finding, which was based upon the state's argument during the hearing, that the Court of Appeals considered the issue as part of its Anders review procedures. Quite simply, the issue regarding the propriety of Dowling's comment on Petitioner's invocation of his Fifth Amendment rights was not preserved for appellate review. Therefore, PCR was the proper forum for consideration of the issue.

Generally, "[t]his Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them, and it will reverse the PCR judge's decision when it is controlled by an error of law." McHam, 404 S.C. at 473, 746 S.E.2d at 45. The PCR judge's decision that Petitioner's claim for relief was procedurally barred was controlled by an error of law. Therefore, this Court must reverse the PCR judge's decision and address the merits of Petitioner's claim.

II. Trial counsel rendered 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 Petitioner invoked his Fifth Amendment rights to silence and counsel subsequent to his arrest and the advisement of rights.

Remand is unnecessary

In its return, the state requested this Court remand this PCR action to the circuit court for findings of fact on the issue presented. Ret. at 8-9. In support of this request, the state argued that a ruling by this Court on the merits would be unfair to the state. Ret. at 9. Citing Simmons v. State, 416 S.C. 584, 593, 788 S.E.2d 220, 225 (2016), the state argued that a ruling by the appellate court would be unfair to the state. Ret. at 9. The state "would be deprived of the opportunity to have this matter fully resolved by a proper order from the PCR court." Ret. at 9 (internal quotation omitted). To this point, a remand would permit the state to present "the panoply of arguments available to it, especially related to the prejudice prong in the PCR analysis." Ret. at 9 (internal quotation omitted).

The reason the PCR judge did not make findings of fact is because the state convinced the judge in its argument that the issue was not preserved for review. While the state's concession of legal error is laudable, even commendable, the state should not receive a second bite at the apple where the state's erroneous legal argument induced the PCR court to make the legal error. The state had every opportunity to present any argument it wanted – even arguments in the alternative. Instead, the state chose to argue – erroneously – that the issue was procedurally barred.

The issue is preserved for appellate review. The state argued the issue is not preserved because "[t]he PCR court did not make a finding of fact on whether Counsel was deficient or Petitioner was prejudiced by the Doyle violation." Ret. at 8. However, this is not the test for error preservation. The purpose of filing a motion pursuant to Rule 59(e), SCRCP, is to preserve for

appeal an issue not addressed in the final order. See Simmons v. State, 416 S.C. 584, 592, 788 S.E.2d 220, 225 (2016) (explaining that "[t]o preserve issues for appellate review, after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP[] motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by [section] 17-27-80 [of the South Carolina Code] and Rule 52(a), SCRCP") (internal quotation omitted) (alterations in original); Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (stating that "[b]ecause [PCR applicant] did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review"); Humbert v. State, 345 S.C. 332, 337, 548 S.E.2d 862, 865 (2001) (holding an issue was "not preserved for review" where the PCR judge did not rule on the issue and the applicant did not file a Rule 59(e), SCRCP, motion requesting a ruling); Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (explaining that "[a] party *must* file [a Rule 59(e)] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review") (emphasis in original); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (noting that "[i]f the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review"); Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (explaining that "[p]ost-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it"); Chastain v. Hiltabidle, 381 S.C. 508, 515, 673 S.E.2d 826, 829 (Ct. App. 2009) (holding that "[w]hen an issue is raised to but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e) motion"). Petitioner filed a motion pursuant to Rule 59(e), SCRCP, specifically requesting the PCR judge "to

address whether trial counsel's failure [to] properly preserve the Doyle v. Ohio issue for appellate review amounts to ineffective assistance of counsel." App. 404-405.

