STATE OF SOUTH CAROLINA
In the Court of Appeals

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Appeal from Florence County

The Honorable D. Craig Brown, Circuit Court Judge

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THE STATE,

Respondent,

v.

TOMMY MCGEE,

Appellant.

Appellate Case No. 2017-001927

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**INITIAL BRIEF OF RESPONDENT**

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SC Court of Appeals

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## APPELLANT'S STATEMENT OF ISSUE ON APPEAL

I. Did the trial judge err in refusing to grant a mistrial when an investigator testified that Appellant "already lawyer up" improperly commenting on Appellant's constitutional right to remain silent?

## RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Was the trial judge correct in holding that testimony by a state's witness, declaring that Appellant had "lawyered up," did not implicate Appellant's Fifth Amendment Right to remain silent?

II. If the trial judge erred in holding that the testimony did not implicate Appellant's Fifth Amendment right to remain silent, was the error either procedurally barred or harmless?

## STATEMENT OF THE CASE

Tommy McGee ("Appellant") was indicted by the Florence County grand jury on the charge of murder (2016-GS-21-01134). (Tr. p. 7, ll. 10-14). At trial, Appellant was represented by Rose Mary Parham, Esquire. Solicitor John Holt, IV., Esquire, prosecuted the case on behalf of the Twelfth Circuit Solicitor's Office. (Tr. p. 1). Appellant was tried before the Honorable D. Craig Brown from September 12th, to September 14th, 2017. (Tr. p. 1). At the conclusion of the trial the jury found Appellant guilty as indicted. (Tr. p. 257, ll. 1-6). Following the conviction, Judge Brown sentenced Appellant to the mandatory minimum of thirty (30) years in prison. (Tr. p. 265, l. 25 – p. 266, l. 3). Appellant filed a timely Notice of Appeal. Katherine Hudgins, Esquire, with the Division of Appellate Defense, submitted Appellant's Initial Brief on July 17th, 2018. This Brief of Respondent follows.

## RESPONDENT'S STATEMENT OF THE FACTS

On October 27th, 2015, the Victim, "Jimmy" Welch, arrived at the bar known as The Office to pick up his girlfriend who was employed there as a bartender. (Tr. p. 65, ll. 13-22; p. 66, l. 8 – p. 67, l. 5; p. 85, ll. 2-8). Jimmy's girlfriend was working a until close that evening so Jimmy stuck around and played pool with other patrons as he waited for her to finish. (Tr. p. 67, ll. 5-13; p. 69, l. 9 – p. 70, l. 18; p. 85, ll. 18-25). Appellant arrived at The Office several hours after the victim on the early morning of October 28th. (Tr. p. 70, l. 19 – p. 71, l. 7; p. 86, ll. 5-7). He proceeded to the pool table and asked Jimmy and the other patrons if he could join them. Jimmy and the others agreed to let Appellant join. (Tr. p. 86, ll. 7-10; p. 88, ll. 15-20). While they were playing pool, Appellant, believing he recognized the victim, accused Jimmy of owing Appellant's father money. (Tr. p. 72, l. 21 – p. 73, l. 5; p. 86, ll. 17-21). Jimmy denied having knowledge of what Appellant was talking about. (Tr. p. 77, ll. 10-15; p. 86, l. 23 – p. 87, l. 16; p. 133, ll. 21-25; p. 137, ll. 8-14). Sometime later, Jimmy approached the bar, turning his attention away from Appellant. (Tr. p. 134, ll. 9-12). At this moment, Appellant punched Jimmy in the face. (Tr. p. 72, ll. 9-14; p. 88, ll. 9-12). Jimmy immediately collapsed to the floor from the force of the punch. (Tr. p. 87, ll. 15-16). Appellant then landed numerous forceful blows to Jimmy's head. (Tr. p. 134, ll. 13-15). Other patrons and Jimmy's girlfriend managed to remove Appellant from the defenseless victim. (Tr. p. 71, ll. 8-11; p. 87, ll. 18-20; p. 134, ll. 21-23). Jimmy's girlfriend ordered Appellant out of the bar and locked the door behind him as he departed the premises. (Tr. p. 73, l. 10 – p. 74, l. 1; p. 75, ll. 16-20). One of the patrons offered Jimmy some paper towels to stanch the heavy bleeding coming from his nose. (Tr. p. 87, l. 21 – p. 88, l. 2). Jimmy told the patron to "give him a minute." (Tr. p. 88, ll. 2-3). Initially, the patrons at the Bar believed Jimmy was fine and recovering on the floor. However, they discovered him unresponsive a few moments later. (Tr. p. 71, l. 12 – p. 72, l. 2; p. 90, ll. 9-11). At this point,

