ORIGINAL

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO BEAUFORT COUNTY
Court of Common Pleas

The Honorable Brooks P. Goldsmith, Circuit Court Judge

Mykel Johnson ..... Petitioner,

v.

State of South Carolina, ... Respondent.

Appellate Case No. 2016-001684

BRIEF OF RESPONDENT

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RESPONDENT'S ISSUES PRESENTED

1. Respondent concedes the PCR court erred in finding that Petitioner's claim was barred as lacking jurisdiction pursuant to Section 17-27-20(B), agreeing with the Assistant Attorney General's erroneous argument at the PCR hearing.

2. Should this Court address the merits of Petitioner's allegation *de novo* when the merits of Petitioner's *Doyle* violation were not ruled on by the Circuit Court?

3. Was Petitioner prejudiced by Counsel's failure to object to testimony that commented on Petitioner's invocation of his constitutional rights were Petitioner made pre-*Miranda* statements to law enforcement and the four *Doyle* factors show a lack of prejudice under *Strickland*?

STANDARD OF REVIEW

This Court will reverse the post-conviction relief court's decision when it is controlled by an error of law. *Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

"Applicant bears the burden of proving the allegations in his application." *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814. Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. "The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Strickland v. Washington*, 466 U.S. 668, 670, 104 S. Ct. 2052, 2056, 80 L. Ed. 2d 674 (1984).

STATEMENT OF FACTS

Procedural History

Petitioner was indicted on December 5, 2011, by the Beaufort County Grand Jury for two counts of Attempted Murder (2012-GS-07-2269, 2270). App. 1. Eric Erickson (Counsel), Esquire, represented him. App. 1. Petitioner proceeded to a jury trial pursuant at which he was found guilty as indicted. App. 415-416. The Honorable Carmen T. Mullen sentenced Petitioner to incarceration for fifteen years for each count of Attempted Murder, with the sentences to run concurrently. App. 418-419.

A notice of appeal was filed on Petitioner's behalf and an appeal perfected. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. *State v. Johnson*, 2014-UP-134 (Filed on April 2, 2014).

Petitioner filed an application for post-conviction relief (PCR) on July 21, 2014. An evidentiary hearing was convened on May 17, 2016, at the Beaufort County Courthouse. Jim Falk, Esquire, represented Petitioner. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent. On June 20, 2016, The Honorable Brooks P. Goldsmith signed an order of dismissal dismissing Petitioner's allegations. App. 403.

Statement of Facts

On October 28, 2011, the victims, Frank Babecki and Desiree Constantineau, were driving down the street when they saw Petitioner. App. 173. Babecki yelled, "what happened the other night." App. 45. In response, Petitioner pulled out a gun and began firing at the victims' vehicle. App. 174. Babecki testified he heard a drug deal went bad involving Petitioner and a third party, and was merely asking to figure out what happened. App. 178. This testimony was corroborated through Petitioner's cell phone. App. 176. Texts from Petitioner's cell phone indicated Petitioner was selling drugs to Babecki. App. 176. Babecki also sent a text to Petitioner accusing him of shooting at Babecki and his pregnant wife. App. 198. Babecki later picked Petitioner out of a photo line-up as the shooter and stated he clearly saw him and knew him. App. 33. The other victim in the case, Constantineau, also testified she saw Petitioner directly before and after the shooting and believed the only logical conclusion was that Petitioner fired the shots. App. 202-203.

Officer Joshua Dowling arrived at the scene shortly after the 911 call. App. 90-91. Dowling recovered a bullet from the car. App. 97. Law enforcement collected no evidence from the scene, and no cartridge cases were found near where the shooting allegedly occurred. App. 99. Dowling

believed the caliber of the bullet was either a .40 caliber or .45 caliber based on the size. App. 107. A text from Petitioner's mother to Petitioner stated that he needed to leave her house and take his guns, indicating multiple firearms, with him.

A search warrant was executed Petitioner's house and .22 caliber rounds and shotgun shells were recovered from the location, but no corresponding firearms. App. 109. He explained the bullet was not examined forensically because a gun was not recovered in order to conduct any comparison testing. App. 107.

