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February 5, 2020

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Osiel Narciso Gomez 319935 v State, 2015-CP-07-2196

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, in the above Beaufort County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,

James K Falk

Thank you for your assistance.

Cc:
Benjamin Limbaugh, Esq
Osiel Narciso Gomez 319935
Beaufort County Circuit Court Clerk

THE STATE OF SOUTH CAROLINA

In The Supreme Court

RECEIVED

FEB 10 2020

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Honorable Jennifer McCoy, Circuit Judge

Case No.: 2015-CP-07-2196

Osiel Narciso Gomez 319935.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Osiel Narciso Gomez appeals the Honorable Jennifer McCoy's January 27, 2020 Order of Dismissal. Undersigned counsel received notice of entry of the order on February 5, 2020. A copy of the order on appeal is attached hereto.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

February 5, 2020

Benjamin Limbaugh, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

Clerk of Court- Beaufort CP
PO Box 1128
Beaufort, SC 29901

THE STATE OF SOUTH CAROLINA

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CERTIFICATE OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Benjamin Limbaugh Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549 and the Beaufort County Clerk of Court. I further certify that all parties required by Rule to be served have been served this February 5, 2020.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
2020 JAN 31 PM 1:18 JERRI ANN ROSENEAU BEAUFORT COUNTY, S.C. CLERK OF COURT	)	
Osiel Narciso Gomez, #319935,	)	Case No.: 2015-CP-07-2196
Applicant,	)	
	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina,	)	
Respondent.	)	

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. In August 2005, the Beaufort County Grand Jury indicted Applicant for trafficking cocaine, 10g to 28g, first offense (2005-GS-07-1304). That indictment was amended on the record on January 17, 2006, to trafficking cocaine in excess of 100 grams. Donald C. Colongeli, Esquire, represented Applicant. Assistant Solicitor Kimberly Smith, Esquire, prosecuted the case. On January 16, 2006, Applicant proceeded to trial before the Honorable Howard P. King. The jury found Applicant guilty as indicted. On January 18, 2007, Judge King sentenced Applicant to imprisonment for twenty-five years for trafficking cocaine in excess of 100 grams. Applicant did not appeal his conviction or sentence at the time.

2007-CP-07-2195

On August 1, 2007, Applicant filed an application for post-conviction relief. In an attachment to the application, Applicant wrote, "My allegation of ineffective assistance of counsel is presently based entirely upon the fact that my attorney did not file a notice of appeal, after stating for the court and upon the record that he would do so." Respondent made its return on May 15, 2008.

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An evidentiary hearing into the matter was convened on August 26, 2008, before the Honorable J. Cordell Maddox. At the hearing, both parties signed a consent order granting Applicant a belated direct appeal pursuant to White v. State. The consent order stated, "The White v. State issue is Applicant's only allegation in the PCR application. Applicant understands that he must proceed on all PCR claims at this time and anything not raised now is waived. Applicant wishes to waive all other PCR claims and proceed with a belated direct appeal." Applicant subsequently filed a notice of appeal in which he asked the court to review the waiver of his other PCR allegations. The South Carolina Court of Appeals affirmed the conviction and remanded the case to the PCR court for a determination as to whether he knowingly and voluntarily waived his right to raise additional PCR claims. The remittitur was issued on March 30, 2012.

On February 20, 2014, after the court's remand, a second evidentiary hearing was held into the PCR matter. Applicant was represented by Carol Ruff, Esquire, and Harley Ruff, Esquire. Present and testifying at the hearing were Philip Rios, Esquire, Rebecca McCann, Esquire, Donald Colongeli, Esquire, and Applicant. An interpreter was present to assist Applicant at the hearing. By order dated June 5, 2014, the court found "the PCR waiver fails the test outlined in Brannon and Spoone," declared Applicant's waiver of his PCR rights in the Consent Order to be null and void, and granted Applicant's request to bring a PCR application. The State subsequently filed a petition for writ of certiorari on December 22, 2014. The South Carolina Supreme Court denied the petition on June 17, 2015. The remittitur was issued on July 6, 2015. Applicant subsequently filed his current PCR application on September 9, 2015.

Attached to this Return and incorporated by reference are the records of the Beaufort County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, Applicant's

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previous PCR records, and the current application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. "Fourth Amendment Violation."
    a. "Illegal search incident to arrest"
    b. "Applicant's trial took place in 2007, two years prior to Arizona v. Gant, 556 U.S. 332 (2009)."
    c. "Law enforcement's actions violated Applicant's Fourth Amendment rights."
2. "Ineffective Assistance of Counsel."
    a. "Trial Counsel committed constitutionally ineffective assistance by failing to move for suppression of State's drug evidence on specific ground of lack of sufficient probable cause of criminal activity that surpassed Applicant's statutory-based defense to the traffic stop."
    b. "Failing to accept a plea bargain of a lesser included offense of 7-25 years, which would have significantly reduced Applicant's sentence."
    c. "Failing to object to hearsay testimony."
    d. "Failing to move for an evidentiary hearing under Franks v. Delaware to demonstrate coordinated police introduction of information to magistrate judge with reckless disregard for truth of such information, prejudiced Applicant's Sixth Amendment right to effective assistance of counsel."