someone called for 911. (Tr. p. 56, ll. 21-24; p. 94, l. 12 – p. 97, l. 7). Law enforcement was first on the scene. (Tr. p. 100, ll. 11-13). They soon discovered that Jimmy Welch was no longer breathing. (Tr. p. 108, ll. 3-9). Law enforcement then called medical responders for assistance. (Tr. p. 100, l. 23 – p. 101, l. 2). Once they arrived, they began administering CPR and other life saving measures. (Tr. p. 78, ll. 21-24; p. 105, ll. 4-14; p. 108, ll. 10-16). EMS eventually loaded Jimmy into the ambulance and took him to the local hospital where he was pronounced dead. (Tr. p. 108, ll. 15-23). Unbeknownst to the patrons at The Office, Appellant's vicious assault on Jimmy cause him to suffer a serious brain bleed that resulted in the victim's death. (Tr. p. 143, ll. 20-25).

## SUMMARY OF THE ARGUMENT

Appellant contends the trial judge erred by denying his motion for mistrial, raised after one of the State's Law Enforcement witness's testified that he did not speak with Appellant because he had "lawyered up." Appellant maintains that this testimony improperly implicated his Fifth Amendment Right to remain silent and, in turn, incurably prejudiced the proceeding. Contrary to Appellant's contentions, the trial judge did not abuse his broad discretion in refusing to grant a mistrial in Appellant's case. A mistrial is an extreme measure that should not be granted unless absolutely necessary. *State v. Kelly,* 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998). In denying the Appellant's motion for a mistrial, the trial judge correctly cited to *State v. Bell*, 347 S.C. 267, 554 S.E.2d 435 (Ct. App. 2001), where this court held that a Fifth Amendment violation does not arise where there is no evidence the defendant received *Miranda* warnings at the time of his arrest. Alternatively, *State v. Pickens*, 320 S.C. 528, 466 S.E.2d 364 (1996) held that Fifth Amendment violations are subject to harmless-error analysis. The Record supports that the trial statement, taken in context, was insignificant and did not prejudice Appellant.

## HOW THE ISSUE AROSE AT TRIAL

On the second day of trial, the State called Officer Jerry Gainey as a witness. (Tr. p. 167, ll. 8-9). During Officer Gainey's testimony, he indicated that Appellant had turned himself in later on the day of the murder. (Tr. p. 173, l. 18). Gainey then provided the following testimony: "I went up – well, I went up there but he already lawyer [sic] up so I didn't talk to him." (Tr. p. 173, ll. 20-21). Officer Gainey then went on testifying about the investigation and his actions in tracking down witnesses to the murder. (Tr. p. 174, ll. 1-5). At this point, Defense Counsel requested that she be permitted to make a motion outside the presence of the jury. Once the jury had departed the courtroom, Defense Counsel made the following motion:

> MS. PARHAM: Thank you, Judge. I would move for a mistrial because of what this officer just testified to that my client, that they went around to talk to him, but he had, quote, lawyered up. It's a comment on my client's right to remain silent and not incriminate himself. In fact he had not hired me until November 2nd; I just looked at my contract. But, it's highly prejudicial, it's highly inappropriate, and it's a comment on the Defendant's right to remain silent and it's an inappropriate – it's a serious case and it's, it's just completely inappropriate, and I believe it's grounds for a mistrial.

(Tr. p. 174, l. 18 – p. 175, l. 3).[1] Thereafter, the State gave argued that, while inappropriate, the testimony fell short of necessitating a mistrial. (Tr. p. 175, ll. 13-25). After taking the matter under advisement, the trial court reached the following conclusion:

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[1] Respondent would note that the Record reflects that the witness's testimony continued for quite some time before Defense Counsel made her request for a motion outside the presence of the jury at which time she moved for a mistrial. *See State v. Torrence*, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991) ("[W]e hold a contemporaneous objection is necessary in all trials beginning after the date of this opinion to properly preserve errors for our direct appellate review."); *State v. Simmons*, 384 S.C. 145, 172, 682 S.E.2d 19, 33 (Ct. App. 2009) (Denying motion for a mistrial because Appellant failed to make a contemporaneous objection required to preserve the issue for appellate review.).