Law enforcement was unable to locate Petitioner and contacted the United States Marshal service for assistance. App. 102. The Marshals were able to locate Petitioner in Yemassee, South Carolina and he was arrested on November 8, 2011, eleven days after the shooting. App. 21. Since Petitioner was arrested outside the four-hour window necessary to test a suspect for gunshot residue, law enforcement did not attempt to collect gunshot residue from Petitioner's hands. App. 100.

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

Relevant Trial Testimony

Petitioner made statements to law enforcement after his arrest. App. 23. A *Denno*[1] hearing was held to determine the admissibility of Petitioner's statements to Officer George Erdel by Petitioner after his arrest. The trial judge found Petitioner's pre-*Miranda* statements were admissible as spontaneous utterances. App. 24.

[1] Jackson v. Denno. 378 U.S. 368 (1964)

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

App. 141.

Petitioner was then taken to the local law enforcement facility. App. 24. At that facility, Investigator Joshua Dowling read Petitioner his *Miranda* rights. App. 24. Petitioner then requested an attorney and refused to speak to law enforcement. App. 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."

App. 103.

Relevant Facts from Post-conviction Relief Hearing

At trial, Officer Dowling testified, "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. 103.

At Petitioner's evidentiary hearing, Counsel stated he did not consider objecting to Officer Dowling's statement because "[He] didn't think there was anything wrong with that." App. 373.

The State argued Petitioner's claim that Counsel was ineffective for failing to object to Officer Dowling's statement, which was a *Doyle* violation, was procedurally barred because the

Doyle violation was brief in an *Anders* appellate brief. App. 373-377. In the order of dismissal, the PCR court agreed with the State's argument and found:

> This allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State. 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashlev v. State. 260 S.C. 436, 196 S.E.2d 501 (1973). This was the exact issue raised in Applicant's direct appeal. (See Anders Brief of Appellant pp. 5-6). As such, this issue is not proper for the PCR forum. Therefore, this allegation is denied.

App. 402.

The State now concedes this was an error of law.

ARGUMENT

I. Respondent concedes the PCR court erred in finding that Petitioner's claim was barred for lack of jurisdiction pursuant to Section 17-27-20(B), agreeing with the Assistant Attorney General's erroneous argument at the PCR hearing.

A remand to the Circuit Court for a determination on the merits of Petitioner's claim is the only proper remedy. The PCR court incorrectly dismissed Petitioner's allegation that Counsel was ineffective for failing to object to Dowling's testimony on the basis of a lack of jurisdiction:

> This allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. *Simmons v. State*. 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. *Ashlev v. State*. 260 S.C. 436, 196 S.E.2d 501 (1973). This was the exact issue raised in Applicant's direct appeal. (See Anders Brief of Appellant pp. 5-6). As such, this issue is not proper for the PCR forum. Therefore, this allegation is denied.

App. 402.

The PCR court appears to have based this decision on the Assistant Attorney General's erroneous legal argument at the PCR hearing. The Assistant Attorney General argued that Petitioner's *Anders* brief, on Petitioner's unpreserved *Doyle* violation allegation, precluded review of that issue for PCR. App. 373-377. Respondent concedes the Assistant Attorney General's argument was legally incorrect. Respondent also concedes the PCR court erred in agreeing with the Assistant Attorney General's erroneous position.

The law is clear that even in *Anders* briefing situations, the normal *Strickland* analysis applies. "With a claim that counsel erroneously failed to file a merits brief, it will be easier for a defendant-appellant to satisfy the first part of the *Strickland* test, for it is only necessary for him to show that a reasonably competent attorney would have found one non-frivolous issue warranting a merits brief." *Smith v. Robbins*, 528 U.S. 259, 288 (2000). "[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. Thus, this Court concluded the merits of an unpreserved claim were not considered by the court of appeals on direct appeal pursuant to *Anders.*" *Jamison v. State*, 410 S.C. 456, 466, 765 S.E.2d 123, 128 (2014). Therefore, the PCR court's mistaken acceptance of the Assistant Attorney General's argument that Petitioner's *Anders* brief, on an issue that was unpreserved, procedurally barred Petitioner's claim was an error of law. "[W]e review questions of law *de novo,* and will reverse the decision of the PCR court when it is controlled by an error of law." *Id*, at 465, 765 S.E.2d at 127.