A remand is unnecessary, and would be improper, in this case because Petitioner did everything required of him to preserve this issue for appeal by presenting the issue at the hearing and raising it in his Rule 59(e), SCRCP, motion. This Court must address this issue on the merits. This point was made clear by the South Carolina Supreme Court in Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006). The Pyes raised an issue at the summary judgment hearing and in the Rule 59(e) hearing, but the court did not rule upon it. Pye, 369 S.C. at 565-566, 633 S.E.2d at 510-511. After determining the issue was preserved for review "even though the circuit judge did not rule on the theory" presented, the Court addressed the merits of the issue on appeal. Id. at 566, S.E.2d at 511.

Ineffective assistance of counsel

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688.

Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Specifically, on the prejudice prong, the question to ask is "whether there is a reasonable probability that, absent the errors, the fact finding would have had a reasonable doubt respecting guilt." Id. (emphasis added). The United States Supreme Court specifically ruled that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. Moreover, the Court held that:

> The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Id. at 696.

Thus, in a PCR action, the applicant must prove by a preponderance of the evidence that (1) counsel's performance was deficient under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 695.

Deficient performance

In Doyle v. Ohio, 426 U.S. 610, 611 (1976), the United States Supreme Court held it is improper for the prosecution to comment or elicit testimony concerning a defendant's exercise of his right to remain silent post-arrest. See also Griffin v. California, 380 U.S. 609 (1965); State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). "The obvious purpose is to try to prevent jurors from improperly inferring the accused is guilty simply because he exercised rights guaranteed to

him by the state and federal constitutions." Edmond v. State, 341 S.C. 340, 346, 534 S.E.2d 682, 685 (2000). In State v. Smith, 290 S.C. 393, 350 S.E.2d 923 (1986), our Supreme Court made clear "[a]n accused has the right to remain silent and the exercise of that right cannot be used against him. The [s]tate cannot, through evidence or the solicitor's argument, comment on the accused's exercise of his right to remain silent." Id. at 394-395, 350 S.E.2d at 924. "Testimony that a defendant refused to comment on an accusation against him is an unconstitutional comment on his post-arrest silence." Id. at 395, 350 S.E.2d at 924.

The Doyle rule, as well as other principles prohibiting the prosecutor from using or commenting on a defendant's exercise of his constitutional rights, is 'rooted in due process and the belief that justice is best served when a trial is fundamentally fair.'" State v. McIntosh, 358 S.C. 432, 443, 595 S.E.2d 484, 490 (2004)(quoting Brecht v. Abrahamson, 507 U.S. 619, 628 (1993)). Therefore, "the state may neither comment upon nor present evidence at trial of a defendant's decision to exercise his right to remain silent or be represented by an attorney." Edmond, 341 S.C. at 345, 534 S.E.2d at 685.

"Doyle and its progeny have [] made clear that it is the breach of the implied assurance contained in the Miranda warnings that violates the fundamental fairness required by the Due Process Clause." Brown v. State, 375 S.C. 464, 472 652 S.E.2d 765, 769 (Ct. App. 2007)(citing Wainwright v. Greenfield, 474 U.S. 284, 291 (1986)). The Court of Appeals explained that "'[t]he 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.'" Id. (quoting Wainwright, 474 U.S. at 292). In Brown, the Court of Appeals stated:

> The courts of South Carolina have consistently recognized the significance of Doyle on post-arrest silence. Moreover, our supreme court and appellate court have

> warned solicitors against violation of the Doyle prohibition. State v. Myers, 301 S.C. 251, 258-259, 391 S.E.2d 551, 555 (1990); State v. Arther, 290 S.C. 291, 350 S.E.2d 187 (1986); State v. Holliday, 333 S.C. 332, 509 S.E.2d 280 (Ct. App. 1998); State v. Gray, 304 S.C. 482, 405 S.E.2d 420 (Ct. App. 1991).

Brown, S.C. at 472-473, 652 S.E.2d at 769; see also State v. Cockerham, 294 S.C. 380, 381-382, 365 S.E.2d 22, 23 (1988)(holding the prosecutor's indirect reference to Cockerham's silence and request for counsel violated his right to due process of law); State v. Hawkins, 292 S.C. 418, 423-424, 357 S.E.2d 10, 13 (1987)(finding a solicitor's comments on a defendant's lack of remorse reversible error).