Applicant amended his application on August 20, 2019 to include the following allegations:

1. Applicant was a non-English speaker from a Latin American country facing charges of trafficking in cocaine. Applicant is informed and believes that because of his client's nationality and the nature of the offense, trial counsel provided ineffective of counsel by failing to submit proposed voir dire questions that could have helped ensure that the veniremen did not harbor any unfair prejudices against Applicant. The record shows that the Court asked trial counsel if he had any additional voir dire to which trial counsel responded that he had none. (Transcript Page 8 lines 14-16). Additionally after the jury was selected, but prior to being sworn, trial counsel moved to excuse Juror 43 for cause. Trial counsel provided ineffective assistance of counsel by failing to make a timely motion to excuse Juror 43. (Transcript page 17 lines 14-17).

2. Trial counsel provided ineffective assistance of counsel by failing make a contemporaneous objection and thus failing to preserve for appellate review the lawfulness of the search and seizure of the vehicle that Applicant was driving. (Officer

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Jody Hiers' testimony regarding the K-9 search of the vehicle. Transcript page 150 line 20 through 153 line 6); (Officer Heir's testimony that drugs were found in the vehicle. Transcript page 151 line 24-152 line 15); (Sergeant Florencio's testimony regarding State's Exhibit S-l-A; S-2-A. Transcript pages 183 and 188); (Staff Sergeant Berry's entire testimony regarding the results of her forensic analysis of the cocaine seized from the car that Applicant was driving).

3. Trial counsel failed to provide effective assistance of counsel by failing to move to have the Incident Report In Case No. 20050803-474 made a Court's exhibit. (Transcript Page 248 lines 8-11). At the close of the case trial counsel renewed his motions under both Rule 5 SCRCrimP and Brad v. Maryland and then moved for a mistrial. Trial counsel believed that the State failed to abide by its obligation to disclose the names of all witnesses with knowledge of the case. In denying trial counsel's motion the Court relied upon the disclosures set forth in the above described incident report. By failing to move to have the report made a Court's exhibit, trial counsel failed to fully preserve the issue for appellate review.

4. Trial counsel provided ineffective assistance of counsel by not requesting a charge on a lesser included offense. When agents searched the car Defendant was driving a small bag of cocaine was found between the driver's seat and center counsel. The bulk of the cocaine was seized from the storage compartment in the rear of the vehicle. The defendant made a statement that he purchased 4 ounces of cocaine. (Transcript page 291 lines21 through page 292 line 12). Therefore the jury could have believed that Applicant was only in constructive possession of the small bag found next to the driver's seat and returned a verdict on the lesser included offense.

5. Trial counsel provided ineffective assistance of counsel by not preserving for appellate review his objection to Defendant's statement. The Court conducted a pre-trial Jackson v Denno hearing. The trial court found that the statement was made knowingly and voluntarily. Trial counsel failed to make a contemporaneous objection when Sergeant Florencio testified about Applicant's statement. (Transcript page 194 lines 14- 25).

6. Trial Counsel failed to object when Sergeant Florencio testified in violation of Applicant's Due Process rights under the 14Th Amendment and as recognized in Dovle v Ohio, 426 U.S. 610 (1976). Sergeant Florencio testified that Applicant stated: at that time he stated that he did not want to answer any more questions and requested a lawyer. (Transcript 194 lines 20- 23).

At the evidentiary hearing, Applicant proceeded with the allegations in his amended application with the sole inclusion of the allegation that counsel failed to accept the plea bargain. Applicant abandoned any other allegations contained in his original application for post-conviction relief. This Court will address the allegations presented during the evidentiary hearing.

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Findings of Facts and Conclusions of Law

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses presented, which allowed the Court to scrutinize the credibility presented. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985). The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland, 466 U.S. 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland does not guarantee perfect representation, only a "'reasonably competent attorney.'" 466 U. S. at 687 (quoting McMann v. Richardson, 397 U. S. 759, 770 (1970)); Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair trial. 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. See generally Id.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove that

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counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286, 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 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.

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, Wiggins, 539 U.S. at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Strickland, 466 U.S. at 688; Harrington v. Richter, 562 U.S. 86 (2011)

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With respect to prejudice, an applicant must demonstrate "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. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687; Harrington, 562 U.S. 86.

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so 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. Strickland, 466 U.S. at 689–690. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings knew of materials outside the record and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). 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. Strickland, 466 U.S at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U. S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is "reasonably likely" the result

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would have been different. Id. at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86.

Based on this standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel as to any of his various allegations. Applicant's allegation is addressed fully below:

Failure to request voir dire concerning Applicant being a non-English speaker from a foreign country and for failing to timely move to excuse a juror

Jury selection is a process that inherently falls within the expertise and experience of trial counsel. Palacio v. State. 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999) (citations omitted). "The selection of a jury is inevitably a call upon experience and intuition. The trial lawyer must draw upon his own insights and empathetic abilities." Id (quoting Romero v. Lynaugh. 884 F.2d 871, 878 (5th Cir. 1989)). "[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." Id (citing State v. Patterson. 324 S.C. 5, 482 S.E.2d 760 (1997)). Consequently, in order to prevail upon a claim that the trial attorney should have struck a juror, the applicant "must provide credible evidence that the trial attorney's refusal to strike a juror prejudiced the defense." Id. Further, "where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State. 308 S.C. 1 19, 122, 417 S.E.2d 529, 531 (1992) (citing Goodston v. U.S. 564 F.2d 1071 (4th Cir. 1977)).