Accordingly, this Court should grant the petition for certiorari, reverse the PCR court's dismissal of Petitioner's *Doyle* allegation, and remand for a PCR hearing and findings on the merits of that allegation.

II. This Court should not address the merits of Petitioner's allegation *de novo* because the merits of Petitioner's allegation were not ruled on by the Circuit Court and, thus, this issue is not preserved for appellate review.

This Court should not address the merits of Petitioner's claim *de novo* because Petitioner's claim is not preserved for appellate review. The PCR court did not make a finding of fact on whether Counsel was deficient or Petitioner was prejudiced by the *Doyle* violation. Accordingly, this Court should grant the petition for writ of certiorari and remand to the PCR court for a finding of fact as to whether Counsel was deficient for or Petitioner was prejudiced by Petitioner's allegation.

The PCR court failed to rule on the merits of Petitioner's *Doyle* allegation. App. 402. The PCR court did not make a finding of fact on whether Counsel was deficient or Petitioner was prejudiced under *Strickland.* Thus, there is no ruling on the merits for this Court to review. The appropriate remedy when the PCR court fails to make specific

findings of fact as required by S.C. Code Ann. § 17-27-80 is for the order to be vacated and the case to be remanded for a new PCR hearing. "The PCR court dismissed McCray's allegations of ineffective assistance of counsel without making findings of fact on the specific allegations raised. S.C. Code Ann. § 17-27-80 (1976), requires the PCR court to make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented. The PCR court's conclusions regarding ineffective assistance are insufficient for appellate review and fail to meet the standard set forth in the statute. Accordingly, we reverse the order denying McCray relief and remand for a new PCR hearing." *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991). Accordingly this Court should grant certiorari and remand to the PCR court for a full factual finding. "[A] preemptive ruling on the merits would be unfair to the State, which would be deprived of the opportunity to have this matter fully resolved by a proper order from the PCR court. In this regard, the State correctly asserts it should not be foreclosed from the panoply of arguments available to it, especially related to the prejudice prong in the PCR analysis." *Simmons v. State*, 416 S.C. 584, 593, 788 S.E.2d 220, 225 (2016). The State needs the opportunity to create a record as to prejudice, as this testimony was not elicited from trial counsel during the evidentiary hearing. The State also recognizes and agrees with Appellant's statement that "PCR is the proper forum for Petitioner's claim for relief." Appellant cites to cases and argues that the PCR court is the proper forum to decide the merits of Appellant's case, but then concludes that this Court should rule on the merits. The State finds this argument inconsistent, but would concur with Appellant that the proper forum for a ruling on the merits would be the PCR court. The State is not attempting to circumvent the judicial system by asking for a remand in this case for the PCR court to

hear testimony concerning the prejudice prong of the Doyle issue. The State simply requests this issue be argued and ruled upon in the proper forum, as it is conceded that this is what should have been done originally. Therefore, where the PCR court failed to consider an allegation's merits and make the appropriate findings of fact regarding the allegation a new PCR hearing is the appropriate remedy.

Accordingly, this Court should grant the petition for certiorari, reverse the PCR court's dismissal of Petitioner's *Doyle* allegation, and remand for a PCR hearing and findings on the merits of that allegation.

III. Petitioner was not prejudiced by Counsel's failure to object to testimony that commented on Petitioner's invocation of his constitutional rights were Petitioner made pre-*Miranda* statements to law enforcement and the four *Doyle* factors show a lack of prejudice under *Strickland*.

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. Therefore, there was no trial strategy or reason given by Counsel for his failure to object. However, Petitioner cannot prove he was prejudiced by the *Doyle* violation.

Officer Dowling testimony impermissibly commented on Petitioner's silence and his invocation of his right to an attorney:

> 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."

App. p. 103.

Officer Dowling's testimony was unresponsive to the solicitor's question and violated *Doyle* by commenting on Petitioner's choice to remain silent and invoke his right to an attorney after being *Mirandized*. "The State may not comment on a defendant's exercise of a constitutional right." *McFadden v. State*, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000).