"Representation of a criminal defendant entails certain basic duties." Id. at 688. Counsel has "the overarching duty to advocate the defendant's cause" and "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. South Carolina's preservation rules require a contemporaneous objection in order to preserve an issue for appeal. Porter, 389 S.C. at 37, 698 S.E.2d at 242; Dunbar, 356 S.C. at 142, 587 S.E.2d at 693-694; Carlson, 363 S.C. at 595, 611 S.E.2d at 287; Humbert, 345 S.C. at 338, 548 S.E.2d at 866.

The United States Supreme Court decided Doyle in 1976, decades before Petitioner's trial. The Doyle principle has been a part of federal and state criminal law jurisprudence for over four decades. There was simply no excuse for trial counsel to be unaware of Doyle and its progeny and fail to object to the testimony clearly in violation of Doyle. Dowling told the jurors that after Petitioner was arrested, he "did not want to talk," "wanted the representation of an attorney," and that as a result, the police were unable to develop any information "[f]rom the defendant's side." App. 102, l. 24 – App. 103, l. 6. During the pre-trial hearing, Erdel established that Petitioner's invocation of his rights to silence and counsel occurred after Petitioner was advised

of his rights. App. 24, ll. 5-14. This was an obvious and glaring comment on Petitioner's post-arrest silence that violated Petitioner's constitutional rights. Trial counsel offered no reason for his failure to object and stated he saw nothing wrong with Dowling's testimony. Counsel's deficient performance is clear and the record amply supports such a finding and conclusion of law on this point.

In its return, the state boldly asserts that trial counsel "did not have the opportunity to explain his lack of objection to the Doyle violation because the court did not consider the allegation that Counsel was ineffective for failing to object to the Doyle violation on its merits." Ret. at 10. In fact, trial counsel did not explain his failure to object to the obvious Doyle violation because the state objected to the answer. App. 373, ll. 10-16. The state argued, successfully, that the questions and answers regarding trial counsel's performance in relation to the Doyle violation were not relevant because the issue was a direct appeal issue and not proper in the PCR forum. App. 373, ll. 10-16. Now, the state seeks to profit from its admittedly improper objection and legal argument presented at the PCR court. The state should not be permitted to benefit from his admitted erroneous legal argument. Doing so would encourage litigants to present erroneous arguments at the trial level, admit those erroneous arguments on appeal, and obtain a remand to obtain another opportunity to prove their cases. See Brown v. Singletary, 226 S.C. 482, 484, 85 S.E.2d 738, 738 (1955) (noting that a party may not "take his chances of a successful issue, reserving vices in the trial, of which he has notice, for use in case of disappointment in the result").

Despite the state's suggestion that trial counsel may have some "trial strategy or reason" for failing to object, the state admitted Dowling impermissibly commented on Petitioner's silence and invocation of his right to an attorney and that trial counsel failed to object. Deficient performance is apparent and is all but actually conceded by the state in its return. Ret. at 9.

Prejudice

Having determined trial counsel performed deficiently, the next question is whether trial counsel's deficient performance was prejudicial, meaning there was a reasonable probability that, but for the error, the result of the proceeding would have been different. The answer must be in the affirmative. The bar against improper comments on a defendant's invocation of silence serves to prevent jurors from improperly inferring guilty based simply upon an exercise of the defendant's constitutional rights. Edmond, 341 S.C. at 346, 534 S.E.2d at 685. Commenting a defendant's invocation violates a defendant's right to a fundamentally fair trial. McIntosh, 358 S.C. at 443, 595 S.E.2d at 490.