Counsel testified that he believed the judge sufficiently voir dired the jury and that he did not feel that any further voir dire was necessary. Counsel testified that in hindsight he could have

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requested some question be asked concerning any bias against persons living in this country but not speaking the language. Counsel testified that he moved to strike juror 43 because he was a firefighter and they frequently work closely with law enforcement. Counsel testified that it appeared that juror 43 had been seated when he was removed from the jury, but that his objection was a renewal of an objection from the previous day. Counsel testified that he did not request a voir dire question as to whether or not there were any other potential jurors who were first responders.

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. First, Applicant provided no evidence to show that Counsel's failure to strike the juror prior to being seated or asking for additional voir dire prejudiced the defense, but merely speculated that jurors could have potentially held negative biases. Second, Applicant provided no evidence he asked Counsel to strike the juror and was refused; the only testimony was that counsel moved to strike the juror for being a first responder. Third, Counsel articulated a valid strategic reason for exercising a strike against the juror insofar as he wished to exclude someone he knew to work closely with law enforcement from the jury. For all these reasons, Applicant's request for relief by way of this allegation is denied.

Failure to preserve for appellate review the lawfulness of the search and seizure of the vehicle Applicant was driving

Applicant contends that counsel was ineffective for failing to make contemporaneous objections to the lawfulness of the search and seizure of the vehicle, thus failing to preserve the issue for appellate review.

In addition to the protections afforded by the United States Constitution, the South Carolina Constitution provides its own protections to the state's citizens against unreasonable

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searches and seizures. State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001); see S.C. Const. art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated[.]"); see also U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]"). Furthermore, primarily in order to guard against invasive technological advancements, the South Carolina Constitution also expressly protects our citizens from "unreasonable invasions of privacy." S.C. Const. art. I, § 10; see Forrester, 343 S.C. at 647, 541 S.E.2d at 842 ("[T]he drafters of our state constitution's right to privacy provision were principally concerned with the emergence of new electronic technologies that increased the government's ability to conduct searches.").

Through the additional provision regarding invasions of privacy, "the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution." State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007). Thus, "the South Carolina Constitution favors an interpretation offering a higher level of **privacy** protection than the Fourth Amendment." Id. (emphasis added). However, the South Carolina Constitution by its express language only forbids searches, seizures, and invasions of privacy that are **unreasonable**. S.C. Const. art. I, § 10; see State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977) ("It is only unreasonable searches and seizures that are prohibited."); see also Maryland v. Buie, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]"); cf. State v. Snapp, 174 Wash. 2d 177, 194, 275 P.3d 289, 297-298 (Wash. 2012) (recognizing a provision of the Washington State Constitution that protects a person's private affairs from being

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disturbed without authority of law is – unlike the Fourth Amendment of the United States Constitution and Article 1, Section 10 of the South Carolina Constitution – **not** "grounded in notions of reasonableness"). Accordingly, just like the search and seizure protections offered by the federal constitution, the touchstone of our state constitution's search and seizure protections is reasonableness. Cf. Florida v. Jimeno, 500 U.S. 248, 250 (1991) ("The touchstone of the Fourth Amendment is reasonableness.").

Historically, in South Carolina, our courts – relying on guidance from the United States Supreme Court – have measured the reasonableness of a traffic stop, which constitutes a seizure for constitutional purposes, along with the reasonableness of other searches and seizures in a purely objective manner. See State v. Williams, 351 S.C. 591, 600, 571 S.E.2d 703, 708 (Ct. App. 2002) ("Reasonableness 'is measured in objective terms by examining the totality of the circumstances.' " (quoting Ohio v. Robinette, 519 U.S. 33, 39 (1996)); see also State v. Maybank, 352 S.C. 310, 315, 573 S.E.2d 851, 854 (Ct. App. 2002) (recognizing a traffic stop of a vehicle constitutes a seizure); see generally Mack v. Lott, 415 S.C. 22, 23, 780 S.E.2d 761, __ (2015) (indicating "the proper standard for determining probable cause [to arrest] is an objective standard"). Critically, the underlying reason why our courts conduct an objective analysis when considering issues involving searches and seizures is the recognition " '[e]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.' " Jackson v. City of Abbeville, 366 S.C. 662, 667, 623 S.E.2d 656, 659 (Ct. App. 2005) (quoting Horton v. California, 496 U.S. 128, 138 (1990)).