However, Petitioner made statements to law enforcement before he was *Mirandized* that divested the State's *Doyle* violation of its potential prejudice. "[Petitioner] 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." App. 141. These statements were made by Petitioner before he was *Mirandized* and, thus, were admissible. "*Doyle* is only applicable after *Miranda* warnings have been given." *Brown v. State*, 375 S.C. 464, 479, 652 S.E.2d 765, 773 (Ct. App. 2007). Petitioner's statements that his exonerating story would be told by his cell-phone and he would turn himself in once he had an attorney were admissible and encompassed the substance of the State's *Doyle* violation. Those pre-*Miranda* statements were admissible and, accordingly, were used by the State in its closing argument. App. 273. The *Doyle* violation provided the jury with no new information and gave the State no new tools by which to assert Petitioner's guilt. The jury heard Petitioner's request for an attorney and that his story would be told by the information on his cell phone through his pre-*Miranda* statements. The State was able to argue Petitioner's guilty conscience through his pre-*Miranda* statements. Petitioner's admissible pre-*Miranda* statements encompassed the entirety of the potential prejudice of the *Doyle* violation. Therefore, Petitioner was not prejudiced by the *Doyle* violation because he was exposed to the potential prejudice by his pre-*Miranda* statements.

Further, Petitioner's case is conclusively shown to lack prejudice by the four *Doyle* factors. Petitioner concedes the first two. Petitioner's alibi is incomplete and lacking in credibility. The

evidence against Petitioner is substantial. Based on this lack of prejudice, this Court should deny Petitioner's requests for a finding that Counsel was ineffective and a new trial.

A. The *Doyle* violation was cumulative to Petitioner's pre-*Miranda* statements and silence. Therefore, the *Doyle* was of minuscule prejudicial value and Petitioner has not proven there was a reasonable probability the *Doyle* violation changed the result of the trial.

Petitioner has not proven he was prejudiced by Counsel's failure to object to Dowling's statement concerning Petitioner's silence and invocation of his right to an attorney. "A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Strickland*, 466 U.S. at 670.

Petitioner has the burden to prove he was prejudiced by the *Doyle* violation. "Applicant bears the burden of proving the allegations in his application." *Butler v. State*, 286 S.C. at 442, 334 S.E.2d at 814. Petitioner must prove that 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.

One piece of cumulative testimony, which was not once commented on by the State in its closing argument, did not create a reasonable probability that the result of the trial would have been different. An analogous example is found in *Truesdale*: "The comment concerning Appellant's silence is miniscule in the record. Its negligible effect is shown by failure of his competent, experienced counsel to object at the time it was made, or at any other time. It was never once referred to or commented upon by the Solicitor during the trial, or in jury argument. Moreover, it was precipitated by Appellant's own spontaneous remark upon awakening and does

not indicate an attempt on the part of the State to elicit an incriminating response." *State v. Truesdale*, 285 S.C. 13, 19, 328 S.E.2d 53, 56 (1984), (overruled on other grounds).

Erdel permissibly testified Petitioner requested an attorney during his arrest. App. p. 140. Dowling impermissibly testified Petitioner requested an attorney after being *Mirandized*. App. p. 103. However, Petitioner's post-*Miranda* request for an attorney was merely cumulative to Petitioner's pre-*Miranda* request for an attorney. Likewise, Petitioner refused to respond to Babecki when Babecki texted Petitioner accusing him of firing shots at himself and his pregnant wife. App. p. 198. Petitioner also made the statement to Erdel that "there was something in his phone that will tell the story." App. p. 141. The inference from this statement is that Petitioner will not be telling law enforcement his story. Petitioner's statement to Erdel was pre-*Miranda* and thus admissible. These statements demonstrate Petitioner's failure to tell his side of the story post-*Miranda*. The State used only Petitioner's permissible pre-*Miranda* statements to show Petitioner's guilty conscience.

Petitioner's pre-*Miranda* request for an attorney, the admission of which does not violate *Doyle*, extracts the prejudice from Dowling's mention of Petitioner's post-*Miranda* request for an attorney. Accordingly, Petitioner failed to show that but for the deficiency "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. Petitioner's post-*Miranda* request for an attorney is merely cumulative to admissible evidence and, therefore, there is no reasonable probability Counsel's failure to object to the statement changed the result of the proceeding. "The admission of improper evidence is harmless where it is merely cumulative to other evidence." *State v. Johnson*, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989).