This Court held Edmond suffered prejudice due to his attorney's failure to object to the detective's testimony and the prosecutor's closing argument that he exercised his right to silence because the testimony and argument "were direct and improper references to the exercise of his constitutional rights." Edmond, 341 S.C. at 348, 534 S.E.2d at 686. "Jurors may have used the improper testimony and comments to infer petitioner was guilty simply because he exercised his rights." Id.

According to this Court, "[i]n deciding the prejudice prong in [a] PCR action," the court "examine[s] the following factors, which are the same ones analyzed in deciding on direct appeal whether a similar error is harmless beyond a reasonable doubt." Id. "To be harmless, the record must establish the reference to the defendant's right to silence was a single reference, which was not repeated or alluded to; the solicitor did not tie the defendant's silence directly to his exculpatory story; the exculpatory story was totally implausible; *and* the evidence of guilt was overwhelming." State v. Pickens, 320 S.C. 528, 530-531, 466 S.E.2d 364, 366 (1996) (emphasis added); see also McIntosh, 358 S.C. at 447, 595 S.E.2d at 492; Edmond, 341 S.C. at 348, 534 S.E.2d at 686-687;

McFadden v. State, 342 S.C. 637, 642-643, 539 S.E.2d 391, 394 (2000). Importantly, all four factors must be proven beyond a reasonable doubt in the direct appeal context in order to determine the error was harmless.

The first factor weighs against Petitioner as the reference to his invocation of his rights to silence and counsel occurred only once. The second factor also weighs against Petitioner because the solicitor did not tie Petitioner's silence to his exculpatory story. However, the third and fourth factors weigh heavily in Petitioner's favor.

Petitioner defended against the charges by arguing that Babecki wanted revenge against him for the "drug deal gone bad." It was undisputed that Babecki had purchased drugs from Petitioner in the past and that on the day of the shooting, Babecki was attempting to purchase more drugs from Petitioner either for a friend or himself. Further, it was undisputed that Babecki believed his friend, Mike, had been robbed of a substantial amount of money in a "drug deal gone bad" the day before the shooting. Additionally, it was undisputed that Babecki believed Petitioner was involved in the robbery. Finally, it was also undisputed that Babecki's friend, Mike, the same one who was allegedly robbed the night before, appeared at the scene of the shooting for reasons unknown to anyone. Petitioner's theory that Babecki concocted the shooting avenge his friend is not implausible. Petitioner even called an alibi witness to testify that he was somewhere else shortly after the shooting. Therefore, the third factor weighs heavily in Petitioner's favor as his exculpatory story was not "totally implausible."

Finally, the fourth factor weighs in favor of finding trial counsel's deficient performance prejudicial as the evidence against Petitioner was not overwhelming. The only evidence against Petitioner was the testimony of Babecki and Constantineau, who testified inconsistently with each other and inconsistently with their prior statements to police. Even one of the state's

principal witnesses, Investigator Erdel, testified that Babecki was untruthful during the police interview. Erdel attempted to skirt the question, but the video interview showed Erdel confront Babecki with inconsistencies and Erdel's belief that Babecki was lying. Eventually, Erdel was forced to admit that Babecki's statement to police was filled with lies of omission. App. 146, ll. 18-22. The state's case rested upon the jury believing a witness that even the police did not believe was telling the truth. Dowling's testimony that Petitioner invoked his rights to silence and counsel, which prevented the police from investigating anything "[f]rom the defendant's side," allowed the jury to infer Petitioner was guilty simply because he exercised his rights.

After weighing the four factors, the determination is clear that Petitioner suffered prejudice as a result of trial counsel's failure to object to Dowling's improper comment on Petitioner's invocation of his rights to silence and counsel. Therefore, Petitioner is entitled to relief.

CONCLUSION

Petitioner respectfully requests this Court (1) reverse the PCR court and hold the issue is not procedurally barred, (2) find trial counsel provided ineffective assistance of counsel in derogation of the Constitution, and (3) order a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of November, 2018.