Similarly, in South Carolina, our courts – again relying on guidance from the United States Supreme Court – have found the initiation of a traffic stop to be reasonable per se when

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either probable cause exists to believe a traffic violation has occurred **or** reasonable suspicion exists to believe the occupants of the vehicle are involved in criminal activity. See State v. Nelson, 336 S.C. 186, 193, 519 S.E.2d 786, 789 (1999) ("As a general matter, the decision to stop an automobile is reasonable where police have probable cause to believe that a traffic violation has occurred."); Knight v. State, 284 S.C. 138, 141, 325 S.E.2d 535, 537 (1985) ("[A] police officer may stop an automobile and briefly detain its occupants, even without probable cause to arrest, if he has a reasonable suspicion that the occupants are involved in criminal activity."); Williams, 351 S.C. at 598, 571 S.E.2d at 707 ("Where probable cause exists to believe that a traffic violation has occurred, the decision to stop the automobile is reasonable per se."). Significantly, in determining whether such a stop is reasonable, our courts have consistently concluded the subjective motivations of the law enforcement officer initiating the stop are **irrelevant**. See Moore, 415 S.C. at 252, 781 S.E.2d at 901 (recognizing subjective motivations are irrelevant when analyzing the constitutionality of an officer's actions); State v. Provet, 405 S.C. 101, 108, 747 S.E.2d 453, 457 (2013) ("The test whether reasonable suspicion exists is an objective assessment of the circumstances; the officer's subjective motivations are irrelevant.").

Notably, in Whren v. United States, 517 U.S. 806, 808 (1996), the United States Supreme Court directly addressed the question of whether a pretextual traffic stop violates the federal constitution's prohibition against unreasonable searches and seizures. In that case, vice-squad officers in an unmarked vehicle were patrolling an area known for drug activity located in the District of Columbia and, during the patrol, drove past a vehicle that drew their suspicions. Id. Based on those suspicions, the officers turned around, and, when they did, the suspicious vehicle turned without signaling and drove off at an unreasonable speed, which were both acts that

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constituted civil traffic violations in Washington, D.C. Id. The officers then followed the suspicious vehicle, and, when it stopped in traffic, one of the officers approached it, identified himself, asked the driver to place the vehicle in park, and quickly observed bags of crack cocaine in the passenger's hands. Id. at 809. Subsequently, the driver and passenger were arrested, charged with several drug crimes, convicted, and appealed those conviction. Id. at 809. On appeal, their cases eventually made their way to the Supreme Court, and they raised constitutional challenges to the reasonableness of the stop. Id. Upon considering the matter, the Supreme Court **unanimously** affirmed their convictions. Id. at 819. In doing so, the Supreme Court thoroughly examined its prior decisions, which had consistently applied objective standards when analyzing search and seizures issues, and rejected any suggestion that "the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." Id. at 812-813. Instead, the Supreme Court concluded a traffic stop is reasonable for Fourth Amendment purposes when the police have probable cause to believe that a traffic violation has occurred. Id. at 810. Because the stop at issue in the petitioners' case was indisputably supported by probable cause to believe a traffic violation had occurred, the Supreme Court held the stop was constitutionally reasonable and the evidence found during the stop was properly admitted during the trial. Id. at 819. Furthermore, in attempting to assuage the concerns of the petitioners, the Supreme Court explained one of their chief concerns – the possibility law enforcement officers might conduct pretextual traffic stops based on impermissible factors like race – was already constitutionally prohibited by the Equal Protection Clause, which meant that concern provided no basis for reaching a contrary conclusion regarding the reasonableness of stops under the Fourth Amendment. Id. at 813.

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Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."). Because Applicant's arrest was lawful and proper, any question regarding whether the arrest was a pretext for some further investigation was entirely irrelevant. See Whren v. United States, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); see also Arkansas v. Sullivan, 532 U.S. 769, 772 (2001) (reversing a decision to suppress evidence discovered during an inventory search conducted after Sullivan was arrested because the evidence was improperly suppressed as the fruit of an allegedly pretextual arrest); see, e.g., State v. Banda, 371 S.C. 245, 253, n. 3, 639 S.E.2d 36, 40 (2006) ("Evidence that the Greenville officers were more interested in apprehending the drug target does not factor into a probable cause analysis in the otherwise valid stop of a vehicle for stolen license tags."). Thus, the subjective intentions of the arresting officer in Applicant's case are irrelevant when considering whether the inevitable discovery doctrine should have been applied. See Nix, 467 U.S. at 445 ("A police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered."); see also Atwater, 532 U.S. at 353-354 ("We are sure there are [other foolish, warrantless misdemeanor arrests], but just as surely the country is not confronting anything like an epidemic of unnecessary minor-offense arrests. That fact caps the reasons for rejecting Atwater's request for the development of a new and distinct body of constitutional law.").

A lawful traffic stop begins at the point that an officer stops a vehicle to investigate a traffic violation and "ordinarily continues, and remains reasonable, for the duration of the stop." Arizona v. Johnson, 555 U.S. 323, 333 (2009). Once a lawful traffic stop is initiated, an officer

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may order the driver and any passengers out of the vehicle pending completion of the stop and "may request a driver's license and vehicle registration, run a computer check, and issue a citation." Pichardo, 367 S.C. at 98, 623 S.E.2d at 847 (citing United States v. Sullivan, 138 F.3d 126 (4th Cir. 1998)); see Maryland v. Wilson, 519 U.S. 408, 415 (1997) ("[A]n officer making a traffic stop may order passengers to get out of the car pending completion of the stop."). "Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave." Johnson, 555 U.S. at 333.