THE COURT: All right. I am going to respectfully deny Defendant's motion for a mistrial. Granting of a mistrial is an extreme measure. It should be taken only where an incident is so grievous that the prejudicial effect can be removed no other way. I've gone back and looked at *Doyle v. Ohio*, U.S. Supreme Court 426 U.S. 610 which was a 1976 case, as well as *State v. Bell*, which is a State of South Carolina case, 347 S.C. 267, both of which it would be improper – and those cases hold the proposition that it would be improper to comment on a Defendant's post-arrest silence under the – for impeachment purposes where the Defendant is on cross examination and, for instance, gives a story in his trial for the first time and the State cross examines him to the effect of, well, you didn't tell police that at the time of your arrest. And in both of those situations, were situations where Miranda warnings had been given to a Defendant and then the State by cross examination brought it out and the Court said that was error.

Now, in this particular case, in this particular case, and I went back just now and listened specifically to the testimony of Officer Gainey. Officer Gainey's testimony was that he got a call that he, being the Defendant, turned himself in, but I didn't talk to him because he had already lawyered up. He is not referring to the Defendant refusing to talk to him, it was his decision not to go talk to the Defendant for whatever reason. That was his reason. It was not the Defendant's exercise of his constitutional right to Gainey and Gainey commenting on his decision not to give a statement as provided or allowed under the protection of the fifth amendment.

Now, having said that and made my ruling upon that, if you wish Ms. Parham for me to give any type of instruction to the jury, curative instruction, I'll be happy to do so.

(Tr. p. 176, l. 23 – p. 178, l. 5).

Despite the trial courts offer to issue a curative instruction, Defense Counsel elected against the precaution, and a curative regarding Office Gainey's testimony was not given.

**STANDARD OF REVIEW**

In criminal cases, appellate courts sit to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Significantly, a decision as to whether to grant or deny a motion for mistrial rests within the sound discretion of the trial judge, and a trial judge's ruling in regard to a mistrial motion will not be disturbed on appeal absent a prejudicial abuse of discretion. *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 627-628 (2000): *see State v. Coaxum*, 410 S.C. 320, 331, 764 S.E.2d 242, 247 (2014) ("[T]o receive a new trial, the defendant must show a prejudicial abuse of discretion."); *State v. Kelly,* 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) ("A mistrial should not be granted unless absolutely necessary. Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial. In order to receive a mistrial, the defendant must show error and resulting prejudice.") (citations omitted). An abuse of discretion occurs where the trial court's conclusions lack evidentiary support or are controlled by an error of law. *State v. Elders*, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010).

## ARGUMENT

**I. Testimony By A State's Witness Declaring That Appellant Had "Lawyered Up" Did Not Implicate Appellant's Fifth Amendment Right To Remain Silent Because There Was No Evidence That Defendant Was Mirandized At The Time Of His Arrest.**

The United States Supreme Court has held that permitting a defendant's silence to be used for impeachment purposes, after receiving Miranda warnings, violates the Due Process clause of the Fourteenth Amendment. *Doyle v. Ohio*, 426 U.S. 610 (1976). In *Doyle*, the defendants were arrested for selling marijuana. *Id.* at 611. They were given Miranda warnings and made no post-arrest statements about their involvement in the crime. *Id.* at 612-614. As part of his cross-examination, the prosecutor asked defendants, why, if they were innocent, they did not give the explanations that they proffered at their separate trials to the police at the time of their arrest. *Id.* at 613. The Court held that the use for impeachment purposes of defendants' silence at the time of arrest and after receiving *Miranda* warnings violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 619.