The two sentences concerning Petitioner's post-*Miranda* invocation of rights had minuscule prejudicial value because any prejudice was already established to the jury through permissible avenues. There was no reason for Counsel to object to the *Doyle* violation because there was nothing to gain from objecting. If Counsel had objected, been sustained, and requested a curative instruction that instruction would not cure Petitioner's pre-*Miranda* statements. Petitioner's desire for an attorney and his failure to tell law enforcement 'his side of the story' were already in evidence. App. p. 141. The pre-*Miranda* statements had been ruled admissible through a *Denno* hearing and the jury heard them through law enforcement testimony. Every potential argument from the post-*Miranda* invocation of rights was argued through the permissible pre-*Miranda* statements. "You can consider the statements he made when he was apprehended...he said I was going to turn myself in when I get a lawyer." App. p. 273. "Mr. Johnson never replied to. Consider that. Text message about trying to kill them. No response." App. p. 273. Despite the jury's reception of unconstitutional testimony, the cumulative pre-*Miranda* statements of Petitioner rendered any potential prejudice minuscule.

The trial court also correctly charged the jury considering Petitioner's silence:

> "I instruct you and emphasize that the fact that the defendant did not testify is not a factor to be considered by you in any way in your deliberation and in your consideration on the question of the guilty or innocence of the defendant. It must not be considered by you in any manner whatsoever. A defendant has the constitutional right to remain silent. The assertion of this right must not be considered by you in your deliberations. I repeat, Ladies and Gentleman, under your oath, you are to draw no conclusions whatsoever from the fact that the defendant in this case did not testify. The fact that this defendant did not testify should not even be discussed in a jury room."

App. 300 l. 9-23. (emphasis added)

The trial court's strong language assisted the jury in understanding Petitioner's silence was not to be considered. In this case, the trial court's instruction goes too far. The State can use a

defendant's pre-*Miranda* silence against him. "*Doyle* is only applicable after *Miranda* warnings have been given." Brown, 375 S.C. at 479, 652 S.E.2d at 773. The trial judge's instruction encompassed both the properly used pre-*Miranda* silence and improper mention post-*Miranda* silence. "A defendant has the constitutional right to remain silent. The assertion of this right must not be considered by you in your deliberations." App. 300. Therefore, any potential that the jury would consider Petitioner's silence against him was cured by the trial judge's broad instruction.

Petitioner has failed to meet his burden to prove there is a reasonable probability the result of the proceeding would have been different if Counsel had objected to Dowling's statement. *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. Petitioner must meet his burden to obtain relief. Therefore, this Court should deny the Petition for Writ of Certiorari.

B. Each Doyle factor shows Petitioner was not prejudiced under *Strickland.*

There are four factors to be considered in determining whether Petitioner was prejudiced by a *Doyle* violation:

> An applicant for PCR, however, must show prejudice from counsel's deficient performance. 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).

The four factors listed in *Doyle* are not rigid rules, but factors to be weighed in determining whether Petitioner was prejudiced under *Strickland.* "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.

Petitioner emphasized the word '*and*' when listing the *Doyle* factors. Based on Petitioner's emphasis of the word 'and,' Petitioner **incorrectly** asserted, "Importantly, all four factors must be proven beyond a reasonable doubt... in order to determine the error was harmless." PWC 22. Petitioner's statement that Respondent must prove all four *Doyle* factors beyond a reasonable doubt in order to show to show a lack of prejudice is incorrect. Importantly, Petitioner cites *Pickens* and its progeny as cases for this proposition. PWC 21. Neither *Pickens*, nor its progeny, stand for that assertion. However, *Truesdale*, cited in *Pickens*, bases its decision on *United States v. Shaw*, 701 F.2d 367, 382 (5th Cir. 1983), (which it proclaimed an "excellent analysis") that "the determination must be made on a case-by-case analysis." *Truesdale*, 285 S.C. at 18, 328 S.E.2d at 56. *Shaw* states the following:

> Subsequent cases have illustrated, however, that factual situations are not always amenable to description within 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." While Chapman's categories are helpful, Fifth Circuit precedent demonstrates that the second and third categories are not to be used as rigid rules.