During the course of the stop, an officer can inquire into matters unrelated to the initial justification for the stop without converting the stop into something other than a lawful seizure so long as the unrelated questioning does not measurably extend the duration of the stop. Id.; see also Muehler v. Mena, 544 U.S. 93, 100-101 (2005) (instructing that additional questioning during a detention unrelated to the original purpose of the detention does not constitute an additional seizure or independent Fourth Amendment violation). Such an investigatory traffic stop must be temporary and last no longer than necessary to effectuate its purpose. Pichardo, 367 S.C. at 98, 623 S.E.2d at 848; see also United States v. Branch, 537 F.3d 328, 336 (4th Cir. 2008) ("The maximum acceptable length of a routine traffic stop cannot be stated with mathematical precision. Instead, the appropriate constitutional inquiry is whether the detention lasted longer than was necessary, given its purpose.").

Even if a traffic stop is initially lawful, the detention "can become unlawful if it is prolonged beyond the time reasonably required to complete [its] mission." Illinois v. Caballes, 543 U.S. 405, 407 (2005); see Pichardo, 367 S.C. at 98, 623 S.E.2d at 848 ("Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention."). However, a further detention extending the scope of a traffic stop beyond

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its original purpose is not automatically unconstitutional. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848. Instead, continued questioning beyond the duration of an initial traffic stop is lawful and permissible where: (1) the officer has a reasonable articulable suspicion of other illegal activity; or (2) the traffic stop becomes a consensual encounter. Id.

Reasonable suspicion consists of " 'a particularized and objective basis' that would lead one to suspect another of criminal activity." State v. Lesley, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). "Reasonable suspicion 'is not readily, or even usefully, reduced to a neat set of legal rules, but, rather, entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act.' " State v. Provet, 391 S.C. 494, 500, 706 S.E.2d 513, 516 (Ct. App. 2011) (quoting United States v. Foreman, 369 F.3d 776, 781 (4th Cir. 2004)). "In this highly fact-specific inquiry, reasonable suspicion 'is a fluid concept which takes its substantive content from the particular context in which the standard is being assessed.' " State v. Wallace, 392 S.C. 47, 51-52, 707 S.E.2d 451, 453 (Ct. App. 2011) (quoting Foreman, 369 F.3d at 781), cert. dismissed as improvidently granted, 401 S.C. 264, 737 S.E.2d 480 (2012). The reasonable suspicion standard "is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence[.]" Illinois v. Wardlow, 528 U.S. 119, 123 (2000). "Reasonable suspicion is more than a general hunch but less than what is required for probable cause." State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007); see State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006) ("Reasonable suspicion is something more than an inchoate and unparticularized suspicion or hunch.").

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In determining the existence of reasonable suspicion, the totality of the circumstances must be considered. Pichardo, 367 S.C. at 104, 623 S.E.2d at 85. In reviewing the totality of the circumstances, the individual factors of the traffic stop must not be considered piecemeal or in isolation. See Branch, 537 F.3d at 337 ("Courts must look at the 'cumulative information available' to the officer . . . and not find a stop unjustified based merely on a 'piecemeal refutation of each individual' fact and inference[.]" (citations omitted)). Instead, all of the circumstances of the stop, including the officer's own experience and specialized training, must be considered as a whole to determine whether the officer's actions were reasonable in light of all of the information available to him at the time. See United States v. Mason, 628 F.3d 123, 129 (4th Cir. 2010) ("[J]ust as one corner of a picture might not reveal the picture's subject or nature, each component that contributes to reasonable suspicion might not alone give rise to reasonable suspicion."); see also United States v. Arvizu, 534 U.S. 266, 273 (2002) ("[W]e have said repeatedly that [reviewing courts] must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing. The process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' " (citations omitted)). "In applying the concept of reasonable suspicion to the various facts of a case, '[i]t is the entire mosaic that counts, not single tiles.' " Wallace, 392 S.C. at 52, 707 S.E.2d at 453 (quoting United States v. Whitehead, 849 F.2d 849, 858 (4th Cir. 1988)). Thus, the presence of several factors seemingly consistent with innocent travel can establish reasonable suspicion when viewed together in totality. United States v. Sokolow, 490 U.S. 1, 9 (1989).

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One of the recognized and accepted exceptions is the automobile exception. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981). That exception is based on: (1) the ready mobility of automobiles along with the potential that evidence may be lost or removed before a warrant is obtained; and (2) the lessened expectation of privacy in motor vehicles. State v. Cox, 290 S.C. 489, 491, 351 S.E.2d 570, 571 (1986). Under the automobile exception, law enforcement officers can conduct a warrantless search of an automobile based on probable cause alone. Bultron, 318 S.C. at 332, 457 S.E.2d at 621. "If a vehicle is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more." Weaver, 374 S.C. at 320, 649 S.E.2d at 482; see also State v. Moore, 377 S.C. 299, 310, 659 S.E.2d 256, 262 (Ct. App. 2008) (recognizing that the rationale for a vehicle search under the automobile exception is not negated even if the vehicle is immobilized or taken into police custody).