While the record indicates that Appellant turned himself into law enforcement, there was no evidence presented that Appellant was subsequently *Mirandized. See* Tr. p. 172, l. 16 – 174, l. 7. Nevertheless, Appellant proposes that he exercised his right to remain silent when he turned himself in to Law Enforcement. Appellant cites to *McFadden v. State*, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000) to support relief. *McFadden* is a PCR appeal in which the applicant claimed ineffective assistance of counsel for failure to object to solicitor's closing statement. *Id.* In the closing, the solicitor improperly made indirect comments that implicated the applicant's Fifth Amendment Right to silence. *Id. McFadden* does not set forth any holding that the Fifth Amendment may be implicated absent a *Miranda* warning. In fact, *McFadden* is simply an application of *Doyle* to certain facts distinct from this case. *See Id.* at 641, 539 S.E.2d at 393 (citing *Doyle*, 426 U.S. at 610).

Contrary to Appellant's position, the Supreme Court of the United States has exercised a different interpretation of *Doyle*. In *Fletcher v. Weir*, 455 U.S. 603, 607 (1982) the Court held that "[i]n the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to post-arrest silence when a defendant chooses to take the stand." *Id.*, 455 U.S. at 607.

Moreover, in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the Supreme Court further clarified:

> [*Doyle*] rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial. The "implicit assurance" upon which we have relied in our *Doyle* line of cases is the right-to-remain-silent component of *Miranda*. Thus, the Constitution does not prohibit the use for impeachment purposes of a defendant's silence prior to arrest, or after arrest if no *Miranda* warnings are given. *Such silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty.*

*Brecht*, 507 U.S. at 628 (citations omitted) (emphasis added).

In the current case, the trial judge cited to *Doyle* and *State v. Bell*, 347 S.C. 267, 554 S.E.2d 435 (Ct. App. 2001) as his reason for denying Appellant motion for a mistrial. *See* Tr. p. 177, ll. 2-4. In *Bell*, the appellant moved for a mistrial, contending the trial court erred by allowing the State to attempt to comment upon her post-arrest silence. *Id.,* at 269, 554 S.E.2d at 435. However, there was no evidence in the record indicating that *Bell* had been *Mirandized. Id.* at 271, 554 S.E.2d at 437. Citing to both *Brecht* and *Fletcher* this Court held:

> In the present case, there is no evidence in the record that Bell ever received *Miranda* warnings, and we will not presume the warnings were given at the time of arrest. *See United States v. Cummiskey*, 728 F.2d 200, 205 (3rd Cir.1984) ("Although nothing in the Weir record indicated the time *Miranda* warnings were given, the Supreme Court did not presume that the warnings were given at the time of arrest. Accordingly, we do not believe that we are authorized to engage in such a presumption." (citation omitted)). Although there was testimony that Bell was arrested approximately one week after the search of her

> apartment, her arrest alone is insufficient to implicitly induce Bell to remain silent. *See Fletcher*, 455 U.S. at 603, 102 S.Ct. 1309 . Therefore, we find no due process violation occurred as a result of the State's cross-examination of Bell.

*Bell*, 347 S.C. at 271, 554 S.E.2d at 437. Similar to the circumstances in *Bell*, the current record is devoid of any evidence that Appellant was *Mirandized* when he was taken into custody. Therefore, the decision made by the trial judge to deny Appellant's motion was proper and should be upheld.

## II. Any Error By The Trial Court In Ruling That Testimony Did Not Implicate Appellant's Fifth Amendment Right Is Either Procedurally Barred Or Harmless.

Any *Doyle* violation that resulted from the law enforcement officer's testimony was procedurally barred do to Defense Counsel's failure to timely request relief. *See Torrence*, 305 S.C. at 69, 406 S.E.2d at 328 (requiring contemporaneous objection to properly preserve and error); *see also State v. Rice*, 375 S.C. 302, 323, 652 S.E.2d 409, 419 (Ct.App.2007) (holding that for an objection to be timely, it must be made at the time that evidence is offered.). The record reflects that Counsel permitted testimony to continue for a period of time prior to requesting relief. In fact, the State submitted three additional questions to the witness prior to Defense Counsel's motion. *See* Tr. p. 173, l. 18 - p. 174, ll. 1-5. "Unless an objection is made *at the time the evidence is offered* and a final ruling made, the issue is not preserved for review." *State v. Simpson*, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996) (citing *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993) (emphasis added). Appellant failed to meet this standard. Therefore, the issue is procedurally barred.