Shaw, 701 F.2d at 382 (citations omitted)

Here, the record does show that all four *Doyle* factors are proven and the violation was, therefore, harmless and lacking in prejudice:

1. <u>The reference to Petitioner's silence was a single reference.</u>

Petitioner concedes this factor. The only mention of Petitioner'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." App. p. 103. The solicitor did not reference this statement in the closing argument or ask further questions. Because the reference was only a single reference this factor is in the State's favor.

2. The State did not tie the exercise of Petitioner's right to an exculpatory account.

Petitioner also concedes this factor. The State did not reference Petitioner's post-*Miranda* silence at all. It certainly did not tie that silence to an exculpatory account.

The State's closing argument did tie Petitioner'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." App. p. 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 Petitioner's exculpatory account, in the form of an alibi, to his post-*Miranda* invocation of his constitutional rights. Therefore, this factor is in the State's favor and shows a lack of prejudice from Dowling's statement.

3. Petitioner's account was totally implausible.

Petitioner asserted an alibi defense through a single witness, Kendalle Simmons. Simmons, who was a friend of Petitioner's, testified he was with Petitioner from 3:00 pm until 7:00 pm the day the incident occurred. App. pp. 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. App. p. 275. The State pointed out several inconsistencies in Simmons' statements. Simmons testified he saw Petitioner on dates in which the State had established Petitioner was no longer in town. App. p. 254. Simmons also testified that Petitioner did not own a firearm or ammunition. App. p. 258. The State established through text messages with his mother and a search warrant of his room that he did. App. pp. 109; 129.

Further, two witnesses placed Petitioner directly on the scene, with the handgun, as the person who was firing the shots. App. pp. 46; 203. This was further corroborated by Petitioner's

actions after the incident. Immediately following the shooting, Babecki accused Petitioner by text of shooting at himself and his pregnant wife. App. p. 198. Petitioner did not respond to that accusation. App. p. 199. This pre-*Miranda* silence was permissively referenced as indicative of guilt by the State along with Petitioner's flight and hiding from law enforcement. App. p. 274.

Petitioner also misstates the record. It is not "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." PWC p. 22. Mike was not robbed, his brother was. Babecki testified, "I heard from Mike that [Petitioner] robbed his brother for $250 or for $300." App. p. 193. Petitioner's theory is that Babecki concocted a scheme to falsely accuse Petitioner. PWC p. 22. Petitioner alleges Babecki concocted a scheme to shoot up his own vehicle, make his 8-month pregnant wife a co-conspirator, and rely on Petitioner to run from law enforcement and not have an actual alibi. Babecki had known Mike for three months. App. 193. Petitioner alleges Babecki did this as revenge for Mike's brother, who he did not know. App. 192. These assertions are patently unreasonable and implausible.

Petitioner's exculpatory account rests solely on the assertion that he was not at the scene of the incident when it took place. Witnesses place Petitioner directly on the scene. Petitioner's actions following the incident are consistent with a guilty conscience. Petitioner's only alibi witness made demonstrably false statements and, therefore, was completely unreliable and unbelievable. Therefore, Petitioner's account was implausible and this factor is in the State's favor and shows a lack of prejudice from Dowling's statement.

4. The evidence of Petitioner's guilt was overwhelming

The State provided overwhelming evidence in the form of direct evidence and supporting circumstantial evidence of Petitioner's guilt. The two victims saw and knew Petitioner. App. 46;

202. They named him as the shooter and called 911 immediately after the incident. App. 46; 202. Following the incident, Petitioner consistently acted with a guilty conscience. He left his mother's home, where he lived. App. 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. App. 141. He said he wouldn't turn himself in until he had an attorney. App. 141. Petitioner's only alibi witness was a friend of his who made statements that were shown to be patently false on behalf of Petitioner and was completely unreliable and unbelievable. Further, Petitioner's witness did not present an actual alibi since he did not account for Petitioner'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.

Since all four factors weigh in the State's favor, Petitioner has failed to prove there was a reasonable probability the *Doyle* violation changed the result of the trial. Therefore, Petitioner is not entitled to post-conviction relief. Accordingly, this Court should deny Petitioner's requests to find Counsel ineffective and for a new trial.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests the petition for certiorari be granted and remanded for new findings of fact and conclusions of law at a PCR hearing, concerning Petitioner's *Doyle* violation allegation. If this Court sees fit to grant the petition for writ of certiorari, Petitioner would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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