If probable cause exists supporting the search of a lawfully stopped automobile, the search can be extended to every part of the vehicle and all of its contents potentially containing the object of the search. Bultron, 318 S.C. at 332, 457 S.E.2d at 621; see also Wyoming v. Houghton, 526 U.S. 295, 307 (1999) ("We hold that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search."). "The scope of a warrantless search based on probable cause is no narrower – and no broader – than the scope of a search authorized by a warrant supported by probable cause." United States v. Ross, 456 U.S. 798, 823 (1982). "The scope of a warrantless search of an automobile is defined by the object of the search and the places in which there is probable cause to believe that it may be found." State v. Perez, 311 S.C. 542, 546, 430 S.E.2d 503, 505 (1993).

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Probable cause is "a justifiable determination, based upon the totality of the circumstances and in view of all the evidence available to law enforcement officials at the time of the search, that there exists a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved." Bultron, 318 S.C. at 332, 457 S.E.2d at 621; see Illinois v. Gates, 462 U.S. 213, 238 (1983) (identifying probable cause as "a fair probability that contraband or evidence of a crime will be found"). "Probable cause may be found somewhere between suspicion and sufficient evidence to convict." State v. Blassingame, 338 S.C. 240, 250, 525 S.E.2d 535, 540 (Ct. App. 1999). However, the probable cause standard does **not** require absolute certainty. In re Care and Treatment of Brown v. State, 372 S.C. 611, 619, 643 S.E.2d 118, 122 (Ct. App. 2007).

In regards to the inevitable discovery due to the inventory search that would have been conducted by the Sheriff's Department[1], Counsel testified at the evidentiary hearing that he failed to object to the testimony of Officer Heirs concerning the K-9 search, Sergeant Florencio's testimony concerning the drugs seized, or Staff Sergeant Berry's testimony concerning the forensic analysis done on the drugs seized. However, in reviewing the trial transcript, the only contemporaneous objection counsel failed to make was to the testimony of Heirs. Counsel objected on at least three occasions to the drugs being introduced: objected to the drugs being introduced through Florencio's testimony, objected to the drugs being introduced through

[1] See, e.g. State v. Miller, 423 S.C. 95, 814 S.E.2d 166 (2018) (affirming tow and inventory search of vehicle where defendant was arrested for driving with a suspended license, and the car was neither his nor that of anybody present at the apartment complex at which it was parked); see also United States v. Bullette, 854 F.3d 261, 265 (4th Cir. 2017) ("An inventory search of an automobile is lawful (1) where the circumstances reasonably justified seizure or impoundment, and (2) law enforcement conducts the inventory search according to routine and standard procedures designed to secure the vehicle or its contents."); United States v. Brown, 787 F.2d 929, 932 (4th Cir. 1986) ("The question . . . is . . . whether the police officer's decision to impound was reasonable under the circumstances.").

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Berry's testimony, and objected/moved to suppress the drug evidence at the close of the State's case. Therefore, this Court finds that counsel properly objected to the evidence introduced in the aforementioned instances and must only address any potential deficiency in failing to object to the testimony of Heirs. Here, counsel was not deficient in failing to object to the testimony of Heirs where there was no articulable basis for the objection. Appellate courts do not require parties to engage in futile actions in order to preserve issues for appellate review. Fettler v. Gentner, 396 S.C. 461, 722 S.E.2d 26 (Ct. App. 2012). As will be addressed subsequently, counsel had no basis for objecting to the testimony and therefore cannot be found deficient for failing to object. Further, Applicant can establish no prejudice from counsel's alleged failure where the issue had no merit at trial and would not have warranted a meritorious appeal.

Applicant can establish no prejudice suffered due to counsel's alleged failure to object to Heir's testimony due to the objection's lack of merit. The objection lacked merit for two reasons; the search and seizure of the vehicle was proper under the automobile exception to warrantless searches and the evidence would have been inevitably discovered when the vehicle was properly seized and inventoried by the Sheriff's Department.

There are four steps that need to be considered to determine whether the traffic stop was Constitutional and whether the automobile exception applies. First, the pretextual traffic stop conducted by the Drug Task Force was constitutional per Whren. The Task Force wanted to stop Applicant's vehicle due to an ongoing drug investigation where they suspected drugs were in fact in the vehicle at the time. However, the traffic stop was properly initiated where the officer ran the license plate on Applicant's vehicle to find that the registration was suspended. P. 78-79. The officer had a valid reason for performing the traffic stop, therefore, any pretextual reason for making the stop is irrelevant and constitutes no meritorious basis for challenging the stop.

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Second, the arrest of the Applicant for the traffic violations was constitutional pursuant to Atwater. The United States Supreme Court has consistently held that law enforcement has the ability to arrest even for minor offenses such as traffic violations. Here, Applicant was arrested for driving with a suspended registration. Testimony from Cobb, Heirs, and Florencio at trial confirmed that Applicant was indeed arrested for driving with a suspended registration. P. 131, 150, 186. Applicant's arrest was clearly constitutional and therefore constituted no meritorious basis for an objection.