Furthermore, any error that arose from the testimony was harmless and did not necessitate a mistrial. It has become clear since *Doyle*, that once a criminal defendant receives *Miranda* warnings, "it is improper under *Doyle* for a prosecutor to cause the jury to draw an impermissible inference of guilt from a defendant's post-arrest silence." *Gov't of Virgin Islands v.*

*Martinez*, 620 F.2d 321, 335 (3d Cir.2010) (internal quotation omitted). However, in *Brecht v. Abrahamson*, the U.S. Supreme Court also held that *Doyle* violations squarely fit into the category of Constitutional violations termed by the Court as "trial error." *Brecht*, 507 U.S. at 529. Trial error "occur[s] during the presentation of the case to the jury," and is subject to harmless-error analysis because it "may ... be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial]." *Arizona v. Fulminante*, 499 U.S. 279, 307-308 (1991). Accordingly, on direct review, an alleged *Doyle* violation is subject to the harmless error standard first laid out in *Chapman v. California*, 386 U.S. 18 (1967) that the error in question must be "harmless beyond a reasonable doubt." *Brecht*, 507 U.S. at 630.

The Supreme Court of South Carolina expanded on this analysis in *State v. Pickens*, 320 S.C. 528, 530, 466 S.E.2d 364, 366 (1996) (holding in the context of a *Doyle* violation, the Court applies a harmless-error analysis). In *Pickens*, our Supreme Court elaborated on the relevant factors a court should consider when reviewing whether a *Doyle* violation is harmless, stating, "[t]he record must establish the reference to the defendant's right to silence was a single reference, which was not repeated or alluded to; the solicitor did not tie the defendant's silence directly to his exculpatory story; the exculpatory story was totally implausible; and the evidence of guilt was overwhelming. *Id.* at 531, 466 S.E.2d at 366.

Assuming, *in arguendo*, that a *Doyle* violation occurred, application of the *Pickens* factors would conclude the error harmless. First, there was only one reference with respect to Appellant's invocation of his right to counsel; specifically the reference by Officer Gainey. After the testimony, Defense Counsel requested for a motion outside the presence of the jury which was promptly granted. *See State v. Hughes*, 328 S.C. 146, 150, 493 S.E.2d 821, 823 (1997) ("It is

desirable the jury not know that a witness has invoked the privilege against self-incrimination since neither party is entitled to draw any inference from such invocation."). Additionally, the State never commented on or alluded to Appellant's invocation of his right to counsel throughout the remainder of trial or during closing argument. Therefore, Appellant was in no way tied to any invocation of his right silence. Lastly, Petitioner's guilt was overwhelming. The State entered into evidence a video showing an unprovoked Appellant striking the victim at the bar and then continuing to strike him after he collapsed. Furthermore, Appellant's testimony largely confirmed the State's case.

The evidence presented by Officer Gainey constitutes reversible error only if Appellant is unfairly prejudiced, *see State v. Kelsey*, 331 S.C. 50, 70, 502 S.E.2d 63, 73 (1998). The Record reflects that any prejudice to Appellant was minimal and does not warrant reversal under *Pickens*. *Pickens*, at 531, 466 S.E.2d at 366; *see State v. Tucker*, 324 S.C. 155, 169, 478 S.E.2d 260, 268 (1996) (citing *State v. Durden*, 264 S.C. 86, 212 S.E.2d 587 (1975) ("The burden of proof is on Appellant to show prejudice.").

## CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the appeal be dismissed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

September 25, 2018

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Florence County
The Honorable D. Craig Brown; Circuit Court Judge

Appellate Case No: 2017-001927

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THE STATE,

Respondent,

v.

TOMMY MCGEE,

Appellant.

**PROOF OF SERVICE**

I, Angela Bennett, certify that I have served the Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Kathrine H. Hudgins, Esquire, Office of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 25th day of September, 2018.

ANGELA BENNETT
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ALAN WILSON
ATTORNEY GENERAL

September 25, 2018

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SEP 25 2018
SC Court of Appeals

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

Re: The State v. Tommy McGee
Appellate Case No: 2017-001927

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Initial Brief of Respondent and Designation of Matter along with proof of service in the above-referenced case.

Sincerely,

Angela Bennett
Legal Assistant to Samuel M. Bailey
Assistant Attorney General
S.C. Bar No: 103131

SMB/ab
Enclosures

cc: Kathrine H. Hudgins, Esquire
Victim Advocacy Division