Third, the K-9 search that provided probable cause to search the vehicle was constitutional because it did not improperly prolong the traffic stop. Hernandez. Here, the facts do not equate to a situation where a K-9 search of a vehicle would be improper because Applicant had already been arrested at the time of the search and it did not prolong the stop in any capacity. Cobb, the K-9 handler, testified at trial that she was requested to come to the scene of the traffic stop as backup. Cobb further testified that Applicant was placed under arrest as she arrived on the scene and she proceeded with the K-9 search once Applicant was in custody. P. 150. There was no testimony at trial that the traffic stop was delayed for the purposes of calling a K-9 unit and Applicant was already under arrest by the time the K-9 unit arrived as backup. Counsel failing to object to Heir's testimony concerning the K-9 search was not deficient because there was no meritorious basis for the objection where the K-9 search in no way improperly prolonged the length of the traffic stop.

Fourth, law enforcement gained probable cause to search the entire vehicle based on the K-9 alerting to drugs in the vehicle and not based on the arrest of Applicant. The testimony from Cobb at trial was that the search of Applicant's vehicle was based on the K-9 alerting to drugs in the vehicle and not Applicant's arrest. P. 142. The K-9 alerted to the presence of drugs in the

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vehicle and the officers subsequently searched the vehicle based on that probable cause. The K-9 alerted to the driver's door handle which provided probable cause to continue the search within the vehicle. P. 151. The K-9 proceeded to the backseat of the vehicle, adjacent to the cargo compartment, indicating that there were drugs in the immediate vicinity. P. 151. Officers proceeded to search the cargo compartment and found a large quantity of cocaine. Under the automobile exception, law enforcement officers can conduct a warrantless search of an automobile based on probable cause alone. Bultron, 318 S.C. at 332, 457 S.E.2d at 621. "If a vehicle is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more." Weaver, 374 S.C. at 320, 649 S.E.2d at 482; see also State v. Moore, 377 S.C. 299, 310, 659 S.E.2d 256, 262 (Ct. App. 2008) (recognizing that the rationale for a vehicle search under the automobile exception is not negated even if the vehicle is immobilized or taken into police custody). Here, the vehicle was mobile even though it had taken into police custody and law enforcement had probable cause to search the vehicle after the K-9 alerted to the presence of drugs in the vehicle. Therefore, counsel's failure to object was not prejudicial to Applicant where there was no meritorious basis for the objection due to law enforcement properly searching the vehicle under the automobile exception to warrantless searches.

Even if the automobile exception did not apply, the evidence would have still been proper under the doctrine of inevitable discovery because the vehicle was to be towed and inventoried pursuant to department policy. First, the towing and inventory search of the vehicle would have been reasonable for the following reasons; Applicant was arrested for the traffic violations, the vehicle did not belong to the Applicant, and there was nobody else on the scene that could have taken the vehicle. See, e.g. State v. Miller, 423 S.C. 95, 814 S.E.2d 166 (2018). Second, the

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inventory search would have been reasonable because the vehicle was properly seized and Florencio testified at trial that the vehicle was to be towed and inventoried pursuant to the Beaufort County Sheriff Department's policies. P. 82. see also United States v. Bullette, 854 F.3d 261, 265 (4th Cir. 2017). The evidence shows that the vehicle would have been properly towed and inventoried, therefore the discovery of the drugs in the cargo compartment was inevitable making there no meritorious basis for an objection by counsel. Therefore, Applicant was not prejudiced by counsel's failure to object where there was no merit to the proposed objection. Ultimately, Applicant has failed to show deficiency by counsel in failing to object or any resulting prejudice resulting therefrom. This Court finds that Applicant has failed to meet his burden and this allegation is dismissed.

Failure to move the incident report into evidence where the Court relied upon the report in denying Applicant's motion for a mistrial

Applicant alleges that trial counsel was deficient for failing to move the incident report into evidence since the trial court relied upon the record in denying Applicant's motion for a mistrial, thus not properly preserving the issue for appellate review. Counsel testified at the evidentiary hearing that he did not mark the incident report as an exhibit because the court identified the incident report on the record, it was published to the court, and the court ruled on his motion. Counsel made timely objections to the potential Brady/Rule 5 violations and the court ruled on those objections. The trial court thoroughly ruled on the objection and went through specifics in the report that he relied upon in making his decision. Applicant did not present evidence or a meritorious argument at the evidentiary hearing as to why counsel was deficient in his performance, how Applicant was prejudiced, or why counsel's contemporaneous

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objections did not preserve the issue for appellate review. Therefore, this Court finds that Applicant has failed to meet his burden and the allegation is dismissed.

Failure to request a charge on a lesser-included offense

Applicant alleges trial counsel was ineffective for failing to request a charge on a lesser-included offense. At trial through Applicant's statement, and reiterated by PCR counsel at the evidentiary hearing, Applicant admitted that he purchased four ounces of cocaine. PCR counsel emphasized at the evidentiary hearing that the jury could have determined that Applicant was responsible for the four ounces of cocaine. Subsequently, Applicant withdrew this allegation from the Court's consideration when he was made aware that four ounces was over one hundred grams and would still make him culpable for trafficking one hundred to two hundred grams. Therefore, this Court finds that Applicant has withdrawn this allegation and the allegation had no merit considering the evidence presented. This allegation is dismissed.

Failure to make a contemporaneous objection to Sergeant Florencio's testimony concerning Applicant's statement

Applicant alleges trial counsel was deficient for failing to contemporaneously object to testimony at trial concerning Applicant's statement to law enforcement. Counsel testified at the evidentiary hearing that he thought that he had objected to the testimony, but that the record reflects that he did not. Counsel testified that he was not surprised about the testimony. Appellate courts do not require parties to engage in futile actions in order to preserve issues for appellate review. Fettler v. Gentner, 396 S.C. 461, 722 S.E.2d 26 (Ct. App. 2012). A Jackson v. Denno hearing was held pretrial to determine the voluntariness of the statement and whether Applicant was properly advised of his rights. Florencio testified at trial that he advised Applicant as to the reason for his arrest and proceed to read him his Miranda rights. P. 193. Florencio testified that

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he is fluent in Spanish and, knowing that Applicant did not speak English well, read him his Miranda rights in Spanish. P. 193-194. There was no testimony pretrial or at trial that would indicate that the statement was not given voluntarily by Applicant. Further, Applicant was advised of his right to testify as to the voluntariness of the statement at no risk to himself during the pretrial hearing and refused to do so. Applicant has failed to show deficiency on the part of counsel for failing to object to testimony regarding Applicant's statement where there was no evidence to show the statement was given involuntarily and Applicant refused to testify as to any issues concerning the statement. Therefore, this Court finds that Applicant has failed to meet his burden and the allegation is dismissed.

Failure to object to Sergeant Florencio's testimony concerning Applicant's invocation of his right to silence and his right to an attorney

Applicant alleges trial counsel was deficient for failing to object to Florencio's testimony concerning Applicant's invocation of his right to silence and his right to an attorney.

Under 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

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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

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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 determining whether the defendant 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[.]"). In 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. Edmond, 341 S.C. at 348, 534 S.E.2d at 686-687; see 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

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considered in determining if a Doyle violation is harmless). However, none of those factors are 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 v. United States, 547 F.2d 1240 (5th Cir. 1977), 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.").

Counsel testified at the evidentiary hearing that he believed he made an issue of the statement pretrial but that the record reflected that he did not make a contemporaneous objection to Florencio's testimony during trial. This Court examined the factors enumerated above in determining whether the admission of the testimony prejudiced Applicant sufficiently to warrant reversal. First, the reference to Applicant's right to remain silent appears to have been a single reference. Second, the reference does not appear to have been alluded to at any other point in the trial. Third, the prosecutor made no efforts to tie Applicant's exercise of his rights to his exculpatory story as there was no real exculpatory story put forth. Fourth, Applicant did not present any, or at least not an apparent, exculpatory story. Fifth, the evidence against Applicant

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was overwhelming considering his voluntary admission to law enforcement about purchasing four ounces of cocaine and the drugs that were found in the vehicle. Therefore, Applicant has failed to show how counsel's failure to object to the testimony concerning Applicant's invocation of his rights amounted to sufficient prejudice to warrant reversal. This Court finds that Applicant has failed to meet his burden and this allegation is dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient, nor was Applicant prejudiced by Counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

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AND IT IS SO ORDERED this 27 day of January, 2019.

JENNIFER MCCOY
Presiding Judge
Fourteenth Judicial Circuit

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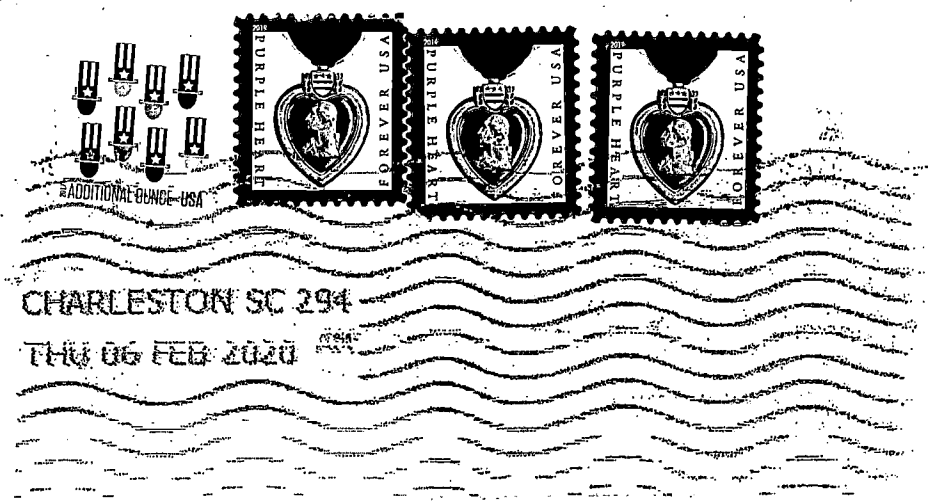

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